

CANADIAN RAILWAY OFFICE OF ARBITRATION
SUPPLEMENTARY AWARD TO
CASE NO. 2190

Heard at Montreal Thursday, 11 February 1992
concerning

CANADIAN NATIONAL RAILWAY COMPANY
and
UNITED TRANSPORTATION UNION

DISPUTE:

Dispute respecting the implementation of the Arbitrator's award in CROA Case No. 2190 regarding Conductor J.I. Musslewhite.

UNION'S STATEMENT OF ISSUE:

In CROA Case No. 2190 Conductor J.I. Musslewhite was ordered reinstated on certain terms. On the basis of a report of Dr. Vidins, relying on a report of Dr. L. Goldsmith, the Company refused to reinstate him to the position of Conductor.

The Union submits that the decision not to reinstate was incorrect, and that Conductor Musslewhite is not "suffering from diminishing sensory and motor reactions while sober". The Union seeks reinstatement of Conductor Musslewhite and any appropriate compensation.

The Company has declined the Union's request.

FOR THE UNION:

(SGD.) J. W. ARMSTRONG
GENERAL CHAIRMAN

There appeared on behalf of the Company:

G. C. Blundell	– Manager, Labour Relations, Edmonton
R. Levacalier	– Legal Counsel, Montreal
M. W. Becker	– Labour Relations Officer, Edmonton
J. Torchia	– Manager, Labour Relations, Montreal
M. Darby	– District Superintendent, Transportation, Edmonton
M. Fisher	– Coordinator, Special Projects, Montreal
Dr. Barriault	– Director, Occupational Health & Services, Edmonton
Dr. E. Vidins	– Witness
Dr. L. Goldsmith	– Witness

And on behalf of the Union:

D. Ellickson	– Legal Counsel, Toronto
J. W. Armstrong	– General Chairman, Edmonton
Dr. N. E. Brodie	– Witness, Edmonton
J. I. Musslewhite	– Grievor

SUPPLEMENTARY AWARD OF THE ARBITRATOR

The hearing in this matter was reconvened to determine whether there has been compliance with the conditions established in the Arbitrator's award herein dated October 24, 1991. The award reinstated the grievor subject to certain conditions, as outlined in the penultimate paragraph of the decision:

The evidence before me is that the grievor's condition is not beyond correction and can be reversed. In light of that evidence, in light of the concern for fairness touched on above, and in light of the grievor's nearly twenty years of service and positive work record, I am satisfied that an appropriate conditional order of reinstatement can be fashioned. The Arbitrator therefore directs that Mr. Musslewhite be reinstated into his employment, without compensation for wages and benefits lost, and without loss of seniority, on condition that he demonstrate his medical fitness to return to work and his willingness to submit to such medical tests or examinations as the Company deems appropriate, from time to time, to monitor his ongoing fitness to work. For the purposes of this award "fitness to work" shall mean freedom of alcohol abuse to a degree that satisfies Dr. Vidins, or, failing her availability, another specialist who is mutually acceptable to the Company and the Union, that he is not at risk of suffering diminished sensory and motor reactions while sober, or of suffering withdrawal symptoms which could jeopardize safety. However, should the grievor not bring himself within the conditions of this award within one year of the date hereof, his right to reinstatement shall cease.

The parties are now disagreed as to whether the above conditions have been complied with. The evidence before me confirms that Mr. Musslewhite has stopped drinking. It appears that he did not take steps to turn his life around immediately after the award ordering his conditional reinstatement. By his own account, he continued to drink until May of 1992. With the encouragement of an officer of the Company's Employee Assistance Programme he undertook and successfully completed a 24 day in-patient substance abuse program at the Alberta Hospital (Ponoka) which he completed June 26, 1992.

On August 28, 1992, Mr. Musslewhite travelled to Toronto to be physically examined by Dr. Eva Vidins, the specialist named in the Arbitrator's award. Dr. Vidins did a medical assessment of Mr. Musslewhite which included blood tests and two abdominal ultrasound examinations. Her evidence confirms that while Mr. Musslewhite's liver appears somewhat nodular, a condition which may be attributable to past alcohol abuse, there was nothing in the medical results to suggest any ongoing alcohol abuse. On the contrary, according to Dr. Vidins, the indications of the tests in August of 1992 are generally consistent with Mr. Musslewhite's claim that he has stopped drinking. It can fairly be said, therefore, the Dr. Vidins' findings indicate that Mr. Musslewhite displayed "... freedom of alcohol abuse" at the time of her examination of him.

Out of an abundance of caution, and in a manner which the Arbitrator judges to be appropriate and in keeping with the conditions of the award, Dr. Vidins went one step further. She referred Mr. Musslewhite to a psychologist, Dr. Leonard Goldsmith, who is a senior psychologist at the Toronto General Hospital. The purpose of the referral was to have Mr. Musslewhite tested for any neuropsychological impairment, or brain damage. Under Dr. Goldsmith's direction, a psychometrist tested Mr. Musslewhite for a period of several hours, both on the afternoon and evening of August 28, and on the morning of August 29, 1992.

The reporting letter of Dr. Goldsmith, sent to Dr. Vidins on September 23, 1992 indicates that Mr. Musslewhite successfully passed a number of the tests, but failed in three important respects. According to Dr. Goldsmith, whose letter was explained in his own evidence at the arbitration hearing, Mr. Musslewhite showed significant impairment in a Digit Symbol Subtest as well as in a Trail Making Test, with some moderate impairment being indicated by his performance on the Halstead Category Test. On the basis of these results Dr. Goldsmith wrote to Dr. Vidins expressing his opinion that Mr. Musslewhite showed significant deficits in the area of rapid decision making, a condition which he suggested was inconsistent with certain of the functions which he would be required to carry out as a train conductor. At the hearing he confirmed his own opinion that the test results of Mr. Musslewhite are indicative of organic dysfunction, or brain damage.

The findings of Dr. Goldsmith, which were the basis of Dr. Vidins' opinion to the Company that he is not fit to return to work as a train conductor, are challenged by a consulting neuropsychologist called as an expert witness by the Union. Dr. Norman E. Brodie, of Edmonton, testified that he had been provided with much of the raw data from the tests administered by Dr. Goldsmith. At the hearing he explained that the norms utilized by Dr. Goldsmith were

inappropriate, as they are, in his opinion, out of date. Norms are adjustment factors used in the evaluation of test results to account for such factors as a patient's age, education, or sex. Dr. Brodie explained that when he applied a more recently developed set of norms, referred to as the Heaton Norms which he says are now widely in use, to the raw data gathered by Dr. Goldsmith, the scores registered by Mr. Musslewhite in fact fall within ranges of normal performance. He further explained that he also conducted his own tests of Mr. Musslewhite, using a larger number of sensory/perceptual tests, including all of those administered by Dr. Goldsmith. Dr. Brodie found Mr. Musslewhite to test normal in all respects. Even without the use of norms, Mr. Musslewhite registered certain raw scores in the tests administered by Dr. Brodie which are remarkably higher than those he scored when tested by the psychologist who did the testing for Dr. Goldsmith. For example, Mr. Musslewhite's test score for the Halstead Category Test taken in Toronto revealed an error rate of 71, while only 34 errors were disclosed in the test administered by Dr. Brodie in Edmonton. Both experts indicated in their evidence at the hearing that it is difficult to reconcile such a marked change in raw score.

Much of the evidence adduced through the two psychologists relates to possible distorting factors which could influence test results. These include fatigue, depression or anxiety, stress and motivation. While Dr. Goldsmith expressed the opinion that these factors did not operate significantly to influence the results of the tests conducted in Toronto, Dr. Brodie has suggested in his testimony that they might well have had a bearing on Mr. Musslewhite's performance.

The evidence indicates that there may be some substantial basis for Dr. Brodie's concern. Mr. Musslewhite testified, without contradiction, that after flying to Toronto from Alberta on August 27th, he spent virtually the entire day of August 28 undergoing medical and psychological examinations. After seeing Dr. Vidins in the morning, he proceeded to the Toronto General Hospital for ultrasound testing, at the conclusion of which he presented himself at Dr. Goldsmith's office for neuropsychological testing. It was well into the afternoon, and Mr. Musslewhite had eaten no breakfast or lunch to that point in the day because, according to his evidence, he believed from past experience that ultrasound tests would yield better results on an empty stomach. It appears that he was given an opportunity to have something to eat in the hospital's cafeteria before the commencement of his psychological testing.

During the course of his testimony Dr. Goldsmith expressed the belief that Mr. Musslewhite's testing had ended at approximately 5:00 or 5:30 p.m. that afternoon. He acknowledged that he was not himself present, however, and had no direct knowledge of what had transpired. Mr. Musslewhite, on the other hand, testified that in fact the psychologist continued testing him until about 7:00 p.m. when he finally refused to continue, as he felt too tired to go on. Mr. Musslewhite testified that he was further upset the following morning when, upon appearing for the resumption of the tests, he was asked his name and what city he was in. The Union submits that the factors of fatigue, stress and concern about his treatment impacted the grievor's performance during the psychological tests conducted in Toronto. On the whole the Arbitrator cannot dismiss out-of-hand the arguments of Counsel for the Union that there are serious questions with respect to the reliability of the tests performed by Dr. Goldsmith. It might equally be said, I think, that there may be questions about the reliability of the tests conducted by Dr. Brodie, in light of Dr. Goldsmith's comments in his reply evidence questioning the degree of acceptance the Heaton Norms within the profession. It is clear, however, that the norms themselves cannot explain the difference between the results obtained by the two experts. The difference in the raw scores registered by Mr. Musslewhite in the Halstead Category Test, for example, raise serious questions about the reliability of both tests, even allowing for the fact that Mr. Musslewhite might have performed better on his second exposure to the same tests.

In the Arbitrator's view, it is important to bear in mind the intention of the original award. It seeks to strike a balance between the interests of the Company and the grievor. The employer is entitled to reasonable assurances that Mr. Musslewhite is fit to return to work in a safety sensitive position. By the same token, Mr. Musslewhite, an employee of long service whose problems are medically based, and who has made impressive efforts at rehabilitation, should not be unduly deprived of an opportunity to resume his livelihood if, indeed, he is fit to do so. In the circumstances, in light of the evidence reviewed above, I must accept the position of the Union that the evidence falls short of establishing a reliable procedure of neuropsychological assessment as an element leading to the ultimate opinion of Dr. Vidins. This conclusion should not be taken as a comment on the care and professionalism exhibited by Dr. Vidins or by Dr. Goldsmith. On the contrary, the evidence discloses that they exercised the highest degree of care and professionalism in their dealings with Mr. Musslewhite. There were, however, elements of significant fact which, it appears, were unknown to either of them, most notably the length of the day put in by Mr. Musslewhite and the late hour at which the initial neuropsychological testing concluded on the 28th of August and, perhaps, the degree of anxiety and fatigue experienced by Mr. Musslewhite who was tested in a

strange environment, immediately following a long trip into a different time zone. The evidence discloses that, for reasons beyond the knowledge or control of the parties, the conditions established by the Arbitrator were frustrated.

By the same token, the Arbitrator is reluctant to prefer, without reservation, the alternative opinion advanced by Dr. Brodie. He is a relatively recent graduate, with substantially less clinical experience than Dr. Goldsmith. While it may be that the Heaton Norms which he utilized are to be preferred (a matter upon which I express no opinion), I cannot entirely disregard the suggestion of Dr. Goldsmith that they have not yet achieved universal acceptance.

In the circumstances the issue becomes what is an appropriate measure to insure the proper completion of the award of October 24, 1991? In my view, for the reasons touched upon above, the issue raised by Dr. Videns, as to whether Mr. Musslewhite has suffered neuropsychological impairment has not been properly addressed or fully answered. While I appreciate that in such matters universal agreement may be impossible, I am satisfied that the findings reached by Dr. Goldsmith in August 1992 cannot be relied upon as the sole basis to dispose of the rights of the parties in this case. It was implicit in the conditions of the award of October 24, 1991 that any examination of Mr. Musslewhite would be conducted in such a manner as to yield reasonably reliable results. For the reasons related, however, that standard has not been satisfied.

In the Arbitrator's view the award can be completed, however, by a direction for further neuropsychological testing of Mr. Musslewhite, in a manner which involves the participation of both parties. The Arbitrator therefore directs that within a reasonable period of time, which should not be unduly delayed, Mr. Musslewhite be tested by a neuropsychologist to be selected jointly by the parties, and failing their agreement, to be named by the Arbitrator. The report of the neuropsychologist, whose tests should include all of those performed by Dr. Goldsmith and Dr. Brodie, and such further tests as he or she may deem appropriate, shall be provided to Dr. Vidins and to the grievor's physician for their comments. In the event that there is then any dispute between the parties with respect to the appropriateness of Mr. Musslewhite's return to safety sensitive duties, the report of the neuropsychologist, along with the comments of Dr. Vidins and the grievor's doctor shall be provided to the parties, who may then make further submissions to the Arbitrator prior to the final disposition of the grievance.

For the purposes of clarity, in light of the delay which I find is chiefly attributable to Mr. Musslewhite's own initial reluctance to comply with the conditions of the award of October 24, 1991, I can see no basis for any order for compensation to the present time. Nor should compensation be expected in relation to the period between this decision and any decision which might subsequently confirm Mr. Musslewhite's return to his employment, unless it can be shown that there has been undue and avoidable delay occasioned by the Employer.

The matter is, therefore, remitted to the parties for further action, in accordance with this supplementary award.

February 19, 1993

(Sgd.) MICHEL G. PICHER
ARBITRATOR