

CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3726

Heard in Montreal, Wednesday, 11 February 2009

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The closure of the employment file of T. Laframboise for his failure to meet the terms and conditions of the reinstatement agreement dated 11 October 2007.

JOINT STATEMENT OF ISSUE:

On 17 September 2007, the grievor was involved in an accident in the Company's MacMillan Yard in Concord, Ontario. As a result of this incident, the grievor was requested to submit to testing, as per the Company's Policy to Prevent Workplace Alcohol and Drug Problems, to which he refused, to which he identified that he was going to resign anyway.

On 19 September 2007, the Union requested of the Company that they reconsider the grievor's resignation and that the Union had discussed the possibility that the Company would require post accident testing. Following this the parties agreed to rescind the grievor's resignation notice, however the grievor would be required to sign and commit to a reinstatement agreement, which was signed between all parties on 1 October 2007.

On 3 October 2007, CN's OHS advised the Company that the grievor did not pass the medical fitness for duty because of a positive test as was required under Item (1) of the agreement.

The Union maintains that the grievor was in fact unaware that the test would detect the presence of THC some 50 to 60 days later, and in that he had partaken in the use of marijuana in the early part of August 2007.

The Union submits that the grievor's positive test does not indicate or confirm a violation of Rule G, or that he has an addiction problem, and the grievor submitted to a test again on October 29, 2007, which showed a clear test, and which the Union is prepared to forward to the Company.

The Union maintains that this new employee was receptive throughout the process, was lacking experience and knowledge of the territory and, in view of his discipline history being clear, is deserving of reconsideration of the dismissal.

The Company disagrees with the Union's contentions and has declined the Union's grievance.

FOR THE UNION:

(SGD.) J. ROBBINS
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) F. O'NEILL
MANAGER, LABOUR RELATIONS

There appeared on behalf of the Company:

F. O'Neill – Manager, Labour Relations, MacMillan Yard, Concord
R. A. Bowden – Manager, Labour Relations, MacMillan Yard, Concord

And on behalf of the Union:

R. A. Beatty – Transition Director, Sault Ste. Marie
J. Robbins – General Chairman, Sarnia
P. Vickers – General Chairman, Sarnia
G. Gower – Vice-General Chairman, Belleville

AWARD OF THE ARBITRATOR

The grievor was hired in April 2007. He was working as the Yard Helper on September 17, 2007 at 03:00 hours. This assignment involved the grievor operating a belt pack, from the point of the movement, while pulling 100 cars from the Green Route at MacMillan Yard. The movement collided with a train departing the yard from the Halton Outbound. A number of cars were derailed. The Company initiated post-incident drug testing under its Drug & Alcohol Policy.

The grievor took a breathalyser test at 05:45 which tested 0% for alcohol. The grievor maintains that he was then asked but unable to physically provide a urine sample. The grievor further claims that he then asked his Company Officer that he be allowed to return later in the day to provide the urine sample. The grievor then decided to resign his position while on site and left the premises at 06:20. Before leaving, he was asked to sign a document acknowledging his refusal to provide a urine sample. The grievor maintains that he refused to sign because he had already attempted to provide a urine sample, and also because he had offered to provide a sample later that same day. As noted in the Joint Statement of Issue, his resignation was subsequently rescinded after the Union became involved. The grievor signed a Last Chance Agreement on October 1, 2007. The Company maintains that the grievor breached the Agreement, and was subsequently dismissed, because he tested positive for illegal drugs on October 3, 2007 in breach of the Agreement which reads:

The following items will govern Mr. Laframboise's re-employment and continued employment:

1. Mr. Laframboise will be required prior to returning to service, agree to undergo a Company medical assessment for fitness for duty, including any tests (blood, urine or breath analyses) deemed necessary by the Chief Medical Officer, or designate. Should the fitness for duty assessment determine that Mr. Laframboise is not medically fit to occupy his position, because of a substance use disorder, Mr. Laframboise will no longer be eligible for re-employment and or continued employment, and his file will remain closed with CN.
2. This "last chance" agreement will serve to resolve any and all outstanding issues, including grievances submitted on Mr. Laframboise's behalf.
3. Mr. Laframboise will be subject to an employment contract for two years following the date of signature and it is understood that violation of the Company's Drug and Alcohol Policy will result in Mr. Laframboise's immediate discharge from Company service.
4. Mr. Laframboise's time out of service between the date of his resignation and re-employment will be without wage or benefit compensation and without loss of seniority.
5. Mr. Laframboise will be subject to an employment contract for a term of two years following the date of a medical approved reinstatement.
6. Mr. Laframboise will be subject to random unannounced drug and alcohol testing for the duration of this contract.
7. Upon successful reinstatement, Mr. Laframboise will be placed on the position he held prior to his resignation.
8. Mr. Laframboise will be required to meet with Mr. Doug Ryhorchuk General Superintendent – MacMillan Yard and/or Mr. Michael Farkough General Manager – Toronto Division and your office to review this document and the overall Company expectations of Mr. Laframboise regarding CN Attendance Management Standard Policy and work performance, which will be monitored. Failure to comply with CN's AMS policy will result in termination of this contract.

...

(signed) F. Laframboise

Oct. 1, 2007

The letter of termination of October 11, 2007 reads in part as follows:

Item Number 1 of the reinstatement agreement provided, that you must pass a medical assessment in order to be eligible for reinstatement. As you failed to meet the terms and conditions of the reinstatement agreement, your employment file with CN will remain closed.

...

D.V. Ryhorchuk

Terminal Superintendent, MacMillan Yard

The basis for the Company's position that the grievor failed to pass the medical assessment is set out in a letter the Company's OH&S Department which reads as follows:

Under the terms of the employment contract for Mr. Terry Laframboise signed October 1, a medical assessment of fitness for duty was organized by CN Occupational Health Services. Mr. Laframboise did not pass the medical assessment of fitness for duty because of a positive drug test (illegal drugs).

Please let me know if you need any more information

Kathy Smolynec

CN Occupational Health Services

The Union maintains that the grievor did not violate the Company policy because the positive test is not conclusive of "substance use abuse", nor is it conclusive of the time such drug was consumed or impairment. In that regard, the Union submits that the detection of drugs does not, in and of itself, demonstrate that an individual is medically unfit and incapable of performing work-related tasks. The Union further notes that the grievor underwent a drug test on October 29, 2007, 14 days after the first test, and passed the test. In the Union's view, the sequence of events demonstrates that the grievor did not use any drugs subsequent to the signing of the Agreement and, further, that there was no breach of the Agreement.

The Company noted that it was Local Chairman Glen Gower who contacted the Company, some two and a half days after the incident, to say that the grievor had been in shock and wished to rescind his resignation. The Agreement was put in place on October 1, 2007 for the grievor's possible reinstatement. The grievor failed the first condition of his reinstatement when he tested positive for illegal drugs. The illegal substance was identified as THC, a marijuana metabolite. The Company referred to several awards of this office which upheld the dismissal of an employee where there has been a violation of a condition of the reinstatement agreement, including a failed drug test. The Company maintains that its decision to close the grievor's file was justified under the circumstances.

The Arbitrator notes at the outset that the grievor was a new employee, having been in the service of the Company only since April 2007. The Union states in the joint statement of issue that the grievor was receptive throughout the process, lacked experience and had a clear disciplinary record. These factors are not of any significant weight in this case given that the grievor's continued employment, subsequent to his resignation, hinged on his fulfillment of the conditions set out in the Agreement dated October 1, 2007.

Turning to the pivotal provision which led to the closing of the grievor's employment file, Item #1, I note the Union's claim that the fitness for duty assessment by the Chief Medical Officer has two components: first, fitness for duty and, second, whether the grievor suffered from a substance disorder. The Union suggests that Item #1 should be interpreted to mean that the mere fact the grievor tested positive for THC does not, in and of itself, support the position that he is medically unfit or provide proof that he suffered from a substance abuse disorder.

The Arbitrator does not accept the Union's narrow interpretation of Item #1. The bottom line of Item #1 of the Agreement is that the Company, the Union and the grievor clearly understood that the determination of the grievor's fitness for duty depended on the grievor being able to successfully pass a blood, urine or breath analysis test. The unrefuted evidence in the form of the October 3, 2007 correspondence from the OH&S Department is that the grievor failed the required urine test for drugs and tested positive for THC. The Company then properly relied on the test results as basis to establish that the grievor was not medically fit for duty because of his failure to pass the required drug test. The reference to a substance abuse disorder in Item #1 is, in my view, incidental to the focal concern of whether or not the grievor was medically fit for duty. He was not fit for duty because he was unable to pass the drug test, an agreed precondition to his reinstatement. The grievor was not reinstated to his employment because he was unable to fulfill the conditions set out in Item #1 of the Agreement.

Finally, I do not accept the Union's submission that a single test was inconclusive of the grievor's medical fitness. The test was done under the auspices of the Chief Medical Officer. There is no evidence adduced, expert or otherwise, to contradict the findings. The Agreement contemplates exactly the kind of testing that took place. The grievor is precluded from now raising the propriety of the test when the facts are that he agreed to it in the first place as a condition of his reemployment.

The grievor failed to meet one the requirements of his reemployment Agreement. His failure to do so was a consequence of his inability to pass a drug test. Given the nature of the Agreement between the parties, there is no basis for the Arbitrator to interfere with the decision not to reinstate the grievor. Accordingly, the grievance is dismissed.

February 17, 2009

(signed) JOHN M. MOREAU, Q.C.
ARBITRATOR