

CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4251

Heard in Calgary, November 12, 2013

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

A 30 day Suspension assessed to Rob Love on March 10th, 2010 for "sideswipe collision by your train (L563) into L562's train, while employed as the conductor on L56331-01 on March 10th, 2010". Also, the allegation that the Company left personal and sensitive documents on the fax machine at Port Robinson regarding the drug and alcohol screening performed on Mr. Love.

JOINT STATEMENT OF ISSUE:

Mr. Love was the Conductor on L56331 01, when he instructed his engineer to shove westward, 2 car lengths, into track JC33 which resulted in a sideswipe with train L562. A total of 3 railcars were damaged in the collision. Mr. Love was issued a 30-day suspension for his involvement in the incident.

The Union alleges that the discipline assessed Mr. Love was unwarranted, unjustified, excessive and in violation of Article 85 and addendum 124 of the 4.16 Collective Agreement. The Union is seeking a remedy under Addendum 123 of the 4.16 Collective Agreement due to the alleged PIPEDA violations. The Union alleges the Company provided front line officers with Mr. Love's personal information regard the results of the drug and alcohol screening and left the results on a fax machine in yard office.

The Company disagrees with the Union's position.

FOR THE UNION:
(SGD.) J. Robbins
General Chairperson

FOR THE COMPANY:
(SGD.) V. Paquet (for) J. Orr
Senior Vice President Operations Easter Region

There appeared on behalf of the Company:

D. Crossan	– Manager Labour Relations, Prince George
D. Brodie	– Manager Labour Relations, Edmonton
K. Morris	– Senior Manager Labour Relations, Edmonton
P. Payne	– Manager Labour Relations, Edmonton

There appeared on behalf of the Union:

D. Ellickson	– Counsel, Caley Wray, Toronto
J. Robbins	– General Chairman, Sarnia
J. Lennie	– Vice General Chairman, Port Robinson
R. Hackl	– General Chairman, Saskatoon
R. Thompson	– Vice General Chairman, Saskatoon

AWARD OF THE ARBITRATOR

The record confirms that while on duty at Port Robinson Yard on February 28, 2010 the grievor violated CROR 115 while shoving cars into a yard track. It is common ground that he did not protect the point of his movement, and that when the cars that he was pushing proceeded beyond the fouling point of track CJ33, on to the lead track, they collided with cars being shoved by another yard movement. The sideswipe collision resulted in a disciplinary investigation conducted on March 10, 2010, resulting in the assessment of a thirty day suspension.

The Union submits that the assessment of the thirty day suspension was excessive. In that regard its counsel draws to the Arbitrator's attention a substantial number of awards of this Office dealing with similar violations of CROR 115. He submits that a review of those cases confirms that the assessment of demerits, generally in the order of fifteen demerits, is the more appropriate measure of discipline. In that regard reference is made to CROA&DR 2990 and 3237, where fifteen demerits were assessed by the employer for violations of CROR 115 and were sustained by this Office. Additionally, similar infractions were reviewed in CROA&DR 3752, 3773, 3936 in which cases higher awards of demerits were all reduced to fifteen demerits.

Having reviewed the cases in question, and the facts of the instant case, the Arbitrator is compelled to agree with counsel for the Union. The assessment of a thirty day suspension for the facts of the instant case is in my view excessive, particularly having regard to the grievor's length of service and his prior disciplinary record. In twenty-two years of service the grievor has received only minor demerits on two prior occasions, in addition to a single written reprimand. Given the history of dealing with similar infractions by the assessment of demerits, as confirmed above, I can see no compelling basis for the substantial financial penalty which was imposed upon the grievor. I therefore direct that the discipline be reduced to the assessment of fifteen demerits, with the grievor to be compensated for any wages and benefits lost, and with the thirty day suspension to be stricken from his record.

The Union also alleges that the Company violated the grievor's right to privacy by allowing a communication with respect to the results of his Drug and Alcohol Test to sit openly on a fax machine in an office location which has broad access by employees and supervisors. It alleges that by leaving that information available for scrutiny, where it was in fact seen and collected by a Union representative, the Company has violated the grievor's rights under the *Personal Information Protection and Electronic Documents Act, SC 2000, c.5 (PIPEDA)*.

There can be little doubt but that PIPEDA prohibits the release or disclosure of personal health information, the definition of which would extend to include, I am satisfied, the results of the testing of body parts or bodily substances. In that regard under the Statute, "personal health information" includes the following definition:

1 (c) information concerning the donation by the individual of any body part or any bodily substance of the individual or information derived from the testing or examination of a body part or bodily substance of the individual;

In the case at hand it is not disputed that the handling of a Drug and Alcohol Test conducted by the Company was done by its service provider retained for that purpose, a company known as Driver Check.

In the case at hand the evidence confirms that Driver Check apparently faxed a form entitled "CN Point of Collection Drug (POCT) Screen Result Form" to the Company through a fax machine which is apparently in public view in the local office. That form identifies the grievor and gives the date with respect to the screen tests taken and the results recorded in respect of his tests, all of which happen to be negative. The Union submits that allowing such confidential documentation to be placed in a position where it can be openly viewed is in violation of PIPEDA and the obligation to not disclose personal health information contained within section 2 of that statute.

While I appreciate the argument made by the Company's representatives that it was the Company's service provider, Driver Check, which was indiscreet in the communication of the information sent by fax, the fact remains that the method of drug testing and the communication of drug testing results remain within the prerogative of the Company and the agents which it may engage for that purpose. It does not lie within the mouth of the employer to suggest that any violation of the grievor's privacy rights was not the employer's fault to the extent that the disclosure of the information on an open fax machine was instigated by the Company's agent, Driver Check. It is incumbent

upon the employer to make arrangements with its service provider to ensure that no such indiscretion can occur.

In the result, I am satisfied that the Union is correct in its position that the grievor's privacy rights were violated. The unchallenged submission of the Union is that this is the second time such an event has occurred. On that basis it asks the Arbitrator to issue a cease and desist order to the Company as well as to award damages to the grievor for any loss of dignity resulting from the failure to protect his personal information.

I do not consider it necessary to make any cease and desist order in the instant case as I am satisfied that the Company fully appreciates the importance of respecting the privacy of its employees and the gravity of the error which occurred in the instant case. I do not reject out of hand, however, the Union's submission that an incentive is necessary to enforce this obligation among some rank and file officers of the Company. I therefore direct that the grievor be compensated in the amount of five hundred dollars (\$500.00) for the Company's negligent disregard for his privacy and dignity by its failure to handle his personal medical information and drug testing results in a confidential fashion.

November 18, 2013

MICHEL G. PICHER
ARBITRATOR