

CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4291

Heard in Calgary, March 11, 2014

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the dismissal of Conductor G. S.

JOINT STATEMENT OF ISSUE:

On May 13, 2013, following an investigation, Mr. G.S's employment was terminated for "Violation of CN Policy to Prevent Workplace Alcohol and Drug Problems and CROR General Rules. Item G while assigned to Y50311 26 on Friday April 26, 2013."

The Union contends that the termination of Mr. G.S's employment is unjustified, unwarranted and excessive in the circumstances, including mitigating circumstances that apply in this matter including the Company's statutory duty to accommodate the Grievor's disability. The Union requests that Mr. G.S. be reinstated without loss of seniority and benefits, and that he be made whole for all lost earnings with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company disagrees and denies the Union's request.

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

FOR THE COMPANY:
(SGD.) A. Daigle
Senior Manager Labour Relations

There appeared on behalf of the Company:

A. Daigle	– Manager, Labour Relations, Montreal
D. Gagne	– Senior Manager Labour Relations, Montreal
K. Smolynec	– Senior Manager OHS, Montreal
N. Gagnon	– General Manager, Montreal
T. Ullrich	– Occupational Health Nurse, Edmonton
P. Payne	– Manager Labour Relations, Edmonton

There appeared on behalf of the Union:

M. Church	– Counsel, Caley Wray, Toronto
J. Robbins	– General Chairman, Sarnia
J. Lennie	– Vice General Chairman, Port Robinson

R. Hackl	– General Chairman, Saskatoon
G. MacPherson	– General Chairman, Toronto
D. Finnon	– Vice President, Calgary
G. S.	– Grievor,

AWARD OF THE ARBITRATOR

The issue in this grievance is whether Conductor S. (“the grievor”) should be given one more chance to continue his career with the Canadian National Railway Company (“the Company”) considering its duty to accommodate his disability to the point of undue hardship. The parties agree that the grievor is an alcoholic and that this constitutes a disability under the *Canadian Human Rights Act* (“CHRA”).

The facts are not substantially in dispute.

On April 26, 2013, the grievor attended for his regularly assigned shift at 0700 hours. Trainmaster Yeadon detected the smell of alcohol on the grievor. Although there is some dispute as to exactly what words were exchanged, the grievor admitted to having a few drinks after dinner the night prior to reporting for duty. After Trainmaster Yeadon confirmed his suspicion with Supervisor Wilson, the grievor was sent for drug and alcohol testing. His test indicated a positive test of 0.044 BAC in violation of the Company’s policy threshold of 0.04 BAC.

At the investigation the grievor said that he had 8 to 10 beers. He said he stopped drinking at approximately 2245 hours. After he consumed his last beer, the

grievor explained that he took a shower to get ready for work the next day. During his investigation the grievor explained that he felt that by 0700 hours he would be fit to report for duty. He said: "I guess I made an error in judgment."

At the investigation, and again at the hearing, the grievor expressed that when he attended at work the morning of April 26, 2013, he thought he was fit for duty.

In anticipation of the hearing the Company discovered and disclosed the recording of a telephone call the grievor had made to the Company at approximately 2252 hours on April 25, 2013. A review of the audiotape leads one to conclude that the grievor was significantly impaired when he contacted the Company. His speech is slurred, and he has difficulty following the direction of the clerk with whom he is speaking. What is apparent, however, is that the grievor had sought to obtain a personal leave day for the following day and that he also requested a sick day. The clerk's response led to some confusion on the grievor's part (not surprisingly given his state but not entirely due to him).

As the conversation ensued the clerk twice asked if the grievor wanted to book off sick. The grievor's responses demonstrate that he failed to appreciate that communication. Later in the conversation, the grievor suggested that perhaps he could back up his vacation to avoid work the following morning. That was not an option. Ultimately, in response to the clerk's question as to whether he wanted to book off sick,

the grievor said that he would call her back. When he asked the clerk her name, she had hung up.

It is unclear to me why the grievor failed to mention the call to the Company in his statement. It could be, given his apparent level of intoxication, that he forgot he made the call.

As soon as the grievor went home on April 26, 2013, he contacted the Employee Family and Assistance Program (“EFAP”) and scheduled an appointment with a counsellor.

As set out at the outset of this decision, the question to be answered here is whether the company has reasonably fulfilled its duty to accommodate the grievor to the point of undue hardship. The answer to that question must be extrapolated by reference to the grievor’s employment history with reference to Company’s ongoing efforts to assist the grievor in continued employment notwithstanding his disability.

The grievor started working for the Company in June 1981. In the 1990s the grievor had significant challenges protecting his assignment. During that period, the grievor accessed benefits while remaining off work for certain periods due to his disability. The Company was aware of the grievor’s disability as early as 1995. The grievor’s challenges in protecting his assignment led to his first discharge on March 28, 1998.

Years later, the Union approached the Company in an effort to seek the grievor's reinstatement. The medical information provided by the grievor in support of that request made clear that the grievor: "more than meets the criteria for someone with a severe addiction." In support of the grievor's reinstatement, his Addictions Medicine Physician ("the Physician") opined that that the grievor had undergone sufficient change to earn a chance to return to the workplace. He wrote:

He identified it as a problem by the time he was 18. He has continued to have problems with alcohol up to 1 1/2 years ago with occasional periods of remission, lasting months. He mostly engages in binge drinking with 3-4 day periods of abstinence. He drinks beer, with occasional liquor. His longest period of abstinence was for 22 months up to September 2002.

On the issue of prognosis, it was the Physician's opinion is that a person with the grievor's history would carry the possibility of relapse for the rest of his life.

The medical expert at the Company, while confirming that the grievor was fit to return to work in February 2004, in stable recovery, offered the prognosis that the grievor's risk of relapse was high.

The parties' agreement to reinstate the grievor to employment took effect on May 21, 2004. The grievor executed a continuing employment/reinstatement contract with the Company and a Relapse Prevention Agreement (RPA). After the grievor's reinstatement he fulfilled the conditions set out in those contracts and went several years without any investigations or discipline. The contracts have long ago expired. Not

until the grievor's dismissal stemming from the incident before me has the grievor ever been investigated or disciplined for any alleged violations of Rule G.

The grievor suffered a relapse on April 25, 2013. There is no doubt that the grievor had been under a number of stressors, which contributed to that relapse. Since then and almost immediately following the incident, the grievor entered into and successfully undertook a 28-day intensive day treatment program. He has attended weekly structured relapse prevention group sessions since that time. The grievor's clinical therapist writes: "He continues to maintain abstinence based recovery, demonstrating sustained remission of alcohol dependence."

The grievor's disability brought an end to his employment with the Company in 1998. With the Union's support, the Company, was willing, notwithstanding the grievor's prognosis for relapse, to reinstate him some 6 years later, on conditions fashioned to protect the Company's legitimate interests.

Most significantly in this case, the grievor complied and was faithful to those conditions between 2004 and 2007 (the contracts were extended by one year). With the exception of the grievor's relapse on April 25, 2013 and his misconduct in attending work the following morning thereby violating Rule G he has been successful in maintaining control of his addiction. I agree with the Union's characterization of the grievor as a "solid" Conductor since his reinstatement to the Company in 2004 and his relapse.

In addition, I must consider the fact that the grievor has, since his relapse on April 25, 2013, continued to maintain his abstinence based recovery in determining whether to exercise my discretion to reduce the penalty of discharge imposed by the Company in this case. Any other approach would run contrary to the *CHRA*, which prohibits discrimination and compels companies and unions to explore means of reasonable accommodation.

On the whole I am satisfied, given the length and quality of the grievor's prior service with the Company, taking into account his absence between 1998 and 2004, that it is appropriate to give the grievor one more chance and that to do so does not constitute undue hardship. This is an appropriate case for an order reinstatement fashioned on conditions to protect the Company's legitimate interests.

This grievance is therefore allowed, in part. I direct that the grievor be reinstated to his employment, without compensation for wages and benefits lost, and without loss of seniority. The grievor's reinstatement shall be conditioned upon his undertaking to abstain from the consumption of alcohol or illegal drugs and be subject to random, unannounced alcohol and drug testing for the duration of his employment with the Company. His reinstatement shall also be conditioned on his continuing involvement with support groups or support services to be approved by the Company and the Union, which involvement is to be confirmed to the Company and Union by quarterly written reports for the same period.

I am aware that the duration of the imposed conditions for reinstatement is longer than the usual two-year period. However, given the significant period between the grievor's previous reinstatement and his relapse in April 2013, and considering the only prognosis on the record before me, I am of the view that the longer period is appropriate. Should the grievor fail to honour any of the conditions of his reinstatement, or should he test positive for alcohol or drugs, he will be subject to termination.

March 25, 2014



CHRISTINE SCHMIDT
ARBITRATOR