

CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4327

Heard in Montreal, July 9, 2014

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the termination of Conductor Richard O'Brien.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Following a protracted investigation, on January 25, 2013, Conductor O'Brien was terminated "Failure to work safely and in a manner compatible with those expected of a safety critical employee as evidence[d] by the multiple reports received by the Company from fellow crew members relating to your performance, while employed as a Conductor in Lethbridge, Alberta between the period of August 20, 2012 and November 11, 2012."

The Union contends that Conductor O'Brien's termination is unjustified, unwarranted and excessive in all of the circumstances. In addition, the Union contends that Conductor O'Brien was wrongfully held from service in connection with this matter, contrary to Article 70.05 of the Collective Agreement.

The Union requests that the discipline be removed in its entirety, that Conductor O'Brien be ordered reinstated forthwith 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.) D. Olson
General Chairperson

FOR THE COMPANY:
(SGD.)

There appeared on behalf of the Company:

B. Sly – Director Labour Relations, Calgary

There appeared on behalf of the Union:

D. Ellickson – Counsel, Caley Wray, Toronto
D. Fulton – General Chairman, CTY, Calgary
D. Edward – Vice General Chairman, CTY, Medicine Hat
R. O'Brien – Grievor, Lethbridge

AWARD OF THE ARBITRATOR

The record before the Arbitrator confirms that a number of locomotive engineers expressed to the Company concerns about the safety of certain of the grievor's work habits. Based on statements taken from the locomotive engineers in question, of which the grievor and his Union had notice and access, the Company conducted an investigation in respect of the grievor's work performance in the period from August 20, to November 11, 2012. While the Union raises concerns about the time period in question, and the difficulty of delay and the freshness of the grievor's memory in relation to certain of these incidents, there is little, if any, indication that Mr. O'Brien was prejudiced or lacking in memory in respect of the matters which were in fact investigated.

As a preliminary matter the Union also questions the fact that the grievor was held out of service for what became a lengthy investigation period. In that regard it cites to the Arbitrator's attention Article 70.05 of the Collective agreement which provides as follows:

An employee is not to be held off unnecessarily in connection with an investigation unless the nature of the alleged offence is of itself such that it places doubt on the continued employment of the individual or to expedite the investigation, where this is necessary to ensure the availability of all relevant witnesses to an incident to participate in all the statements during an investigation which could have a bearing on their responsibility. Layover time will be used as far as practicable. An employee who is found blameless will be reimbursed for time lost in accordance with Clause 30.01(1), (2), (4) or Clause 49.01(1), (2), (4).

The Arbitrator cannot agree with the Union's submission in respect of the application of the foregoing provision in the instant case. Whether correctly or not, the Company was in possession of statements of concern from a number of locomotive engineers going to the ongoing safety of the grievor's work habits, based on information provided by some five separate employees involving a number of incidents. In these circumstances the Arbitrator is not prepared to conclude that the Company was unreasonable in forming the view that the continued employment of the grievor was placed in substantial doubt by reason of the allegations it was required to deal with. I am therefore not persuaded that the Company acted improperly in holding the grievor from service for the time that it did.

With respect to the merit of the grievance, however, I am not persuaded that the Company did not have alternatives available to it short of discharge in the circumstances of this case, or that it gave adequate consideration to those alternatives. While it may be true, as the Company's representative notes, that other employees in the field periodically attempted to correct or reorient the grievor, it does not appear that there was any concerted attempt on the part of the Company or the Union to establish a specific program, such as a combination of re-training and ongoing mentorship, to give the grievor an opportunity to learn the trade and demonstrate his ability to work in a safe and productive manner. I can nevertheless appreciate the Company's perception that certain of the errors committed by Mr. O'Brien could fairly call into question his ultimate suitability and ongoing employability. That said, however, the gist of the grievance, which I believe has some merit, is that the Company, apart from certain settlement

proposals, declined to consider options such as retraining and/or mentorship, preferring to proceed on the disciplinary path in respect of a substantial number of events over a period of several months.

The Arbitrator has some difficulty accepting the suggestion made by the Union that the length of time taken by the Company worked to the prejudice of the grievor. There appears to have been no difficulty on his part remembering the incidents which were the subject of the investigation statements taken both from a number of locomotive engineers as well as from the grievor. Given the nature of the problem being addressed, I do not believe that the Company can be faulted on the basis of undue delay.

What does emerge from the material before me is that the Company had legitimate concern for the grievor's ongoing employment. That said, however, I am not satisfied that sufficient examination was given to measures that would protect the Company's legitimate interests, while affording the grievor a fair opportunity to demonstrate his ability to be a safe a productive employee. On the whole, while I believe this is not a case for compensation, I feel that it is appropriate to direct the Company to afford the grievor a reasonable opportunity for retraining, and reemployment, to demonstrate his potential to be a safe and productive employee.

The grievance is therefore allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without compensation for any wages or benefits lost. Upon a reinstatement, for a period of not less than six months the grievor

shall be provided retraining, and shall be assigned to work in a situation of clearly defined mentorship on terms to be worked out between the parties or, failing their agreement, to be determined by the Arbitrator.

July 14, 2014

MICHEL G. PICHER
ARBITRATOR