

CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4343

Heard in Montreal, November 12, 2014

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

UNITED STEELWORKERS – LOCAL 2004

DISPUTE:

The discharge of Dustin Lysohirka.

JOINT STATEMENT OF ISSUE:

On September 8, 2014 the Grievor was discharged for his alleged “being under the influence of alcohol while at work on July 24, 2014 in violation of CROR Rule G and CN’s Drug and Alcohol Policy.

The Union filed a grievance regarding this matter citing violations of Articles 18.3 and 18.5 of Agreement 10.1. The Union argues that the Grievor was cooperative with the investigation and complied with OHS for an assessment and urine test. The Union has argued that the discipline is excessive and unwarranted and should be immediately removed from the Grievor’s work record.

The Union has argued that the Grievor is a long service employee with a good work record with no previous offences. The Union has further requested the Grievor be immediately reinstated to his former position with full redress with no loss of pay, benefits or seniority standing.

The Company submits that the Grievor is deserving of the discipline and that they have not violated the Collective agreement.

The Parties have not been able to resolve the dispute to date.

FOR THE UNION:
(SGD.) M. Piche
Staff Representative

FOR THE COMPANY:
(SGD.) B. Laidlaw
Manager Labour Relations

There appeared on behalf of the Company:

B. Laidlaw	– Manager Labour Relations, Winnipeg
T. Hickie	– Program Supervisor, Brandon
B. Murray	– Senior Manager Production, Kamloops
J. Anderson	– Team Leader OHS, Toronto
B. Strachan	– Manager of Production, Winnipeg
G. Stripe	– Nurse Case Manager, Montreal
S. Grou	– Senior Manager Labour Relations, Montreal

There appeared on behalf of the Union:

M. Piché	– Staff Representative, Toronto
D. Lysohirka	– Grievor, Winnipeg
G. Colli	– Chief Steward, Winnipeg
J. Lander	– Group Two Operator, Winnipeg
T. Lundblad	– Staff Representative, Toronto
R. Koch	– President, Winnipeg

AWARD OF THE ARBITRATOR

This matter concerns the discharge of the grievor for allegedly being under the influence of alcohol in violation of CROR Rule G and the Company's Drug and Alcohol Policy.

The evidence indicates that the grievor worked on July 24, 2014 starting at 19:30 on a 28 man rail gang working near Watrous Saskatchewan. At approximately 20:20 the grievor's supervisor Mr. Hickie received a report that the grievor and another employee had been drinking. Mr. Hickie went looking for the grievor and the other employee. Eventually, the grievor showed up and was questioned whether or not he had been drinking. The grievor admitted he had consumed two beers that day prior to 15:30.

The grievor and the other employee were then both taken to the RCMP detachment for a breathalyzer. The grievor did not object to being taken to the RCMP for the breathalyzer test. The RCMP however, would not perform the breathalyzer because it was not a police matter.

At approximately 22:10 Bruce Murray and Brent Strachan arrived at the workplace. Mr. Murray proceeded to question the grievor and the other employee. It

was then determined that the other employee was not under the influence of alcohol and he was considered fit for duty. The grievor on the other-hand was deemed to be under the effects of alcohol and he was removed from service because he was deemed to be a safety risk.

The issue to be determined was whether or not the grievor violated CROR Rule G and the Company's Drug and Alcohol policy.

CROR General Rule G prohibits the use of alcohol and or drugs by employees who are on duty or "subject to duty". The relevant paragraph reads as follows:

- (i) the use of intoxicants or narcotics by employees subject to duty, or their possession while on duty is prohibited.

The term "subject to duty" is not defined in CROR Rule G. Neither does CROR Rule G prohibit employees from consuming alcohol for a specific period of time prior to one's scheduled shift.

In **CROA 557** Arbitrator Weatherill indicated it was his view that "subject to duty" should be read "in view of the obvious purpose of the rule as a whole, namely to protect persons and property from the dangers of the operation of railway equipment by those not in a fit condition to do so. Thus employees who are on duty, or who may be expected to be on duty within the period during which they might be affected thereby, must not consume intoxicants or narcotics".

I agree with Arbitrator Weatherill and would add that employees should be cautious with respect to any alcohol consumption prior to their scheduled shift as it may well be found that they were consuming alcohol at a period when they were subject to duty, if the effect of the alcohol consumption impairs their ability to perform work. In other words, employees may be found to have violated CROR Rule G if they consumed alcohol prior to their shift and remain impaired by the effects or after effects (i.e. hangover) when they report for duty.

In this matter I am quite concerned about the observations that are noted in the reasonable cause / post incident report forms with respect to what was observed by the supervisors on the evening in question. Mr. Hickie stated observations at 20:20 which include slurred speech and reddened eyes. However, Mr. Hickie also described the grievor as having normal balance and walking, normal skin and no smell of alcohol was noted. Mr. Nielsen, Mr. Strachan, and Mr. Murray all provided reasonable cause / post incident report forms at 22:10 (almost two hours later). All three of these supervisors note of the smell of alcohol and some signs that might support a concern that the grievor could be intoxicated including, slurred speech and reddened eyes. At the same time there are also inconsistencies with respect to whether the grievor was displaying normal balance or was uncoordinated in his appearance.

To add to my concern is the fact that the Union asserts that the three of the management witnesses were not made available for questioning during the investigation, in violation of Article 18.2 of the collective agreement. In fact only Mr. Strachan was made available via phone. In these circumstances, I find that the

Company failed to give the grievor and his Union representative a proper opportunity to hear all of the evidence submitted by witnesses whose testimony would clearly have a bearing on the grievor's responsibility. I also conclude that the supervisors' untested observations do not satisfy the burden of proof on the balance of probabilities.

Based on all the evidence, I am compelled to conclude that the grievor did present himself at work displaying signs of previous alcohol consumption. In my view, there was certainly reasonable and probable cause to hold the grievor out of work that evening and request that he submit to a breathalyzer. Unfortunately, the RCMP declined to give the grievor a breathalyzer. Accordingly, there is no objective evidence with respect to the grievor's condition on the night in question. I also conclude that the subjective evidence does not meet the burden of proof necessary to find that the grievor was impaired or that his consumption much earlier in the day affected his ability to work. Accordingly, I conclude that the grievor did not breach CROR Rule G.

I acknowledge that the Company's Drug and Alcohol Policy maintains a "zero tolerance for impairment" in the workplace. I also acknowledge that employees who work in safety sensitive positions, such as the grievor, are held to a higher standard and are subject to more serious consequences because of the direct impact that these positions have on safety. At the same time, I must note that the Policy does not completely prohibit the consumption of alcohol prior to one's shift. Rather, any employee whose breath alcohol concentration is over 0.04 or who tests positive for illegal drugs will be considered to be in violation of the Policy. Therefore, while the Policy maintains "zero tolerance" with respect to impairment, the Policy does not

maintain zero tolerance with respect to consumption prior to work or require that an employee be completely free of alcohol use prior to their scheduled shift. That being said, employees should be very wary about consuming alcohol prior to their shift. This is because they may violate the Policy if the effects of consuming alcohol prior to their shift are such that it impairs their ability to perform their work in a safe manner.

After considering all of the evidence and submissions of the parties, I am allowing the grievance. The grievor is to be reinstated forthwith into his employment without loss of seniority. I direct that the employer compensate the grievor for all lost wages and benefits from the date he was held out of service until his return to work. However, the grievor is not to be compensated for any lost wages for the night in question. I retain jurisdiction in the event of any dispute concerning the interpretation or application of this award.

November 20, 2014

JOHN L. STOUT
ARBITRATOR