

**CANADIAN RAILWAY OFFICE OF ARBITRATION  
& DISPUTE RESOLUTION**

**CASE NO. 4349**

Heard in Montreal, January 13, 2015

Concerning

**CANADIAN NATIONAL RAILWAY COMPANY**

And

**TEAMSTERS CANADA RAIL CONFERENCE**

**DISPUTE:**

Appeal of the dismissal of Conductor A. Melnykoytch on June 18, 2014.

**JOINT STATEMENT OF ISSUE:**

Following an extended period of absence that commenced in early 2009, Ms. Melnykoytch was cleared by CN's OHS Department to return to work in March 2014.

Prior to returning to work, Ms. Melnykoytch was required to complete the QSOC Recertification. She attended the classroom instruction of the recertification training between June 2<sup>nd</sup> and June 5<sup>th</sup>.

Ms. Melnykoytch was unsuccessful on her first attempts at the signals and dangerous goods tests, and was given the opportunity to rewrite these sections during the recertification training. After rewriting these sections on June 4<sup>th</sup>, she was informed that she had again failed these tests. She was allowed to write them again.

Upon re-examination on June 14, 2014, Ms. Melnykoytch passed the dangerous goods section but failed the signals section. On June 18, 2014, Ms. Melnykoytch was issued a letter from the Company advising that "Unfortunately you did not successfully complete your signals exams and have failed to obtain your CROR qualification. Therefore I must inform you that your employment at CN is administratively terminated, effective immediately."

**The Union's Position:**

The Union contends that the Company's outright termination of this long service employee is unjustified and unwarranted. The Union contends that the Company has failed to support Ms. Melnykoytch's return to the workplace by failing to provide sufficient training and exposure to the signal system and dangerous goods regulations.

The Union contends that the Company's June 18<sup>th</sup>, 2014 termination letter alleges just cause for discipline. The Union contends that there is no cause for termination and termination without an investigation, is fatally flawed. In the alternative and without prejudice, in the event that the Company establishes that this was purely an administrative termination, the Company's abrupt, unilateral decision to terminate Ms. Melnykoytch's employment is unjustified, procedurally flawed and fundamentally unreasonable.

In either event, the Union contend that the termination of Ms. Melnykowsytsch's employment is unjustified and contrary to Agreement 4.16 and CROA&DR jurisprudence.

The Union requests that Ms. Melnykowsytsch be reinstated into Company service forthwith without loss of seniority and that she be made whole for any and all losses incurred as a result of this matter.

The Company's Position:

The Company disagrees with the Union's position. The Company submits that this was an administrative closure of her employment file and that it fully met its obligations.

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

**FOR THE COMPANY:**  
**(SGD.) V. Paquet**  
**Labour Relations Manager**

There appeared on behalf of the Company:

|                |   |
|----------------|---|
| V. Paquet      | – Labour Relations Manager, Toronto         |
| K. Morris      | – Senior Manager Labour Relations, Edmonton |
| P. Payne       | – Manager Labour Relations, Edmonton        |
| J. Shields     | – Manager Labour Relations, Edmonton        |
| B. Martignetti | – Labour Relations Officer, Toronto         |
| D. Larouche    | – Labour Relations Manager, Montreal        |
| M. Dupere      | – Assistant Manager CMC, Montreal           |

There appeared on behalf of the Union:

|                   |   |
|-------------------|---|
| A. Stevens        | – Counsel, Caley Wray, Toronto          |
| J. Robbins        | – General Chairman, Sarnia              |
| J. Lennie         | – Vice-General Chairman – Port Robinson |
| A. Melnykowsytsch | – Grievor, Toronto                      |

**AWARD OF THE ARBITRATOR**

The grievor, Ms. Melnykowsytsch was terminated on June 18, 2014 for failing to pass the signals section of her QSOC Recertification. Ms. Melnykowsytsch has been employed for eighteen years. The Company asserts that the termination was an administrative one. The Union asserts that the termination of a long service employee such as the grievor was unjustified and unwarranted in this situation. Further, the Union

says that this was a disciplinary termination and no investigation was conducted. As such the Union says that the termination is fatally flawed.

The Canadian Rail Operating Rules (CROR) are rules that cover all aspects of the safe operation and movement of the railroad. Employees are provided with training on CROR and must maintain required qualifications.

Addendum 92, item 5 of Agreement 4.16 provides:

5. (a) Employees attending a training course who fail to qualify in accordance with the Regulations for their occupational category will not work until they become so qualified.

(b) To the extent that an instructor/examiner is available, instruction and/or re-examination, as desired by the employee, may be arranged outside the hours of the normal training course at no additional cost to the Company. Alternatively, and again dependent on the availability of a qualified instructor/examiner, the employee may arrange to qualify in whatever subject areas required at the home terminal or other location at no cost to the Company.

(c) The provisions of paragraphs 1 to 5 included will not again apply to employees taking subsequent training or instruction as a result of failure to qualify on their first attempt. Any further training, instruction or re-examination will be at the employee's own expense.

Ms. Melnykowytch was absent from work for a period of approximately five years. Upon her return the grievor received training materials on May 6, 2014 and attended classroom instruction for recertification training on June 2<sup>nd</sup> to June 5<sup>th</sup>, 2014. Tests are administered during the training.

On June 4, 2014 she wrote 9 exams and did not succeed on two of them.

On June 14, 2014 she again wrote these two exams and passed the dangerous good section and achieved 86% on the Signals section. The Signals exam requires a perfect score.

The Company relies on the decision in **CROA&DR 1813** decided under a different collective agreement with different language. In that case the provision at issue provided that an employee who failed to pass a required exam was to be ...”placed at the foot of the Brakeman’s seniority list or their services dispensed with at the option of the Company...”.

However that case did confirm that a grievance of this nature is not a disciplinary termination. As the Company argues that case confirmed that the test to be applied in assessing the Company’s response was whether the decision to terminate was done without bias, unfairness or overt discrimination.

The Union contends that Item 5 does not provide consequences or time limits for failure to qualify other than that the employee will not work until he/she is able to qualify and that the re-examination arrangements be at no cost to the Company.

The Union says there are mitigating circumstances that enhance the grievor’s case. They are that she was out of the workplace since 2009, that she previously had been assigned to GO train service, that the Company did not factor her improvement in the rules into its decision to terminate and that years of absence resulted in a stressful

situation. The Company responds that there are other employees with significant period of times away from work who do achieve success on the exams upon their return, that the GO system also operates on signals, that the dangerous good exams the grievor did pass was a repeat of an earlier one and that in fact she fared worse on her subsequent signals exam.

The consequence of a failure to qualify under Item 5 is to remain out of work until qualification. Although, I do not accept that to be an unlimited amount of time, this is a case in which further opportunity should be afforded this grievor. As stated in

**CROA&DR 2379:**

The understanding in the railway industry is that an employee is responsible for completing his or her rules qualifications, and rules requalification's, from time to time. According to long-standing practice, should an employee's qualifications in the CROR lapse, the normal outcome is that the employee is withdrawn from service until such time as he or she requalifies in the rules.

Although that case was determined in respect of discipline that had issued in the form of demerit points for a deliberate delay by an employee in pursuing his requalification, the reference to the practice is relevant.

Ms. Melnykowsky is a long service employee who has been successful in the exam before, and the time of her termination was successful in the other required exams. Although, she did write the exams a number of times without success, she is entitled to additional opportunity to requalify.

The grievance is allowed. Ms. Melnykowsky is to be reinstated and provided with the opportunity to requalify and return to service. To the extent she needs further training she is to be provided with that, in accordance with Item 5 and at no cost to the Company. Given the circumstances of this case, I am not in this decision making any order with respect to back pay. However, I remain seized to do so if the parties are unable to resolve that issue.

February 5, 2015



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MARILYN SILVERMAN  
ARBITRATOR