

CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4352

Heard in Montreal, January 13, 2015

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal on behalf of Conductor K. G. of Edmonton, Alberta, appealing his discharge for his failure to comply with the terms and conditions of his Continuing Employment Contract dated May 13, 2013 by virtue of a positive test result for Opiates on August 22, 2013.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

On November 21, 2012, the grievor signed a Confidential Relapse Prevention Agreement with Occupational Health Services. On April 17, 2013, the grievor was rejected from the monitoring process for cause of non-compliance as evidenced by a positive test result. On May 13, 2013 the grievor was offered, and accepted, a Continuing Employment Contract.

On August 22, 2013, the grievor attended hair testing, and was found positive for Opiates. The Company conducted an investigation and determined that the grievor had violated his Continuing Employment Contract conditions, and discharged the grievor.

The Union contends that on March 20, 2014 the grievor received results of a hair test for amphetamines, marijuana, opiates, cocaine, and phencyclidine that were all negative, and provided these results to the Company, requesting the Company return the grievor to his Conductor position. The Company confirmed that they would not return the grievor to his position of Conductor based on his violation of the Continuing Employment Contract. The Union contends that the grievor should be brought back to work and be made whole from the time he presented the Company with his drug test results.

The Company disagrees with the Union's contentions.

FOR THE UNION:
(SGD.)

FOR THE COMPANY:
(SGD.) P. Payne for D. VanCauwenbergh
Director, Labour Relations

There appeared on behalf of the Company:

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

There appeared on behalf of the Union:

A. Stevens	– Counsel, Caley Wray, Toronto
R. Hackl	– General Chairman, Saskatoon

AWARD OF THE ARBITRATOR

The grievor is a Conductor with 23 years of service who was terminated for breach of his Continuing Employment Agreement.

The grievor suffered from an addiction to opiates which began when he was prescribed pain medication for chronic knee pain. Prior to this there was no history of substance abuse. In September 2012, he grievor self-reported his dependency to the Company and went on an approved leave of absence. He admitted to a substance dependency to prescription pain killers. In November 2012 the grievor entered into a Relapse Prevention Agreement. That agreement provides that the employee abstain from the use of alcohol and illegal drugs for the duration of the agreement. Random drug tests are administered under that program. Failure to comply with the agreement results in rejection from the monitoring process.

On April 17, 2013 the results of a controlled substance test (a hair sample) showed positive for oxycodone. Under the terms of the Relapse Prevention Agreement, management was advised of this result on May 9, 2013. As a result, on May 13, 2013, the grievor signed a Continuing Employment Reinstatement Agreement. As part of the Continuing Employment Reinstatement Agreement the grievor was required to execute another Relapse Prevention Agreement, which he did on June 6, 2013. The grievor

complied with the counselling requirements under the Continuing Employment Agreement. He also was required to undergo drug testing.

One of the terms of the Continuing Employment Reinstatement Agreement is found in paragraph 5 of that agreement:

Should you fail to comply with the full terms of this contract, including compliance with the Relapse Prevention Agreement, you will be discharged from CN and will not be eligible for continuing employment/reinstatement.

On August 22, 2013 a hair test was returned positive for opiates; specifically Oxycodone.

The grievor said in the investigation meeting that he had not used narcotics since August 2012. The Union produced a doctor's note saying that the grievor has not been prescribed narcotics since August 20, 2012. The grievor said in the investigation that he has not obtained narcotics from any other source. His only explanation for the positive drug tests was the long preceding period of time of drug use and that he and his doctor are going to investigate if he had a condition preventing opiates from leaving his system. Following the investigation, the grievor was terminated under the terms of the Continuing Employment Contract.

In March 2014, seven months after the termination the grievor produced the negative results of a hair sample test that the grievor himself had obtained.

The Union relies on the grievor's participation under the Relapse Prevention Agreements and the March 12, 2014 negative hair sample test. Although the Union relies upon negative urine tests during the period when the grievor was under the Relapse Prevention Agreement, there were also two positive hair sample tests in that period.

The Company relies upon the fact that the grievor failed to fulfill the requirements of his Continuing Employment Contract in arguing that the discharge was justified. The Company says it tried to accommodate the grievor for a period of time, with the support of two Relapse Prevention Agreements. It contends that the Continuing Employment Agreement is clear on its terms.

In **CROA&DR 3588, 2632, 4046** and **4233** this Office upheld discharges based on violation of a continuing employment contract in respect of drug and alcohol dependence cases. In **CROA&DR 4046** the arbitrator noted that such agreements were an agreed means of accommodation.

The Union relies on **CROA&DR 3912, 4054, 4094**, where discharges for violation of continuing employment contracts were overturned, with conditions for employees where there was substantial material produced, even post discharge, as to recovery and rehabilitation efforts. The Union also refers to the Company obligations under the *Canadian Human Rights Act*. It refers to **CROA&DR 2716** where this Office analyzed the statutory provisions that require a board of arbitration, to exercise its discretion to

mitigate the penalty of discharge. That case referred to the obligation to consider “clear and compelling evidence” even post discharge of efforts at controlling addictions.

In this case, beyond the March 14, 2014 negative hair sample test, no additional material or information was adduced in respect of rehabilitation efforts, medical or other support or ongoing testing. This distinguishes the case before me from the **CROA&DR** cases relied upon by the Union. Although the Union’s position is that the grievor has gained control of his addiction and is either recovered or committed to recovery, there is no evidence to support that contention other than the March 14 hair sample test. In requesting that this Office mitigate the penalty of discharge in consideration of all the facts, including the obligations under the *Canadian Human Rights Act*, the “clear and compelling evidence” found in the case law supporting reinstatement is absent here.

Therefore, having regard to the specific facts of this case, the continuing employment contract, the obligations of accommodation to the point of undue hardship, the material relied upon by the Union and the grievor’s safety critical position, the Company cannot be required to reinstate the grievor.

Accordingly, this grievance is dismissed.

February 25, 2015



MARILYN SILVERMAN
ARBITRATOR