

CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4375

Heard in Calgary, March 10, 2015

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal on behalf of Locomotive Engineer Mr. E. of Fort Frances, Ontario appealing his discharge from the Company effective August 8th, 2014, for Violation of CN Drug and Alcohol Policy and Canadian Rail Operating Rule G while operating as a locomotive engineer on train Q19651-13 on July 16, 2014. All time from July 16, 2014 through to August 8, 2014 is suspension without pay.

COMPANY'S EXPARTE STATEMENT OF ISSUE:

On July 16, 2014 Mr. E. was the Locomotive Engineer operating Train Q19651-13, from Winnipeg, Manitoba to Ranier, Minnesota. Upon arrival at Ranier, Mr. E. was subject to FRA random alcohol testing, and testing positive for alcohol in excess of the legal limit. The Company subsequently discharged him.

The Union's appeal contended that the Company assessed excessive discipline to Mr. E, and that Mr. E. is disabled and required accommodations. The Union's grievance requested that Mr. E be made whole for all lost wages and benefits.

The Company disagrees with the Union's contentions.

FOR THE UNION:
(SGD.)

FOR THE COMPANY:
(SGD.) J. Shields for K. Madigan
Manager Labour Relations

There appeared on behalf of the Company:

J. Shields	– Manager Labour Relations, Edmonton
K. Morris	– Senior Manager Labour Relations, Edmonton
V. Paquet	– Manager Labour Relations, Toronto

There appeared on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
B. Willows	– General Chairperson, Edmonton
B. Ermet	– Vice General Chairperson, Edmonton
Mr. E.	– Grievor, Rainy River

AWARD OF THE ARBITRATOR

The grievor, a Locomotive Engineer, is fifty-six years old with thirty-seven years of service with the Company.

The facts of this case are not in dispute. On July 16, 2014 the grievor was operating a train from Winnipeg to Ranier, Minnesota. He was subject to random alcohol testing under the U.S. Federal Railroad Administration (the "FRA") random testing and found positive for alcohol, beyond the legal limit.

CRO Rule G and the CN Drug and Alcohol Policy provide in the relevant portions:

Rule G

The use of intoxicants or narcotics by employees subject to duty, or their possession or use while on duty is prohibited.

And the Policy provision:

"Any employee whose breath alcohol concentration is over 0.04 or who tests positive for illegal drugs would be considered in violation of this policy".

In the investigation material the grievor admitted consuming alcohol while on duty. He was discharged for his Rule G violation.

The Company says that the grievor placed himself, his crew, the public and the legitimate interests of his employer in jeopardy. Further it relies on that fact that the grievor did not report his alcohol addiction and seek assistance through the Company's OHS department and EFA Program but rather only sought assistance after having been found in violation of Rule G. The Company suggests this is self-serving.

The Company contends that discharge was warranted because the grievor used alcohol while on duty in a safety critical position. The Company relies on **CROA&DR 4352**.

The Union relies on the grievor's alcohol addiction as a disability and the provisions of the *Canadian Human Rights Act*, which prohibits discrimination due to disability. The material presented highlights the grievor's life stressors including family issues which contributed to his relapse.

The grievor has a history of alcohol abuse. In 2006 the grievor contacted the Company's EFAP and in connection with that he completed a twenty-one day residential treatment program. For two years following he attended Alcoholics Anonymous meetings. He suffered a relapse in 2009 and took himself out of service for two months and again began attending AA meetings. The grievor says that the 2014 incident for which he was discharged was another relapse. He knows it was serious and cannot be tolerated and he now understands that he must not drink alcohol at all.

The Union relies on several decisions of this Office in asking for the reinstatement of a long service employee with an addiction that is recognized as a disability requiring accommodation under the *Canadian Human Rights Act*. (**CROA &DR 2716, 3355, 4054, 4059**).

The grievor is a long service employee. After his termination he completed a residential treatment program ending in September 2014. The grievor says he has had substantial periods of sobriety; from 2006 to 2009 and again from 2009 to 2014. In addition he says he has been sober for the months from his termination to the hearing, a period of eight months. In that time he has undergone two alcohol tests (both negative) in connection with his current employment. He has attended approximately twelve Alcoholics Anonymous (AA) meetings and attends as many as he can given his work schedule and the fact that he lives in a small community where the frequency of meetings is limited. His intention, if returned to the Company, is to attend more AA meetings regularly where offered in a larger community.

The **CROA&DR** jurisprudence is supportive of the Union's case. In **CROA&DR 2716** an employee who consumed alcohol during his tour of duty and was in possession of marijuana was reinstated on conditions. That decision referenced the recognition of alcohol and drug addiction as an illness under the *Canadian Human Rights Act* which gives rise to a duty of accommodation. In that case this Office noted that the evidence confirmed successful and substantial participation by the grievor in AA and in a residential treatment program. In **CROA&DR 3355** an employee who reported for duty under the influence of alcohol was reinstated to a non-safety sensitive clerical position where he had previously been terminated and reinstated with conditions. In **CROA&DR 4054** an employee was reinstated after breaching a last chance opportunity by testing positive for drugs in the face the employee's substantial rehabilitation efforts. Again in

CROA&DR 4059, 4094 and 4328 where there was evidence of clear and compelling rehabilitation efforts, reinstatement was ordered with return to work conditions imposed.

As to the Company's reference to **CROA&DR 4352** in that case there was no evidence of any rehabilitation efforts on the part of the grievor who had been subject to two Relapse Prevention Agreements and was on a Continuing Employment Contract.

In this case the grievor committed a serious infraction worthy of serious consequences. He operates in a safety critical environment. However, he has also provided substantial and on-going evidence supportive of his rehabilitation efforts. He has participated in a residential treatment program following his discharge. His rehabilitation counsellor from that program provided a letter attesting to the grievor's participation and commitment. He has participated in AA. The grievor has a disability; alcohol addiction.

In view of the grievor's long service, the requirements to accommodate the grievor to the point of undue hardship under the *Canadian Human Rights Act*, the grievor's continuing and ongoing rehabilitation efforts and the relevant **CROA&DR** jurisprudence, reinstatement with conditions is appropriate.

Accordingly, the grievance is therefore allowed in part. The Arbitrator directs that the grievor be reinstated into his employment, without loss of seniority but without

compensation for any wages and benefits lost. He is returned subject to the following conditions:

1. The grievor shall not be returned to work until such time as he is confirmed by the Company's medical officer to be physically fit to work, including any addiction problems assessment which the Company's medical officer deems appropriate.
2. Upon being confirmed fit to return to work by the Company's medical officer the grievor shall be subject to the following conditions for a period of 2 years:
 - a) The grievor shall abstain from the consumption of alcohol or drugs;
 - b) The grievor shall be subject to random, unannounced drug and alcohol testing, to be administered in a non-abusive fashion.
 - c) The grievor shall attend regular AA meetings;
 - d) The grievor shall engage in such periodic contact and follow-up with the Company's Employee and Family Assistance Program (EFAP) program as the parties may agree is appropriate, and failing their agreement as shall be determined by the Arbitrator.

The grievor will be subject to discharge if the return to work conditions are not complied with.

I remain seized to the extent that clarification is required in respect of the conditions imposed.

April 10, 2015



MARILYN SILVERMAN
ARBITRATOR