

CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4392

Heard in Calgary, May 12, 2015

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal on behalf of Locomotive Engineer C., assessed a sixty day suspension for Violation of CRO Rule 439 while working as a Locomotive Engineer on train Q10131-08 on the Albreda Subdivision, June 11, 2014 and the assessment of discharge for Violation of Rule G and the Company Workplace Drug and Alcohol Policy by virtue of a positive test result for cocaine following your tour of duty as the Locomotive Engineer on June 11, 2014 on train Q10131-08.

COMPANY'S EXPARTE STATEMENT OF ISSUE:

On June 11, 2014, the grievor was called as the Locomotive Engineer on Q10131-08, Jasper via Blue River at milepost 113.7 proceeding Westward on the Albreda Subdivision, Q10131-08 passed signal 1137, Pyramid East, which was displaying a Stop signal. Train Q10131-08, being operated by the grievor, passed the signal without authority resulting in violation of CRO Rule 439.

The grievor was required to provide an employee statement with respect to the June 11, 2014 CRO Rule 439 incident and was subsequently assessed a sixty day suspension.

Following the June 11, 2014 incident, the grievor was required to undergo Drug and Alcohol testing for which the results were non-negative. Further laboratory tests resulted in the grievor being positive for cocaine use on both the urine and oral fluids tests. The Company discharged the grievor for a violation of Rule G and the Company Workplace Drug and Alcohol policy.

The Union contends that the grievor suffers from a physical disability as defined by the *Canadian Human Rights Act*, and as such the Company is required to afford the grievor reasonable accommodation short of the point of undue hardship on the Company. The Union further contends that it was the grievor's minimal experience as a locomotive engineer that was responsible for his error and not, as the Company suggests the violation of Rule G. it is the Union's position that the grievor be reinstated into his employment, without loss of seniority or loss of wages.

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
R. Baker	– Supervisor, Edmonton
J. Crevier	– Nurse Case Manager, Edmonton
V. Paquet	– Labour Relations Manager, Toronto
M. Marshall	– Senior Labour Relations Manager, Toronto

There appeared on behalf of the Union:

M. Church	– Counsel, Caley Wray, Toronto
B. Ermet	– Senior Vice General Chairman, Edmonton
B. Willows	– General Chairman, Edmonton
G. Mensaghi	– Local Chairman, Calgary
R. C.	– Grievor, Calgary

AWARD OF THE ARBITRATOR

The grievor, a locomotive engineer with six years of service, was issued a sixty day suspension for a CRO Rule 439 and discharged following a positive test result for cocaine.

On June 11, 2014 the grievor was operating as a locomotive engineer on the Albreda subdivision. Prior to passing an approach signal the crew was contacted by the Rail Traffic Controller (RTC) to change the signal. The grievor gave the RTC permission to do so. Notwithstanding that this communication occurred three miles prior to the stop signal, the grievor had to use the emergency brake to stop. He then passed the stop signal by 150 feet; a violation of CRO Rule 439. The grievor was issued a sixty day suspension for the violation. The investigation material discloses that the grievor thought he was taking the siding and was not adequately prepared to stop, even though he acknowledged the RTC request to change the signal indication.

As part of the post incident investigation the grievor and the conductor submitted to alcohol and drug testing. The final lab based tests confirmed that the grievor was positive for cocaine on both the urine test and oral swab. The grievor was discharged for violation of CRO Rule G and the Company Workplace Drug and Alcohol policy.

Those provide:

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

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”.

Adhering to signal indications is of the most fundamental and important functions of train operation. Failure to stop as indicated was a serious cardinal rule violation and this Office has upheld substantial suspensions and discharges where appropriate for a Rule 439 violation. It has been identified as “among the most serious of cardinal rule violations” (**CROA&DR 4105**). The grievor’s record contains discipline in the form of written reprimands and demerits, including for Rule violations. Given the grievor’s disciplinary record and the facts leading to this violation, the sixty day suspension is upheld.

Turning to the discharge, the Union contends that the grievor suffers a disability and is in need of accommodation under the *Canadian Human Rights Act*. It says that this current incident represents a relapse. The Company relies upon the safety sensitive position held by the grievor, the events leading to the discharge and the grievor's history.

At the investigation meeting into the positive drug test the grievor said that he has a substance abuse problem and was attending and would continue to attend counselling. This incident did not represent the first time that the grievor was in violation of the Company Policy to Prevent Workplace Alcohol and Drug Problems. On April 11, 2011 the grievor was suspected of being under the influence of drugs or alcohol and underwent testing. At that time a medical assessment was arranged and provided to the Company by a Family Medicine/Addition Medicine Specialist. The diagnosis from that assessment concluded with the physician's belief of substance abuse rather than substance dependence. The conclusion was that if the grievor could not remain abstinent his diagnostic conclusion should be reviewed and he would be a candidate for residential treatment. The grievor was returned to work after a three month period of assessment on conditions including random and unannounced testing and abstinence for two years under the terms of a Relapse Prevention Agreement. The grievor maintained the conditions imposed and the two year period ended in July 2013.

In this case, the grievor attended EAP on June 12 and 17, 2014 immediately following the incident giving rise to the substance testing. He provides a note from his

Narcotics Anonymous (NA) sponsor indicating that he began attending NA meetings in January 2015, seven months after the discharge, and does so regularly. It is noteworthy too that the original medical assessment provided in 2011 indicated that the grievor would be a candidate for residential rehabilitation in the event his was a case of dependence rather than abuse. There is no evidence of the grievor attending a residential program or obtaining further medical diagnosis or treatment.

In **CROA&DR 2716** 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 rehabilitation. In this case, there is not the kind of substantial evidence necessary to persuade me to reinstate the grievor. (See **CROA&DR 2716, 4347, 4375**).

Given the facts of this case, the lack of clear and compelling evidence supporting an accommodated return to work and the safety sensitive operations of the Company, the discharge is upheld.

Accordingly the grievance of both the sixty day suspension and the discharge are dismissed.

Marilyn Silverman

June 17, 2015

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MARILYN SILVERMAN
ARBITRATOR
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