

CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4435-B

Heard in Toronto, January 12, 2016

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Discharge of Locomotive Engineer Adam Myer for Violation of CN's Work Place Violence Prevention Policy and violation of GOI 8, 7.1, as a result of his decision to carry a firearm and ammunition in his work bag while at work as a locomotive engineer at Whitecourt, Alberta on September 24, 2014.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

On September 24, 2014, at 13:00 the grievor was called as the Locomotive Engineer on the outpost road switcher assignment, L50951-24, working in Whitecourt. That same day Inspector Benoit Tessier of the CN Police, received information that Locomotive Engineer Myer was in possession of a hand gun at work. Inspector Tessier drove to Whitecourt and communicated the information received to the RCMP. Upon the grievor and his fellow crew members returning from the assignment to the Whitecourt crew facility, police searched the grievor's work bag, which reveals a .38 caliber hand gun and matching ammunition. The grievor was arrested and charged under the Canadian Criminal Code.

The Company conducted an investigation and determined that the grievor's decision to be in possession of a hand gun and ammunition, while on Company property, and while at work, was in violation of the General Operating Instructions and Company Policy, and that discharge was the appropriate discipline response.

The Union contends that the refusal of the Company to allow the grievor time to prove to the Company that the hand gun was only a collectible and not in working order, amounts to unfairness and impartiality, and a violation of Article 86.3. The Union also contends that the Company denied the grievor the opportunity to face his accuser(s), the informant(s) who is/are alleged to have notified the Company that the grievor had a firearm in his knapsack, and that this is a further violation of Article 86.3.

The Company disagrees.

FOR THE UNION:
(SGD.)

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

There appeared on behalf of the Company:

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|----------------|---|
| P. Payne | – Labour Relations Manager, Edmonton |
| S. P. Paquette | – Counsel, Montreal |
| K. Morris | – Senior Labour Relations Manager, Edmonton |
| B. Tessier | – Inspector, CN Police, Edmonton |
| R. Bateman | – Director Labour Relations, Toronto |

There appeared on behalf of the Union:

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| M. Church | – Counsel, Caley Wray, Toronto |
| B. Ermet | – Senior Vice General Chairman, Edmonton |
| B. Willows | – General Chairman, Edmonton |
| R. Thompson | – Senior Vice General Chairman, Saskatoon |
| R. Donegan | – General Chairman, Saskatoon |
| A. Myer | – Grievor, Edmonton |

AWARD OF THE ARBITRATOR

The Grievor was hired on June 25, 2007, as a Conductor Trainee in Edmonton and qualified as a Conductor on October 16, 2007, and as a Locomotive Engineer on July 15, 2011. On October 15, 2014, the Grievor's employment was terminated. The Company sustains that the Grievor violated several Company policies and rules that stipulate that possession of a firearm (loaded or empty) is prohibited while on CN property.¹

The facts in relation to this grievance are not in substantial dispute. The evidence establishes that on September 24, 2014, while at work, the Grievor had in his possession, in his work bag a .38 caliber revolver-type pistol and approximately 30 bullets in .357 and .38 calibers. The handgun was unloaded but in the opinion of Inspector Tessier, unsecured, i.e. it had no trigger lock and was not in a locked carrying case as required by federal firearms legislation.

¹ CN Code of Business Conduct, page 23 ; CN Work Place Violence Policy ; General Operation Instructions, section 7.1

On September 25, 2014, at around 01:40, when the Grievor arrived at the bunkhouse, Inspector Tessier advised him that he was detained for investigation for possession of a firearm. Inspector Tessier reported at the criminal hearing that “Mr. Myer was, during his arrest, cooperative and admitted to possession of an antique gun. He also stated that at some point, he and Constable Scarf tried to open the gun to secure it, but they were unable to do so until Mr. Myer showed them how to open it. Mr. Myer was then criminally charged of violating the Criminal Code, for careless use of a firearm.

On September 29, 2014, at the beginning of the investigation, the Grievor advised the investigator that he believed that this investigation violated his rights, that he could self-incriminate himself and that he should have the assistance of a lawyer since there is a criminal investigation being conducted. Nevertheless, the Grievor indicated that the gun was not functional, that it was a collectible falling outside the scope of Canadian legislation governing firearms and therefore that he did not violate any CN policies or work rules.

On June 22, 2015, the RCMP National Weapons Enforcement Support Team issued a certificate of analysis of the handgun. The examiner concluded that the weapon:

“Is a firearm as defined in Section 2 of the *Criminal Code* of Canada. Is a prohibited firearm as defined in Section 84 of the *Criminal Code* of Canada. Functions correctly as a revolver handgun.”

At the criminal trial held on December 16, 2015, the Grievor explained that at the time of the incident, he was going through a difficult period with his wife and gave her space to deal with the issues. Therefore he moved out of the house and was working “outpost assignments” in Whitecourt. Once a week, when he was not assigned at work, he had to sleep in his car. He also stated that he did not want a firearm around the house while his wife and daughter were there; he wanted to avoid anyone getting a misconception about it and therefore brought it with him. Mr. Myer also explained why he brought the firearm to work:

“(…) I didn’t think it was a good idea to leave (it) in my car because it was right across from the old Howard Johnson. Our vehicles are – were subjected to lots of breaks-ins.

Again, I didn’t want to leave it inside the room just because I didn’t want misconceptions and have the cleaning staff panicking. I just – I thought I had better chances just knowing where it was and knowing that it didn’t go to the wrong place or something.”

He also explained how he obtained the antique firearm and his desire to start a collection of antique firearms, only for display purposes.

The evidence establishes that the firearm was made sometime in the 1800’s and was essentially a relic and that the Grievor did not believe that it was capable of discharge. Before this incident, Mr. Myer had never tried to fire the gun and he stated at the criminal trial that “I didn’t want to (fire the gun). I didn’t have an interest in it as well. Ah, plus some of the research I had shown – or found, umm, it just – it wasn’t safe idea.” Finally he stated that it wasn’t clear from his research on the RCMP’s website if such antique guns fall under the *Firearms Safety Act*. Finally, the Grievor was found not guilty.

In summary, I consider that the evidence establishes that the Grievor did violate Company's rules and policies. The language of those rules is quite clear: unless authorized, possession of a firearm (loaded or empty) is prohibited while on CN property. Whether it is an antique firearm or not, functional or not, it is irrelevant, there are no such exceptions in the rules. For legitimate safety purposes, unless authorized, all guns are prohibited.

The Grievor was made aware of those rules and it was quite unwise to bring a firearm at work, even if he did believe that it was not functional. The Grievor did admit at the hearing that he made a really bad decision and he convinced me that he truthfully regrets it. That being said, does it deserve automatic grounds for termination?

Prior decisions involving similar infractions in the railway sector reveal that possession of a firearm without the exercise or expression of threat² does not lead automatically to termination, when all mitigating factors are taken into account. In **AdHoc Case 613**, Arbitrator Picher summarized examples of treatment of employees that had committed similar offense:

“Of equal concern is what appears to have been the treatment of other employees charged with similar infractions by the Company. Three such examples are offered by the Union. In 2002 a B&B Foreman working in the Sudbury area used a registered hunting rifle to kill a beaver without authorization. That incident occurred on Company property with the weapon being carried without authorization in a Company vehicle. As discipline, a caution was registered against the foreman in question.

² See CROA&DR 4238.

In 2005 an S&C Maintainer was investigated for carrying a firearm in his vehicle while on duty. The employee admitted that he used his gun to shoot injured trap animals and suggested that he had permission from the Company to trap and hunt on a certain section of the Winchester Subdivision. When it was revealed that he did not in fact have proper authorization to do so, he was assessed ten demerits for his violation of rule I-K.

Finally, the Union refers to a third incident, the timing of which does not appear clear, which involved an S&C Maintainer who used an unauthorized firearm to shoot moose on Company property, as a result of which he was prosecuted by the Ministry of Natural Resources. While the employee in question was investigated and disciplined by the Company, he was not discharged.”

Finally, in the latter case, Arbitrator Picher reinstated a grievor who had possession of a hunting rifle in his Company vehicle, finding that the circumstances could be taken into account to mitigate the penalty.

While each case must rest on its own facts, I am compelled to agree with the Union that the dismissal in this case is excessive, once mitigating factors are taken into consideration.

Even if the discipline record of the Grievor was not without blemish, at the time of the incident, the Grievor’s record had no previous history of such an incident as alleged. The evidence establishes also that the Grievor was at all times cooperative and transparent. There is no doubt that he did not intend to use that firearm and the ammunition, they were only collectible items in a display; and the Grievor informed the Employer of such use on the very first day of his arrest. Perhaps, the evidence reveals different opinions regarding the gun’s state and its definition in regards to legislation, but such evidence is of little importance given it was well demonstrated that the Grievor

never intended to use the firearm and that such firearm was placed at the bottom of his work bag and therefore it was not easily accessible to anyone. Overall, I am satisfied that the Grievor had no intention to use the firearm or to harm anyone.

Basically, the Grievor committed an error in judgment, when he decided that the best or safest place to keep the antique firearm was his work bag while he had no stable home to live in and where he would have normally kept the gun. Such circumstances weigh in the Grievor's favour and having regarded all of the evidence, I do not think that the bond of trust is broken beyond repair. Given also how other similar incidents were treated, the grievance is therefore allowed, in part. I direct that the Grievor be reinstated into his employment forthwith, without loss of seniority and with compensation for half of the lost wages and benefits. Half the period between his discharge and reinstatement shall be recorded as suspension for violating many of the Company's policies and rules regarding possession of a firearm on Company property.

I retain jurisdiction in the event of any dispute between the parties of the interpretation of this Award.

February 17, 2016

MAUREEN FLYNN
ARBITRATOR