

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

CASE NO. 4698

Heard in Edmonton, September 17, 2019

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

UNIFOR NATIONAL COUNCIL 4000

DISPUTE:

The probationary release of Mr. M. Uy.

JOINT STATEMENT OF ISSUE:

The Union alleges that during the grievor's probationary period, the Company placed obstacles and barriers that would assist to show his failure to demonstrate abilities to perform the job he was hired. Further, the Union alleges that the Company failed to provide the grievor with a fair and impartial investigation, and that his release was discriminatory and arbitrary.

The Company disagrees with the Union's allegations. The essential elements of a fair and impartial hearing were not violated as the grievor was provided with the evidence, given the opportunity to rebut the evidence in his own defense, and the investigator met the standards of impartiality.

The Company also denies that the grievor's release was discriminatory or that it placed any obstacles or barriers to support the allegation that the grievor would fail. Finally, the Company maintains that time spent training, as outlined in Article 11.1 is not contemplated as time of "actual work".

The Company denies the Union's contentions and has declined the grievance.

FOR THE UNION:
(SGD.) B. Kennedy
National Representative

FOR THE COMPANY:
(SGD.) S. Blackmore
Senior Manager, Labour Relations

There appeared on behalf of the Company:

S. Blackmore – Senior Manager Labour Relations, Edmonton
F. Daignault – Manager, Labour Relations, Montreal

And on behalf of the Union:

B. Kennedy – National Representative, Edmonton

AWARD OF THE ARBITRATOR

The Grievor began his employment with the Company on October 31, 2017 as a probationary employee.

On February 8, 2018 (Company Exhibit; Tab 4), his employment was terminated following an investigatory meeting on February 5, 2018 (Company Exhibit; Tab 3).

Article 11.1 (Agreement 5.1) reads in part:

"...If considered to be unsuitable during the probationary period, employees will be subject to an investigation under Article 224.2, after which such employees may not be retained in the service."

In a thorough argument and presentation on behalf of the Grievor, the Union argued, *inter alia*, that the presence of a Service Delivery Manager, Kristine Fabish at the investigation - despite her being directly involved in the Grievor's training and speaking out during the investigation - amounted to a breach of the Company's obligation to conduct a fair and impartial hearing.

In fact, the Union made its objection known at the investigation itself (Q. 5). At the time that the objection was made, the Company's representative advised that Ms. Fabish was at the hearing to expedite the presentation of collected evidence and would have no influence on the determination of the findings of the investigation. Having raised his concern at the investigation, the Grievor allowed, at Q. 38 and 39, that he was both satisfied with the manner in which the investigation was conducted and that he

appreciated the conduct of his manager (Ms. Fabish) in coaching him and sharing her knowledge with him during his job training.

Considering the exchanges at the investigation and the fact that Ms. Fabish's participation consisted only of presenting the Company's concerns to the Grievor at the hearing, I am unable to conclude that her presence created a situation wherein the investigation was unfair or otherwise partial.

In re: *U.S.W.A., Local 5046 vs. Construction Aggregates Corp.* [1958] 9 L.A.C. 187, Arbitrator Robinson sets out the applicable principles relative to probationary employees which remain in place today. In that award, the Arbitrator states, at p. 5, *et seq.*, the following principles which apply here:

"c) During the probationary period the employee is, in effect, on trial to determine whether or not he possesses satisfactory qualifications and is suitable for regular employment.

...

f) Unless otherwise provided in the agreement, the employment of a probationary employee may be terminated by the Company at any time during the probationary period if in the judgment of the Company the probationary employee has failed to meet the standards set by the Company and is considered to be not satisfactory.

...

h) Providing the Company decision as to termination of the employment of the probationary employee is arrived at in good faith and meets the above tests then, apart from any provision in the Collective Agreement, the board of arbitration cannot substitute its own view for that of the Company."

In CROA 1568, Arbitrator Picher points out that:

"It is common ground that the standard of proof required to establish just cause for the termination of a probationary employee is substantially lighter than for a permanent employee. The determination of "suitability" obviously leaves room for a substantial discretion on the part of the employer in deciding whether an employee should gain permanent employment status.

...
The Company's decision to terminate a probationary employee must not be arbitrary, discriminatory or in bad faith. It must be exercised for a valid business purpose, having regard to the requirements of the job and the performance of the individual in question."

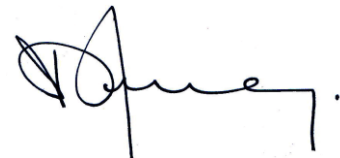
In the circumstances here, the Grievor was provided with six weeks of class-room training and then worked another 30 days of on-the-job training. At the investigation (namely Q. 17, 18, 21, 22 and 25) it was made apparent that the Grievor failed to meet the Company's standards regarding a number of fair expectations of a Service Delivery Representative.

The information provided by the Company reflects that it had sufficient ground in which to conclude that the Grievor's performance was not satisfactory and that he was not suitable to be maintained in the Company's employment. In that respect, ending his probationary employment was justified in the circumstance and in accordance with Article 11.1.

Despite a comprehensive and strenuous argument on the Grievor's behalf by the Union, I was not satisfied that there was evidence to conclude that the release of the Grievor was discriminatory or arbitrary or was otherwise not arrived at in good faith and for *bona fide* reasons.

Accordingly, the grievance is dismissed.

October 24, 2019



**RICHARD I. HORNUNG, Q.C.
ARBITRATOR**