

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

CASE NO. 4778

Heard in Calgary and with Zoom Video Conferencing, June 9, 2021

Concerning

BOMBARDIER

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the dismissal of Mr. J. Wood of Edmonton, AB.

JOINT STATEMENT OF ISSUE:

Following an investigation, Mr. Wood was dismissed which was described as “the results of this Investigation revealed that you did in fact fail to comply with the Bombardier Drug and Alcohol Policy during your tour of duty on August 28, 2019. As a result of this non-compliance, the Company has no alternative but to terminate your employment effective September 26, 2019.”

Union’s Position:

The Union contends the Company has failed to meet the burden of proof required to sustain formal discipline related to the allegations outlined within the discipline assessment. In the alternative, the Union contends that Mr. Wood’s dismissal is unjustified, unwarranted and excessive in all of the circumstances, including significant mitigating factors evident in this matter.

The Union contends that the Company conducted a for-cause substance test in an improper manner, violating the Bombardier Drug and Alcohol Policy.

The Union requests that the discipline be removed in its entirety, and that Mr. Wood be made whole for all lost earnings with interest. Further, the Union seeks damages, in amounts to be determined, resulting from the aforementioned violations. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

FOR THE UNION:

(SGD.) D. Fulton

General Chairperson

FOR THE COMPANY:

(SGD.) A. Ignas

Manager, Human Resources & Labour Relations

There appeared on behalf of the Company:

- D. McDonald – Counsel, Norton Rose Fulbright, Toronto
- A. Ignas – Manager, Labour Relations and Compliance Canada, Kingston

And on behalf of the Union:

- M. Church – Counsel, Caley Wray, Toronto
- D. Fulton – General Chairman, Calgary
- D. Edward – Senior Vice General Chairman, Calgary
- R. Finnsen – Vice General Chariman, Calgary

E. Mohan	– Local Chairman, Division 310, Edmonton
C. Frewin	– Local Chairman, Division 310, Edmonton
S. Silvestri	– Summer Law Student, Caley Wray, Toronto
J. Wood	– Grievor, Edmonton

AWARD OF THE ARBITRATOR

The grievor was employed as a Product Integration Technician, a safety-sensitive position, at the new Trans Ed Valley light rail transit project in Edmonton. He began his employment with the Company on June 5, 2018.

There is no applicable collective agreement yet in place between the parties. The parties, who are both members of CROA, nevertheless agreed to advance the current grievance to final and binding arbitration through the CROA process. It is understood this process includes the Company being held to a just cause standard for the grievor's dismissal.

The grievor reported to work at the TransEd workplace before 7:00 a.m. on August 28, 2019. At about 7:30 a.m. that morning the grievor's Manager, Shane Campbell, completed a safety briefing. The grievor was present for the briefing. Mr. Campbell's written memorandum of August 28, 2019 described what occurred with the grievor afterwards. It reads in part:

Started and completed safety brief on LRV1. Noticed a smell like an alcoholic drink. Took the employee (Jon Wood) aside and asked if there was alcohol in his coffee. Jon admitted there was and that there was some Bailey's in his coffee, "just enough to colour the coffee". I explained that there is a zero tolerance policy for alcohol on site.

After explaining to the grievor the Company's zero tolerance policy about alcohol on site, Mr. Campbell advised the grievor that he would be required to submit to a drug

and alcohol test. Mr. Campbell then contacted Mr. Jerrold Harvey in the Safety Department and requested his support.

Mr. Harvey arrived on the site approximately forty minutes later and informed the grievor he would be suspended with pay pending the results of the drug and alcohol test. Mr. Harvey's own memorandum of the incident, also dated August 28, 2019, contains the following under the NOTES section:

When I arrived at the site, I spoke with the employee in private and asked why he didn't stay home? His response was, "I had drinks up until midnight and felt fine when I woke."

I asked the employee why he had Bailey's in his coffee, he said, "it's only a splash, enough to cover the coffee."

I reminded the employee once again that it is a safety absolute site (0 tolerance for alcohol or drugs to be brought onto site).

The employee said, "what will they do, get rid of their best employee for having a splash of Bailey's in my coffee?"

....

The grievor's drug and alcohol POCT test was returned negative for alcohol. Further laboratory testing confirmed the negative result for alcohol as well.

The Company delivered a "Notice to Appear" to the grievor on September 17, 2019 advising that he was to appear for an investigation on September 20, 2019. His statement reads in part as follows:

Q015: Did you admit to supervisor Jerrold Harvey that what you had there was some Bailey's in your coffee as stated in Appendix 3?

A015: I call bailey's bailey coffee creamer. I've been with girlfriend and she drinks almonds, which is also an almond creamer. I drink Baileys coffee creamer, I've been doing this for years. I refer to Baileys coffee creamer as Bailey's.

Q016: Did you tell Supervisor Jerrold Harvey that the Bailey's you allegedly had in your coffee was non-alcoholic

A016: No, I just referred to it as Bailey's as I always do.

Q017: Why would you not explain to supervisor Jerrold Harvey that the Bailey's you put in your coffee was non-alcoholic?

A017: Because I was not drinking alcohol. He didn't ask the question if I had alcohol.

Q018: Did you tell Manager Shane Campbell that the Bailey's you allegedly had in your coffee was non-alcoholic?

A018: No.

Q019: Why would you not explain to Manager Shane Campbell that the Bailey's you put in your coffee was non-alcoholic?

A019: Just didn't. None of his business.

During the investigation, the Union called Mr. Campbell whose statement reads in part as follows:

CF 1: Did Jon ever tell you he put alcohol in his coffee?

SC: I asked if there was alcohol in his coffee. Jon admitted there was baileys in his coffee.

CF 2: As per Appendix 10: What is the name brand on the coffee creamer?

SC: Name brand say Baileys

CF 3: Can you identify anywhere in the ingredients of Appendix 11, where there is alcohol content?

SC: No, not on this picture.

CF 4: Did you examine or take any steps to examine Mr. Woods coffee cup to ensure there was alcohol?

SC: The step I took was asked the employee if there was alcohol and he said Baileys.

CF 5: Did Mr. Wood use the term Bailey's or Alcohol?

SC: I used the term Alcohol, and he admitted there was some Bailey's in his coffee. Just enough to color it.

CF 6: Did he use the word Alcohol?

SC: I don't think he used the word Alcohol.

CF 7: Do you have any proof that there was alcohol in the coffee cup?

SC: I have an employees admission there was alcohol.

CF 8: Did Mr. Wood use the term Alcohol in his coffee?

SC: I don't believe he used the word Alcohol. He said Baileys in his coffee.

CF 9: Did anyone else confirm your suspicion of alcohol in his drink?

SC: What happened was I spoke with the employee, and based on the admission I explained to Jon I had to act and I was going to send him for testing. The next thing I did was contact Supervisor Jerrold Harvey from HSE and he brought down the necessary paperwork that we filled in together and we went for the drug and alcohol test.

CF 10: What was the result of Mr. Wood drug and alcohol test?

SC: Zero

CF 11: Did Mr. Harvey examine Mr. Woods coffee?

SC: Not to my knowledge.

CF 12: According to your previous answer nobody confirmed your suspicion of alcohol in his drink?

SC: Nobody confirmed there was alcohol in his coffee.

The Union maintains there is no evidence of either impairment or, for that matter, that the grievor had any alcohol at all in his coffee cup. Mr. Campbell, the only material witness for the Company, was only able to say that the grievor smelled of alcohol. No one else observed the grievor or noted any of the typical indicia of impairment. Nor is there evidence that the grievor violated the *Bombardier Drug and Alcohol Policy* (the "Policy") by possessing alcohol at work with the intention to consume alcohol while on duty, as they first alleged in their Step 3 grievance reply.

The Union further submits that if alcohol was present in the grievor's coffee cup, as the Company alleges, there would have been a positive reading for alcohol from his drug and alcohol test. The Union notes that Mr. Campbell himself confirmed that the alcohol result from the clinic testing was an absolute zero reading. The Company, in the end, has failed to meet the evidentiary burden of proof required to establish a violation of the policy. The Union submits that grievor should therefore be reinstated to his position,

without losses, and that the Arbitrator also order damages be paid as a result of the grievor's treatment by the Company over this incident.

The Arbitrator agrees with the Company that the facts here are straightforward. Mr. Campbell spoke to the grievor after completing the safety briefing. As noted in his Memorandum of the incident, he "*Noticed a smell like an alcoholic drink*" from the grievor's coffee cup. Mr. Campbell then took the grievor aside and, according to his Memorandum and his answers at the grievor's investigation, asked him if there was alcohol in his coffee. The grievor, according to Mr. Campbell, replied there was Baileys in his coffee, "just enough to colour the coffee".

Mr. Harvey also interviewed the grievor after he arrived at the operations facility. He also took the grievor aside and asked him why he had Baileys in his coffee. According to Mr. Harvey's notes, the grievor responded in a similar fashion by stating "it was only a splash, enough to cover the coffee". The grievor stated at his interview that what he meant by "*Bailey's*" was not the alcoholic liquor, but rather a non-alcoholic coffee creamer. In his words "*I refer to Bailey's coffee creamer as Baileys*". The grievor was asked why he did not clarify that his coffee cup contained a non-alcoholic creamer to either Mr. Campbell to which he responded it was "*none of his business*".

I accept that the smell of alcohol from the grievor's coffee cup led Mr. Campbell to initially inquire with the grievor whether there was alcohol in his coffee. The grievor's spontaneous answer to Mr. Campbell, and later repeated to Mr. Harvey, was that he had

Bailey's in his coffee. I also agree with the Company's assertion that the reference to Bailey's was reasonably interpreted by the Company as a reference to an alcoholic beverage. This is the accepted and presumptive interpretation of "Baileys" in today's society.

This well-known understanding of Baileys as an alcoholic substance in my view shifted the onus to the grievor at that point to clarify with Mr. Campbell that the Baileys in his coffee was in fact the non-alcoholic creamer with the same brand name. His excuse is that he did not clarify that the creamer was in fact non-alcoholic because it was "...none of his [Mr. Campbell's] business". This response in my view was an attempt by the grievor to avoid taking responsibility for letting the Company know in a timely manner that the Bailey's in his coffee cup was of the non-alcoholic variety, and not the commonly accepted Baileys which contains alcohol.

In the end, I find that the grievor did in fact have an alcoholic substance in his coffee on the morning of August 28, 2019. His first reaction when confronted by management was to identify the substance as Baileys, *"just a splash, enough to cover the coffee"*. The grievor's failure to immediately clarify that the Bailey's was a non-alcoholic substance when by confronted by Mr. Campbell leads the arbitrator to conclude on the balance of probabilities that the grievor had alcohol in his coffee cup and later fabricated a story at his interview about the non-alcoholic Baileys in an attempt to avoid culpability for breaching the Company policy.

I would add that the drug and alcohol test was ordered by the Company for purposes of determining whether the grievor was under the influence of drugs and alcohol to the point of impairment while on duty. The grievor's zero reading on the alcohol test does not detract from the finding here that the grievor did in fact have Bailey's, an alcoholic substance, in his coffee cup on the morning of August 28, 2019 at the Company's operations site. By doing so, the grievor breached the Company policy, as the Company asserts, by willfully possessing alcohol with the intention of consuming it in his coffee while on duty.

In terms of mitigation, the grievor is not a long-service employee. Of more concern is the fact that he was not truthful about his consumption of alcohol while at work. After considering all the facts and evidence, I find there was just cause for the grievor's dismissal and no basis for adjustment of penalty.

The grievance is dismissed.

June 17, 2021



**JOHN M. MOREAU, Q.C.
ARBITRATOR**