

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

CASE NO. 4820

Heard via Video Conference and in Ottawa, Ontario, April 14, 2022

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal on behalf of Locomotive Engineer Tyler Smits of Saskatoon, SK, appealing his administrative file closure effective June 02, 2020.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

Between a period of April through June 2020, the grievor failed to respond to significant Company attempts to contact him and obtain a proper update on his employment status and ability to work. The grievor consistently failed to directly communicate and thereby respond to direct Company attempts via phone, email, and registered mail.

The Company ultimately provided two Notices to Appear to attend to a Company investigation for his Absent without Authorized Leave status and failing to follow the direction of Company Officers. When the grievor failed to respond to the second Notice to Appear scheduled for June 02, 2020, his employment file was administratively terminated.

The Union's position is that that the file closure was extremely excessive in all the circumstances, and respectfully demands that his file closure be revoked without loss and seniority, and that he be made whole for all lost wages and benefits, and if necessary that the Company participate in meaningful discussion regarding accommodation with the Union and the grievor.

The Company disagrees with the Union's contentions and denied the request, as the grievor failed to follow Company instruction as well as manage his own responsibilities with respect to his employment obligations.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Between April 02 and June 02, 2020 Mr. Smits was off the working board. The Company contends that Mr. Smits failed to respond to Company attempts to contact him and obtain a proper update on his employment status and ability to work. The Company further alleges that the grievor consistently failed to directly communicate and thereby respond to direct Company attempts via phone, email, and registered mail.

The Company attempted to provide a Notice to Appear (NTA) on two occasions to attend a formal investigation for his absence without authorized leave status and failing to follow the direction of Company Officers. When the grievor failed to respond to the second Notice to Appear scheduled for June 02, 2020, his employment file was administratively terminated.

It is the Unions position, that Mr. Smits was in Bona fide sick status during this time frame and did communicate such with a Company officer as well as the OHS function, and was unaware that his turn had been activated on April 04.

On June 2, 2020, the Company issued Mr. Smits a final letter, indicating that they had closed his employment file effective that date, as they had deemed him to have abandoned his employment obligations after not showing up for his formal employee investigation, scheduled for the same date.

The Union submits that over a very short 8-week period between April 2, 2020, and June 2, 2020, Mr. Smits has been subjected to an administrative file closure and effectively discharged from service without the benefit of his fundamental Collective Agreement right to a fair and impartial investigation. Additionally, The Company has failed in their requirement to meet the establishment of responsibility prior to discharge, and the rehabilitative principles which are meant to underline the Brown's discipline system, if discipline was warranted, were not respected; and finally, that the Company's actions are contrary to the rules and principles of procedural fairness and natural justice and are not supported by arbitral jurisprudence or past practice.

The Union submits that the Company's unprecedented actions in closing Mr. Smit's file are contrary to Company's Collective Agreement obligation to exercise its managerial rights in a reasonable fashion. By dismissing Locomotive Engineer Smits from employment, the Company has violated the Collective Agreement including, inter alia, Article 86, the Canada Labour Code, specifically, but not limited to Section 239, the Canadian Human Rights Act, and its own policies and procedures, including, but not limited to: Failure to fulfill its' duty to accommodate the Grievor's disability to the point of undue hardship. The Company's unprecedented acceleration and the extreme haste in which they acted during this process, all while the grievor was suffering from a Bonafide illness and injury, was extremely premature and has denied the grievor and his Union, the opportunity to participate in accommodation discussions.

The Union insists that the penalty assessed against Mr. Smits was extremely excessive in all the circumstances and respectfully demanded that the Company immediately revoke the closure of his employment file and return Mr. Smits to the employment roster without loss of seniority, and that he be made whole for all lost wages and benefits for his time held out. The Company disagrees with the Union's contentions and denied the request, as the grievor failed to follow Company instruction as well as manage his own responsibilities with respect to his employment obligation.

FOR THE UNION:

(SGD.) K.C. James
General Chairperson

FOR THE COMPANY:

(SGD.) D. Houle (for) **D. Klein**
Senior Vice President Human Resources

There appeared on behalf of the Company:

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| S. Roch | – Manager Labour Relations, Montreal |
| M. Boyer | – Senior Manager, Labour Relations, Montreal |
| K. Macdonell | – Manager Labour Relations, Edmonton |
| V. Carreiro | – Jr. Labour Relations Associate, Montreal |
| A. Hernandez | – Jr. Labour Relations Associate, Montreal |

And on behalf of the Union:

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| K. Stubeing | – Counsel, Caley Wray, Toronto |
| K.C. James | – General Chairperson, Edmonton |
| T. Russett | – Senior Vice General Chairperson, Edmonton |
| C. Giesbrecht | – Local Chairperson, Saskatoon |
| T. Smits | – Grievor, Saskatoon |

AWARD OF THE ARBITRATOR

1. The Company issued a Notice of File Closure to the Grievor on June 2, 2020, administratively terminating his employment for being absent without leave, failing to follow directions, and failing to appear at two formal investigation meetings. The Company's position is that the Grievor abandoned his job. The Union vigorously disputes this.

2. The Grievor took a scheduled vacation, from March 11 to 17, 2020. He travelled abroad and, upon his return, was subject to the mandatory 14-day quarantine period required by Health Canada at the time. While in quarantine, the Grievor reported symptoms of COVID-19.

3. According to the Company, the Grievor failed to respond to significant Company attempts to contact him and failed to provide a "proper" update on his status and ability

to work between April 22 and June 2. According to the Company, the Grievor did not return phone calls and was not responsive to certain requests for information, most notably from his supervisor.

4. Importantly, however, there is clear evidence of ongoing communication from the Grievor to the Company during this period. For example:

- On April 14th, the Grievor emailed the Company's COVID team to advised that he had developed COVID symptoms and was required to stay home.
- On April 20th, the Grievor emailed the COVID team and advised that he was required to isolate for a further 14 days.
- On April 24, he provided a medical note to his supervisor, William Manning.
- On April 25, he emailed the COVID team, provided medical documentation, and advised that he had been advised to continue to quarantine.
- On May 1, he emailed Mr. Manning, included a medical note, and advised that he could not return to work.
- On May 12, he emailed the COVID team to advise that he was awaiting the results of a COVID test.
- On May 15, he emailed the COVID team to advise that he had tested positive for COVID.
- On May 18, he emailed Occupational Health to advise that he was required to quarantine for a further 14 days. He provided medical documentation.
- On June 2, there was communication between the Grievor and Occupational Health, as reflected in notes taken by Occupational Health. The Grievor advised Occupational Health that he received medical care on June 1 and would need to remain off work until June 6.
- On June 6, the emailed Occupational Health and provided a medical note indicating that he was to be off work from June 1 to June 6th.

5. Importantly, the Company is not alleging an absence of communication from the Grievor but seems instead to have terminated the Grievor's employment because it deemed his communications insufficient. The Company submits that the Grievor communicated what he wanted, when he wanted, and on his own terms.

6. If the Company was dissatisfied with the Grievor's information or believed he was ignoring directions, it had a number of available options, possibly including discipline. However, faced with ongoing and regular contact from the Grievor, it was entirely unreasonable for the Company to conclude that he had abandoned his job.

7. The Company scheduled two investigation meetings, on May 21 and June 2, 2020. In its Notice of File Closure, the Company relies on the fact that the Grievor did not attend these meetings and failed to contact his Supervisor, Bill Manning, to provide a reason to reschedule.

8. There is a dispute between the parties as to whether the Grievor received notice of the investigation meetings. Even if I assume (without finding) that the Grievor was notified, the fact that he did not contact his supervisor to reschedule does not constitute abandonment in the circumstances.

9. The Grievor had, in fact, provided medical notes to Occupational Health establishing that he was unable to attend work on either May 21 or June 2, 2020. The Company could not reasonably take action against the Grievor because he failed to attend meetings that were scheduled while he was on a medical leave.

10. The evidence shows that Mr. Manning knew the Grievor was absent from work for medical reasons. On June 2, Mr. Manning wrote to Occupational Health and indicated that the Grievor's employment would be terminated that day, because of his failure to

attend two formal investigation meetings. Mr. Manning asked Occupational Health if the Grievor had any limitations that prevented him from contacting Mr. Manning to reschedule the meetings.

11. Occupational Health responded as follows:

OHS received a note today advising that Mr. Smits received medical care on June 1 and was to remain off work until June 6, 2020. [...] Mr. Smits has been off work since April 14, 2020 and was restricted today by OHS due to lack of medical. OHS must ensure that Mr. Smits who is a safety critical employee is fit for duty prior to any return to work.

12. It may have been open to the Company to seek additional information from the Grievor about his medical leave or his ability to attend meetings on May 21 and June 2. However, it was entirely unreasonable for it to conclude he had abandoned his job and terminate his employment in these circumstances.

13. The Grievor is reinstated forthwith with full compensation and without loss of seniority. The Company's decision to administratively terminate his employment was entirely unreasonable and inappropriate.

April 25, 2022



MICHELLE FLAHERTY

ARBITRATOR