AH734

IN THE MATTER OF AN ARBITRATION UNDER THE *CANADA LABOUR CODE, RSC 1985, C L-2.*

BETWEEN:

TEAMSTERS CANADA RAIL CONFERENCE (TCRC)

-and-

CANADIAN NATIONAL RAILWAY COMPANY (CN)

Discharge Grievance of Locomotive Engineer Trenton Moore

Arbitrator: Graham J. Clarke
Date: February 2, 2022

Appearances:

TCRC:
D. Ellickson: Legal Counsel
P. Boucher: General Chairman
C. Wright: Senior Vice-General Chairman
M. Kernaghan: Vice-General Chairman
P. Stewart: Local Chair, Hornepayne
T. Moore: Grievor

CN:
V. Paquet: Manager, Labour Relations Toronto
F. Daignault: Senior Manager, Labour Relations Montreal
M. Boyer: Senior Manager, Labour Relations Montreal
A. Borges: Manager, Labour Relations
S. Roch: Manager, Labour Relations
V. Carreiro: Labour Relations, Montreal

Arbitration held via videoconference on January 26, 2022.

Award

INTRODUCTION

1. On January 26, 2022, the parties pleaded two unrelated termination grievances in a matter of a few hours. For both cases, they successfully drafted a Joint Statement of Issue (JSI) summarizing their detailed positions. They also exchanged their Briefs in advance of the hearing. This Award deals with the first of those cases involving the termination of Mr. Moore.

2. On August 27, 2020, CN terminated Locomotive Engineer (LE) Moore for operating a train while having a significant level of cocaine in his system. CN argued this conduct constituted just cause for dismissal since it violated Rule "G" as well as its Drugs and Alcohol Policy.

3. At the hearing, the TCRC did not pursue two arguments it had included in the JSI and its Brief. The first argument alleged that the parties had previously settled the matter. The second argument suggested that CN had failed to accommodate an alleged disability. Accordingly, the arbitrator has not considered the parties' arguments in their Briefs about these issues.

4. The TCRC advised the sole issue concerned whether the arbitrator should modify the penalty of termination. In that regard, it noted Mr. Moore's admission that he had taken cocaine, his apology and remorse, coupled with15 years of service.

5. For the following reasons, and given the extensive case law in this area, the arbitrator found no compelling circumstances to modify the penalty CN imposed.

FACTS

6. As noted in the JSI[1], the parties do not dispute the facts.

7. CN hired Mr. Moore on August 8, 2005. At the time of his termination, he had roughly 15 years of service and 55 demerits on his active discipline record[2]. CN imposed 30 of those 55 demerit points for a failure to secure his power, i.e. locomotive. That

[1] TCRC Brief, Tab 1.
[2] TCRC Brief, Tab 2.

separate August 1, 2020 incident, which is not before the arbitrator, led to the drug testing at issue in the instant case.

8. Mr. Moore's urine sample tested non-negative for cocaine in a point of collection test (POCT). His oral fluid sample tested positive for cocaine at 55 ng/ml, an amount more than 5 times above the cut off level of 10 ng/ml.

9. After conducting its formal investigation, CN terminated Mr. Moore for the following reasons[3]:

> Failure of CROR Rule G, CN Drug's and Alcohol policy on August 1st, 2020 while operating train Q10641 30. (sic)

10. Rule "G" of the Canadian Rail Operating Rules (CROR) sets out employee obligations regarding intoxicants or narcotics:

> G
>
> (i) The use of intoxicants or narcotics by employees subject to duty, or their possession or use while on duty, is prohibited.
>
> (ii) The use of mood altering agents by employees subject to duty, or their possession or use while on duty, is prohibited except as prescribed by a doctor.
>
> (iii) The use of drugs, medication or mood altering agents, including those prescribed by a doctor, which, in any way, will adversely affect their ability to work safely, by employees subject to duty, or on duty, is prohibited.
>
> (iv) Employees must know and understand the possible effects of drugs, medication or mood altering agents, including those prescribed by a doctor, which, in any way, will adversely affect their ability to work safely.

ANALYSIS

11. The arbitrator must first characterize this case properly.

12. Mr. Moore's situation differs from those where an employee's urine tested non-negative, but the oral swab test came back negative. In those types of cases, arbitrators

[3] Form 780: TCRC Brief, Tab 4.

have generally concluded that the evidence failed to establish an employee's impairment at work[4].

13. Neither is this a case where an employee suffered from a disability, an allegation which mandates a duty to accommodate analysis[5].

14. Instead, this case falls within the category of cases where testing demonstrated that an employee worked while impaired. Railway arbitrators have often had to consider cases where employees worked in safety sensitive positions when under the influence of alcohol or narcotics.

15. In AH689, the arbitrator quoted Arbitrator Picher who in these situations considered termination the "prima facie disciplinary response" and further emphasized the importance of deterrence[6]:

> 52. In CROA&DR 1954, Arbitrator Picher noted that the presumptive penalty is dismissal for engaging in the behaviour that is at issue in this case:
>
> > The jurisprudence of this Office is replete with decisions confirming that **running trades employees who consume alcoholic beverages while subject to duty, or while on duty, make themselves liable to dismissal. Unless compelling grounds for mitigation can be demonstrated, that is the prima facie disciplinary response justified in the circumstances**.
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> 53. In CROA&DR 2695, Arbitrator Picher also noted the importance of deterrence:
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> > **The use of a narcotic in the workplace by an employee in a safety-sensitive position is an extremely serious offence. In considering the appropriate measure of discipline regard must be had not only to the gravity of the infraction, but to the need for the employer to deter similar conduct by other employees.** As noted, this is not a case where Mr. Middleton can plead a medical condition or disability in mitigation of his actions. In all of the circumstances the Arbitrator is satisfied that the grievance must, therefore, be dismissed.
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> (Emphasis added)

[4] See, as just one example, Bombardier Transportation Canada Inc. v Teamsters Canada Rail Conference, 2020 CanLII 53040.
[5] See CROA 4667.
[6] See also SHP100; CROA 3279 and CROA 3928.

16. Recent awards have applied Arbitrator Picher's approach. In SHP726, Arbitrator Schmidt upheld the termination of an employee who had consumed both alcohol and cocaine before starting his shift:

> The overwhelming evidence in this case is that the grievor consumed both cocaine and marijuana immediately before he commenced his shift on March 21, 2015 or shortly thereafter. I find that he was impaired during his shift and there is simply no other rational conclusion to be drawn having regard to the evidence before me.
>
> **An individual in the grievor's position who causes himself to become impaired on the job merits the most severe discipline, absent very compelling mitigating factors**. Not only was the grievor impaired, I must conclude that he has been dishonest about when he had last used marijuana and about his denial of cocaine use. **The Company's decision to discharge the grievor in these circumstances was entirely appropriate and should not be disturbed**.
>
> (Emphasis added)

17. In AH633, the arbitrator upheld an LE's termination due to his testing positive for cocaine when at work. Arbitrator Moreau came to a similar conclusion for impairment in CROA 4733[7]:

> For all the above reasons, I regrettably must dismiss the grievance. **There is simply too much risk to the Company and the public when an employee in a safety- sensitive position like the grievor reports to work in an impaired condition, in violation of the Company's drug and alcohol policy and CRO Rule G, and then goes on to carry out his assigned duties. The grievor's long service, coupled with his forthright answers throughout this matter, is unfortunately insufficient for the arbitrator to consider reinstatement**. The grievance is dismissed.
>
> (Emphasis added)

18. In all these cases, arbitrators consider whether compelling circumstances outweigh the prima facie disciplinary response of dismissal and the importance of deterrence[8]:

> 54. The IBEW did not persuade the arbitrator to intervene in the instant situation where a short service employee, working in a safety sensitive position,

[7] Arbitrator Hornung followed that reasoning in CROA 4742.
[8] AH689, supra.

> consumed alcohol and then drove two of CN's vehicles. The standard disciplinary response for such conduct is termination, absent compelling grounds for mitigation.

19. Despite its best efforts, the TCRC did not persuade the arbitrator that compelling grounds existed to change Mr. Moore's termination into a lesser penalty.

20. While Mr. Moore no doubt regrets the August 1, 2020 event, the arbitrator concludes that his actions have irreparably broken the essential bond of trust that CN must have in its generally unsupervised LEs. Mr. Moore put himself, his colleagues, CN and the general public at risk by operating his train while impaired by cocaine.

21. The suggested mitigating factors of regret, an apology and 15 years service remain insufficient to counter the seriousness of operating a train in this condition. Similarly, Mr. Moore had 55 demerit points, including the August 1, 2020 "failure to properly secure your power" incident, which provides no support for mitigating the penalty.

DISPOSITION

22. Mr. Moore operated his train when an oral drug test later showed he had over 5 times the cut off level for cocaine. There are no compelling circumstances which would justify the substitution of a lesser sanction in place of the prima facie penalty of termination.

23. The arbitrator dismisses the grievance.

SIGNED at Ottawa this 2nd day of February 2022.

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Graham J. Clarke
Arbitrator