

IN THE MATTER OF AN AD HOC RAILWAY ARBITRATION

BETWEEN

BOMBARDIER TRANSPORT CANADA INC.

(The “Company”)

AND

TEAMSTERS CANADA RAIL CONFERENCE

(The “Union”)

Grievance Contesting the Termination of Mr. Turner

Arbitrator: Johanne Cavé

Appearances on behalf of the Company:

D. McDonald	– Counsel, Norton Rose Fulbright
A. Ignas	– HRBP Labour Relations and Compliance Canada
C. Henripin	– Human Resources Advisor

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray
W. Apsey	– General Chairman
D. Psychogios	– Vice General Chairman

Heard in person in Montreal on September 27, 2021.

AWARD

1. The Grievor was employed by the Company as a conductor, a safety-critical position. He was dismissed on September 17, 2020, for failing to successfully complete a recertification exam on the Canadian Rail Operating Rules (“CROR”), after two attempts.
2. The Grievor is bilingual. He has worked in French throughout his employment with the Company but his preferred language is English.
3. When he was hired in 2017, the Grievor attended a five-week training program arranged and funded by the Company. The program was delivered in French, by a bilingual instructor who translated the instruction in English. The program included training on rules of operation specific to Canadian National Railway Company (CN) and Canadian Pacific Railway (CP), as the Company operates on both CN and CP lines. The Grievor successfully obtained the mandatory CROR certification, which was valid until October 2, 2020.
4. Recertification on the CROR is required every three years under the *Railway Employee Qualification Standards Regulations*¹ (the “Regulations”). The recertification requires employees to pass three exams. The Grievor passed two of them. At issue here is the open book rules exam (“Rules Exam”), which he failed twice. The Rules Exam requires a passing grade of 90%.
5. Beginning on July 28, 2020, the Grievor attended a three-day recertification training. The training material was provided in French. The first two days were conducted by Instructor Farrell. On the third day, Instructor Beaupré reviewed the content delivered the first two days and supervised the Rules Exam. Both instructors were fully bilingual and answered questions in each student’s official language of preference. The exams were available and provided to the Grievor in English.
6. On the day of the Grievor’s first attempt at the Rules Exam, on July 30, 2020, Instructor Beaupré reviewed the relevant rules with the Grievor in French and English in preparation for the exam. The Grievor asked questions, which the instructor answered in English. The Grievor obtained a mark of 83% on the exam. Immediately after the exam, Instructor Beaupré reviewed the Grievor’s errors with him.

¹ SOR/87-150, Subsection 10(1)

7. At no point during the instruction, the taking of the exam, or his review with the instructor after the exam did the Grievor raise any concerns about his language ability to understand the material or the exam questions.

8. Following a discussion among the Company management, the Grievor was given an opportunity to repeat the three-day certification training and to rewrite the Rules Exam the following week.

9. The Grievor attended the training with the same instructors and material, starting on August 4, 2020. Instructor Farrell took special care to ensure that the Grievor understood the rules in both languages. Again, Instructor Beaupré answered the Grievor's questions in English during the review session before the Rules Exam, on August 6, 2020.

10. The Grievor was given the identical Rules Exam he had taken the previous week, in English. He asked questions during the exam. Instructor Beaupré responded in English by pointing him to the applicable rule, without providing the answer. Unfortunately, the Grievor failed again, with a mark of 84%. When reviewing his errors with Instructor Beaupré, the Grievor indicated that perhaps he had misread the questions.

11. According to Instructor Beaupré, based on his discussions with the Grievor, there were "grey zones" for the Grievor, i.e., areas he did not comprehend well, preventing him from "achieving an appropriate level of knowledge to complete his duties" (this is captured in Instructor Beaupré's email dated August 14, 2020, to the Company).

12. The Company held an investigation meeting with the Grievor to determine why he had been unsuccessful. The Grievor suggested, for the first time, that he had difficulty switching from French to English when reading the training material provided in French.

13. After reviewing the instructors' respective email summaries of the content delivered and their interactions with the Grievor and considering the Grievor's statement, the Company determined that he did not demonstrate adequate knowledge to safely perform his duties as a conductor. The Company also concluded that the Grievor had not provided a reasonable or justifiable explanation for his failure to successfully complete the Rules Exam after two attempts. Therefore, the Company dismissed the Grievor.

Language Barrier and Discrimination

14. The Union contends that although the Grievor can perform his duties in French, he had difficulty reading the training material in French. It draws a direct correlation between

this alleged lack of proficiency in French and the Grievor's failure on his two attempts at writing the Rules Exam.

15. I am not persuaded by that argument.

16. First, it is significant that the Grievor raised this issue for the first time in the investigation interview. If the Grievor felt he could not succeed because of the language of the training materials, he would be expected to identify this concern at a reasonable point in the training program. In this case, he raised the issue only after he failed the Rules Exam a second time.

17. Second, and most importantly, the Grievor had sufficient ability to understand the French training material and pass two of the three recertification exams. And although he did not achieve a passing mark in the Rules Exam, his results were 83% and 84% in each attempt. Considered together, the Grievor's exam results are not indicative of a lack of proficiency in French or inability to understand the training material. I note that he had the English version of the CROR, received instructions and support in English from the bilingual instructors and was provided with the exam in English.

18. Therefore, I do not accept the Grievor's alleged lack of French language proficiency as a reasonable justification for the failed exams.

19. Also, I reject the Union's contention that the Grievor should have been accommodated with training material in English, under Articles 6.01 and 6.02 of the Collective Agreement. These provisions pertain to the Company's duty to accommodate under human rights legislation, but the Union did not raise any prohibited ground of discrimination which the Grievor would have been subject to.

Passing Mark and Arbitrary Standard

20. The Union submits that the passing mark under the Regulations is 80%² and that the Company acted arbitrarily by setting a passing mark that is higher, at 90%.

21. While the Regulations provide for a set standard, they do not prevent the Company from establishing additional or more stringent qualification requirements if it deems it appropriate. In this case, the 90% passing mark is not set by the Company but rather, is the requirement set by CN for conductors operating on its lines (this is set out in Instructor Farrell's email dated August 13, 2020).

² *Supra* note 1, subsections 10(2) and 14(2).

22. The Union does not allege that the standard is applied inconsistently among employees, nor does it raise other arguments which could support a finding of arbitrary conduct by the Company.

23. For these reasons, I find that the 90% passing mark is not unreasonable.

Collective Agreement Provisions and Management Rights

24. The Union also argues that the Collective Agreement does not provide for the Company's right to dismiss a conductor for failing an exam rewrite. The Union points to Article 69.03 (14) of the Collective Agreement, which expressly states that new conductors who do not pass one exam rewrite will be removed from the training program. The Union contends that the absence of a similar provision for previously qualified conductors who are required to recertify precludes the Company from dismissing them upon failing a rewrite. I disagree.

25. In the absence of a provision setting out the consequence for a conductor failing to recertify, the Company may exercise its management rights.

26. In this safety-critical environment which is subject to certification and recertification requirements under the Regulations, it would be unreasonable to prevent the Company from taking steps where an employee fails to demonstrate a continued level of knowledge. In this case, there was no arbitrary or unreasonable exercise by the Company of its management rights when dismissing the Grievor. To the contrary, as described above, the Company made significant efforts to assist the Grievor in successfully completing the Rules Exam, including providing the training to him a second time, reviewing his errors with him, and administering the identical exam in English approximately one week after his first unsuccessful attempt.

27. The Union argues that the Company would suffer no prejudice by maintaining the Grievor's employment, i.e., keeping him withdrawn from service until he requalifies. Again, I disagree. In the absence of a valid explanation provided by the Grievor for his failure to pass the Rules Exam or at least to significantly improve his result on the rewrite, despite the considerable support provided by the Company, there was no reasonable basis to expect that the Grievor would be successful on subsequent attempts. In my view, the Company is not required to indefinitely bear the cost of training employees and administering the exam.

Excessive Discipline

28. The Union argues excessive discipline, in violation of the parties' Blended Discipline Agreement.

29. I reject this argument. The Grievor's failure to pass his recertification is a performance issue relating to competency and non-culpable deficiencies. The simple fact that he had an opportunity to provide an explanation through an investigation statement does not render this a disciplinary matter.

30. The criteria to be applied in cases of dismissal for non-culpable deficiencies are set out in the oft-cited decision ***Edith Cavell Private Hospital and Hospital Employees Union, Local 180*** (1982), 6 L.A.C. (3d) 229. The test requires the employer to demonstrate that it defined the level of job performance required, communicated that standard to the employee, gave reasonable supervision and instruction to afford the employee an opportunity to meet the standard, provided reasonable warning that a failure to meet the standard could result in dismissal and, upon establishing the employee's inability to meet the standard, made reasonable efforts to find alternative employment within the competence of the employee.

31. In this case, there is no dispute that the Grievor knew that he was required to achieve a grade of 90% to pass the Rules Exam and maintain his qualification as a conductor. As detailed above, he was given more than reasonable instruction and support to prepare for that exam and was unable to meet the standard after two attempts.

32. The Union argues that the Grievor was not warned that a failure to pass the rewrite could result in dismissal. It submits this should be fatal to the Company's case. While there is no evidence that the Company specifically informed the Grievor that his failure to pass the rewrite would result in his dismissal, it is well known that a failure to maintain certification prevents a conductor from performing his duties. Although he was not specifically told this, the Grievor would reasonably have known that a failure to pass the Rules Exam and the rewrite could result in his dismissal.

33. The Union takes issue with the fact that the Company dismissed the Grievor prior to the expiry of his initial certification. From the moment the Company became aware of the Grievor's knowledge gap, through his failure at his first attempt at the Rules Exam, the Company was justified in removing him from service, pending successful achievement of the appropriate exam standard. In this case, after the Grievor failed the rewrite, the Company had reasonable ground to conclude that he did not have the required knowledge to successfully recertify and perform the conductor duties safely.

34. The Union cited case law, discussed below, where employers were required to give an employee another opportunity to meet certification standards.

35. In **CROA 2379**, the grievor's certification had lapsed and the employer was required to maintain his employment while he took steps to recertify. Those circumstances are different from the instant matter. Here, the Grievor had completed the recertification process and failed the Rules Exam twice, demonstrating a lack of understanding of the CROR.

36. In **CROA 4349**, the grievor was returning to work following a five-year medical leave, which is not the Grievor's case.

37. In *IBEW S.C. No. 11 v. CN (Dismissal of S. Smilar), Ad Hoc 555*, the grievor had 10 years of service, which is considerably more than the Grievor's three years of service. Also, the arbitrator took into account the fact that the grievor's assignments had provided him with a limited opportunity for practical work, which may have contributed to his shortcomings. Again, that is not the Grievor's case. While the Grievor suggests that he worked exclusively on CP lines since his hiring, there is no evidence that his failure to pass the Rules Exam was caused by a lack of practical experience, nor that the experience acquired on CP lines was so different that he could not assimilate the differences applicable on CN lines.

38. As for making reasonable efforts to find alternative employment within the Grievor's competence, I accept the Company's statement that there were no job openings for which the Grievor was qualified at the time of his dismissal. The Union did not counter this assertion.

39. In the circumstances, I see no reason to interfere with the Company's decision to dismiss the Grievor after two failed attempts at recertification. The requirements relating to certification and recertification must be taken with the utmost seriousness, considering the safety-critical nature of the Company's operation and the Grievor's position.

Dated at Gatineau this 17th day of January 2022.



JOHANNE CAVÉ
ARBITRATOR