

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

CASE NO. 4733

Heard in Montreal, May 12, 2020

Concerning

ONTARIO NORTHLAND TRANSPORTATION COMMISSION

And

UNITED STEELWORKERS – LOCAL 1976

DISPUTE:

The dismissal of J. Glinski from Ontario Northland.

JOINT STATEMENT OF ISSUE:

On August 30, 2019, Mr. Jeff Glinski was dismissed from Ontario Northland. The reasons for termination were as follows:

- a. On August 20, 2019, Mr. Glinski violated CROR Rule 311(b) by entering a Foreman's TOP without authority. This violation was assessed at 45 demerit points. At the time of that incident, Mr. Glinski had 15 demerit points on his record. Ontario Northland's Discipline Policy provides that a net total of 60 demerit points will result in immediate dismissal.
- b. In accordance with Ontario Northland's Drug and Alcohol Policy, Mr. Glinski was required to undergo oral fluid testing due to the above-noted rule violation. The oral fluid testing demonstrated a "non-negative" test result for THC. Following an investigation, it was determined that Mr. Glinski violated Ontario Northland's Drug and Alcohol Policy and that he attended at work unfit for duty.

The Union grieved the discipline as excessive and unjust. The Union argued that, given the grievor's 31 years of service, the Company ought to have accommodated him. The Union also took the position that, although the grievor's test results exceeded the limits established by the ONTC Drug and Alcohol Policy, Mr. Glinski was not impaired at work. The Union also took the position that, given the legalization of marijuana, Ontario Northland cannot dictate what its employees do when they are off duty. Finally, the

Union claimed that the discipline too severe.

The Union requested the grievor be brought back to work without delay and his record be made whole plus that he be reimbursed loss wages (including overtime) with seniority and all benefits.

Ontario Northland disagrees with the Union's position and denies the grievance.

FOR THE UNION:
(SGD.) N. Lapointe
 Staff Representative

FOR THE COMPANY:
(SGD.) D. Baker
 Director, Human Resources

There appeared on behalf of the Company:

G. Ryans	– Counsel, Filion Wakely, Toronto
D. Baker	– Director Human Resource, North Bay
J. Corley	– Director, Transportation, Engleheart
T. Heppenstall	– Manager, Human Resources, North Bay

And on behalf of the Union:

N. Lapointe	– Staff Representative, Montreal
B. Gowell	– Local Representative, Engleheart
J. Glinski	– Grievor, North Bay

AWARD OF THE ARBITRATOR

On August 20, 2019, the grievor was operating Train No. 313 with conductor Thomas Skinner. He recalled that he intended to call his foreman Norm Tverdal for TOP authorization but was distracted by the carman to perform a break test before leaving Cochrane. The grievor left Cochrane and entered the foreman's TOP without obtaining authority to do so. The grievor subsequently failed an oral fluid (swab) test in violation of the Company's *Drug and Alcohol Policy* and Rule G of the CRO rules. He admitted that he had smoked two marijuana joints the night before the incident.

The Company argues that the grievor's TOP actions amount to a cardinal rule violation which could have had serious consequences as CRO Rule 31(b) is one of the few protections provided to foremen in these types of circumstances. The Company cited several other disciplinary cases which indicate that the 45 demerits imposed for

this incident was within the range for similar violations. Those 45 demerits, combined with the grievor's 15 demerits on his record, led to his dismissal for accumulating 60 demerits. The Company also noted that the other bargaining unit member involved with this incident was given 40 demerit points as well as a 10-day suspension. That individual did not have a positive drug test.

The Union pointed out that the grievor was honest throughout the investigation of the incident. He openly admitted to being a frequent user of cannabis, now a legalized substance, while away from work. In fact, he has recognized since his termination that he has a substance dependency issue and has attended professional support group sessions with AA on numerous occasions since his termination. The Union also noted that the grievor, now 53, has been with the Company for more than thirty-one years. The grievor is committed to the Company, according to the Union, having worked his way up over the years from an extra gang position to the running trades. The Union also argues that the Company had a human rights obligation to inquire into the grievor's substance dependency given his positive oral fluid test result. The grievor, under the circumstances, and particularly given his long service, should be allowed to resume and complete his career in the service of the Company.

The arbitrator notes that the grievor committed a serious rule violation which could have resulted in damage to Company property or physical injuries. On the other hand, given the grievor's long-service to the Company; his forthrightness about the circumstances surrounding the incident; and, finally, the fact that the incident brought

him right on the 60-point line for termination, the arbitrator would have been disposed to consider a reinstatement order without compensation.

Unfortunately for the grievor, he tested positive after taking an oral fluid (swab) test. The oral fluid (swab) test, unlike the results of urine testing standing alone, has been accepted by this office as a reliable determinant of impairment. As Arbitrator Picher noted in *CNR v. USWA, Local 2004*, 2008 CarswellNat 6269:

There is existing technology which would allow the employer to test for actual impairment, should it wish to do so. *Taking that approach would appear to avoid any controversy about impairment.* (See, *Imperial Oil Ltd. v. C.E.P., Local 900* [2008 CarswellOnt 669 (Ont. Div. Ct.)], (2008 CanLII 6874).

The Union is correct that an Employer has a duty to fulfill its human rights obligations in the event an employee has a demonstrated disability. The Company's *Alcohol and Drug Procedures Policy* however requires that an employee must disclose a substance abuse disorder in order to avoid disciplinary consequences:

An Employee who discloses a substance abuse disorder will not be disciplined or terminated from employment as a result of the disclosure. However, it is necessary that the Employee make that disclosure promptly and before engaging in Policy violation. If an Employee refrains from disclosing a substance use disorder and subsequently engages in a Policy violation (e.g. by attending at work unfit due to drug or alcohol use), the Employee cannot avoid disciplinary consequences of the Policy violation by disclosing substance use disorder after the fact. (p.6-ZD-5)

There are certainly cases, nevertheless, where an employee's non-disclosure of their disorder is simply symptomatic of being in denial about a substance dependency problem. But the case law is clear that strong evidence, typically in the form of medical

documentation of the disability, is required to support such a finding. The evidence falls short of that requirement in this case. As Arbitrator Weatherill wrote recently in **CROA&DR 4704** at p.4:

The material before me does not, however, support a finding that the grievor has a specific disability or disabilities for which workplace accommodation is to be sought.

Accordingly, the arbitrator finds that there is no evidence of *prima facie* discrimination (see: *Steward v Elk Valley Coal Corp.*, 2017 SCC 30) and the duty to accommodate does not arise in this case.

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.

May 26, 2020



JOHN M. MOREAU
ARBITRATOR