

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

CASE NO. 4787

Heard in Gatineau and via Zoom Video Conferencing, July 14, 2021

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the discharge of Locomotive Engineer M. Kimacovich of Winnipeg, Manitoba, who was discharged for – “Violations of the CN Drug and Alcohol Policy as well as CROR General Rule G” while working as Locomotive Engineer on train S77181-30 on February 1, 2020.

JOINT STATEMENT OF ISSUE:

On February 1, 2020, the Grievor was the Locomotive Engineer assigned to train S77181-30. During the tour of duty, while in the process of yarding the train, the crew inadvertently ran through a split point derail in violation of CROR 104.5, the first operating rule violation noted on the Grievor employee history. The Grievor received a 15-day suspension which is under grievance.

As a result of the incident the Grievor was required to undergo post incident Drug and Alcohol testing which returned a positive result for marijuana. Subsequent to an investigation held on February 25, 2020, the Company discharged the Grievor for a violation of the Company Policy to Prevent Workplace Alcohol and Drug Problems as well as CROR General Rule G.

The Union contends that the Grievor suffers from a disability and as such is entitled to accommodation. Since the incident the Grievor has successfully undergone extensive and continuous rehabilitation efforts.

The Union also contends that the Company has not established that the Grievor was impaired and as such has violated the Grievor’s right to a fair and impartial investigation. It is the

Union's further position that the ultimate penalty of discharge is unfair, unjust and unwarranted, and that it is excessive under all the circumstances.

The Union requests that the Grievor be reinstated into his employment without loss of seniority and that he be made whole for all lost wages and benefits.

The Company disagrees with the Union's contentions.

FOR THE UNION:

(SGD.) M. King (for) **K.C. James**
General Chairman

FOR THE COMPANY:

(SGD.) L. Paulicelli (for) **D. Klein**
Senior VP Human Resources

There appeared on behalf of the Company:

F. Daignault	– Senior Manager, Labour Relations, Montreal
L. Paulicelli	– Manager, Labour Relations, Winnipeg
K. MacDonell	– Labour Relations Manager, Edmonton
M. Boyer	– Manager, Labour Relations, Montreal
M. Jackson	– Labour Relations Associate, Edmonton

And on behalf of the Union:

M. Church	– Counsel, Caley Wray, Toronto
K.C. James	– General Chairperson, Edmonton
M. King	– Senior Vice General Chairperson, Edmonton
R. Koffski	– Vice General Chairperson, Kamloops
M. Kimacovich	– Grievor, Winnipeg

AWARD OF THE ARBITRATOR

1. On February 1, 2020, the Grievor was working as a Locomotive Engineer. While in the process of yarding the train at the end of his tour of duty, the crew ran through a split point derail. As a result, the Grievor was subject to post incident drug and alcohol testing. He tested negative for alcohol but his oral fluids test returned positive for marijuana consumption, at a quantitative level of 14 ng/ml. The Grievor was discharged for violating the Company's *Policy to Prevent Workplace Alcohol and Drug Problems* (the *Drug and Alcohol Policy*), as well as General Rule G of the *Canadian Rail Operating Rules* (CROR).

2. The Union submits that the Company did not establish that the Grievor was impaired. It also submits that the Grievor had a disability, i.e. a drug addiction, which the Company must accommodate, as per the *Canadian Human Rights Act (CHRA)*. The Union contends that the Grievor has undergone extensive rehabilitation efforts since his discharge and should be reinstated.

3. Therefore, the questions to be determined are:

- Whether the Grievor was impaired while on duty on February 1, 2020;
- Whether the Grievor suffered from a drug addiction on February 1, 2020;
- Whether the discharge was an excessive or inappropriate measure.

Was the Grievor impaired while on duty on February 1, 2020?

4. During the investigation, the Grievor was asked if he had ingested or smoked marijuana prior to accepting the call for work on February 1, 2020. He denied using immediately prior to the call but stated he had smoked marijuana approximately 16 hours before the call for duty, which he added was 27.5 hours prior to being tested. He indicated that he “had felt 100% that [he] had shown up sober and fit for duty”.

5. In SHP 726 (upheld in judicial review), after considering expert medical evidence, Arbitrator Schmidt wrote the following:

The Union does not contest the science of the testing undertaken by the Company or Dr. Snider-Adler’s opinion. The laboratory results of the urine and oral fluid samples are consistent with prior marijuana use. The level of the marijuana parent at 40 ng/ml (four times higher than the accepted cut-off level) is consistent with marijuana use within the four hours immediately prior to the administration of the oral swab. A concentration of marijuana higher than 10 ng/ml not only demonstrates

very recent use, it is in turn a scientifically reliable and valid indicator of impairment.

(My emphasis)

6. In **CROA&DR 4775**, Arbitrator Moreau recently cited several CROA cases and commented that this Office has accepted oral fluid testing as a reliable determinant of impairment. He relied on the cut-off level of 10 ng/ml used by DriverCheck, the drug-testing firm used by the Company, as indicative of consumption within 12 hours of the oral swab sample being taken.

7. Based on CROA jurisprudence, rooted in scientific evidence, I have no difficulty finding, on a balance of probabilities, that the Grievor was impaired while on duty on February 1, 2020, despite his statement that he felt sober and fit for duty. Specifically, the concentration of 14 ng/ml revealed by the Grievor's drug test is well above the 10 ng/ml threshold which has been repeatedly recognized as indicative of impairment.

Did the Grievor suffer from a drug addiction on February 1, 2020?

8. The Union acknowledges that it has the onus to establish a *prima facie* case of discrimination and refers to the test confirmed by the Supreme Court of Canada in *Stewart v. Elk Valley Coal Corp.*, [2017] 1 S.C.R. 591, at paragraph 24, which requires, as a first step, that the Grievor establish that he has a characteristic that is protected from discrimination under the law. The Union must therefore establish that the Grievor suffered from a disability and, more specifically, from a drug addiction, on February 1, 2020.

9. In its brief, the Union submits that the Grievor's use of marijuana prior to commencing duty on February 1, 2020, was clearly related to a drug dependency. The Union suggests that the Grievor was not in control of his drug use, although he may have believed otherwise. Those arguments are not compatible with the Grievor's statement during the investigation, nor are they supported by medical evidence contemporaneous to the incident.

10. As mentioned above, during the investigation, the Grievor denied using marijuana shortly before commencing duty and stated he felt 100% sober and fit for duty. The Grievor also stated he had started smoking marijuana because it was legal. Though he knew that he could not work while impaired, the Grievor insisted that he was not aware of the Company's zero-tolerance policy for impairment, adding that, had he been aware, he would not have had marijuana in his system. At no time during the Grievor's statement did he provide information suggesting that he was suffering from an addiction. Rather, he presented himself as a recreational user of marijuana. The Union reinforced the Grievor's self-description by asking him if he had been drug tested previously. The Grievor replied that he had been tested three times in the past by the Company and had tested negative each time, thereby buttressing the position that he was not a frequent user.

11. While it is beyond controversy that denial may be a characteristic of drug addiction, and while the failure to disclose a disability during the investigation may not always be fatal, that does not detract from the fact that the employee must provide evidence to establish the existence of a disability at the time of the incident. Disability cannot simply

be raised as a defense against a discharge for on-duty impairment from drug consumption, without proof of the disability.

12. In this case, the Grievor did not report a disability to the Company during the investigation, nor did he make such a report within a reasonable period of time thereafter. During the grievance process - two months after the incident leading to the discharge - the Union asserted that the Grievor suffered from a disability. Yet, at that time, the Union provided no medical support for its position.

13. It was only at arbitration, well over one year after the incident and discharge, that the Union presented the Company with documents in support of the contention that the Grievor suffered from a drug addiction, including the following:

- A note dated September 29, 2020, from a recovery centre, confirming that the Grievor was under care for in-patient treatment from September 2 to October 2, 2020;
- A medical note dated November 6, 2020, indicating that the Grievor was dependent on marijuana and alcohol and was treated for such, through the in-patient program described above;
- Negative drug and alcohol test results from January and June 2021, issued by DriverCheck, further to voluntary testing done by the Grievor, at the Union's initiative;
- A note from the recovery centre dated July 7, 2021, indicating that the Grievor has been sober for 10 months.

14. While I accept that the Grievor successfully undertook a drug and alcohol addiction in-patient treatment program on or around August 30, 2020, I am not persuaded that the evidence demonstrates he was disabled on February 1, 2020, at the time of the incident

which led to his discharge. In all of the circumstances, the seven-month period between the February 1, 2020, incident and the beginning of the Grievor's treatment, and the nine-month period before the first medical document confirming a disability as of August 30, 2020, do not lead me to the conclusion that the Grievor was disabled on February 1, 2020. Therefore, the first step required to establish a *prima facie* case of disability at the relevant point in time is not met.

Was the discharge an excessive or inappropriate penalty?

15. Before answering this question, it is useful to review the legislative and corporate policy framework.

16. The *Canada Labour Code* sets out a joint obligation for employers and employees to ensure health and safety at work:

124 Every employer shall ensure that the health and safety at work of every person employed by the employer is protected.

[...]

126 (1) While at work, every employee shall

[...]

(b) follow prescribed procedures with respect to the health and safety of employees;

(c) take all reasonable and necessary precautions to ensure the health and safety of the employee, the other employees and any person likely to be affected by the employee's acts or omissions;

(d) comply with all instructions from the employer concerning the health and safety of employees;

[...]

17. General Rule G of the CROR sets out the standards relating to intoxicants, narcotics, drugs, medication or mood altering agents:

(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.

18. The Company's *Drug and Alcohol Policy* provides context for the reasons why the Company aims at preventing impaired employees from working in safety-sensitive operations. It reads in part as follows:

CN's Policy to Prevent Workplace Alcohol and Drug Problems is a key element of our longstanding commitment to health and safety. The Policy applies to everyone working at CN, regardless of your position, your status or your work location, and to any substance, legal or illegal, that can cause impairment.

Impairment at work can have catastrophic consequences. It can lead to accidents and risk lives. That's why we have a zero-tolerance approach to impairment at work and why we take disciplinary action in the case of any employee who is impaired on the job due to alcohol or drug use.

[...]

All employees are required to report and remain fit for duty, free of the negative effects of alcohol, cannabis and other drugs. It is strictly prohibited to be on duty or to be in control of a CN vehicle or equipment while under the influence of alcohol or other drugs, including the after-effects of such use. Specifically, the use, possession, presence in the body, distribution or sale of illegal drugs while on duty (including during breaks), on or off company premises, in company vehicles and equipment, or while on company business is prohibited.

19. In this case, the Grievor held a position of Locomotive Engineer, a safety-critical position in which he was entrusted with the safe operation of trains. The legislation cited above sets out the high standard of workplace safety for employers and employees. The CROR and the Company's *Drug and Alcohol Policy* clearly set out the expectations regarding the use and after-effects of drugs and alcohol in the workplace. There is no ambiguity as to the prohibition regarding impairment for employees subject to the CROR. Further, the Company submits that it encourages employees to report any substance use problems and to seek assistance, notably through the Employee and Family Assistance Program (EFAP). In this context, the safety-critical position held by the Grievor is evidently incompatible with impairment while on duty, due to potential catastrophic consequences, notably for employees and for the public. Drug impairment is a serious offence which cannot be tolerated.

20. As discussed above, I find no compelling evidence to demonstrate the existence of a disability at the time of the incident. Also, there are no significant mitigating factors. The Grievor had only seven years of service and had a significant discipline record at the time of the incident. While the Grievor expressed remorse during the investigation for violating the *Drug and Alcohol Policy* and General Rule G, his assertion that he was unaware of the zero-tolerance policy for impairment while on duty was less than compelling having regard to his training record reflecting that he was trained on the *Drug and Alcohol Policy* in 2012. The Grievor's alleged ignorance of the Company's policy on impairment is not credible.

21. Impairment while on duty in a safety-critical position is among the most serious offences and, in the absence of a disability or significant mitigating factors, warrants the most severe penalty. On the totality of the evidence, there is no reason to interfere with the Company's decision to terminate the Grievor's employment.

22. The grievance is dismissed.

September 3, 2021



JOHANNE CAVÉ

ARBITRATOR