

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

CASE NO. 4811

Heard via Video Conference and in Ottawa, Ontario, April 12, 2022

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the dismissal of Conductor R. Thul of Moose Jaw, SK.

JOINT STATEMENT OF ISSUE:

Following an investigation, Mr. Thul was dismissed as follows: “A Formal investigation was held in connection with “your Post Incident Test conducted on March 26, 2020.” the results of which were:

- Negative Breath Alcohol Test
- Positive Oral Fluid Drug Test
- Negative Urine Drug Test

The investigation concluded that:

- You tested positive (oral fluid drug test) after the start of your work shift on March 26, 2020 while on duty as a Conductor.
- You violated CROR General Rules, Section G (Rule G.)
- You violated the Policy and Procedures as outlined in the CP Alcohol and Drug Policy – Policy # HR203 and HR203.1.

You are hereby DISMISSED from Company service.”

UNION POSITION:

The Union submits the Company has failed to recognise Mr. Thul’s medical condition as requiring accommodation, which has resulted in a discriminatory treatment. The Union contends the Company’s actions are contrary to the terms of the Collective Agreement (Article 36),

Company Policy (Workplace Accommodation, Discrimination and Harassment, Fitness to Work Medical Procedures, Return to Work Policy), the *Canada Labour Code* and the *Canadian Human Rights Act*.

The Union contends that Mr. Thul's dismissal is unjustified, unwarranted, and excessive in all of the circumstances, including significant mitigating factors as provided in the grievance correspondence.

The Union requests that Mr. Thul be reinstated without loss of seniority and benefits, and that he be made whole for all lost earnings with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

COMPANY POSITION:

The Company disagrees and denies the Union's request.

The Company maintains the Grievor's culpability was established following the fair and impartial investigation into this matter and the Grievor was appropriately dismissed. The Company duly considered all aggravating and mitigating factors when assessing the quantum of discipline.

The Union has failed to particularize their claims that the Company's actions are contrary to the Collective Agreement, Workplace Accommodation, Discrimination & Harassment, and Fitness to Work Medical Procedures and Return to Work, *Canada Labour Code*, *Canadian Human Rights Act* and recent jurisprudence.

Company policy on the requirements of disclosure and requests for assistance are very clear:

"The Company recognizes that substance use disorders are medical conditions and that early intervention and ongoing monitoring and accountability greatly improves the effectiveness and success of treatment.

Employees who suspect they have a substance use disorder or an emerging issue or problem related to alcohol and/or drugs are required to report, seek assistance and to access and follow appropriate treatment promptly **before an incident occurs** and before safe job performance is affected or violations of the Policy and Procedures occur. Failure to disclose an issue or restrictions and/or limitations related to alcohol and/or drugs may result in disciplinary action up to and including dismissal." (Emphasis Added)

The Grievor failed to follow Company policies and procedures by not indicating he required assistance prior to the incident triggering post incident testing.

The Grievor's alleged lack of intention to violate the rules and policies does not negate the severity of the violation.

Accordingly, the Company cannot see a reason to disturb the discipline assessed and requests the Arbitrator be drawn to the same conclusion.

FOR THE UNION:

(SGD.) D. Fulton
General Chairperson

FOR THE COMPANY:

(SGD.) C. Clark
Manager Labour Relations

There appeared on behalf of the Company:

- C. Clark – Manager Labour Relations, Calgary
- L. McGinley – Assistant Director Labour Relations, Calgary

And on behalf of the Union:

- M. Church – Counsel, Caley Wray, Toronto
- D. Fulton – General Chairperson, Calgary
- D. Edward – Senior Vice General Chairperson, Calgary
- R. Finnon – Vice General Chairperson, Wynyard
- R. Thul – Grievor, Moose Jaw

AWARD OF THE ARBITRATOR

1. The Grievor's employment was terminated after he tested positive in an oral fluid drug test, on March 26, 2020. The test was administered after the Grievor ran through a switch during his shift that day. There is no dispute that the Grievor violated Canadian Rail Operating Rule G and was impaired while on duty or subject to duty.

2. This grievance raises the following issues:

- a. Does the Grievor have a disability?
- b. If so, has the Company accommodated the Grievor to the point of undue hardship?

The Grievor has a Disability

3. The Grievor suffers from interrelated substance dependence disorders, which he disclosed to the Company in 2013. The Grievor underwent an independent medical assessment in 2013, which established a substance dependence disorder and showed that the Grievor was in early remission at that time.

4. The 2013 medical assessment concluded that the Grievor was fit to return to safety critical duties, subject to unannounced alcohol and drug testing for a period of not less than two years.

5. In May, 2013 the Grievor agreed to an EFAP Monitoring Contract. At that time, he also entered into a Relapse Prevention Agreement and Medical Monitoring Requirements for Safety Critical Position Employees with a Substance Dependence Disorder.

6. Between 2013 and 2015, the Grievor underwent a series of at least eleven random, unannounced substance screening tests. He tested negative each time.

7. From 2014 to 2019, the Grievor's treating physician provided annual medical reports, repeatedly confirming that the Grievor remained in recovery for his substance dependence condition and was fit for the safety critical position of conductor. In each of these reports, the physician reported that the Grievor was abstaining from alcohol and prohibited substances.

8. I accept that the Grievor had a medical disability and that this was known to the Company. The fact the Grievor appeared to be managing his substance dependence successfully does not mean that he no longer has a disability, nor does it relieve the Company from an ongoing duty to accommodate, including in respect of possible relapses. Indeed, it is well-established that relapses are a common feature of substance disorder disabilities.

Undue Hardship

9. The documents referenced above suggest that (until approximately March of 2020) the Grievor was managing his disability, abstaining from drug and alcohol use, and complying with the Monitoring and Relapse Prevention agreements. Indeed, all of the information the Grievor shared with the Company indicates that he was drug-free and fit to work in a safety critical position.

10. Importantly, however, the information provided to the Company did not present a full picture. Far from it. The evidence at arbitration showed that the Grievor was not actually abstaining from drug and alcohol use and, beginning in 2017, he was using cocaine often, up to two or three times per week.

11. In this respect, I was provided with a report, prepared by an addiction counsellor at Prairie Sky Recovery Centre on August 27, 2020 ("Report"), approximately four months after the Grievor's discharge. The Report states that the Grievor's longest period of abstinence since the age of sixteen was for a period of six months. This is entirely inconsistent with the medical forms submitted to the Company by the Grievor's physician, which state that the Grievor had consistently abstained from drug and alcohol use since 2013.

12. As the Company indicated, either the Grievor lied to his physician, or he lied to the addiction counsellor. The Grievor had an interest in ensuring his physician reported he

was fit for work. After he was dismissed, there was less incentive for the Grievor to provide false information to the addiction counsellor. In my view, the Report raises very serious concerns about the veracity of the information the Grievor provided to the Company.

13. Significantly, the Report states:

[The Grievor] discontinued use when challenged with drug testing in the work force, (Sporadic use). He states that he began using cocaine recreationally and then stopped for a few years. Then after a break up with his spouse in 2017 he started using cocaine often, up to two or three times per week.

14. As the Company points out, the Grievor worked the equivalent of an average of five days per week in 2017. During a period when the Grievor attested to his abstinence and fitness to work, he was using drugs and may well have been operating trains while impaired.

15. Equally troubling is the fact that the Grievor appears to have evaded detection in the random drug tests conducted from 2013 through 2015. Even assuming his six months of abstinence falls during that time, he appears to have used substances during the remainder of the two-year period, but evaded detection.

16. The Grievor has an obligation to cooperate with the accommodation process. In this case, he failed to do so. Instead, he systematically misled the Company about his drug use and his ability to work. He did so over an approximately seven-year period. On a balance of probabilities, I find that the Grievor's dishonesty extended to providing

incorrect information to his physician – knowing that this would be relied on by the Company.

17. In these circumstances, it would be an undue hardship for the Company to continue to accommodate the Grievor. He cannot be relied upon to cooperate in the accommodation process or to provide accurate information to the Company about his disability, including any ongoing drug use or relapses. For whatever reason, the Grievor's drug use evaded detection by random drug testing in the past. In the circumstances and given the safety-sensitive context in which the Grievor works, random drug testing would be insufficient to ensure detection and safety.

18. Even assuming (without finding) that there is a connection between the Grievor's dishonesty and his disability, I find that the Grievor cannot be accommodated in this case. He provided misleading information and avoided detection for almost seven years. It would be unreasonable, unsafe, and an undue hardship to expect the Company to continue to employ and attempt to accommodate the Grievor in these circumstances.

19. For these reasons, the grievance is dismissed.

April 25, 2022



MICHELLE FLAHERTY

ARBITRATOR