

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

CASE NO. 4813

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

Concerning

CANADIAN PACIFIC RAILWAY

And

**TEAMSTERS CANADA RAIL CONFERENCE –
MAINTENANCE OF WAY EMPLOYEES DIVISION**

DISPUTE:

Claim on behalf of Mr. Robin Jackson.

JOINT STATEMENT OF ISSUE:

Following an on track collision on July 9, 2020, the Grievor was post-incident drug and alcohol tested.

The Grievor attended an investigation statement in relation to his post-incident tests on July 27, 2020.

On August 12, 2020, the Grievor, Mr. Robin Jackson, was dismissed by the Company for:

“Failing to adhere to of CP Policy HR 203 Alcohol and Drug Policy and Procedures (Canada), as determined by positive post incident test results on July 9, 2020.

Summary of rules violated:

BOOK	SECTION	SUBSECTION	DESCRIPTION
Rule Book for Engineering	2.1 Reporting for Duty	A	You must be fit and rested
Rule Book for Engineering	2.2 While on Duty	A	Safety and a willingness to obey the rules are of the first importance in the performance of duty. If in doubt, the safe course must be taken.
Rule Book for Engineering	2.2 While on Duty	C, iii	Be conversant with and comply with this rule book, the CROR, each applicable time table, safety rule, policy, and instructions;

Rule Book for Engineering	2.2 While on Duty	E, iii	Use drugs, medication or mood altering agents, including those prescribed by a doctor, which, in any way, will adversely affect your ability to work safely, while subject to duty, or on duty. You 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 your ability to work safely;
HR 203 – Alcohol and Drug Policy	Section 2	2.1	All employees must report for work in a condition that enables them to safely and effectively perform their duties.
HR 203 – Alcohol and Drug Policy	Section 2	2.2	All employees must report fit to work and remain fit for work and be able to perform their duties free from adverse effects of alcohol and / or drugs. Adverse effects may include acute, chronic, hangover and other after – effects.
HR Policy and Procedure 203.1	Section 3	3.1.5 Canadian Rail Operating Rules – Rule G	<p>Employees who are qualified in the CROR are governed by those rules including Rule G. The requirements of the Policy and Procedures align with and supplement the requirements of Rule G, which include:</p> <ul style="list-style-type: none"> - The use of intoxicants or narcotics by employees subject to duty, or their possession or use while on duty is prohibited. - 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. - The use of drugs, mood altering agents or medications, 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. - 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.

A step 2 grievance was filed on August 26, 2020. The Company responded on September 30, 2020.

The Union contends that; the grievor had been experiencing serious personal issues well before July 9 2020. The grievor sought assistance from EFAP; the Company failed in its duty to accommodate this disabled employee; The Company's decision to dismiss the grievor was unwarranted and excessive in the circumstances.

The Union requests that; The Company be ordered to reinstate the grievor immediately without loss of seniority and with full compensation for all losses incurred as a result of this matter.

Company Position:

The Company denies the Union's contentions and declines the Union's request.

On July 9, 2020, the Grievor was sent for post-incident testing and there is no dispute between the parties concerning the testing itself. Moreover, there is no dispute between the parties that the Grievor tested positive in his urine sample and saliva sample for both cocaine and opioids.

As per the Grievor's positive tests, he was unfit for duty and subsequently in violation of the Rule Book for Engineering 2.2 and HR 203 Alcohol and Drug Policy 2.1, 2.2, and 3, all of which warrant dismissal in of themselves.

The Company maintains that no violation in regards to duty to accommodate has occurred as the Grievor had never sought medical consultation, nor did he ever request for an accommodation relating to substance use with the Company prior to the incident, in order to substantiate any alleged medical disability and/or substance use disorder. Moreover, the Company maintains that there was no indication that the Grievor had a substance issue and in fact the Grievor advised the Company that he had no alcohol concerns or ongoing substance use issues.

As such, the Company maintains that the Grievor was rightfully dismissed given the circumstances and that the dismissal should not be disturbed.

FOR THE UNION:

(SGD.) W. Phillips

President, MWED

FOR THE COMPANY:

(SGD.) F. Billings

Labour Relations Manager

There appeared on behalf of the Company:

F. Billings – Labour Relations Officer, Calgary
D. Zurbuchen – Labour Relations Manager, Calgary

And on behalf of the Union:

D. Brown – Counsel, Ottawa
W. Phillips – President, Ottawa
R. Jackson – Grievor, Thunder Bay

AWARD OF THE ARBITRATOR

1. The Grievor was discharged on August 12, 2020 for a violation of Canadian Rail Operating Rule G. The main issue in dispute is whether the Grievor had a disability at the time of the incident, which entitled him to accommodation.

Facts

2. On July 9, 2020, the Grievor was operating an on-track hi-rail pickup truck when he collided with an excavator. The Grievor took full responsibility for the incident and was issued a 30-day suspension. The Grievor was post-incident tested and his results revealed the presence of cocaine and oxycodone in both his urine and oral fluids. There is no dispute that the Grievor was impaired while on duty.

3. The Grievor had not disclosed any substance dependency issues to the Company prior to July 9, 2020. At his investigation interview, he explained that he had been experiencing very difficult personal circumstances. He stated:

[...] I'm really sorry it happened, and everyone has work to do. I'm just really upset with myself. I'm going into a drug and alcohol program. I've got a phone interview on July 29 at 0800 with Brian Hagerman from EFAP. I reached out to a lady named Lisa from Renascent for counselling. [Emphasis added.]

Positions of the Parties

4. According to the Company, it was not required to accommodate the Grievor because he did not disclose or establish that he had a substance use disability as of July 9, 2020. In any event, the Grievor did not request accommodation prior to the incident, as required by the Company's Alcohol and Drug Policy and Procedures, HR 203.1, 3.2.2 and 7.1 (the "Policy.") The Company relies on the Supreme Court of Canada's decision in *Stewart v. Elk Valley*, 2017 SCC 30. It submits that the Grievor was properly discharged for violating the Policy.

5. The Union submits that, based on the information the Grievor provided at the investigation interview, the Company could reasonably have known of his substance dependency issues. According to the Union, the Company had a duty to accommodate the Grievor and, at a minimum, it should have inquired about the existence of a disability before terminating the Grievor's employment.

Did the Grievor have a Disability on July 9, 2020?

6. The Union bears the burden of proof and must demonstrate, on the balance of probabilities, that the Grievor had a disability on July 9, 2020. The Union must also establish a connection between the Grievor's misconduct and his disability: **CROA 4527**.

7. The existence of a substance use disability is generally established through an expert medical opinion, although this will not always be required. In the absence of expert medical evidence, however, the Union must present other, compelling information to show the Grievor was suffering from a disability at the time of the incident: **CROA 4527** and **CROA 4762**.

8. In this case, there is no expert medical opinion establishing that the Grievor had a disability on July 9, 2020. Rather, the Union relies on the following:

- A letter dated October 16, 2020, from a Renascent Outpatient Counsellor, confirming that the Grievor had completed a six-week virtual, outpatient care program "for the commencement of his rehabilitation from the disease of alcoholism and/or drug addiction."
- A letter dated March 11, 2022 from a Social Worker, indicating that the Grievor had been receiving counselling "off and on" since 2018, when he used "maladaptive

“coping strategies” to cope with very difficult personal circumstances. The letter indicates that the Grievor has been working to establish better coping mechanisms.

- A letter dated March 17, 2022 from the Grievor’s current employer, indicating that the Grievor passed the required drug and alcohol testing every three weeks since approximately November 2021.
- An email dated March 27, 2022, from an Employee Assistance Counsellor, confirming that the Grievor and his spouse had participated in three counselling sessions in 2018 – 2019.

9. The Grievor was certainly struggling in the face of very difficult personal circumstances. However, I cannot infer from this or from the limited evidence before me that the Grievor was disabled within the meaning of Human Rights legislation.

10. In considering what amounts to compelling evidence of a disability, this Office has held that a Grievor must do more than undergo counselling or claim that he has challenges with drug use: **CROA 4653**. Thus, the Grievor’s response at the investigation interview and the fact that he received counselling are not sufficient to establish the existence of a disability. Similarly, the social worker’s reference to “maladaptive coping strategies” does not show that the Grievor was disabled. Maladaptive strategies can relate to a range of behaviours, including (for example) recreational drug and alcohol use.

11. I have also considered the Grievor’s post-discharge efforts at rehabilitation, namely his participation in a six-week outpatient rehabilitation program. This Office has held that substantial post-discharge evidence that shows a meaningful course of rehabilitation may help show the existence of a disability: **CROA 4763** and **AH704**. Importantly, however,

participation in a single rehabilitation program falls short of what this Office has required to establish a disability: **CROA 4763** (at para. 103).

12. Finally, in the letter of October 16, 2020, the outpatient counsellor refers to the Grievor's "rehabilitation from the disease of alcohol and/or drug use." Considered in context, this comment is not compelling evidence of a disability. The letter was written over three months after the incident and its stated purpose is to confirm the Grievor's participation in a rehabilitation program. It is not clear that the outpatient counsellor had the ability or intention of diagnosing the Grievor with a disability.

13. In sum, I find that the Union has not provided compelling evidence to show that the Grievor had a substance use disability on July 9, 2020. Accordingly, the Company did not have a duty to accommodate him.

14. The Union submits that, at minimum, the Company had a duty to inquire about the existence of a disability before it discharged the Grievor. In the context of this arbitration, the Union had an opportunity to put forth evidence to establish the existence of a disability. For the reasons provided, I have concluded that evidence is insufficient. There is nothing to suggest that, had the Company made inquiries in July of 2020, the evidence available to the Union would have been different or sufficient to establish the existence of a disability.

15. Finally, the Union has urged me to give this Grievor a second chance. The Union points to the difficult personal circumstances he was experiencing as well as his rehabilitation and ongoing sobriety. The Grievor had four years of service with the Company and a clear disciplinary record. He was forthright throughout the investigation.

16. I am sympathetic to the Grievor's situation. However, I must also be mindful of the gravity of his misconduct. The evidence does not establish that he had a substance abuse disability. The only conclusion I can draw is that he chose to consume drugs and attend work while impaired. This is very serious misconduct, which attracts serious consequences. The Grievor worked in a safety sensitive position and his impairment put others at risk and had the potential for serious consequences.

17. In these circumstances, it was reasonable for the Company to discharge the Grievor. The grievance is therefore dismissed.

April 28, 2022



MICHELLE FLAHERTY

ARBITRATOR