CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4859

Heard in Edmonton, September 12, 2023

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The discharge of Conductor Trainee Ian Shaw from the Company's service on December 1st, 2022.

JOINT STATEMENT OF ISSUE:

Conductor Trainee Shaw commenced his employment with CN on August 15, 2022. Following the completion of the theoretical portion of the Conductor Training Program he began the practical portion of his training within the terminal of Toronto South in November 2022.

During the week of November 21st, 2022, Conductor Shaw commenced training on the 2215 West Control assignment, in Toronto South. During his tour of duty on November 24th, his fourth (4) familiarization tour, Conductor Shaw sustained a workplace injury.

The Company released the grievor effective December 1st, 2022.

Union's Position:

It is the Union's position, however not limited hereto, that the Company violated Article(s) 58.1, 59, 65A, 82, 84, 85, 85.5, Addendum(s) 123 and 124 of Collective Agreement 4.16 as well as Arbitral Jurisprudence and the Canada Labour *Code*, when Conductor Shaw received an outright discharged, in absentia, on November 30th, 2022.

The Union contends that the Company violated Conductor Shaw's substantive rights under Part III Division XIII Medical Leave s. 239 of the Canada Labour *Code*, when he was discharged as a result of an on-duty injury.

The Union further contends that Conductor Shaw was assessed an outright discharge as a result of a workplace injury, contrary to the Canada Labour *Code*, and not, as suggested, as a result of being unsuitable or unable to perform the duties of a Conductor as contemplated under Article 58.1 of Collective Agreement 4.16.

The Union submits that Conductor Shaw was unaware of the meeting scheduled with Assistant Superintendent Maltby on November 29th, 2022, nor was he provided with any notice to attend. This is confirmed in an email dated November 30th, 2022 at 0618 hours.

The Union further submits that the second alleged meeting was never scheduled. Documentation shows that Conductor Shaw was discharged, in absentia, on November 30th, 2022 and the first meeting was scheduled for November 29th, 2022.

The Union views the Company's actions as contrary to their commitments under Article 85.5 of Collective Agreement 4.16, it cannot be said that the Company exercised its rights' reasonably.

The Union submits that the outright discharge of Conductor Shaw was arbitrary, unjustified, unwarranted, discriminatory, in bad faith and contrary to the Canada Labour *Code*. The Company was in possession of twelve (12) completed evaluations, by various Conductors in two separate terminals, all of which were positive and suggested that Conductor Trainee Shaw was performing as expected.

The Union, as a result of these violations, submits that a remedy in the application of Addendum 123 of Collective Agreement 4.16 is appropriate.

The Union consequently seeks that Conductor Shaw be reinstated into the Company's training program, without loss of seniority and compensated for any/all lost wages and benefits, with interest. Failing that the Union requests that Conductor Shaw be reinstated, under the terms, as the Arbitrator may deem appropriate.

Company's Position:

The Company disagrees with the Union's position. The decision to release Mr. Shaw was due to the fact he was AWOL and failed to attend two scheduled meetings after several attempts to try and reach him. The Company denies the Unions allegations that the grievor was being discharged for his injury. The Company further denies the Unions allegations that the grievor was never notified of the meetings. The Company further denies the allegation that the Collective Agreement was violated or that the articles relied on by the Union are relevant or that a Remedy under Addendum 123 is applicable.

FOR THE UNION:
(SGD.) J. Lennie
General Chairperson, CTY C

FOR THE COMPANY:
(SGD.) A. Borges
Labour Relations

There appeared on behalf of the Company:

A. Borges	– Manager Labour Relations, Edmonton
F. Daignault	– Director Labour Relations, Montreal

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
J. Lennie	– General Chairperson, Smiths' Falls
E. Page	– Vice General Chairperson, Toronto
P. Boucher	– President, TCRC, Ottawa
R. Finnson	– Vice President, Ottawa

AWARD OF THE ARBITRATOR

[1] As noted in the JSI, above, this Grievance concerns the dismissal of a probationary Conductor Trainee on December 1, 2022, during week 12 of his training program.

[2] At the time of his dismissal, the Grievor had completed four of the 60 training trips required by Article 59.1(c) of the Collective Agreement, in the practical portion of his training.

[3] For the reasons which follow, the Company has satisfied its burden to establish the Grievor was unsuitable for continued employment. Its decision was not taken arbitrarily, was not made in bad faith, and was not discriminatory.

[4] The Grievance is dismissed. The discharge is upheld.

Analysis and Decision

[5] The standard for review of decisions relating to probationary employees was discussed in **CROA 4823**[1] and that analysis is adopted here. That case considered a different collective agreement, however Agreement 4.16 which is at issue in this case contains a similar provision to that considered in **CROA 4823**: Article 58.1 allows for dismissal of probationary employees who are "found unsuitable".

[6] In determining "suitability", the Company is not held to a "just cause" standard. Rather, it must establish that its decision was not taken arbitrarily, in bad faith or discriminatorily (by considering factors unrelated to performance).

[7] The Union argued the Grievor was discharged because he suffered an injury and that the Company's decision did not meet the standard required. The Company argued it dismissed the Grievor as it determined he was unsuitable for employment, when he failed to show up for two meetings scheduled with the Company, after he had completed the rest prescribed for his injury.

[8] The Grievor was hired on August 15, 2022. He was enrolled in the Conductor Training Program in Winnipeg (Article 65A). On November 21, 2022, he successfully completed the theoretical portion of the course and was assigned to Toronto South terminal for the practical portion of his training.

[9] On his fourth tour of duty in Toronto (November 24, 2022), the Grievor stepped on railway ballast and slipped, which caused sudden pain in his knee. He was seen by a

[1] See paragraphs 44 to 49.

doctor that same day and advised to stay off work for one work day, which was November 25. The Grievor's regularly scheduled rest days were to be November 26th and 27th. He was to return to work on November 28, 2022.

[10] I am satisfied the training schedule was sent out on November 25, 2022, for the following week, when the Grievor would have been back to work (November 28 – December 4) and that the Grievor received this schedule. The Grievor was not "left off" this trainee list as argued by the Union; his name appeared on the list and there was a notation beside it that said "Meeting 10:00" which was listed next to his name. I am satisfied the Grievor knew he was expected at a meeting at work on November 29, 2022 at 10:00 a.m.

[11] The Grievor did not attend at the Company on November 29, 2022 – at 10:00 a.m. or earlier - or later.

[12] The Union has noted the list did not say with whom or where the meeting was to take place and that this excused the Grievor's inaction, and failure to attend. I find I cannot agree. Had the Grievor actually gone into work on November 29 and made any effort to ask a question where the meeting that was listed was to occur – demonstrating he was prepared to attend at work as required that day - I would have found the Union's argument persuasive. However, I am satisfied the Grievor made no efforts – and had no intention - to work on November 29, to attend a meeting or otherwise.

[13] It must be recalled the Grievor had no medical authorization *not* to be at work on November 29. He was only authorized to be off work due to his injury for November 25, and was on his rest days on November 27 and 28. He knew the Company expected to meet with him on November 29, 2022 at 10:00 a.m., which was difficult to do when he did not show up at work.

[14] It was not unreasonable for the Company to expect the Grievor would have arrived prepared to work that day. The Grievor had no explanation for *not* going into work that day. Not knowing where a meeting was is not an explanation when he could have easily confirmed that information when he reported to work. Neither does it appear the Grievor was even *available* for work on November 29 or had any interest in understanding what his obligations were that day.

[15] The Grievor was sent an email on the morning of November 29 from the OJT confirming the meeting would be held at the Dual Tower at 10:00 a.m. The Grievor did not respond to that email until 3:27 p.m. and stated he did not know “till now” that was where the meeting was to be.

[16] No explanation was offered for this 5.5 hour delay, which occurred on a day the Grievor knew he was supposed to be available – in the morning - to attend a meeting.

[17] The Grievor provided no explanation of where he was on November 29, instead of at work prepared to attend a meeting. The Workers Compensation Manager also left him voice mails on November 25, 28, 29 and 30 but received no response.

[18] It is curious that on a day the Grievor says he was confused as to where he was supposed to be - he was not waiting by the phone to receive that clarification – or making any efforts to seek clarification or even be available to the Company by phone.

[19] Despite this lack of effort from the Grievor, he responded to the email from the OJT late in the day and asked for the meeting to be rescheduled and the Company agreed. He was sent an email on November 30, 2022 with a new date and time to meet with the Assistant Superintendent.

[20] That new date was December 1 at 10:00 a.m.

[21] The Grievor did not appear for the meeting December 1. He failed to either show up or even acknowledge this email. The Union argued that the Grievor did not “confirm” that he was “able” to attend this meeting on December 1. Again, this is a very curious answer for a full-time employee whose time was supposed to be committed to the Company during the week of November 28 (which included December 1), and whose injury only authorized him to be off for one day – which was November 25.

[22] The Company was entitled to set a meeting during the Grievor’s workday and expect he would appear at work. There was no need for this to be “acknowledged” as there was no evidence it was sent to an incorrect email address. The Grievor offered no explanation for his failure to appear.

[23] The Grievor had no explanation as to why he was not available *anytime* during what would otherwise have been a normal work week (the week of November 28 to December 4).

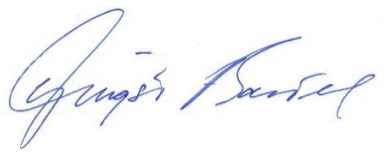
[24] I am satisfied that being reliable and willing to attend at work – whether for an actual work assignment, or a meeting in the time that would otherwise be a day for a work assignment - are basic and foundational work ethic issues which are related to the suitability of the Grievor for the role of Conductor. There is no demonstrated arbitrariness, bad faith or discriminatory behaviour by the Company in expecting the Grievor, as a Trainee, to meet that standard, or in dismissing him when he did not.

[25] The Grievor was not dismissed because he was injured; he was dismissed because he was unreliable and lacked initiative to report to work when required.

[26] The Union emphasized that the decision of the Company was actually made on November 30, 2022, even before the Grievor missed the meeting on December 1, which demonstrated bad faith. I cannot agree. I do not find it unusual that the Company would prepare paperwork the day before for the eventuality that the Grievor may not show up on December 1, which is what I find occurred in this case. His absence was not unpredictable, given his history. The fact the paperwork was dated on November 30 instead of December 1 does not demonstrate the Company was acting in “bad faith” and is also consistent with a clerical error.

[27] For all of these reasons, the Company’s decision to dismiss the Grievor was not taken in bad faith, was not arbitrary and was not discriminatory. It has demonstrated it has met the standard to consider the Grievor was unsuitable for continued employment.

[28] The Grievance is dismissed. The Grievor’s discharge is upheld.



November 29, 2023

CHERYL YINGST BARTEL
ARBITRATOR