

IN THE MATTER OF AN ARBITRATION
BETWEEN
THE CANADIAN NATIONAL RAILWAY COMPANY
("the Company" / "the Employer")
- AND -
**THE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION
AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA)**
("the Union")
CONCERNING THE INDIVIDUAL GRIEVANCE of GORD HEYWOOD
("the Grievor")

Christopher Albertyn - Sole Arbitrator

APPEARANCES

For the Union:

Brian McDonagh, National Representative, CAW

Les Lilley, Vice-President, Local 100

Gord Heywood, the Grievor

Reg McKay, Witness

Terry McKimm, Local Chairman (Witness)

For the Company:

Ron Campbell, Manager, Labour Relations, Winnipeg

Ross Bateman, Senior Manager Labour Relations, Toronto

Tim Maltais, Senior Mechanical Manager, Winnipeg

Hearings held in WINNIPEG on July 17, 2007.

Award issued on October 16, 2007.

AWARD

1. This award concerns three disputes between the parties, all concerning discipline issued to the Grievor arising from a motor collision at work on January 18, 2007. The Grievor was terminated as a consequence of the discipline issued to him.

2. The Grievor was driving a Company vehicle, a small truck, at the Symington Heavy Repair Centre in the early morning of January 18, 2007. While doing so, the Grievor's truck collided with a freight car, causing severe damage to the truck. At the time the Grievor did not possess a valid driver's license. He was required to provide a urine sample for a post-accident drug test. He refused. He was then issued the following discipline:

- 45 demerits for operating the Company vehicle without due care and caution;
- 30 demerits for failing to advise the Company he was not in possession of a valid driver's license;
- discharge for accumulation of [60] demerits;
- discharge for driving a Company vehicle without a valid driver's

license;

- discharge for violating the Company Policy to Prevent Workplace Alcohol and Drug Problems by refusing to provide a sample for a post-accident drug test.

The Grievor's termination was effective from January 25, 2007.

3. I address each item of discipline in turn. Although the Company treated the driving without a license as a separate offence from failing to advise the Company of the absence of a driver's license, these stem from the same act of misconduct, and I deal with them together.

4. In assessing the discipline I take account of the fact that the Grievor has nearly 30 years of service with the Company. His disciplinary record prior to the incidents described herein shows that he was disciplined in 2000. In that year, he was given 5 demerits for poor work performance, a further 5 demerits for poor work performance and a written reprimand for excessive absenteeism. This prior discipline is not relevant to what occurred on January 18, 2007 because it does not concern related misconduct and, in any event, Company policy provides that 20 demerits are removed from an employee's record every 12 consecutive months of

active service free from discipline. The Grievor has no history of being involved in vehicle accidents.

The collision

5. The Grievor was working the 12 midnight to 8am shift. His responsibilities were to air test and inspect freight cars in the running yard and other locations outside the yard. The vehicle being driven by the Grievor was a 1-ton diesel pickup truck (“the truck” / “the vehicle”). In the course of his work that morning, the Grievor drove his vehicle over the crossing on track C027, and between track C024 and track C028 in an area known as the classification bowl. He was operating his vehicle at the bottom of the bowl where hump trucks are tested.

6. A train is pushed over the hump, the cars are detached from the train and they then roll on their own down a track that leads from the hump into the classification bowl. The tracks leading from the hump are live and cars can be expected on a track at any time. Symington Yard covers 400 acres with 180 miles of track with approximately 320 switches and 30 miles of road that run in and

around the Yard. The Yard is active with the movement of boxcars and locomotives, including locomotives that are remotely controlled, twenty-four hours a day, seven days a week, fifty-two weeks of the year. The classification bowl is an especially dangerous or safety sensitive area as over 2,000 individual freight cars are humped over the hill and directed down the classification tracks daily. That amounts to approximately 104,000 cars humped each year. Despite this large traffic of freight cars, no similar accident has been reported in many years.

7. It was early morning, at about 6:50am, and it was still quite dark. Visibility was poor. It was snowing and the Grievor was not on a real road. He had to make a U-turn. While making the turn the Grievor realized he could not complete it without crossing the hump track. He had to convert the U-turn into the a three-point turn. A box car had been released and was coming down the live hump track. The Grievor stopped to reverse, but before he could reverse to make his three-point turn, his vehicle was struck on the front right by the freight car, causing severe damage to his vehicle. The Grievor never heard or saw the box car coming.

8. Driving in poor visibility in an area without clear roads, in snowy

conditions, when unmanned freight car are being released on the tracks, requires a great deal of caution. The Grievor ought to have been extremely careful, given the conditions in which he was driving. The test as to whether an individual driving a motor vehicle is negligent is whether the harm was reasonably foreseeable and whether the individual took reasonable precautions to avoid the potential harm. In this case, the conditions were inherently dangerous. The Grievor was aware of these conditions. For the collision to have occurred, the Grievor did not take the requisite precautions; he did not exercise the level of care that was necessary to protect himself and the Company's property. He is lucky that he was not severely injured or killed, and that only the Company vehicle was damaged.

9. As a consequence, I find the Company was correct to conclude that the Grievor did not operate the vehicle with the requisite care and caution required of him. Although snow covered the ground, which meant that the rail track could not be readily seen and the Grievor had to estimate where it was, this required greater caution from the Grievor than he exhibited. The damage caused as a result of his negligence was significant. In these circumstances discipline was appropriate.

10. Was 45 demerits the appropriate discipline? In my view this was too severe. The Grievor did not exercise the requisite level of caution, and the damage

caused to the truck was significant, but there was no recklessness, no blatant disregard for the consequences of his actions. There was a momentary error of judgment. The Grievor is a long-serving employee whose record does not include a pattern of similar accidents or a significant disciplinary history of any kind. In these circumstances, the appropriate discipline was 20 demerits. I vary the discipline issued to the Grievor accordingly.

Driving without a license and failing to advise the Company of the suspension of his driver's licence

11. The Grievor's Manitoba driver's license was suspended because he failed to pay the fee for its renewal. His license was suspended from July 31, 2004.

12. In November 2006 the Grievor bid and was awarded a job at the Symington yard requiring a valid driver's license.

13. The Grievor thought he did not have to advise the Company of the suspension of his driver's license because, according to him and the Union, many Company vehicles do not have license plates and are not insured. After the

collision, when the Grievor volunteered the information that he did not have a valid driver's license, he was apologetic for failing to tell the Company of his license suspension earlier.

14. The Union's witnesses allege the truck had no license plates and was not insured. This contention is advanced to suggest that the Grievor did not require a driver's license to drive the truck. The contention is disputed by the Company, which says that every vehicle is licensed and insured.

15. The Union argues that the Symington Yard is not a public road, but private space that does not require a valid driver's license to operate a motor vehicle.

16. Part of the Grievor's duties, as a car mechanic, is the driving of Company vehicles. The Company requires those who drive Company vehicles to have a valid driver's license. The position he bid into in November 2006 had this as a specific requirement. Whether or not the Symington Yard is public space, which I think is likely the case, and whether or not the truck itself was licensed, I find that the Grievor was required to have a valid driver's license to perform the responsibilities of his job for the Company. The Company reasonably assumed he had a valid driver's licence when, in fact, his license had been suspended.

17. The Union argues that the Company rule requiring a valid driver's license was introduced unilaterally and that it is unreasonable. I am not persuaded of this. The Employer is entitled to make work rules as part of its general right to manage the enterprise. The test of the reasonableness of a company rule is whether it is operationally necessary, i.e. whether it serves a legitimate business, or rational operational, purpose. In my view, the Company rule that those who drive Company vehicles must have a valid driver's license is reasonable because, in the first instance, a driver's license is a requirement for the vehicle's insurance and when the vehicle is on a public road. Secondly, the rule has the clear operational purpose of ensuring that only those sufficiently trained and experienced as drivers can drive Company vehicles. The rule enables the Company not to have to establish that an employee is sufficiently trained and experienced to drive a motor vehicle safely; the Company can rely upon the driver's license to establish such skill and ability. In these circumstances, I find that the Company's rule requiring a driver's license for someone in the Grievor's position was reasonable and valid.

18. I find that the Grievor was obliged to inform the Company that his driver's license had been suspended. His failure to do so, in circumstances when he was continuing to drive Company vehicles, was irresponsible. This irresponsibility

had a direct consequence for the Company in this case. The Company could not recover the cost of repair of the damaged truck from its insurer on account of the Grievor not being a licensed driver. It had itself to pay the more than \$10,000 to repair the damage done to the vehicle in the collision. The Company further points out that, if the Grievor had been seriously injured or killed in the accident, with its liability insurance invalidated as a consequence of his driving without a license, the Company would itself have incurred a large liability. As a consequence of his driving without a license, the Grievor unnecessarily placed the Company in a position of significant financial jeopardy.

19. The Company was therefore entitled to discipline the Grievor for his failure to inform the Company that his license had been suspended and for driving Company vehicles for some extended period without a valid driver's license. The question is whether the appropriate sanction was 30 demerits. In my view, this was an excessive reaction to the Grievor's misconduct, given that he is being disciplined separately for the collision and for causing the damage to the Company vehicle. He volunteered the information that he did not have a valid driver's license when the accident occurred. This information would not have become apparent were it not for his honest admission. In these circumstances, given that the misconduct was moderately serious, the appropriate sanction was

20 demerits.

The refusal to give a urine sample

20. Besides the accident itself, there was nothing to suggest any impairment of the Grievor. On the Employer's Reasonable Cause Form a number of options are made available. The following was revealed regarding the Grievor: his speech was normal, his balance / walking was normal, his eyes were normal, his awareness was normal. There was no smell of alcohol, no sign of intoxication of any sort. Nonetheless the Company required the Grievor to undergo a breathalyser test. His Union steward advised him against it, saying the test was not necessary and that he should refuse to undergo it. Despite this advice, the Grievor decided to undergo the breathalyser test. It proved negative. There was no trace of any alcohol.

21. The Employer then required the Grievor to give a urine sample for a drug test. Again his steward strongly urged the Grievor to refuse, arguing that doing so was not necessary. Management explained to the Grievor that he would be in breach of the Company's Policy if he refused to undergo the test and that there

would be disciplinary consequences for him. This time the Grievor followed his steward's advice. He thought he had shown himself to be unimpaired by the breathalyser test and he felt a further test was unnecessary and intrusive. The Grievor's declining to undergo the urinalysis was cause, in the Employer's view, for his termination.

22. In requiring the breath and urine analysis, the Employer was labouring under a misapprehension. It had just learnt that the Grievor's driver's license had been suspended. It assumed, erroneously, that the cause of the suspension was because the Grievor had been found guilty of impaired driving. Management never inquired of the Grievor as to the reason for the license suspension. The reason was because the Grievor had failed to pay the annual license fee. The suspension had nothing to do with impaired driving. Management was faced with an individual who had just been involved in a serious collision, where poor judgment appeared to be the cause, and his driver's license had been suspended. Management concluded that impairment was possibly the cause of the accident. This is why management insisted on both the breathalyser and the urinalysis tests.

23. The Company's Policy to Prevent Workplace Alcohol and Drug Problems permits the Company to require post-accident tests under certain circumstances.

The relevant portion of the Policy reads as follows:

Reasonable Cause and Post Accident Testing

Biological testing for the presence of drugs in urine or alcohol in the breath is conducted where reasonable cause exists to suspect alcohol or drug use or possession in violation of this policy, including after an accident or incident. Post accident testing is done after any significant accident or incident where an experienced operator officer, upon consideration of the circumstances, determines that the cause may involve or is likely to involve a rule violation and/or employee judgment. In cases of reasonable cause or post accident testing, any employee whose breath alcohol concentration is over 0.04 or who tests positive for illegal drugs would be considered to be in violation of this policy.

24. The member of management, an experienced operator officer, who required the Grievor to undergo the post-accident tests was Tim Maltais, the Senior Mechanical Manager in Winnipeg. Many features of the accident concerned Mr. Maltais. The Grievor was making a turn in a tight area, located adjacent to a hump track. The Grievor was familiar with this area and had driven in it frequently. The Grievor knew that cars were being humped. Mr. Maltais felt this incident was out of character for the Grievor. There was enough room to stop and backup the truck without fouling the track. Usually the freight cars coming

down the tracks from the hump make a loud, screeching noise as the retarding brakes slow the free rolling freight car. Mr. Maltais wondered why the sound did not alert the Grievor to the potential hazard. Hundreds of thousands of cars are humped each year without a similar incident. Given these considerations, in the absence of a satisfactory explanation as to why the incident could not have been avoided, Mr. Maltais thought that the accident might have been the result of the Grievor's impairment through drugs or alcohol. This is why he required the Grievor to undergo the post-incident testing.

25. I have had careful regard to the award in *SHP 530* on July 18, 2000 (M. Picher) between these parties. That case involved an exhaustive analysis of the issues which have been presented to me in this case. The efficacy of drug testing, or urinalysis, was thoroughly explored in that case. Arbitrator Picher said this:

Given the highly safety sensitive nature of the Company's operations as a railway, it is reasonable for the Company to require employees in risk sensitive positions to undergo drug and alcohol testing in circumstances where it has reasonable grounds to believe that an employee is impaired while on duty, while subject to duty or while on call, including where an employee has been involved in a significant accident or incident, or when an employee seeks promotion or transfer into a risk sensitive position. While it is true that in all of the foregoing circumstances a positive drug test would not give the employer conclusive proof that an employee was or

would be impaired while at work, or that he or she suffers from an alcohol or drug addiction or dependency, it may nevertheless be a significant and relevant piece of evidence which the employer can legitimately weigh in the balance in considering the merits of discipline, renewed safety measures or additional vigilance in the aftermath of an accident or incident.

...

In the result, I am satisfied that those aspects of the drug and alcohol testing policy which would require an employee, under pain of discipline, to undergo drug and alcohol testing on the basis of reasonable grounds, including after a significant accident or incident, or as a pre-condition to promotion or transfer into a risk sensitive position are not, of themselves, unreasonable by the standards of *KVP [Re Lumber and Sawmill Workers, Local 2537 and KVP Co. (1965), 16 L.A.C. 73 (Robinson)]*, and are not a violation of the collective agreements. Obviously an employee can decline to undergo a drug or alcohol test where it is manifest that there are no reasonable grounds to do so.

26. The validity of the urinalysis results for the purposes of establishing impairment, substance abuse, dependence, etc. is a separate question from whether an employee is obliged in appropriate circumstances to undergo the test.

27. The principle set out in *SHP 530* is the following:

In respect of drug and alcohol testing of employees the balance has been struck in favour of protecting individual privacy rights, except where reasonable and probable grounds exist to suspect the drug and alcohol impairment or addiction of an employee in the workplace and except where there is no less intrusive means of confirming the suspicion. Conversely, the balance has been struck in favour of management's right (as part of its general right to manage) to require drug or alcohol testing, where the two aforementioned conditions exist. It follows that each case must be decided on its own facts.

28. The Grievor proved to be unimpaired by alcohol as a result of the breathalyser test. Given the circumstances at the time, was the Company entitled to know whether drugs might have played any part in the accident?

29. In its argument the Union makes much of the unreasonableness of requiring the urinalysis when the Grievor had shown himself, by the breathalyser result, to be unimpaired. It says there was nothing else to suggest impairment by the Grievor. There was nothing also to suggest dependence or drug use by the Grievor.

30. The context of the request for the urine sample was the following: there had been a significant accident caused by the driver's atypical error of judgment, working in a safety sensitive environment where serious personal harm could

have occurred and where serious damage to property did occur in a location with which the Grievor was familiar, on a task he had done many times. The Company is entitled to know what caused the accident. Establishing whether the use of drugs or alcohol played any role in causing the accident is a relevant part of the inquiry. It had discounted alcohol abuse. The Company had not discounted the possibility of drug use playing a part in the occurrence. A drug test may have proved nothing, but it may have suggested, with a positive result and an admission of recent use, that drug use did play a role in the Grievor's judgment error. The Employer might equally have asked for an eye examination or a hearing test to determine why the Grievor did not see or hear the rail car approaching. All of these tests would go reasonably to understanding why the accident occurred. In this context, the Company was entitled to require the drug test as well as the alcohol test.

31. Given the above, I find that Mr. Maltais acted reasonably by requiring post-accident testing, despite his misapprehension as to the cause of the Grievor's driver's license suspension. In the context I have described, the Company was entitled to require the Grievor to undergo both tests: one to check for recent alcohol use, the other to check for drug use.

32. This is not to say that every accident will justify a urine test. The facts of each case are important. Here where significant property damage occurred and the Grievor might have been killed, and the circumstances of the accident called out for an explanation, the Company's interests in determining, as accurately as possible, why the accident occurred trumped the Grievor's privacy rights to withhold the sample.

33. In this context, the Grievor was not entitled to refuse to undergo urinalysis because, by doing so, he impeded the Company's investigation into the cause of the accident. His refusal to undergo the test was therefore an act of misconduct because it prevented the Company from doing a thorough analysis of what might have caused a serious accident.

34. What is the appropriate discipline for the Grievor's refusal? In some circumstances a termination will be warranted for a refusal to undergo urinalysis. This is not such a case. The Grievor's misconduct in refusing to undergo the test was ameliorated because he had shown himself to have had no trace of alcohol in his system. There were no other signs of impairment. He is also not a person who has shown any signs of drug or alcohol dependence or abuse and it was at least arguably reasonable for him to have believed, at the time, that the urinalysis was

unnecessary and excessive. He was also significantly influenced by the Union in refusing. (This factor will, of course, not be mitigation in future because the Union is on notice that a urine test is legitimate in cases of a significant, unexplained accident). In these circumstances, I find that the Grievor's refusal to undergo urinalysis should result in him being issued 10 demerits.

Summary

35. As regards the collision, the appropriate discipline was 20 demerits. As regards the failure to advise of the license suspension and driving without a license, the appropriate discipline was 20 demerits. For the refusal to provide a urine sample for urinalysis, the appropriate discipline was 10 demerits. I substitute this discipline for that imposed on the Grievor.

36. Consequence the Grievor is reinstated in his employment, without loss of seniority. He is entitled to reinstatement from the time his driver's license is or was reinstated.

37. I remain seized in the event of any dispute between the parties concerning

the implementation of this award.

A handwritten signature in blue ink, appearing to read "C. Albertyn". The signature is stylized with a large initial "C" and a long horizontal stroke.

Christopher J. Albertyn

Arbitrator

October 16, 2007.