

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

CASE NO. 4364

Heard in Montreal, February 11, 2015

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the dismissal of Conductor Gary Dickson.

JOINT STATEMENT OF ISSUE:

On April 4, 2014, following an investigation, Conductor Dickson was dismissed from Company service "for a violation of CROR Rule G, CROR General Notice and Alcohol and Drug Policy and Procedures 4100/5100 as a result of your refusal to submit to a post incident test while working as a Trainperson on assignment U55-11 on March 11th 2014 at Romford on the Cartier Subdivision."

The Union contends that the Company did not have cause or justification to request a substance test in these circumstances. The Union contends that the penalty of discharge is unjustified, unwarranted and excessive in all of the circumstances. The Union further contends that the Company's termination of Mr. Dickson's employment breaches the Collective Agreement and the Canadian Human Rights Act.

The Union requests that Mr. Dickson 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.

The Company disagrees and denies the Union's request.

FOR THE UNION:

(SGD.)

B. Hiller
General Chairperson

FOR THE COMPANY:

(SGD.)

There appeared on behalf of the Company:

B. Medd – Labour Relations Officer, Calgary

And on behalf of the Union:

K. Stuebing – Counsel, Caley Wray, Toronto

W. Apsey – Vice General Chairperson, Smith Falls

J. Campbell – Vice General Chairperson, Toronto

AWARD OF THE ARBITRATOR

1. The incident that occasioned a post-incident substance test involved the Grievor, Gary Dickson, and his crew's non-compliance with a "slow order". They failed to operate their train at a restricted speed; they said this was because they had forgotten about the order. The Union accepts there was cause for requiring the post-incident substance test. The Union's preliminary objection therefore falls away.

2. Prior to refusing to undergo the substance test, the Grievor was alerted to the Rules 3.2.3 and 3.2.5 of the Company's Alcohol and Drug Procedures:

3.2.3 - Unionized employees will be entitled to union representation provided this does not cause undue delay.

3.2.5 - Employees cannot be forced by management to submit to a For Cause or Post-Incident/Accident test. Refusal to submit to a test should be witnessed and documented by management. ... In documented cases of refusal to test a negative inference may be taken by the Company in its subsequent investigation.

3. Despite being so alerted, the Grievor refused to undergo the test and declined the opportunity of union representation. His subsequent explanation was that he was "not feeling well" and that, when he went directly home, he "was sick to [his] stomach, and later calmed down". Prior to this occasion, the Grievor had not previously been requested to undergo a substance test. The Union submits that the circumstances surrounding the request for testing prompted an overwhelming stress reaction in the Grievor that brought on an acute unfitness. Feeling as he did,

the Grievor thought it best to leave for home where he could calm his nerves and re-gain his composure.

4. The Grievor made the following statement at the conclusion of the investigation into his refusal to be tested:

I would just like to say that I am a professional with many, many years of experience and that I know how dangerous this job can be. I would never, ever come and do my job in an impaired condition. An experienced man with my work record, I feel my word of honor would be good enough in this situation. I feel that I should not be put through the embarrassment and the humiliation of going through a substance test to prove it. I would just like to finish my remaining service with the company and retire with dignity like my father did before me.

5. The Company says it has no further confidence in the Grievor's ability to operate safely and free from impairment and resists any suggestion that the Grievor be reinstated in employment.

6. **CROA 1703** makes clear the consequences of an unjustified refusal to undergo a substance test:

... where good and sufficient grounds for administering a drug test do exist, the employee who refuses to submit to such a test does so at his or her own peril.

7. The Company argues that a negative inference must be drawn from the Grievor's failure to undergo the test, and that the failure should be treated as a violation of the prohibition against substance abuse impacting on the workplace.

8. The Grievor is a 34-year employee. He is 54 years old. If in employment, he could retire with an unreduced pension at age 55, on June 7, 2015. In his long career he has had a total of 30 demerits and a caution. He had three rule violations, each in 1988, 1990 and 1994. He has not been disciplined since 2008.

9. The Union advises the Grievor wished to attend the hearing. He could not because of a herniated disc in his back, and the need to attend to his sickly spouse, who requires his presence for care and support. The Union submits that the Grievor's spinal injury is such that he will be medically unfit to return to his physically intensive, safety critical duties with the Company at any point prior to his June 7, 2015 retirement date. Consequently, the Union suggests that the Grievor's reinstatement would pose no safety risk.

10. The Union refers to the following authorities in support of its proposal, on equitable grounds, that the Grievor be reinstated for the purpose of exercising his entitlement to a pension on June 7, 2015: **CROA 942, CROA 2417, CROA 2471, CROA 3376, CROA 3934, CROA 4028, CROA 4150, CROA 4230 and CROA 4231.**

11. The Grievor acted wrongfully when he refused to undergo the substance test. As the Company argues, a negative inference is drawn from his refusal. What mitigates his misconduct is that the Grievor is a long-serving employee with a relatively good overall disciplinary record. I find that what is fair and reasonable in all the circumstances is to do as Arbitrator Picher did in **CROA 4028:**

The issue then becomes the appropriate disciplinary outcome. I am satisfied that the grievor should not return to active service. However, fair regard must be had to the fact that in a few months the grievor will reach age fifty-five, and will then have some thirty-three years of service. If in fact that age and service will then entitle him to take unreduced early retirement pension benefits, I would be inclined to order a conditional suspension until that date, on the condition that the grievor then take his retirement.

12. I make that order. The grievance is partially upheld. The Grievor is reinstated in employment, subject to a disciplinary suspension, without compensation, from the date of his dismissal until the date of his retirement on or about June 7, 2015, failing which the Company's

discipline of dismissal will be sustained. The Grievor is therefore required to take his retirement on his retirement date.

13. I remain seized of the implementation of this award.

A handwritten signature in black ink, appearing to read "C. Albertyn", written over a horizontal line.

February 27, 2015

**CHRISTOPHER ALBERTYN
ARBITRATOR**