

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

CASE NO. 4290

Heard in Calgary, March 11, 2014

Concerning

BOMBARDIER

And

TEAMSTERS CANADA RAIL CONFERENCE – Division 660

DISPUTE:

The terminations of Train Operator T. McCormick on August 15 and August 16, 2012.

JOINT STATEMENT OF ISSUE:

On July 18, 2012 Mr. McCormick was part of the crew operating GO Train 479 which allegedly entered the crossovers at Burlington East in excess of the allowable speed. Following an investigation, the Company issued a letter dated August 15, 2012 terminating Mr. McCormick's employment for failure to comply with CROR General Rules A (i), A (iii), 33, 34, 106 and 421.

On August 16, 2012 the Company issued a second letter to Mr. McCormick purporting to terminate his employment a second time. The Company alleges that a drug test done following the incident revealed Mr. McCormick "had significantly elevated levels of marijuana" in his system. The Company concluded that Mr. McCormick was "under the influence of marijuana while on duty" and therefore in violation of Rule G.

In relation to the first termination, the Union maintains that the discipline imposed was excessive and the Company failed to take into consideration relevant mitigating factors. The Union has requested the Company reduce the discipline and reinstate Mr. McCormick. The Company has refused the Union's request.

In relation to the second termination, the Union maintains that the letter of termination is of no force or effect; is abusive; fails to comply with the Collective Agreement in relation to only issuing discipline after a fair and impartial investigation is held; and constitutes impermissible change of grounds. Further, the Union denies Mr. McCormick was in violation of Rule G and the Company has not offered any proof to substantiate this allegation. The Union has requested the Company rescind this letter and reinstate Mr. McCormick. The Company has refused the Union's request.

FOR THE UNION: (SGD.) G. Macpherson General Chairman	FOR THE COMPANY: (SGD.) A. Brown Manager Human Resources
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There appeared on behalf of the Company:

M. Horvat	– Counsel, Norton Rose Fullbright, Toronto
A. Brown	– Manager, Human Resources Manager, Toronto
D. Mitchell	– General Manager, Toronto

There appeared on behalf of the Union:

M. Church	– Counsel, Caley Wray, Toronto
G. MacPherson	– General Chairperson, Toronto
D. Finnsen	– Vice President, Calgary
R. Hackl	– General Chairman, Saskatoon
R. Robbins	– General Chairman, Sarnia
J. Lennie	– Vice General Chairman, Port Robinson

AWARD OF THE ARBITRATOR

This case concerns whether Bombardier's ("the Company") termination of Train Operator ("TO") Tim McCormick ("the grievor") on August 15, 2012, was excessive in all the circumstances. If I find that it was not, there will be no need to address the issues reflected in the Joint Statement of Issue in respect of the grievor's second termination on August 16, 2012.

FACTS

On July 18, 2012, the grievor was assigned to GO train 479, together with crew members CTO Gooden and Throttle Trainee Luciano ("TT Luciano"). The grievor was in charge of the crew and was responsible for the train's movement. TT Luciano had begun his on-the-job training on March 19, 2012. He was operating the train at the time of the incident. CTO Gooden, an experienced CTO, had been with the Company for approximately 2 months.

As the train proceeded westward to Burlington from Union station at approximately 5 PM, signal 303T1 alerted the grievor to proceed "Limited to Stop" and thereby proceed through the signal at a speed not exceeding 45 mph. The crew called out the light before reaching the signal. CTO Gooden was getting a Rule 42 from Foreman Lovio. As the train passed signal 303T1 the grievor looked up and realized that the train was exceeding its authorized speed.

The train passed signal 303T1 at 70.4 mph and entered crossover number 7 at a speed of 71 mph and continued to track number three at a speed of 68 mph. During the grievor's formal investigation statement, when first asked why he did not contact anyone after the incident, the grievor replied: "I don't know, it will never happen again."

The grievor explained that when he realized that the train was going faster than the authorized speed, he yelled to the throttle trainee: "whoa" and that at that point TT Luciano applied the brake. In TT Luciano's investigation statement he reported that he was unaware that the train was operating at an excessive speed when he applied the brake. He applied the brake in reaction to the grievor "screaming." In CTO Gooden's statement, when faced with repeated questions by the investigator on this issue and when asked why the grievor had yelled "whoa" CTO Gooden responded:

First of all, Tim did not say whoa. Tim screamed look out. And that was the reason I looked and thought we were going to hit somebody. So now through the second crossover, that's where I asked how fast we were going because I realized we were going fast.

Once the train stopped the record reveals that the grievor and CTO Gooden asked TT Luciano how fast the train was going:

A 052 Gary and Tim asked me how fast I was going. I told them I don't know. Fast. They say how fast? I said I don't know. I said we should call someone. That's when Tim said let's just get to the station and get these people off safely.

CTO Gooden's investigation statement confirms TT Luciano had suggested calling in to report the incident. As to why CTO Gooden did not contact anyone, he explained:

A 054: I haven't been through this before. I'm not saying it is an excuse but it's in the book and I should have but not really knowing, being a couple of months in, I did not want to overstep any boundaries.

In his statement, the grievor recalled there being "some mention of reporting" and that he thought he mentioned that he did not know what the threshold of reporting was. He went on to explain that he did not consider the situation an emergency, but that in hindsight he appreciates that it was. When questioned about why he would yell at the throttle trainee he said that it appeared that the train was going faster than 45 miles an hour.

The following day, July 19, 2012, the Company learned about the incident. A passenger on the train reported that it changed tracks abruptly at Burlington and that as a result he and about seven others went "flying" before the train stopped. As a serious incident had taken place, the crew then underwent drug and alcohol testing. The test results received on July 25, 2012 indicated that the grievor had a marijuana metabolite quantitative level equating 560 ng/mL as at the time of the test. A positive result is 15 ng/mL.

In the circumstances, the Company conducted a formal investigation into the grievor's use of marijuana or its influence while on duty. That formal investigation took place on August 2, 2012. The grievor denied that he has had ever used marijuana while on duty or when subject to duty. When asked about the positive test result, he explained that the only reason his test could have come back positive was that he lives "in an environment where it is present and because he was always in such close proximity." The grievor did not attend the hearing, but the Union, on his behalf, revisited the grievor's explanation for the extremely elevated level of marijuana metabolite in the grievor's system:

Following his shift, Mr. McCormick was wound up by the incident. He returned home and in an uncharacteristic and impulsive moment, he consumed a portion of banana bread belonging to his roommate, which he knew to contain marijuana.

As a result of the events of July 19, 2012, and the information gathered in the investigation of the incident, all three crew members were dismissed on August 15, 2012. TT Luciano and CTO Gooden have since been reinstated.

On August 16, 2012, the grievor was sent a second termination letter for being under the influence of marijuana while on duty in violation of CROR Rule G.

DECISION

I turn first to consider whether the Company's decision to dismiss the grievor on August 15, 2012, was excessive in the circumstances. As part of that assessment I consider the Union's allegation that the discharge is discriminatory because TT Luciano and CTO Gooden have both been reinstated since they were discharged.

In assessing the gravity of the grievor's misconduct, it is important to highlight its seriousness as well as the grievor's unique position as the most senior crew member (not in terms of seniority - his date of hire is October 12, 2010 - but he has been in the running trades since 1981) and the one responsible for the operation of the train.

The seriousness of the incident itself, whereby the train went through two 45 mph crossovers at an actual speed of approximately 70 mph cannot be overstated. A number of the passengers went "flying" as the train would have swayed at the time. The movement of the train at that excessive speed could have damaged the crossovers, and if left uninspected, could have meant the unsafe condition of the track for subsequent trains. In the circumstances, the failure to report the incident is the most serious aspect of this case.

The grievor's response to TT Luciano's remark that they should call someone, effectively translated to the grievor telling the crew that it would not be reporting the incident. CTO Gooden remained silent, as he did not "want to step on any boundaries." Given the power dynamic at play I do not accept the Union's submission that "they all determined that there was no reporting required."

Moreover, in respect of the failure to report the incident, a careful review of the grievor's statement during the investigation suggests that he was less than forthcoming on this issue. He was also less than forthcoming about his appreciation of the seriousness of the incident itself.

On the reporting issue, the grievor's response was vague and his response to the suggestion that it be reported was that he did not know the threshold for reporting. That statement was not corroborated. As for the grievor's assertion that he did not appreciate the seriousness of the situation, I have some difficulty with that proposition as well. TT Luciano stopped the train because the grievor was screaming, and CTO Gooden was right beside the grievor and corroborated that being the case. I am of the view that the grievor's statement that he yelled "whoa" is an attempt to minimize what the grievor fully appreciated was the train running through the crossovers at an excessive speed.

I have read all of the cases put before me. While certainly the facts in **CROA 3607** and **4101** are more egregious, and I do not consider the grievor's misconduct to be as serious to that of the long-service grievors in **CROA 3607** or analogous to the grievor in **4101** (in that case the grievor had concealed facts from his employer for the second time but had been reinstated largely on the basis that the discipline issued against him was disproportionate compared to his workmate), Arbitrator Picher's comments form **CROA 3607** are instructive on the facts of this case:

The failure to report an incident has always been viewed as extremely serious, and has been treated accordingly in this Office."

...
As employees of long service, the grievors knew, or reasonably should have known, that the importance of reporting such an incident, if only to allow its examination by the Corporation, and possibly government authorities, might yield insights which would allow the avoidance of a similar event in the future. That is, of course quite apart from the ongoing general obligation of the grievors to be truthful to their employer and, as required by the rules cited above, to immediately advise the rail traffic controller of the rules violations and the incident which resulted from them. To some degree, the continued concealment of what transpired can be viewed as an ongoing deliberate failure by the grievors to bring a potentially hazardous condition to the attention of their supervisors. In the facts of the case at hand, it is the failure of candor and honesty on the part of the grievors, which more than their rules infractions in the operation of their train, which calls into question their ongoing employability in the operation of a high profile public passenger train service.

I appreciate that the concealment of the incident in **CROA 3607** went on for months, involved the collusion of the two crews, and only came out in the context of a subsequent investigation. In this case, however, although the facts are appreciably less egregious, here too the Company may never have become aware of the incident as it was solely due a passenger report that it came to light.

At the time of the incident, the grievor's discipline record included three separate incidents since he commenced employment with the Company on October 12, 2010. On March 18, 2011, he was issued a written warning for speeding in a qualifying run. He was also issued a one-day suspension on April 13, 2012 for violating CROA Rule 114(b) by running through a switch. The grievor also received a two-day suspension for an incident on July 6, 2012 where he put his train into emergency while approaching a stop signal and then provided incorrect information in regards to its delay.

Considering the grievor's record, his few years of service with the Company, and his position of most responsible crew member on GO Train 429, and having regard to the aggravating factors outlined above, it is my view that a more serious disciplinary response was justified against the grievor than his crewmates and that his termination was justified. I am troubled by the grievor's lack of candour. It calls into question his employability in the operation of a high profile public passenger train service.

For all these reasons, the grievance is dismissed.

March 25, 2014

CHRISTINE SCHMIDT
ARBITRATOR