

CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 2190
Heard at Montreal, Thursday, 10 October 1991
concerning
CANADIAN NATIONAL RAILWAY COMPANY

and
UNITED TRANSPORTATION UNION
EX PARTE
DISPUTE:

Appeal of discipline against Conductor J.I. Musselwhite and
subsequent discharge effective November 30, 1990.

STATEMENT OF ISSUE:

UNION:

On May 25, 1989 Conductor Musselwhite was held out of service. Subsequent to being held out of service Conductor Musselwhite attended the CN Medical Clinic on a number of occasions to establish his fitness to work. The Company refused to allow Mr. Musselwhite to return to work. As a result Conductor Musselwhite attended a medical on his own and was assessed ``Fit for Work''.

Following an investigation the Company assessed Conductor Musselwhite's record 15 demerits for alleged ``Failure to take corrective action to comply with the requirements of UCOR General Rule C from January 17, 1990 up to and including March 14, 1990.'' Conductor Musselwhite continued to advise the Company of his desire and fitness to return to work. Subsequently, however, following an investigation the Company discharged Conductor Musselwhite effective November 30, 1990.

The Union contends that Conductor Musselwhite was wrongfully held out of service and that the assessment of discipline and subsequent discharge were unwarranted in all the circumstances. Accordingly the Union seeks reinstatement of Conductor Musselwhite and full compensation with no loss of seniority or benefits.

The Company has declined the Union's request.

COMPANY:

On May 25, 1989, Conductor J.I. Musselwhite was held out of service due to medical requirements.

On June 7, 1989, conductor Musselwhite attended the CN Medical Clinic. During this visit Conductor Musselwhite was examined by the CN Medical Office and as a result of this examination, it was determined Conductor Musselwhite was medically unfit for work and was placed on medical leave until October 25, 1989.

Conductor Musselwhite continued not to satisfy CN Medical requirements and following an investigation on March 13-14, 1990, the Company assessed Conductor Musselwhite's record 15 demerits for ``failure to take corrective action to comply with the requirements of UCOR General Rule C from January 17, 1990, up to and including March 14, 1990.''

Conductor Musselwhite continued to be held out of service for his failure to comply with Company medical requirements. On August 22, 1990, an investigation was conducted into Conductor Musselwhite's reported failure to meet CN Medical requirements resulting in unauthorized absence from work between May 1, 1990, and August 8, 1990. Conductor Musselwhite was subsequently discharged from service effective November 30, 1990, for ``failure to take corrective action to meet the CN Medical requirements for a safety sensitive position in train service''.

The Union contends that Conductor Musselwhite was wrongfully held out of service and that the assessment of discipline and subsequent discharge were unwarranted in all the circumstances. Accordingly the Union seeks reinstatement of Conductor Musselwhite and full compensation with no loss of seniority or benefits.

The Company has declined the Union's request.

FOR THE UNION:

FOR THE COMPANY:

(SGD.) J. W. ARMSTRONG

(SGD.) K. G. MACDONALD

GENERAL CHAIRPERSON

for: ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

G. C. Blundell

Manager, Labour Relations, Edmonton

D. W. Coughlin

Manager, Labour Relations, Montreal

R. Lecavalier

Counsel, Montreal

M. S. Fisher

Coordinator, Special Projects, Transportation, Montreal

Dr. R. Dufresne

Director of Medical and Health Services, Montreal

Dr. R. Hillis

Medical Officer, Edmonton

Dr. E. Videns

Witness

M. Becker

Labour Relations Officer, Edmonton

A. Wagner

Terminal Superintendent, Transportation, Edmonton

And on behalf of the Union:

D. A. McKee

Counsel, Toronto

J. W. Armstrong

General Chairperson, Edmonton

L. H. Olson

Vice-President, Edmonton

B. Henry

Vice-General Chairperson, Winnipeg

J. I. Musselwhite

Grievor

AWARD OF THE ARBITRATOR

The grievor was discharged from service effective November 30, 1990 for his ``failure to take corrective action to meet the CN Medical requirements for a safety sensitive position in train service.'' The position of the Company is that Mr. Musselwhite's abuse of alcohol rendered him medically unfit for continued employment in a safety sensitive position within the running trades.

This is, to some extent, a case of first impression. The instant case does not involve an alleged violation of Rule G. There is no suggestion on the evidence before the Arbitrator that the grievor was terminated for using alcohol on duty or while subject to duty contrary to that rule. The burden of the Union's position is that while Mr. Musselwhite is, by his own admission, a heavy drinker, he is not alcohol dependent and his off-duty drinking habits pose no risk to Company operations. The Company disagrees.

The evidence before the Arbitrator concerning Mr. Musselwhite's medical condition as it relates to the consumption of alcohol is extensive. In November of 1988 Mr. Musselwhite was diagnosed as having liver dysfunction caused by the abuse of alcohol. He then voluntarily entered into the Company's Employee Assistance Program and, for a time, abstained from the consumption of alcohol. He was given a medical leave of absence which extended until January 4, 1989. During that time he received out-patient treatment at an Edmonton clinic of the Alberta Alcoholism and Drug Abuse Commission. In January of 1989 further medical examinations confirmed his fitness to return to work. It is clear, however, that at that time the grievor did not, as he still does not, admit to an alcohol dependency problem. It is common ground that in the early part of 1989 he resumed his drinking habits, with the result that in the latter part of May blood tests again disclosed that he was suffering from an alcohol related liver condition. This resulted in his removal from service effective May 25, 1989. From that time onward the position taken by the Company was that so long as Mr. Musselwhite failed to bring what it viewed as his alcohol dependency under control he could not be returned to service.

Little changed until March 14, 1990 when the grievor was assessed fifteen demerits for ``failure to take corrective action to comply with the requirements of UCOR General Rule C from January 17, 1990 up to and including March 14, 1990.'' That discipline, along with the grievor's subsequent discharge, are the subject of this grievance.

During the course of the Company's disciplinary investigation conducted in March of 1990 the grievor submitted to the Company two medical reports. One was from an internist, Dr. K. Bhargava, and the second from his own physician, Dr. Daintree, which confirmed his medical condition as ``altered liver function on the basis of chronic abuse of alcohol'' and ``alcoholic liver disease''. On the strength of that information further medical assessments were conducted by the Company, based on the grievor's existing medical records. On May 1, 1990 CN Regional Medical Officer Dr. R. Hillis concluded that the grievor remained medically unfit for duty. No significant change or improvement occurred in the grievor's condition, and he continued to be held out service. It may be noted that no grievance was taken against the grievor's being held out of service prior to his discharge. On October 2, 1990 the grievor was again assessed by the Company's doctors at Edmonton. The report of

Dr. Hillis with respect to that assessment is as follows:

The above-named Transportation employee presented to the CN Medical Clinic October 2, 1990 for review of his fitness to work. Dr. E. Ghitter conducted the assessment, determining that Mr. Musselwhite does not admit to any significant medical condition being present.

On this basis, further follow-up is required before a full physical examination will be conducted. The necessary steps have been outlined to Mr. Musselwhite, and a copy of Dr. Ghitter's written notes made available for his review and use (a similar copy is attached to this memo for your consideration).

Therefore, Mr. Musselwhite has seven (7) days to comply with laboratory testing (he was given a requisition to any of the Hansen labs) and to reach a decision as to whether he will commit to full participation in the CN Employee Assistance Program.

In summary, Mr. Musselwhite remains unfit for employment duties in the safety sensitive position of Conductor/Trainman at this time. Medical clearance for return to work remains contingent on the outlined steps. An update will be forwarded in one week's time. The Dr. Ghitter referred to above is the doctor who preceded Dr. Hillis as the Company's doctor in Edmonton, and who had previously assessed Mr. Musselwhite. Following the foregoing communication, and in light of the grievor's apparent unwillingness to acknowledge that he has a medical problem related to alcohol which impacts his capacity to work in a safety sensitive position and to take any steps to correct it, the Company indicated to the Union its intention to terminate his services. A meeting between Company and Union officers was held on November 16, 1990 at which time the grievor was given a final chance to enrol in the Employee Assistance Program and take steps to correct his condition, failing which he would be terminated. The Company's offer was declined and his termination ensued effective November 30, 1990.

This case involves a balancing of the rights of employer and employee in circumstances involving a heavy off-duty drinker. Mr. Musselwhite's use, and indeed his abuse, of alcohol outside of work is admitted, and is documented to the extent that it has caused liver dysfunction over a substantial period of time. The Union's position, however, is that the grievor's drinking is a private, off-duty matter which does not impact his employment relationship, and cannot be the basis for any discipline at the hands of the Company. Its position is based on its view that the grievor's consumption of alcohol is not beyond his control, and that notwithstanding its negative effects on his health, and the risk of still greater damage in the future (of which he has been warned by his own doctors) he is nevertheless fit to work. It stresses that he does not mix alcohol and work. The Union's position is perhaps best summarized by the report following his examination by Dr. Bhargava on July 17, 1989. He confirms that the grievor suffers altered liver function and that regular use of alcohol by him could eventually cause cirrhosis of the liver. Dr. Bhargava goes on to state: In my opinion so long as he doesn't report for work under the influence of alcohol and so long as alcohol is not found to be influencing his work abilities, he should be able to work with the CN.

However, evidence adduced by the Company through the testimony of two physicians at the arbitration hearing points to a different conclusion. Both Dr. Hillis and Dr. Eva Videns, a specialist in addiction medicine currently practicing in Toronto, gave extensive evidence as to the continued employability of the grievor given his present medical condition. Of particular significance, in the Arbitrator's view, is the testimony of Dr. Videns as it relates to the state of current medical knowledge of the sensory and motor responses of persons who, like the grievor, show medical evidence of continuing chronic alcohol abuse, quite apart from dependency or intoxication while at work.

Firstly, Dr. Videns established, on the basis of the medical records available respecting the grievor's history, that with the exception of the short period of abstinence during which he was involved in the Company's EAP program, the grievor has had a minimum intake alcohol per day that corresponds to his admitted intake and which has caused, and continues to cause, his liver dysfunction. She referred in particular to tests relating to the size of the grievor's red blood cells, as well as the ``GGT test'' which relates to an enzyme present in the bile ducts and lastly what she described as the ``AST test'' relating to liver cells. The unchallenged evidence of Dr. Videns is that a reading of these three indicators provides an eighty-eight to ninety-nine percent accurate assessment of the presence of alcohol abuse in an individual. She confirms that, with respect to Mr. Musselwhite, the readings of these indicators, as well as a diagnosis of ``vascular spiders'' or a network of damaged blood vessels on the skin, made in July of 1989, all confirm on-going alcohol abuse, resulting in serious liver damage, over the medical history examined.

Significant in Dr. Videns' evidence is her disclosure that current knowledge in the field of addiction medicine recognizes that a person in the circumstances of Mr. Musselwhite has a high probability of suffering diminished sensory and motor responses, even while sober. In other words she confirms that in her opinion there is a very high likelihood that the grievor will suffer impaired judgement and coordination in both sensory and motor functions. She explains that the degree of risk may vary upwards with still greater average alcohol intakes and can be aggravated by other factors such as sleep deprivation. On the basis of the medical evidence relating to the grievor's record before her, Dr. Videns expresses the opinion that the ongoing risk of the impairment of the sensory and motor functions of Mr. Musselwhite is sufficient to disqualify him from service in a safety sensitive position, at least until his condition is reversed.

A second dimension of concern expressed by Dr. Videns relates to the problems of withdrawal. She confirms that should a person in the position of the grievor cease drinking there is a high probability of an unpredictable physical reaction, which can be delayed as long as three to seven days after alcohol intake has stopped. The withdrawal symptoms can range from relatively mild manifestations such as being jittery, nauseated or having a rapid heart beat to more extreme states such as uncontrolled shaking, hallucinations and, in the extreme case, grand mal seizures and unconsciousness. While she acknowledges that the precise timing and degree of withdrawal reaction cannot be predicted for a person in the grievor's circumstance, in her opinion there is a likelihood that Mr. Musselwhite would suffer some withdrawal symptoms. She added that these might be avoided or diminished if his drinking is reduced gradually.

In conclusion, Dr. Videns testified that in her opinion, in light of the objective and uncontradicted evidence relating to the grievor's history of alcohol abuse, his liver dysfunction and the admitted fact that he has taken no corrective steps to the present, he cannot be considered physically fit to work in a safety sensitive position such as that of a conductor who is responsible for the movement of a train. It is clear that Dr. Videns' opinion is not based on any hypothesis that the grievor would drink surreptitiously and be intoxicated or impaired by the fresh consumption of alcohol while he is on duty or subject to duty. Rather, her assessment is entirely based on her diagnosis that, as long as the grievor continues to abuse alcohol at the same rate, there is a real and continuing risk that he will suffer diminished capacity in his sensory, cognitive, judgemental and motor functions during hours when he is not drinking. She affirms that the risk inherent in his condition would substantially jeopardize safety and that it therefore renders him unfit for duty in the safety sensitive position of a train conductor.

The evidence of Dr. Videns must be viewed as substantially un rebutted. It is true that certain of the medical opinions before me, including that of Dr. Bhargava, appear to be inconsistent with the view of Dr. Videns. However, there is no evidence to establish that the authors of those opinions have the experience and qualifications of Dr. Videns, whose expertise in addiction medicine is not challenged. Nor, in fairness to them, is it established that their opinions are based on the same degree of knowledge of the grievor's medical history and vital indicators as were fully analyzed by Dr. Videns. Moreover, the distinction which appears to be made by Dr. Bhargava between working while intoxicated and alcohol influencing Mr. Musselwhite's working abilities may reflect a recognition on his part of the particular risks that can flow from liver damage. In any event, on the whole, the Arbitrator is satisfied that the more elaborated opinion advanced by Dr. Videns is to be preferred. It is, in my view, a persuasive justification of the action taken by the Company both in removing the grievor from service and, when he declined to take steps to correct his liver condition and to change his habits with respect to the consumption of alcohol, in terminating his services.

In my view, the foregoing conclusion can be drawn without resolving any semantic disputes raised with respect to whether the grievor is or is not ``alcohol dependent''. It is of little moment whether Mr. Musselwhite is an ``alcoholic'' who cannot control his drinking or whether he is, as the Union submits, merely a ``heavy drinker'' who can. Whatever he may be, I find the evidence of his present medical condition to be compelling. Because of the relationship between liver dysfunction and the high risk of diminished capacity in his sensory and motor functions in ways and at times that cannot be precisely foreseen, as well as the possibility that he could suffer unpredictable withdrawal symptoms, Mr. Musselwhite must be viewed as medically unfit for active service in any safety sensitive position. The issue then becomes whether some measure short of discharge is appropriate in the circumstances of this case. After careful consideration of all of the evidence, I am persuaded that there is scope for some mitigation of the consequences in a manner that will protect the legitimate interests of the employer while ensuring a degree of equity to the grievor, who is an employee of long service. As Counsel for the Union stresses, at the time Mr. Musselwhite declined to re-enter the Company's EAP program he had not been given a clear medical diagnosis to the effect that he was medically unfit for work for the reasons disclosed in Dr. Videns' testimony. On the contrary, his own specialist expressed the opinion that he could safely perform his duties as a conductor. For the reasons related above, that opinion is questionable and cannot, in the Arbitrator's view, be preferred to the contrary opinion of Dr. Videns. It is clear that while Mr. Musselwhite was given to understand both by his own doctor and by the Company's doctors that he was placing his own health at risk by his continued off-the-job drinking, he was never made aware of the link between that conduct and the high risk of his diminished capacity to work while sober.

The evidence before me is that the grievor's condition is not beyond correction and can be reversed. In light of that evidence, in light of the concern for fairness touched on above, and in light of the grievor's nearly twenty years of service and positive work record, I am satisfied that an appropriate conditional order of reinstatement can be fashioned. The Arbitrator therefore directs that Mr. Musselwhite be reinstated into his employment, without compensation for wages and benefits lost, and without loss of seniority, on condition that he demonstrate his medical fitness to return to work and his willingness to submit to such medical tests or examinations as the Company deems appropriate, from time to time, to monitor his ongoing fitness to work. For the purposes of this award ``fitness to work'' shall mean freedom of alcohol abuse to a degree that satisfies Dr. Videns, or, failing her availability, another specialist who is mutually acceptable to the Company and the Union, that he is not at risk of suffering diminished sensory and motor reactions while sober, or of suffering withdrawal symptoms which could jeopardize safety. However, should the grievor not bring himself within the conditions of this award within one year of the date hereof, his right to reinstatement shall cease. The Arbitrator retains jurisdiction in the event of any dispute between the parties with respect to the interpretation or implementation of this award.

October 24, 1991

(Sgd.) MICHEL G. PICHER

ARBITRATOR