

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2716

Heard in Montreal, Thursday, 14 March 1996

concerning

CANADIAN PACIFIC LIMITED

and

TRANSPORTATION COMMUNICATIONS UNION

DISPUTE:

The dismissal of Train Machine Clerk Wayne Martin effective February 24, 1995.

JOINT STATEMENT OF ISSUE:

On February 9, 1995, an investigation was held with Train Machine Clerk W. Martin in connection with an incident involving Ports Canada Police during his tour of duty on February 2, 1995.

On February 27, 1995, Mr. Martin was dismissed from Company service for "conduct unbecoming an employee as evidenced by you receiving a suspension of driving privileges for a 24-hour period, for consuming alcohol and possession of a controlled substance cannabis, during your tour of duty; a violation of Form 330-2, Item I, paragraph (G), at Williston Yard, February 2, 1995.

The Union maintains that Mr. Martin's discipline penalty of dismissal was both unjust and excessive as Mr. Martin did not consume alcohol nor was he in possession of a controlled substance during his February 2, 1995, tour of duty. The Union further maintains that Mr. Martin was not in violation of Form 300-2, Item 2, paragraph (G).

The Union also submits that Mr. Martin has sought help for his problems and has successfully completed a recognized alcohol and substance abuse residential program and he continues to participate in an extensive after care program with Alcoholics Anonymous.

The Union progressed a grievance in connection with the dismissal of Mr. Martin requesting that, in view of Mr. Martin's successful rehabilitation efforts, he be reinstated with full seniority, salary and benefits.

The Company declined the Union's grievance.

FOR THE UNION:

(SGD.) L. HILDEBRAND
FOR: DIVISIONAL VICE-PRESIDENT

FOR THE COMPANY:

(SGD.) C. GRAHAM
FOR: GENERAL MANAGER, OPERATIONS & MAINTENANCE

There appeared on behalf of the Company:

C. Graham – Labour Relations Officer, Montreal
S. Moutinho – Labour Relations Officer, Montreal

And on behalf of the Union:

R. Pagé – Executive Vice-President, Winnipeg
N. Lapointe – Assistant Divisional Vice-President

AWARD OF THE ARBITRATOR

Upon a review of the material filed in evidence the Arbitrator is satisfied, on the balance of probabilities, that the grievor did consume alcohol during his tour of duty on February 27, 1995, and was in possession of a small amount of marijuana, found in his vehicle by Ports Canada Police. When regard is had to the admission made by Mr. Martin to the officers who stopped him in his vehicle on the evening of February 27th, it is difficult to conclude other than that he did consume alcohol, presumably during his lunch break, and that he also used a small amount of cannabis, given his admission to that effect made to Ports Canada Police Constable Klassen. The record reveals that the police did not bring any charges against the grievor, who declined to take a breathalyzer test. They did, however, serve him with a notice of a twenty-four hour driving prohibition, and apparently seized and disposed of the small amount of marijuana found in a plastic bag on the rear seat of his car.

The issue of real substance in this case is whether the Arbitrator should use his discretion to substitute a penalty other than discharge, regard being had to a number of mitigating factors presented by the Union. The evidence marshalled in support of the Union's request for an alternate penalty is not inconsiderable. The grievor is an employee of sixteen years' service to the Company, whose disciplinary record was clear at the time of the events leading to his discharge. He had never previously been disciplined for any similar infractions. Most importantly, it is not disputed that shortly after the events of February 27 Mr. Martin started down a path of rehabilitation that continues to the present time. He contacted a referral agent of the Company's EFAP Office on or about March 3, 1995, at which point he signed a "contract for successful treatment", undertaking to have an assessment appointment at the Maple Ridge Treatment Centre. Thereafter he was admitted to the Centre and successfully followed a twenty-eight day residential treatment program for chemical dependency, which he completed on April 28, 1995. The prognosis of his counsellor at the Treatment Centre, filed in evidence, expressed in a letter dated April 27, 1995 states, in part:

If Wayne continues involvement with AA or NA we feel he has a good chance of maintaining abstinence and improving the quality of his life.

The evidence confirms, overwhelmingly, that the grievor has successfully participated in follow-up programs of Alcoholics Anonymous. Attendance records of that organization presented to the Arbitrator disclose that since April 2, 1995, on a basis of several times a week, Mr. Martin has faithfully attended and participated in AA meetings on a regular and uninterrupted basis. Based on the material filed the Arbitrator accepts the representation of the bargaining agent that the grievor has not consumed alcohol or drugs since the commencement of his rehabilitative program in April of 1995, which represents close to a full year of sobriety.

The Arbitrator cannot accept the argument of the Company's representative, nor the reasoning of certain cases decided in the earlier years of this Office, which predate current human rights legislation and arbitral jurisprudence, to the effect that an employee discharged for the possession or consumption of alcohol or non-prescription drugs cannot, thereafter, legitimately claim that he or she should be reinstated based on rehabilitation efforts undertaken after the discharge. Both legislation in Canada, such as the **Canadian Human Rights Code**, and an extensive body of arbitral jurisprudence, clearly recognize that alcoholism and drug addiction are a form of illness, and are to be treated as such. When, as in the instant case, an employee can demonstrate by clear and compelling evidence that he or she has made substantial strides in gaining control of an addictive condition, even if it be after the culminating and sometimes galvanizing event of discharge, it is incumbent upon a board of arbitration to take full cognizance of that reality in considering whether to exercise the board's statutory discretion to reduce the penalty of discharge. Any other approach would, in my respectful view, run contrary to current statutory standards which prohibit discrimination on the basis of an illness such as alcoholism or drug addiction, and specific statutory provisions which now compel employers and unions alike to explore means of reasonable accommodation for persons so afflicted.

It is, of course, important for boards of arbitration to safeguard against spurious claims of rehabilitation, patched together in an opportunistic way so as to regain employment for an individual who has not in fact either recognized or truly come to grips with his or her addiction. It is for that reason that this Office, and other boards of arbitration generally, place a significant onus upon the employee seeking the benefit of the arbitrator's discretion to bring forth substantial documentary evidence to confirm a meaningful course of rehabilitation and follow-up.

That standard of evidence has been well satisfied in the instant case. In the Arbitrator's view the grievor has made substantial strides in acknowledging and bringing under control his addiction problems. That, indeed, is not

substantially disputed by the Company. In the circumstances I am satisfied, for reasons related in prior awards of this Office, that the interests of the Company can be reasonably protected, and balanced against the interests of the grievor, by a denial of compensation and a reduction of penalty, subject to conditions fashioned to protect the employer against a relapse or a reoccurrence.

The Arbitrator therefore directs that the grievor be reinstated into his employment, without compensation or benefits, and without loss of seniority subject to the following conditions. A first condition of the grievor's reinstatement is that he abstain from the consumption of alcohol and non-prescription drugs. For the period of two years following his reinstatement, Mr. Martin shall continue participation in the meetings of Alcoholics Anonymous, or any similar organization, with his attendance at such meetings to be confirmed, on a quarterly basis, to the Company in writing by a responsible officer of that organization. Mr. Martin shall also be subject, for the two year period, to random alcohol or drug tests, to be administered by the Company in a non-abusive fashion. Failure on the grievor's part to honour the conditions of reinstatement shall render him liable to discharge.

March 15, 1996

(signed) MICHEL G. PICHER
ARBITRATOR