CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3198

Heard in Calgary, Thursday, May 10, 2001

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA)

EX PARTE

DISPUTE:

Dismissal of Edmonton terminals Machine Operator Alfred Davidson.

UNION'S STATEMENT OF ISSUE:

On April 23, 1997 Alfred Davidson received an impaired driving charge. The Company investigated the matter on August 26, 1997. As a consequence of this, on August 25, 1997, Mr. Davidson was required under the Company Drug Testing Policy to undergo a drug test.

On September 10, 1997 the Company investigated Mr. Davidson in regard to testing positive to the drug test performed on August 25, 1997. As a result Mr. Davidson was held out of service until a "Continuing Employment Contract" was signed by Mr. Davidson and the Union on November 12 and November 14, 1997 respectively.

Mr. Davidson was randomly tested five or six times over the next twelve months, the test results of which were negative. In December of 1998 Mr. Davidson tested positive for marijuana.

On December 30, 1998 Mr. Davidson was investigated for: "Failing to comply with the provisions of your continuing employment contract" and as a consequence, on January 12, 1998 (sic) was dismissed for: "Violation of your continued employment contract dated November 10th, 1997".

It is the contention of the Union that: **(1.)** the Company did not establish a relationship between the testing of Alfred Davidson and impairment on the job. **(2.)** the Company Drug Testing Policy is arbitrary and discriminating in relation to Human Rights Laws and Regulations and the collective agreement; and **(3.)** The "Continuing Employment Contract" is discriminatory and arbitrary in relation to Human Rights laws and regulations and the collective agreement; and **(4.)** Mr. Davidson was treated in an arbitrary, discriminatory and an excessive manner in regard to his dismissal.

Therefore, with regard to the foregoing, it is the position of the Union that Machine Operator Alfred Davidson should be returned to duty forthwith without loss of seniority, with full redress for all lost wages, benefits and losses incurred as a result of his dismissal, including, but not limited to, interest on any moneys owing.

The Company denies the Union's contentions and claim.

FOR THE UNION:

(SGD.) RICK JOHNSTON
PRESIDENT, COUNCIL 4000

There appeared on behalf of the Company:

S. Blackmore	– Labour Relations Associate, Edmonton
D. S. Fisher	– Director, Labour Relations, Montreal
S. Michaud	– Human Resources Business Partner, Vancouver

R.Reny	– Human Resources Associate, Vancouver
S. Ziemer	– Human Resources Associate

And on behalf of the Union:

Brian McDonagh	– National Representative, Vancouver
B. Kennedy	– Regional Representative, Edmonton
A. Davidson	– grievor

AWARD OF THE ARBITRATOR

The issue is whether the Arbitrator should overturn the grievor's discharge when his termination was implemented in accordance with the terms of a "last chance" agreement. The Union submits that the grievor's failure to maintain the conditions of the agreement, by testing positive for marijuana, involved a relapse of a physical disability, and that the agreed consequence of automatic discharge fails to properly accommodate his condition, contrary to the requirements of the **Canadian Human Rights Act**. In that regard it relies on a series of prior arbitration awards, culminating in the recent decision of Arbitrator M. Lynk in **Re Canadian Waste Services Inc. and Christian Labour Association of Canada** (2000), 91 L.A.C. (4th) 320.

The Company takes the position that the terms of the continued employment agreement executed by the grievor, and also signed by the Union's Vice-President, do not violate the **Human Rights Act**, and represent a considered agreement reached between the parties, the substance of which should not be overturned by a board of arbitration.

The record before the Arbitrator reveals that the grievor, Edmonton Terminal Machine Operator Alfred Davidson, has been employed by the Company for some eighteen years, during which time he has had a good work and discipline record. The record also discloses, however, that Mr. Davidson has an extensive history of substance abuse. As reflected in a letter drafted by Assessment Counsellor Karen Bell, dated August 29, 1997 Mr. Davidson has suffered a history of problems with alcohol. It appears that in 1990 he attended the Henwood Treatment Program for alcohol abuse. His difficulties with respect to alcohol resurfaced in April of 1997, when he was charged with impaired driving. The grievor failed to report the charge to the Company, and upon being advised of the circumstances it conducted a disciplinary investigation in Edmonton on August 26, 1997. In partial explanation of the circumstances of his impaired driving charge on April 23, 1997 Mr. Davidson responded that the deaths of friends and family member had caused him personal stress.

It appears that the day prior to the investigation of August 26, 1997 the grievor underwent a medical examination, including a drug and alcohol urinalysis test. That test proved positive for marijuana. As a result, the Company's Occupation Health Services restricted Mr. Davidson from safety sensitive work. For the purposes of this grievance, and without prejudice to any outstanding issues between the parties in that regard, I am satisfied that the work performed by Mr. Davidson as a heavy equipment operator, which includes responsibilities requiring CROR qualification, a valid class III driver's licence and the obligation to operate on and around track, does constitute a safety sensitive position.

Following the grievor's disqualification from safety sensitive work as a result of his positive drug test, the Company held a further investigation on September 10, 1997. During the course of that investigation the grievor indicated that he would be agreeable to accepting the conditions of a continuing employment contract, which would include a follow-up program. Subsequently, on November 12, 1997 Mr. Davidson signed a continuing employment contract, a document co-signed by his Union representative, Vice-President R. Storness-Bliss. The terms of the agreement, which is dated November 10, 1997 and is noted as being "without prejudice or precedent" are as follows:

> The Company has detailed the conditions of your continued employment which requires your acknowledgement and concurrence prior to being returned to active service. The District Engineer, Great Plains District, will be advised and will make the arrangements necessary to immediately accommodate your return to active service once your concurrence is received regarding the following:
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> **1.** You must agree to be medically examined, including tests for drug/alcohol abuse prior to return to active service. You must also agree to unannounced tests for drug/alcohol use for a minimum period of three years and up to five years from the date of your return to service.
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> **2.** You must continue to participate in the activities of Alcoholics Anonymous, and participation must be confirmed through documented reports by written confirmation form an

appropriate officer of the organization provided quarterly to the District Engineer for a minimum period of three years and up to five years from the date of your return to service.

3. You must agree to post-treatment monitoring by Med Can and CHC for a minimum period of three years and up to five years from the date of your return to service, with release of information for the Chief Medical Officer of the Company to discuss on-going progress.

Note: "Med Can" is a service provider under contractor with the Company to complete medical examinations and follow-up requirements.

4. You must agree to liaise on a regular basis (Monthly) with two members of the Edmonton EFAP committee, the persons to be chosen by yourself. These members of the EFAP committee will liaise regularly with the EFAP System Manager as to your progress.

5. At all times you will be expected to fully comply with the requirements of CROR General Rule G as a condition of employment including complete abstinence form alcohol and illicit drugs.

6. While employed by CN Rail, should you fail to abstain from drug and alcohol use, and/or fail to comply with the full conditions of this contract, you will be discharged form the Company and will not be considered for reinstatement.

7. Supervisors will have the authority to insist on a drug/alcohol test in a "just-cause" situation. Such tests are to be administered as soon as possible and in all cases within forty-eight hours of your notification. In a "just-cause" testing situation, you will also be required to attend the CN Medical Clinic for medical evaluation. You must authorize a release of medical information pertaining to this specific drug/alcohol test and medical evaluation.

Just Cause is defined as: "Where an employer has reasonable grounds to believe that you have caused or contributed to an accident/incident or you have demonstrated a failure to meet the various requirements of the reinstatement conditions."

8. You will be subject to frequent observations for compliance with these conditions (which may be shared with Med Can) for a minimum period of three years and up to five years from the date of your return to service.

9. Your acceptance of the conditions herein, along with the concurrence of the Vice-President, C.A.W., (which is understood to be on a without prejudice or precedent basis) will enable your return to active service with the Company.

In the following year, on December 14, 1998 the grievor again tested positive for marijuana during a routine follow-up appointment. A further disciplinary investigation ensued on December 30, 1998 and Mr. Davidson was discharged from service on January 12, 1999 for the violation of his continuing employment contract.

No issue as to the regularity of the drug test is taken in these proceedings. In fact Mr. Davidson admitted to the consumption of marijuana. By his account, he found himself at a house party where others were smoking marijuana and, depressed by the break-up of his engagement, he succumbed and joined in the smoking of marijuana. By his account he consumed only two puffs, and realized the mistake he had made, leaving the party shortly thereafter.

The Union's representative submits that the Company has failed to establish any relationship between the grievor's consumption of marijuana and impairment on the job. He further submits that the Company's drug testing policy, including the terms of the grievor's last chance agreement, are arbitrary and discriminatory, and fail to recognize the obligation to reasonably accommodate a person with a disability, such as Mr. Davidson, in respect of continued employment and efforts toward recovery from his condition. On that basis he submits that the grievor should be reinstated into his employment with full compensation for all wages and benefits.

Central to the Union's argument is the decision, noted above, of Arbitrator Lynk in **Re Canadian Waste Services Inc.** That award, it should be noted, concerned an employee who exhibited chronic absenteeism, including a pattern of absences on Mondays and Fridays. Following the grievor's dismissal for absenteeism the Union succeeded in negotiating a "last chance agreement" for his continued employment, subject to certain established conditions. Among the conditions was the requirement of a stipulated maximum permissible rate of absenteeism. The grievor nevertheless continued to register some absences, leaving himself little margin of protection. Eventually

he exceeded the permissible maximum days of absence, as a result of an injury to his wrist incurred during off-duty activities. It does not appear disputed that his wrist or arm injury required medical attention and did prevent him from attending at work. It is that final absence which triggered his discharge.

In that circumstance Arbitrator Lynk found that the last chance agreement, and the manner in which it was applied by the Company, was in violation of the grievor's protections under the **Ontario Human Rights Code**. While acknowledging the deference which arbitrator's normally give to last chance agreements, he concluded that the **Code** must prevail, and that the grievor's ultimate discharge for a cause entirely related to a physical disability was in itself contrary to the **Code**. In that regard he reasoned, in part, as follows at pp. 328-29:

> Accordingly, arbitrators are understandably reluctant to interfere with the terms of a last chance agreement. These LCAs, including the one before me, are usually clearly drafted, and the expectations are well understood by the parties. If they can be easily undone by a grievor's claim that her or his unexpected or unintended relapse cause the attendance or performance breach of the LCA, the employers would have little incentive to enter into these agreements in the future. As Arbitrator Davie stated in *Re Standard Products (Canada) Ltd.*, at p. 96:
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> > If arbitrators do not uphold or enforce "last chance" agreements, parties would be discouraged from resolving matters and agreeing upon conditions which generally reflect prevailing arbitral jurisprudence and the specific circumstances of an individual case.
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> Having stated this, it is important to recognize that recent rulings by the courts and by arbitration boards have clearly held that LCAs are not immune from human rights obligations. Arbitrators are required to read LCAs with the *Ontario Human Rights Code* and other relevant employment statues in mind, and they must ignore or nullify any provisions that would breach, even unintentionally, the principle that industrial relations parties cannot contract out of their statutory duties: *O.P.S.E.U. v. Ontario (Ministry of Community and Social Services)* (1996), 96 C.L.L.C. ¶230-016 (Ont. Div. Ct.); *Ontario (Human Rights Commission) v. Gaines Pet Foods Corp.* (1993), 16 O.R. (3d) 290 (Div. Ct.); *Re Thunder Bay (City), supra,* Arbitrator Michel Picher ruled in *Re Slater Steels and U.S.W.A. Loc. 4752 (Corbacio)* (1998), 76 L.A.C. (4th) 241, that a last chance agreement provision which failed to appreciate a grievor's mental disorder breached the Ontario *Human Rights Code*, and was therefore not enforceable. At p. 247, he stated that:
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> > In light of that determination, I am satisfied that the restriction of jurisdiction which is placed upon an arbitrator by the terms of the last chance agreement must be viewed as inoperative, to the extent that that agreement itself is discriminatory in its treatment of [the grievor], in a manner contrary to the protections which he has under the Ontario *Human Rights Code*. …

Arbitrator Lynk finally concluded that the grievor's rights under the **Code** were violated, as reflected in the following passage from p. 332:

> For the purpose of this case, it is sufficient to find that Mr. McGee's wrist injury on 19 July resulted in a physical disability, which directly led to his subsequent absence from work on 21 July. Thus, the circumstances of these events involving Mr. McGee fell within the definition of "handicap", as per the *Human Rights Code*. He is entitled to the protection of the *Code*, which supersedes the provisions of the LCA that triggered his termination.
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> V. Conclusion
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> For the reasons stated, it is my decision that the Union grievance must succeed. Mr. McGee's absence from work on 21 July 2000 was the result of a "handicap". Consequently, the decision of the Employer to dismiss Mr. McGee because of his absence from work on 21 July breached its obligations under the *Human Rights Code*.

It should be noted, however, that Arbitrator Lynk did not suggest that an employee's absence precipitated by a disability could not, in some circumstances, justify the employee's termination. In that regard he commented at pp. 332-33 in the following terms:

> One final comment can be made in *obiter*. I have found in this decision that the injury to Mr. McGee amounted to a handicap, and therefore the triggering of the LCA dismissal vision reached the *Human Rights Code*. There was insufficient evidence and argument before me to find that the absences had caused undue hardship to the Employer. This ruling should not be taken by anyone as a licence to adopt or resume unacceptable patterns of absenteeism such as the patterns that promoted the creation of this LCA in the first place. Arbitrators have clearly stated that, even in absenteeism cases where a handicap was a determining or prominent factor for the employee's absence from work, there can be a point where, despite the handicap, any further efforts by the employer to accommodate the employee's inability to attend work can amount to an undue hardship, and a termination is justified.

It is important to understand the **Canadian Waste Services Inc.** decision in its context. The grievor in that case appears to have been placed under a last chance agreement following an abysmal record of absenteeism that can fairly be characterized as behaviour related, tied as it was to a tendency to extend weekends, and without the apparent involvement of any medical condition or other physical disability. In that circumstance it is understandable that the arbitrator would have been concerned that a disability, protected by the **Code** and unrelated to the grievors' previous problem of absenteeism, should emerge as the triggering event in support of the employee's automatic discharge. It is understandable that in that situation the arbitrator might well have concluded that there was a failure to give due consideration to the duty of accommodation. As reflected in the **Slater Steels** decision, this Arbitrator has no difficulty with the approach taken by Arbitrator Lynk, and other boards of arbitration which have acknowledged the primacy of statutory human rights protections.

In my view, however, the instant case must fairly be distinguished. As the record before me reveals, Mr. Davidson has a long record of struggling with substance abuse. The earliest manifestations of it appear to have resulted in his following a professional treatment program in 1990. His impaired driving charge in 1997 plainly reveals that that problem was not brought under control, and as the drug test taken at the time indicated, was perhaps compounded by his use of drugs.

Bearing in mind that the grievor occupied a safety sensitive position, and had an extensive history of substance abuse requiring treatment, the Arbitrator is not persuaded that the grievor was made the victim or an arbitrary or discriminatory last chance agreement. A number of factors support that conclusion. Firstly, as noted in the letter of August 29, 1997 of Counsellor Bell, the grievor apparently abused alcohol, resulting in his impaired driving charge, as a means of coping with the death of his sister. As the counsellor expressed it: "This is a pattern for Mr. Davidson." That diagnosis is to some extent borne out by Mr. Davidson's own account of his violation of his continued employment agreement. He explains his use of marijuana as prompted, in part, by his depression over the break-up of his engagement. In fact the medical records filed in evidence indicate that the grievor also has something of a history of clinical depression for which he has undergone medical attention. It also appears, contrary to the suggestion of the Union, that on at least one occasion during the currency of the last chance agreement which he signed Mr. Davidson did consume alcohol. A substance abuse evaluation follow up form, dated September 17, 1998 reflects the following answer by the grievor to the question as to whether he had consumed alcohol since his last appointment: he apparently responded that he had in fact taken a "sip" … "to celebrate getting his driver's licence back".

Mr. Davidson was somewhat less candid in his next follow up meeting. The interview form for that encounter, dated December 14, 1998 records a denial of any drug use since his last appointment and simply relates with respect to any triggering of his desire "at bikers party – had second hand pot smoke blown in face." During that same interview he described his emotional status as "good".

The history of Mr. Davidson's treatment does not, in the Arbitrator's view, sustain the Union's argument that he is the victim of arbitrary or discriminatory disregard of his rights under the **Canadian Human Rights Act**. On the contrary, the evidence reveals that the Company acknowledged and responded to what it perceived as Mr. Davidson's record of substance abuse dating back to 1990 by providing him an opportunity to pursue a course of follow up treatment as a condition of his continued employment pursuant to the agreement which he and his Union signed on November 12, 1997. I am satisfied that Mr. Davidson's removal at that time from safety sensitive work, and his continued employment under the conditions of the agreement in fact satisfied the requirement of reasonable accommodation to which he was entitled in light of his acknowledged substance abuse problem. Indeed, on the facts of this case the Union's consent to the continuing employment contract can fairly be construed as an agreement on its own part that that the arrangement was itself a fair accommodation of Mr. Davidson's condition, and that any

requirement to employ him in the face of his failure to meet the conditions would constitute undue hardship. The fact that the document may bear the words "without prejudice" is of little significance given the facts of the case. The grievor and the Union obviously had the choice to decline to sign the agreement and to pursue Mr. Davidson's rights under the grievance and arbitration provisions of the collective agreement, if they chose to do so. I am satisfied that in all of the circumstances they can fairly be taken to have essentially agreed that the last chance agreement was a suitable form of accommodation. It is my own view that it did constitute reasonable accommodation short of the point of undue hardship, and that the grievor's eventual termination for his failure to respect the conditions of the agreement did not involve a denial of his right to be further accommodated in conformity with the requirements of the **Canadian Human Rights Act**, as his continued employment would constitute an undue hardship to the Company.

The material before the Arbitrator indicates a long-standing substance abuse problem suffered by Mr. Davidson, as first noted in 1990 and culminating in his positive drug test in December of 1998. Bearing in mind the safety sensitive nature of his work duties, and the Company's efforts at accommodating his condition, including the substantive terms of the last chance agreement of November 12, 1997, I am satisfied that this is a case in which this Office should uphold the agreement made by the parties, for reasons well articulated in prior jurisprudence. Such agreements obviously have little value to employers, in the words of Arbitrator Lynk at p. 328 of the **Canadian Wastes Services** award: … "If they can be easily undone by a grievor's claim that her or his unexpected or unintended relapse caused … breach of the LCA, …". (See also **CROA 2595, 2632, 2743, 2753, 2965** and **3186**.)

For all of the foregoing reasons the grievance must be dismissed.

May 31, 2001

(SIGNED) MICHEL G. PICHER
ARBITRATOR