CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3269

Heard in Montreal, Thursday, 13 June 2002

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS
(UNITED TRANSPORTATION UNION)

DISPUTE:

Dismissal from employment of Conductor J.G. Caruso of Lethbridge, Alberta.

JOINT STATEMENT OF ISSUE:

Following an investigation Mr. Caruso was dismissed from Company service for "failure to adhere with (sic) the terms and conditions outlined in your return to work letter dated January 31,2001 as evidenced by you consumption of alcohol on April 25, 2001 at Lethbridge, Alberta."

The Council contends that the termination of Mr. Caruso was without just cause and was contrary to the collective agreement, including article 32, and the *Canadian Human Rights Act*.

The Council requests Mr. Caruso be reinstated with full compensation for wages and benefits and no loss of seniority. Alternatively, the Council requests reinstatement on terms the arbitrator considers appropriate.

The Company has declined the Council's request.

FOR THE COUNCIL:	FOR THE COMPANY:
(SGD.) L. O. SCHILLACI	(SGD.) C. M. GRAHAM
GENERAL CHAIRPERSON	FOR: GENERAL MANAGER OPERATIONS

There appeared on behalf of the Company:

C. M. Graham	– Labour Relations Officer, Calgary
K. Fleming	– Counsel, Calgary
D. Guérin	– Labour Relations Officer, Calgary
D. T. Cooke	– Manager, Industrial Relations, Calgary

And on behalf of the Council:

M. Church	– Counsel, Toronto
D. Finnson	– Vice-General Chairperson, Calgary
J. G. Caruso	– Grievor

AWARD OF THE ARBITRATOR

The material before the Arbitrator confirms that Mr. Caruso was reinstated into his employment by agreement between the Company, the Council and himself, pursuant to the terms of a Continuing Contract of Employment agreement dated January 31, 2001. It is not disputed that the arrangement was in contemplation of the grievor's condition as an alcoholic, and involved a number of conditions, including periodic unannounced drug and alcohol testing and adherence to the terms of an EFAP contract. The letter signed on January 31, 2001 contains, in part, the following paragraph:

> **(5)** Throughout your continued employment, you must adhere to the terms and conditions of your EFAP contract. Failure to adhere to these terms and conditions may result in the termination of your employment.

It is common ground that during the course of a conversation with his supervisor C. Lencucha on April 16, 2001 Mr. Caruso told his supervisor that he had consumed some alcohol on the evening of April 15, 2001, in violation of his EFAP contract. Following a disciplinary investigation conducted by on April 19, 2001 Mr. Caruso was dismissed for what the Company characterizes as a violation of his "last chance" agreement.

The Council seeks the reinstatement of Mr. Caruso, on terms and conditions which are appropriate. It maintains that he is owed accommodation by reason of his condition as an alcoholic, and that in the circumstances a minor relapse should not be viewed as conclusive as against the viability of his employment relationship. The Company submits that the "last chance" agreement reached with Mr. Caruso should be enforced, and that this is not a circumstance for a substitution of penalty.

The Arbitrator well appreciates the importance of last chance agreements. Their role as an instrument in rehabilitation, and, in some circumstances, as a form of accommodation for an addicted employee has been recognized by this Office on a number of occasions (see **CROA 2595, 2704, 2743, 2753, 2965, 3080, 3186** and **3198**).

Canadian jurisprudence does not, however, confirm that the violation of an agreement of the type which is the subject of this grievance must automatically result in an employee's termination. It is well established that each case must be reviewed on the merits of its own particular facts, and that in any event the application of any such agreement cannot be in violation of the duty of accommodation owed to an employee with a disability, in keeping with human rights codes such as the **Canadian Human Rights Act**. (**Re Toronto Transit Commission and Amalgamated Transit Union, Local 113**, (1998) 75 L.A.C. (4th) 180 (Davie); **Re Regional Municipality of Ottawa-Carlton and Ottawa-Carlton Public Employees Union, Local 503** (2000) 89 L.A.C. (4th) 412 (Mitchnick); **Re Camcar Textron Canada Ltd. and United Steelworkers of America, Local 3222** (2001) 99 L.A.C. (4th) 305 (Chapman))

As the jurisprudence reflects, in many cases arbitrators will conclude that the history of employees' treatment, culminating in a last chance agreement, reflects a sufficient degree of accommodation to support the conclusion that any further continuation of the employment relationship would be tantamount to undue hardship upon the employer. That is the analysis which has to be made in each case. The mere fact of a last chance agreement does not, of itself, confirm whether there has been sufficient compliance with the duty of accommodation established under human rights legislation of general application, legislation which the parties cannot contract out of, as confirmed by the Supreme Court of Canada (**Re Etobicoke (Borough) v. Ontario (Human Rights Commission)**, [1982] 1 S.C.R. 202 at p.213).

What, then, does the instant case disclose? Firstly, as the Company asserts, Mr. Caruso had been made the subject of an earlier conditional reinstatement by agreement. In December of 1999 Mr. Caruso was reinstated on a last chance basis subject to a conditional agreement relating to what was then perceived as absenteeism problems. When those problems persisted, in September of 2000, the grievor disclosed to the Company that he is an alcoholic. Rather than invoking the initial last chance agreement to discharge him, on the basis of his disclosure the Company agreed to draft a new "last chance" agreement, including the requirement of his entering into an EFAP contract. The parties fully recognized the grievor's condition as an alcoholic, and sought to establish terms to assist in his rehabilitation.

The Arbitrator is compelled to conclude that the Company's treatment of Mr. Caruso, over two separate "last chance" agreements, including the services of its EFAP, did constitute reasonable accommodation of his disability, to the point of undue hardship. Bearing in mind the safety sensitive nature of his duties, I cannot conclude that yet another "last chance" is justified, or that a third "last chance" would be short of undue hardship on the employer.

The progress recorded by Mr. Caruso in dealing with his condition, apparently undertaken some months following his discharge, is commendable. It does not change the fact, however, that his employer did meet its obligation of reasonable accommodation, for the reasons related above.

The foregoing reasons the grievance must be dismissed.

June 14, 2002

(signed) MICHEL G. PICHER
ARBITRATOR