CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3436

Heard in Edmonton, Tuesday, 13 July 2004

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

EX PARTE

DISPUTE:

Dismissal of employee N. for conduct unbecoming an employee.

UNION'S STATEMENT OF ISSUE:

On March 19th, 2003, N. was contacted by Ms. Rollande Richard to schedule testing pursuant to the conditions of a confidential personal contract entered into by N. As he had no means of transportation to the appointment, N. requested that transportation be provided. Ms. Richard contacted N.'s immediate supervisor and requested the transportation. During this conversation with [the supervisor], however, Ms. Richard revealed that N. was under the confidential contract.

When N. became aware that Ms. Richard had breached his confidentiality he called her and, quite upset, confronted her over this breach.

An employee investigation was held, based on allegations forwarded by Ms. Richard. The Company however refused the Union's request to have Ms. Richard present at the investigation. Following the statement, N. was dismissed for conduct unbecoming an employee.

The Union contends that the Company failed to provide a fair and impartial hearing and that the Company had no right to compromise the confidentiality of the personal contract and, while N.'s behaviour was excessive, it is certainly justifiable given the circumstances. Following an independent investigation the Privacy Commissioner of Canada found Ms. Richard's actions to be inappropriate and in contravention of the *Personal Information Protection and Electronic Documents Act*.

Despite the findings of the Privacy Commissioner, the Company maintains that no breach of confidentiality occurred and that dismissal is warranted.

The Union requests that N. be reinstated without loss of seniority, that he be made whole for all wages and benefits lost and that this incident be expunged from his record. Further, as a result of the failure to provide a fair and impartial hearing the discipline assessed should be declared void *ab initio*.

The Company disagrees.

FOR THE UNION:

(SGD.) R. A. HACKL
FOR: GENERAL CHAIRPERSON

There appeared on behalf of the Company [among others]:

D. Brodie	– Manager, Labour Relations, Edmonton
R. Reny	– Sr. Manager, Human Resources, Edmonton
J. Hunder	– Counsel, Edmonton

And on behalf of the Union [among others]:

D. Ellickson	– Counsel, Toronto
R. A. Hackl	– Vice-General Chairperson, Edmonton
J. W. Armstrong	– Vice-President, UTU-Canada, Edmonton
N.	– Grievor

AWARD OF THE ARBITRATOR

The material before the Arbitrator confirms that the grievor, N., referred himself by his own initiative, to the Company's EFAP program to deal with a personal addiction problem. That referral was, in keeping with the EFAP plan, unknown to his fellow workers or to his supervisors. It led to the signing of a confidential contract whereby N. was under the obligation to attend random and previously unscheduled drug and alcohol tests, as directed by a case worker/nurse of Medisys, the Company's medical services provider, apparently located in Vancouver.

The record reveals that N. was contacted by telephone by the nurse on March 19, 2003 and advised that he must attend at a clinic in Kamloops to undergo testing on that same day. The grievor indicated to her that he was entitled to four hours' notice, and further advised her that he was without funds, without a car and would need transportation to get to the clinic, apparently some three miles from his residence. The nurse then indicated that she would arrange for a taxi.

Unfortunately, it does not appear disputed that the nurse then contacted the grievor's immediate supervisor to make the taxi arrangements. His supervisor then telephone the grievor to advise him of the taxi arrangement, indicating that the taxi would pick him up within the hour. The grievor was understandably concerned that his supervisor was obviously made aware of his involvement in substance abuse testing through the services of Medysis. He immediately responded to his supervisor that he was in fact entitled to greater notice, saying words to the effect that he "gets fucking four hours notice". It appears that based on that information his supervisor verified with the nurse and called the grievor back to confirm that he would have his four hours and that the taxi would be sent later. It appears that during that second telephone call the grievor was extremely agitated, saying that he was "calling his fucking union" and "this is bull shit". It also appears that he hung up on the Company's manager during the course of that conversation.

It does not appear disputed that the grievor telephoned the nurse in Vancouver and expressed in very strong terms his displeasure at what he viewed as a breach of

his rights of confidentiality. The Arbitrator is satisfied that that was, to say the least, an unpleasant conversation and that the grievor did use abusive language in dealing with the nurse on that occasion. Following the incident, on March 26, 2003 the Company conducted an investigation into the incident and discharged N. effective April 4, 2003 for conduct unbecoming an employee. That is the subject of this grievance. Further, the grievor filed an independent complaint with the privacy commissioner. That complaint resulted in a report dated April 2, 2004, which essentially recounts the facts related above and adds the unfortunate observation that when the nurse was asked to document the incident she sent an e-mail which disclosed the grievor's involvement in the program to a still larger number of CN supervisors. The report of the Assistant Privacy Commissioner reflects a certain understanding of the need of the nurse to communicate with local company management to arrange for the taxi, but concludes that the arrangement could have been made without making reference to anything more than a "medical appointment". In the result, she found the grievor's complaint to be well-founded.

The Arbitrator must agree with counsel for the Union that the facts disclosed do not justify the termination of the grievor, an employee of twenty-two years' service who had never received discipline previously for any behavioural shortcomings, save for one incident involving obscene language over the telephone in 1985. I cannot agree with the suggestion of the Company's representative that two incidents, almost twenty years apart, constitute a behaviour "pattern" for the purposes of discipline. While the grievor's record stood at thirty demerits at the time of his discharge, those demerits were

accumulated by reason of poor attendance, a problem intrinsically related to the grievor's medical disability of addiction. The Arbitrator cannot agree, however, that the case does not disclose any wrong doing on the part of N. While I accept that the discovery of the fact that the Medysis nurse committed a violation of the grievor's right to confidentiality, that error did not justify the grievor responding either to the nurse or to his supervisor in a manner that was plainly abusive. As the grievor's complaint to the Privacy Commissioner reflects, there was an avenue by which the grievor could channel his complaint and obtain redress, without engaging in insulting language and open disrespect of both his supervisor and the nurse in question.

In my view what the case discloses is an error in judgement on both part of the Company and the grievor. In passing it should be noted that I do not, on the basis of the evidence adduced, accept the suggestion that there was a failure of the obligation of a fair and impartial investigation by reason of the fact that the nurse was not produced as a witness at the Company's investigation. The collective agreement does not require the attendance of such a witness at the disciplinary investigation, even if it could be viewed that she can be characterized as an agent of the Company. It was, moreover, open to the Union to subpoena the nurse to the arbitration hearing if it felt that her testimony was critical. In fact, however, there is little dispute on the material elements going to the issue of just cause in the case at hand. In the result, I am satisfied that this is a case for a reduction of penalty, albeit one which nevertheless brings home to the grievor the importance of civility in his dealings with the Company and its agents.

The grievance is therefore allowed in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, with the payment of all wages and benefits lost, subject to a two-week suspension for conduct unbecoming an employee. His disciplinary record shall be restored to the level of thirty demerits.

July 20, 2004

(signed) MICHEL G. PICHER
ARBITRATOR