

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 3500

Heard in Edmonton, Tuesday, 12 July 2005

concerning

CANADIAN PACIFIC RAILWAY

and

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The discipline and discharge of Mr. Brandt of Calgary.

JOINT STATEMENT OF ISSUE:

On September 5, 2002, Mr. Brandt was issued 25 demerits for rules violations. He was subsequently discharged for accumulation of demerits.

Mr. Brandt is a long service employee with 22 years of service.

The Union's position is that prior to and at the time of his discharge he was experiencing a number of personal and medical issues that had a detrimental impact on his personal life. Mr. Brandt's personal and medical issues were significant contributing factors to the events leading to his discipline and discharge. Mr. Brandt has sought appropriate treatment and assistance and now presents himself as a person who is capable of safely performing the responsibilities and expectations of a yardman.

The Union believes that there is sufficient mitigation to warrant reinstatement.

The Union is seeking reinstatement without loss of seniority or benefits and with conditions appropriate in the circumstances.

The Company does not agree with the position of the Union.

FOR THE UNION:

(SGD.) D. FINNISON
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) R. HAMPEL
FOR: GENERAL MANAGER – OPERATIONS

There appeared on behalf of the Company:

C. Ayton – Labour Relations Officer, Calgary
R. Hampel – Manager, Labour Relations, Calgary

And on behalf of the Union:

D. Ellickson	– Counsel, Toronto
D. Finnon	– General Chairman, Calgary
R. Maygard	– Local Chairman, Calgary
G. McMorrان	– Local Chairperson, Calgary
G. Brandt	– Grievor

AWARD OF THE ARBITRATOR

On the basis of the material filed the Arbitrator is satisfied that the grievor suffered from a gambling addiction during the two year period leading to his discharge. That is confirmed by the report of EFAP Counsellor James Pender, a certified addictions counsellor. For the purposes of this award the Arbitrator is satisfied that a gambling addiction is a condition which would fall within the ambit of a mental disability as contemplated within the **Canadian Human Rights Act**.

While the Company's representatives sought to challenge certain aspects of the analysis and conclusions in Mr. Pender's assessment of the grievor, that report is, in the end, the only professional opinion before the Arbitrator. For reasons which it best appreciates, the Company did not tender a contrary professional opinion until only four business days prior to the arbitration hearing. In that circumstance the Arbitrator is compelled to rule the report offered by the Company as inadmissible, regard being had to the notice requirements of the **Evidence Act** and general principle of natural justice.

The record confirms that on September 5, 2002, the grievor was assessed twenty-five demerits for a rules violation. It is not disputed that on August 21, 2002,

while switching cars in Alyth Yard, Mr. Brandt, who was then working as a yard foreman, failed to secure a sufficient number of hand brakes on a standing cut of cars, as a result of which the cars rolled free for a short distance until they encountered a switch. While the grievor initially denied any wrongdoing, within a few hours of the event he “came clean” and admitted to his supervisor that he had not secured the hand brakes on two cars, as required given the number of cars to be protected. At the time of that incident the grievor was on a deferred discipline arrangement following his notional termination for an earlier assessment of forty-five demerits on April 4, 2002.

The position of the Company is understandable. The grievor’s record contains a number of rules infractions which indicate inattention or neglect in the performance of his operating duties. The history of his employment, however, does indicate that he has been able to remain discipline free for substantial periods of time. As stressed by counsel for the Union, before the onset of his gambling difficulties the grievor had a five year period during which he was virtually discipline free, and he was disciplined only twice in one period of ten years.

There are other mitigating factors to consider. As an employee of twenty-two years’ service, with limited employment prospects outside the railway industry, the grievor deserves a degree of compassionate treatment, particularly having regard to the general obligation under the **Canadian Human Rights Act** to accommodate what, in the Arbitrator’s view, would constitute a mental disability. As noted in **CROA&DR 3479**, a history of the **Canadian Human Rights Act** clearly indicates the intention of

Parliament that the concept of disability is to be liberally and generously interpreted, in keeping with the overall purpose of the **Act**.

In the case before the Arbitrator the uncontradicted report of Mr. Pender concludes that the grievor's addiction difficulties, difficulties which eventually led to his personal bankruptcy, "... contributed to the overall decline he exhibited in his work performance; ...". In these circumstances the Arbitrator is satisfied that a remedial order can be fashioned to protect the legitimate interests of the Company, while giving some accommodation to the grievor's condition. Essential to that conclusion is unchallenged evidence which confirms that following his discharge the grievor received treatment for his condition from the Alberta Alcohol and Drug Abuse Commission, and has attended and continues to attend meetings of Gamblers Anonymous.

The grievance is therefore allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment subject to the following conditions. His reinstatement shall be conditional upon the Company's medical officer being satisfied that the grievor is fit to return to work, being free from any active or uncontrolled gambling addiction and, in keeping with the recommendation of Mr. Pender, free of any clinical depression which might impact his work performance. Assuming he achieves an assessment which confirms his fitness to return to work, the grievor's reinstatement shall nevertheless be conditioned upon his agreeing to maintain, for a period of not less than two years, on-going participation in meetings of Gamblers Anonymous, under the guidance of an identified sponsor whose identify shall be communicated to the Company and to the

Union, and who shall provide to the Company and the Union written reports, on a quarterly basis, for not less than two years confirming the grievor's ongoing participation in the meetings of Gamblers Anonymous. The grievor's reinstatement shall be without compensation for wages and benefits lost and without loss of seniority, with the twenty-five demerits assessed against his record to be removed and a suspension substituted therefor covering the period from his termination to his reinstatement, with his record to stand as it did prior to the incident of September 5, 2002. Finally, as a condition of the grievor's reinstatement, as recommended by Mr. Pender, he is to access the services of the Company's Employee Assistance Program and attend regular counselling sessions, not less than monthly and for not less than two years. Attendance at such sessions shall also be confirmed in writing to both parties, not less than quarterly. Failure to abide by the conditions of this award shall make the grievor liable to discharge.

Should the parties be in dispute with respect to any aspect of the interpretation or implementation of this award, the matter may be spoken to.

July 19, 2005

(signed) MICHEL G. PICHER
ARBITRATOR