CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3602

Heard in Montreal Tuesday, 9 January 2007

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

EX PARTE

DISPUTE:

Assessment of thirty (30) demerits and discharge to Conductor Tania Pastl of Kamloops, British Columbia for violation of an attendance management contract.

UNION'S STATEMENT OF ISSUE:

On October 10, 2005, Ms. Tania Pastl suffered an at work injury. Following a series of doctors appointments, the submission of medical information and WCB claims, Ms. Pastl was required to provide an employee statement regarding her alleged failure to adhere to an attendance management contract.

Ms. Pastl was assessed thirty demerits which resulted in her dismissal.

The Union submits that there was no valid attendance management contract in place and, as such, no discipline could be assessed with respect to one. Additionally, and without prejudice to the foregoing, the Union submits that all time lost in the instant case was due to the properly reported injury of October 10, 2005 and the assessment of discipline for an injury or for the absence from work due to an injury is prohibited by the **Canada Labour Code**.

In either case, the Union submits that the discipline assessed to Ms. Tania Pastl was unwarranted and should be expunged, and she be made whole.

The Company has not responded to the Union's request.

FOR THE UNION:

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

There appeared on behalf of the Company:

B. Laidlaw	– Manager, Labour Relations, Winnipeg
K. Morris	– Manager, Labour Relations, Edmonton

And on behalf of the Union:

D. Ellickson	– Counsel, Toronto
R. A. Hackl	– Vice-President, Edmonton
B. R. Boechler	– General Chairman, Edmonton
M. Rutzki	– Local Chairperson / Secretary, Melville
J. Robbins	– Vice-General Chairman, Sarnia

AWARD OF THE ARBITRATOR

The grievor was first hired as an assistant conductor on August 8, 1989 in Saskatoon. She was discharged on July 24, 1998 for accumulation of demerits but was later reinstated by this office in January 1999 without compensation and with time out of service from July 24, 1998 to the date of her reinstatement (**CROA 3028**). In June 2005, the grievor transferred to Kamloops to be closer to her family who were living in Vernon. Her discipline record stood at 59 demerits at the time of her transfer.

The grievor was absent from work for a total of 26 days during her first three months of service in Kamloops. Her record of absenteeism precipitated an investigative meeting on September 20, 2005 at which time she received a suspension for her unsatisfactory work record, in particular her attendance record. The grievor also entered into an Attendance Management Agreement (AMA) with the Employer. Under the terms of the AMA, the grievor agreed to attend work on a regular basis and that her failure to do so would result in a formal investigation as well as applicable corrective measures up

to and including termination. The grievor was not accompanied by a Union representative when the AMA was signed.

The grievor hurt her back at work on October 10, 2005. She was placed on light duties and also filed a Workers' Compensation Board (WCB) claim. The grievor worked on modified duties for two weeks until Tuesday October 25, 2005 but, on Wednesday October 26, 2005, advised her trainmaster that she would not be reporting to work that night because of a headache. The following Thursday and Friday were her assigned rest days.

The grievor's trainmaster left on vacation and did not return until November 14, 2005. The grievor told the trainmaster, after he contacted the grievor upon his return, that she had not reported to work because her back was too sore. She also said that she did not intend to report to work that week as well. The Employer considered her to be AWOL as of October 26, 2005 for not reporting to work for modified duties. In addition, the Employer similarly reported to WCB on November 16, 2005 that the grievor failed to report to work for modified duties. The WCB then wrote to the grievor on November 24, 2005 advising that the WCB Nurse had spoken with her physician who found no objective findings of disability, including any signs of decreased range of motion, redness or swelling. The WCB consequently denied the grievor's claim because there was no objective medical evidence to support her disability, particularly after she was able to perform two weeks of modified duties after her injury.

On November 29, 2005, the Employer requested that the grievor return to work to perform modified duties. The grievor replied that her back was still too sore to return to work. On November 30, 2005, the grievor's physician completed a Return to Work Restriction Report indicating that the grievor was unfit for all duties from October 29, 2005 to December 9, 2005 and needed physiotherapy. After consultation with the WCB, the grievor's physician approved the grievor for modified duties, with standing and lifting restrictions. The grievor was contacted by her trainmaster again on Friday, December 2, 2005 and advised that modified duties were available to her on a swing shift starting that day at 1600.

The swing shift assignment was initiated by the Employer in order to accommodate the grievor's physiotherapy appointments. The grievor, however, failed to report for the modified duties on December 2, 2005. Her physician faxed a medical note that same day to the Employer saying that the grievor was not fit to return to do any work, including modified duties, until she had completed a course of physiotherapy. On December 6, 2005, the grievor was again advised by WCB of their determination that she was fit to perform modified duties and, as a consequence, her claim was denied.

On January 19, 2006, the grievor's doctor approved her for modified duties but only if she could work one day per week for a few hours. When the grievor met with her superintendent after her January 19, 2006 appointment, he advised her that there were no light duties available if she could not work five days per week. On January 30, 2005, the OHS Nurse contacted the grievor to advise that she was fit to return to work for modified duties. The grievor's physician provided her with a medical note on February 9,

2005 indicating that she was “OK for light duties; expected date of recovery: unknown”. On February 26, 2005, the grievor advised the OHS Nurse that modified duties were too difficult because she could not sit or stand for prolonged periods of time. The grievor was contacted by her supervisor on March 21, 2005 to attend an employee investigation on March 24, 2005 with respect to an alleged violation of her AMA. In that regard, Form 780 reads in part:

> YOUR RECORD HAS BEEN ASSESSED WITH: 30 Demerit Points
> FOR THE FOLLOWING REASON: Violation of attendance management contract dated September 26, 2005 whereby you were deemed absent without authority from work October 26, 2006 [sic] through January 19, 2006.

The grievor did not provide the statement until April 11, 2005. A grievance arose in relation to the grievor’s attendance at the investigation and is dealt with in **CROA 3603**. The grievor was assessed 30 demerits after the April 11, 2005 investigation because she was deemed absent without authority from October 26, 2005 to January 19, 2006.

The Union argues that the AMA is void *ab initio* given the absence of a Union representative for what amounts to a last chance agreement. The Employer concedes that the AMA does not meet the requirements of a last chance agreement given that it does not state that a further recurrence of her misconduct would result in her termination. Given the Employer’s position, the Union submits that the Employer is bound by the allegations set out in the Form 780 and cannot enlarge the grounds for the termination by now relying on the grievor’s refusal to perform modified duties to make their case.

The Union's objection in that regard is rejected. It is clear that the subject matter of the investigation is the allegation that the grievor was absent without authority from October 26, 2005 to January 19, 2006. Further, neither the grievor nor her Union representative indicated that they were taken by surprise by any of the questions asked about the grievor's absenteeism for the period in question, including her failure to report for modified duties. The Arbitrator also rejects the suggestion by the Union that it was not open to the Employer to rely on the WCB assessments. Those assessments were copied as a matter of course to the Employer and the Employer was within its rights to rely on the interpretation of the medical evidence by the WCB experts in order to make its determination on the validity of the grievor's absences from modified duties.

The Union submits that any discipline flowing from a violation of the AMA, a purported last chance agreement, should be declared null and void given the lack of Union involvement. The Arbitrator notes that it is accepted practice for employers to verbally counsel employees before imposing discipline in order to allow them an opportunity to correct their behaviour. The AMA, however, amounts to a written disciplinary warning and for that reason should be given no weight under the circumstances because of the absence of a Union representative. Nevertheless, the fact that the AMA is to be given no weight does not automatically exclude the evidence surrounding the grievor's failure to report for modified duties. In other words, it is still open to the Arbitrator in this case to review all the evidence, including the medical information and WCB assessments, in order to determine whether the discipline imposed was appropriate under the circumstances. As noted in **CROA 3203**:

> In the circumstances the status of the "last chance agreement" is of little consequence. However, even if the Company's letter to the grievor cannot be given the weight of a last chance agreement, it is clear that, as of June 30, 1999, Ms. Tuohimaa's continuing failure to maintain acceptable standards of timeliness in coming to work would result in her termination.

The Union also contends that the Employer breached the provisions of s.239.1(1) of the **Canada Labour Code** because it assessed discipline for a work-related injury. The provision reads:

> **239.1(1)** Subject to subsection (4) and to the regulations made under this division, no employer shall dismiss, suspend or lay off demote, or discipline an employee because of absence from work due to work-related illness or injury.

Although the grievor's physician indicates in his note of December 2, 2005 that the grievor was not fit for modified duties, he provides no medical reasons for his conclusions, including any objective findings which would support the grievor's inability to perform modified duties. In that regard, the simple assertion in the physician's medical note that the grievor needs physiotherapy or was not fit to resume duties is an insufficient evidentiary basis from which to conclude that the grievor was unable to perform modified duties. Accordingly, in the absence of any objective evidence supporting the grievor's absences for medical reasons, the Arbitrator finds that the grievor could have attended for modified duties during the period between October 26, 2005 and January 19, 2006 in the same way she did for the first two weeks after she reported her injury. The grievor, as the Employer submits, was not disciplined in contravention of the **Canada Labour Code** but rather because she refused modified duties.

In terms of the Union's submission with respect to accommodation, the Employer did in fact try to accommodate the grievor during the period in question. They did so, for example, by offering swing shifts in order that she could attend for physiotherapy treatments. The Employer also offered the grievor duties driving a vehicle in the yard. The Employer also offered the grievor sedentary office duties. The grievor did not report for these modified duties as she did for the first two weeks after her injury. In the absence of any objective medical evidence indicating otherwise, the Employer, in the view of the Arbitrator, did all they could reasonably be expected to do in the circumstances to accommodate the grievor.

The Employer had just cause to impose discipline, for the reasons stated above, as a result of the grievor's failure to report for work to perform modified duties. The 30 demerits is not out of range given her record at the time. Although the grievor deserves sympathy for having to deal with personal family issues, her work record over the years confirms her lack of commitment to this Employer. Accordingly, the Arbitrator must deny the grievance. The grievor's termination stands for accumulation of demerits.

January 29, 2007

(signed) JOHN M. MOREAU, Q.C.
ARBITRATOR