

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

CASE NO. 3667

Heard in Montreal, Thursday, 10 April 2008

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

RAIL CANADA TRAFFIC CONTROLLERS

EX PARTE

DISPUTE:

The discharge of Rail Traffic Controller Mark Svoboda.

UNION'S STATEMENT OF ISSUE:

On November 1st, 2006, Rail Traffic Controller Mark Svoboda attended an investigation in connection with his alleged conduct unbecoming an employee. On November 8th, 2006 he was discharged for his cumulative discipline record.

The Union advanced a grievance contending that the majority of RTC Svoboda's incidents were centred around a period of time when an unhealthy and unsafe work environment existed in the Toronto Rail Traffic Control Centre.

Also, Mr. Svoboda acknowledged his conduct towards Mr. Ross was inappropriate and apologized for it. The Company also failed to recognize Mr. Svoboda's mental state at the time and his professional counselling to accomplish his therapeutic goal.

The Union maintains that the discipline was excessive and unwarranted and RTC Svoboda must be immediately returned to service with full seniority and compensated for all lost wages and benefits.

The Company maintains that due to Mr. Svoboda's discipline record reflecting instances of inappropriate conduct and his prior operating shortcomings, this warranted and justified his discharge.

FOR THE UNION:

(SGD.) J. RUDDICK
GENERAL CHAIRMAN

There appeared on behalf of the Company:

D. S. Fisher – Director, Labour Relations, Montreal
A. Daigle – Manager, Labour Relations, Montreal

And on behalf of the Union:

J. Ruddick – General Chairman, Burlington
S. Brownlee – Vice-General Chairwoman,
I. McKay – President, Toronto Division
M. Svoboda – Grievor

AWARD OF THE ARBITRATOR

The material before the Arbitrator confirms, beyond controversy, that the grievor engaged in insubordinate conduct, using clearly insulting and unacceptable language when speaking with a supervisor. Understandably, given his prior record, the Company viewed the incident as a culminating incident and terminated his employment. It did so, in substantial part, by reason of the fact that Mr. Svoboda had received a number of counselling sessions with respect to anger control and his communications with supervisors and fellow employees, and had received a suspension only four months prior. In fact, he had suffered a five-day suspension in August of 2005 and a ten-day suspension in November of 2005 for the violation of operating rules. In addition, in January of 2004 he was suspended for conduct unbecoming, the same infraction for which he received a written reprimand in November of 2003 and fifteen demerits as early as July of 1996.

Viewed as a whole, Mr. Svoboda's record discloses that of an individual with a serious recurring problem of attitude toward authority. The Union submits that his record in that regard, particularly as recorded in the two years prior to his termination are by reason of a diagnosed disability. It relies, in that regard, on the opinion of his family physician that he was suffering from Adjustment Disorder. The Arbitrator is satisfied that that diagnosis is not persuasive. The extensive opinion of a leading psychiatrist, Dr. Sam Ozersky, dated April 1, 2006, thoroughly reviews the grievor's history and evaluates him in accordance with established standards. The opinion of this specialist, which the Arbitrator accepts without qualification, concludes with a number of statements, including: "He has no impairment or disability." Dr. Ozersky expressly rejects the diagnosis on the general practitioner, and finds no abnormal psychiatric, psychological or emotional condition in the grievor. This is not, therefore, a case for the application of the **Canadian Human Rights Act** or the duty of the employer to accommodate any disability of the grievor.

The issue then becomes the appropriate measure of discipline in all of the circumstances. The Arbitrator can readily appreciate the Company's perspective. It is presented with an employee with an inclination to engage repeatedly in obnoxious behaviour, in the form of insulting comments. It has, as the record indicates, utilized progressive discipline over the years, as well as counselling, to attempt to correct Mr. Svoboda's misconduct. Those efforts appear to have been for nought.

Are there mitigating which should suggest another outcome? It would appear that there are. Firstly, the grievor is an employee of seventeen years' service, and it would seem that the bulk of his behavioural infractions were coincident with a troubled common law marital relationship which he had, the stress of which appears to have culminated at the time of the events preceding and leading to his discharge. The stress of that relationship is indeed recorded in the analysis of Dr. Ozersky. While it does not constitute a disability, there appears to be little doubt that the grievor did go through a difficult personal period, a part of his life which now appears to be behind him. In these circumstances the Arbitrator is satisfied that a "last chance" reinstatement is appropriate, obviously subject to conditions fashioned to protect the Company's interests.

The grievance is therefore allowed in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without compensation for wages and benefits lost and without loss of seniority. As a condition of reinstatement Mr. Svoboda must agree that for the two year period immediately following his reinstatement, should he incur discipline for insubordination or disrespectful behaviour towards a supervisor or fellow employee, that conduct shall be sufficient cause for his termination. Any grievance or arbitration in respect of such an event shall be restricted to the issue of whether the conduct in fact occurred.

April 14, 2008

(signed) MICHEL G. PICHER
ARBITRATOR