

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

CASE NO. 3747

Heard in Montreal, Thursday, 16 April 2009

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

RAIL CANADA TRAFFIC CONTROLLERS

DISPUTE:

Discharge of Mrs Carol Cyr for “violation of the last chance agreement signed March 7 2008, with respect to the events which occurred during her shift on July 1, 2008” (translation)

JOINT STATEMENT OF ISSUE:

On July 18, 2008, the grievor was discharge for “violation of the last chance agreement signed March 7, 2008, with respect to the events which occurred during her shift on July 1, 2009” (translation)

The Union contends that the Company violated the grievor’s right to a fair and impartial hearing, failed to provide a safe and healthy environment and to recognize the grievor’s personal and work related problems. The Union contends that the discipline was excessive and requests that the discipline be removed and that the grievor be immediately returned to service with full seniority and be made whole for all lost wages and benefits,

The Company disagrees.

FOR THE UNION:

(SGD.) J. RUDDICK
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) S. GROU
FOR: DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Company:

S. Grou	– Manager, Labour Relations, Montreal
D. S. Fisher	– Director, Labour Relations, Montreal
L. Viau	– S&C Supervisor, RTC Centre, Montreal
B. Carrier	– Manager, RTC II, Montreal
L. Savoie	– Work Force Coordinator, Montreal
J-J Lajoie	– Manager, RTC, Montreal

And on behalf of the Union:

J. Ruddick	– General Chairman, Burlington
S. Brownlee	– Vice-General Chairwoman,
M. Boucher	– Local Chairman, Montreal
C. Cyr	– Grievor

AWARD OF THE ARBITRATOR

The grievor, as noted in **CROA 3646**, was the subject of discipline for the July 1, 2008 incident. The Arbitrator ruled in that case that the 40 demerit penalty should be substituted with a period of suspension, without compensation or loss of seniority. The grievor provided her first statement for the July 1, 2008 incident at an investigative meeting held on July 4, 2008. A second investigative meeting of the grievor was held on July 17, 2008 for violation of the last chance agreement arising out of the events that occurred on July 1, 2008.

The last chance agreement reads, in part, as follows:

Suite aux multiples discussions concernant ces incidents des plus sérieux, ainsi qu'à vos représentations, il a été convenu d'offrir à madame Cyr une offre conditionnelle de dernière chance de reprendre son lien d'emploi le tout sans préjudice ou précédent, conformément aux termes et conditions suivants qui s'appliqueront pour une durée de deux ans à compter de la date effective de son retour au travail.

- 1. Afin d'être considérée pour une réintégration au travail Madame Cyr devra d'abord réussir avec succès un examen médical, y compris un test de drogue et alcool. De plus, madame Cyr devra aussi réussir avec succès ses règlements ferroviaires.*
- 2. Si madame Cyr devait échouer l'examen médical, y compris les tests de drogue et alcool, et/ou échouer ses règlements ferroviaires, cette dernière ne sera plus éligible a une réintégration, et son dossier d'employé sera fermé.*
- 3. Une fois les deux conditions à l'item 1 complétées avec succès, madame Cyr sera réintégrée à un poste permanent de contrôleur de la circulation ferroviaire, au Centre de contrôle de Montréal.*
- 4. Le retour au travail de madame Cyr se fera sans perte d'ancienneté, mais sans salaire ni bénéfices pour la période du 21 septembre 2007, à la date effective de son retour au travail. Cette période sera considérée comme une suspension sans salaire.*
- 5. Comme condition de retour a l'emploi et de maintien d'emploi madame Cyr s'engage à avoir une conduite, un comportement et un langage exemplaires et irréprochables a l'égard de ses affectations, des exigences et directives de la compagnie, du personnel cadre et non-cadre, ainsi que de son environnement. Madame Cyr s'engage de plus à se conformer en tout temps aux directives et politiques de la compagnie.*
- 6. Pour une durée de deux (2) années à compter de la date de son retour au travail, madame Cyr consent à se soumettre à de fréquentes observations de performance de la part de son chef hiérarchique, y compris sur le plan de la sécurité et de l'assiduité et celui-ci ou celle-ci les documentera.*
- 7. L'assiduité au travail de madame Cyr sera aussi sujette à vérification pour une période de deux (2) années a partir du moment de son retour au travail et devra se comparer favorablement à la moyenne du taux d'absentéisme du centre de contrôle de Montréal, et ce, pour toute période de deux (2) mois consécutifs données.*
- 8. Tout manquement à ce niveau minimum d'assiduité pour quelque période de 2 mois résultera au congédiement de madame Cyr sans possibilité de réintégration d'emploi.*

9. *En fin, madame Cyr sera réintégrée au travail après avoir rencontré monsieur Jean-Jacques Lajoie, Directeur du centre de contrôle.*

Hormis une mésentente sur la méthode employée pour le calcul de l'assiduité au travail, il est entendu que tout manquement à l'une des conditions spécifiques précitées résultera en la cessation finale de la relation d'emploi de madame Cyr avec le CN, le tout sans appel et non arbitral.

Les parties conviennent que la présente constitue une résolution exceptionnelle de tous les dossiers menant au congédiement de madame Cyr, et ce dans le but de lui offrir une dernière opportunité de retour à l'emploi de la compagnie.

The Union submits that the Company did not hold a fair and impartial investigation and referred specifically to the fact that Mr. Lajoie, Manager of the Rail Traffic Control Center, objected to questions put to him by the grievor at her investigation. The questions related to the July 4, investigation and read as follows:

Q 25 (Ms. Cyr's question to Mr. Lajoie)

Mr. Lajoie, are you aware of the disciplinary measures following the July 4 investigation?

A 25 (Mr. Lajoie's reply)

I am not required to answer that question.

Q 26 (Ms. Cyr's question to Mr. Lajoie)

if you do not know the disciplinary measures following the July 4 investigation, why are you calling an investigation for breach of contract?

A 26 (Mr. Lajoie's reply)

I am not required to answer that question.

Q 27 (Ms. Cyr's question to Mr. Lajoie)

According to Section 25.6 of the Collective Agreement, Mr. Lajoie has been cited as a witness and his answers have a bearing on his responsibility to the investigation.

A 27 (Mr. Lajoie's reply)

Because I am not required to answer, I do not feel that Question 25 and 26 are relevant to this investigation.

(translation)

Mr. Lajoie maintained that he did not answer the questions put to him by the grievor because they were not relevant to the investigation concerning the Last Chance Agreement. Although it is important that all witnesses give frank and forthright testimony at an investigation, the Union in this case did not seek a ruling from the presiding officer requesting that Mr. Lajoie provide an answer to the questions.

I note that article 25.6 reads in part that "Employees and their accredited representatives will have the right to hear all the evidence submitted and will be given an opportunity through the presiding officer to ask questions of the witnesses (including Company officers when necessary) whose evidence may have a bearing on their responsibility". The specific reference to the presiding officer indicates that it is the presiding officer who is accountable for the proper conduct of the hearing which includes dealing with all procedural issues, such as whether a witness like Mr. Lajoie should be compelled to answer a question put to him from the grievor.

It is incumbent upon both the Company and Union representatives present at the hearing to seek timely rulings from the presiding officer in the event they are dissatisfied with the manner in which a witness has answered, or failed to answer, a question put to them. The onus was on the Union representative, or the grievor because she was asking the questions, to request that the presiding officer direct Mr. Lajoie to answer the grievor's two questions if he or she felt that Mr. Lajoie provided inadequate answers to the questions. Their failure to do so must be accepted as their acquiescence to Mr. Lajoie's reasons for not answering the questions, which in this case was on the basis that the questions were irrelevant. As often noted in other awards of this office, **CROA 1858** and **2073**, the investigative process is not intended to be as formal as a full-blown civil trial. There is a need, nevertheless, for fairness and it is the presiding officer who is responsible for making rulings on the relevancy of questions, as noted in **CROA 1858**:

As this Office has noted in the past, investigation procedures such as those contemplated in Addendum 41 are intended to provide an expeditious, fair and open system of fact finding in serious disciplinary cases. The procedure is not, however, intended to take on the procedural trappings of judicial or quasi-judicial hearings. **It is not disputed that the person conducting the investigation is entitled to rule upon the relevance of questions put by an employee or his representative.** While the explanatory letter to Addendum 41 indicates the understanding of the parties that questions ruled irrelevant will be recorded, and that answers given are also to be recorded, that document does not expressly provide that the Union is entitled to insist upon an answer being given and recorded to a question that has been ruled irrelevant.

(emphasis added)

In the absence of a request for a ruling from the presiding officer, the Union cannot now claim that the investigation was flawed. The Union's preliminary objection that the hearing was not fair and impartial is denied.

In terms of the merits, Paragraph 5 of the above Agreement clearly spells out that the grievor is to demonstrate "*une conduite, un comportement et un langage exemplaires et irréprochable à l'égard de ses affectations*". Regrettably, the grievor did not adhere to this condition of her reinstatement. She breached several operational rules and, in addition, did not come clean about her mistake with her supervisor at the earliest opportunity as she was required to do. The grievor, in doing so, also breached paragraph 5 of her return- to-work Agreement because she did not adhere to the strict requirement for "irreproachable behaviour while on duty" on July 1, 2008.

As stated in **CROA&DR 3588**, an arbitrator "... cannot properly undo or amend the terms of the last chance employment agreement which the parties themselves executed." The consequences of a breach of article 5 of the Agreement are clearly spelled out at clause 7 which states that any breach of one of the conditions (with the exception of a misunderstanding regarding the calculation of the *assiduité de travail* which is not alleged in this case) will result in the cessation of the employment relationship. The grievor was unfortunately unable to live up to the terms and conditions set out for her reinstatement. By operation of that Agreement, the employment relationship must come to an end.

Given the failure of the grievance on its merits, there is no need to deal with the Company's preliminary objection regarding the arbitrability of the grievance.

The grievance is dismissed.

May 4 , 2009

(signed) JOHN M. MOREAU QC
ARBITRATOR