

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

CASE NO. 3912

Heard in Edmonton, June 9, 2010

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

EX PARTE

DISPUTE:

The dismissal of Employee G of Vancouver, BC on December 17, 2009 for violation of his Continuing Employment Contract signed February 5, 2008.

UNION'S STATEMENT OF ISSUE:

In or about February of 2006 the grievor voluntarily reported to the Company that he suffered from a drug addiction and requested assistance through the Employee & Family Assistance Program (EFAP). The grievor was diagnosed with having a substance abuse disorder and underwent treatment.

In January 2008, the Company notified the grievor to enter into a Continuing Employment Contract within 21 days or the grievor would "no longer be eligible for continuing employment/reinstatement." The grievor entered into the contract on February 5, 2008 and subsequently returned to work. The contract requires the grievor to abstain from the use of alcohol and drugs at all times, both on and off duty. The contract also stipulates that failure to comply with its terms will result in dismissal. In or about September 2009 the grievor suffered a slip/relapse while off work.

On October 20, 2009 the grievor tested positive for the presence of cocaine. Following an investigation the grievor was dismissed on December 17, 2009 for violation of the contract.

The Union contends that the grievor suffers from a disability and that the discharge of the grievor is discriminatory in violation of the *Canadian Human Rights Act*. The Union contends that the Company has failed to accommodate the grievor's disability to the point of undue hardship. The Union further contends that requiring the grievor to sign the contract, the terms of the contract and the termination of the grievor pursuant to the contract for a slip/relapse are contrary to the *Canadian Human Rights Act* and are failures to accommodate the grievor to the point of undue hardship. The Union further contends that the contract is void and unenforceable because it is contrary to public policy, contrary to the Company's own policies, unconscionable and lacks consideration.

The Union further contends that the dismissal of Employee G was without just and reasonable cause or, in the alternative, that the penalty is excessive.

The Union requests that the dismissal be expunged from Employee G's record, that he be reinstated without loss of seniority or benefits and that he be made whole for all losses including damages pursuant to the *Canadian Human Rights Act*. Alternatively, the Union requests that the grievor be reinstated on terms the arbitrator deems appropriate.

The Company disagrees. The Company contends that there is no dispute regarding the terms and conditions of the contract and all parties were signatory to the contract. The Company contends that it properly applied the agreed upon terms and conditions of the contract. The Company maintains that Employee G's dismissal was warranted and has declined the Union's request.

The Union disagrees with the Company's contentions.

COMPANY'S STATEMENT OF ISSUE:

On February 5, 2008 Employee G entered into a Continuing Employment Contract with the Company. The contract required that Employee G abstain from the use of alcohol and drugs at all times, both on an off duty. Failure to comply with the full terms of the contract would result in his dismissal from CN.

On October 24, 2009 Employee G tested positive for cocaine in violation of the terms and conditions of his continuing employment contract. Following an investigation, Employee G was dismissed.

The Union contends that the dismissal of Employee G was without just or reasonable cause or, in the alternative, that the penalty is excessive. The Union further contends that the Company discriminated against Employee G on the grounds of medical disability when it relied upon the Continuing Employment/Reinstatement contract. The Union requests that Employee G be reinstated and made whole in addition to requesting general damages in the amount of \$15,000.

The Company disagrees. The Company contends that there is no dispute regarding the terms and conditions of the Continuing Employment/Reinstatement contract. In fact, all parties were signatory to the contract. The Company properly applied the agreed upon terms and conditions of Employee G's contract. The Company maintains that Employee G's dismissal was warranted and has declined the Union's request.

FOR THE UNION:
(SGD.) J. HOLLIDAY
GENERAL CHAIRMAN

FOR THE COMPANY:
(SGD.) D. CROSSAN
FOR: DIRECTOR HUMAN RESOURCES

There appeared on behalf of the Company:

K. Morris	– Sr. Manager, Labour Relations, Edmonton
D. Crossan	– Manager, Labour Relations, Prince George
B. Laidlaw	– Manager, Labour Relations, Winnipeg

There appeared on behalf of the Union:

S. Moore	– Counsel, Vancouver
J. Holliday	– General Chairman, North Vancouver
W. Martin	– Local Chairman, North Vancouver
G. Geddes	– Local Chairman, Prince George
Employee G	– Grievor

AWARD OF THE ARBITRATOR

The material before the arbitrator confirms that Employee G struggled with a cocaine addiction. Significantly, he self-reported his condition to the Company's Occupational Health Services (OHS). To the credit of both the Company and to the grievor, both worked together for some three and one-half years in an endeavour to accommodate his circumstances and to help him overcome his addiction. He was ultimately dismissed for testing positive for cocaine after his return to work under the terms of a continuing employment/reinstatement contract.

The Union alleges that the reinstatement contract was, by its very terms, a violation of the **Canadian Human Rights Act** to the extent that it did not allow the possibility of a relapse, but rather stipulated the draconian outcome of discharge in the event of any positive drug test. Counsel for the Union stresses that the terms of the continuing employment/reinstatement contract, which prohibit the consumption of drugs or alcohol and provide for automatic discharge for non-compliance, is in itself a violation of the duty to accommodate the grievor's condition, fraught as it is of the likelihood of relapse.

Counsel for the Union cites a number of precedents, including a decision of the Saskatchewan Human Rights Tribunal in **Merrick and Ipsco Saskatchewan Inc.**, a decision issued on November 14, 2008 which held that the terms of a last chance agreement were inconsistent with the terms of the **Saskatchewan Human Rights Code** S.S. 1979, c S-24.1 where the agreement itself implicitly failed to take into account the high risk of relapse in an employee who suffered a drug and alcohol addiction. Reference is also made to the railway industries' own standards, as reflected in the *Canadian Railway Medical Rules Handbook* of February 2010, issued by the Railway Association of Canada. Counsel draws to the Arbitrator's attention the following excerpts from that document:

The Monitoring Process

Monitoring is arguably the most important component in the treatment of individuals with substance use disorders. Like many other chronic illnesses, addictions are marked by early lapses or relapses, from which the recovering individual will learn valuable information and strengthen their recovery. Personnel providing components of the Monitoring Process provide accountability and support, seeing the recovering individual very frequently early in recovery and less frequently with the prolonged abstinent stability. The risk of further relapse is greatly reduced after a period of two years of uninterrupted abstinent recovery.

...

Relapse

Especially during early recovery when the risk of relapse is greatest, more vigilance is needed by both the recovering individual and those providing relapse prevention support. Although all incidents of non-compliance must be reported to the CMO, not all episodes of substance use will necessarily result in maximum consequences. When the lapse has been brief and the individual demonstrates motivation, behaviour and attitude consistent with recovery, the response of the CMO in consultation with the Addiction Medicine Physician will be more flexible, depending on individual circumstances.

Reference is also made to a number of judicial and arbitral decisions including **Toronto Transit Commission** (1998) 75 L.A.C. (4th) 180 (Davie); **Canadian Union of Public**

Employees, Local 234 and City of Cornwall [2006] O.L.A.A. No. 560 (Burkett) and the decision of Arbitrator Hope in **SHP 447** involving Canadian Pacific Limited and CAW Local 101.

The Arbitrator agrees with the comments of Arbitrator Burkett in the **City of Cornwall** award where he said, among other things, a last chance agreement is not, in and of itself, evidence of accommodation to the point of undue hardship. Regard must be had to all of the facts surrounding the agreement and the circumstances which follow it and ultimately lead to the failure of its conditions. It should be noted, however, that Mr. Burkett also stresses that such agreements are important devices for balancing employer and employee interests in seeking to determine if a viable employment relationship can subsist and to establish the terms upon which that may be encouraged to happen.

In the case at hand the Company places great reliance on the efforts which it made with respect to the opportunities given to the grievor over a period of some three and one-half years, including an extended leave of absence, to assist in his rehabilitation. It also relies on the continuing employment/reinstatement contract, asserting that that document reflects the agreement of the parties that accommodation had been granted to the point of undue hardship, arguing that the failure of the grievor to honour its conditions did justify the termination of his employment in all of the circumstances.

The Arbitrator does not consider it necessary to rule on the Union's allegation that the Company failed to provide reasonable accommodation to the grievor to the point of undue hardship for the purposes of properly disposing of this grievance. The ultimate question in this grievance is whether the Company had just cause to terminate the grievor, and if it did have such just cause whether there are circumstances which would justify the exercise of the Arbitrator's discretion to substitute an alternative penalty short of discharge. Even accepting that the full duty of accommodation was accorded to the grievor by the Company, and that his breach of the continuing employment/reinstatement contract would have given cause for his discharge, there are compelling facts unique to the instance case which I believe bear close scrutiny.

Firstly, as stressed by counsel for the Union, the grievor initially volunteered to the Company's OHS that he did suffer from a cocaine addiction and needed assistance. In pursuit of rehabilitation he followed two separate extensive residential treatment programs, the first at the expense of the Company and the second at his own expense. Having heard his testimony I am satisfied that he did struggle for some time before bringing his addiction under control. I accept his evidence that after his return to work, in circumstances of personal stress, he did have an isolated relapse which resulted in his positive drug test. I also accept his evidence that he has been "clean" otherwise. I also accept the documentary medical evidence tendered by the Union, in the form of a letter dated May 26, 2010 from the grievor's physician which expresses an extremely positive opinion with respect to the prognosis for the grievor to "achieve complete remission from his drug addiction ...".

In the Arbitrator's view there are many mitigating and exceptional factors in the case at hand. The grievor is an employee of thirty years' service with both BC Rail and the instant company. As stressed by counsel for the Union, he has a positive disciplinary record and there is no suggestion of any discipline incurred as a result of his addiction disability. His addiction to crack cocaine has presented an enormous challenge which he has struggled with for several years. By his own unchallenged account, he is now in control of that condition, attending meetings of NA and AA some three to four times per week. It also appears that he now has a supportive spouse. In all of the circumstances I am satisfied that this is an appropriate case to exercise my discretion under the **Canada Labour Code** to reduce the penalty and that the grievor can be returned to employment, albeit under conditions established to protect the employer's legitimate interests.

The grievance is therefore allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without compensation for any wages and benefits lost and without loss of seniority, subject to the following conditions which the grievor must accept:

- 1 He shall refrain from the consumption of alcohol or prohibited drugs.
- 2 He shall be subject to random drug testing, to be administered in a non-abusive fashion, for a period of not less than two years.

- 3 He shall continue in the activities of NA and/or AA, providing to the Company and to the Union quarterly written confirmation of his attendance and activities in that regard by an appropriate representative of those organizations, for a period of not less than two years.

- 4 His return to work shall be conditioned upon his providing a medical certificate of his fitness to perform the duties of the conductor's craft.

- 5 Any failure to honour the conditions herein, and any positive drug or alcohol test result, shall render the grievor liable to discipline, up to and including discharge.

June 18, 2010

(signed) MICHEL G. PICHER
ARBITRATOR