CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4046

Heard in Montreal, 12 October 2011

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

UNITED STEELWORKERS UNION – LOCAL 2004

DISPUTE:

Mr. Santala was discharged for the following reason: "Employee has failed to comply with the rules set out in his Continuing Employment/Reinstatement Contract as set out by the Company".

JOINT STATEMENT OF ISSUE:

On April 2, 2011, the grievor was discharged because: "Employee has failed to comply with the rules set out in his Continuing Employment/Reinstatement Contract as set out by the Company". The Union filed a grievance.

The Union submits that Mr. Santala suffers from a disability, is under a doctor's care and in the process of rehabilitation. The Union submits that the reinstatement contract was, by its terms, a violation of the Canadian Human Rights Act to the extent it did not allow for the possibility of a relapse.

The Union submits that the discharge was discriminatory and in violation of the Human Rights Act or, in the alternative, excessive and requests that the grievor be immediately reinstated with full redress.

The Company raises the preliminary objection to the arbitrability of this dispute in keeping with the terms of paragraph 5 of the last chance agreement contract signed on June 22, 2010, The Company also disagrees with the Union's contentions and has declined the grievance.

FOR THE UNION:
(SGD.) M. PICHÉ
STAFF REPRESENTATIVE

FOR THE COMPANY:
(SGD.) S. GROU
SR. MANAGER, LABOUR RELATIONS

There appeared on behalf of the Company:

S. Blackmore	– Manager, Labour Relations, Edmonton
S. Grou	– Sr. Manager, Labour Relations, Montreal
R. Haggart	– Assistant Chief Engineer, Toronto
B. Laidlaw	– Manager, Labour Relations, Winnipeg
C. Gilbert	– Manager, Labour Relations, Montreal

There appeared on behalf of the Union:

M. G. Piché	– Staff Representative, Toronto
R. Tompkins	– Chief Steward, GLR
G. J. Santala	– Grievor

AWARD OF THE ARBITRATOR

The unfortunate record before the Arbitrator confirms that the grievor has a substantial history of alcohol addiction and abuse. In the five years of his employment Mr. Santala recorded extensive periods of absence, generally without leave. In fact, the five years of his employment included only sixteen months of active service, the balance being accounted for by sick leave or unauthorized absence. During that relatively short period he received discipline on three occasions, once for failing to attend at rules' training and twice for attendance problems.

There is no dispute that the grievor's condition as an alcoholic became known to the Company. That condition was first accommodated in February of 2009. At that time the grievor, while continuing in employment, signed a confidential "Relapse Prevention Agreement" with the Company's Occupational Health Services. The Relapse Prevention Agreement and program involves regular meetings with a representative of

Occupational Health Services, part of which is intended to help identify signs or symptoms of any impending relapse on the part of an addicted person.

Notwithstanding those efforts the grievor did suffer a relapse causing him to go AWOL after August 20, 2009. Subsequently the Company decided to give the grievor yet another opportunity at rehabilitation. The grievor, his Union and the Company signed a Continuing Employment / Reinstatement Contract on June 22, 2010.

Unfortunately, some four and one-half months after the execution of his continuing employment contract, the grievor violated its terms. Notwithstanding the prohibitions of his contract, he consumed alcohol on or about December 16, 2010 which resulted in legal charges being brought against him.

The Company submits, in part, that the grievance should be viewed as not arbitrable, to the extent that the grievor violated both his continuing employment agreement and a relapse prevention agreement which was negotiated within the framework of his return to work. Alternatively, the Company submits that it did have just cause to terminate the grievor's services by reason of his failure to honour the conditions of his last chance continuing employment / reinstatement contract.

I am not persuaded that the grievance is not arbitrable. Paragraph 5 of the continuing employment contract states:

> Should you fail to comply with the full terms of this contract, including compliance with the Relapse Prevention Agreement, you will be discharged from CN and will not be eligible for continuing employment/reinstatement.

While the foregoing provision is not uncommon in such contracts, it clearly does not state that in the event of a discharge the grievor will have no right to avail himself of the grievance and arbitration provisions of the collective agreement. Absent any such specific language, I cannot agree that the circumstances herein render this matter inarbitrable.

However, with respect to the larger question of the merits of the grievance, the Arbitrator has substantial difficulty with the position of the Union. It argues, essentially, that the grievor suffers from a condition which is known to involve relapses. In the Union's submission the Company's duty of accommodation for the grievor's disability in relation to alcohol addiction was not discharged to the point of undue hardship, and on that basis his termination should not be sustained.

With respect, I cannot agree. The record discloses that over a period of five years the Company has been extremely patient and understanding with the grievor and the difficulties caused by his medical disability. As indicated above, it tolerated a rate of absenteeism by Mr. Santala which, standing alone, might well have justified the termination of his employment some time ago. However, the Company, based on its eventual knowledge of his condition, first gave the grievor the benefit of negotiating a relapse prevention agreement with its Occupational Health Services in February of

2009. However, that effort did not prove successful as the grievor's agreement was violated by his incurring a DUI charge in August of 2009.

Notwithstanding that background, the Company again entered into a continuing employment agreement with Mr. Santala on June 22, 2010. Unfortunately, with the legal charges brought against him for the events of December 16, 2010 it became evident that the grievor again relapsed into alcohol use, violating the agreement and triggering his termination.

This Office has previously commented on the importance of last chance continuing employment agreements, particularly in the context of employees who suffer from addictions. In **CROA 2743** the following comments appear:

> This Office can see no responsible basis upon which to reverse that decision. The ability of employers and unions to make individual employees, whatever their personal problems, subject to strict conditions as a requirement of their continued employment is an instrument of great importance whose credibility should be sustained by employers, unions and arbitrators alike. In **CROA 2632** the rationale for the reluctance of arbitrators to interfere with the consequences of the violation of such conditions was expressed in the following terms:
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> > … To [interfere] would be tantamount to disregarding or amending the conditions agreed to between the parties, … As a matter of general policy, such settlements should be encouraged. As reflected in Canadian arbitral jurisprudence, arbitrators do not interfere with the terms of such settlements, as to do so would tend to discourage parties from resorting to them and, ultimately, undermine their utility as an important instrument for resolving disputes. …
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> See also **CROA 2595** and **2704**.
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> On the evidence, the Arbitrator is satisfied, on the balance of probabilities, that Mr. [O] did consume a prohibited drug, contrary to the terms of his agreement. The pre-agreed consequence for that infraction is discharge.

Additionally, this Office has recognized that the parties do, on occasion, fashion last chance agreements precisely as a means of accommodation for a disabled employee. In **CROA 3198** the following analysis appears:

> The history of Mr. [D]'s treatment does not, in the Arbitrator's view, sustain the Union's argument that he is the victim of arbitrary or discriminatory disregard of his rights under the **Canadian Human Rights Act**. On the contrary, the evidence reveals that the Company acknowledged and responded to what it perceived as Mr. [D]'s record of substance abuse dating back to 1990 by providing him an opportunity to pursue a course of follow up treatment as a condition of his continued employment pursuant to the agreement which he and his Union signed on November 12, 1997. I am satisfied that Mr. [D]'s removal at that time from safety sensitive work, and his continued employment under the conditions of the agreement in fact satisfied the requirement of reasonable accommodation to which he was entitled in light of his acknowledged substance abuse problem. Indeed, on the facts of this case the Union's consent to the continuing employment contract can fairly be construed as an agreement on its own part that that the arrangement was itself a fair accommodation of Mr. [D]'s condition, and that any requirement to employ him in the face of his failure to meet the conditions would constitute undue hardship. … It is my own view that it did constitute reasonable accommodation short of the point of undue hardship, and that the grievor's eventual termination for his failure to respect the conditions of the agreement did not involve a denial of his right to be further accommodated in conformity with the requirements of the **Canadian Human Rights Act**, as his continued employment would constitute an undue hardship to the Company.
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> The material before the Arbitrator indicates a long-standing substance abuse problem suffered by Mr. [D], as first noted in 1990 and culminating in his positive drug test in December of 1998. Bearing in mind the safety sensitive nature of his work duties, and the Company's efforts at accommodating his condition, including the substantive terms of the last chance agreement of November 12, 1997, I am satisfied that this is a case in which this Office should uphold the agreement made by the parties, for reasons well articulated in prior jurisprudence. Such agreements obviously have little value to employers, in the words of Arbitrator Lynk at p. 328 of the **Canadian Wastes Services** award: … "If they can be easily undone by a grievor's claim that her or his unexpected or unintended relapse caused … breach of the LCA, …". (See also **CROA 2595, 2632, 2743, 2753, 2965** and **3186**.)
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> For all of the foregoing reasons the grievance must be dismissed.

On the whole, I am satisfied that the Company has been diligent in attempting to reasonably accommodate the grievor's medical condition over a substantial period of

years. To require that it continue to do so, in light of the history demonstrated by the grievor, would, in my view, amount to undue hardship imposed upon the employer.

For all of the foregoing reasons the grievance must be dismissed.

October 17, 2011 **(signed) MICHEL G. PICHER**

ARBITRATOR