

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4136**

Heard in Montreal, Wednesday, 13 September 2012

Concerning

VIA RAIL CANADA INC.

And

**THE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION
AND GENERAL WORKERS' UNION OF CANADA (CAW-CANADA)**

EX PARTE

DISPUTE:

The termination of employment of Ms. D. Boychuk for alleged violation of the October 22, 2010, Last Chance Agreement by being under the influence of alcohol and/or intoxicants while on duty July 26, 2011.

UNION'S STATEMENT OF ISSUE:

The Corporation states that on July 26, 2011, the grievor was under the influence of alcohol and/or intoxicants while on duty at the Winnipeg Station in violation of the last chance agreement of October 22, 2010.

An investigation was held August 3, 2011, in which the grievor maintained her position that at the material time she was not under the influence of alcohol and/or illegal intoxicant. Further, she maintained her sobriety was continuous since October 22, 2010.

It is the Union's position that the grievor was not under the influence of alcohol and /or illegal intoxicant at the material time and maintained her sobriety continuous to this date. Therefore she was not in violation of the last chance agreement of October 22, 2010.

CORPORATION'S STATEMENT OF ISSUE:

The Corporation maintains that Ms. D. Boychuk violated the terms and conditions of her last chance agreement and that her subsequent dismissal was appropriate.

**FOR THE UNION:
(SGD.) R. FITZGERALD
NATIONAL REPRESENTATIVE**

**FOR THE CORPORATION:
(SGD.) B. A. BLAIR
SR. ADVISOR, LABOUR RELATIONS**

There appeared on behalf of the Corporation:

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| B. A. Blair | – Sr. Advisor, Labour Relations, Montreal |
| B. Gibney | – Manager, Customer Experience, Winnipeg |
| M. Woelcke | – Sr. Manager, RE West, Winnipeg |
| J. Mailhot | – Advisor, Labour Relations, Montreal |
| V. Jean-Pierre | – Customer Experience Manager, Toronto |
| J. Hood | – Customer Experience Manager, Toronto |
| G. Lavoie | – Customer Experience Manger, Montreal |

There appeared on behalf of the Union:

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|---------------|------------------------------------|
| R. Fitzgerald | – National Representative, Toronto |
| D. Andru | – Regional Representative, Toronto |
| H. Grant | – Secretary/Treasurer, Halifax |
| J. Brown | – President, Halifax |
| D. Boychuk | – Grievor |

AWARD OF THE ARBITRATOR

The grievor, Ms. D. Boychuk, is a relatively long service employee, having been hired in 1986. In the spring of 2009 she held the position of full time Station Service Attendant at Winnipeg.

By reason of two incidents in October of 2010 for which the grievor received demerits, it became evident that she suffered from an alcohol dependency. The parties then concluded a last chance agreement for her continued employment one of the conditions of which involved completing a course of treatment. It appears that that was successfully done.

The terms of the last chance agreement are as follows:

In recognition of her condition the Corporation is prepared to maintain the employment of Ms. Boychuk, under a last chance agreement, as follows:

1. Ms. Boychuk will seek treatment for her illness. Her return to work is conditional upon a physician confirming that the treatment prescribed has been followed and completed as prescribed.

2. Ms. Boychuk's disciplinary record will stand at 55 demerit marks. Upon her return to work, Ms. Boychuk will return to her position. She will be allowed to displace as per collective agreement No. 1 work rules.
3. For a period of two (2) years of Cumulative Compensated Service after her return to work:
 - a) Ms. Boychuk must remain clean and abstain from all use of alcohol,
 - b) Ms. Boychuk must attend, on a regular basis, an alcohol dependency support group (such as Alcoholics Anonymous) and provide the Corporation with proof of her regular attendance, on a quarterly basis,
 - c) Ms. Boychuk will be subject to random alcohol and/or urine tests at the Corporation's discretion; such testing shall be conducted in a non-abusive manner. If these tests indicate illegal drug usage, Ms. Boychuk's employment will be terminated.
4. Failure to adhere to these conditions by Ms. Boychuk will result in her discharge and the only matter that may be grieved and/or referred to arbitration will be the question of whether or not Ms. Boychuk adhere to the conditions of her reinstatement.
5. Ms. Boychuk acknowledges she has been apprised of her rights under the Canadian Human Rights Act. She also acknowledges that the terms of the agreement are fair and reasonable and understands that the agreement is in full and final satisfaction of any and all claims under the Canadian Human Rights Act and Collective Agreement #1.

The Corporation maintains that the grievor violated the conditions of the last chance agreement. The problem arose when the grievor was working on July 26, 2011. On that date she was observed by a number of persons to be behaving in a bizarre fashion. For example, she apparently went into the first class lounge area and thrust her hand into a water jug, pulling out a lemon slice, in full view of waiting passengers. It appears that employee Dan Vandale first reported to an on duty manager that he had concerns about the grievor's physical state. That report was received past the mid-point of the grievor's eight hour shift. Shortly thereafter another employee, Ms. Alex Faryon also expressed concerns that Ms. Boychuk was acting strangely. It appears that Ms.

Faryon was a witness to the grievor pulling a lemon slice out of a water jug in the passenger lounge.

Upon being advised of Ms. Faryon's observations Manager Brent Gibney went to see the grievor. On his way to find her another employee commented to him that the grievor was outside and seemed to be drunk.

Mr. Gibney found the grievor sitting in a wheelchair speaking with a passenger in a loud fashion. He asked her to accompany him to the office, which she did. By his observations the grievor's eyes were glassy and bloodshot and he could smell the presence of alcohol, being unable to determine whether it was a Listerine type of mouthwash or some other form of alcohol. The grievor then denied drinking and said that she could not explain why she smelled of alcohol.

Mr. Gibney then advised the grievor that he was sending her home and instructed her to obtain her belongings and return to the office. He accompanied her to the locker room where he saw Foreman Paul Sullivan. He asked Mr. Sullivan to observe the grievor and the latter did, advising Mr. Gibney that in his opinion she was not fit for duty. In fact the grievor never returned from the locker room to Mr. Gibney. She apparently left the premises and drove home in her own vehicle.

The sole issue in these proceedings is whether the grievor did consume alcohol, in violation of the provisions of her last chance agreement. It should be stressed that her

recourse to arbitration is solely for the determination of that question. In other words, should I be satisfied, on the balance of probabilities, that the grievor did consume alcohol, her termination would be unconditional and could not be mitigated by any order of this Office. I should add, however, that the last chance agreement cannot trump the provisions of the **Canadian Human Rights Act**. In other words, notwithstanding the last chance agreement, there might still be an argument of accommodation available to the grievor.

On the material before me I am satisfied that in fact Ms. Boychuk was under the influence of alcohol while on duty on July 26, 2011. In my view there is no other plausible explanation for her physical condition and boisterous conduct as observed by several individuals. I accept the evidence of Mr. Gibney to the effect that he could smell alcohol on her and that she had bloodshot and glass eyes. I am further satisfied that that condition was brought on by the consumption of alcohol. Her unilateral departure from work made it impossible for the employer to direct a drug and alcohol test, should it have wished to do so.

The fourth condition of the last chance agreement is clear and unequivocal. Failure to adhere to the conditions in her last chance agreement "... will result in her discharge" with the only arbitrable issue being whether she did or did not violate the conditions.

The Arbitrator makes no comment on the content of the fifth condition contained in the grievor's last chance agreement. Whether an individual can waive the terms and protections of the **Canadian Human Rights Act** is a question that need not be determined here. Most importantly, I am satisfied that the Corporation has been fair and constructive in dealing with the grievor's condition. The last chance agreement is itself, in my view, an appropriate instrument of accommodation. No violation of the duty of accommodation is disclosed before me.

Unfortunately, what is confirmed in the evidence before me is that the grievor did fail to adhere to the conditions of her last chance agreement by consuming alcohol and being under the influence of alcohol while at work. The consequence for that violation is discharge.

This Office has long recognized that it is important to give effect to last chance agreements. Boards of arbitration are loathe to interfere with such agreements, as to do so would make them less available to parties as an instrument of dispute resolution (see, e.g., **CROA&DR 4046**).

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

September 18, 2012

(signed) MICHEL G. PICHER
ARBITRATOR