

**CANADIAN RAILWAY OFFICE OF ARBITRATION**  
**& DISPUTE RESOLUTION**  
**CASE NO. 4234**

Heard in Montreal, September 10, 2013

Concerning

**CANADIAN NATIONAL RAILWAY COMPANY**

And

**TEAMSTERS CANADA RAIL CONFERENCE**

**DISPUTE:**

Discharge of Joshua Borrie for failing to comply with the terms of your Continuing Employment/Reinstatement Contract dated December 5, 2011.

**JOINT STATEMENT OF ISSUE:**

Mr. Borrie was a conductor and worked out of Sarnia. He had approximately 5 years' service at the time of discharge. In 2009, Mr. Borrie voluntarily signed a Relapse Prevention Agreement. In April of 2011, Mr. Borrie violated his Relapse Prevention Agreement. In December of 2011, Mr. Borrie signed a Continuing Employment/Reinstatement Contract. The Union signed this agreement on January 30, 2012. On March 12th, 2012, CN's OHS advised the Company that Mr. Borrie failed to attend a full Drug and Addiction Medicine Physician Assessment with a specialist on March 7th, 2012 as required. In addition, Mr. Borrie failed to attend several drug and alcohol screening appointments. On April 5, 2012, Mr. Borrie was required to attend a formal employee statement for failure to comply with terms of Continuing Employment/Reinstatement Contract (dated Dec. 05, 2011) with CN by refusing a Physical Exams Assessment & Drug Testing on Mar. 07, 19, 22, 26, 2012. As a result of the findings of the investigation, Mr. Borrie was discharged.

The Union alleges that the Company has violated Articles 75, 82, 85 and 94 of Agreement 4.16, the Canada Labour Code, the Human Rights Act and P.I.P.E.D.A.

The Company disagrees. The Company asserts that Mr. Barrie was accommodated and afforded numerous opportunities to come into compliance with his contract, but failed to do so. The Company asserts that discharge is warranted. Additionally, Article 94 was not part of the discharge grievance and therefore the Company objects to the expansion of the grievance.

**FOR THE UNION:**  
**(SGD.) J. Robbins**  
**General Chairman**

**FOR THE COMPANY:**  
**(SGD.) V. Paquet**  
**Labour Relations Manager**

There appeared on behalf of the Company:

D. Larouche  
D. Gagne

– Labour Relations Manager, Montreal  
– Senior Labour Relations, Montreal

M. Marshall	– Senior Labour Relations Manager, Toronto
P. Bistis	– Superintendent, Sarnia
V. Paquet	– Labour Relations Manager, Toronto
K. Smoynec	– Manager, OHS, Montreal
N. Villeneuve	– Sourcing Manager, Montreal

There appeared on behalf of the Union:

K. Stuebing	– Counsel, Toronto
J. Robbins	– General Chairman, Sarnia
J. Lennie	– Vice General Chairman, Port Robinson

### **AWARD OF THE ARBITRATOR**

The material before the Arbitrator confirms that the grievor, a twenty-five year old employee of some five years of service, encountered serious substance abuse problems. He self-referred to the Company's EFAP in November 2008, following which he was placed on a leave absence and received treatment for his substance abuse disorder. He then signed a relapse prevention agreement (RPA) on February 3, 2009. For the two year period of the agreement the grievor undertook to abstain from the use of alcohol and illegal drugs, subject to ongoing testing and monitoring to verify his compliance.

It appears that while he was on a leave of absence in April 2011 the grievor violated the RPA. During that time, by reason of his non-compliance with his treatment regime and missed appointments for medical assessments including drug and alcohol testing, he was no longer in receipt of any compensation from the Company.

Notwithstanding the foregoing, on December 5, 2011, with the grievor still on a leave of absence without pay, the Company proposed the execution of a Continuing Employment / Reinstatement Contract. That contract essentially renewed the conditions

for treatment and rehabilitation established in his RPA for a further minimum of two years, renewing the obligations to abstain from “ all use of alcohol and drugs at all times, both on and off duty.”

As part of the contract of employment, the grievor was required to undergo a physical exam assessment and drug testing, scheduling initially for March 7, 2012. In fact the grievor failed to attend scheduled appointments on March 7, 19, 22, and 26, 2012. In the circumstances, the Company determined that the grievor was in violation of his continuing employment contract and discharged him on April 19, 2012.

The Union argues that there are mitigating circumstances to be taken into consideration and that overall the Company did not provide the grievor reasonable accommodation for his disability in relation to the consumption of alcohol. The Arbitrator has some difficulty with that submission. The grievor, who is not a long service employee, was given the benefit of a sick leave in November 2008, to allow him the opportunity to undergo treatment for his condition. To that end an RPA was negotiated and signed. In fact when that agreement was violated, as communicated to the Company on April 8, 2011 the grievor, although placed on a leave of absence without pay, was not subjected to any discipline. The Company nevertheless offered the grievor the opportunity of a continuing employment contract in December of 2011, the terms of which required him to attend for medical assessment. Despite signing that contract, the grievor failed to attend the physical examination and drug testing scheduled for him on March 7, 19, 22, and 26, 2012.

The Company scheduled a disciplinary investigation during which the grievor admitted, "...there is no reasonable excuse for missing these appointments...". In the result, on April 19, 2012 the Company concluded that the grievor had violated his continuing employment / reinstatement contract of December 5, 2011 and terminated his employment. Counsel for the Union submits that the grievor's personal circumstances and his physical location, made it difficult for him to attend the medical assessment. The Union argues that in fact the Company did not give the grievor reasonable accommodation contemplated under the provisions of the *Canadian Human Rights Act*. Although the joint statement of issue also references the *Canada Labour Code* and *PIPEDA*, that was not pursued at the hearing.

Having reviewed the facts, I have substantial difficulty with the Union's case. The grievor is not a long service employee. It is true, however, that even as a junior employee he is entitled to the full rights of accommodation under the *Canadian Human Rights Act*. The question is whether those rights were respected.

I am satisfied that they were. For a period of well over three years the Company collaborated with the grievor, providing him with the necessary leaves, and the arrangements, firstly under the Relapse Prevention Agreement (RPA) made in February 2009. And subsequently pursuant to a continuing contract of employment negotiated and completed in December of 2011 and January of 2012. Notwithstanding these efforts by the Company the grievor inexcusable violated his contractual obligation to undergo

medical assessment pursuant to the terms of his continuing contract of employment. That document was clear: failing to meet the conditions contained within it would result in his termination.

On the whole of the evidence before me I am satisfied that the Company did respect its obligation of accommodation in its overall treatment of the grievor through a substantial period of time, and that no violation of the *Canadian Human Rights Act* is disclosed. Nor do the facts before me indicate mitigating factors which would justify disturbing the decision taken by the Company. For all of the foregoing reasons the grievance must be dismissed.

September 13, 2013

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MICHEL G. PICHER  
ARBITRATOR