CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4236

Heard in Montreal, September 10, 2013

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Discharge of Prince George Conductor Shawn Topley on January 8, 2013 for "misleading the Company when you booked sick and subsequent absence without leave from November 20th to December 14th and ongoing failure to be available to protect your employment.

THE COMPANY's ExPARTE STATEMENT OF ISSUE:

On Sunday, November 18th, 2012 at 21:55 the grievor booked sick. On November 23rd the grievor had yet to provide any documentation or advice to the Company with respect to his return to work and was therefore placed into absent without leave (AWOL) status. On December 1st the grievor advised the Company of his incarceration. On November 27th a Notice to Appear was issued and on December 21st an investigation was conducted at the Prince George Correctional Center at which time the grievor admitted that he had been remanded in the Prince George Regional Correctional Center since November 20th and would be unable to protect work.

The Union's grievance contends that the discharge was excessive, given the circumstances; that the Company had no evidence that the grievor wasn't sick on November 18th; that the discipline assessed for "ongoing failure to be available to protect your employment" after December 14th cannot be upheld because it violates Article 117.1 of the 4.3 agreement. The Union requested that the grievor's discipline be expunged or reduced and his record be made whole.

The Company disagrees with the Union's contentions and denied their request.

FOR THE UNION:
(SGD.)

FOR THE COMPANY:
(SGD.) D. Crossan (for K. Madigan)
Vice President, Human Resources

There appeared on behalf of the Company:

V. Paquet	– Labour Relations Mangers, Toronto
D. Gagne	– Senior Labour Relations Manager, Montreal
D. Larouche	– Labour Relations Manager, Montreal

There appeared on behalf of the Union:

A. Stevens	– Counsel, Toronto
R. Hackl	– General Chairman, Saskatoon
K. Stuebing	– Counsel, Toronto
S. Topley	– Grievor, Prince George

AWARD OF THE ARBITRATOR

The grievor, Shawn Topley, was hired by the Company in July of 2011. Unbeknownst to the employer, he had previously been arrested and charged with producing marijuana, contrary to the *Control Drugs and Substances Act*. It appears that in fact the grievor pleaded guilty to that charge and that on November 20, 2012 he was sentenced to a six month prison term.

The record confirms that in anticipation of his attending at court on November 20, 2012, Mr. Topley booked sick on or about November 18, which effectively liberated him from his assignment through the 20th. In the result, the Company had no knowledge of the grievor's circumstances. As he was taken into custody directly from the sentencing hearing, nothing further was heard from him and on November 23, 2012 the Company deemed him to be absent without leave.

The Company subsequently issued a notice to appear to the grievor for an investigation scheduled on November 30, 2012 concerning his absent without leave status. It is only some days after that, on December 1, 2012 that the Company's Train

Master Jim Roy received a telephone call from the grievor advising that he was in fact incarcerated. Mr. Roy's report confirms that the grievor advised him that he expected to remain in jail through March. Based on the information received, the Company conducted an investigation of the grievor's circumstances at the Prince-George Correctional Centre on December 21, 2012. It clearly emerged from that investigation that the grievor could obviously not protect his work assignment, and would not be able to do so until his release, apparently scheduled for March 20, 2013. Following the investigation the Company terminated Mr. Topley for : "misleading the Company when you booked sick and subsequent absence without leave from November 20, to December 14th and ongoing failure to be available to protect your employment, as expressed in the Form 7-80 Notice of Discharge dated January 8, 2013".

The Union argues that the grievor did not in fact mislead the Company, submitting that as his sentencing date approached Mr. Topley was under substantial stress which would have made it unwise for him to perform work in a safety sensitive position. Counsel for the Union also stresses that in fact the grievor made all reasonable efforts to reach the Company to advise as to the circumstances of his incarceration, but that access to a telephone in the Prince George Correctional centre was extremely difficult. Counsel also draws to the Arbitrator's attention the fact that the grievor had apparently worked out an arrangement with the Crown which would have resulted in a conditional sentence without incarceration, a fact which was apparently overtaken by mandatory minimum sentence provisions which apparently went into effect on the day of his sentencing.

I have substantial difficulty sympathizing with the Union's case. The unchallenged facts before me are that the grievor, an employee who holds a safety sensitive position, operated a substantial marijuana grow-op for which he had been arrested and charged shortly prior to his being hired by the Company. While technically the Company could not discipline him for conduct unbecoming, as his criminal activity and his resulting criminal charge occurred before he was hired, he did not apparently disclose that to his prospective employer.

I cannot dismiss out of hand the Company's concerns for an employee of short service who is unable to attend at work for a substantial period of months by reason his or her incarceration. In my view the Company was justified in concluding that based on Mr. Topley's short service and clear inability to attend at work by reason of his incarceration, it was justified in terminating his services. Moreover, it is necessary to determine the question, I would be inclined to sustain the Company's view that the grievor did in fact mislead his employer when he booked sick on November 18, 2012. There is in fact no evidence of any real physical illness which the grievor had at the time, and it appears clear that he booked off for the precise purpose of attending at his sentencing scheduled for November 20, 2012, something he might not have been able to do if he had accepted a road assignment commencing on November 18, 2012.

Its trite to say that the most fundamental obligation of an employment relationship is for the employee to attend at work as scheduled and to provide the services for which

he or she was hired. The grievor obviously made himself incapable of meeting that obligation.

The Arbitrator cannot accept the submission of counsel for the Union that the Company improperly declined to grant the grievor a leave of absence for the period of his incarceration. It appears that he made such a request to Trainmaster Roy on December 1, 2012 albeit indirectly and that subsequently a request for leave was made by his local Union Chair, which request was denied. As noted by the Company, this Office has previously confirmed that an employer is under no automatic obligation to grant a leave of absence for the purposes of incarceration. In CROA 1645 the following factors were noted as pertinent to the Company's considerations in a circumstances of that kind :

a. Nature and circumstance of the offence;
b. Nature of the work performed
c. Length of service
d. Prior disciplinary record
e. Jeopardy to the Company's legitimate interests

In the instant case the nature of the offence committed by the grievor is not inconsequential. I am satisfied that the criminal context is well reflected in the following comments of the sentencing judge :

> The principles of sentencing that I have to consider are, firstly, deterrence, that is, deterrence to you specifically, Mr. Topley, and general deterrence, that is, so members of the public who may think it should be legal to have marihuana, are not quite in the majority as of yet, and accordingly, it is my duty to deter those people from doing exactly what you were doing. This was not a little grow operation in the back room so you could roll a few joints. This was a commercial operation. That type of profitability that the Crown indicates, anywhere from $60,000 to $125,000, is not something going on for recreation. This is a commercial operation, and I view it as such.

> Second after deterrence is the matter of protection of the public. People who live in communities in this city, Prince George, have a right be protected from people like you growing pot, and the reason for it is because of the threat of violence and the threat of home invasions and the other people having their property values devalued because of people like you doing commercial grow-ops in residential areas.

A substantial line of cases out of this Office confirms the incompatibility of employment in the safety sensitive duties of the running trades and a heavy involvement in the drug culture (see e.g.: CROA 1476, 1703, 2038, 2039, 2090, 2416, 2429). While many of those cases involved trafficking, in my view it should be clear that the same concern attaches to an individual involved in the large scale production of a prohibited narcotic. I am satisfied that in the instant case the Company was well within its rights to consider the nature of the grievor's offense in declining his request for a leave of absence. It was also justified in its view that, while the grievor's activities may not have occurred while he was an employee of the Company, his incarceration obviously rendered him unable to honour his employment obligations. In my view his termination was amply justified in the circumstances.

For the foregoing reasons the grievance is dismissed.

September 13, 2013

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MICHEL G. PICHER
ARBITRATOR