CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4477

Heard in Edmonton, July 12, 2016

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Administrative termination of Dean Hutchison's employment file effective July 28, 2015 for innocent absenteeism.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

On July 28, 2015, the Company advised Mr. Hutchison that his employment file had been closed for failure to maintain an acceptable attendance record.

The Union submitted an appeal contending the Company failed to establish, on the balance of probabilities that Mr. Hutchison's employment should have been terminated for non-culpable absenteeism. The Union's position is the Company discharged the grievor due to a *bona fide* medical condition in contravention of Section 239 of the *Canada Labour Code* and the *Canadian Human Rights Act*. The Union's appeal requested that Mr. Hutchison be reinstated without loss of seniority, and that he be made whole for all lost earning and benefits.

The Company maintains that Mr. Hutchison was incapable of meeting his fundamental contract of service to the Company as he failed to attend work on a regular and continuous basis. The Company disagrees with the Union's contentions and has declined the Union's request.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

On February 8, 2015, Conductor D. Hutchison was required to attend a meeting with Superintendent F. Boucher, where a discussion took place regarding the grievor's absences from work due to *bona fide* medical conditions. On May 14, 2015, the grievor was required to attend another meeting with Superintendent Boucher, where again his absences from work due to *bona fide* medical conditions was discussed. The grievor was asked to provide medical documentation with regards to an illness for which he booked off sick on May 9, 2015. The grievor provided the requested documentation, which noted there were no restrictions and a prognosis of full recovery. On July 28, 2015, the grievor was called to another meeting with Superintendent Boucher and was issued a letter notifying the grievor the Company had terminated his employment, due to his failure to maintain an acceptable work record.

The Union's position is the Company has failed to establish, on the balance of probabilities, that the grievor's employment should have been terminated for non-culpable absenteeism. The Union's position is the Company has discharged the grievor due to *bona fide* medical conditions, in contravention of Section 239 of the *Canada Labour Code*, the *Canadian Human Rights Act*, and/or any other clause, regulation, understanding, practice or related jurisprudence which may apply. We request the grievor be returned to employment as Conductor with the Company without loss of seniority and benefits, and that his record be made whole.

FOR THE UNION:
(SGD.)R. S. Donegan
General Chairperson

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

There appeared on behalf of the Company:

D. Crossan	– Manager Labour Relations, Prince George
K. Morris	– Senior Manager Labour Relations, Edmonton
F. Boucher	– General Superintendent, B.C. South
G. Capeness	– Team Leader Nurse, CN OHS, Edmonton

There appeared on behalf of the Union:

M. Church	– Counsel, Caley Wray, Toronto
R. Donegan	– General Chairman, Saskatoon
D. Hutchison	– Grievor, Vancouver

AWARD OF THE ARBITRATOR

This arbitration concerns the termination of Conductor Dean Hutchison's employment file, on July 28, 2015, for failure to maintain an acceptable attendance record.

At the time of dismissal, the Grievor had accumulated six years of service with the Company. He was hired in October 2006 as a Conductor Trainee in Vancouver, BC and became qualified as a Conductor on January 29, 2007. Approximately two years later, Mr. Hutchison began missing work due to various illnesses.

From June 2, 2009 to June 1, 2011, the Grievor was suspended for disciplinary reasons. When he returned to work, he was required to be cleared medically fit for duty by CN Occupational Health Services (OHS).

Upon his examination, OHS deemed Mr. Hutchison fit to return to work three months later, on August 31, 2011, with some permanent restrictions related to posture and certain movements or body positions as well as force exertion restrictions.

Considering the Grievor would not be able to perform all of a Conductor's duties, the Company offered that Mr. Hutchison take work at the Vancouver Thornton Yard Office on October 20, 2011.

Two days later, the Grievor declined the Company's offer and indicated that he wanted to remain a train Conductor and subsequently met with Assistant Superintendent Mike Merson to discuss his return to work at such a position.

In December of the same year, OHS, having received updated medical information regarding Mr. Hutchison's permanent restrictions, allowing him additional duties in the capacity of lifting heavy objects.

Given the Grievor's will to come back to work as a Conductor and taking into account his restrictions, the Company placed Mr. Hutchison on the yard spare board where he would be called as a conductor in either yard transfer service or through

freight road service. He commenced familiarizing as a Conductor on February 15, 2012, in Vancouver, which he completed on March 17, 2012.

Even with the above-mentioned steps Mr. Hutchison went on and missed several days of work for sickness related issues. In 2013, he was absent from work for sixty-nine days, an absence ratio of 18%. In 2014, he missed one-hundred-sixty-seven days, equalling a 46% absence ratio. For the year 2015, the Grievor missed fifty days, equalling 39% of absenteeism rate. For each previously mentioned year, his peers recorded ratios of 8%, 9% and 4% respectively. In hours of absence, Mr. Hutchison had an even worse record when compared to his coworkers.

Starting in 2014, the Grievor met four times with General Superintendent Francois Boucher to try to solve his absenteeism issues and underlined the importance for Mr. Hutchison to improve his attendance. Mr. Boucher repeatedly told him that failure to reach an acceptable standard would leave the Company no choice but to increase the severity of discipline up to dismissal. Mr. Boucher also reminded the Grievor numerous times that the Company would help him if need be and invited him to communicate all pertinent information regarding his health. Additionally, he was informed that his work attendance record was far below his peers at the Vancouver Terminal.

In February 2015, Mr. Boucher met with the Grievor again since no improvement was made to his attendance record. The General Superintendent told Mr. Hutchison

that, starting from their meeting, he was to provide OHS with a medical certificate from his physician to justify any absence from work.

After every meeting, Mr. Hutchison stated that he understood the Company's requirements and would comply with them in the future.

In late July 2015, following a review of the Grievor's absence record, the Company decided to terminate Mr. Hutchison's employment for failure to maintain an acceptable attendance record.

Brown and Beatty, regarding incapacity and innocent absenteeism write that:

> "Arbitrators are not inclined to regard the employment relationship as terminated until it can be said that a disability or an absence caused by an illness or incapacity had 'undermined', 'fundamentally breached' or 'frustrated' the employment relationship. Whether the circumstances have reached this point is always a question of fact. Sadly, it is not uncommon for the employees to find themselves in a situation where their medical conditions cause them to be absent so frequently and/or for such prolonged periods that the arbitrator is unable to provide any relief.
> […]
> In other cases, the disability may be so severe that it puts into question whether the employee can recover sufficiently to allow her to return to productive employment without endangering the health and safety of herself and others, and/or whether the employee's disability or incapacity is so severe as to irreparably damage the employment relationship and deprive it of its validity."[1]

In **CROA&DR 4337**, Arbitrator Schmidt explained that:

> "An employer is entitled, where circumstances justify it, to terminate the employment of a person whose innocent absenteeism reaches a degree incompatible with the fundamental contract of service to his or her employer. For the Company to invoke its right to terminate an employee for innocent absenteeism, it must satisfy two requirements. First, it must demonstrate that the grievor's level of absenteeism was excessive.

1 Brown & Beatty 7:6110, 4th edition

> Secondly, it must demonstrate that there is no reasonable basis to believe that the employee's attendance will improve.
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> Beyond the two requirements referenced above, there is also a suggestion that it may very well be appropriate for an employer to give some advanced warning to an employee when his or her rate of absenteeism threatens his or her continued employment (see SHP 284 and SHP 377). This is the case where absenteeism for medical reasons can be controlled or mitigated by an employee. On careful review of the entirety of the grievor's record in this case, I have no doubt that the grievor was in a position to control or mitigate his absenteeism.
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> […]
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> The circumstances of this case reveal that the Company was justified in coming to its conclusion that the grievor would be incapable in meeting his fundamental contract of service to the Company. The grievor's history of attendance at work has been abysmal since he began working for the Company. It is not due to any disability. The Company should not have to endure the grievor's absences indefinitely for varying and sometimes sustained periods of time, in unpredictable patterns."

Arbitrator Picher, in **CROA&DR 2503**, regarding a similar case, concluded that:

> "Regrettably, the Arbitrator does not find the case presented by the grievor to be compelling. As the record discloses, the Corporation has been extremely patient in dealing with his extraordinary rate of absenteeism and lateness over the years. As the jurisprudence reflects, in a circumstance such as this, where the record gives grounds to draw the inference that there will be no improvement in the future, the burden falls naturally to the employee to provide medical or other evidence which provides a sound basis for concluding that an individual's attendance problems will not continue into the future. In the case at hand, other than the grievor's own expressed hopes, there is no significant evidence to substantiate such a prognosis. In the Arbitrator's view the case at hand falls within the principles generally discussed in prior awards of this Office (see CROA 1924, 2002, and 2233)."

In another case involving innocent absenteeism, Arbitrator Picher further explained the second criteria in the following passage:

> "For the reasons related above, I am satisfied that the first part of the two-fold requirement is satisfied. Clearly the grievor has demonstrated an unacceptable level of absenteeism over a substantial period of time. The

> next issue is whether there is any reasonable basis to believe that his performance in respect of attendance at work will improve in the future.
>
> Counsel for the Brotherhood suggests that the Company bears the burden of proof in that regard, and that it has advanced no evidence to support such a conclusion. Even if I should accept that the Company does bear the burden of proof with respect to that element, I cannot agree with the Brotherhood's characterization of the evidence. It is generally accepted by boards of arbitration that where an employee has a substantial record of absenteeism which is, in large part, linked to a medical condition or disability, absent compelling evidence with respect to the cure or control of that condition or disability, it may reasonably be inferred that the employee's record of attendance will not improve in the future. That inference may be the very basis of the Company's judgment as to the viability of the employment relationship and, absent contrary evidence, may suffice to discharge the employer's burden."[2]

In yet another case presented to arbitrator Picher, the latter indicated that an on-going medical condition that doesn't seem to stabilize is sufficient basis to uphold the termination of an employee:

> "As difficult as the grievor's personal circumstances are, the Arbitrator must act out of fairness to both the employee and the Employer. I am satisfied that the conditions for the termination of an employee for innocent absenteeism are amply made out on the material before me. The grievor's record of innocent absenteeism is clearly beyond the average for other employees in his classification, bargaining unit and geographical area. It is at a level incompatible with an ongoing contract of employment. Most significantly, the material before the Arbitrator does not contain any clear and elaborated medical opinion to confirm to the satisfaction of the Arbitrator that Mr. Mills' medical condition has normalized to a degree that his reinstatement to employment on a basis of regular attendance can be reliably predicted. The very terse comment by the grievor's physician, as reflected in the letter of December 15, 1994, is simply not sufficient to rebut the inference, based on the grievor's employment history of the last ten years that he cannot reasonably be expected to maintain an acceptable level of attendance at work."[3]

How does the case at bar qualify regarding the two requirements of the innocent absenteeism test?

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2 **CROA&DR 2371**
3 **CROA&DR 2663**

Firstly, can the absences displayed by Mr. Hutchison be qualified as excessive? I find that the Employer has adequately shown that the Grievor's rate of absenteeism was greatly above the average of his peers at the Vancouver Terminal, over a period of two and a half consecutive years, with percentages at least twice as high and up to almost ten times the average of his peers for half of 2015.

Secondly, the evidence is very telling: The Grievor's absence rate has not gone down since the year 2013. In fact, despite the numerous meetings between Mr. Boucher and the Grievor in 2014 and 2015, the Grievor's absenteeism remained excessive.

The Union claims that the Company knew about Mr. Hutchison's ailment and failed to accommodate him and that the grievance should therefore be allowed.

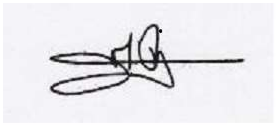
With all due respect, I must disagree. During his meetings with the Grievor, Mr. Boucher repeatedly offered help to him regarding his condition. If Mr. Hutchison suffered a new handicap requiring accommodation, he should have told his Employer. Instead, he declined any help and claimed each time that he understood the requirements and was going to increase his work attendance. A promise that failed to materialized.

The Union affirms that Mr. Hutchison should have been accommodated by the Employer and yet has not provided any proof of a handicap requiring accommodation. The Employer has provided a list of all medical notes from the Grievor. The causes for

his absences vary greatly from one another and, taken as a whole, fail to establish a handicap that would require an accommodation as defined in the *Charter of Rights*.

As stated above, the Company demonstrated that the absence rate of the Grievor was clearly excessive and that he showed no signs of amelioration after meeting Superintendent Boucher several times. Despite those warnings, during the years 2013 through 2015, Mr. Hutchison kept booking sick for a variety of different reasons or for other reasons.

I am satisfied that the two requirements for innocent absenteeism have been demonstrated by the Employer. Therefore, the grievance must be dismissed.



October 3, 2016

MAUREEN FLYNN
ARBITRATOR