CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4511

Heard in Calgary, November 9, 2016

Concerning

KELOWNA PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE
MAINTENANCE OF WAY EMPLOYEES DIVISION

DISPUTE:

The dismissal of Kevin Erickson.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

On September 15, 2015, the grievor, Mr. Kevin Erickson, was dismissed from Company service for "failing to comply with the terms of your Continuing Employment Contract singed on March 24, 2015 by registering a positive test result". A grievance was filed.

The Union contends that the grievor is a person with a disability, one the Company was fully aware of prior to dismissal, who has successfully taken, and continues to successfully take, serious meaningful steps to deal with his disability.

The grievor signed a Relapse Prevention Agreement in March, 2015 but was not returned to work, the stress of which led him to relapse in May, 2015. Relapses are not uncommon in addiction situations;

The grievor was never impaired at work;

The dismissal of the grievor was unfair, unwarranted and a violation of the Company's legal obligation to accommodate its disabled employees.

The Union requests that the Company reinstate the grievor into Company services immediately without loss of seniority and with full compensation for all wages and benefits lost a result of the Company's wrongful decision to dismiss.

The Company denies the Union's contentions and declines the Union's request.

FOR THE UNION:
(SGD.) H. Helfenbein
Vice President

FOR THE COMPANY:
(SGD.)

There appeared on behalf of the Company:

B. Laidlaw	– Manager Labour Relations, Winnipeg
G. Capeness	– CN OHS, Edmonton
D. Crossan	– Manager Labour Relations, Prince George

There appeared on behalf of the Union:

G. Doherty	– President, Ottawa
D. Brown	– Counsel, Ottawa
W. Phillips	– Director, Frankfort

AWARD OF THE ARBITRATOR

The grievor began his employment on October 21, 2013 as a Track Maintainer with the Company's Engineering Department on CN's Okanagan subdivision in Vernon BC, formerly operated by Kelowna Pacific Railway. All positions within the Company's Engineering Department are safety sensitive positions. Prior to being employed by CN, the grievor had worked on the Kelowna Pacific Railway since 2010.

On July 3, 2014 the grievor had a seizure at work. His seizure was the result of a brain injury which occurred in March 2005 after the grievor fell and fractured his skull. Neurosurgery was required at the time and he developed a seizure disorder about two years after his injury. It was documented in the grievor's treating physician's report that he suffered the seizure partly as a result of his forgetfulness in taking his medication. It was also documented that the grievor was an alcoholic.

After his seizure, the grievor was away from work until September 2014. An IME was performed that month on the grievor by a physician in Kamloops BC. The physician determined that the grievor was medically unfit to return to work and recommended that he attend a residential treatment facility to deal with his alcohol addiction. The grievor attended AA meetings regularly before being admitted into a 28 day residential

treatment program in Kamloops on November 12, 2014. The grievor successfully completed the program in December 10, 2014.

On December 15, 2014 the grievor signed a Relapse Prevention Agreement ("RPA") with the CN Occupational Health Services ("OHS") which provided for a two-year monitoring program that included random drug and alcohol testing. The grievor was not permitted to return to work in any capacity.

Following the requirements of the RPA, the grievor provided frequent urine samples during the months of December 2014 and January/February, 2015. A urine sample provided by the grievor on February 24, 2015 showed the presence of Ethyl Glucuronide. This indicated he had been consuming alcohol.

Employees who are non-compliant under an RPA do not face any discipline, but OHS informs the Company that the employee is unfit for work. Employees can continue to receive medical treatment and maintain the employment relationship, including eligibility for benefits, on the condition that they enter into a Continuing Employment Agreement ("CEC"). The CEC is a tripartite "Last Chance" agreement signed by the Union, the Company and the employee. It includes a clause that states that failure to comply with the CEC and the RPA will result in discharge from employment.

The grievor signed the CEC on March 24, 2015 which stated that he was subject to evaluation for two years, including alcohol and drug testing as well as medical

monitoring. He also agreed in the CEC to enter and abide by a further RPA and abstain from all substances both on and off work.

The grievor then attended for a further IME on March 31, 2015 for the following reasons: to confirm any substance abuse or other diagnosis, assess the stability of his recovery from his alcohol dependence, identify any treatment recommendations and determine his fitness to return to his regular duties. In his March 31, 2015 IME report, the physician concluded that the grievor was unfit to return to safety sensitive employment in the railway industry but that he could do so if he could demonstrate abstinence for 90 days. On the recommendation of the IME physician, the grievor continued to attend AA meetings and enrolled in a 10-day outpatient treatment program. Again, the grievor provided numerous urine samples during the months of March April and May 2015, all of which were negative.

On June 24, 2015, after providing a hair sample, the grievor again tested positive for alcohol consumption. On August 4, 2015, OHS reported the grievor as non-compliant with the CEC. After receiving this advice from OHS, the grievor was terminated on September 15, 2014 pursuant to the terms of the CEC.

The Company, in argument, pointed out that non-compliance with the CEC will result in an employee's dismissal, as outlined in item 5:

> Should you fail to comply with the full terms of this contract, including compliance with the relapse prevention agreement, you'll be discharged from CNA will not be eligible for continuing employment/reinstatement.

The Company further noted that the CEC was a three-party agreement signed in good faith that is recognized, pursuant to human rights legislation, as a legitimate means of accommodation for individuals who are disabled by drug or alcohol dependency. The Company submits that the grievor understood the terms and conditions of the CEC as well as the consequences of his failure to adhere to the CEC. The Company further submits that the penalty of dismissal for noncompliance with a last chance agreement like the CEC must be adhered to in order to maintain the integrity of these agreements as tools for accommodation.

The effect of non-compliance of a last chance agreement in the context of the duty to accommodate an employee with a substance abuse addiction was addressed in **CROA&DR 3198** cited by the Employer:

> I am satisfied that Mr. Davidson'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. Davidson's condition, and that any requirement to employ him in the face of his failure to meet the conditions would constitute undue hardship. The fact that the document may bear the words "without prejudice" is of little significance given the facts of the case. The grievor and the Union obviously had the choice to decline to sign the agreement and to pursue Mr. Davidson's rights under the grievance and arbitration provisions of the collective agreement, if they chose to do so. I am satisfied that in all of the circumstances they can fairly be taken to have essentially agreed that the last chance agreement was a suitable form of accommodation. 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.

The arbitrator agrees entirely with the proposition that a last chance agreement is a suitable form of accommodation, particularly when one considers the extent to which an employee is able to continue attending for medical treatment and maintain benefits eligibility throughout the rehabilitation period. It is also in keeping with the duty of accommodation to the point of undue hardship that a single relapse only triggers a notice to the Company of the breach, but nothing more in the form of discipline.

It is reasonable and consistent with the duty to accommodate that when an employee relapses and a breach of RPA occurs the employee is required to sign a last chance agreement (in the form of the CEC) in order to continue with their rehabilitation efforts and maintain their employee status, which includes employee benefits. The whole accommodation process established to deal with an employee living with a substance abuse problem is, to quote Arbitrator Picher, a “suitable form of accommodation”.

As noted in **CROA&DR 4054** and more recently **CROA&DR 4375**, employees who have breached last chance agreements but who are able to provide substantial evidence of rehabilitative efforts have been reinstated to their employment, including into safety sensitive positions such as the grievor occupied here. Those employees demonstrated that they have taken significant steps post-termination to maintain their sobriety including attendance at support meetings like AA and out-patient counselling.

The grievor has continued to regularly attend AA support meetings since his termination. Although not conclusive of his sobriety, the grievor has further demonstrated his earnestness in staying clean by attending for alcohol testing at his own cost, the results of which tests have all been negative. The grievor has been working more recently as a labourer and enlisted his current Employer to provide a letter of support. In keeping with his consistent record of attendance for AA meetings and treatment programs since entering the rehabilitative program in late 2014, the grievor has maintained a positive work record.

Bearing in mind that the grievor does suffer from a disability in the form of an alcohol addiction which requires accommodation to the point of undue hardship under the *Canadian Human Rights Act*, and given the evidence before me which corroborates his ongoing and consistent rehabilitative efforts since his termination, the grievance is upheld in part. In upholding the grievance with the conditions stipulated below, however, the arbitrator recognizes the need to send a message to the grievor that further non-compliance will result in his immediate dismissal without further recourse to arbitration. To reinforce the seriousness of the Company's overriding concern for safety, the arbitrator has also directed that the grievor shall be monitored for random alcohol and drug testing for a period of three years, which is one more year than the initial monitoring set out in the RPA.

Accordingly, the arbitrator directs that the grievor shall be reinstated into his employment without loss of seniority but also without compensation for past wages or benefits and subject to the following conditions:

1. The grievor shall not return to work until he is confirmed by the Company OHS department to be capable of performing the safety sensitive duties of a Track Maintainer.

2. Upon being confirmed fit to return to work by OHS, the grievor shall be subject to the following:
    a. He shall abstain from the consumption of alcohol or drugs;
    b. He shall be subject to random drug and alcohol testing in the same manner as occurred prior to his termination for a period of three years;
    c. He shall continue to maintain membership in support groups such as AA for the same three year period he is subject to random alcohol and drug testing. The grievor shall provide confirmation of his attendance at the support group meetings to the Union and the Company no less than quarterly for the three year period;
    d. Should the grievor fail an alcohol or drug test, or fail to appear for a drug and alcohol test without a proper reason for his absence, or otherwise violate any of the conditions set out herein for his reinstatement, he shall be subject to termination without access to arbitration except for the sole purpose of the arbitrator determining whether the grievor violated the conditions of his reinstatement as directed in this award.

December 5, 2016

JOHN MOREAU
ARBITRATOR