CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3415

Heard in Calgary, Wednesday, 10 March 2004

concerning

CANADIAN PACIFIC RAILWAY

and

UNITED STEELWORKERS OF AMERICA, LOCAL 1976

DISPUTE:

The dismissal of Mr. Wayne Martin of Coquitlam, BC.

JOINT STATEMENT OF ISSUE:

On December 10, 2001, Mr. Martin was dismissed form Canadian Pacific Railway for reporting to duty under the influence of alcohol and for failing to adhere with CROR Rule G and the terms and conditions of his arbitrated return to work in CROA 2716. On July 9, 2003, there was a CROA hearing regarding the dismissal and on July 14, 2003, CROA decision 3355 was issued to reinstate Mr. Martin. On July 18, 2003 Mr. Martin consumed alcohol.

On August 5th, 2003, Mr. Martin started his training at the Intermodal Terminal in Pitt Meadows. On August 21, 2003 the Company advised Mr. Martin that he was being held out of service. on August 25, 2003, the Company conducted an investigation. On September 11, 2003, the Company conducted a supplementary investigation. On September 17, 2003 Mr. Martin was dismissed.

The Union appealed the discipline on the following grounds: **(1)** Mr. Martin did not return to active service until August 5. As such, he was not in the employ of Canadian Pacific Railway on the date he consumed alcohol. Accordingly, the requirement to remain abstinent did not apply to Mr. Martin, and further **(2)** Mr. Martin is an alcoholic, suffered from a relapse, has a medical disability and continues to fight the sickness. As such, the discipline was excessive and the Company should have continued to accommodate Mr. Martin, in lieu of dismissal.

The Union seeks the reinstatement of Mr. Martin without loss of seniority and claims for lost benefits and wages since August 21, 2003. In the alternative, the Union seeks the reinstatement of Mr. Martin on such terms that the Arbitrator considers appropriate.

The Company disagrees with the Union's position, as set out above, and declined the grievance.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) RICHARD PAGÉ	**(SGD.) R. SABOURIN**
STAFF REPRESENTATIVE	**FOR: DIRECTOR, INTERMODAL OPERATIONS – WEST**

There appeared on behalf of the Company:

R. Sabourin	– Labour Relations Officer, Calgary
S. Seeney	– Manager, Labour Relations, Calgary
R. Hampel	– Manager, Labour Relations, Calgary

And on behalf of the Union:

P. J. Conlon	– Chairman, Board of Trustees
R. Summerside	– Chief Steward

AWARD OF THE ARBITRATOR

The facts giving rise to this grievance are not in dispute. The grievor, an employee with over twenty years of service, is an alcoholic. That disability has plagued his employment history, having lead to his termination on two separate occasions, with reinstatement by this Office on each of those occasions, with due consideration for the accommodation of Mr. Martin's disability. The first reinstatement, ordered in **CROA 2716**, involved Mr. Martin's termination for the consumption of both alcohol and cannabis while on duty. In that award, dated March 15, 1996, the Arbitrator stressed the duty of accommodation owed to a person in the grievor's circumstances. The award reads, in part, as follows:

> The Arbitrator cannot accept the argument of the Company's representative, nor the reasoning of certain cases decided in the earlier years of this Office, which predate current human rights legislation and arbitral jurisprudence, to the effect that an employee discharged for the possession or consumption of alcohol or non-prescription drugs cannot, thereafter, legitimately claim that he or she should be reinstated based on rehabilitation efforts undertaken after the discharge. Both legislation in Canada, such as the **Canadian Human Rights Code**, and an extensive body of arbitral jurisprudence, clearly recognize that alcoholism and

> drug addiction are a form of illness, and are to be treated as such. When, as in the instant case, an employee can demonstrate by clear and compelling evidence that he or she has made substantial strides in gaining control of an addictive condition, even if it be after the culminating and sometimes galvanizing event of discharge, it is incumbent upon a board of arbitration to take full cognizance of that reality in considering whether to exercise the board's statutory discretion to reduce the penalty of discharge. Any other approach would, in my respectful view, run contrary to current statutory standards which prohibit discrimination on the basis of an illness such as alcoholism or drug addiction, and specific statutory provisions which now compel employers and unions alike to explore means of reasonable accommodation for persons so afflicted.

In light of evidence tendered before the Arbitrator with respect to the grievor's rehabilitation at the time, and his ongoing treatment, the Arbitrator ordered his reinstatement subject to conditions, including "… that he abstain from the consumption of alcohol and non-prescription drugs."

Unfortunately the grievor suffered a relapse. On December 10, 2001 he was dismissed for having reported for duty in the safety sensitive position of a yardmaster under the influence of alcohol on November 8, 2001. The arbitration relating to the grievor's second discharge resulted in the decision in **CROA 3355**, issued on July 14, 2003. During the course of the hearing of that grievance the grievor, then represented by counsel for the United Transportation Union, indicated to the Arbitrator through his counsel that he was willing to accept conditions for his reinstatement following the relapse, specifically including the condition that he remain abstinent from the consumption of alcohol or drugs for the entire remainder of his employment with the Company, and that he maintain continued participation in Alcoholics Anonymous and be subject to random alcohol and/or drug testing for the same period. It was also suggested that because the grievor also held seniority in a clerical bargaining unit that

he be reinstated into a position within that unit, with no safety sensitive duties or responsibilities.

The Arbitrator took the representations made on behalf of Mr. Martin to heart. The Union stressed that he was then, and for some time had been, fully rehabilitated and abstinent from alcohol consumption. As extraordinary as the conditions which his counsel proposed might have been, in the circumstances the very real alternative of his termination gave justification to the conditions proposed. In the result, the Arbitrator's award directed that the grievor be reinstated into a clerical position, not in a safety sensitive position, subject to his refraining from the consumption of alcohol or drugs for the remainder of his employment, as well as his ongoing participation in Alcoholics Anonymous and his being subject to random alcohol or drug testing, to be administered in a non-abusive fashion. The award was clearly fashioned as a last chance opportunity, as was made clear by the penultimate sentence of the award:

> Failure to abide by any of the foregoing conditions shall render the grievor liable to discharge, with access to arbitration only in respect of the issue of whether he did violate any such condition or conditions.

The evidence confirms that within four days of that award, at a time when the grievor was well aware of the conditions imposed regarding his reinstatement, Mr. Martin did consume alcohol, albeit in a non-work related setting. It appears that on that date he was arrested by the Port Moody Police for driving a motor vehicle with his blood alcohol level in excess of the legal limit. In the ensuing investigation conducted by the Company, which learned of the event on or about August 21, 2003, the grievor

confirmed that he did consume alcohol on July 18, 2003, although he asserted his own view that he was not then reinstated and did not consider that he was subject to the conditions in the Arbitrator's award.

In the case at hand the representative of the grievor's new union as a clerical employee makes extensive and able arguments concerning the merits of the circumstances under which Mr. Martin was subsequently discharged. Firstly, he questions the legitimacy of the decision in **CROA 3355** to the extent that it would purport to bind the United Steelworkers of America, Local 1976, the bargaining agent for the clerical unit into which the grievor was returned to employment, when that union did not participate in the original hearing in **CROA 3355**, where carriage of Mr. Martin's grievance was then with the United Transportation Union which represented him as a yardmaster. The Union's representative also questions whether a board of arbitration could properly bind an employee, particularly an employee who works in a non-safety sensitive environment, to lifetime conditions of the kind found within **CROA 3355**. It fairness, it emerged during the course of the hearing that he was not aware that the conditions adopted by the Arbitrator were in fact those which were advanced and specifically suggested on the grievor's own behalf by his counsel at the hearing of the grievance in **CROA 3355**.

The Company's representative objects to the suggestion made by the Union to the effect that the decision in **CROA 3355** should be revisited or is in some manner not binding upon the Union. In particular, he stresses that the joint statement of issue does

not contain any reference to any jurisdictional limitations on the decision in **CROA 3355** as it might apply to the instant Union, nor any suggestion that the award itself is inappropriate or out of keeping with the **Canada Human Rights Act** or the decision of the Supreme Court of Canada in the **Meiorin** case (**British Columbia (Public Service Employee Relations Commission) v. BCGSEU**, [1999] 3 S.C.R. 3).

After careful consideration the Arbitrator cannot agree with the objections raised by the Union. It may well be that the Union is correct in its suggestion that it should have received notice of the hearing in **CROA 3355**, as the remedy proposed by the United Transportation Union arguably impacted the interests of its members. However, I am satisfied that the conduct of the Union subsequently amounts to a waiver on its part of any right of objection which it may have had at the time of reinstatement, when it clearly became aware of the terms of the award. Firstly, it was then open to the Union to bring the matter to this Office in a timely fashion, bearing in mind that it is part of the rules of the Canadian Railway Office of Arbitration that the Arbitrator remains seized of all disputes in the event of any problems with respect to the implementation of a remedy. However, the Union made no attempt to bring the matter back for the resolution of any dispute as to the implementation of the award. It effectively accepted the reintegration of the grievor into its bargaining unit without formal protest in August of 2003. Nor was any jurisdictional objection raised during the course of the disciplinary investigation conducted by the Company in respect of the alleged violation of the grievor's conditions of employment, during which time he was represented by the Union. Further, if the Union was of the view that its rights were not being respected by virtue of the grievor's

reinstatement into its bargaining unit in August of 2003, it was open to the Union to challenge that reinstatement by judicial review. The Union did not do so. It is only after the grievor was terminated by the Company on September 17, 2003, and indeed for the first time at the hearing of this matter in March of 2004, that the Union raised the jurisdictional objections related above.

It is trite to say that in matters of labour relations finality is of the essence. I am satisfied that in the circumstances disclosed, while the Union had every opportunity to bring a proper challenge to the decision in **CROA 3355**, it waived its right to do so and cannot now be heard to object to the legitimacy of the conditions which the grievor effectively accepted as governing his continuing employment. By way of background, it should also be noted, as well, that within the railway industry it is not uncommon for employees to hold seniority in more than one union, with access to employment in more that one bargaining unit. Indeed, in a number of prior awards of this Office demotion to another bargaining unit has been ordered, most commonly within the running trades, without any objection or grievance. It is also not uncommon for employees in a given bargaining unit who suffer from a disability protected by the **Canada Human Rights Act** to be provided accommodated employment within the ranks of another bargaining unit, albeit that is most generally done where existing vacancies might allow it.

For the foregoing reasons the Arbitrator is satisfied that the jurisdictional objections raised in the submission of the Union cannot succeed. What then is left? What is left is the status of the grievor at the time of the events of July 18, 2003 and the

operation of the conditions contained in **CROA 3355**. Clearly, Mr. Martin did not cease to be an employee during the period following his reinstatement by the order of this Office after July 14, 2003. Indeed, he never ceased to be an employee. It is well established that termination subject to reinstatement through the grievance and arbitration process does not place an individual in an employment limbo. An order of reinstatement generally restores the full status of the employment relationship retroactively to the date of termination. In the result, I am satisfied that the requirement that the grievor remain abstinent from the consumption of alcohol was in full force and effect on July 18, 2003, and that the grievor was well aware of the conditions which then governed him.

There can be little doubt but that the grievor suffered a relapse in his condition as an alcoholic on July 18, 2003. I do not think it necessary to consider whether he deceived the United Transportation Union or this Office as to his state of recovery at the arbitration hearing held on July 9, 2003. I accept the submission of the Union that he continued to be owed a duty of accommodation at that time. The question then becomes whether the Company reasonably fulfilled the duty of accommodation, to the point of undue hardship. The answer to that question can only be extrapolated by reference to the entire history of the grievor's employment and the ongoing efforts on the part of the Company, through the arbitrated results of this Office, to assist the grievor in his continued employment notwithstanding his disability.

In the case at hand the conditions for reinstatement, which were in fact proposed by the grievor himself through his bargaining agent at the hearing in **CROA 3355**, were themselves the measures whereby accommodation was to be achieved. Accommodation in the context of an individual suffering from the disability of alcoholism or drug addiction does not simply mean that the employer must tolerate the individual continuing to be actively afflicted by that condition. The continued employment of an addicted individual, subject to conditions fashioned to deal with his or her disability, is an instrument common in the workplace. Under the regime of collective bargaining unions frequently enter such arrangements with employers precisely for the purpose of allowing an individual to continue his or her employment while overcoming or gaining control of an addiction to alcohol or drugs. Such agreements commonly include in-patient or out-patient treatment and follow-up participation in the ongoing activities of support groups, on a documented basis. Such arrangements, which also can be fashioned remedially by boards of arbitration, are of the essence of the attempt to provide reasonable accommodation to an employee afflicted with a disability of alcohol or drug addiction.

As related above, the grievor's disability brought his continued employment in a safety sensitive position into question on two separate occasions, both resulting in his termination and both concluding with his reinstatement subject to accommodative conditions. In the case at hand, albeit through the grievance and arbitration mechanism, Mr. Martin has been accorded extensive accommodation in two separate attempts to assist him in continuing his employment with the Company. Regrettably, the most

recent relapse takes Mr. Martin's circumstances into the area of undue hardship for his employer to the extent that he has been unable to remain faithful to conditions which his own bargaining agent proposed at arbitration. While the Arbitrator accepts that relapse is a common dimension in the evolution of a person dealing with the disability of alcoholism, that being indeed the very premise of the decision in **CROA 3355**, the duty of accommodation does not require indefinite or endless tolerance on the part of an employer. In this case, the grievor has been accommodated to the point of undue hardship.

I am satisfied that the decision in **CROA 3355** was in full force and effect on July 18, 2003. The grievor knew that he was then subject to termination with no recourse to arbitration save on the question of whether he did violate the conditions of that award. Unfortunately, he did. In the circumstances I have no alternative but to sustain the termination of Mr. Martin's employment.

The grievance must therefore be dismissed.

March 15, 2004

(signed) MICHEL G. PICHER
ARBITRATOR