CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3549

Heard in Montreal Wednesday, 12 April 2006

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

DISPUTE:

Circumstances surrounding the closure of Kasha Whyte's employment file.

JOINT STATEMENT OF ISSUE:

On February 26, 2005, Ms. Whyte received a call from CMC advising her that she had sixteen days to report to Vancouver. She wrote to the Company requesting an extension and describing her circumstances, explaining that it would be an extreme hardship to have to go to Vancouver.

Ms. Whyte then received a letter form the Company dated April the 25th. This letter did not comment on her earlier correspondence and informed Ms. Whyte that if she did not advise the CMC by May 6 that she would be reporting to Vancouver her seniority would be forfeited. Ms. Whyte received a phone call on June 22, 2005 and was informed that if she didn't report to Vancouver by July 2 her employment file would be closed. On July 4 the Company terminated Ms. Whyte.

The Union contends that, contrary to the collective agreement, the Company has: acted unreasonably by not granting Ms. Whyte a leave of absence; failed to reasonably consider Ms. Whyte's reasons for not reporting for duty in Vancouver; and dismissed Ms. Whyte without an investigation.

The Union requests that Ms. Whyte be reinstated without loss of seniority; made whole for all losses and be granted a leave of absence.

The Company disagrees.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) B. R. BOECHLER	**(SGD.) K. MORRIS**
GENERAL CHAIRPERSON	**MANAGER LABOUR RELATIONS**

There appeared on behalf of the Company:

K. Morris – Manager, Labour Relations, Edmonton

J. Torchia – Senior Manager, Labour Relations, Edmonton

And on behalf of the Union:
D. Ellickson – Counsel, Toronto
B. R. Boechler – General Chairperson, Edmonton
R. A. Hackl – Vice-General Chairperson, Edmonton
R. Thompson – Local Chairperson, Jasper
K. Whyte – Grievor

AWARD OF THE ARBITRATOR

This grievance presents an extremely unfortunate circumstance. The grievor has effectively lost her employment by reason of her inability to respond to a recall, an inability occasioned by personal and family responsibilities.

Ms. Whyte was hired in April of 1991 and qualified as a conductor in 1993. First home terminalled in Jasper in 1992, she was laid off shortly thereafter and forced to exercise her seniority to cover shortages in terminals such as Calgary and Terrace, B.C. She returned to Jasper in May of 1994 and continued working in her home terminal for some five and one-half years, albeit subject to periodic layoffs which occasioned the exercise of her seniority to other locations such as Vancouver, Terrace, B.C. and Edson, Alberta.

In June of 1999 Ms. Whyte applied for maternity and parental leave. Upon return from her leave of absence she remained in lay off status by reason of a shortage of work at Jasper. That status continued over a period of three years. During that time, however, she accepted emergency work in Jasper. She also worked temporarily to

cover shortages of the Union Pacific Railway, on one occasion for a six month term in St. Louis, Missouri in the spring of 2002 and again in October of 2003 in Tucson, Arizona, for approximately five months. Thereafter she returned to her laid off status at Jasper, still being called to perform occasional work from the emergency board.

On February 26, 2005, the Company contacted the grievor by telephone, advising her that she was being recalled from layoff to cover a manpower shortage in Vancouver. On March 9, 2005, she filed a written request for an extension of thirty days to report to the shortage location by reason of her ongoing other employment, it being agreed that she had other work during her layoff. That extension was granted.

Shortly thereafter, on March 18, 2005, the grievor wrote to the Company's Senior Manager, Labour Relations seeking to be excused from her obligation to protect work at Vancouver. Her reason for the request was her wish to remain in Jasper, as a single parent, to care for her six year old son. She explained that she did not want to disturb his living and schooling arrangements and that moving her son to Vancouver would risk a custody battle with his father. In response to that letter the Company did not fully accede to the grievor's request. On April 25, 2005 it communicated to her that it was extending her time for reporting to Vancouver to May 6, 2005 but stating very clearly: "The Company cannot grant any further time for you to report."

Thereafter the grievor wrote a second letter addressed to the Senior Manager, Labour Relations, providing greater detail as to the medical needs of her son, who

apparently suffers from asthma. Subsequently the grievor's circumstance became the subject of discussion between representatives of the Company and the Union's General Chairperson in June of 2005. The Company then communicated to the Union's representative that it was prepared to provide a further extension to allow the grievor time to arrange her personal affairs so as to be able to report to work in Vancouver. Finally, on June 22, 2005, the Senior Manager of the Company's Crew Management Centre in Edmonton reached the grievor by telephone. She had then been granted an extension to report for work in Vancouver from February 26, 2005. The Crew Management Centre Senior Manager advised her that she was to report to work in Vancouver no later than July 2, 2005 failing which she would forfeit her seniority and her employment. Thereafter Ms. Whyte made two further written pleas, one dated June 23, 2005 to the Senior Manager, Labour Relations and another dated June 30, 2005 to the Vice-President of CN for Western Canada, both letters seeking relief on compassionate grounds. Those pleas were not successful and when the grievor failed to report for work in Vancouver by July 2, 2005 the Company issued a registered letter dated July 4, 2005 advising Ms. Whyte that she had forfeited her seniority and that her services with the Company were dispensed with.

In this grievance the Union does not plead any obligation of accommodation to the grievor under the provisions of the **Canadian Human Rights Act**, nor any other legislation. It submits that, in effect, the Company unreasonably failed to provide the grievor with a leave of absence to allow her to avoid the recall to Vancouver by reason of her personal circumstances. The Union also maintains that the Company failed to properly apply articles 115.4 and 148.11(d) of the collective agreement, to the extent

that the grievor did have a "satisfactory reason" for not reporting to Vancouver when recalled. Those provisions read, in part, as follows:

> **115.4** A laid off employee who fails to report for duty, or to give satisfactory reason for not doing so, within 15 days from date of notification, will forfeit all seniority rights.
>
> **148.11** When their services are required elsewhere on the seniority territory, employees on the furlough board will be required to respond in accordance with the following conditions:
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> …
>
> **(c)** All employees with a seniority date subsequent to June 29, 1990 will be required:
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> (i) to protect all work in accordance with this article over the seniority territory governed by this Agreement and in addition they will be required to protect work governed by other collective agreement [sic] on the Region;
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> (ii) to accept and successfully complete training as a locomotive engineer or traffic coordinator and will not be permitted to relinquish traffic coordinator's seniority.
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> **(d)** Employees with a seniority date subsequent to June 29, 1990 who fail to comply with the provisions of sub-paragraph (c)(i) above will, if failing to report at the expiration of 7 days following notification, forfeit any guarantee payments until such time as they report. **Failure to comply with the provision[s] of sub-paragraph (c)(i) above within 30 days of notification or, failure to comply with the requirement of sub-paragraph (c)(ii) above the employee will forfeit their seniority and their services dispensed with unless able to give a satisfactory reason, in writing, to account for their failure to report.**
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> (emphasis added)

Finally, the Union submits that the current termination should be declared null and void by reason of the Company's failure to conduct a disciplinary investigation pursuant to the provisions of article 117.1 of the collective agreement.

The Company cites to the Arbitrator's attention the following provisions of the collective agreement:

Article 115 – Employees Laid Off

115.1 An employee who is laid off will be given preference of reemployment when staff is increased on the seniority and promotion district and will be returned to the service in order of seniority.

115.3 A laid-off employee who is employed elsewhere at the time notified to report for duty may, without loss of seniority, be allowed 30 days in which to report, providing:

(a) that it is definitely known that the duration of the work will not exceed 30 days;

(b) that other laid-off employees are available;

(c) that written application is made to the superior officer immediately on receipt of notification to resume duty.

The Company takes the position that the request made by Ms. Whyte was not truly a request for a leave of absence but rather for an indefinite reprieve from reporting for work and complying with her obligations under the collective agreement. In effect, she was prepared to remain on layoff at Jasper, while responding to any emergency board work available at that location, but not to report to Vancouver, as other employees would be required to do. Indeed, during the course of its presentation the Company's representative noted that all employees with a seniority date subsequent to June 29, 1990 who were laid off in Western Canada were recalled to cover the Vancouver shortage. There was, in that circumstance, no-one else in Western Canada junior to the grievor, or even senior within her own "D" seniority classification, who could be forced to that service. The Company's option would then have been to force a senior employee in the "C" class of seniority from a terminal adjacent to Vancouver, or to fill the position which the grievor would otherwise have covered by hiring and training a new employee. The Union's representatives maintain that they communicated to the Company that the Union would not object to the forcing of a senior employee from an adjacent terminal.

Counsel for the Union submits that the decision taken by the Company was arbitrary, to the extent that it did not truly turn its mind to the merits of the grievor's situation. He submits that a request for a leave of absence could not be arbitrarily refused.

While counsel for the Union does not plead the application of the **Canadian Human Rights Act** nor make a charge of discrimination, he submits that the Arbitrator should take into account, when considering what is reasonable or arbitrary, the decision of the British Columbia Court of Appeal in **Health Sciences Association of British Columbia v. Campbell River and North Island Transition Society** (2004) 240 D.L.R. (4th) 479. In that case the Court found that an arbitrator had erred in declining to find that the scheduling of an employee's hours in such a way as to prevent her from providing care for her child's behavioural and medical needs after school was discrimination on the basis of family status. The Court concluded that there was a *prima facie* case of discrimination and remitted the matter to the arbitrator to deal with the issue of reasonable accommodation. By analogy to the foregoing case, counsel for the Union submits that it was unreasonable for the Company to decline the grievor's request for a leave of absence or to accept her personal circumstances as a reasonable explanation for her failure to respond to the recall to work in Vancouver.

After a careful review of the facts, the Arbitrator has considerable difficulty with the submission of the Union. Firstly, I must agree with the Company that in fact the

grievor did not request a leave of absence. What she sought was a form of super-seniority which would allow her, unlike other employees, to remain laid off at Jasper, with no obligation to protect work elsewhere, while continuing to receive periodic calls to work from the emergency list at Jasper, as she had previously done. A leave of absence connotes a departure from the workplace, virtually for all purposes, whether for an indefinite period or for a period that is fixed. Those are not options which were being requested by Ms. Whyte. Nor, as is evident from the facts above, is this a case comparable to that considered by the British Columbia Court of Appeal in the **Campbell River** case, cited above. The grievor in the case at hand was not asking for an adjustment or accommodation in her work schedule. She was asking, in effect, for relief against one of the most fundamental obligations of the collective agreement, namely the obligation to protect work on her seniority territory in the event of a shortage of employees at any location.

Under the instant collective agreement leaves of absence are dealt with under article 130. Article 130.3 provides as follows:

> **130.3** Leave of absence for other reasons, including personal, for a period not in excess of one year, may be granted at Management's discretion in accordance with Company policy

As noted above, the Arbitrator is satisfied that the grievor did not in fact bring the above provision into effect by reason of what she was requesting. And even if the provision did apply, the Arbitrator has some difficulty is seeing how it can be said that the Company would have violated it, assuming that a violation could only be established on the basis of a refusal which was arbitrary, discriminatory or in bad faith. It appears

clear to the Arbitrator that the Company did turn its mind to the grievor's circumstances. Whether rightly or wrongly, it took the view that a fair response to her request would be a generous extension of time to allow her to make the child care adjustments which might be necessary in the event of her undertaking work at Vancouver. I would have some difficulty in concluding that the Company was unreasonable or arbitrary in refusing to effectively grant to the grievor an amendment of her collective agreement obligations which might extend indefinitely, perhaps for as long as ten years, while she would continue to have the special protected status as an employee who could only be compelled to work in Jasper.

This grievance brings to the fore what must be recognized as a constant in any employment relationship, namely the tension between personal and family obligations and obligations to one's employer. Myriad circumstances might influence an employee's personal or family obligations: care for a child, care for an aged parent or another close relative or care for a spouse with a serious medical disability. Other personal circumstances might include parole or community service obligations after sentencing, close involvement with a church or social group, civic volunteering or competitive sports activities, to name but a few.

A railway is, by its nature, a twenty-four hour, seven day a week enterprise. Persons who hire on to work, particularly in the running trades, know or reasonably should know that their hours of work will be irregular and that they will, on occasion, be compelled to change location to protect work as needed. In exchange for meeting those

onerous obligations railway employees have gained the benefit of relatively generous wage and benefit protections.

On what basis can a board of arbitration, charged with interpreting and applying the terms of the collective agreement, conclude that the conditions of single parenthood can effectively trump the obligations of employment negotiated by the parties within the terms of their collective agreement? In a world where single parenthood is not uncommon that is not an inconsiderable question. As a general matter, boards of arbitration, including this Office, have confirmed that with respect to issues such as childcare the onus remains upon the employee, and not the employer, to ensure that familial obligations do not interfere with the basic obligations of the employment contract. (See, e.g., **CROA 3077**.)

It is, of course, open to the parties to negotiate language within their collective agreement to provide possible relief from obligations of employment which would otherwise be borne by single parents or, for that matter, married parents with special needs. Likewise, Parliament or provincial legislatures could promulgate clear legislation to oblige employers to take such factors into account in the administration of contracts of employment and collective agreements. But as matters stand, the Arbitrator can find no discriminatory practice in the policy of the Company. It essentially requires all parents, whether single or married, to respond to their core employment obligations regardless of their personal or family circumstances. It obviously does occur, as in the case of the grievor, that extensions of time and other accommodations may be considered where hard personal circumstances are demonstrated. But in the end, all

employees subject to the obligations of parenthood are treated the same, without discrimination based on the status of parenthood. In my view it would be highly inappropriate, when neither the parties nor Parliament have enacted such protection, for an arbitrator to extract from a provision such as article 115.4 and the phrase "satisfactory reason" for not responding to a recall, an effective annulment of an employee's most fundamental collective agreement obligation to be at work, in a manner tantamount to granting a form of super-seniority. If neither the parties themselves nor Parliament has ploughed any such new furrow, it is plainly not for an arbitrator to do so, bound as any board of arbitration is to apply the collective agreement as it stands. The conferring of what, in effect, would be indefinite and qualified partial parental leave is for the parties to negotiate or for the appropriate legislators to promulgate, should that be appropriate or desirable.

In the result, for the reasons related, I am satisfied that the Company did give the fullest consideration to the grievor's personal circumstances and her request for compassionate consideration. In fact it accommodated her circumstance, to some extent, by extending for a considerable period of months her obligation to report for work at Vancouver. There was no collective agreement obligation on the part of the Company to effectively waive the provisions of the collective agreement and in effect confer a special status upon the grievor by reason of her personal circumstances. There was, in the end, no violation of the collective agreement itself.

Nor does the Arbitrator share the view of the Union with respect to the application of article 117, Disciplinary Investigations. This is not a circumstance where the

Company found any wrongdoing or negligence on the part of the grievor which should be investigated. On the contrary, it dealt with the file from the beginning as one which could result in an administrative termination of employment by reason of the forfeiture of seniority in accordance with the interpretation and application of articles 115.4 and 148.11 of the collective agreement. This is plainly not a circumstance in which the Company was under an obligation to conduct a disciplinary investigation.

For these reasons the grievance must be dismissed.

April 20, 2006

(signed) MICHEL G. PICHER
ARBITRATOR