CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION
CASE NO. 3588

Heard in Calgary, Tuesday, 14 November 2006

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

DISPUTE:

The dismissal of Tom Carroll of Kamloops, B.C. for violation of a Continuing Employment Contract.

JOINT STATEMENT OF ISSUE:

On March 26, 2004, Tom Carroll entered into an Continuing Employment Contract with the Company. One provision of this contract required Mr. Carroll to abstain from drugs and alcohol.

Mr. Carroll's father passed away in August of 2005 after some eight months of hospitalization. Mr. Carroll, after attending his father's funeral, was distraught and upset and ended up violating the terms and conditions of his Continuing Employment Contract.

Following an investigation Mr. Carroll was dismissed for "failure to comply with the terms and conditions of your continuing employment contract date March 2004 with CN Rail on October 24th, 2005.

The Union contends that there are substantial mitigating factors with respect to this matter and that dismissal ought to be set aside and a lesser amount of discipline substituted.

The Company contends that there is no dispute regarding the terms and conditions of the grievor's continuing employment contract. In fact, all parties were signatory to the contract. The Company properly applied the agreed upon terms and conditions of the grievor's contract and therefor mitigation of the consequences flowing from the grievor's actions is unjustified.

FOR THE UNION:

(SGD.) R. A. HACKL
FOR: GENERAL CHAIRPERSON

FOR THE COMPANY:

(SGD.) K. MORRIS
FOR: VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

K. Morris	– Manager, Labour Relations, Edmonton
B. Laidlaw	– Manager, Labour Relations, Winnipeg

And on behalf of the Union:

M. A. Church	– Counsel, Toronto
R. A. Hackl	– Vice-General Chairperson, Edmonton
D. Finnson	– General Chairman, TCRC, Calgary
D. Olson	– Vice-General Chairman, TCRC, Calgary
T. Carroll	– Grievor

AWARD OF THE ARBITRATOR

The material before the Arbitrator establishes, beyond controversy, that in 1999 the grievor, while suffering depression, was referred to the Company's Employee & Family Assistance Program (EFAP). As a result, he entered into a personal service agreement which included, in part, an undertaking on his part to refrain from the consumption of drugs and alcohol, and to be subject to periodic random testing. In April of 2003, after registering a positive test for cocaine, the grievor sought treatment for his substance dependence. Following a course of rehabilitation the grievor was eventually returned to work on a continuing employment contract dated March 12, 2004, returning to active service on April 13, 2004.

One of the conditions of the contract of employment was abstention from consuming alcohol or drugs for a period of two years, subject to periodic random, unannounced testing. Paragraph 6 of the contract, signed by the grievor and the General Chairperson of his Union, provides as follows:

6. Should you fail to comply with the full terms of this contract, including compliance with the Commitment for Workplace Rehabilitation as established by the Chief Medical Officer, you will be discharged from CN and will not be eligible for continuing employment/reinstatement.

On October 5, 2005, CN Occupational Health Services directed the grievor to attend for drug and alcohol testing within a period of twenty-four hours. It appears that the grievor then indicated to the Medical Department that he would in all likelihood test positive as he had violated his last chance contract. In fact, the drug test was positive for the consumption of marijuana. Following an investigation on October 27, 2005, the Company discharged the grievor for his failure to comply with the terms and conditions of his continuing employment contract.

On behalf of the grievor the Union makes a number of submissions. Firstly, it argues that the last chance agreement executed by the grievor, in circumstances where he had virtually no choice, is not fair and that the strict terms of the agreement should therefore not be enforced. In support of that argument Counsel for the Union points to the grievor's long service of some thirty-two years. He also stresses the fact that he has never been disciplined for being impaired in any work-related situation and the mitigating circumstances of the grievor's consumption of marijuana, apparently prompted by the death of his father. Additionally, counsel for the Union argues the Company's duty of accommodation and suggests that the agreement itself is in contravention of the **Canadian Human Rights Act**, to the extent that it does not adequately accommodate the grievor's disability with respect to drug dependence, to the point of undue hardship.

The case at hand is extremely unfortunate. It appears that the grievor is a long service employee whose faithfulness to his job have has never been substantially questioned. The fact remains, however, that the work which he performs is highly safety sensitive, and that the Company remains under an obligation to ensure the safety of its operations, equipment and the well being of its employees as well as the public.

This is not a case in which the Arbitrator can entertain submissions with respect to any alleged violation of the **Canadian Human Rights Act**. Under the rules establishing the CROA&DR, the Arbitrator's jurisdiction is limited to those issues identified in the joint statement of issue. The alleged failure of accommodation on the part of the Company is simply not raised in the joint statement of issue filed in the instant matter. That matter can therefore not be addressed, as it is beyond the jurisdiction of this Office.

The sole issue, therefore, is whether the Company was entitled to enforce the strict terms of the last chance employment agreement made with the grievor in March of 2004. The grievor's positive drug test in October of 2005 violated that agreement. In the Arbitrator's view there can be no doubt but that there was a violation of the terms of the agreement by the grievor. By his own admission, he consumed marijuana on several occasions following the passing away of his father in August of 2005. He then knew, or

reasonably should have known, that his actions in that regard placed his continuing employment in the most serious jeopardy.

This Office has had prior occasion to consider the importance of last chance agreements, particularly as applied to persons recovering from alcohol or drug addictions who work in safety sensitive positions. In **CROA 2632** this Office declined to interfere with the consequences of a discharge under such an agreement stating:

> The Arbitrator can see no basis to interfere with that decision. To do so would be tantamount to disregarding or amending the conditions agreed to between the parties, as reflected in the settlement relating to Mr. Haydock's reinstatement. As a matter of general policy, such settlements should be encouraged. As reflected in Canadian arbitral jurisprudence, arbitrators do not interfere with the terms of such settlements, as to do so would tend to discourage parties from resorting to them and, ultimately, undermine their utility as an important instrument for resolving disputes. …

Additionally, in **CROA 2743** the following appears:

> The record before me establishes, beyond any substantial controversy, that during the course of a periodic medical examination, which included a drug and alcohol test, Mr. O'Connell proved positive for cannabinoids, or marijuana. Following a disciplinary investigation, at which a copy of the drug test report in the possession of the Company was provided to the grievor, he was terminated for violation of the terms of his personal contract.
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> This Office can see no responsible basis upon which to reverse that decision. The ability of employers and unions to make individual employees, whatever their personal problems, subject to strict conditions as a requirement of their continued employment is an instrument of great importance whose credibility should be sustained by employers, unions and arbitrators alike. …

Given the grievor's age and years of service, this is a deeply unfortunate case. That said, however, the Arbitrator cannot properly undo or amend the terms of the last

chance employment agreement which the parties themselves executed. Moreover, from the standpoint of general fairness, the grievor did have the advantage of an initial arrangement with the Company's Health Services, whereby his employment continued while he was subject to random testing, albeit unknown to his supervisors, as well as the subsequent agreement freely and knowingly executed in March of 2004. On the whole, the Arbitrator cannot find that there is any unfairness in the decision of the Company, or in the operation of the agreement itself. Even if the **Canadian Human Rights Act** were considered, I would find that by virtue of the two chances given to the grievor, he was accommodated to the point of undue hardship.

For all of the foregoing reasons the grievance must be dismissed.

November 20, 2006

(original signed by) MICHEL G. PICHER
ARBITRATOR