CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3797

Heard in Montreal, Tuesday, 8 September 2009

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA)

DISPUTE:

Concerning the dismissal of Mr. John Quinn from the Moncton Intermodal Terminal

JOINT STATEMENT OF ISSUE:

On December 24th, 2008 the grievor was required to submit to an alcohol test. The result was a positive test indicating a blood level content of .036%. Mr. Quinn was subsequently discharged for an alleged violation of the Company's Drug and Alcohol Policy.

It is the Union's position that the Company lacked reasonable cause to submit the grievor to testing. The Union further submits that the grievor was not impaired, by any standard, and therefore not in violation of the Company's policy. Notwithstanding that, the grievor admitted during the investigation statement that he suffered from addiction and it is the Union's position that the duty to accommodate arose at the time of the grievor's admission. The Union therefore alleges a violation of the *Canadian Human Rights Act* with respect to the Company's duty to accommodate the grievor's illness and its refusal to grant benefits during his convalescence.

The Union seeks reinstatement with full seniority and without loss of wages and benefits to be paid with interest.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) D. OLSHEWSKI	**(SGD.) S. GROU**
NATIONAL REPRESENTATIVE	**DIRECTOR, LABOUR RELATIONS**

There appeared on behalf of the Company:

S. Grou	– Manager, Labour Relations, Montreal
D. S. Fisher	– Director, Labour Relations, Montreal
F. Boucher	– Superintendent
N. Lurette	– Risk Management Officer
K. Smolynec	– Sr. Manager, Occupational Health

There appeared on behalf of the Union:

R. Fitzgerald	– National Representative, Toronto
J. Savard	– Regional Representative, Montreal

AWARD OF THE ARBITRATOR

The first issue to be resolved is whether the grievor was, as the Company alleges, in violation of the Company's Alcohol and Drug Policy by reason of having undergone a positive breathalyser test revealing a blood level content (BLC) of 0.036% during the middle of his tour of duty. In essence, the position of the Company is that although the reading was below the permissible level of 0.04%, the normal metabolizing of alcohol must support the view that the grievor was in excess of that permissible base line when he came to work or, alternatively, that he consumed alcohol while at work so as to register the BLC which was detected. The unchallenged evidence is that two supervisors did detect the odour of alcohol from the grievor, as well as some other outward signs of alcohol consumption, albeit he was not visibly impaired.

Upon a review of the evidence the Arbitrator is satisfied that indeed the grievor did violate the Company's policy. While technically the grievor is not employed in a safety sensitive position, his duties, which involve the operating of a light duty van, are clearly inconsistent with the consumption of alcohol or being under the influence while at work.

The record indicates that the grievor has suffered from alcoholism, as a result of which he was subject to prior discipline. Indeed, he was the subject of accommodation as a result of his earlier discharge and the execution of a reinstatement agreement dated April 8, 2008, some eight months prior to the incident giving rise to his discharge.

That agreement resulted from a prior discharge on July 26, 2007 which was also for a violation of the Company's policy in respect of workplace alcohol and drug problems. It would appear that at that time the parties agreed to return the grievor into a non-safety sensitive position so as to avoid the requirement to his being subject to ongoing random drug and alcohol testing. That accommodation also allowed the grievor to return to safety sensitive work subject to an amended work arrangement which would include random drug and alcohol monitoring.

How is this Office to approach what appears to be clear recidivism in an employee previously discharged for a violation to the Company's policy in relation to the consumption of alcohol? In **CROA 3279** the following comments are to be found:

> … In the Arbitrator's view the more appropriate approach to the case at hand is to deal with the issue of whether, as a general matter, the Company had just cause to terminate the grievor under the provisions of its collective agreement, given the fact that he reported for work and was prepared to operate a tractor-trailer while he had a blood alcohol content which was in excess of the rate acceptable under the **Criminal Code of Canada**, and which would be generally viewed as reflecting the impairment of his faculties by reason of the ingestion of alcohol.
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> ...
> Nor does the Arbitrator have any difficulty concluding that a tractor trailer driver who is called upon to operate heavy road equipment works in a safety sensitive position. That is the learning of many prior arbitration awards. Those awards have also confirmed that, as a general rule, within the trucking industry discharge is the normal disciplinary sanction for driving while impaired by alcohol. The thrust of the jurisprudence is, in my view, well captured by the following passage in the decision of Arbitrator MacDowell in **Re Inter-City Truck Lines (Canada) Inc. and Teamsters Union, Local 880** (1988) 32 L.A.C. (3d) 370 (MacDowell):
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> > … I am not unmindful of the hardships which the loss of the grievor's job may cause him. But, I am constrained to note that, in large measure, he has brought that hardship on himself. If, on one's own time, one indulges in alcohol, a board of arbitration has no right to sit in judgement. But once a driver puts at risk himself, his family, the company and its property, and members of the public who share the highway with him, he forfeits much of the sympathy to which he might otherwise have been entitled. He is jeopardizing the lives of innocent third parties, engaging in

> conduct which society itself has judged to be criminal and violating a well-known and firmly established norm in the trucking business. That is why arbitrators have, almost unanimously, treated impaired driving as just cause for discharge.

The record reveals that the grievor is a thirty year employee, whose entitlement to an unreduced pension will vest within a relatively short time. In all of the circumstances the Arbitrator is satisfied that an outcome can be fashioned which legitimately protects the Company's interests, and tends to minimize adverse pension consequences for the grievor. I am satisfied that the Company did have just cause to impose discipline upon the grievor by reason of his violation of the alcohol policy on December 24, 2008, and that his discharge was certainly within the realm of appropriate disciplinary response. I am satisfied, however, that it is equally appropriate to substitute a conditional suspension, whereby the grievor will not return to active service, but will not forfeit the full pension benefits which he has earned over a thirty year career.

The Arbitrator therefore directs that the grievor be reinstated into his employment forthwith, without compensation for any wages or benefits lost, subject to his accepting to be subject to a continuing suspension which shall last until such time as he is able to and does in fact claim by proper entitlement his unreduced pension. Should the grievor decline to accept the condition so described this grievance shall be dismissed.

September 18, 2009

(signed) MICHEL G. PICHER
ARBITRATOR