CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4033

Heard in Montreal, Tuesday, 13 September 2011

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

MAINTENANCE OF WAY EMPLOYEES DIVISION

EX PARTE

DISPUTE:

Dismissal of Employee J.

JOINT STATEMENT OF ISSUE:

On April 13, 2010 the grievor was dismissed from Company service. On November 2, 2010, the grievor entered into a Return to Work (RTW) Agreement for a period of two years. The RTW Agreement provided that the grievor would not recommence duty until such time as the relevant provisions of the RTW Agreement were satisfied. On February 16, 2011, the Company advised the Union that because the grievor had not, in the Company's opinion, fully satisfied all of the conditions set out in the RTW Agreement, the agreement was null and void and the grievor's dismissal was final. A grievance was filed.

The Union contends that: **(1)** The grievor complied fully with the conditions of the November 2, 2010 RTW Agreement; **(2)** Even though the RTW Agreement had a term of two years, the grievor was dismissed only about three months after it was signed; **(3)** The Company's actions were in violation of the November 2, 2010 RTW Agreement and the grievor's dismissal was unreasonable and unwarranted in the circumstances.

The Union requests the grievor be reinstated into Company employment immediately without loss of seniority and with full compensation for all wages and benefits lost as a result of this matter.

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

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) WM. BREHL	**(SGD.) B. LOCKERBY**
PRESIDENT	**LABOUR RELATIONS OFFICER**

There appeared on behalf of the Company:

W. Scheuerman	– Labour Relations Officer, Calgary
M. Goldsmith	– Manager, Labour Relations, Calgary
M. Chernenkoff	– Labour Relations Officer, Calgary
L. Trueman	– Director, Occupational Health Services

There appeared on behalf of the Union:

Wm. Brehl	– President, Ottawa
D. W. Brown	– Legal Counsel, Ottawa
A. Dellaporta	– Director, Atlantic Region

AWARD OF THE ARBITRATOR

The record confirms that the grievor has a long-standing record as an alcoholic, a medical condition which unfortunately gave rise to discipline over the years of his service with the Company. It appears that in April of 2010 the grievor was discharged for being under the influence of alcohol while at work on March 29, 2010. On November 10, 2010 the parties executed a Return to Work (RTW) agreement which contained a number of provisions, including that the grievor would be subject to mandatory unannounced substance testing for a period of two years, and would remain in contact with the EFAP referral agent as well as maintain his involvement in regular attendance at 12 step meetings. Paragraph 2 of the return to work agreement provided as follows:

> 2. Before actually recommencing duty or training, [Employee J] must first submit to a safety sensitive medical examination, or any other medical assessment deemed necessary, under the terms and conditions directed by the Occupational Health Services department, which will include a substance test. In this regard, [Employee J] must first be determined to be medically fit to return to service in his normal position by the OHS Department.

In furtherance of the agreement Employee J underwent an independent medical examination with Dr. Brendan Adams. Dr. Adams' report, which is extensive, found that the grievor's recovery was less than compelling, and that a number of unanswered questions remained. In that regard the doctor expressed himself, in part, as follows in his report:

> Overall, even allowing for the language and culture differences evident today, I am markedly unimpressed with [Employee J's] recovery, despite the fact that superficially he appears to be doing everything that he has been told to do. He shows no sign of deeper insight into alcoholism and one gets a strong feeling that the has been through the assessment and intake process so many times that his answers are very stereotyped now. He shows no deeper emotional insight into recovery, has not had any significant emotional experiences in recovery, and is unable to articulate in any meaningful sense what the 12 steps really mean to him. It is not apparent to me that he is working very effectively with his sponsor, although he has several individuals that he refers to as sponsors. He is certainly attending more than the mandated three meetings per week. It is interesting when given no direction, at the start of this interview, and asked what it was that brought him here, he focuses on the pure mechanics of returning to work at the railroad as if going down a list and ticking off the boxes. While he does not specifically deny historical items, there is a tendency to minimize and gloss over much of the details of his latter alcoholic career. As such, I do not gain any sense that his recovery is stable and **I would certainly be unwilling to certify him as fit for safety sensitive or safety critical work. It is possible that, if accommodation were available in non-safety sensitive work he might be returned to work on a rigorous monitored program.** He should have frequent unannounced drug testing, and in particular, attention should be placed on benzodiazepines which have exactly the same neurological effect as alcohol, as he appears to have abused these in the past. If he is able to maintain sobriety for at least one year then further consideration could be given to returning him to safety sensitive work.
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> (emphasis added)

Based on the report of Dr. Adams the Company came to the conclusion that as he failed to comply with paragraph 2 of the Return to Work agreement Employee J was subject to dismissal. It appears that on or about February 16, 2011 the Company's Manager of Labour Relations notified the Union that in the view of the Company's Occupational Health and Safety Department Employee J failed to comply with the terms of the Return to Work agreement and that his dismissal would not be reversed. In that

regard she relied, in part, on paragraph 3 of the Return to Work agreement which states:

> 3. It is agreed that [Employee J] must first comply with the conditions set forth, in item 2, before any of the remaining conditions, contained in this agreement, have application.

The position of the Company, therefore, is simply that the grievor failed to be certified as fit to return to service as contemplated in item 2, and that he therefore failed to honour the conditions of reinstatement which resulted in his continuing dismissal.

Upon a review of the positions of both parties the Arbitrator can understand the position taken by the Company. The fact remains, however, that the Company's statutory obligation under the **Canadian Human Rights Act** is to offer reasonable accommodation, short of undue hardship, to an employee suffering from a disability, as was the case for Employee J. While it is true that the return to work agreement was an attempt at accommodation, when it became frustrated by the opinion of Dr. Adams it is arguable that the Company, and the Union, still remained under an obligation to attempt reasonable accommodation. Indeed, as Dr. Adams' own report indicates, in his view accommodation would have been possible by assigning the grievor to non-safety sensitive duties for a sufficient period of time so as to monitor his recovery from his alcoholic condition over a period which he estimated should be "at least one year of continuous sobriety". It appears, however, that neither the Company nor, insofar as I can tell, the Union, pursued that alternative. Rather, the matter simply resolved itself into a dispute over the Company's decision to treat the grievor as still terminated.

The record confirms, without apparent contradiction, that in fact the grievor has maintained sobriety for close to a year since the January 24, 2011 assessment by Dr. Adams. It would seem that he has found work in another part of the railway industry and has maintained his involvement in attending support groups and abstaining from the consumption of alcohol, apparently with considerable success.

Based on the evidence before me, and in partial reliance on the opinion of Dr. Adams, I am satisfied that this is an appropriate case for finding that accommodation was not sufficiently explored by the parties in light of the conclusions of Dr. Adams and to direct that the grievor be reinstated to employment rolls forthwith, with the direction that the parties meet to consider the possibility of another Return to Work agreement under such conditions as they deem appropriate, or failing their agreement for the matter to be returned to the Arbitrator to be ultimately resolved by this Office. In my view this is not a circumstance which justifies any order for compensation, although it is to be hoped that the implementation of this award will lead to the grievor returning to gainful employment without unreasonable delay.

September 22, 2011

(signed) MICHEL G. PICHER
ARBITRATOR