CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4094

Heard in Calgary, Tuesday, 13 March 2012

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE
MAINTENANCE OF WAY EMPLOYEES DIVISION

DISPUTE:

Dismissal of Mr. R. Sladek.

JOINT STATEMENT OF ISSUE:

On September 1, 2011, the grievor, Mr. R. Sladek, was issued a Form 104 advising him that he was dismissed from Company service for "violating your last chance agreement dated January 25, 2010 when you tested positive for cocaine on July 25, 2011."

The Union contends that: **(1)** The grievor is a person with a disability who has taken, and continues to take, serious and meaningful steps to deal with his disability; **(2)** The grievor "slipped" in July, 2011 when he tested positive for cocaine. However, such occurrences are not uncommon in addiction situations; **(3)** The dismissal of the grievor was unfair, unwarranted and a violation of the Company's legal obligation to accommodate its disabled employees.

The Union requests that the Company reinstate the grievor into Company service immediately without loss of seniority and with full compensation for all wages and benefits lost as a result of the Company's wrongful decision to dismiss.

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

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) WM. BREHL	**(SGD.) M. MORAN**
PRESIDENT	**MANAGER, LABOUR RELATIONS**

There appeared on behalf of the Company:

M. Chernenkoff	– Labour Relations Officer, Calgary
M. Moran	– Manager, Labour Relations, Calgary
V. White	– Labour Relations Officer, Calgary

And on behalf of the Union:
Wm. Brehl – President, Ottawa
D. W. Brown – Counsel, Ottawa
A. R. Terry – Vice-President, Ottawa

AWARD OF THE ARBITRATOR

The grievor is not a long term employee, having been hired in April of 2007. The record confirms that when he attended at work to follow a mandatory training course on June 24, 2009 he was impaired by alcohol. In the ensuing investigation the grievor misled the Company by stating at the outset of his investigation that he was fit for duty. It appears that at the conclusion of his statement he admitted otherwise, confirming that he had made a mistake. He was then dismissed for a violation of Rule G on July 23, 2009. That discharge are grieved and shortly prior to the arbitration the Company and the Union entered into a “last chance agreement / employment contract” which allowed the grievor to return to work. The agreement, made on January 25, 2010 included a two year period of unannounced drug and alcohol testing.

Some eighteen months after that agreement, made January 25, 2010, the grievor submitted to an unannounced substance test on July 25, 2011. That test showed that he was positive for cocaine.

During the investigation in relation to that offence, the grievor stated “I truly and honestly don’t have an idea or answers as to why it was in my system” referring to the cocaine. That caused the Company to do a second analysis of the remaining split

sample from the original drug test. The split sample confirmed the he was in fact positive for cocaine. In other words there was no flaw in the testing system.

Following that development the grievor entered a statement into the grievance process whereby he admitted that he had lied. That statement is quoted as follows: “At first I tried lying to save my job, when in reality I had a relapse on July 20, 2011. I was afraid and truly ashamed.”

The Company stresses that the grievor lied to his Union, to his EFAP counsellor and to the Company, in addition to having obviously violated the prohibition against the consumption of an illicit drug contained within his last chance employment agreement.

The Union submits that the grievor has since made great strides in overcoming his addiction. In support of that assertion it has filed in evidence an attestation of his EFAP counsellor as well as an attestation by his AA sponsor.

The Union submits that the grievor is owed an obligation of accommodation by the Company and that in light of the significant strides he has made in respect of bringing his drug addiction under control, notwithstanding his violation of the last chance agreement, this is an appropriate case for the Arbitrator to direct his reinstatement. Stressing that relapse is a common syndrome in overcoming an addition, the Union’s representatives refer the Arbitrator to prior awards of this Office, including **CROA 3269, 3355** and **3415,** and **CROA&DR 3479, 4033** and **4054**.

Having reviewed the facts of the instant case closely, and with the full understanding of the submission of the Company with respect to its concern about the grievor having been less than honest when confronted with his positive drug test, and his relative short service, I am nevertheless compelled to consider whether those factors outweigh the statutory obligation which both the Company and the Union have to accommodate what is clearly a recognized disability in the grievor's addiction.

The evidence before me is indeed compelling with respect to the efforts which Mr. Sladek has made overcome his addiction. I am compelled to agree with the Union's representatives that the circumstances of the instant case are fairly comparable to those considered by this Office in **CROA&DR 4054**. That case involved the relapse of an employee addicted to cocaine in the face of a last chance agreement. This Office determined that the employee should be returned to work under similar conditions to his last chance agreement, to be in effect for a period of two years. It is noteworthy that in that case the grievor had remained drug free for some two and one-half years from the time of his termination to the date of the arbitration of his grievance. In the instant case Mr. Sladek can claim successful rehabilitation for the substantially shorter period of seven months from the time of his termination, although that period would extend to nine months if the date of his relapse, July 20, 2011, is accepted.

Admittedly, the length of the grievor's service and the length of his period of rehabilitation do not weigh as heavily as was the case in prior awards in which this

Office found it appropriate to accord an employee another “last chance”. However, bearing in mind that the duty of accommodation extends to all employees, and that conditions of reinstatement can be fashioned to protect legitimate interests of the Company, I am persuaded that it is not inappropriate to allow the grievor an opportunity to demonstrate that he has gained control of his addiction and can be restored to a position of trust in employment with the Company.

The grievance is therefore allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without compensation for any wages or benefits lost and without loss of seniority. The grievor’s reinstatement shall be conditioned on his accepting to abstain from the consumption of drugs and alcohol and to be subject to random and unannounced drug and alcohol testing for a period of two years from the date of his reinstatement, such testing to be administered in a non-abusive fashion. In the event the grievor should be alleged to have violated the conditions of his reinstatement he shall have access to arbitration only for the purposes of determining that question.

March 19, 2012

MICHEL G. PICHER
ARBITRATOR