CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4233

Heard in Montreal, September 10, 2013

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The discharge of Conductor Dwayne Dennis for failing to comply with terms of "Continuing Employment/Reinstatement Contract dated Dec. 21, 2010 with CN by failing testing May 01, 2012 and by not remaining abstinent from alcohol."

JOINT STATEMENT OF ISSUE:

In 2008, Mr. Dennis voluntarily signed a Relapse Prevention Agreement. In August of 2010, Mr. Dennis violated his Relapse Prevention Agreement. In December of 2010, Mr. Dennis and the Union signed a Continuing Employment/Reinstatement Contract. On May 14, 2012, ON's Occupational Health Services advised the Company that Mr. Dennis was in violation of his Continuing Employment/Reinstatement contract. On May 17, 2012, Mr. Dennis was required to attend a formal employee statement. As a result of the findings of the investigation, Mr. Dennis was discharged.

The Union alleges that Mr. Dennis was not provided with a fair and impartial investigation and that the Company has violated Articles 82 and 85 of Agreement 4.16, the Canada Labour Code and the Canadian Human Rights Act.

The Company disagrees. The Company asserts that Mr. Dennis was accommodated and afforded numerous opportunities to come into compliance with his contract, but failed to do so. The Company asserts that discharge is warranted in these circumstances.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) V. Paquet	**(SGD.) J. Robbins**
For J. Orr : Vice President of Operations	**General Chairperson**

There appeared on behalf of the Company:

V. Paquet	– Labour Relations Manager, Toronto
D. Gagne	– Senior Manager Labour Relations, Montreal
P. Bistis	– Superintendent, Sarnia
D. Larouche	– Labour Relations Manager, Montreal
M. Marshall	– Senior Labour Relations Manager, Toronto

K. Smolynec – Manager, OHS, Montreal
N. Villeneuve – Sourcing Manager, Montreal

There appeared on behalf of the Union:
K. Stuebing – Counsel, Toronto
A. Stevens – Counsel, Toronto
J. Robbins – General Chairman, Sarnia
J. Lennie – Vice General Chairman, Port Robinson

AWARD OF THE ARBITRATOR

The grievor had some twenty-two years of service when he was terminated for the violation of a continuing employment contract which prohibited his consumption of alcohol or illegal drugs.

The record confirms that in 2008 that the grievor revealed to the Company that he suffered from a substance use disorder. Following a period of treatment and recovery he was made subject to a relapse prevention agreement executed on January 13, 2009. Subsequently he was cleared to return to work, following a brief period of illness, and did so on March 16, 2009. It does not appear disputed that on January 15, 2010 the grievor was found to have violated his RPA. Thereafter, in March 2011 with the involvement of his Union, the grievor became subject to a continuing employment contract.

It appears that on November 14th, 2011 during the course of undergoing a urine test, the grievor spilled his sample at the testing centre and refused to provide another. Following an investigation, the Company confirmed that Mr. Dennis did in fact refuse a

drug and alcohol test on November 14, 2011. The employer nevertheless decided to allow the grievor another opportunity.

On May 10, 2012, the Company was advised that Mr. Dennis tested positive for alcohol on May 1, 2012. After an ensuing investigation held on May 17, 2012, the Company concluded that the grievor failed to comply with the conditions of his continuing employment contract and terminated his employment.

During its presentation the Union questioned the reliability of the urine analysis test utilised by the Company. That is an issue which had previously not been raised and it met with the Company's objection. I consider that objection to be well founded. The purpose of fashioning a Joint statement of Issue in the arbitration of grievances before this Office is to ensure that the issues to be dealt with are clearly identified, providing a fair opportunity of preparation to both parties. With the greatest respect, I do not consider that a mere allegation that the Company did not have just cause to terminate the grievor is sufficient notice to the employer that its drug and alcohol testing system was being challenged, something which only became apparent during the course of the Union's brief at the arbitration hearing. Considering that the parties have lived together for a substantial number of years with a drug and alcohol testing regime, fairness would require that the Company be put on notice of the intention of the Union to challenge the reliability of its drug and alcohol testing system.

Counsel for the Union argues that the Union is not in fact challenging the drug and alcohol testing system, but merely pointing to certain studies which have indicated that false positives can result in such tests, depending on the circumstances. It cites the example of the use of a hand sanitizer possibly creating a false-positive alcohol reading. With respect, while I accept that it is entirely open to the Union to challenge the reliability of the Company's drug and alcohol testing, it is not unreasonable to expect a high standard of evidence in support of any such challenge. In the instant case there was no expert testimony brought on behalf of the Union to speak to the alleged frailty of the Company's testing system. At most, reference is made to academic literature dealing with the possibility of false-positives. In the circumstances, I do not consider that the material brought forward by the Union is sufficient to sustain its objection with respect to the qualities of the Company's testing system. It is therefore unnecessary for me to rule upon the Company's objection to the issue being raised in the first place without prior notice, although if it were necessary to do so, I would be inclined to rule that the Company should be entitled to clear notice of that issue, an issue which does not in fact appear within the joint statement of issue formulated by the parties in the instant case.

The record confirms that the grievor's difficulties with the consumption of alcohol date back at least to 2008, when he was clinically diagnosed as having alcohol dependence. Despite returning to work under terms of an RPA in March of 2009, Mr. Dennis tested positive for alcohol consumption on January 7, 2010. On March 10, 2010

the grievor admitted to being in relapse. Mr. Dennis was also allowed leave to attend the Westover treatment centre, a residential facility, from June 21, to July 9, 2010.

In March of 2011 the grievor and his Union signed a continuing employment contract, the terms of which prohibited his consumption of alcohol and made him subject to ongoing monitoring and testing. That agreement stated in part : “should you fail to comply with the full terms of this contract, including compliance with the Relapse Prevention Agreement as established by the Chief Medical Officer, you will be discharged from CN and will not be eligible for continuing employment / reinstatement and without recourse to the grievance and arbitration process”. Notwithstanding that the grievor failed to comply with the testing obligations on November 14, 2011 the Company decided to give him another opportunity to pursue his recovery. However, on May 10, 2012 the Company was advised that he had tested positive for alcohol on May 1, 2012. That precipitated a disciplinary investigation which culminated in his discharge on May 28, 2012.

There can be no doubt but that the grievor did consume alcohol contrary to the requirements of his Continuing Employment Contract. Notes from the Company’s Occupational Health Services confirm that on May 10, 2012 he expressly admitted to having consumed alcohol to an OHS Officer. The record further confirms that over a long period of time the Company was tolerant and supportive of the grievor’s efforts to come to terms with his alcohol dependence. Notwithstanding the terms of his RPA negotiated in 2009, the grievor consumed alcohol, as confirmed either by tests or his

own admission, on eleven separate occasions, including the final positive test registered on May 1, 2012.

The Union submits that the grievor was denied a fair and impartial investigation. It argues that the notice provided to the grievor for the May 17, 2012 investigation was insufficient. I cannot sustain that objection. It does not appear denied that emails sent to the grievor notified him that the statement was “regarding your contract”. In my view that adequately put the grievor on notice that it was the Company had concerns that he had violated his Continuing Employment Contract. This is not a situation, in my view, where the grievor was surprised or prejudiced by the wording of the notice which was sent to him. The Union’s objection with respect to procedure can therefore not be sustained. Nor, for the reasons touched upon above, am I satisfied that the Union has demonstrated that the Company’s testing system is not sufficiently reliable. While it might make that case with the appropriate expert testimony, such testimony was not advanced in the case at hand.

What of the Union’s allegation that the Company failed to accommodate the grievor in accordance with the *Canadian Human Rights Act* ? I find that submission particularly difficult to sustain. As noted above, the Company dealt with the grievor in a tolerant and supportive way for a period of close to four years. During that time, having signed an RPA in January 2009, Mr. Dennis committed repeated infractions of the prohibition against the consumption of alcohol, which continued on a regular basis until his eventual termination. During all of that time the Company allowed Mr. Dennis all the

necessary leaves of absence, sometimes with full benefits so long as he remained compliant with conditions.

The obligation of reasonable accommodation is not eternal. While the grievor's rehabilitation is to be supported and hoped for, the more than ten episodes of relapse tolerated by the Company, in the context of its willingness to allow the grievor substantial latitude to deal with his condition does, in my view, satisfy its obligation of accommodation under the *Canadian Human Rights Act*.

In the circumstances no violation of the collective agreement or of the Act is disclosed. I am also satisfied that the Company did have just and sufficient cause to terminate the grievor's employment I can see no mitigating circumstances which would justify any other result.

The grievance must therefore be dismissed.

September 13, 2013

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MICHEL G. PICHER
ARBITRATOR