CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4337

Heard in Montreal, October 15, 2014

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Administrative closure of David Loyer's employment file effective February 7, 2014 for innocent absenteeism.

COMPANY'S EXPARTE STATEMENT OF ISSUE:

On February 7, 2014, the Company advised Mr. Loyer that his employment file had been closed for innocent absenteeism.

The Union submitted an appeal contending Mr. Loyer was unreasonably terminated. The Union contends that the Company violated the provisions of Articles 117.1 and 117.2, the Canadian Human Rights Act when it terminated Mr. Loyer's employment with the Company. The Union's appeal requested that Mr. Loyer be reinstated without loss of seniority, and that he be made whole for all lost earnings and benefits.

The Company disagrees with the Union's contentions and has declined the Union's request.

FOR THE UNION:
(SGD.)

FOR THE COMPANY:
(SGD.) D. Crossan for D. VanCauwenbergh
Director of Labour Relations

There appeared on behalf of the Company:

D. Crossan	– Manager Labour Relations, Prince George
K. Morris	– Senior Manager Labour Relations, Edmonton
F. Boucher	– General Superintendent, B.C. South
D. Brodie	– Manager Labour Relations, Edmonton

There appeared on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
R. Hackl	– General Chairman, Saskatoon

AWARD OF THE ARBITRATOR

The material facts are not in dispute. The Company hired Mr. Loyer ("the grievor") in October 2005 and he qualified as a Conductor in January 2006. He was terminated on February 7, 2014 for innocent absenteeism. From the outset of his employment and throughout the grievor's tenure with the Company, the grievor has had an extraordinarily high rate of absenteeism. The following table summarizes the grievor's absences from 2006 through 2013.

YEAR	Total Days of Absence	Rate of Absenteeism	Rate of Peer Absenteeism
2006	197	54%	8%
2007	64	18%	5%
2008	163	48%	7%
2009	179	49%	8%
2010	87	24%	10%
2011	181	50%	11%
2012	310	85%	10%
2013	208	57%	8%

On January 22, 2013, General Superintendent Boucher ("Mr. Boucher") met with the grievor about his poor attendance record. Mr. Boucher explained to the grievor that the Company required that he significantly improve his attendance. Mr. Boucher explained the concept of innocent absenteeism to the grievor. He explained the possible ramifications if the grievor was unable to meet his fundamental obligation to attend work. Mr. Boucher offered the grievor assistance, on the Company's behalf, to improve his attendance.

At the January 22, 2013 meeting the grievor declined Mr. Boucher's assistance and promised that his attendance would improve. Mr. Boucher followed up with a letter dated February 13, 2013, reflecting the Company's expectations.

As had been the case throughout the grievor's tenure with the Company, the grievor continued to be absent due to various illnesses/injuries that manifested themselves unpredictably. The absences are not due to any one recurring or chronic medical condition. There is no suggestion in this case that the grievor suffers from any disability requiring accommodation under the *Canadian Human Rights Act.*

On October 16, 2013, Mr. Boucher followed up with the grievor. Mr. Boucher went over the grievor's attendance since he and the grievor had last met. It was not improving. Mr. Boucher reiterated the Company's expectations to the grievor and followed up with another letter setting out each of the 120 days the grievor had been absent since the meeting on January 22, 2013. The correspondence makes very clear to the grievor that his failure to reach an acceptable level of attendance could lead to the termination of his employment.

In addition, the Company would, on a go forward basis, be requiring that the grievor provide a medical certificate to justify his absences. If his absences were due to a chronic medical condition, the grievor was asked to provide a letter to the Occupational Health Services Department ("OHS") from his physician to that effect,

together with an explanation of the expectation for attendance at work in the future. The grievor was also asked to provide any medical documentation if he were suffering from a disability requiring accommodation. None was forthcoming.

Between the meeting with the Company on October 16, 2013 and December 31, 2013 the grievor worked 10 days and was absent due to various illnesses/injuries for another 56 days. He suffered, according to the medical notes provided to OHS, stomach flu, “illness”, pain in his right knee, a cold and/or asthma, a bruised forearm. The grievor was also “sick” from December 23 through December 26, 2013.

The grievor worked January 3, 2014 and then was off from January 4, 2014 through February 7, 2014. The grievor had bronchitis and an earache for which medical documentation was provided covering January 7 to January 13, 2014 and January 29 through February 10, 2014, respectively.

In the circumstances, and after the Company’s failed attempt to reach the grievor to inform him of its decision to terminate him for innocent absenteeism, it sent him a registered letter on February 7, 2014.

DECISION

An employer is entitled, where circumstances justify it, to terminate the employment of a person whose innocent absenteeism reaches a degree incompatible

with the fundamental contract of service to his or her employer. For the Company to invoke its right to terminate an employee for innocent absenteeism, it must satisfy two requirements. First, it must demonstrate that the grievor's level of absenteeism was excessive. Secondly, it must demonstrate that there is no reasonable basis to believe that the employee's attendance will improve.

Beyond the two requirements referenced above, there is also a suggestion that it may very well be appropriate for an employer to give some advanced warning to an employee when his or her rate of absenteeism threatens his or her continued employment (see **SHP 284 and SHP 377**). This is the case where absenteeism for medical reasons can be controlled or mitigated by an employee. On careful review of the entirety of the grievor's record in this case, I have no doubt that the grievor was in a position to control or mitigate his absenteeism.

The grievor's absences are undeniably excessive. His absenteeism is excessive as compared with that of his peers over a significant period of time – for the entirety of the more than eight years since the grievor began working for the Company. Over that period his rate of absenteeism has ranged from a low of 18% to a high of 85%, compared to a low of 5% to a high of 11% for his peer group over the same period. The grievor's level of absenteeism is well beyond a rate that the Company can reasonably be expected to tolerate.

As for the second requirement, this is a case where the Company was entitled to infer that the grievor's extremely negative attendance record of the past eight years would reasonably continue to manifest itself in the future. It fell to the grievor to provide medical or other evidence to suggest otherwise. There is no such evidence before me.

The Union argued that the Company's February 7, 2014 termination letter to the grievor was disciplinary and that therefore an investigation was required pursuant to Article 117.1 of the collective agreement. In the Union's view an accredited representative should have been present during that investigation pursuant to Article 117.2 of the collective agreement. In addition, the Union also takes the position that the grievor did not have clear notice of his potential termination prior to February 7, 2014 and that the Company should have done more to address the grievor's absences and reasons for them. The Union points out that it was not until after the grievor's termination that Labour Relations sought information from OHS about the medical support the grievor had provided for his absences.

The Union's argument that the grievor's termination was disciplinary in nature is without merit. That is simply not the case. The grievor's termination was not for culpable conduct and the Company was not seeking to correct any misconduct on the grievor's part. Rather, as it was entitled to do, the Company looked to the entire pattern of the grievor's attendance to establish the elements of innocent absenteeism justifying termination. This grievance does not concern discipline, and as such Article 117.1 and

117.2 did not come into play. **CROA 3322**, relied on by the Union, has no application to the matter before me.

As for the Company's alleged failure to provide notice of administrative termination, Mr. Boucher met with the grievor on January 22, 2013. He did so again on October 16, 2013. In my view, the Company made it abundantly clear to the grievor its concern about his excessive level of absenteeism from work, and he was given ample time to improve his attendance with a clear warning that his failure to do so would result in his administrative termination. What the Company told the grievor could happen did happen on February 7, 2014. The fact that there was no deadline set out in the October 22, 2013 letter does not mean that the grievor was not put on notice of the ramifications of his continued excessive absenteeism.

The Union relies on **CROA 3346** to suggest it was incumbent on the Company to put the Union on notice when the Company met with the grievor and informed him that if his attendance did not improve he could be administratively terminated. **CROA 3346** involved a situation where the Company administratively terminated eighteen employees who had been absent from work for more than two years as a result of compensable injuries, and where the Company failed to make any assessment of disability or consider any accommodation options before it terminated the employees. There had been no assessment of disabled employees' or reasonable accommodation possibilities. **CROA 3346** has no application to the matter before me.

The circumstances of this case reveal that the Company was justified in coming to its conclusion that the grievor would be incapable in meeting his fundamental contract of service to the Company. The grievor's history of attendance at work has been abysmal since he began working for the Company. It is not due to any disability. The Company should not have to endure the grievor's absences indefinitely for varying and sometimes sustained periods of time, in unpredictable patterns. Ironically, but perhaps not unexpectedly, the grievor neither attended the hearing nor offered any basis to suggest that his attendance would be better in the future.

I find that in all the circumstances, the Company was entitled to consider the grievor's employment as being at an end.

For these reasons the grievance is dismissed.

October 30, 2014

CHRISTINE SCHMIDT
ARBITRATOR