Will CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4510

Heard in Calgary, November 9, 2016

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The administrative closure of Sukhwinder Bal's employment file effective January 30, 2015 for innocent absenteeism.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

On January 30, 2015, the Company advised Mr. Bal that his employment file had been closed for innocent absenteeism.

The Union submitted an appeal contending the Company failed to establish, using the dual test, that Mr. Bal should have been terminated for non-culpable absenteeism that the grievor was terminated in contravention of Section 239 of the Canada Labour Code. The Union's appeal requested that Mr. Bal 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* K. Madigan
Vice President Labour Relations

There appeared on behalf of the Company:

D. Crossan	– Manager Labour Relations, Prince George
K. Morris	– Senior Manager Labour Relations, Edmonton
G. Capeness	– CN OHS, Edmonton

There appeared on behalf of the Union:

D. Ellickson	– Counsel, Caley Wray, Toronto
R. Donegan	– General Chairperson, Saskatoon
S. Bal	– Grievor, Vancouver
J. Thorbjornsen	– Vice General Chairman, Saskatoon

AWARD OF THE ARBITRATOR

The grievor was hired on October 23, 2006 as a conductor trainee and qualified as a conductor on March 27, 2007. The grievor accumulated only three years and eight months of pensionable service over the eight years of his employment due to a number of absences related to various illnesses.

In December 2007 the grievor was diagnosed with alcohol dependence and attended a 28-day inpatient treatment facility. He was deemed to be unfit at that time to work in a Safety Critical position. The grievor was also required to sign a Relapse Prevention Agreement agreeing to remain abstinent from drugs or alcohol for period of two years. By September 2008 the grievor was found to be non-compliant with the terms of the Relapse Prevention Agreement. He was assessed and recommended to attend a 60-day inpatient treatment program. The grievor also signed a Continuing Employment Contract ("last chance agreement") and a further Relapse Prevention Agreement which required him to submit to random drug and alcohol testing for a period of two years.

The grievor did not comply with several OHS requests to attend treatment facilities. He was warned on July 29, 2009 that his failure to comply with the required treatment program would be reported to his supervisor and result in a formal investigation. The grievor responded by commencing and completing the required treatment program from August 9, 2009 to April 6, 2010. Throughout this time, the grievor was off work on an approved absence and in receipt of disability benefits.

The grievor returned to work as a conductor in Vancouver B.C. on May 10, 2010. On April 28, 2011 he was involved in a motor vehicle accident. It was determined at that time that it would be unlikely he would be able to return to work for at least a year. The grievor was involved in a second motor vehicle accident on February 27, 2012, aggravating his injuries from the first accident. Since the car accidents, the grievor has also been diagnosed with post-traumatic stress disorder, severe depression, ulcerative colitis and numerous other medical disabilities.

On July 18, 2014, OHS required the grievor to provide medical documentation to substantiate his ongoing absence from work. On September 11, 2014, having received no response from the grievor, OHS sent a follow-up letter requesting medical information to validate the grievor's ongoing absence. The letter further advised that the medical information was to be returned no later than October 20, 2014. The letter states in part in that regard:

> Updated medical information will be required by OHS to assess your ongoing absence from work. Please forward us the request reports no later than October 20, 2014.
>
> If not received by this date, OHS will not be able to support your ongoing medical leave and the company will be advised of such.

In response to the September 11, 2014 request, the grievor provided a handwritten medical note from his physician dated October 1, 2014 which simply stated:

> The above patient is unable to work indefinitely due to his car accident x 2 and depression/headaches

On January 30, 2015 the grievor's employment was terminated because of his physician's advice that he would be unable to work indefinitely. His file was closed for innocent absenteeism.

On March 7, 2015 the union filed a grievance claiming that the Company had failed to explore options to facilitate the grievor's return to work and had also failed to accommodate the grievor's disabilities to the point of undue hardship. A further medical note was provided to the Company on April 28, 2015 which stated as follows:

> Patient cannot work safety sensitive job due to depression & PTSD. He can be accommodated light duties due to ulcerate of colitis.

The Company maintains that it was justified in closing the grievor's employment file due to his inability to provide a satisfactory level of attendance at work and because there was no reasonable basis to believe that the grievor's attendance would improve in the future. In particular, the Company submits that it was justified in drawing an inference from the grievor's past attendance record as well as the information provided by the grievor's treating physician on October 1, 2014 (that he would be off work indefinitely), that it was unlikely the grievor's attendance would improve in the future.

The Arbitrator notes the Company's reference to the accepted two-prong test in cases such as the present involving termination for innocent absenteeism: (i) excessive absenteeism; (ii) no reasonable expectation that the grievor's attendance will improve in the future. There is no dispute that the grievor's absence was excessive, having only worked less than half the time during eight years of employment. The Company

maintains that it has also fulfilled the second part of the test, the evidence demonstrating that the grievor was unlikely to improve his attendance in the future.

As has been pointed out in numerous decisions of this Office, most recently by Arbitrator Sims in **CROA&DR 4493**, there is another layer to the innocent absenteeism test which is the requirement not to discriminate on the basis of disability. The duty to accommodate an employee suffering from a disability to the point of undue hardship was articulated as follows in **CROA&DR 3346** by Arbitrator Picher:

> This Office accepts that it may, in the proper circumstance, be appropriate for an employer to terminate an employee for innocent absenteeism, even though that individual may be disabled and be owed a duty of reasonable accommodation. In that circumstance, however, procedure is of the essence. As part of the continuing duty of accommodation it is essential that the employer make all reasonable efforts to verify, prior to the point of discharge whether the person in question can be accommodated. Given the decision of the Supreme Court of Canada in *Renaud*, that inquiry necessitates reasonable notice to the employee and to his bargaining agent.
>
> Nor is that requirement necessarily burdensome. In some cases it may involve no more than simple verification that there is little or no change in the individual's condition and little prospect for any significant change in the foreseeable future. However, that communication with the employee and his or her union is important not only to the extent that conditions may have changed for the employee. There may also have been changes within the workplace, whether by the introduction of new technology, different procedures, new vacancies or otherwise, such that the ability to accommodate the individual may have changed since his or her case was last considered. These are not theoretical considerations, as is amply demonstrated in the case at hand. The Company's own brief to the Arbitrator reflects that in fact three of the employees whose files were closed objected, and eventually were returned to active employment, with appropriate accommodation. I am satisfied that in such a circumstance, as a matter of law, the proper course is not for the Company to discharge the employee and then make the inquiry as to whether their action was correct, but to give the appropriate notice in advance. That approach is also more in keeping with the collective bargaining regime to the extent that some individuals may be less able than others to advocate for themselves, particularly where their bargaining agent has been given no notice of their termination and no

> meaningful opportunity to engender the three party discussion about possible accommodation mandated by the courts.
>
> The foregoing observations obviously do not stand for the proposition that a disabled employee can never be terminated for innocent absenteeism. This award merely confirms the fact that the disabled employee is, as the Brotherhood argues, entitled to a duty of reasonable accommodation, to the point of undue hardship, as long as he or she remains an employee. Termination can therefore not occur unless it can be demonstrated at the point of termination that reasonable accommodation to the point of undue hardship is still not possible, and that there is no reasonable basis to believe that the employee will be able to return to meaningful service in the future.

Arbitrator Sims in **CROA&DR 4493** notes the importance of union involvement in the process involving accommodation of disabled employee. He states in that regard, citing **CROA&DR 3346**:

> None of this is remotely new to the parties, since it is well canvassed in arbitrator Picher's decision in CROA&DR 3346, the case cited by the employer in its brief. Indeed the employer, in paragraph 29 asserts it has met the test in that case. Arbitrator Picher was dealing with the union's right to be notified and involved in decisions of this nature. Arbitrator Picher begins his review (in 2003) noting the parties sophisticated attention to return to work and duty to accommodate issues. He then noted the three-party aspect of the duty to accommodate saying:
>
> > It is now well established that disabled employees are owed a duty of accommodation to the point of undue hardship, now entrenched in section 15(2) of the *Canadian Human Rights Act*. It is also well settled, through the decisions of the Supreme Court of Canada, that the duty of accommodation involves not only the employer, but also requires the active participation of the employee and his or her trade union (*Central Okanagan School District No. 23 v. Renaud* (1992), 95 D.L.R. (4th) 577, [1992] 6 W.W.R. 193, [1992] 2 S.C.R. 970). If a trade union has an obligation to be involved in the accommodation process, an obligation which may perhaps include making allowances under the provisions of its collective agreement, it must surely have a corresponding right of notice to participate in any significant decision affecting the employment status of a disabled employee who is subject to the duty of accommodation.

The evidence is clear that the grievor suffers from numerous medical disabilities including alcohol addiction, depression and PTSD. These medical conditions are recognized disabilities requiring accommodation to the point of under hardship pursuant to the *Canadian Human Rights Act*. The evidence is un-contradicted that the Company took the termination step without discussions with the Union or the grievor about the grievor's medical status and whether he was capable of being accommodated with alternative employment.

Further, neither the grievor nor the Union were warned that the handwritten note written on a prescription pad supplied by the physician dated October 1, 2014 stating only that the grievor would be absent indefinitely would be a key factor in the Company's decision to terminate the grievor. There was no follow-up request for further particulars from the physician as to the grievor's medical condition or a request for a more detailed prognosis. Nor was the grievor's physician asked whether the grievor was capable of performing modified duties or capable of returning to work in a different capacity.

As pointed out above, the duty to accommodate requires the active participation of the employee and his or her trade union. The timing of those discussions is critical. As stated above in **CROA&DR 3346**, *"...the proper course is not for the Company to discharge the employee and then make the inquiry as to whether their action was correct, but to give the appropriate notice in advance".* Unfortunately that is what occurred here. There were no tripartite discussions between the Union, the grievor and

the Company where accommodation options could have been explored, which are an essential part of the duty to accommodate. To simply rely on a doctor's handwritten note as the triggering event to close the grievor's employment file and dismiss the grievor falls far short of the threshold requirements of accommodation to the point of undue hardship.

The grievance is allowed. The grievor shall be reinstated to his employment. I will reserve jurisdiction to allow the parties to discuss a proper accommodation process for the grievor as well as any other issues in relation to remedy.

December 5, 2016

JOHN MOREAU
ARBITRATOR