CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4576

Heard in Edmonton, September 12, 2017

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The discharge of Locomotive Engineer Brian Young (a pseudonym) of Fort St. John, BC for a violation of his Continuing Employment Contract signed February 26, 2015.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

On March 23, 2016, the grievor was subjected to an alcohol and drug test in accordance with the provisions of his Continuing Employment Contract signed between the grievor, the Union and the Company. The test resulted positive for alcohol and the grievor was subsequently discharged.

The Union contends that the terms of the continuing employment contract impinge on Mr. Young's rights as contained in the Canadian Human Rights Act, is discriminatory and the requirement to accommodate to the point of undue hardship was not met despite the fact that the Union and Mr. Young signed the "last chance" agreement.

The Company disagrees with the Union's position.

FOR THE UNION:
(SGD.)

FOR THE COMPANY:
(SGD.) D. Crossan *for* K. Madigan
Vice-President, Human Resources

There appeared on behalf of the Company:

D. Crossan	– Manager, Labour Relations, Prince George
P. Payne	– Manager, Labour Relations, Edmonton
J. Thompson	– General Manager, Edmonton
G. Capeness	– Team Nurse, CN OHS, Edmonton
C. Michelucci	– Director, Labour Relations, Montreal

There appeared on behalf of the Union:

M. Church	– Counsel, Caley Wray, Toronto
B. Ermet	– Senior Vice General Chairperson, Edmonton

AWARD OF THE ARBITRATOR

This case concerns a 41 year old locomotive engineer that I will call Brian Young (a pseudonym used to protect his privacy). A third generation railroader, he was hired out with CN in 2005.

In 2014, Mr. Young approached his Superintendent to say he believed he was suffering from a cocaine use problem and wanted help. This was entirely voluntary; not the result of any incident. He attended a six week substance abuse program, after which he remained clear and subject to a Relapse Prevention Agreement requiring abstinence. The Medical Officer authorized his return to work in October 2014. Unfortunately, the grievor's wife suffered from similar problems and this led, not only to the break up of the marriage, but also to her death from overdose.

In February 2015 the grievor suffered a relapse. The Employer was willing to allow him a further opportunity and the Union, and the Company entered into a "Continuing Employment Contract", which again, subject to strict undertakings including continued abstinence, allowed him to return to work, which he did. He worked without incident until March 23, 2016 when, as a result of random testing while at work it was discovered that he had consumed alcohol. This led to his termination.

At the investigation, he was asked the following questions and gave the following answers:

> 17. Q. I refer you to your Continuing Employment contract you signed on February 26, 2015, which states under paragraph 3, "The

necessary behaviours include total abstinence from all substances, both on and off duty, and all other requirements for treatment, counselling, medical examinations, and blood, urine, hair, breath and any other biological tests". Did you comply with this as stated?

A. I'm saying yes.

18. Q. Mr. Young, if you tested positive for Ethyl Glucuronide with a quantitative level of 1850 ng/ml on March 23, 2015, how is it that you stated in question 17 that you complied with the Continuing Employment Contract?

A. Because alcohol was being put into my drinks without my knowledge 4 days prior to the test by my ex-girlfriend.

19. Q. Mr. Young, if there was alcohol in your drinks, how could you not know this?

A. Because there wasn't enough alcohol in each drink to know this.

20. Q. How did you discover this?

A. We got into an argument on March 30th and she admitted to me that she had been spiking my drinks to retaliate for perceived wrongs that she felt I had committed against her. After that, I left from that relationship.

21. Q. Mr. Young, when did this spiking of your drinks allegedly occur?

A. From March 19th to 22nd.

22. Q. Mr. Young, when you discovered this on March 30th, did you report this to CN Occupational Health?

A. Yes I did. She said it would have to go to Dr. Baker in Kamloops and that protocol and we would go from there. I talked to him April 1st. He asked me about it and I explained to him. He said that he would pass that onto Gwenyth at OHS and the Chief Medical Officer.

In answer to his Union representative he said:

> Q1. Mr. Young, did you knowingly take or ingest alcohol prior to the positive test on March 23rd?
>
> A1: No.

In closing he added the following:

> 29 Q. Do you have anything further to add to this employee statement?
>
> A. Yes I do. I wouldn't jeopardize my job with me being non-compliant with drugs and alcohol. Most importantly, it would affect me getting my son who has been taken away from his mother and is in foster care. This would risk me not getting him back. All my testing results with CN are being forwarded to the Ministry of Children and Families to determine my abstinence. I am fully aware of this and have agreed to this with OHS. Prior to this most recent relationship, there was never any problems with me in regards to my attendance or my abstinence. The reason for this contract was because of prior drug addiction, not alcohol. Alcohol was not my thing. I've been working hard and clean for almost 2 years as of April 22nd. Now I'm in a safe environment and I'm happy. I'm confident going forward that I will be able to maintain abstinence from drugs and alcohol and comply with the Continuing Employment Contract. I will do whatever I need to do to keep my job.

The reviewing Medical Officer did not find the grievor's explanation credible and neither did the Employer. Termination followed. The grievor has since conceded that the explanation he offered was not true.

The Union advances a number of mitigating factors which, it says, should persuade this arbitrator to exercise remedial jurisdiction and substitute a lesser penalty. First it advances the proposition, which I fully accept, that recovering from an addiction is a difficult path to travel and relapses can easily occur. I note, however, that his addiction

was to cocaine and what occurred here was what is now clearly voluntary alcohol use. Second, the grievor has now been diagnosed with clinical depression and is under a doctor's care for that condition. This was perhaps exacerbated by abuse he says he suffered at the hands of an ex-girlfriend. Next, and these are all significant points in his favour, he passed many drug screening tests in 2016 and 2017, kept up regular attendance at Narcotics Anonymous Meetings, and attended an Adult Addiction Day Treatment Program in 2017.

The grievor's work record, aside from these issues, includes one written reprimand for missing a call and one suspension for failure to provide documents to support bereavement leave.

On March, 2014 the grievor entered into a confidential Relapse Prevention Agreement. Once the grievor completed a period of observation and entered into the undertaking in those agreements he was deemed fit to return to work, subject to ongoing conditions, including the following express terms:

> (a) for substance abuse:
>
> I agree to abstain from the use of alcohol and illegal drugs at all times for the duration of the agreement.
>
> (b) for substance dependency:
>
> I agree to abstain from the use of alcohol and illegal drugs at all times for the duration of this agreement and as long as I will be employed by CN in a safety critical position. I also agree to report to CN OHS the use of any prescribed or over-the-counter medications.

and in each document:

> I understand that this follow-up period may be ended by the CN CMO because of my failure to comply with all components of this agreement. Under the circumstance, CN OHS, upon recommendation from the Chief Medical Officer, will inform management of my rejection from the monitoring process for cause of non-compliance, and the decision not to medically support my fitness-for-duty. (*emphasis added*)

On February 12, 2015 the grievor failed a random test and was reported as being in violation of his Relapse Prevention Agreement. He was not terminated. Instead, after meeting with his Superintendent, he was allowed to continue work if he signed agreements called "Continuing Employment Contract for Safety Sensitive and Safety Critical Position for Employees with a Substance Use Disorder." This second form of agreement provides, in clear terms:

> 3. The Chief Medical Officer, taking into consideration your specific medical condition, will establish a Relapse Prevention Agreement. For the duration of this contract, you are required to comply with the terms of medical treatment and rehabilitation for your condition, as established in a Relapse Prevention Agreement, listing all necessary behaviours expected of you. These necessary behaviours include total abstinence from all substances, both on and off duty, and all other requirements for treatment, counselling, medical examinations, and blood, urine, hair, breath and any other biolological tests. If you do not comply with the terms of your Relapse Prevention Agreement, the Chief Medical Officer will report this non-compliance to CN and you will be considered in breach of this contract.
> …
>
> 5. Should you fail to comply with the full terms of this contract, including compliance with the Relapse Prevention Agreement, you will be discharged from CN and will not be eligible for continuing employment or reinstatement. (*emphasis added*)

The grievor acknowledges agreeing to, signing, and understanding this agreement, along with his Union representative.

I heard some debate as to whether this is or is not fairly characterized as a “last chance” agreement. Similarly I heard debate about, whether, under the *Canadian Human Rights Act*, one can contract out of one’s right to be accommodated up to the point of undue hardship. The Employer referred me to cases speaking to the policy reasons why it is important to uphold the validity of such agreements, both for their impact on employees and on the willingness of Employers to offer such additional choices in the face of relapses. After reviewing these authorities and considering the facts of this case, I do not find it necessary to review that jurisprudence in detail.

This is a safety critical position. The job the grievor seeks to regain is driving a train, where the need for alertness, attentiveness, and trust is obvious and the opportunity for direct supervision low.

The type of agreement the grievor entered into accommodates substance dependency, but it does so on conditions. The one condition is abstinence, but the other is a willingness to be forthcoming and truthful in the event of any breach or relapse. Here the grievor, following his first relapse, was given a further chance. Following that, it turns out, he voluntarily consumed alcohol. He did not disclose this before going to work. He was randomly tested and then investigated. He did not attribute the test results to his addiction, or to any relapse. Instead, he concocted an incredible story putting the blame on his partner. The medical officer and the Company both, quite understandably, disbelieved his story. He later confessed that it was not true.

What he did not do, and by clear implication cannot be further trusted to do, is to come forward and advise the Employer of his use of alcohol or drugs before going to work as a locomotive engineer. In these circumstances, with such a demonstration of a lack of trustworthiness, it is quite justified for the Employer to invoke the consequence of the agreement, which is termination. Weighing the grievor's right not to be discriminated against due to his substance abuse, the safety critical nature of the job, the effort at cover up, and the accommodation already offered, I am persuaded that the Employer has reached the point of undue hardship. Further, the grievor has never established that this alcohol consumption, contrary to his agreement, was caused by a relapse in his earlier cocaine addiction. In these circumstances, despite the several positive things properly said in his favour, I find I must dismiss the grievance.

September 21, 2017

ANDREW C. L. SIMS, Q.C.
ARBITRATOR