CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4773

Heard via Video Conferencing in Montreal and Calgary, March 11, 2021

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE
MAINTENANCE OF WAY EMPLOYEE DIVISION

DISPUTE:

Dismissal of J. Code.

THE JOINT STATEMENT OF ISSUE:

On November 1.4, 2019, the Grievor, Mr. Jonathan Code, was issued a Form 104 that stated the following: "Please be advised thot you have been dismissed from Company service for the following reason(s): for violation of your Offer of Continued Employment (Last Chance) dated of March 22nd 2018 and signed by yourself on March 26th 2018 following the results of the drug test with o collection date of 10/11/2019 09:40AM.

Summary of Rules violated:

BOOK	SECTION	SUBSECTION	DESCRIPTION
Offer of Continued Employment (Last Chance) dated of March 22nd 2018 and signed by Mr. Code on March 26th 2018.	2	a	Further to the safety sensitive medical assessment referenced above, HR will determine whether there are any further.
Relapse Prevention Agreement and Medical Monitoring Requirements for CP Safety Sensitive Position Employees with a Substance Use Disorder, dated January 25th 2019 and Signed by Mr. Code.	1		Total abstinence from all legal, illegal or illicit drugs and other mood altering substances (which includes alcohol, cannabis, and any potentially addictive medications) for as long as you are working in a Safety Sensitive Position.
Offer of Continued Employment (Last Chance) dated March 22nd 2018 and signed by Mr. Code on March 26th 2018.	6	b	Shall strictly comply with all Company's policies, procedures and work practices, including without limitations: i. Alcohol and Drug Policy and Procedures.
HR 203.1 Alcohol and Drug Procedures Canada	3.1.3 Cannabis	28-Day Cannabis Ban	Employees in or subject to a Safety Critical Position or Safety Sensitive Position are further prohibited from using or consuming cannabis from

			any source for a minimum 28 days before being on duty or subject to duty.

The Union disagrees and a grievance was filed.

The Union contends:

1. The grievor is a person with a disability who has taken, and continues to take, steps to deal with his disability;

2. The grievor had a relapse in October 2019 when he had a positive drug trust. However, such occurrences are not uncommon in addiction situations. Indeed, a relapse has long been recognized as a weighty mitigating factor even in the face of a Last Chance Agreement;

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's Position:

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

2. The Company fulfilled its duty to accommodate and is not in violation of the *Canadian Human Rights Act* by accommodating the Grievor twice; the first instance via an offer of Continued Employment Agreement (last chance) dated March 26, 2018 and the second by way of Relapse Prevention Agreement dated January 25, 2019. The Company maintains that it is at the point of undue hardship.

3. The Grievor tested positive for marijuana in his hair sample on October 11, 2019. As a Safety Sensitive employee, the Grievor's positive test result constitutes a violation of HR 203.1 Alcohol and Drug Procedures Canada.

4. The Grievor signed an Offer of Continued Employment (last chance) on March 26, 2018. His positive test collected on October 11, 2019 constitutes a violation of this agreement to provide a further "last" chance to the grievor would render the October 11, 2019 meaningless despite the grievor having agreed to abide by its terms with full Union endorsement.

5. The Grievor failed to adhere to the terms of his Relapse Prevention Agreement dated January 25, 2019.

6. The Company maintains that the discipline assessed was just, appropriate and warranted in all circumstances. Accordingly, the Company cannot see a reason to disturb the discipline assessed.

FOR THE UNION:
(SGD.) G. Doherty
President

FOR THE COMPANY:
(SGD.) D. Guerin
Senior Director, Labour Relations

There appeared on behalf of the Company:

F. Billings – Manager Labour Relations, Calgary
D. Zurbuchen – Manager Labour Relations, Calgary

And on behalf of the Union:

D. Brown – Counsel, Ottawa
W. Philips – President, Ottawa

AWARD OF THE ARBITRATOR

The grievor entered into the service of the Company on August 25, 2010. He currently works as a carpenter in the Company's Engineering Services. His position is considered to be safety sensitive.

The main facts are not in dispute. Following an incident on February 2, 2018, the grievor tested positive for both marijuana and alcohol and was removed from service. The grievor began attending addiction rehabilitative sessions through the Company's EFAP provider on March 6, 2018. A report from the grievor's counselor of March 12, 2018 indicated that he suffered from severe depression and anxiety. The report further details that he had been diagnosed with depression some five years earlier and had sought counseling and prescribed various medications for his condition. Of significance, the grievor also reported to his counselor that he tragically lost his son three years earlier when the infant was only eight months old.

The grievor returned to work after signing a Last Chance Agreement dated March 22, 2018. The Agreement provided that the grievor's continuing employment was conditional upon his undergoing a safety sensitive medical assessment, including a return-to-work substance test and complying with *"… all the requirements of any treatment program, aftercare and follow-up including the requirements of a CP Relapse Prevention Agreement."* The Last Chance Agreement also provided for unannounced substance testing for two years. The grievor, as required, signed the Relapse Prevention Agreement on January 25, 2019. The Relapse Prevention Agreement states in part:

> This Relapse Prevention Agreement is an important component to assist you in maintaining your stable and abstinent recovery. It is also required to support your ongoing fitness for work in a safety critical position. This relapse prevention agreement is for a period of two years...

The grievor tested positive for marijuana in a hair sample obtained from him on October 11, 2019. As a consequence, he was removed from service on November 4, 2019. After attending a formal investigation on November 14, 2019, the grievor was served with a Form 104 advising him that he was dismissed from Company service for violating the March 22, 2018 Last Chance Agreement.

The Company's position is straightforward. It submits that the grievor's consumption of marijuana within 28 days of his October 11, 2019 random test is a direct violation of policy HR 203.1 and his Last Chance Agreement. The Last Chance Agreement is clear that a violation of any of its terms shall be considered just cause for the termination of his employment. The Company noted that it fulfilled its duty to accommodate the grievor by offering continued employment in March 2018 through both the Last Chance Agreement and the Relapse Prevention Agreement. The Company maintains that relapses of a kind that occurred here, even if unintended, do not alleviate the grievor from his obligations under the Last Chance Agreement. The Union disagrees and asserts that relapses are often part of the condition of a medical disability stemming from an addiction to alcohol or drugs and that he should be given another opportunity to return to his previous employment.

The Arbitrator notes that one of the key decisions relied on by the Company in their brief is from Arbitrator Picher's 2009 award in **SHP 648** where he states:

> The same sentiment was reflected in **CROA 3198** in the following terms, quoting Arbitrator M. Lynk in *Canadian Waste Services Inc. and Christian Labour Association of Canada* (2000) 91 L.A.C. (4ht) 320:
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> > Accordingly, arbitrators are understandably reluctant to interfere with the terms of a last chance agreement. These LCAs, including the one before me, are usually clearly drafted, and the expectations are well understood by the parties. If they can be easily undone by a grievor's claim that her or his unexpected or unintended relapse caused the attendance or performance breach of the LCA, the employers would have little incentive to enter into these agreements in the future. As Arbitrator Davie stated in *Re: Standard Products (Canada) Ltd.,* at p. 96:
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> > > If arbitrators do not uphold or enforce "last chance" agreements, parties would be discouraged from resolving matters and agreeing upon conditions which generally reflect prevailing arbitral jurisprudence and the specific circumstances of an individual case.[1]

The Arbitrator notes that arbitral jurisprudence from this Office, particularly the cases authored in the mid-1990's from Arbitrator Picher, underlines the importance of closure and finality when interpreting Last Chance Agreements. See: **CROA 2595** (1995); **CROA 2632** (1995); **CROA 2704** (1996) **CROA 2743** (1996) **CROA 2753** (1996).

These decisions in the mid-1990's, however, do not detract from this Office's awareness of the applicability of human rights principles in the event of a proven disability,

1 It is important to note that Arbitrator Lynk confirmed that Last Chance Agreements must still be interpreted in the context of human rights requirements. He states in the paragraph that follows the above quotation:

> *Having stated this, it is important to recognize that recent rulings by the courts and by arbitration boards have clearly held that LCAs are not immune from human rights obligations. Arbitrators are required to read LCAs with the Ontario Human Rights Code and other relevant employment statues in mind, and they must ignore or nullify any provisions that would breach, even unintentionally, the principle that industrial relations parties cannot contract out of their statutory duties:*..

such as alcoholism or drug dependency. In **CROA 3269**, a decision issued by Arbitrator Picher in June 2002, he stated the following:

> Canadian jurisprudence does not, however, confirm that the violation of an agreement of the type which is the subject of this grievance must automatically result in an employee's termination. It is well established that each case must be reviewed on the merits of its own particular facts, and that in any event the application of any such agreement cannot be in violation of the duty of accommodation owed to an employee with a disability, in keeping with human rights codes such as the **Canadian Human Rights Act**. **(Re Toronto Transit Commission and Amalgamated Transit Union, Local 113,** (1998) 75 L.A.C. (4th) 180 (Davie); **Re Regional Municipality of Ottawa-Carlton and Ottawa-Carlton Public Employees Union, Local 503** (2000) 89 L.A.C. (4th) 412 (Mitchnick); **Re Camcar Textron Canada Ltd. and United Steelworkers of America, Local 3222** (2001) 99 L.A.C. (4th) 305 (Chapman))
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> As the jurisprudence reflects, in many cases arbitrators will conclude that the history of employees' treatment, culminating in a last chance agreement, reflects a sufficient degree of accommodation to support the conclusion that any further continuation of the employment relationship would be tantamount to undue hardship upon the employer. That is the analysis which has to be made in each case. The mere fact of a last chance agreement does not, of itself, confirm whether there has been sufficient compliance with the duty of accommodation established under human rights legislation of general application, legislation which the parties cannot contract out of, as confirmed by the Supreme Court of Canada *(Re Etobicoke (Borough) v. Ontario (Human Rights Commission),* [1982] 1 S.C.R. 202 at p.213). (emphasis added)

The Arbitrator agrees that each case must be reviewed on its merits and must be read in the context of any potential violation of human rights legislation, which requires the Employer to accommodate an employee suffering from a disability to the point of undue hardship.

The Arbitrator accepts the Company's position that the grievor has received the benefit of accommodation for his disability through the Company's EAP programs as well as its efforts to keep the grievor employed in his safety sensitive position as a carpenter

if he adhered to the terms of Last Chance Agreement and the Relapse Prevention Agreement. The grievor adhered to those terms for a year and a half before breaching the Last Chance Agreement after testing positive for marijuana in a hair follicle substance test. The Union points out that the grievor had undergone random testing on a half dozen occasions up until that point and had tested negative in each instance. This relapse, according to the grievor, was precipitated by his ongoing struggles with addictions and depression.

Relapse is a common condition in cases involving addictions but it does not necessarily follow that the Company must tolerate continuing relapses as part of its duty of accommodation, as noted in **CROA 3415:**

> While the Arbitrator accepts that relapse is a common dimension in the evolution of a person dealing with the disability of alcoholism, that being indeed the very premise of the decision in **CROA 3355**, the duty of accommodation does not require indefinite or endless tolerance on the part of an employer. In this case, the grievor has been accommodated to the point of undue hardship.

The Arbitrator notes that the grievor claimed in his interview that he had reached a “dark place” some two or three months before his hair follicle test and consumed marijuana edibles containing THC to bring him out of his depressed mental state. Those personal circumstances do not excuse his behaviour, particularly in the face of the clear consequences for breaching the terms of the Last Chance Agreement.

The Arbitrator nevertheless accepts the grievor’s assertion at his interview that the tragic loss of his child, coupled with his other addictions, caused his single relapse after some 19 months of testing negative for substance abuse. Bearing in mind the applicable

principles of accommodation to the point of undue hardship set out in human rights legislation, as interpreted in the case law, the Arbitrator is of the view under the circumstances that the appropriate remedy is to direct that the grievor be further accommodated in a reinstatement order with conditions. This order will provide him with one last chance to prove that he can perform his duties without further relapse and, at the same time, as Arbitrator Picher stated in **CROA 3355** *"…will also protect the Company's interests".*

Accordingly, the arbitrator directs that the grievor shall be reinstated into his employment, without loss of seniority but also without compensation, subject to the following conditions:

a. He shall abstain from the consumption of alcohol or drugs and continue to be subject to the same terms of his contractual obligations under the Last Chance Agreement dated March 22, 2018 and the Relapse Prevention Agreement dated January 19, 2019.

b. He shall be subject to random drug and alcohol testing in the same manner as occurred prior to his termination under the Last Chance Agreement (clause 6.c) for a further period of two years from the date he returns to service with the Company.

c. He shall continue to maintain membership in support groups for his addictions for the same two-year period he is subject to random alcohol and drug testing.

d. Should the grievor fail an alcohol or drug test, or fail to appear for a drug and alcohol test without a proper reason for his absence, or otherwise violate any of the conditions set out herein for his reinstatement, he shall be subject to termination without access to arbitration except for the sole purpose of the arbitrator determining whether the grievor violated the conditions of his reinstatement as directed in this award.

March 23, 2021

JOHN M. MOREAU
ARBITRATOR