

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 4779

Heard in Calgary and with Zoom Video Conferencing, June 9, 2021

Concerning

CANADIAN PACIFIC RAILWAY

And

**TEAMSTERS CANADA RAIL CONFERENCE
MAINTENANCE OF WAY EMPLOYEES DIVISION**

DISPUTE:

Dismissal of T. Angus.

JOINT STATEMENT OF ISSUE:

On March 10, 2020, the Grievor, T. Angus was issued a Form 104 that stated the following: *“Please be advised that you have been dismissed from Company service for the following reasons: In connection with your positive substance test on November 25, 2019; whereby a random substance test was performed as per your Reinstatement Agreement. A violation of your Conditional Offer of Reinstatement Agreement dated August 2, 2019, CP’s Alcohol and Drug Policy HR 203 and SPC 41 M/W Rules and Instructions with Item 1.2D(i, ii) E and F.”* The Union objected to the dismissal and a grievance was filed.

Union’s Position:

The Union contends; the Grievor is a person with a disability who has taken, and continues to take, steps to deal with his disability; the grievor had a relapse on September 28, 2019 and as a result tested positive on a hair follicle test. However, relapses 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; 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 this matter.

Company’s Position:

The Company denies the Union’s contentions and declines the Union’s request.

The Grievor signed a Conditional Offer of Reinstatement on August 2, 2019 which stipulated that he would be subject to mandatory random substance testing for a period of not less than two (2) years. His positive test collected on November 25, 2019, constitutes a violation of this agreement. To provide a further “last” chance to the Grievor would render the August 2, 2019 agreement meaningless despite the Grievor having agreed to abide by its terms with full Union endorsement.

The Company fulfilled its duty to accommodate by offering the grievor a conditional Offer of Reinstatement (last chance).

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.) W. Phillips

President

FOR THE COMPANY:
(SGD.) D. Guerin

Senior Director, Labour Relations

There appeared on behalf of the Company:

- | | |
|-------------|-------------------------------------|
| F. Billings | – Labour Relations Manager, Calgary |
| P. Sheemar | – Labour Relations Manager, Calgary |
| E. Allen | – Labour Relations Officer, Calgary |

And on behalf of the Union:

- | | |
|-------------|---------------------|
| D. Brown | – Counsel, Ottawa |
| W. Phillips | – President, Ottawa |

AWARD OF THE ARBITRATOR

The grievor entered the service of the Company on August 25, 2008. He worked his way up over his eleven years of service to the position of Leading Track Maintenance/BTMF Operator in Moose Jaw, Saskatchewan.

The grievor was dismissed by the Company for being absent from work due to lateness on six occasions over the months of October 2018, and a further two occasions in December 2018. On August 2, 2019, the Company, the Union and the grievor signed a Last Chance Agreement. The Agreement stipulated that the grievor would be reinstated subject to mandatory substance testing for a period of two years. It also contained a provision that any positive substance test would be considered a violation of the Agreement and lead to his removal from service. The grievor returned to active duty on October 24, 2019.

A month later, on November 25, 2019, the grievor was subject to a hair follicle test that produced a positive result for amphetamines. The grievor had passed two previous urine tests on September 19, 2019 and October 26, 2019.

The only issue in this case is whether the Company has fulfilled its duty to accommodate the grievor to the point of undue hardship given that the grievor is a person with a disability stemming from his addiction to drugs and, as such, is entitled to the protection of the ***Canadian Human Rights Act***.

The Company notes that the grievor tested positive for amphetamines within a month of the grievor confirming his adherence to its strict terms and conditions. The Company cites **SHP 648** where it was noted that a substantial deference is owed to Last Chance Agreements in general and that arbitrators should be reluctant to interfere with the stated consequences of a provable breach of its terms. The Company therefore maintains that the grievor has been accommodated to the point of undue hardship given his conduct leading up to his breach of the Last Chance Agreement.

The jurisprudence in this area, as the Union pointed out, does not support termination as an automatic result in the case of a breach of a Last Chance Agreement, particularly in those cases involving an employee with a disability where the duty of accommodation is invoked. As Arbitrator Picher stated in **CROA 3269**:

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**...

In cases involving a breach of a Last Chance Agreement as a result of a relapse, as occurred in this case, arbitrators look in particular to the efforts the grievor has undertaken to battle his or her addiction. As noted in **CROA 4511**:

As noted in **CROA&DR 4054** and more recently **CROA&DR 4375**, employees who have breached last chance agreements but who are able to provide substantial evidence of rehabilitative efforts have been reinstated to their employment, including into safety sensitive positions such as the grievor occupied here. Those employees demonstrated that they have taken significant steps post-termination to maintain their sobriety including attendance at support meetings like AA and out-patient counselling.

The evidence involving the grievor in this instance is similar to the facts before Arbitrator Picher in **CROA 4054** where the employee was returned to work on conditional terms. He states in that regard:

The material before me confirms that for the past five years the grievor has been involved in an arduous personal struggle to control his drug addiction. In the two and a half years since his termination he has remained abstinent and has been heavily involved in addiction support meetings through organizations such as Alcoholics Anonymous and Narcotics Anonymous as well as out-patient counselling through the Company's EFAP program, in addition to undergoing anger management therapy. The documentation tendered in evidence before the Arbitrator confirms a very high rate of attendance by Employee L in support group meetings, on a very regular basis, from 2007 through 2011.

On the basis of the material before me I accept the submission of the Union that save for the single event of relapse which caused his discharge, the grievor has worked extremely hard and has been successful in attaining and maintaining control of his addiction. Bearing in mind that his drug addiction is a disability recognized under the Canadian Human Rights Act, I consider it significant that he has achieved the documented success which he has, and that it is not inappropriate to fashion an opportunity for his return to work, conditioned on terms fashioned to protect the employer's legitimate interests.

It is of concern that the grievor relapsed so quickly only a month after signing the Last Chance Agreement and that the substance involved amphetamines, a very potent and addictive drug. On the other hand, the grievor has worked diligently to try and arrest his addiction. There is no evidence in that regard indicating that the grievor has relapsed since he was removed from service on November 25, 2019 after he took a hair follicle test that produced the positive result for amphetamines.


The grievor sought help for his drug addiction shortly after his relapse on November 25, 2019. A letter from his Narcotics Anonymous (“NA”) sponsor attests that that the grievor entered a 12-step NA program, beginning in December 2019, and that he received his 1-year medallion attesting to his sobriety a year later in December 2020. In addition to seeking the help of NA, the grievor contacted the intake services of Saskatchewan’s Mental Health and Addiction services on February 12, 2020. He was scheduled for intake services beginning on February 24, 2020 at a treatment centre but his admission had to be delayed until July 29, 2020. A “Response to Service Request” document from the Saskatchewan Health Authority indicates the grievor attended at the Calder Treatment Centre from July 29 to August 27, 2020. A further letter from the grievor’s physician dated February 1, 2021 confirms that the grievor’s attendance at the Saskatchewan’s Mental Health and Addiction services from February 2020 through to August 2020. His physician also noted that the he had no documentation on file indicating any local relapse on the part of the grievor.

Under the circumstances, and focussing on the requirement of accommodation to the point of undue hardship for employees with a demonstrated disability such as the grievor's drug addiction, I am of the view that the grievor should be granted a further opportunity to return to work on the following conditions. He shall accordingly be reinstated to his position without loss of seniority and without compensation.

Further, upon being confirmed fit to return to work by OHS, the grievor shall accordingly be subject to the following:

- a. He shall abstain from the consumption of alcohol or drugs;
- b. He shall be subject to random drug and alcohol testing in the same manner as occurred prior to his termination for a further period of two years;
- c. He shall continue to maintain membership in support groups such as NA for the same two year period he is subject to random alcohol and drug testing. The grievor shall provide confirmation of his attendance at the support group meetings to the Union and the Company no less than every six months for the two-year period;
- 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.

June 17, 2021



JOHN M. MOREAU, Q.C.
ARBITRATOR