

IN THE MATTER OF AN ARBITRATION

B E T W E E N :

**VIA RAIL CANADA INC. (the
"Corporation")**

- and -

UNIFOR AND ITS LOCAL 100 (the "Union")

**RE: TERMINATION OF CRAIG PATRICK O'BRIEN
GRIEVANCE NUMBER: UNIFOR 250414 VIA**

ARBITRATOR: MICHEL G. PICHER

APPEARANCES FOR THE CORPORATION:

Ed Houlihan	- Director, Employee Relations
Melanie Martens	- Senior Advisor, Employee Relations
Alain Deslauriers	- Senior Advisor, VIA Montreal Maintenance Centre

APPEARANCES FOR THE UNION:

Brian Stevens	- Unifor National Rail Director
Jacques Ouimet	- Vice-President St. Lawrence and Atlantic Region, Local 100
Craig O'Brien	- Grievor

**A hearing in this matter was held in Montreal, Quebec on April 13,
2016.**

AWARD

This arbitration concerns the termination of employee Craig Patrick O'Brien for the alleged violation of the last chance or continuing employment agreement dated October 11, 2013. The pertinent facts material to this dispute are not substantially in issue.

The grievor has some 11 years of service with the Corporation. A last chance agreement dated October 11, 2013 was executed following an incident on or about September 27, 2013, when an odour of alcohol was detected on the grievor while at work, and after a subsequent investigation determined that there had been a related violation of the Corporation's Alcohol and Drug Policy.

Paragraph 3 of the agreement of October 11, 2013 (which appears to have been erroneously described as the agreement of October 21, 2013), established a number of conditions under the heading "Compliance" which provide as follows:

Compliance

- You will be subject to performance observations by your supervisor, including work safety and attendance, which will be documented.
- You will be subject to unannounced testing for alcohol and drug use for reasonable cause, for the duration of this agreement.
- Without limiting the above, you must abstain completely from the use of alcohol and/or other drugs when reporting for work for the duration of this agreement. Any prescribed medication

must be used responsibly and in compliance with your doctor's recommendation and the *Alcohol and Drug Policy*.

- If you feel that you have a problem, you are expected to seek help before a further violation occurs.
- You must comply with all provisions of the Alcohol and Drug Policy and all other VIA policies.

If you refuse to undergo or fail to successfully pass any alcohol and drug testing you will no longer be eligible for continued employment/reinstatement and your employment will be terminated.

Consistent with the foregoing compliance provisions, on March 29, 2014 the grievor was tested for drugs and alcohol by way of a breathalyzer test and the taking of a urine sample. It is not disputed that the grievor was found to have alcohol in his system and that his urine sample tested positive for marijuana. The Corporation's representative notes that in fact the grievor admitted to having used marijuana, albeit in the form of a few puffs on the weekends. Following an investigation conducted on April 18, 2014, Mr. O'Brien was terminated, effective April 28, 2014, for his use of drugs and his breach of the last chance agreement of October 11, 2013.

Through this grievance the Union seeks the grievor's reinstatement into employment. Among other things, the Union questions whether there was "reasonable cause" for the Corporation to test the grievor when it did, stressing that the continuing employment agreement did not contemplate random unannounced testing. The Union also stresses that the continuing employment agreement did not prohibit the grievor from consuming alcohol or drugs as a general matter. Rather, the compliance conditions stipulated that he was to "... abstain completely from the use of alcohol

and/or other drugs when reporting for work for the duration of this agreement."

The Corporation submits that the continuing employment agreement entered into with Mr. O'Brien was clear and categorical in requiring that he was to "abstain completely from the use of alcohol and/or other drugs when reporting for work ...". The issue, the Corporation stresses, is not impairment, but rather the consumption of alcohol and/or drugs which, in the instant case, is not a disputed fact. It is the Corporation's position that the grievor's reading of 0.017 percent blood alcohol as well as the positive result for marijuana establish, in and of themselves, that the grievor failed to honour the conditions of the last chance agreement because they reveal that he did not abstain completely from alcohol and/or drugs when coming to work. The Corporation's representative stresses that any level of blood alcohol and drugs found in the grievor would constitute a violation of his last chance agreement, whether or not it resulted in impairment.

Upon a review of the material before the Arbitrator, there can be no dispute that the grievor did violate the terms of his continuing employment agreement. The unannounced drug and alcohol test revealed both alcohol and drug use when he reported for work. Moreover, the Arbitrator is unable to accept the Union's assertion that the unannounced testing was not for reasonable cause. Given the pattern of the grievor's absences that had occurred earlier in March of 2014, the related informal investigation to discuss his absences and the resulting assessment of 10 demerit points on or about

March 26th, the Arbitrator is satisfied that the unannounced alcohol and drug testing three days later, on March 29, 2014, was for “reasonable cause”.

In the face of the breach of the continuing employment agreement, the issue becomes whether there are elements of mitigation in the material presented to the Arbitrator which would justify the grievor's return to work. Having given the matter close consideration, the Arbitrator is persuaded that it is not inappropriate to reinstate Mr. O'Brien into his employment, albeit with important conditions fashioned to protect the Corporation's legitimate interests.

In coming to that conclusion, the Arbitrator is to some degree influenced by the unchallenged evidence of the grievor that he has been, and continues to be, involved in support programmes, including the completion of a 28-day residential programme in October of 2014. The unchallenged representation of the Union is that the grievor has remained sober and continues to participate in weekly group sessions directed towards relapse prevention.

On the whole of the material, therefore, the Arbitrator is satisfied that it is not inappropriate to give the grievor what the Arbitrator considers to be a final chance to demonstrate that he can be a faithful and productive employee free of any problems related to drug or alcohol consumption. The Arbitrator therefore directs that the grievor be reinstated into his employment forthwith, without compensation, subject to his accepting the conditions which follow. The grievor shall, for a period of not less than three

years from the date of this Award, be subject to random, unannounced testing for alcohol and drugs. Accordingly, “reasonable cause” will no longer be a prerequisite for the drug and/or alcohol testing. Additionally, the grievor shall at all times abstain from the use of alcohol and/or drugs when reporting for work. Further, the grievor's reinstatement is predicated on his accepting to continue his current weekly group sessions for relapse prevention for a period of not less than two years following the date of this Award.

The Arbitrator retains jurisdiction with respect to the implementation and interpretation of this Award.

Dated at Ottawa, Ontario this 30th day of April, 2016.

Michel G. Picher

Michel G. Picher
Arbitrator