IN THE MATTER OF AN ARBITRATION

BETWEEN

CANADIAN NATIONAL RAILWAY COMPANY

("the Company")

- AND -

UNIFOR LOCAL 100

("the Union")

CONCERNING THE GRIEVANCE REGARDING BRADLY KOSKI ("the Grievor"), DISCIPLINE & TERMINATION

SHP 728

Christopher Albertyn - Sole Arbitrator

APPEARANCES

For the Union:

Brian Stevens, National Rail Director

Zoltan Czippel, Vice-President, Mountain Region

Bradly Koski, Grievor

For the Company:

Ron Campbell, Labour Relations Manager, Winnipeg

Susan Blackmore, Senior Manager, Labour Relations, Edmonton

Jennifer Darby, Labour Relations Associate, Toronto

Hearing held in TORONTO on September 23, 2016.

Award issued on October 21, 2016.

AWARD

Dispute

1. 10 demerits assessed against Mr. Koski for failing to protect his assignment on May 19, 2015. 10 demerits assessed against Mr. Koski for absenteeism over the average of BC South and termination for accumulation of demerits exceeding 60. Discharge of Mr. Koski for failing to comply with the conditions of his last chance agreement.

Joint Statement of Issue

2. The Union alleges the Company violated Rules 16.1, 27.1, 27.2, 27.4, Appendix III and Appendix XVIII, Section 239 of the *Canada Labour Code* and Section 7 of the *Canadian Human Rights Act* as a result of its actions and that the discipline assessed was without cause and excessive.

3. The Company disagrees with the Union's allegations. Mr. Koski failed to protect his assignment on May 19, 2015, exceeded the average absenteeism of his peers and failed to comply with the conditions of his last chance agreement and is deserving of the discipline assessed. Also the matter of his violation of the last chance agreement is not arbitrable under the terms of the last chance agreement.

Background

4. The Grievor is a Car Mechanic. He entered the service of the Company on September 20, 2010 at Thornton Yard in Surry BC to train and qualify in the trade of car mechanic. He had poor attendance and time keeping. He was discharged on December 31, 2013 for accumulation of demerits in excess of 60, largely as a result of poor attendance at work and poor time keeping.

5. When the Grievor was discharged in 2013 the Union secured his reinstatement, subject to a number of conditions. The Company, the Union and the Grievor entered into a last chance agreement on June 17, 2014 (referred to by the Union as a continued employment agreement). As a result of this agreement, the Grievor came back to work. He was given a final chance to improve his conduct, particularly his attendance at work and time keeping. The terms of the last chance agreement are:

> The Company is prepared to reinstate Mr. Koski to the Apprentice program contingent upon Mr. Koski's compliance with specific conditions governing his return to work and continued employment.
>
> For clarification purposes, it must be understood that the conditions of reinstatement and continued employment are presented as a last chance opportunity for Mr. Koski to improve his attendance and work performance [in order to] maintain his future employment. The following items will govern Mr. Koski's reinstatement and continued employment:
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> 1. Mr. Koski's time out of service will be considered a disciplinary suspension and will be without compensation or benefits and without loss of seniority.
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> 2. Prior to reinstatement, Mr. Koski will attend an interview to

satisfy the Company that [he] has accepted responsibility for his past behavior and that he is genuinely committed to improving his attendance and work performance.

3. Following Mr. Koski's reinstatement, he will be subject to an employment contract for two years following the date of reinstatement. Notwithstanding that Mr. Koski's discipline record will stand at one suspension, 55 demerits and 3 written reprimands upon his return to work, it is understood that any issue related to Mr. Koski's work performance and/or time keeping in which Mr. Koski's responsibility is determined will result in his discharge with no recourse to the grievance and arbitration process, with the exception of a dispute that Mr. Koski's responsibility has not been appropriately determined and/or a dispute concerning the Company's method of calculating attendance.

4. Mr. Koski's attendance will be monitored for a period of two years following his reinstatement and will be compared against the average absenteeism rate of the Thornton Car Shop employees for any two month period. A failure to meet the minimum standard of attendance for any two month period of review shall result in the termination of Mr. Koski's employment from the Company with no opportunity for re-employment.

5. Any absence justified by a medical condition or disability must be supported by a dated medical certificate signed by a physician provided to the supervisor within 10 days of the absence.

6. If the absence is due to a chronic medical condition, Mr. Koski must substantiate the absence by providing a medical report to CN Occupational Health Services explaining the absence, including diagnosis, prognosis, treatment and recommendation for accommodation if any (only information on accommodation will be shared outside of Occupational Health Services).

7. This Last Chance agreement will serve to resolve any and all

> outstanding grievances submitted on behalf of Mr. Koski.
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> 8. Mr. Koski agrees that he has had full opportunity to consider the terms of settlement of this document and that he has entered into it freely and voluntarily without undue duress. Mr. Koski further agrees that the Union has provided him with competent advice in this regard and that the Union has represented him fairly throughout the grievance process on these matters.
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> The foregoing is without prejudice to all parties in this matter and will not be used as a precedent for future cases of a similar nature. Should you agree that the above resolution represents full and final settlement of all issues raised in this matter, including any grievances or future Human Rights or other complaints, please sign below, returning one signed copy to this office. Arrangements will be made to implement the agreement upon receipt of your concurrence.

6. The document, issued by the Company, was signed by the Grievor and the Union.

The Grievor's failure to protect his assignment on May 19, 2015

7. The Grievor did not attend work on May 19, 2015. He phoned his supervisor the day before, at 8:05pm to say he would not be coming in, a few hours before the start of his shift, so that his supervisor could arrange relief. He did not say he was sick. His supervisor told him he would need a doctor's note, and the Grievor said he would get one. The supervisor did not think that the Grievor sounded sick.

8. The Company held an investigation. The Grievor said he did not come in

because he was unfit for duty because of his sleep disorder. He said he had been up for a couple of days and was tired and sleep deprived and he thought attending work would be unsafe for him and for others.

9. The Company includes, in its brief, an extract from the Grievor's Facebook page of May 18, 2015, at 4:24pm, which strongly suggests he was not ill and that he was not sleep deprived. The Facebook entry contradicts the Grievor's explanation at the investigation. The Union objects to its inclusion because it was never put to the Grievor in the Company's investigation and he had no opportunity to respond to it.

10. I agree. The procedure between the parties is to share information relevant to an issue between them so that they may each comment on it, and not to be ambushed. I will not take account of the Facebook posting.

11. The Grievor got a medical note from his doctor. It is dated May 28, 2015. It states that the Grievor's medical condition was reviewed on May 28, 2015 (9 days after the date of his absence). It certifies that the Grievor was absent from work on May 19 and May 27 "for medical reasons".

12. The Union argues there was no misconduct for this absence. The Grievor complied with the requirement to notify his supervisor that he was unfit to work his shift. He did so in a timely manner. He obtained a doctor's note of the absence within the time period stipulated in the last chance agreement.

13. The Company is suspicious of the absence. The doctor's note refers to a doctor's visit on May 28, 2015, many days after the absence. The doctor must have relied only on the Grievor's explanation for his absence because he did not examine the Grievor at the time of his absence.

14. I agree that the doctor's note only confirms what the Grievor must have told the doctor. It is not an independent verification of unfitness for duty. However, the absence reporting, including the doctor's note, is in accordance with the last chance agreement.

15. Accordingly the absence on May 19, 2015 was dealt with by the Grievor in the manner contemplated by the parties in the last chance agreement. Therefore, there can be no misconduct by the Grievor with respect to this absence. He ought not to have been assessed any demerits.

16. I order that the 10 demerits for this incident be set aside.

Mr. Koski's absences were over the average of the Thornton Car Shop

17. Following the signing of the last chance agreement, from the date of his reinstatement on June 20, 2014 until June 15, 2015, the Grievor missed 17 days and was late for work twice.

18. This level of absence was above the average absence rate of the Thornton Car Shop employees for a period of at least two months.

19. The Union suggests the Company's method of calculation was not wholly fair to the Grievor. But even on the Union's proposed calculation the Grievor exceeds the average for two month periods.

20. So, prima facie, the Grievor has breached para. 4 of the last chance agreement, which required that he meet the absence average in every period of two months.

21. This is not, in itself, misconduct that warrants the imposition of demerits as the Company has done. It is misconduct only in the context of the last chance agreement, which stipulates a particular result (a result that is not 10 demerits). I find, therefore, that there was no justification for the imposition of 10 demerits for exceeding the average. These 10 demerits are set aside.

22. There was, however, prima facie justification to apply the last chance agreement provision that made clear that the Grievor would be terminated if he did not meet this condition. That is what the parties and the Grievor agreed when they concluded the last chance agreement.

The arbitrator's jurisdiction under the last chance agreement

23. Para. 3 of the last chance agreement provides that the Grievor does not have recourse to the grievance and arbitration procedure, subject to limited exceptions, if he breaches the last chance agreement, as he has done. In this

circumstance, an arbitrator can only confirm the result agreed between the parties and the Grievor, that the Grievor's employment be terminated.

24. This limitation on an arbitrator's jurisdiction is subject to statutory exceptions. If the effect of the application of the last chance agreement is to violate the *Canadian Human Rights Act, RSC 1985, c H-6*, as the Union alleges in this case, an arbitrator has jurisdiction to prevent that.

25. Mention is made, in the final paragraph of the last chance agreement, that the Grievor accepts, by signing the last chance agreement, full settlement of all issues raised, including "future human rights … complaints". The implication of this provision is arguably that, even if the Grievor has an ongoing human rights claim, he cannot rely upon it if he breaches the provisions of the last chance agreement, as I have found he has done.

26. I find this provision is not within the power of the parties to conclude. They cannot contract out of the statutory rights provided under the *Canadian Human Rights Act*, RSC 1985, c H-6. Hence the Grievor cannot be held to any purported waiver in the last chance agreement of his human rights entitlements under that Act.

27. The question is, did the Grievor have rights under the *Canadian Human Rights Act*, RSC 1985, c H-6 relevant to the determination of the grievance? The Union claims that. It does so on the basis of the Grievor's alleged disability, his sleep disorder.

28. It is therefore necessary to consider whether, at the relevant times, the Grievor suffered from a disability, a chronic condition, that prevented him, beyond his volition, from the regular attendance at work he had undertaken in the last chance agreement.

A chronic condition?

29. Four of the Grievor's 17 absences between his reinstatement in June 2014 and June 2015 occurred while he worked the afternoon shift. The remainder occurred after February 2015 when he was switched to the night shift. So, the bulk of his absences occurred in the last few months of his employment. In his defence at the investigation the Company held into his absences being above the shop average, the Union argued that the Grievor's record showed he could do much better on the afternoon shift and suggested that he should be returned to that shift.

30. At the investigation into the Grievor's absences being above the average, the Grievor said the following: "I would like to comply with the rules, but my medical condition is being ignored"; "I suffer from a sleep condition [and] if given a proper shift I wouldn't miss work. But my condition would also have to be given a chance to get better for that to happen". The Grievor also said that he had given his medical documentation of his chronic condition to the Union and the Union had assured him it would be taken care of. His final statement was: "I love CN. I love working here and would like to improve my skills as a carman but the

lack of attention given to my medical condition even when I have doctor's proof has given me an unhealthy medical condition and an unsafe working condition for myself and others".

31. The medical notes produced at the hearing are the following:

a. June 10, 2014:
"Brad has a difficulty with insomnia. This has improved. However, he would be better on afternoon shifts as this suits his natural routine better and would help prevent him relapsing."

b. January 21, 2015:
"Brad suffers from a sleep disorder. He should stay on an afternoon shift".

c. March 30, 2015:
"Brad was not able to work Feb. 15 and 24, Mar. 22 and 23 due to his sleep disorder".

d. April 14, 2015:
"Brad has a sleep disorder which is made worse by night shifts. Since he has been on night shift from January, his condition has deteriorated. He would benefit from staying on afternoon shifts."

32. There is a discrepancy between the medical notes the Grievor gave to his supervisor and the notes that were submitted to the Company's Occupational Health Services (OHS). The OHS was in possession only of the medical note of June 10, 2014. The rest were given to the Grievor's supervisor, but they were apparently not passed on to the OHS. In order for the Company's OHS to have

been able to make a fair assessment of the Grievor's medical condition, the OHS should have had all the medical notes.

33. The notes, taken together, strongly suggest that the Grievor's family doctor considers the Grievor to be suffering from a chronic condition, a disability, in the form of a sleep disorder. His family doctor also suggests how the disorder can be accommodated, by having the Grievor return to working the afternoon shift, rather than the midnight shift. Although, as the Company points out, the Grievor's family doctor did not insist on this, he does strongly recommend it.

The Union's effort to seek an accommodation

34. On February 11, 2015, shortly after the time when the Grievor was moved from the afternoon to the night shift, Zoltan Czippel, the Union's Vice-President of the Mountain Region, wrote to Scott Klappstein, the Company officer dealing with risk management and workers' compensation claims, and advised that the Grievor did not require an accommodation. The Grievor thought he could manage on night shifts.

35. That changed in April 2015. On April 21, 2015, by which time the Grievor had had a series of absences from work during February, March and April, Mr. Czippel again wrote to Mr. Klappstein. He said the Grievor had again approached him about an accommodation. Mr. Czippel provided the medical note of April 14, 2015, above, which says the Grievor "would benefit from staying on afternoon shifts". Mr. Czippel mentioned he had spoken to Gerry Harder, the Company's

Regional Mechanical Officer, “and the accommodation shouldn't be an issue on afternoon shift (1500-2300). We are looking at Wednesday/Thursday as days off. Let me know how you would like to proceed.” This suggests Mr. Czippel had spoken to Mr. Harder and confirmed that the switch of the Grievor to afternoon shifts would not pose an operational problem for the Company.

36. Mr. Klappstein responded the next day, April 15, 2015, pointing out that the doctor’s recommendations on the note are not given as permanent restrictions, and that they don’t have an end date. He said he had spoken to his superior who had recommended he speak to OHS “to see if they need to clarify restrictions with the doctor directly since there is no end date given”. He then added, “Once we know that then we’ll know how to proceed. I’ll get back to you as soon as I hear from them.”

37. There was no follow up from Mr. Klappstein. On May 31, 2015 Mr. Czippel wrote to Mr. Klappstein asking for an update on the Grievor’s accommodation. “He called me inquiring about it. Have you spoken to OHS?” By this time the Grievor had notice of disciplinary investigations into his May 18 absence and into his absences exceeding the shop average.

38. Mr. Klappstein responded 10 days later, after the Grievor’s termination on June 4, 2015. Mr. Klappstein’s response was on June 10. He said: “I was not provided any further clarification from OHS. Based on the current doctor’s note [the April 14, 2015 note], there are no permanent work restrictions given upon which to base an accommodation. What the note constitutes is a recommendation

and thus I cannot initiate any process. If this changes please forward me the medical information and I'll again send it back to OHS."

39. Mr. Czippel responded the same day, June 10, 2015, and advised Mr. Klappstein that the Grievor "missed time from work due to his sleep disorder which caused him to get fired by CN. Now it becomes a case of duty to accommodate, which CN failed to do. … All [that] was needed to help him is to put him on afternoon shift. This could have been done without OHS involvement since there was no adverse effect on CN nor did CN have to modify anything or even spend any money to accommodate. .."

40. Mr. Klappstein replied the same day, "I cannot speak to the outcome of a disciplinary process that I am not party to. However, I can clarify that typically CN cannot accommodate unless we are provided valid permanent work restrictions from a physician. This is not overly difficult to obtain if any worker has permanent or temporary restrictions which medically restrict him from performing his current job. CN has a multitude of accommodations in the system, both occupational and non-occupational, where this requirement has been met."

41. It is by no means clear if Mr. Klappstein contacted OHS as he had undertaken after his email of April 15, 2015. In it, he had said he would see if OHS needed to clarify any restrictions for the Grievor with the doctor directly. That inquiry was never answered or explained to the Union. Did the OHS consider the matter? Did the OHS advise Mr. Klappstein that the doctor had not required any restriction, but merely recommended it? These questions are

unanswered.

42. The Company explains that the only document in the possession of OHS was the Grievor's doctor's note of June 10, 2014. This means that the OHS never had the doctor's note that was sent by the Union to Mr. Klappstein (the note of April 14, 2015). It means also that the OHS did not have the notes of January 21, 2015 and March 30, 2015, given by the Grievor to his supervisor.

43. The note that the OHS had in its possession (June 10, 2014) advises that the Grievor "has a difficulty with insomnia". The later notes, which the OHS did not have, refer in each instance to "a sleep disorder". The three notes that mention this were never in the possession of the OHS, and only one of them was in Mr. Klappstein's possession. This means that the section of the Company that addresses issues of accommodation had no knowledge that the Grievor's doctor was claiming that he suffered from a sleep disorder.

44. The doctor's notes make clear that, in the doctor's professional opinion, if the Grievor were working on the afternoon shift, he would miss work less often. This was the Company's concern.

45. Particularly when Mr. Klappstein conveyed that the Grievor's medical notes were insufficient to establish evidence of a disability requiring accommodation, the Union or the Grievor ought to have communicated directly with the Company's OHS, as was provided for in the last chance agreement, rather than with Mr. Klappstein. This is because he was not the person to set up an

accommodation for an employee on grounds of disability and para. 6 of the last chance agreement contemplated communication with the OHS.

46. Further, as the Grievor wished to pursue his claim for an accommodation on the basis of a disability, the Grievor ought to have obtained a medical report that addressed what is referred to in para. 6 of the last chance agreement.

47. Nevertheless, based on the medical notes that were provided, the Grievor might have a sleep disorder. The family doctor suggests this. He indicates that the Grievor suffers from a chronic condition, whether temporary or permanent. The parties – meaning the Company and the Union – knew that the Grievor's family doctor was claiming that the disorder was having an impact upon his attendance at work. The Grievor was telling the Union this, the Union was telling the Company this, and the Grievor mentioned it repeatedly in the investigations into his absences. Yet no clarification was sought from his physician as to precisely the nature of his sleep disorder. What was needed was for the Grievor to be examined by a specialist, likely a psychiatrist or neurologist, in conjunction with a sleep study, to determine precisely the nature of the Grievor's medical condition and of its impact on his attendance at work. That never happened. Consequently he was treated throughout by the Company as if the sole reason for his absences was his own neglect of duty, without sufficient regard to what his doctor was saying.

Conclusions

48. I must be satisfied, in all the circumstances, that the termination of the

Grievor's employment was for just cause. I must be satisfied also that his breach of the last chance agreement was culpable, and not because of a chronic condition.

49. On the evidence, I am not so satisfied. The medical evidence before the Company at the time it made its decision to terminate the Grievor was that he was suffering from a chronic condition that prevented him from regular attendance at work, particularly on the night shift.

50. At the time of the Grievor's termination, if the Company was not satisfied by the medical evidence, it had a number of options available to it to test the veracity of that evidence, and the extent, if any, to which the Grievor ought to have been accommodated. The Company concluded that the medical evidence the Grievor had provided from his family doctor was not sufficient to justify an accommodation. That may have been a reasonable conclusion, but the Company was not entitled then to reach the further conclusion, as it did, that the opinion expressed by the family doctor was without any substance, and that it could be ignored as an explanation for the Grievor's absences. Before that conclusion could be reached the Company was entitled to require the Grievor to produce more comprehensive medical information from his family doctor or from an appropriate specialist, which would have put the issue beyond doubt.

51. The circumstances that applied at the time of the Grievor's termination include efforts initiated by the Union on April 21, 2015, when the Grievor was becoming concerned by his poor attendance, to seek his accommodation on

grounds of disability, on the afternoon shift. This was more evidence to the Company at the time that it was dealing with a disability and accommodation case, and not purely a matter of misconduct. This fact adds to the reasons why the Company ought to have considered the matter as a potential disability and accommodation case. In those circumstances, it was unreasonable for the Company to have concluded that the Grievor's case was not, at least, a threshold disability case.

52. In light of these considerations, I find that the Company did not have just cause to terminate the Grievor under the collective agreement or under the last chance agreement. On the medical evidence the Grievor produced, the Grievor's absences were at least arguably the consequence of a medical disability, a chronic condition, that was sufficiently contemplated as an explanation for absence in para. 6 of the last chance agreement for the Company to have addressed it. The Company should have exhausted this possibility before concluding that the Grievor's absences were purely a matter of neglect and misconduct.

53. I accordingly order the Grievor to be reinstated in employment, without loss of seniority. This will be without any compensation because the Grievor failed to fulfil his obligation under para. 6 of the last chance agreement, when seeking an accommodation on grounds of a chronic medical condition (as he and the Union claimed), to provide the Company's OHS with a report giving diagnosis, prognosis and treatment, with recommendations for accommodation of his medical condition. He is not to return to active employment until this condition has been met.

54. I remain seized of the implementation and interpretation of this award.

DATED at TORONTO on October 21, 2016.

Christopher J. Albertyn
Arbitrator