SHP649

IN THE MATTER OF AN ARBITRATION

BETWEEN

CANADIAN NATIONAL RAILWAY COMPANY

("the Company" / "the Employer")

- AND -

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW – CANADA), LOCAL 100

("the Union")

CONCERNING THE INDIVIDUAL GRIEVANCE of CHRISTOPHER McCALLION

("the Grievor")

Christopher Albertyn - Sole Arbitrator

APPEARANCES

For the Union:

Brian McDonagh, National Representative

Drew Ratajewski, Vice-President, Local 100, Great Lakes Region

Robert A. Davis, CAW Lodge 110, Chairperson

Christopher McCallion, Grievor

For the Company:

Ross Bateman, Senior Manager, Labour Relations

Marc Ethier, District Mechanical Officer

Frank O'Neill, Manager Labour Relations

Sandra Prudames, Labour Relations Officer

Hearing held in TORONTO on May 29, 2009.

Award issued on November 23, 2009.

AWARD

Issue

1. This grievance concerns the termination of Car Mechanic Apprentice Christopher McCallion's employment on January 21, 2008.

2. The Union contends that the Company did not conduct a fair and impartial investigation and that the Company violated Rules 23.1, 27.1 and 27.4 of the collective agreement. The Union maintains also that the Company violated Rule 43 – Discrimination and Harassment and Employment Equity of the collective agreement, and the *Canada Labour Code*, Part III, Division XIII – Sick Leave.

3. Further, the Union alleges the Grievor's termination was arbitrary and excessive and in violation of Appendix XVIII of the collective agreement.

4. The Union asks that the Grievor be reinstated in employment, with full redress for all lost wages, benefits and losses incurred as a result of his discharge, including interest on any moneys owing.

5. It is the Company's position that the Grievor failed to "display the desire and aptitude to learn the trade" and his employment termination was made in accordance with Rule 30.5 of the collective agreement.

6. I deal with the issues in this case in the following sequence:

a. A preliminary matter as to the scope of the grievance;

b. A brief description of the collective agreement Rules relied on by the parties;

c. The parties' submissions;

d. Whether the Company was obliged to have a fair and impartial investigation before terminating the Grievor;

e. If not, what procedure applied to the situation;

f. The facts;

g. The claim of the Grievor's disability and the Union's claim of discrimination and statutory relief;

h. The application of the procedure to the facts.

Preliminary issue

7. In the original grievance the Union relied on Rule 27.1. Among the preliminary issues raised by the Employer is whether the Union is entitled to introduce Rule 27.2 and Appendix III of Agreement 12 into the grievance, when those provisions were not relied on in the original grievance. The Company contends the Union is not at liberty to raise them at arbitration. The Company relies on Rule 27.7. That Rule requires the Union to identify the Rule(s) relied upon when challenging a management decision. In support, the Company refers to *CROA 3265* (Picher) and *SHP 634* (Albertyn) and to the doctrine of *res judicata.*

8. The Union responds that reference to Rule 27.2 and Appendix III is implied in the reference to Rule 27.1.

9. Rule 27.1 reads:

> Except as otherwise provided herein, no employee can be made to suffer discipline or discharge without a fair and impartial investigation being conducted and responsibility established.

10. Rule 27.1 ends with the words "(Rule 27.1 is Amended by Appendix III)". Appendix III confirms this. It begins with the words:

> IT IS AGREED THAT, effective March 6, 2001, this Memorandum of Agreement will suspend Rule 27.1 and 27.2 inclusive of Agreement 12.

> The procedures outlined herein will apply until cancelled by the application of Rule 27.2 contained herein.

11. The provisions of Appendix III then go on to describe the INFORMAL INVESTIGATION procedure for Rule 27.1 and the FORMAL INVESTIGATION procedure for Rule 27.2.

12. The implications of these provisions is that if the Union refers to Rule 27.1 it refers also to the reference to Appendix III, and Appendix III therefore applies. If a matter requires informal investigation, then informal investigation is necessary; if a matter requires formal investigation under Appendix III, then a formal investigation must be done.

13. Accordingly, the Union's original reference to Rule 27.1 is sufficient to engage these provisions. This conclusion is enhanced by the letter from Mr. Bateman, the Senior Manager Labour Relations for the Company, to Mr. Burns, the Union's President, dated December 19, 2007. The letter confirms the applicability of a fair and impartial investigation before an employee is disciplined or discharged.

14. For reasons explained below, though, because what occurred was not

disciplinary in nature, Appendix III was not engaged.

Relevant Rules

15. The Rules relevant to this case are the following.

16. Rule 23.1 states:

> New employees shall not be regarded as permanently employed until they have completed 65 working days cumulative service. In the meantime, unless removed for cause which, in the opinion of the Company renders them undesirable for its service, employees shall accumulate seniority from the date they entered the classification in the trade, and shall be regarded as coming within the terms of this Agreement.

17. Rule 30 governs the training of apprentices, their seniority, rates of pay, and apprentice responsibilities. Rule 30.5 applies to apprentices throughout the term of their apprenticeship, and states:

> Apprentices must throughout the apprenticeship continue to display the desire and aptitude to learn the trade or they will not be retained in the service except as may be otherwise mutually agreed.

18. Article 43 reads:

> 43.1 (a) It is agreed by the Company and the Union that there shall be no discrimination or harassment towards an employee based on the employee's age, marital status, race, colour, national or ethnic origin, political or religious affiliation, sex, family status, pregnancy, disability, union membership, sexual orientation, or conviction for which a pardon has been granted.
>
> (b) It is agreed that the terms discrimination and harassment as used in this Rule, shall be defined and interpreted in the *Canada Human Rights Act.*
>
> (See Appendix XVII)
>
> 43.2 As a matter of principle and in compliance with the *Employment Equity Act*, the Company and the Union are fully committed to achieving equality in the workplace so that no person shall be denied employment opportunities or benefits based on any of the prohibited grounds of discrimination. Employment Equity means treating people the same way despite their differences, and respecting their differences to allow them to participate equally.

Parties' submissions

19. The Union contends that the Grievor held a bulletined mechanics position and was being paid the mechanic's rate of pay. The Union contends too that the Grievor was not being rotated through work modules as outline in the collective agreement, nor was he registered with the Apprenticeship Board of Ontario. Accordingly, the Union claims that the Grievor was being used in the capacity of a tradesperson and not under any particular training regime. In these circumstances, the Union contends that the Grievor was entitled to an impartial

investigation before being terminated, as is required by Article 27.1.

20. The Union's position is that the Grievor's status was that of a permanent employee and he should therefore have been afforded the right of a disciplinary investigation.

21. The Company takes the view, on the basis of long practice and the jurisprudence between the parties, that the termination of an apprentice under Rule 30.5 is not disciplinary. The termination is not for misconduct, but for a failure to meet the required standard of performance necessary to complete the apprenticeship. The Company submits that it was therefore not required to hold an investigation under Rule 27.1 prior to discharging the apprentice. It relies on *SHP 54* (Weatherill) which expressed considerable doubt that the disciplinary rules of the collective agreement applied to the apprentice rule (that an apprentice continue to display the desire and aptitude to learn the trade). The Company relies also on *SHP 146* (Weatherill) and *SHP 177* (Weatherill) which confirm the non-applicability of the disciplinary rules to the review of an apprenticeship under the apprentice rule.

22. The Union claims a violation by the Company of Rule 43 of Agreement

12 and a violation of the *Canada Human Rights Act*. It says that, by terminating the Grievor, the Company discriminated against him on grounds of his disability. The Company denies this. It contends that it has not been provided with any information, from the Grievor or the Union, that would indicate that the Grievor suffers from a disability as defined by the *Canada Human Rights Act*. The Company suggests there is no evidence of any incapacity that hindered the Grievor's ability to come to work on time, regularly, as required. Furthermore, the Company contends that there is no evidence that any Company officer perceived the Grievor to be suffering from any disability or handicap.

23. Employer counsel relies on *SHP 219* (Weatherill). That case confirms that repeated lateness and unjustified absence warrants a conclusion that an apprentice does not show a desire to learn their trade, and justifies termination of the apprenticeship.

24. The Union relies on s.239(1) of the *Canada Labour Code*, Part III, Division XIII – Sick Leave. It reads:

> 239. (1) Subject to subsection (1.1), no employer shall dismiss, suspend, lay off, demote or discipline an employee because of absence due to illness or injury if
>
> (a) the employee has completed three consecutive months of continuous

> employment by the employer prior to the absence;
>
> (b) the period of absence does not exceed twelve weeks; and
>
> (c) the employee, if requested in writing by the employer within fifteen days after his return to work, provides the employer with a certificate of a qualified medical practitioner certifying that the employee was incapable of working due to illness or injury for a specified period of time, and that that period of time coincides with the absence of the employee from work.

25. The Union says that the Employer violated this provision. The Employer denies it.

26. The Company says the absences for which the Grievor was terminated were not for illness. His termination was because his absences were too frequent and, except in one instance, were not illness related, and were without justification.

27. The Union suggests that some of the Grievor's lateness can be attributed to him being allowed to leave his shift early. The Company disputes this.

Was the Company obliged to have a fair and impartial investigation before terminating the Grievor?

28. When the Grievor was terminated, he had completed more than 65 working days cumulative service. His probation had ended. Therefore, under Rule 23.1, the Grievor was a permanent employee entitled to the full protections of the collective agreement.

29. However, notwithstanding the Grievor's permanent status, he was employed as an apprentice, even if working in the capacity of a tradesperson and even if he earned the equivalent rate of pay. Rule 30.5 therefore applied to him.

30. As the numerous authorities referred to by the Union in its brief attest, where the Company intends to discipline an employee, it must first conduct a fair and impartial investigation. The question is whether, if terminated under Rule 30.5, the Grievor was entitled to a fair and impartial investigation under Rule 27.1 before being terminating.

31. The question was addressed in *SHP 177* (Weatherill), as follows:

> It was argued in the instant case that article 23.30 [now 27.1] provides a blanket prohibition against dismissal of any permanent employee without a proper investigation. In my view, the article, read in context, cannot properly be given this effect. It deals not with dismissal but with discharge, and while the two terms may in some contexts be used interchangeably, they often have different meanings in labour relations matters, and I think that they do under this collective agreement. It is

> specifically provided that apprentices who do not meet the obligation imposed by article 31.8 [now 30.5] may "not be retained", and the apprenticeship program calls for those who do not meet its standards (as the grievor did not), to be offered the opportunity to resign, or to be dismissed. Such persons are not "discharged", and are not alleged to be guilty of any wrongdoing for which their "responsibility" must be established through an investigation. In my view, neither article 23.30 nor article 28 imposed an obligation on the company to conduct an investigation in the instant case.
>
> There was, I find, no violation of the collective agreement, and for all of the foregoing reasons the grievance must be dismissed.

32. The approach I adopt was explained in *SHP 311* (Picher), as follows:

> The foregoing passage indicates that Rule 38.1 [now 30.5] of the collective agreement is not conceived as a purely disciplinary provision, but rather one which reserves to the Company the discretion to assess, on an ongoing basis, whether an apprentice continues to demonstrate the desire and aptitude to learn that justify his or her being retained. The Arbitrator cannot accept the submission of counsel for the Grievor that Rule [38.1][now 30.5] relates only to an employee's technical knowledge, skill and ability. In my view the broader concepts of "desire and aptitude to learn" must also be interpreted in light of such other attributes as reliability in attendance, the ability to accept and carry out directions in a team work setting, personal integrity, and, to some extent, the ability to work satisfactorily with other employees.

33. The parties contemplate, in their collective agreement, that the termination of an apprenticeship under Rule 30.5 is not the same as termination of employment for misconduct. It is not discipline. The Employer may choose to discipline an apprentice for misconduct (in which event the fair and impartial investigation procedures of the collective agreement under Rule 27.1 are engaged)

or it may choose to deal with the unsatisfactory performance on the apprentice under Rule 30.5, as it did in this case. The process for assessing an apprentice's poor performance need not be addressed as discipline. For this reason, I find that the Employer did not breach the collective agreement by failing to hold an investigation under Rule 27.1.

34. The effect of this conclusion is that I do not need to address the Employer's *res judicata* argument.

What procedure applies to the review of the suitability of an apprentice who is no longer on probation and has become a permanent employee?

35. My conclusion that the Rule 27.1 investigation procedures do not apply does not end the matter. What procedure should the Company have used to determine whether the Grievor continued to be a suitable apprentice, i.e. one continuing to display "the desire and aptitude to learn the trade" (Rule 30.5)?

36. The Union refers to *SHP – 393* (Kinzie). That award relied on *Re Edith Cavell Private Hospital and Hospital Employees Union, Local 180* (1982), 6 L.A.C. (3d) 229 (Hope) for its interpretation of the requirement for terminating an

apprentice for failing to display the desire and aptitude to learn the trade. *Edith Cavell* considers what is required of an employer to justify termination on the basis of poor performance; that is, to terminate an employee on the basis that they lacked the capacity required to retain their employment. The criteria set out in *Edith Cavell* are the following:

> (a) The employer must define the level of job performance required.
> (b) The employer must establish that the standard expected was communicated to the employee.
> (c) The employer must show it gave reasonable supervision and instruction to the employee and afforded the employee a reasonable opportunity to meet the standard.
> (d) The employer must establish an inability on the part of the employee to meet the requisite standard to an extent that renders them [him/her] incapable of performing the job and that reasonable efforts were made to find alternate employment within the competence of the employee.
> (e) The employer must disclose that reasonable warnings were given to the employee that a failure to meet the standard could result in dismissal.

37. If the parties had not themselves developed a standard for the evaluation of the work of an apprentice, as they have in Rule 30.5, then the principles set out in *Edith Cavell* would apply. Rule 30.5 constitutes its own code for the retention or termination of an apprentice.

38. Although I must apply Rule 30.5 to the facts of this case, the principles in *Edith Cavell*, being reasonable for the assessment of performance, have some application. Clearly the employer must define the level of job performance

required; it must communicate the expected standard to the apprentice; it must give reasonable supervision and instruction to the apprentice so that the apprentice has a reasonable opportunity to meet the standard; and it must point out the deficiency to the apprentice, if their performance is falling short of what is required under Rule 30.5, and give them a reasonable opportunity to improve. Clearly, if challenged, as here, the Employer must be able to show that the standard expected of the apprentice, as described in Rule 30.5, was not met.

39. The requisite standard is described by the parties as being that the apprentice continue to display the desire and aptitude to learn the trade. For the purposes of this case, the required standard the Grievor had to meet was satisfactory or regular attendance at work such that he displayed the desire and aptitude to learn the trade.

Facts

40. The Grievor entered the service of the Company on June 4, 2007, at MacMillan Yard, Ontario, as an apprentice to train and subsequently qualify in the trade of Car Mechanic. Car Mechanics' work consists of the inspection, maintenance and repair of freight and passenger cars.

41. The Company terminated the Grievor's apprenticeship and his employment on January 21, 2008. The letter of termination explains that the Company had concluded that he had not complied with Rule 30.5 in that he had failed to continue to "display the desire and aptitude to learn the trade", particularly on account of what the Company referred to as his "abysmal attendance rate". The letter goes on to say that the Grievor failed to demonstrate an ability to accept and carry out directions in a teamwork setting, to follow directions, or to work satisfactorily with other employees as part of a team. Management also claimed the Grievor had shown a lack of personal integrity.

42. The Company's record of the Grievor's attendance for the period of his employment from June 4, 2007 until his dismissal on January 21, 2008 reveals the following:

Date	**Time absent**	**Reason**
Jul. 9, 2007	8 hours	AWOL
Aug. 8, 2007	3 hours	None recorded
Aug. 16, 2007	2 hours (late)	None recorded
Sept. 9, 2007	1 hour (late)	Initially AWOL, upon reporting, alleged he had flat tire
Sept. 15, 2007	3.5 hours (late)	Initially AWOL, upon reporting, advised father in

		hospital.
Oct. 22 to Nov 7, 2007		Bona fide illness
Nov. 24, 2007	15 minutes	Late – no explanation.
Nov. 25, 2007	8 hours	Reported sick and would bring Dr.'s note. None provided.
Dec. 1, 2007	1 hour	Phoned and reported would be late, waiting for tow truck. No proof provided
Dec. 13, 2007	30 minutes	Late – claimed result of dental work. Works 12/8 shift.
Dec. 14, 2007 to Dec. 22, 2007		unsupported absence from work
Dec. 29, 2007	45 minutes	Late – initially AWOL, when reported late, advised stuck behind salters.
Jan. 6, 2007	8 hours	No reason
Jan. 7, 2007	8 hours	Booked sick

43. From the documents provided to the Company, only the absence from October 22 to November 7, 2007 was established to be a medical absence. At the hearing the Union produced certain medical documentation that had not been provided to the Company previously. It showed that the Grievor had seen his dentist on December 6, 2007 – not one of the days he is recorded as being absent.

44. As part of their orientation, apprentices are advised of the Company's expectations regarding their work performance. The company stresses the importance of maintaining acceptable attendance standards throughout the apprenticeship. The Grievor was therefore aware of the Company's expectation of

regular attendance at work.

45. The Grievor's attendance fell well below the Employer's expectation. He did not attend work regularly, he failed often to report to work in a timely fashion, he failed to provide timely notification of absences or late arrivals and, once absent, he failed to provide supporting documentation to explain his absence.

46. Following each occasion of the Grievor reporting to work late on September 15, 2007, November 24, 2007, and December 29, 2007, he was counselled concerning his tardiness and he was reminded of the Company's expectations. Letters confirming the counselling followed the meetings. In particular, on September 15, 2007 the Grievor was told by his supervisor that he was required to produce documentation to show that his absence was bona fide. He was encouraged to improve what the supervisor referred to as "his tardy behaviour". The Mechanical Supervisor's note records: "I asked him to ensure he supplies some documentation to prove the nature of his absence is bona fide. This is the third time that [the Grievor] has been late on my watch. … I stressed to [him] that CN does not want to hire people with absenteeism problems and for his own good he supply the Company with documentation when he is ill and to improve his tardy behaviour..".

47. The coaching letter of November 24, 2007 from the Mechanical Supervisor to the Grievor confirms the verbal counselling he received, to report to work on time at the start of his shift, prepared to work and wearing his personal protective equipment. The coaching letter of December 29, 2007 is in the same vein.

48. The Grievor's absence record compares unfavourably with other employees at his workplace. When compared with the entire ERC/IRC workforce from June 1, 2007 through January 21, 2008, the Grievor's absenteeism was 17.23%, as compared to the workforce average absenteeism rate of 4.9%.

49. When the Grievor was terminated, a meeting took place attended by two Company officers, the Grievor and a Union representative. According to the Union, the Company officers said that the Grievor was a good, competent worker who had demonstrated keen aptitude and a willingness to learn his trade, but his attendance management had been deficient. He was provided the letter of termination.

Was the Grievor terminated because of his disability?

50. The Union alleges that the Company discriminated against the Grievor on grounds of disability, in violation of Article 43 of the collective agreement and the *Canada Human Rights Act*? As the Company argues, the Union has not established any evidentiary foundation for its submission that the Grievor was discriminated against on grounds of disability. The Grievor's legitimate absence from work on sick leave on one occasion (October 22 to November 7, 2007) is insufficient to establish a disability. Although the Grievor reported sick on other occasions, none was verified. There is no medical information to suggest the Grievor suffered, at the relevant time, from a disability. Even if this were the case, there is no evidence that any disability was ever brought to the Company's attention. Furthermore, the facts show that the reason the Employer terminated the Grievor's employment was because of his lack of punctuality, his poor timekeeping, and his frequent absence without explanation. He gave several excuses for being late or absent – flat tire, waiting for tow truck, his father's illness, among others – that derogated from a conclusion that a disability caused his poor attendance.

51. I conclude that the reason for termination did not touch on a prohibited ground under the no-discrimination provision of the collective agreement or under

the *Canada Human Rights Act*.

52. Accordingly, I find there was no discrimination against the Grievor on a prohibited ground.

53. The Union also contends the Employer breached s.239 of the *Canada Labour Code*. The statute contemplates termination for absence due to illness. As explained, this was not the cause of the Grievor's termination. He was terminated for absence other than for illness. It was the plethora of lateness and the unexplained absences that led to his termination, not the absence due to illness. Accordingly, the statutory provision does not apply to the Grievor's situation.

Did the Company comply with the required procedure when deciding to terminate the Grievor's employment?

54. Although I have found that the requirement of Rule 27.1, a "fair and impartial investigation" prior to exercising rights under Rule 30.5 does not apply to the Employer, I have also found that the criteria described above do apply. Did the Company comply with these criteria when it terminated the Grievor's employment?

55. There is no dispute that the Company defined the level of job performance required of the Grievor. The Company established, and communicated to the Grievor, the work and attendance standards expected of him. The Employer gave reasonable supervision and instruction to the Grievor and afforded him a reasonable opportunity to meet the attendance standard. Further, the Company informed the Grievor that his attendance was unacceptable and that he needed to improve it. He was counselled and given letters of coaching advising him of the attendance requirements.

56. As the Employer claims, the Grievor had an unsatisfactory timekeeping and attendance record. I am not persuaded there is any evidence to suggest that the Grievor was allowed to leave his shift early, and then penalized for doing so. The record of his attendance at work suggests that only on one occasion, on August 8, 2007, could the Grievor have left early rather than been late coming to work, and on this occasion the information is not clear. Even discounting August 8, 2007, the Grievor's attendance was unsatisfactory.

57. The Grievor was not employed for long. He had barely completed his probation when he was terminated. He had only 7 months service, yet within that

time he was late on many occasions and absent without a credible explanation numerous times. In my opinion, Arbitrator Weatherill's comments in *SHP 219* are apposite. The Grievor appeared to be someone who did not have the desire and aptitude to learn his trade.

58. Although the Grievor had completed his probationary period and had become a permanent employee with full rights under the collective agreement, he maintained an obligation to continue to display to the Employer "the desire and aptitude to learn the trade". The apprentice must continually show their suitability for continued employment. As Arbitrator Picher said in *SHP 311*, desire and aptitude to learn "must be interpreted in light of such other attributes as reliability in attendance, the ability to accept and carry out directions …".

59. In my view, on an assessment of the facts in this case, the Grievor did not display that desire or aptitude; he did not show the capacity to become a journeyman. He neglected his obligation to arrive at work in a timely manner, to remain at work for the duration of his shift, and to attend. This was despite coaching from management, including written reminders to comply with the obligations of timely and regular attendance at work.

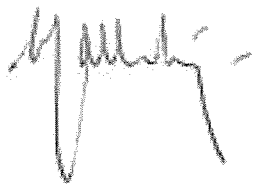
60. The Company must point out the deficiency to an apprentice, if their performance is falling short of what is required under Rule 30.5, and give them a reasonable opportunity to improve.

61. While management of the Grievor should have been more explicit in warning the Grievor that his employment was in jeopardy if his attendance continued to be irregular and untimely, I am not persuaded that this defect is such as to vitiate the Grievor's dismissal. He was counselled three times about his attendance. He received three letters that made clear he had to improve his attendance. He was told that he was not meeting the standard expected of him. Yet, despite these warnings in September, November and December 2007, his attendance continued to be below the standard of what was reasonably expected of him. The counselling appeared to have had no salutary effect on him.

62. I find therefore that the Company complied with the steps required of it before deciding to terminate the Grievor's employment under Rule 30.5. I find that the Grievor did not continue to display the desire and aptitude to learn the trade, despite having a reasonable opportunity to do so, and that the Company was justified in terminating his apprenticeship.

63. In the circumstances, I deny the grievance.

DATED at TORONTO on November 23, 2009.



Christopher J. Albertyn

Arbitrator