

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3258

**Heard in Calgary, Tuesday, May 14, 2002
concerning**

CANADIAN NATIONAL RAILWAY COMPANY

and

**CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS
(UNITED TRANSPORTATION UNION)**

DISPUTE - COMPANY:

Whether former Yard Conductor Randy J. Ludlow breached the terms of the Minutes of Settlement, signed 14 November 2001, thereby disentitling him to reinstatement as contemplated by the Minutes.

DISPUTE - COUNCIL:

The reinstatement of R.J. Ludlow pursuant to the terms of the 14 November 2001 tri-party agreement.

COMPANY'S STATEMENT OF ISSUE:

On 14 November 2001, an arbitration hearing was held in Calgary concerning an appeal of the assessment of 25 demerits against Mr. Ludlow for an unsatisfactory work record between 10 March 1999 and 1 June 1999, resulting in his dismissal for accumulation of demerits in excess of 60. During the course of the hearing a tri-party settlement agreement was reached among the Company, the Union and Mr. Ludlow.

The settlement agreement was evidenced by the execution of Minutes of Settlement by the Union, the Company and Mr. Ludlow which state, in part, that:

In order to resolve Mr. Ludlow's grievance and all claims whatsoever Mr. Ludlow now has or may have against either the Company or the Council it is agreed as follows:

I. Mr. Ludlow shall be reinstated into his employment, without compensation or benefits, and without loss of seniority, as soon as possible, subject to his compliance with the following conditions ...

The conditions to which his reinstatement was subject included a requirement that he pass a Company preemployment medical examination, including drug and alcohol testing. At the Company's request, the Minutes specifically provided that the testing was to be held on 30 November 2001. The Minutes also specify that Mr. Ludlow's reinstatement was subject to his passing the Qualification Standards for Operating Crews (QSOC) within 30 days of 14 November 2001.

Mr. Ludlow complied with neither of the foregoing two conditions. The Company contends that Mr. Ludlow has no satisfactory or reasonable explanation for failing to comply with the conditions of reinstatement, and he is therefore no longer eligible for reinstatement to his former position.

The Union disagrees with the Company's contentions.

The Minutes of Settlement include a condition that "The parties agree that any dispute arising from the implementation of these Minutes shall be referred to the Arbitrator for final and binding resolution."

COUNCIL'S STATEMENT OF ISSUE:

On November 14, 2001 an arbitration hearing was held in Calgary concerning an appeal of the assessment of 25 demerits against Mr. Ludlow for an unsatisfactory work record between 10 March 1999 and 1 June 1999 resulting in his dismissal for accumulation of demerits in excess of 60. During the course of the hearing a tri-part settlement agreement was reached between the Company, the Union and Mr. Ludlow.

The settlement agreement included a requirement that Mr. Ludlow must pass the Company's pre-employment medical examination, including alcohol and drug testing.

The Union contends that there were compelling extenuating circumstances which resulted in Mr. Ludlow being unable to attend the medical appointments as scheduled and that the Company has unreasonably voided the reinstatement contract.

The Union requests that Mr. Ludlow be given sufficient opportunity to fulfill the requirement.

The Company has declined the request and considers the reinstatement contract void.

FOR THE COUNCIL: FOR THE COMPANY:

(SGD.) B. R. BOECHLER (SGD.) S. ZIEMER

(FOR) GENERAL CHAIRPERSON (FOR) VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

D. Kruk - Counsel,

R. Reny - Manager Human Resources, Vancouver

S. Blackmore - Manager Human Resources, Edmonton

E. Blokyzl - Supt. B.C. South Zone

J. Torchia - Director, Labour Relations, Edmonton

And on behalf of the Council:

M. Church - Counsel, Toronto

B. Boechler - Vice-General Chairperson, Edmonton

G. Kopp - Local Chairperson, Kamloops

R. Thompson - Local Chairperson, Jasper

T. Carroll - Local Chairperson, Jasper

D. Forbes - Local Chairperson, Edmonton

B. Larson - Vice-Local Chairperson, Edmonton

R. J. Ludlow - Grievor

AWARD OF THE ARBITRATOR

The grievor was made the subject of a conditional reinstatement agreement signed on November 14, 2001. The agreement reads as follows:

In order to resolve Mr. Ludlow's grievance and all claims whatsoever Mr. Ludlow now has or may have against the Company or the Council, it is agreed that:

1. Mr. Ludlow shall be reinstated into his employment, without compensation or benefits and without loss of seniority as soon as possible, subject to the following conditions.

2. Mr. Ludlow shall be reinstated into Vancouver Terminal and his discipline record shall stand at forty-five (45) demerits.

3. Mr. Ludlow shall maintain ongoing full compliance with the Company's current Attendance Management Standards for running trades employees, identified under current General Notices 088, 089 and 90 (attached). Failure to observe this condition shall render him liable to immediate dismissal.

4. Within seven (7) days of the date hereof, the Company will provide a copy of the policy to the Council for furtherance to Mr. Ludlow for his information and to provide any explanation required.

5. Mr. Ludlow must pass the Company's pre-employment medical examination, including drug and alcohol testing. Test to be scheduled for November 30, 2001.

6. Mr. Ludlow must pass the Qualification Standards for Operating Crews (QSOC) within 30 days of the date hereof.

7. The parties agree that any dispute arising from the implementation of these minutes of settlement shall be referred to the Arbitrator for final and binding resolution.

An initial issue arose with respect to whether the grievor's alleged failure to comply with the terms of the agreement could be made the subject of his discharge without a disciplinary hearing. The Arbitrator is satisfied that on the specific facts of this case it must be concluded that Mr. Ludlow did not achieve reinstatement into the status of employment. His reinstatement was made subject to a number of conditions precedent, including the requirement to pass the pre-employment medical examination, including drug and alcohol testing, scheduled for November 30, 2001. I am satisfied that the grievor could not claim active employment status, and the entitlement to a disciplinary investigation, until such time as that condition was satisfied and he was effectively returned to service. It is unnecessary for the Arbitrator to comment with respect to what the circumstances might be in the case of an employee who does return to active service under such an agreement.

The facts before the Arbitrator confirm that Mr. Ludlow failed to appear for the medical examination as scheduled on November 30, 2001. He also failed to attend at a subsequent opportunity for medical examination rescheduled for December 7, 2001.

The Company views the instant case as one of a last chance agreement in respect of an employee with an extremely negative prior disciplinary record. It is common ground that Mr. Ludlow, who is not a long service employee, was reinstated into employment by an order of this Arbitrator in 1994, subject to certain attendance conditions. Very simply, he comes to the instant situation with a record as a problem employee who has not demonstrated a serious commitment to his employer.

It is well settled that this Office must accord the greatest respect to agreements such as the one which is the subject of this dispute. In **CROA 2743** the following comment was made:

This Office can see no responsible basis upon which to reverse that decision. The ability of employers and unions to make individual employees, whatever their personal problems, subject to strict conditions as a requirement of their continued employment is an instrument of great importance, whose credibility should be sustained by employers, unions and arbitrators alike.

See also **CROA 2632**.

In the Arbitrator's view the Council is correct in its argument that if the grievor could demonstrate that conditions beyond his control made it impossible for him to meet the requirements of the reinstatement agreement, there would be some latitude to give relief in the circumstances. However, it must be borne in mind that where there is a failure of the conditions, a natural onus rests upon the employee and the union to bring a clear and compelling explanation for the failure to honour the conditions. In this case the Arbitrator is regrettably driven to the conclusion that Mr. Ludlow has failed to do that. His essential explanation for failing to attend at both medical appointments is that snow and road conditions made it impossible for him to do so. However, the documentary evidence adduced with respect to the actual volume of precipitation and road conditions at the times in question leave the grievor's explanation in some substantial doubt. There is also evidence with respect to one explanation advanced concerning the cost of rail transportation which appears to have no foundation in fact. Very simply, Mr. Ludlow does not present a compelling and credible explanation for his failure to be at an appointment, of which he had substantial advance notice and on which his future employment depended. The Arbitrator is compelled to the conclusion that Mr. Ludlow failed to meet the conditions for his reinstatement, and that the grievance must therefore be dismissed.

May 21, 2002

(signed) MICHEL G. PICHER
ARBITRATOR