

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2444

Heard in Montreal, Wednesday, 12 January 1994

concerning

CANADIAN PACIFIC EXPRESS & TRANSPORT

and

TRANSPORTATION COMMUNICATIONS UNION

DISPUTE:

Employee Al Ryder, Calgary, Alberta was dismissed by the Company. Thirty (30) demerits issued on August 27th, 1993 for mishandling dangerous goods shipment on August 23rd, 1993.

EX PARTE STATEMENT OF ISSUE:

The Union alleges the Company did not take seriously the grievor's health condition that would cause him to make these mistakes.

The Company alleges Mr. Ryder reported for work and made no mention of feeling ill.

The Union asserts the Company did not read the doctor's report or bother to look into the problems associated with diabetes or how a person can be affected by these problems.

The Union asserts that there has not been that many problems in the past thirteen (13) years, only in the last few months.

The Union requests that the grievor be re-instated with full seniority or such other remedies as the Arbitrator deems appropriate.

FOR THE UNION :

(SGD.) D. J. DUNSTER

EXECUTIVE VICE-PRESIDENT

There appeared on behalf of the Company:

M. D. Failes - Counsel, Toronto  
B. F. Weinert - Director, Labour Relations, Toronto  
W. B. Smith - Area Terminal Manager, Calgary

And on behalf of the Union:

P. Sadik - Counsel, Toronto  
G. Rendell - Division Vice-President, Toronto  
A. Ryder - Grievor

AWARD OF THE ARBITRATOR

The thrust of the Union's submission is that the grievor's errors in the handling of dangerous goods shipments, and in particular on the culminating incident of August 23, 1993, were caused by his diabetic condition. It is not disputed that Mr. Ryder is an insulin dependent diabetic. It is well recognized in the decisions of this Office that an insulin dependent diabetic whose condition is under control can perform work with safety sensitive aspects [CROA 1928].

The Union submits that the grievor's diabetic condition caused him no problem from its onset, in June of 1989, until such time as he was removed from working a regular afternoon shift, in December of 1992. Its counsel submits that after December 15,

1992, when the grievor commenced to work irregular hours on an "on call" basis, he encountered more difficulty in regulating his blood sugar levels, as a result of which he made judgmental errors during the course of his work. This, counsel submits, is supported by the fact that Mr. Ryder incurred an accelerated rate of discipline totalling ninety demerits between February and August of 1993, including five separate incidents of failing to follow instructions, three of which related to dangerous goods.

Assuming, without necessarily finding, that the grievor's assignment to irregular working hours did impact his ability to regulate his blood sugar, causing an inability to follow instructions in the handling of dangerous goods, there are nevertheless disquieting aspects to the evidence before the Arbitrator. According to Mr. Ryder's own evidence, maintaining a proper balance among the intake of insulin, the timing of meals and snacks and the amount of one's physical exercise is vital to the control of a diabetic condition. However, by Mr. Ryder's admission, when he was called to work on the morning of August 23, 1993, he failed to take his insulin injection or to have any breakfast before arriving at the terminal.

There is some discrepancy in the evidence with respect to the events of that morning. While the grievor maintains that he was called into work for 7:00 a.m., and was told by his supervisor, Mr. Joe Goleski, that he should be at work within 25 minutes to deal with the unloading of express trailers, the documentary evidence tendered by the Company differs. The grievor's time card for the day in question reveals that he punched in at 8:01 a.m., and that he had a lunch break at 12:32. This differs substantially from his own account of arriving at work at 7:00 a.m. and being forced to work, without any break whatsoever, until he was allowed to have lunch at 1:30 p.m. On this matter the Arbitrator is satisfied that the documents tendered by the Company constitute the best evidence.

Of gravest concern, however, is the grievor's apparent inability to grasp the importance of regulating his insulin and food intake. By his own account he failed to take his insulin injection and declined to have any breakfast because his supervisor told him to hurry to work. Additionally, he relates that when he felt dizzy or disoriented because of a lack of blood sugar, he made no attempt to notify his supervisor or to stop working briefly for a snack that would normalize his blood sugar level.

The medical evidence in the case at hand is not extensive. Firstly, neither party called a physician to comment upon the grievor's condition and the likelihood that fluctuations in blood sugar levels could have affected his judgment during the course of his work. Documentary medical opinions were adduced by both sides. A note from the grievor's doctor, Dr. J.G. Edwards, states, in part:

He needs a regular routine so he can establish a regular diet and dosing time for his insulin. Poorly controlled sugars are a health hazard to Al and yield him a less effective worker.

Dr. Edwards further elaborates that the grievor had experienced substantial difficulty in controlling his sugar levels in the prior five to six months before August of 1993. Further, Dr. Edwards noted in an indemnity insurance form dated July 5, 1993:

Have had great difficulty with control secondary to irregular eating patterns and shift work getting any control on this man's sugars. His cognitive ability seems to frustrate a good understanding of diabetes and control of sugars has been very poor.

Further, in the same form, with respect to the description of the nature of treatment necessary for the grievor the physician emphasizes, among other factors, "education".

On the opposite side of the ledger is a letter from Dr. Frank Shapiro, the Company's physician, dated January, 11, 1993. He states, in part,

There is no evidence that suggests that Diabetes Mellitus creates problems in thinking or decision making.

Upon a careful review of the evidence I am inclined to conclude that there is reason to believe that Mr. Ryder's diabetic condition has negatively impacted his work performance. There is, as Counsel for the Union stresses, a marked relationship between the deterioration of his work record and his assignment to irregular "on call" shifts. Prior to December of 1992, although Mr. Ryder's record was not pristine, it was largely free of errors in respect of the handling of documentation relating to dangerous goods. Indeed, the grievor's record indicates a substantial period of discipline free service while he was working on a regular shift, after his initial diagnosis as a diabetic in 1989. Moreover, in the Arbitrator's view, the possibility of errors in documentation need not necessarily turn on a finding that the grievor was impaired in his judgment or thinking. The substitution of an incorrect document for a correct one, which is what occurred on the 23rd of August 1993, could also be the result of blurred vision, a condition which, it is not disputed, Mr. Ryder did experience during hypoglycemic reactions while at work. I am therefore prepared to conclude, on the balance of probabilities, that Mr. Ryder has had substantial difficulty controlling his diabetic condition since his assignment to work on an irregular "on call" basis commencing in December of 1989, and that his difficulties in that regard did contribute to his failure to properly execute his work, particularly with respect to the documentation attaching to dangerous goods shipments.

In the Arbitrator's view the above conclusions do not exonerate Mr. Ryder from responsibility from what has occurred, although they may suggest the possibility of mitigation of the consequences. As an insulin dependent diabetic Mr. Ryder remains responsible for his actions. I am satisfied, as is evident from the documentation provided from the grievor's own physician, that he does not possess the degree of understanding of his condition, or ongoing control of it, to be able to maintain appropriate blood sugar levels while working irregular or "on call" shifts. The grievor's willingness to respond to a call to work without taking his insulin or having breakfast, as occurred on the occasion of the culminating incident, borders on recklessness, as does his admitted failure to take snack breaks when he experienced hypoglycemic reactions at work. It appears equally true, as indicated by Dr. Edwards, that when the grievor worked regular tours of duty on the afternoon shift he was able to balance the elements of insulin, food intake and exercise.

Before the Arbitrator the Union did not argue that Mr. Ryder should be awarded a job on a regular shift, a position which his seniority would otherwise not enable him to obtain. Rather, counsel for the Union argues that the Company should establish a separate regular shift for Mr. Ryder, even if that should involve his being idle at work for substantial periods of time. I have substantial difficulty with that proposal, as it would, in my view, impose a degree of undue hardship upon the employer. It is especially significant, in my view, that such hardship would be brought about not only by reason of the grievor's diabetic condition, but most significantly, by reason of his apparent unwillingness or inability to control that condition. I am satisfied that the interests of the parties are better served if a remedial order is fashioned based on the grievor's proven ability to perform adequately when he is assigned to a regular tour of duty and the equally evident fact that he is unable to control his medical condition when he is assigned to irregular hours.

As noted above, the grievor's seniority does not presently allow him to claim a regular tour of duty. He should not, however, be deprived of all employment rights, to the extent that he could, if properly recalled on the basis of his seniority, function on a regular tour of duty. In the result, while the Arbitrator is satisfied that, by reason the grievor's irresponsibility in regulating his own medical condition, the Company had just cause to terminate his services, it is more appropriate, in light of the mitigating factors discussed above, to restore the grievor to a position in which he retains a right of recall to a regular shift assignment, at such time as such a position becomes vacant or available to him by the exercise of his seniority.

For the foregoing reasons the grievance is allowed, in part. Mr. Ryder shall be reinstated into his employment, without compensation and without loss of seniority, to be maintained on an unpaid leave of absence, with a right of recall to a regular assignment, when such assignment becomes available and can be claimed on the basis of his seniority. The Arbitrator retains jurisdiction in the event of any dispute between the parties having regard to the interpretation or implementation of this award.

14 January 1994\_\_\_\_\_

\_\_\_\_\_  
MICHEL G. PICHER  
ARBITRATOR