

# CANADIAN RAILWAY OFFICE OF ARBITRATION

## CASE NO. 2811

Heard in Montreal, Tuesday, 14 January 1997

concerning

**CANPAR**

and

**TRANSPORTATION COMMUNICATIONS UNION**

### **DISPUTE:**

Toronto employee Eglon Gordon disciplined for allegedly misleading the Company regarding his Workers' Compensation claim and for being uncooperative during interviews.

### **JOINT STATEMENT OF ISSUE:**

On September 21, 1995, Mr. Eglon Gordon was given thirty (30) demerits for failure to cooperate with the Company during interviews. It was further felt by the Company that a deliberate attempt by Mr. Gordon to mislead the Company on the circumstances surrounding his Workers' Compensation claim had occurred. For these reasons the demerits were assessed.

The Union contends this is not to be the case and that the grievor has done nothing to breach the employer/employee relationship. After two interviews, one in which lasted over five (5) hours in length; and twenty-three (23) pages of documented interview, the Union finds it hard to believe the grievor was not cooperative.

The Union further contends Mr. Gordon was cooperative with the Company and that any findings that the grievor misled the Company on his medical condition are unfounded and medically unproved. Accordingly, the union asked for the removal of all thirty (30) demerits assessed to Mr. Gordon.

The Company has denied our request.

### **FOR THE UNION:**

**(SGD.) D. NEALE**

**ASSISTANT DIVISION VICE-PRESIDENT**

### **FOR THE COMPANY:**

**(SGD.) P. D. MACLEOD**

**VICE-PRESIDENT, OPERATIONS**

There appeared on behalf of the Company:

M. D. Failes	– Counsel, Toronto
P. D. MacLeod	– Vice-President, Operations, Toronto
R. Weight	– Terminal Manager, Concord
A. Riley	– Witness
A. Darbo	– Witness

And on behalf of the Union:

H. Caley	– Counsel, Toronto
D. Dunster	– Executive Vice-President, Ottawa
E. Gordon	– Grievor

## **AWARD OF THE ARBITRATOR**

The material before the Arbitrator establishes that on the evening of July 19, 1995 the grievor sustained a lower back injury while at work. Although there is some dispute as to the precise time, it is common ground that he did report that injury to his lead hand prior to leaving work, although he did not then complete a formal written report. The record also discloses that Mr. Gordon reported for work the following day and, during the course of his tour of duty, was taken to a hospital because of a stomach ailment and vomiting. The hospital's report, which only recently came into the possession of the parties, confirms that he did then report to the hospital that he was also suffering lower back pain. The following day, while he was off work, Mr. Gordon called his lead hand, Mr. Abby Darbo, to ask whether he could file his accident report in respect of his lower back by telephone. He was then advised that he could not. It is not disputed that the grievor was diagnosed as having a strain to his lower back, and was referred to his family physician for treatment. The referral apparently occurred on a subsequent visit by the grievor to the hospital on the 24<sup>th</sup> of July. Following an appointment with his family doctor on the 25<sup>th</sup> of July, the grievor was taken off work, with the prospect of a gradual return through light duties.

There is little doubt that the circumstances surrounding the grievor's claim of a back injury raised suspicion among his supervisors. It is common ground that the grievor was in fact scheduled to be on vacation for a period of time immediately following the period of July 19-20. A successful WCB claim by Mr. Gordon would have meant the rescheduling of his vacation to a later time, with compensation for the period in question.

Mr. Gordon resides with his children in a small apartment attached to a extremely small clothing boutique on Oakwood Street in Toronto. Suspicious of the grievor's condition, the Company engaged a private investigator to determine whether Mr. Gordon was in fact spending time working in the family shop. The investigator attended at the store on three occasions, two of which involved contact with Mr. Gordon. On July 27 Mr. Gordon appeared to be in charge of the shop when the investigator presented himself as a customer interested in buying clothing for the Caribana Festival. It would seem that Mr. Gordon served the customer in the normal manner, which involved removing clothing from racks and similar light endeavours. The next day, July 28, when the investigator attended at the store the grievor's son was present, but Mr. Gordon was not. Thereafter, when he returned on July 31<sup>st</sup>, Mr. Gordon was again the sole person present in the shop. At that point the investigator purported to purchase a suit for the Caribana festivities.

Based on the information available to it, the Company convened an investigative interview. During the course of questions put to the grievor on August 23, 1995, Mr. Gordon was asked whether "...you did perform duties at another business while you were on WCB contrary to medical instructions?" To this he responded in the negative. When he was asked more directly whether he worked at "any store or some other business?" he again replied no. At that point of the investigation Mr. Gordon was shown the investigator's report. He proceeded to explain that he resided partially in the store, which is above his small basement apartment. He related that his television set and sitting chair are in fact in the store, and that he spends considerable time there, although he does not necessarily perform work. According to his explanation, four of his children are principally responsible for operating the store.

The Company does not take issue with the grievor's claim that he suffered a back injury, or that he was properly off work at the time in question. It assessed thirty demerits against him, as Counsel for the Company notes, solely for his failure to be candid and forthcoming with the Company, and the answers which he gave during the course of the investigation concerning his involvement in the operation of the family store. This is not a case, it should be noted, where the physical activities engaged in by the grievor in the clothing shop were necessarily inconsistent with the medical restrictions placed upon him by his family physician.

Counsel for the Union submits that the grievor was, in fact, honest with the Company at all stages. Most importantly, he stresses that the back ailment suffered by Mr. Gordon was reported to the hospital on July 20<sup>th</sup>, and that there was follow-up care upon his return to the hospital on July 24<sup>th</sup> and referral to his family physician on July 25<sup>th</sup>. Counsel submits that the circumstances of the grievor's residence and family business do not disclose any attempt on his part to defraud the Company, or Workers' Compensation authorities. In support of his position he draws to the Arbitrator's attention a number of prior awards, including **CROA 2374**, where the following passage is found:

In the Arbitrator's view great care should be taken in determining what might constitute an "occupation or employment" for the purposes of a document such as the insurance form tabled in evidence in the instant case. Does an employee who is on sick leave and who resides on a farm, or in an apartment attached to a family store engage in an occupation or employment by contributing an occasional light chore? A determination of that kind must depend closely on the facts of the specific case in which the issue arises. A prior case heard in this Office, although not identical, raised an analogous issue. In *CROA 2185* it was found that an employee who was in receipt of indemnity sickness benefits did not violate his obligation his employer merely by reason of his performing, on an occasional basis, non-strenuous work in relation to logging equipment operated by a hired helper on a woodlot owned by the employee.

In the Arbitrator's view this is a case where neither side can claim to be fully in the right. A review of investigative interview indicates that the Company's supervisors harboured a profound suspicion as to the *bona fides* of Mr. Gordon's back ailment. To some degree, I think, they over-reacted in their demand for immediate documentation and a full account of his medical condition as reported at various stages. By the same token, the Arbitrator is not impressed by certain of the answers provided to the employer by Mr. Gordon during the course of the interview. I find it difficult to understand why he would not have been fully open with the Company when it put to him the direct question as to whether he was involved in the operation of the store during the course of his absence. Plainly he was, and just as plainly he denied any such involvement. Mr. Gordon best appreciates why he declined to be forthcoming with respect to his involvement in the clothing shop. In this regard it may be noted that he likewise denied any involvement in an outside work or business on his WCB claim form. I find it difficult, in these circumstances, to reject out of hand the Company's concern about the grievor's concealment of facts which, it would seem to the Arbitrator, do touch on matters of interest to the Employer, to the extent that they could relate to his physical condition at a time when he was claiming Workers' Compensation benefits. The fact that the grievor's activities might not, in the end, jeopardize his claim has no bearing on the separate concern which the Company had with respect to the ability to rely on the truthfulness of its employee's answers.

On the whole, I am satisfied that Mr. Gordon was deserving of some measure of discipline for his failure to be honest and forthcoming with the Company during the course of the disciplinary interview. I am not persuaded, however, that the circumstances justify a quantum of demerits which would represent the half-way point to discharge. That is particularly so where, as here, the Company does not take issue with the *bona fides* of Mr. Gordon's claim of a back ailment, and where medical documentation, made available prior to the arbitration, discloses that he did complain of his lower back problem to the hospital as early as July 20, 1995. In all of the circumstances I am satisfied that the assessment of ten demerits would be sufficient to communicate to Mr. Gordon the importance of being fully candid with the Company during the course of a disciplinary investigation.

On the foregoing basis, the grievance is allowed, in part. The Arbitrator directs that the discipline assessed against Mr. Gordon be reduced to ten demerits.

January 20, 1997

**(signed) MICHEL G. PICHER**  
**ARBITRATOR**