CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2828

Heard in Montreal, Thursday, 13 February 1997

concerning

CANADIAN PACIFIC LIMITED
[CANADIAN PACIFIC RAILWAY COMPANY]

and

CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS
[BROTHERHOOD OF LOCOMOTIVE ENGINEERS]

DISPUTE:

The closure of Locomotive Engineer M.G. Tremblay's employment record.

JOINT STATEMENT OF ISSUE:

Locomotive Engineer M.G. Tremblay last worked on November 11, 1990. He submitted a claim for weekly indemnity benefits on November 24, 1990 and was advised on November 28, 1990, that authorization would be required from Medical Services before he would be allowed to return to duty. On February 3, 1991 he entered Camillus Centre at Elliott Lake but was discharged on February 6, 1991, prior to completing treatment. On February 15, 1991, his physician advised the Company of a diagnosis of alcoholism and alcohol withdrawal seizures. Mr. Tremblay failed to complete an alcohol treatment program and the Company closed his record on November 4, 1994.

The Council contends that: **1.)** Locomotive Engineer Tremblay suffered from depression, not alcoholism; **2.)** a request for independent assessment was denied by the Company; **3.)** the June 11, 1992 investigation held by the Company clarified all facts of the grievor's case; and **4.)** Mr. Tremblay received medical clearance of fitness for full employment which was acknowledged nine months later.

The Council has requested that Locomotive Engineer Tremblay be reinstated into Company service without loss of seniority and with full compensation for wages and benefits for all time subsequent to his record disclosure.

The Company has declined the Council's request.

FOR THE COUNCIL:	FOR THE COMPANY:
(SGD.) R. S. MCKENNA	**(SGD.) R. M. SMITH**
GENERAL CHAIRMAN	**FOR: DISTRICT GENERAL MANAGER - ALGOMA**

There appeared on behalf of the Company:

R. M. Andrews	– Labour Relations Officer, Calgary
M. K. Couse	– Algoma District Coordinator, Calgary
H. B. Butterworth	– Labour Relations Officer, StL&H, Toronto

And on behalf of the Council:

R. S. McKenna	– General Chairman, Barrie
D. A. Warren	– General Chairman, UTU, Toronto
D. Stefurak	– Local Chairman, Schreiber
R. Hewitt	– Local Chairman, Toronto
M. G. Tremblay	– Grievor

AWARD OF THE ARBITRATOR

Notwithstanding the contents of the Joint Statement of Issue, before the Arbitrator the Council does not assert that the grievor is not an alcoholic. Rather, it maintains that he has had a long-standing struggle with alcohol, combined with other conditions, including depression and phobia, and that the Company has not sufficiently accommodated his condition.

The Arbitrator has some difficulty with that submission, on the facts of this case. The Company's treatment of the grievor's condition is, to some extent, reflected in the letter of November 4, 1994 by which it advised the grievor that it was closing his employment record. That letter reads, in part, as follows:

> Dear Sir:
>
> This letter refers to your employment status as a Locomotive Engineer with CP Rail System at Schreiber, Ontario.
>
> A review of your file reveals that you have a history of alcohol/substance abuse. As an employee in a safety-sensitive position, such a condition cannot be left unchecked. Accordingly you were required to seek appropriate treatment prior to returning to active duty. Our records indicate that you entered the Camillus Centre in Elliott Lake, Ontario on February 3, 1991.
>
> Your entry into this treatment facility was arranged through the Schreiber CP Rail System EAP Committee. The Company supported your admission to this facility as part of our commitment to the principles of the Employee Assistance Program, to assist you in the resolution of your problem with alcoholism and to facilitate your return to service as a productive employee of CP Rail System.
>
> Unfortunately, you discharged yourself from this facility three days later, claiming that you were suffering from claustrophobia.
>
> You were subsequently advised by the Company, in writing, that you were required to complete a course of treatment at a recognized facility prior to being permitted to return to work as a locomotive engineer. Additionally, the Company offered to assist you in dealing with your alleged claustrophobia.
>
> We have no record of you complying with this instruction, nor have you submitted any evidence to the Company stating that you have completed an approved course of treatment. You have made no effort to discuss your employment status and conditions with local Company officers after you removed yourself from treatment. In fact, you have steadfastly refused to do so, and continually deny that you have a problem with substance abuse.
>
> ...
>
> You have continually refused to acknowledge your problem with substance abuse; to accept your doctor's medical diagnosis of substance abuse, and to complete an approved course of treatment. Moreover, you have claimed that you were unable to complete treatment due to claustrophobia, yet did not seek treatment for that alleged condition. Additionally, you have steadfastly refused to be candid with Company Officers during this entire period.
>
> It has also come to my attention that you were involved in an incident involving your impaired operation of a motor vehicle, from which criminal charges have resulted.
>
> Such actions plainly illustrate that you are unwilling, or unable, to protect your employment obligations. Instead, you have chosen to operate your own business.
>
> For the foregoing reasons your employment record with the Company is closed. Documents concerning refund of Pension monies will be forwarded to your attention in due course.
>
> Yours truly,
>
> (signed) _____
> for: D. M. Hayden

Division Manager

The record before the Arbitrator discloses that from the grievor's removal from service in 1991, over a period of almost four years, to November of 1994 there was no attempt on the part of Mr. Tremblay to seek reinstatement, or to otherwise grieve his removal from service. The only exception to the grievor's silence was a formal request submitted in December of 1992 for participation in a conductor only separation package. That request was denied by the Company in June of 1993. It would seem that the decision to close the grievor's record was precipitated by a drinking driving charge brought against Mr. Tremblay on August 28, 1994. Although it appears that that charge did not result in a conviction, it is common ground that more recently, in February of 1996, the grievor plead guilty to a subsequent and different charge of impaired driving, apparently arising out of an incident on May 26, 1995.

Can it be said that the Company was unreasonable in its treatment of Mr. Tremblay, or that it failed in its responsibility to accommodate his condition? I think not. The record discloses that the Company was in possession of a medical opinion of the grievor's own physician diagnosing his condition as that of chronic alcoholism, and indicating that he in fact had suffered *grand mal* seizures associated with that condition. It was obviously incumbent upon the employer to remove the grievor from service, as it did in late 1990. Was it unreasonable for the Company to insist that the grievor complete an appropriate in-patient treatment prior to being reinstated? Again, the answer must be in the negative. It should be stressed that there is no medical opinion placed before the Arbitrator to suggest that it would have been impossible for the grievor to attend such a program, although it appears that he did to refuse to attend any program which was sponsored through the employer's EAP program. Most significantly, in my view, there is no evidence produced by the Council to suggest that, as at the time of the arbitration hearing, the grievor is in control of his problem of alcoholism, or that he has received any professional or institutional assistance in that regard. Very simply, the Council appears to be requesting the reinstatement of an employee who is not a recovered alcoholic, and in respect of whom there is no reliable medical or other professional opinion tendered in evidence to support a prognosis that he can and will discharge the functions of a locomotive engineer with the requisite degree of safety. I can, in these circumstances, see no responsible basis upon which the grievance can be allowed.

In my view the Company did act reasonably in its treatment of Mr. Tremblay, from the date of his initial removal from service in November of 1990 to the time, some four years later, when his employment file was closed. He was made well aware that his successful participation in an in-patient treatment program was a condition of his reinstatement and, for reasons which he must best appreciate, that condition was never satisfied. The process of accommodating an individual's physical disability places a burden not only upon an employer, but upon the employee as well. If, as Mr. Tremblay seems to suggest, his phobic and depressive conditions prevented him from participating in normal EAP programs, it was incumbent upon him, and his Union, to propose a viable alternative. The record is devoid of any attempts to make such a proposal, short of the dubious suggestion that he might simply attend some meetings of Alcoholics Anonymous. In the Arbitrator's view the position taken throughout by the Company was not unreasonable, and there was no failure to reasonably accommodate the grievor's condition. As he is obviously not in control of his condition at this time, there is no basis upon which the grievance can be allowed.

For the foregoing reasons the grievance must be dismissed.

February 14, 1997

(signed) MICHEL G. PICHER
ARBITRATOR