

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3222

Heard in Calgary, 15 November 2001

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

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

DISPUTE:

Dismissal of Conductor H.

EX PARTE STATEMENT OF ISSUE:

Following an investigation, Conductor H was issued a Form 104 informing him that he had been dismissed from Company service for:

Failing to perform assigned modified duties, for knowingly providing inaccurate information and deliberately misleading Company officers, C.P. Police Services and the Safety and Health Committee with respect to your activities, and for accepting wages for work not performed, pertaining to the Operational Lifesaver/Railway Safety Program between April 28, 1997 and July 18, 1997 ...

The Council contends that the penalty of termination was too severe in all of the circumstances and has requested the reinstatement of Conductor H into Company service.

The Company takes issue with the Council's contentions and has declined the Council's request.

FOR THE COUNCIL:

(SGD.) D. H. FINNISON

FOR: GENERAL CHAIRPERSON

FOR THE COMPANY

(SGD.) J. C. COPPING

FOR: GENERAL MANAGER, OPERATIONS

There appeared on behalf of the Company [among others]:

C. M. Graham – Labour Relations Officer, Calgary

And on behalf of the Council [among others]:

D. Ellickson – Counsel, Toronto

L. O. Schillacci – General Chairperson, Calgary

H – Grievor

At the request of the parties, the Arbitrator adjourned the hearing *sine die*.

On Thursday, 14 February, 2002, there appeared on behalf of the Company:

C. M. Graham – Labour Relations Officer, Calgary
 S. Seeney – Manager, Labour Relations, Calgary
 D. Guérin – Labour Relations Officer, Calgary
 D. M. Hodgson – Witness
 Dr. G. Berthiaume – Witness

And on behalf of the Council:

D. Ellickson – Counsel, Toronto
 D. H. Finnson – Vice-General Chairman, Calgary
 Dr. T. C. Smith – Witness
 H – Grievor

AWARD OF THE ARBITRATOR

It is not disputed that the grievor was involved in defrauding the Company. It is admitted that while he was assigned to modified duties, during the period between April 28 and July 18, 1997, he fraudulently claimed to have conducted community safety classes, at a number of elementary and secondary schools, when in fact he did not. It was for the falsification of that work record that the grievor was ultimately dismissed, although it would appear that he also engaged in other falsehoods with respect to certain training assignments given to him as modified duties.

The sole issue in these proceedings is whether the grievor should be reinstated into employment, on appropriate conditions, because of mitigating factors relating to his own medical and mental condition at the time of the event for which he was discharged. In relation to that issue the Arbitrator heard the evidence of three physicians: Dr. Terrence C. Smith, the grievor's personal physician, Dr. Georges Berthiaume, the Company's consulting physician in occupational health for Quebec and Ontario, and psychiatrist Dr. Maureen L. Hodgson, the Director of Emergency Psychiatry and a staff psychiatrist at the Lakeshore General Hospital, serving Montreal's West Island.

The evidence of Dr. Smith, who is the Senior Medical Director of Mental Health Services for the Chinook Health Region of Alberta, and has extensive experience in dealing with mental health issues within his own general practice, confirms that he has treated the grievor for some twenty years for what he has diagnosed as a condition of clinical depression. Over a period of a number of years he treated the grievor with a number of medications with little lasting success, and occasionally resulting in episodes of medication abuse by the grievor. Dr. Smith also used psychotherapy with H over the years, also with limited success.

According to Dr. Smith the grievor also suffered from what he described as a cluster B or mixed personality disorder, which included such traits as deceitfulness, impulsivity, shame-based motivations, feelings of inadequacy, accident-prone risk taking behaviour and manipulation of other people.

In 1998 Dr. Smith referred H to a psychiatrist, Dr. Georges Vozar of Lethbridge. When attempts at using additional drugs did not resolve the problem, Dr. Vozar applied twelve sessions of electro-convulsive therapy (ECT). According to Dr. Smith that treatment, administered through 1999, seemed to have a dramatic impact on H's condition. He relates that in 2000 and 2001 he saw a substantial change in H's situation, and a significant reduction, if not elimination, of the personality behaviour problems previously exhibited by the grievor. Dr. Smith expressed his opinion that the grievor is better suited now than he ever was in the past for work as a valuable employee, and can be returned to work, subject to conditions that would ensure ongoing monitoring of his susceptibility to depression.

The testimony of Drs. Berthiaume and Hodgson relates primarily to their observations of the grievor's own medical record with the Company and the content of a reporting letter prepared for the grievor's legal counsel by Dr. Smith. The Arbitrator is satisfied that both physicians were fair and candid in their testimony, each of them stressing that they did not have sufficient information to agree or disagree with the diagnosis of the grievor's condition related by Dr. Smith.

The Company's representative stresses that during 1997, when the grievor engaged in the fraudulent conduct which led to his dismissal, he was not in contact with Dr. Smith. It is submitted on that basis that his physician could not give an assured opinion that H was suffering from depression at the time he engaged in the falsification of his work report to the Company, which led to his termination from employment.

While the Arbitrator can understand the argument made by the Company, it is not persuasive against the totality of the evidence before me. Firstly, there is nothing to rebut the testimony of Dr. Smith, the truth of which I take to be beyond any doubt, that the grievor has struggled with a condition of depression for the last twenty years. There can be little doubt that his condition, which involved treatment by an extensive series of drugs, without substantial success, coupled with his personality disorder, caused a long period of clearly abnormal behaviour patterns. Dr. Hodgson's own evidence confirms that depression can affect an individual's judgement, although it does not impede a person's sense of right and wrong. The misconduct for which the grievor was ultimately discharged, including fabricating out of whole cloth his attendance at some eleven schools to give safety classes to elementary and secondary students, is itself so extreme as to call into question H's ability to fashion a convincing lie. His conduct was, to all appearances, not the pattern of behaviour of a person who is well and able to exercise normal rational judgement. Nor is there anything in the prior eighteen and one-half years of the grievor's employment to suggest any pre-existing patterns of dishonesty or any related prior discipline. On the contrary, he is characterized by his own supervisor as a person who was highly trusted in the workplace.

In the result, the Arbitrator is satisfied that the position advanced by the Council, substantiated as it is by the extensive evidence of Dr. Smith, merits a substitution of penalty in the case at hand. Such a course is, moreover, in my view consistent with the duty of accommodation under the **Canadian Human Rights Act** which governs the Company, the Council and the grievor in such a circumstance. I am satisfied that the grievor's medical condition did influence the events leading to his discharge, and that he can be returned to employment, in light of the improvement in his condition and the positive prognosis provided by Dr. Smith, subject to conditions appropriate to protecting the interests of the Company.

The Arbitrator therefore directs that the grievor be reinstated into his employment forthwith, subject to the following conditions. Following his reinstatement, on a twice yearly basis, he shall be subject to medical and psychiatric assessment for the condition of depression, or any other condition which might impede his ability to perform the duties and responsibilities of his condition, by a physician or specialist to be agreed by the Company, and the Council, in consultation with the grievor's own physician. Such examinations may, of course, be conducted at less frequent intervals, in the discretion of the employer. Should the parties be unable to agree on the choice of psychiatrist the Arbitrator shall make the choice, following appropriate submissions.

The reinstatement of the grievor shall also be conditional upon his agreeing to provide to the Company's Medical Officer a current and ongoing report of any prescription medications which he may be taking, whether for depression or any other condition. Failure by the grievor to honour the conditions herein shall render him liable to termination.

The grievor's reinstatement shall also be on the basis that he retains his seniority, without any award of compensation, with the time between his termination and his reinstatement to be recorded as a suspension.

February 15, 2002

(signed) MICHEL G. PICHER
ARBITRATOR