CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3274

Heard in Montreal, Tuesday, 9 July 2002

concerning

CANPAR

and

UNITED STEELWORKERS OF AMERICA (LOCAL 1976)

DISPUTE:

Employee "T" was assessed twenty (20) demerits for an alleged unjustified absence from work for the period of July 20, 2001, until July 27, 2001. In addition he lost one day's pay and was not reimbursed for the doctor's certificate he was required to submit.

JOINT STATEMENT OF ISSUE:

The Union contends that "T" was off work from July 20, 2001 until July 27, 2001 on legitimate medical grounds. The Union argued that "T" complied with the collective agreement and Company policy and that there was no justification for the discipline issued. In addition the Union argued that he be reimbursed for the lost of a day's pay on July 30, 2001, and that he be reimbursed for the $50.00 expense he incurred for the doctor's certificate he provided at the request of the Company.

The Company denied all the Union's requests.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) D. J. DUNSTER	**(SGD.) P. D. MACLEOD**
STAFF REPRESENTATIVE	**VICE-PRESIDENT TERMINAL OPERATIONS**

There appeared on behalf of the Company:
P. D. MacLeod – Vice-President, Terminal Operations, Mississauga

And on behalf of the Union:
D. J. Dunster – Staff Representative, Ottawa

AWARD OF THE ARBITRATOR

The facts in relation to this grievance are not in substantial dispute. The grievor is a long service driver, first employed by the Company in October of 1981. In early 2001 he unsuccessfully bid for annual vacation on the week of July 23, 2001. On the morning of July 20, 2001 the Company's supervisor received an overnight voice mail from "T" stating that he had been to see his doctor on July 19 and was directed to take a week off work. He indicated to his supervisor that he would return on July 30.

Subsequent attempts throughout the week to contact the grievor at his home were unsuccessful and culminated in a letter of July 27, 2001 advising the grievor that he was terminated for his unauthorized absence. It also appears undisputed that when "T" did return to work on July 30 he was sent home for the day, pending an investigation of the circumstances of his absence.

In short, the Company did not believe that the grievor had a valid medical excuse for his absence, and concluded that he had sought to manipulate his own physician, as well as the Company's supervisors, to in fact take the vacation during the period which he had initially requested and was denied.

The Arbitrator can readily understand the Company's concern, given the objective evidence which was presented to it both at the time of the grievor's absence and subsequently, including during the disciplinary investigation. For example, as noted above, the grievor's initial telephone message indicated to the Company that he had been to see his doctor on the 19th of July. Upon his return to work he presented the Company with a letter dated July 17, 2001 from his physician indicating that he had been seen on July 19th and "was totally disabled from Friday, July 20, 2001 through Monday, July 30, 2001." It now appears that the dates in that letter were in error. A subsequent letter, dated July 30, 2001 from "T's" physician stated that the grievor had seen his doctor on July 17th "… with an exacerbation of anxiety and depressive symptoms." The doctor's own notes, tendered in evidence by the Union, as well as a covering letter which he addressed to the Union's representative, clearly confirm that it was on the 17th, and not on the 19th that "T" had his appointment with his family physician. Notwithstanding that record, however, during the course of the Company's investigation the grievor insisted that he had merely arranged for the appointment on the 17th and had attended at his physician's office on the 19th. The Arbitrator is satisfied that the physician's own record's are more reliable in this matter. Significantly, it is understandable that the Company may have

formed the view that the grievor was seeking to advise his supervisors of his impending absence at the last minute, without any opportunity of challenge to his condition or his intentions.

There are other aspects of the investigation which also call into the question the grievor's candour. During the investigation he was asked by the Company's officer where he had been during his week of absence. He stated that the question was irrelevant and refused to answer. With respect, the Arbitrator cannot agree. The whereabouts and activities of an employee who is on sick leave, and claims medical indemnities as the grievor did, can be a matter of legitimate interest to an employer, if only to verify that the individual in question was not engaged in activities incompatible with his medical condition or, as has been found in some cases, was using a paid period of sick leave to pursue gainful employment elsewhere. The grievor's refusal to give any information whatsoever as to his whereabouts or activities during his period of absence would therefore give little reassurance to any employer already inclined to be suspicious of his motives particularly given the discrepancies in the chronology of events and the account given by his own physician.

Apart from the issue of candour, a central issue in the grievance at hand was whether the grievor was in fact physically disabled for the period of time in question. On a careful review of the documents tendered by the Union, I am satisfied that he was. I base that conclusion on the report of the grievor's family physician, including an extensive excerpt of his medical notes relating to the treatment of the grievor both by his own physician and by a psychiatrist, over a substantial period of time between March 27, 2001 and December 11, 2001. The medical records confirm that for some time the grievor had been prescribed Zoloft and was being followed by his own physician on a regular basis.

Could it be, as the Company suspects, that the grievor took advantage of his ongoing condition to claim an exacerbation of his depression at a time convenient for his own vacation? That is, of course, possible. But a board of arbitration must make a determination on the balance of probabilities, based on the evidence and bearing in mind that in a matter of discipline the employer retains the burden of proof. In the case at hand I am satisfied that the preponderance of the evidence does confirm, with adequate medical documentation, that "T" had received care for anxiety and depression for some three years, and that he was directed by his physician to take one or two weeks rest on July 17, 2001.

In the Arbitrator's view, however, the foregoing conclusion does not entirely dispose of this grievance. The fact remains that the grievor did fail to meet his obligation of reasonable candour towards his employer concerning the circumstances of his absence, his whereabouts and activities during his week away from work and the date on which he saw his physician and was told to remain off work. That failure of obligation is, in my opinion, deserving of a degree of discipline, notwithstanding that there may have been a legitimate medical condition justifying the grievor's absence from work. This unfortunate situation was obviously not assisted by the questionable quality of communication exhibited by "T's" own family physician. For these reasons the Arbitrator determines that the grievance should only be allowed in part, and that a reduction of the penalty to ten demerits for the failure of the grievor to properly communicate with the Company with respect to the circumstances of his absence is appropriate in the circumstances.

The Arbitrator therefore directs that the penalty assessed against the grievor be reduced to ten demerits for the grievor's deliberate failure to properly provide sufficient information to the Company with respect to the circumstances of his absence commencing July 19, 2001. Given the conflicting documents presented to the Company and the failure of the grievor and his physician to communicate correctly, I do not consider it appropriate to order compensation for the loss of one day's pay on the grievor's return. Nor has the Arbitrator been directed to any provision of the collective agreement that would support the request that the Company should pay for the cost of the doctor's notes which, I am satisfied, the Company had reasonable grounds to demand. It is to be hoped that in the future the grievor will appreciate the importance of communicating fully and clearly with the Company in the event of any absence from work.

July 12, 2002 **(signed) MICHEL G. PICHER**
ARBITRATOR