CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 3318

Heard in Montreal, Tuesday, 14 January 2003

concerning

CANPAR TRANSPORT LTD.

and

UNITED STEELWORKERS OF AMERICA (LOCAL 1976)

DISPUTE:
The requirement imposed on Ottawa employee R. Diotte to provide a physician's note prior to being permitted to return to duty on April 8, 2002, after a short term absence for illness.

JOINT STATEMENT OF ISSUE:
The grievor booked off for illness on April 2, 2002. He was advised on April 5 to obtain a physician's note prior to his return to duty, and was denied work on April 8, 2002 for not producing the note.

The Union filed a grievance, alleging a violation of article 3 and Appendix "G" of the collective agreement and claiming one day's wages. The Company declined the grievance.

FOR THE UNION: FOR THE COMPANY:
(SGD.) N. LAPOINTE (SGD.) P. D. MACLEOD
PRESIDENT VICE-PRESIDENT, OPERATIONS
There appeared on behalf of the Company:
P. D. MacLeod – Vice-President, Operations, Mississauga
R. Dupuis – Regional Manager, Quebec & Ottawa, Montreal
And on behalf of the Union:
D. Neale – Executive Vice-President, Hamilton
R. Pagé – Staff Representative, Montreal

AWARD OF THE ARBITRATOR

It is not disputed that the grievor, Ottawa Driver R. Diotte, was ill with influenza from Tuesday April 2nd through Friday April 5th, 2002. The evidence also establishes, beyond controversy, that the Company has an established practice whereby employees who are absent by reason of illness for three days or more are required to obtain a medical certificate as a condition of returning to work. Very simply, the practice has been that an employee who fails to obtain a medical certificate is not allowed to return to work until such a certificate is provided. That practice does not obtain in the case of absences by reason of illness for one or two days. In those instances employees are not required to provide a physician's certificate, unless in the judgement of the Company they have a problematic absenteeism history or the particular absence in question is suspect.

The foregoing policy is reflected, albeit in general language, within the terms of Appendix G of the collective agreement, a provision newly added with the most recent version of that

document. In the form of a letter dated December 24, 2001 addressed to the Union's president by the Company's Vice-President, Operations, Mr. Paul MacLeod, it reads as follows:

As discussed at the recent meetings the following is the Company's intention regarding the requesting of medical reports for return to work from illness.

Medical documentation to support a short-term absence will only be required of those individuals who have an absenteeism history or whose absence is suspect in the Company's opinion.

The request for medical support for the absence will be made in advance of the employee's return to work, preferably at the time the employee reports his/her absence.

The current practice regarding providing medical information for WCB and STD claims and where an employee's fitness for work is in question will remain unchanged.

In the case at hand the Union also relies, in part, on article 3.2 of the collective agreement which provides as follows:

3.2 If a permanent employee takes a medical examination at the Company's request during his normal working hours, he shall be paid for the time. Not less than one day's notice will be given.

The material before the Arbitrator establishes that the grievor gave proper notice of his absence from work commencing Tuesday April 2, and remained in continuing day-to-day contact with the Company respecting his physical condition. It is common ground that he spoke with a Company supervisor on the afternoon of Friday, April 5th to indicate that he was better and would be able to return to work on the following Monday. He then advised his supervisor that he could not arrange to see his own physician until Tuesday. His supervisor then responded that he would remain off work for the Monday, and could not return to work until the medical certificate was obtained on the Tuesday. That is in fact what transpired. The grievor was denied access to work on Monday, April 8, and did return to work on the following day, Tuesday April 9, albeit after an hour and one-half of time was expended on that day to attend at his physician's office to obtain the necessary medical certificate.

The Union maintains that the Company could not reasonably have withheld the grievor from service for Monday April 8. While it's representative submits that it would have been open to the Company to consider assessing discipline against the grievor for failing to provide a medical certificate, there is no principle which would allow the employer to simply subject an employee to an indefinite suspension from work until such time as a medical certificate was provided.

The Company's representative counters that there are two aspects to the requiring of a medical certificate. One is to verify the illness of the individual – an issue which does not arise in the case at hand as the legitimacy of the grievor's condition is not disputed in the case at hand. The second aspect concerns verifying that the employee is medically fit to return to work, with possible regard to the use and effect of ongoing medications in relation to the ability to perform the safety sensitive work of a vehicle driver. The Company's representative stresses that the practice, as reflected in the outlines of Appendix G of the collective agreement, has been consistent throughout the Company's operations and has generally been accepted by the Union and by employees who are subject to it. In support of that condition the Company tendered a number of documents indicating that other employees in similar circumstances have obtained

and provided medical certificates upon their return to work after an absence of three days or more for medical reasons.

It would appear that there is an established practice in the workplace whereby employees are advised that in the case of absences of three days or more they must provide a medical certificate as a condition of returning to work. Part of the legitimate business interests is the employer's entitlement to know, through the verification of medical opinion, that the employee in question is fit to perform the duties and responsibilities of his or her job. The practice, apparently, agreed by both parties appears to be reasonable.

The issue in the instant case, however, is whether that policy was applied reasonably and fairly in the case of Mr. Diotte. Firstly, as a matter of undisputed fact, it would appear that Mr. Diotte was fully aware of the need to provide a medical certificate. It seems evident from his telephone conversation with his supervisor on the Friday afternoon of April 5th that he had already obtained information to the effect that he could not meet with his own physician until Tuesday morning, April 9, 2002. He clearly advised his supervisor of that fact when the latter responded that he was nevertheless effectively suspended for the Monday in question.

There is no suggestion that the Company doubted the truth of the grievor's illness, or that it had any genuine concern about his fitness to return to work. If the grievor had been suffering from an injury or an illness of a type which could potentially adversely affect his ability to perform his duties the position advanced by the Company's supervisor might be persuasive. On the facts of the case at hand, however, the Arbitrator has substantial difficulty with the manner in which the Company's supervisor applied the policy.

Firstly, there was no dispute that the nature of the grievor's illness was a bout of the flu. A period of two to four days is not an uncommon length of absence to recover from the flu. There is nothing in the record to suggest that the Company's supervisor doubted that the grievor had suffered from the flu or that he had any significant doubt that he was fully recovered when they spoke together on the afternoon of Friday April 5, 2002. Further, the supervisor knew, or reasonably should have known, that the grievor understood the rule necessitating a medical certificate, had made a preliminary investigation as to the ability to meet with his physician, and was undertaking to do so as early as Tuesday April 9th. Notwithstanding that knowledge the Company's representative insisted on the strict application of the rule, thereby depriving the grievor, who had undertaken to obtain a medical certificate as soon as his physician was available, from the opportunity of returning to work in circumstances where there was no meaningful question as to his ability to resume his duties.

In the Arbitrator's view the circumstances at hand fall outside the reasonable purview of the Company's own policy, and cannot, from the standpoint of sound business practice, justify the loss of a day's pay to an employee merely by the reason of the unavailability of his personal physician. Nor, given the importance to individuals of dealing with their own doctors, is the Arbitrator persuaded by the alternative argument of the Company's representative that the grievor could have found some other doctor to provide a note one day earlier. In my view it would not be reasonable, for example, where an employee who was absent for three days under the treatment of his or her personal physician to be required wait two weeks before returning to work because his or her doctor had left on a two week vacation. The case at hand is not significantly different in principle.

On the whole, therefore, while I am satisfied that the Company's general policy of requiring medical certificates for absences of three days or more as a condition of returning to work is

reasonable, I cannot find that it was applied in a reasonable and fair manner in the case at hand. The Company knew, or reasonably should have known, that Mr. Diotte understood the rule and intended to comply with it, save that he could not meet with his doctor until Tuesday April 9, 2002. To the extent that there was no meaningful challenge as to the grievor's ability to return to work, or the fact that he had in fact suffered from a bout of the flu, the strict application of the policy in the particular circumstances of this case went beyond what can be fairly characterized as a valid business purpose in the exercise of management prerogatives implicit in the administration of the collective agreement.

For the foregoing reasons the grievance is allowed, in part. The Arbitrator directs that the grievor be compensated for the work day of Monday, April 8, 2002 for all wages and benefits lost. The Arbitrator declines to order any compensation for the Tuesday, however, as that claim was not part of the original grievance, and in any event would have related to the time expended by the grievor in attending at his physician's office in circumstances which I am satisfied would not constitute a "medical examination" within the meaning of article 3.2 of the collective agreement.

January 20, 2003

MICHEL G. PICHER
ARBITRATOR