

# CANADIAN RAILWAY OFFICE OF ARBITRATION

## CASE NO. 1544

Heard at Montreal, Thursday, July 10, 1986

Concerning

**ALGOMA CENTRAL RAILWAY**

and

**UNITED TRANSPORTATION UNION**

**EX PARTE**

### **DISPUTE:**

Brakeman Mr. J. Hernden resigning position, while on Workmen's Compensation to obtain monies from his pension contributions, realizing error, requesting to have his resignation rescinded.

### **UNION'S STATEMENT OF ISSUE:**

The Brotherhood contends that Mr. J. Hernden has been misled by the Company in resigning his position, to obtain his pension contributions. Further contends that another employee received his pension contribution under similar circumstances without resigning and also the Company did not advise the General Chairman until after the resignation was filed.

The Company would not rescind the resignation and they contend that the dispute is not arbitrable.

The Organization contends the dispute is arbitrable and has complied with the proper Grievance Procedures in the Collective Agreement.

Should the Arbitrator allow, the Organization requests that the merits of the case be heard and that the resignation be rescinded.

### **FOR THE UNION:**

**(SGD.) J. SANDIE**  
GENERAL CHAIRMAN

There appeared on behalf of the Company:

V. E. Hupka                   – Manager, Industrial Relations, Sault Ste. Marie  
N. L. Mills                   – Superintendent, Sault Ste. Marie

And on behalf of the Union:

J. Sandie                   – General Chairman, Sault Ste. Marie

## AWARD OF THE ARBITRATOR

The grievor, Mr. James Hernden, has had a long stormy relationship with the Company with respect to his claim for compensation under the Workman's Compensation Act arising out of a work related injury affecting his back.

The grievor's financial situation has suffered immeasurably as a result of his inability to secure light duty work with the Company. He cannot, because of his chronic back ailment, perform the regular duties of his position.

Because of his desperate financial situation the grievor approached the Company with a request for the return of his financial contributions to the pension plan. He was advised by a Company official that the only way this could be brought about was through his resignation and/or termination (and provided his pension benefits had not vested).

The grievor chose to resign. He signed a document prepared for that purpose by the Company signifying his alleged intention to resign.

Afterwards the grievor learned of another episode where an employee on long term lay off was allowed to obtain the return of his pension contributions without severing his seniority with the Company. That is to say, he neither had to resign nor be terminated.

The Company advised that this forbearance is permitted employees on long term lay off under the Company's pension plan. The same benefit, however, is not extended employees whose disability places them on compensatory leave.

The issue before me is whether Mr. Hernden's resignation was voluntary? If the grievor's resignation was voluntary he ceased to be an employee at the time of resignation and therefore would have no status to present a grievance to arbitration. On the other hand, if the resignation was involuntary then his resignation would be treated as a "constructive dismissal". And, given that the grievor committed no misconduct there would be lacking any evidence to support the justness of his termination. Accordingly, this Arbitrator would hold jurisdiction to direct the grievor's reinstatement.

It appears to me the fundamental error committed by the Company was its failure to advise the grievor to seek independent advice before it accepted his resignation. The Company, in having regard to its adversarial relationship with the grievor, was in a conflict of interest situation when it presumed to give the grievor advice with respect to his desire to resign.

It matters not that the grievor's situation may have been different from that of a laid off employee's circumstance with respect to the withdrawal of pension contributions. The Company in having a very direct and immediate interest in securing the grievor's resignation cannot be seen to be giving the grievor neutral and unbiased advice with respect to the advancement of his best interests in submitting his resignation.

The prudent course of action for the Company to have followed was to have referred the grievor to his Trade Union representative or another third party (such as his lawyer) so that an informed decision was made prior to the voluntary submission of a valid resignation.

In the light of the foregoing I have not been satisfied that the grievor's resignation was voluntary.

Moreover, because his severance from the employ of the Company was tantamount to a "constructive discharge" where no cause has been shown, I direct the grievor's reinstatement forthwith.

The Arbitrator shall remain seized with respect to all matters arising out of this direction.

**(signed) DAVID H. KATES**  
**ARBITRATOR**