CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2374

Heard at Montreal, Thursday, 10 June 1993

concerning

CANPAR

and

TRANSPORTATION COMMUNICATIONS UNION

EX PARTE

DISPUTE:

Dismissal of employee D. for allegedly attempting to secure SunLife benefits for a fraudulent claim.

UNION'S STATEMENT OF ISSUE:

Employee D. was off work and under the care of a doctor since December 4, 1992 for depression.

The grievor was notified by written notice dated January 21, 1993 to attend an interview to investigate his SunLife claim from December 4, 1992, to be held on January 26, 1993 at 10:00 a.m.

The grievor was advised by written letter dated January 29, 1993, his employment with CanPar was terminated effective January 27, 1993, for attempting to secure SunLife benefits for a fraudulent claim.

The Union asserts that the grievor was off work and under the care of a physician.

The Union also asserts that the grievor at no time submitted a fraudulent SunLife Benefit clam nor attempted to submit a fraudulent SunLife claim.

The Union also asserts that the Company failed to put forward evidence during the interview.

The Union further asserts that the Company failed to supply such evidence when requested by the Union at Step Three of the grievance procedure.

The Union requested employee D. be reinstated with full compensation (SunLife Benefits) and all other benefits and monies owing and full seniority.

FOR THE UNION:

(SGD.) G. RENAUD
for: EXECUTIVE VICE-PRESIDENT

There appeared on behalf of the Company:

M. D. Failes	– Counsel, Toronto
P. D. MacLeod	– Director of Terminal, Toronto
B. Trew	– Loss Prevention Supervisor, Toronto
C. Killingbeck	– Delivery Supervisor

And on behalf of the Union:

M. Church	– Counsel, Toronto
J. Marr	– Vice-President, Saint John
D.	– Grievor

AWARD OF THE ARBITRATOR

The facts pertinent to the resolution of this grievance are not in dispute. The grievor, D., has been employed with the Company for seven years as a driver out of its […] terminal. On December 4, 1992, he attended at the office of his family physician, who diagnosed him as suffering from severe anxiety and depression. His physician, Doctor L., prescribed an anti-depressant and advised him to stay off work. That same date the grievor provided the Company with a note from Dr. L. indicating that he would be off work indefinitely, effective December 4, 1992.

Several days thereafter, on December 9, 1992, a Company Loss Prevention Supervisor began surveillance of the grievor's home in […]. He observed Mr. D. traveling in a van which belongs to his father and is used in [their] business. It is not disputed that the grievor has long been associated with his father in the operation of [this business]. There is no evidence to establish the nature or extent of Mr. D.'s activities on the morning of December 9, 1992.

It is common ground that the same day his supervisor, Mr. Carl Killingbeck, telephoned the grievor at his home at 1:10 p.m. and received no answer. He left a message on the employee's answering machine requesting a call back, which he later received from Mr. D.. During that conversation the grievor advised his supervisor that he was off work for severe depression, that he was on medication and that the duration of his absence was uncertain. It appears that when his supervisor asked why the telephone had not been answered earlier in the day the grievor indicated that he had been sleeping. It also appears that during the course of that conversation Mr. Killingbeck made some indication to Mr. D. that he should apply for SunLife Benefits in respect of his illness claim. This the grievor did, on December 12, 1992. The claim was countersigned by his physician on December 21, 1992. The record indicates that in fact the claim was not submitted by the Company to the carrier for payment. In or about the third week of January 1993, the Union's Vice-President inquired of Company Director Paul MacLeod as to the status of the insurance claim, and was told that it was under review.

On January 21, 1993 the grievor was given notice to attend at an interview investigating his insurance claim, to be held on January 26, 1993. At that interview, when he was advised that the subject matter of the inquiry was an alleged fraudulent insurance claim, the grievor refused to answer any questions, in pursuance of his right under article 6.02 of the collective agreement. Subsequently, by letter dated January 29, 1993 Mr. D. was terminated effective January 27, 1993. The reason for his discharge is stated as: "... that you have attempted to secure SunLife Benefits for a fraudulent claim."

The Company submits that in fact Mr. D. misled the employer and attempted to mislead the insurer. Its evidence establishes, without contradiction, that Mr. D. was involved in auctions conducted on Friday December 4, Sunday December 6, 1992 and Saturday, January 16, 1993. While the Company does not allege that Mr. D. engaged in gainful work activities during times he would otherwise have been scheduled to work for the Company, it submits that he did make a false or fraudulent statement on his application for SunLife Benefits. Specifically, where the form in question asks whether the claimant was "... engaged in any occupation or employment?" Mr. D. responded "no". The Company submits that his activities in relation to the auctions constituted the pursuit of an occupation or employment within the contemplation of the question appearing on the insurance form, and that his answer was deliberately deceptive. It further submits that his answer to Mr. Killingbeck about having been asleep during his phone call was also an attempt to deceive the Company. The Company's Counsel argues that those events, coupled with the grievor's refusal to answer questions at the investigation formed the basis for a conclusion by the Company that he had deliberately attempted to mislead his employer.

The Arbitrator has some difficulty with assertion of the Company, based on the evidence in the case at hand. Firstly, there is no evidence to suggest that Mr. D. was not suffering from a serious condition of depression for which he was on medication and in respect of which his family physician directed him to stay off work. While the particulars of his illness may not have been disclosed in the initial medical note of December 4, 1992, they were made known to his supervisor in the telephone conversation between Mr. Killingbeck and Mr. D. on December 9, 1992, and are fully documented before the Arbitrator.

In the case at hand the burden is upon the Company to prove, on the balance of probabilities, that there was deliberate or knowing attempt on the part of Mr. D. to deceive the Company or the insurance carrier. It is not disputed that Mr. D. has been involved in [a] business, apparently started by his father, over a period of some fifteen years. The auctions conducted are on an occasional basis, and normally take place on Friday evenings or weekends. During the time period under scrutiny in the case at hand, there were three auctions, one of which occurred on a Friday evening and two of which were on Saturday and Sunday, respectively, spread over a period of approximately

a month and a half. The Arbitrator accepts the suggestion of Counsel for the Union that the involvement of the grievor in helping with the activities of [the] business would, in all likelihood, not exceed seven hours in total.

Two questions arise in relation to the facts disclosed. The first is whether Mr. D.'s occasional or casual involvement in the [the] business during his absence from work, during non-working hours, would constitute engagement in an occupation or employment for the purposes of the insurance form. A second related question, even if the first should be answered in the affirmative, is whether an employee in the position of the grievor must reasonably have believed that his activities would involve the pursuit of an occupation or employment within the meaning of the form. In other words, even if a board of arbitration should find that the casual endeavours disclosed might constitute an occupation or employment in the sense contemplated by the document, or intended by the insurance carrier, did the employee appreciate that meaning and deliberately intend to make a fraudulent response?

In the Arbitrator's view great care should be taken in determining what might constitute an "occupation or employment" for the purposes of a document such as the insurance form tabled in evidence in the instant case. Does an employee who is on sick leave and who resides on a farm, or in an apartment attached to a family store engage in an occupation or employment by contributing an occasional light chore? A determination of that kind must depend closely on the facts of the specific case in which the issue arises. A prior case heard in this Office, although not identical, raised an analogous issue. In **CROA 2185** it was found that an employee who was in receipt of indemnity sickness benefits did not violate his obligation his employer merely by reason of his performing, on an occasional basis, non-strenuous work in relation to logging equipment operated by a hired helper on a woodlot owned by the employee.

Technically, it would seem to the Arbitrator that the ongoing involvement of Mr. D. in [the] business, which is apparently run principally by his father, could be said to be an occupation or employment within the meaning of insurance form. In reality, however, it is understandable that a reasonable employee in the grievor's position would not have seen the form as speaking to very sporadic weekend and evening activities, which constituted his involvement in [the] business at that time. There was little auction activity being conducted and it appears that, while Mr. D. was paid something by his father in relation to the December auctions, he received nothing for his involvement in the auction of January 16, 1993. Putting the Company's case at its highest, even if it can be argued that the answer given on the insurance form by the grievor was incorrect, the evidence falls short of satisfying the Arbitrator, on the balance of probabilities, that it was fraudulent or intended to deceive either the Company or the insurance carrier. Mr. D.'s involvement with his father in [the] business seems to have been a matter of some public knowledge. The evidence falls short of disclosing any attempt at concealment or dissimulation on his part. I am satisfied, on the whole of the material before me, that Mr. D. saw his involvement in [the] business as being so casual and occasional as not to constitute an occupation or employment in the sense contemplated in the insurance form. In the result, the Company has failed to discharge the onus of establishing that he engaged in any deliberate deception.

In light of the foregoing conclusion, it is unnecessary for the Arbitrator to deal with issues raised by Counsel for the Union in respect of the application of article 6 of the collective agreement, and the Company's alleged failure to disclose documents and materials to the Union under the requirements of that provision. In the result, the grievance is allowed. The Arbitrator declares that Mr. D.'s termination was void *ab initio* (*see supplementary award to* ***CROA 2100***) and the Company is directed to reinstate the grievor into his employment, with compensation for all wages and benefits lost, and without loss of seniority.

June 11, 1993

(SGD.) MICHEL G. PICHER
ARBITRATOR