# CANADIAN RAILWAY OFFICE OF ARBITRATION

# CASE NO. 2606

Heard in Montreal, Wednesday, 12 April 1995

concerning

## CANADIAN NATIONAL RAILWAY COMPANY

and

## NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA)]

**DISPUTE:**

Appeal the discharge of Train Movement Clerk, G.J. Rothon effective 3 December 1993.

**JOINT STATEMENT OF ISSUE:**

On 17 & 24 November 1993, G. Rothon provided an employee statement concerning the circumstances surrounding his absence from duty on 21 September 1993, 28 September 1993, 1 October 1993, 2 October 1993 and 5 October to 30 October 1993, submission of weekly indemnity claim form for the collection of sick benefits (for the period 5 October to 30 October) and alleged attendance at a school during the aforementioned absences.

Following a review of the employee statement, the Company discharged G. Rothon on 3 December 1993, for his unauthorized and unsubstantiated absences from duty during the period 21 September 1993 to 30 October 1993, and the fraudulent submission of a SunLife Weekly Indemnity Claim for benefits.

The Union maintains that the Company has not established G. Rothon's responsibility and requests that the discipline be expunged from his record.

The Company disagrees and has declined the Union's request.

| FOR THE UNION: | FOR THE COMPANY: |
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| (SGD.) A. S. WEPRUK | (SGD.) A. E. HEFT |
| NATIONAL COORDINATOR | FOR: SENIOR VICE-PRESIDENT - EAST |

There appeared on behalf of the Company:

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| R. Bateman | – Human Resources Officer, Toronto |
| Dr. T. VanSchoor | – Medical Director Eastern Canada, Toronto |
| M. L. Brown | – Regional Operations Officer, Toronto |
| T. Novak | – Administration Officer, C.S.C., Toronto |

And on behalf of the Union:

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| R. Fitzgerald | – Local Chairman, Montreal |
| G. J. Rothon | – Grievor, Montreal |

## AWARD OF THE ARBITRATOR

The evidence before the Arbitrator discloses that the grievor was absent from work on several occasions between September 21 and October 30, 1993. He booked sick on September 21 and September 28, apparently because of his concern that he would be ill if he worked in the area of the building to which he was assigned on those days. He states that he had previously suffered headaches in the location in question, and was prompted to trade shifts with two co-workers to avoid working on there on other occasions.

The grievor obtained an approved leave for October 1 and 2, because he was scheduled to take medical tests for allergies. It appears that in fact on October 1 his physician referred him to another doctor, and that the tests did not proceed as scheduled. The grievor did not, however, return to work. It appears that he attended a part-time real estate course which he was then taking at Seneca College on those days, although he did not attend courses during hours for which he would otherwise have been scheduled to work. According to Mr. Rothon, he felt that having originally obtained the approved leave for a proper medical purpose, he had approval to stay away from work on both days.

The evidence before the Arbitrator further discloses that the grievor suffered a condition of severe enteritis during October of 1993. Medical documentation confirms that he was treated by his physician who, in a form dated October 29, 1993, advised that he had authorized the grievor to be absent from work from October 5 to October 29, 1993. A further note from Mr. Rothon's physician states that he visited his office on October 5, 6, 12, 15, 23 and 29, 1993. It is not disputed that during the period of the grievor's absences between October 5 and October 30, 1993, he attended the final phase of a part-time real estate course which he was pursuing at Seneca College in Newmarket, Ontario. The thrust of the position taken by the Company is that the grievor's attendance at classes on a close to full time basis during that period was inconsistent with his absence from work for illness, and demonstrates that his claim for indemnity benefits for the period in question was fraudulent. On that basis it submits that his discharge was justified.

The Arbitrator is not persuaded of the merits of the Company's position, in light of all of the evidence presented. It appears that the Company relied, in part, on the conclusion of the SunLife Company that the ability of the grievor to attend at the real estate training course was inconsistent with his inability to attend at work. On a close review of the facts, that does not appear to be necessarily so. The evidence of Mr. Rothon, corroborated to some extent by the documentation from his physician, is that he suffered acute diarrhea, and that travelling the substantial distance between his home and work, and being in the work place, was not viable, as he occasionally soiled himself and needed to shower and change. He also relates that he would be required to be in the washroom for indeterminate periods of time, on an unpredictable basis.

According to his evidence, it was substantially less difficult for him to attend the real estate course, which was given some two or three minutes drive from his home. He could excuse himself from classes as need be, and if necessary absent himself at least for partial days. It does not appear disputed, however, that he was able to attain the level of 70% attendance during the course of the classroom sessions, a level necessary for successful completion.

The Arbitrator does not share the view of the Company that the grievor misled his physician. In the Arbitrator's view this is not a case of deliberate defrauding of the Company on the part of an employee for the purpose of furthering some other activity under the guise of a sick leave. On the basis of the medical evidence before me I am satisfied that Mr. Rothon was ill at the time, and that his decision that he could not attend at work was supported by his doctor. While it is debatable whether he should have attended the real estate training course, what is revealed, at most, is an error of judgment on his part, and a failure of full candour with his Employer. Mr. Rothon states that he did not want to disclose the nature of his illness to his supervisors for fear of being ridiculed, and indeed he did not disclose the full nature of his medical condition until the hearing before the Arbitrator. However, there was an obvious obligation upon him to give some explanation to the Company as to his activities and whereabouts during the medical leave of absence, if not during the leave itself, then certainly in the course of the subsequent disciplinary investigation conducted by the Employer. The grievor clearly failed in that obliggation. However, he did not, I am satisfied, set out to deliberately deceive or defraud the Company.

In the Arbitrator's view, in light, if the the grievor's length of service, and the fact that all of his absences in September and October can be said to have involved an error of judgment rather than a malicious or fraudulent intention, discharge is not an appropriate disciplinary penalty in the circumstances. Given his failure of disclosure throughout, however, and in particular his refusal to provide any clear medical documentation to the Company during the course of its investigation, or to give the Company access to his attendance records at Seneca College in October of 1993, he clearly deprived the Company of any opportunity to make an informed decision as to his true condition and motives. In the circumstances, no compensation should be paid.

The Arbitrator therefore directs that the grievor be reinstated into his employment, without loss of seniority and without compensation. In the Arbitrator's view the grievor should give serious thought to the need for full openness and candour in his relations with his Employer in the future.

April 20, 1995

**(signed) MICHEL G. PICHER**
**ARBITRATOR**