

# CANADIAN RAILWAY OFFICE OF ARBITRATION

## CASE NO. 2863

Heard in Montreal, Tuesday, 10 June 1997

concerning

**CANADIAN PACIFIC RAILWAY COMPANY**

and

**TRANSPORTATION COMMUNICATIONS UNION**

**EX PARTE**

### **DISPUTE – UNION:**

The assessment of 10 demerit marks to Mr. B. Osask's record for continued excessive absenteeism.

### **DISPUTE – COMPANY:**

Assessment of ten demerit marks to Mr. B. Osask's discipline record as a result of his continued excessive absenteeism.

### **STATEMENT OF ISSUE – UNION:**

On July 31, 1996, Mr. Osask was investigated for absence from work for the period of May to July 1996. Mr. Osask was sick on: May 02, May 07, May 21, June 21, July 15 and July 19. Mr. Osask supplied doctor certificates on every occasion when the Company requested one. Mr. Osask did not produce any certificates for June 12, July 15 and July 19, 1996. The Company did not request a doctor certificate for those three days.

On August 6, 1996 the Company assessed 10 demerits as a result of his excessive absenteeism.

The Union grieved that the discipline was unwarranted, and in any event excessive and asked Mr. Osask's discipline record be cleared of the 10 demerits.

The Company denied the grievance.

### **STATEMENT OF ISSUE – COMPANY:**

On July 31, 1996, an investigation was conducted with Mr. Osask in connection with his absence from work from May to July 1996. Based on the facts adduced from the investigation, Mr. Osask's discipline record was assessed ten demerit marks on August 6, 1996 for his continued excessive absenteeism.

The Union progressed a grievance requesting that the ten demerit marks which were assessed Mr. Osask on August 6, 1996, be removed from his discipline record.

The Company has denied the Union's grievance.

### **FOR THE UNION:**

**(SGD.) N. LAPOINTE**  
ASSISTANT DIVISION VICE-PRESIDENT

### **FOR THE COMPANY:**

**(SGD.) C. M. GRAHAM**  
FOR: GENERAL MANAGER, TRANSPORTATION  
SERVICE CENTRE

There appeared on behalf of the Company:

C. M. Graham – Labour Relations Officer, Calgary

And on behalf of the Union:

N. Lapointe – Assistant Division Vice-President, Montreal

P. J. Conlon – Assistant Division Vice-President, Toronto

### **AWARD OF THE ARBITRATOR**

The material before the Arbitrator confirms that the grievor suffers from asthma. Although it appears that recent medical documentation confirming his condition has not been forthcoming, the Company does not dispute that he does suffer from that condition. Further, the evidence confirms that the Company never requested medical certificates of the grievor for certain of the absences in respect of which he was disciplined. There is no indication that he has ever failed to produce a medical certificate if requested to do so. Further, there is some evidence in the file which indicates that Mr. Osask did obtain medical certificates for certain absences, although it seems that he may have simply shown those to a Company officer and retained the original himself. For example, the Union tables original certificates relating to absences due to asthma dated February 3 and May 27, 1997.

The Company's concern is understandable. It appears that on an annual basis the grievor's absences total some twenty-four, well in excess of the average for employees in his Winnipeg work centre. Further, it is not disputed that on at least one occasion in the past the grievor falsely claimed illness as a pretext to obtain a day off on July 16, 1993, a matter in respect of which he was disciplined by the assessment of fifteen demerits.

The primary burden of proof in a case of this kind, which involves discipline, is upon the employer. It must establish, on the balance of probabilities, that the grievor was either false in his claim of illness for the absences in question, or that if he was ill there was some negligence or carelessness on his part which contributed to his condition. On the evidence before me I cannot find that those elements are made out with respect to Mr. Osask's absences which are the subject of this discipline. It is not appropriate to infer false claims of illness based merely on the fact that the grievor admittedly made one such claim in the past, or based on the fact that certain of his absences fall immediately before or after his scheduled rest days. Consequently, the Arbitrator cannot conclude that the Company has discharged the burden which is upon it, to establish on the balance of probabilities that the grievor was either not ill on the dates claimed, or can be said to have contributed to his illness by his own carelessness or irresponsibility.

None of the above conclusions, however, derogate from the right of the Company to deal with the grievor's medical condition and related rate of absenteeism on a non-culpable basis, should it deem it appropriate to do so. If it can be shown that the grievor maintains a rate of absenteeism which is inconsistent with the fundamental bargain of employment made between himself and the Company, and that his asthmatic condition is such that it cannot be accommodated without undue hardship to the employer, in keeping with the standards of the **Canadian Human Rights Act**, a different conclusion might obtain. However, it should be noted, as reflected in the material before the Arbitrator, that the grievor has now authorized the Company's physician to make inquiries of his own doctors as to the nature of his overall medical condition. Hopefully, on the basis of that more detailed information, the parties will be in a position to address the problem of the grievor's absenteeism in a more constructive manner.

For all of the foregoing reasons the grievance is allowed. The Arbitrator directs that the ten demerits assessed against the grievor be removed from his record forthwith.

June 20, 1997

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