CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3002

Heard in Calgary, Wednesday, 11 November 1998

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS (UNITED TRANSPORTATION UNION)

DISPUTE:

Termination of employment of probationary employee Ms. T.P. Kenworthy of Lethbridge, Alberta on June 12, 1997.

JOINT STATEMENT OF ISSUE:

In a double registered letter dated June 12, 1997, the Company advised Ms. T.P. Kenworthy that her employment with Canadian Pacific Railway was terminated. The letter outlined various reasons for the action taken.

The Union appealed Ms. Kenworthy's termination on the basis that the information surrounding the Company's reasons for termination was incomplete and that before Ms. Kenworthy's employment could have been terminated for the reasons stated by the Company in their June 12, 1997 letter that she had the right under the collective agreement to a fair and impartial investigation to establish her responsibility, if any. In view of this, the Union asked that Ms. Kenworthy be reinstated into Company service without loss of seniority and with full compensation for wages and benefits lost.

The Company disagreed with the Union's position and refused to reinstate Ms. Kenworthy.

FOR THE COUNCIL:	FOR THE COMPANY:
(SGD.) L. O. SCHILLACI	(SGD.) K. E. WEBB
GENERAL CHAIRPERSON	FOR: DISTRICT GENERAL MANAGER, PRAIRIE DISTRICT

There appeared on behalf of the Company:

J. L. Dragani	– Labour Relations Officer, Calgary
M. E. Keiran	– Director, Labour Relations, Calgary
R. M. Smith	– Labour Relations Officer, Calgary
R. T. Bay	– Manager, Road Operations, Edmonton
L. Kohlman	– Field Safety Specialist, Safety & Regulatory Affairs, Calgary

And on behalf of the Council:

D. Ellickson	– Counsel
L. O. Schillaci	– General Chairperson, Calgary
B. McLafferty	– Vice-General Chairperson, Moose Jaw
M. G. Eldridge	– Vice-General Chairperson, CN West, Edmonton
W. McCotter	– Local Chairperson, Edmonton
B. Sparks	– Local Chairperson, Regina
T. P. Kenworthy	– Grievor

AWARD OF THE ARBITRATOR

Upon a close review of the material and evidence provided, the Arbitrator is satisfied that the Company erred in its decision to close the grievor's employment file. The record confirms that in March of 1997 the grievor and her Union representative met with Company officials to discuss her impending recall from layoff. It is not disputed that the Company's representatives were then made aware that the grievor had suffered a knee injury. It appears that subsequently there was a breakdown in communication between the grievor and the employer, occasioned perhaps in part by the fact that much of the communication between them was through the intermediary of Ms. Kenworthy's local union chairman. Additionally, it appears that a letter which the Company solicited from the grievor's orthopaedic surgeon, Dr. Martin Grypma, a letter which was apparently sent by the doctor, went astray and was not in fact received by the Company.

Having received no reply to her letter of recall sent in April, on June 12, 1997 Mr. R.T. Bay, Manager Operations at Lethbridge wrote the grievor a letter which reads as follows:

> Ms. Kenworthy:
>
> On April 3rd you were advised by registered letter that you were recalled for service to attend classroom instruction for Promotion to Conductor. In this letter you were also advised if you had any exceptional circumstances that prohibited you from returning to work you were to advise me. The only information that I have received is you have a knee injury which may have prohibited you from the on the job training portion of the Promotion to Conductor.
>
> During a meeting that you and your Legislative Representative, B. Quinn, Road Manager, Les Kohlman and Operations Coordinator, C. Lenchucha you advised that your doctor required a letter from me requesting the medical information. This letter was delivered to your Doctor on April 25th. A copy was provided to your Legislative Rep. who advised you of the contents. I spoke to your Doctor's nurse on April 28th and advised I needed this information even if it was late. I again contacted the nurse approximately ten days later and again requested this information. I advised your Legislative Representative that this information has not been received and I understand he spoke to you on two or three occasions concerning this information not being received.
>
> It is my understanding that you are presently employed at H&R Transport and that you have been working regularly. Given this, and with the lack of medical information to the contrary, we have to assume that you could have attended the classroom instruction for the promotion to conductor course.
>
> In view of the foregoing, your employment is hereby terminated with Canadian Pacific Railway. Arrangements will be made to have your pension contributions returned.

In the Arbitrator's view Mr. Bay and the other Company officers involved acted in good faith, and with a degree of patience, in attempting to obtain the appropriate medical information which would explain and justify the grievor's apparent failure to respond to her recall to service. I must also agree with the Company that this is not a disciplinary matter which would require the holding of an investigation under article 32 of the collective agreement. The issue is whether the Company was justified in invoking the provisions of article 29 clause (e) of the collective agreement which provides as follows:

> **29 (e)** Employees who have been laid off due to a reduction in staff will receive 15 days' notice by registered mail when being recalled for service, provided other employees are available. Otherwise they will return to actual service when recalled.
>
> Employees who do not return to actual service within 15 days of the date of the notice will be considered to have resigned and their records closed accordingly except that in exceptional circumstances, local arrangements may be made between the General Manager and the General Chairman to extend the 15 day period.

The Arbitrator is satisfied that on the particular facts of this case the Company erred in invoking the application of article 29(e) to terminate the services of Ms. Kenworthy. Firstly, it appears that local supervisors were under the incorrect impression that the grievor was in fact working for another employer on days during which she was in fact absent for knee surgery. Additionally, it does not appear disputed that she would, in any event, been unable to attend

the conductors' training course for which she was recalled by reason of the untimely death of her father, a fact apparently known to some of the Company's supervisors.

Nor does the record suggest that Ms. Kenworthy is herself entirely blameless. It would unfortunately appear that she was less than diplomatic in her first communications with Company supervisors who, in January or February, contacted her by telephone to canvas her interest in a possible recall for training. It seems that at that time she accused them of wanting to have her fired, an accusation which gave rise to the meeting of March 24, 1997. Further, it is less than clear to the Arbitrator that the grievor should have simply ignored the formal letter of recall which she did receive, on the assumption that the matter was being dealt with between her local Union representative and the Company.

For the purposes of the merits of this grievance, however, the Arbitrator is compelled to conclude that there was not an abandonment of employment on the part of Ms. Kenworthy in the circumstances disclosed. Moreover, to the extent that she then suffered, and apparently still suffers, from a physical disability related to a knee injury, the employer was under an obligation, pursuant to the **Canadian Human Rights Act**, to reasonably accommodate her circumstances. While, for the reasons touched upon above, I am satisfied that the Company did act at all times in good faith, in light of the further medical evidence now disclosed, and the confirmation of the apparent failure of communication between the grievor and the Company, I am satisfied that her purported termination as of June 12, 1997 must be viewed as null and void. The Arbitrator finds and declares that the grievor has not ceased to be an employee of the Company, and should not, by reason of her physical disability, suffer any reduction in seniority. In the circumstances, however, this is not a case for an award of compensation. Should there be any dispute between the parties with the conditions of the grievor's eventual return to work or her status under the collective agreement, the matter may be spoken to.

November 17, 1998

(signed) MICHEL G. PICHER
ARBITRATOR

SUMMARY – CROA 3002

Trainperson Kenworthy Lethbridge – Termination of probationary employee – employee failed to respond to formal notice of recall – breakdown in communication not abandonment of employment – employer has duty to accommodate Canadian Human Rights Act – no compensation GRIEVANCE ALLOWED

KEYWORDS – 3002

Termination probationary recall physical disability duty to accommodate allowed

CPR – CCROU/UTU – November 11 1998 – award dated November 17 1998