

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 3475

Heard in Calgary, Thursday, 10 March 2005

concerning

CANADIAN PACIFIC RAILWAY

and

**TEAMSTERS CANADA RAIL CONFERENCE
RAIL CANADA TRAFFIC CONTROLLERS DIVISION**

DISPUTE:

The termination of probationary Rail Traffic Controller R.C. Cansdale of Calgary, Alberta.

JOINT STATEMENT OF ISSUE:

On or about February 25th, 2003, R.C. Cansdale filed an "Employment Medical Examination Report" as part of her application for a position as a Rail Traffic Controller with Canadian Pacific Railway.

In their Employment Medical Examination Report, prospective employees are required to provide information regarding medical conditions as well as medication they may be prescribed., given that the position for which the person is applying is a safety critical position.

On April 21, 2003 R.C. Cansdale was hired into the Rail Traffic Controller program as a trainee.

On December 15, 2003 RTC Cansdale was issued a "Notice for Investigation" and attended that investigation on December 17, 2003.

With regards to Form 104 Disciplinary Notice dated December 31, 2003, Ms. Cansdale was being terminated for allegedly "wilfully withholding a known medical condition and medication that you are taking when applying for employment in a safety critical position."

The Union contends that the termination of probationary RTC Cansdale is improper and inappropriate under the circumstances and that her reinstatement as a Rail Traffic Controller should be granted with full seniority and made whole for all lost wages and benefits. The Union

further contends that probationary RTC Cansdale did not deliberately withhold medical information from the Company.

The Company has declined the Union's request, and believes that the termination of the grievor is justified and warranted under the circumstances.

FOR THE UNION:

(SGD.) J. RUDDICK
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) R. HAMPEL
FOR: DIRECTOR, NMC

There appeared on behalf of the Company:

R. Hampel	– Manager, Labour Relations, Calgary
Dr. J. Cutbill	– Chief Medical Officer, CPR
C. Ayton	– Labour Relations Officer, Calgary

And on behalf of the Union:

K. Essery	– Vice-General Chairwoman,
J. Ruddick	– General Chairman, Burlington
D. Arnold	– National Advisor, Calgary

AWARD OF THE ARBITRATOR

The grievor, who attended at the hearing, successfully applied for the safety critical position of a Rail Traffic Controller (RTC). During the application process she completed an Employment Medical Examination Report dated February 2003. On the form she indicated she was not suffering any psychiatric condition. She further indicated that she was not taking any medications at the time. She signed the Report which, in part, gave the employer permission to ask her doctor to release information to them. She also attested that the information provided was truthful and accurate. In accordance with its obligation, as the position was a safety critical one, the employer had the grievor seen by a CP physician during the initial medical assessment. The grievor, at this time, was undergoing certain personal private issues she chose not to disclose.

The grievor completed the training on October 20, 2003. On November 3, 2003 she told a supervisor she was unable to work the swing shifts required of an RTC. She indicated that it was because she was on anti-depressants which made it difficult to sleep during the day. She also indicated that the Company doctors knew of and had cleared her for use of the anti-depressant. This assertion to the supervisor was false.

On November 13, 2003, the grievor provided the Company with a letter from her physician indicating she was on medication that confounded transitions in sleep patterns to the extent that she became sleep deprived, causing safety concerns. A week later a further medical report was completed by her physician, at the request of the employer, indicating a diagnosis of depression commencing in the summer of 2002 and further indicating that the grievor would, for an indefinite period, be on 20 mg. of fluoxetine. It further indicated she needed to be accommodated.

With the above information, further clarification was sought of the grievor culminating in a Q&A on December 27, 2003. At all material times during the course of the investigation the grievor maintained that she had not falsified the report as she was, in her view, not suffering a medical condition at the time she completed the medical report. She did acknowledge that she was on medication at the time she completed the medical report. She was under the impression, she stated, "that the Company will check, that they will look into it." It was for this reason, she stated that she felt no need to indicate she was on medication.

She was subsequently dismissed for her failure to properly complete the medical form.

The grievor was a probationary employee at the time of her discharge. The only question then, and the only issue that has to be determined, is whether the grievor was discharged for reasons which were arbitrary, discriminatory or in bad faith. This means that the actions of the employer and its decision making process have to be analysed to see whether the grievance will be allowed or not.

The decision of the employer to hire the grievor as an RTC was based, among other reasons, on their conclusion from the Employment Medical Examination Report and the assessment of the CP physician that she could do the work of the position; that there was no medical reason that she could not do the job safely. Some time later they were confronted with the reality that, according to the grievor's physician she was on an anti-depressant, that she had been on it when hired, she would be on it indefinitely and that she needed to be accommodated. This information was not only new, it was also materially different from the information provided by the grievor at the time of hiring. At the very least, had the information been known to the employer, as well as the reason for the medication, it could have been addressed and an informed decision could have been made by the employer as to whether, given all the circumstances, hiring the grievor into the safety sensitive position of an RTC was appropriate at that time.

The grievor made a decision to withhold information from the employer. She, for very good reasons, did not want her situation broadcast. There were ways, however, to communicate this information confidentially to the medical staff of the employer, herself or through her physician. The employer's medical staff then would have been required to maintain confidential the information disclosed. Armed with this information, the medical staff could have, more than likely, dealt with the situation differently. Her decision deprived the employer of knowledge they needed to determine whether it was safe to hire her as an RTC. In fact, they were under a legal obligation under the Railway Medical Guidelines to ensure this was the case.

The grievor, disingenuously, took the position that she understood that signing the Employment Medical Examination Report meant that the employer would check her medical records the same way they would do a criminal or credit check. She blamed her situation on the employer for not performing the check. The reality is that there was no reason for the employer to check. She signed a statement indicating that she suffered no medical condition and was not taking medication. Why would the employer check the *bona fides* of the document unless there was a reason to suspect its contents and there was certainly none in the instant case.

An allusion was made that the employer discriminated against the grievor. The reality is that by her own actions in giving inaccurate and/or misleading information she took it out of the realm of human rights and the duty of accommodation under the **Canadian Human Rights Act**, and made it simply an issue of the Company's opinion

as to whether or not this was a person whose honesty and candour made her a good candidate for the safety sensitive position of an RTC.

Ultimately, no matter how the facts of this case are looked at, the decision of the employer was made based on the information it had at the time as disclosed by the grievor and her physician. The grievor chose to withhold critical information from the employer and the employer cannot now be accused of acting in an arbitrary or discriminatory manner or in bad faith when their decision was based on what they were told by the grievor herself.

The grievance is dismissed.

March 14, 2005

(signed) M. BRIAN KELLER
ARBITRATOR