

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

**CASE NO. 3487**

Heard in Montreal, Thursday, 12 May 2005

concerning

**CANPAR TRANSPORT LTD.**

and

**UNITED STEELWORKERS OF AMERICA (LOCAL 1976)**

**DISPUTE:**

The termination of Mr. Jeff Gough's employment with Canpar L.P. for his absence from work.

**JOINT STATEMENT OF ISSUE:**

On June 2, 2003, Mr. Jeff Gough left the Company premises stating he could not work under the conditions of harassment. Since that date of June 2, 2003, Mr. Gough has not returned to work. During that period of time Mr. Gough has provided the Company with medical information.

The Company attempted to return Mr. Gough to work either at the Hamilton terminal or, if Mr. Gough chose, at another terminal. Mr. Gough declined these offers.

On November 19, 2004, Canpar Transport L.P. terminated Mr. Gough's employment with them because in the Company's opinion there was no medical reason why Mr. Gough could not have returned to work at Canpar in some capacity and/or regardless of whether his absence from work was justified or not, there was no likelihood that he would be prepared to return to work at Canpar in the foreseeable future.

The Union grieved that Mr. Gough was unable to attend work because he was ill, that he required an accommodation and that he be allowed to remain off work, allowed to remain an employee, allowed to continue to seek short term disability insurance and allowed to advise the Company when his doctor indicates that he is able to return to work and under which conditions he may return to work.

The Union also grieved that the Company has failed to accommodate Mr. Gough and that they have discharged him without just cause.

The Union requested that Mr. Gough be immediately reinstated without loss of seniority and his record be made whole. The Union contends that Mr. Gough's reasons for declining the attempts to return him to work are valid.

The Company has denied the grievance.

**FOR THE UNION:**

**(SGD.) D. NEALE**  
VICE-PRESIDENT, LOCAL 1976

**FOR THE COMPANY:**

**(SGD.) P. D. MACLEOD**  
VICE-PRESIDENT, OPERATIONS

There appeared on behalf of the Company:

- M. Failes – Counsel, Toronto
- P. D. MacLeod – Vice-President, Operations, Mississauga
- B. Neill – Vice-President, Human Resources, Mississauga

And on behalf of the Union:

- P. J. Conlon – Chairman, Board of Trustees, Toronto
- N. Lapointe – President, Local 1976, Montreal
- J. Gough – Grievor

**AWARD OF THE ARBITRATOR**

The material before the Arbitrator establishes that the grievor left work on June 2, 2003 and has not worked since. The Union asserts that Mr. Gough suffered stress occasioned by the excesses of a manager. At least one medical evaluation diagnosed the grievor as suffering from post-traumatic stress disorder and anxiety disorder, although another medical opinion obtained by the Company did not sustain a similar diagnosis.

The Arbitrator is satisfied that the Company did make all reasonable efforts to accommodate the grievor's situation. Apart from corrective actions taken with respect to the supervisor in question, actions which it appears have corrected his management

style, the Company conducted a number of meetings in an attempt to reintegrate the grievor into the workforce, all without success. Among the offers made to the grievor was the possibility of his working at a location other than the Hamilton Terminal where he had encountered difficulties with the supervisor.

The record discloses that on July 30, 2004 the Company's efforts culminated in an offer which stated that if the grievor should return to the Hamilton facility all outstanding disciplinary interview notices would be cancelled and that for the first twelve months of his re-employment no disciplinary interviews concerning him could be initiated without the approval of higher management. In addition, he was assured that if he had any concerns about his treatment in the workplace he could take up his complaint with the Regional Manager.

Notwithstanding a follow-up meeting on August 5, 2004, the grievor declined to return to work. Sometime later, on November 18, 2004, the Company met with the grievor to again discuss his return to work. On that occasion, as indeed at the arbitration hearing, the grievor indicated that he was not medically cleared to return. In the meeting of November 18, 2004, in response to the suggestion that he could go to another location, he responded: "Why should I have to move?" With respect to his having direct recourse to higher management, rather than the supervisor who had caused him earlier difficulties, he responded to managers: "You are the system, I don't think anything will change." Sadly, the grievor seems to be fixated on the past. The Company then decided

that it had no alternative but to close the grievor's employment file and he was terminated effective November 19, 2004.

Based on the foregoing the Arbitrator would be inclined to conclude that the Company did make every reasonable effort to accommodate the grievor's condition. There is, however, one piece of evidence which might suggest an alternative other than simply dismissing this grievance. The Union's representative indicates that the nature of the grievor's psychiatric diagnosis was not made known to the Union until shortly before the arbitration. In the circumstances it is suggested that the Union was itself without sufficient knowledge to exercise its own obligation with respect to the duty of accommodation. The Arbitrator is prepared to give some weight to that submission, bearing in mind that a direction can be given which will protect the legitimate interests of the Company.

The duty of accommodation is not infinite or eternal. If it can be shown that after all reasonable efforts at accommodation have been made an individual cannot in fact attend at work, and there is no foreseeable likelihood that he or she will return within a reasonable time, an employer is entitled to bring the employment relationship to an end. That conclusion should only be arrived at, however, after the proper exhaustion of the fullest effort at accommodation. Given the Union's own lack of knowledge about the diagnosis made in respect of the grievor, I am satisfied that it is appropriate to extend the opportunity for accommodation, albeit for a limited period of time.

As matters now appear, the grievor's rehabilitation, which has gone on for two years, lies largely within his own hands and those of his physician. If he cannot, within a reasonable time, which the Arbitrator is satisfied would be one year, achieve medical clearance to return to work, at least on a partial basis of work hardening within the period of one year, there would be little alternative but to conclude that all efforts at accommodation have failed. At that point, the grievor's employment may be terminated.

For the foregoing reasons the grievance is allowed, in part. The Arbitrator directs that the grievor's termination be rescinded subject to the following condition. The grievor shall endeavour to pursue his own rehabilitation. His physician shall provide quarterly reports to the Company and to the Union with respect to his progress. Should he not be able to achieve a state of rehabilitation which will allow him to return to work within one year from the date of this award, the Company shall be justified in concluding that it has made all reasonable attempts to accommodate his condition and may then take such steps as it considers appropriate with respect to the continuation or termination of the grievor's employment. Should compliance with the conditions of this award become an issue in dispute, the matter may be spoken to.

May 16, 2005

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