

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

CASE NO. 3528

Heard in Montreal, Tuesday, 13 December 2005

Concerning

CANPAR TRANSPORT LTD.

and

UNITED STEELWORKERS OF AMERICA (LOCAL 1976)

DISPUTE:

Kelowna employee Pat Willicombe denied request for banked overtime while off due to a bona fide illness.

JOINT STATEMENT OF ISSUE:

The grievor was absent from work due to illness on August 15, 16, 17, 18 & 19, 2005. The Company requested a doctor's note to explain the absence after the end of the business day on August 17, 2005. The grievor was seen by his doctor on August 18, 2005 and was provided with a note allowing him to return to work on August 22, 2005.

Upon his return to work the grievor requested to withdraw 32 hours from the balance of his banked overtime to help cover his lost earnings. The Company denied the request.

The Union filed a grievance on behalf of the grievor citing violations of article 8.9.2 and Appendix "G" of the collective agreement. The Union grieved that the entire absence became *bona fide* at the time the doctor made his diagnosis of the grievor's medical condition and the grievor should have been entitled to withdraw his money from the overtime bank.

The Company contends that the absence only became *bona fide* on the date the grievor visited the doctor and the grievor is not entitled to request the money from the overtime bank for the days preceding the doctor's diagnosis.

The Company denied the grievance.

FOR THE UNION:

(SGD.) A. KANE
REGIONAL VICE-PRESIDENT

FOR THE COMPANY:

(SGD.) P. D. MACLEOD
VICE-PRESIDENT – OPERATIONS

There appeared on behalf of the Company:

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| P. D. MacLeod | – Vice-President – Operations, Mississauga |
| D. Verbin | – Supervisor, Edmonton |
| L. Pothier | – Supervisor, Human Resources, Mississauga |

And on behalf of the Union:

- A. Kane – Staff Representative, Vancouver
- R. Summerside – Vice-President, F.S.T., Montreal

AWARD OF THE ARBITRATOR

This grievance turns on the application of article 8.9.2 of the collective agreement, which reads as follows:

8.9.2 An employee off duty due to a bona fide illness who is not claiming Short Term Disability Benefits payments will be permitted to use accumulated Banked Overtime as of the second day of their absence.

The Company's representative submits that the supervisor at the grievor's terminal became suspicious of his absence and directed a lead hand to tell him to obtain a doctor's certificate, which was done late on August 17, 2005. It appears that the grievor visited his physician on the 18th and remained absent through the 19th of August 2005. Upon his return to work the Company denied the grievor's request to withdraw thirty-two hours from the balance of his banked overtime. At the hearing the Company acknowledged that in fact Mr. Willicombe is entitled to banked overtime in relation to August 19th.

The Company's position in respect of August 19th explains its general position in this matter. Its representative submits that the grievor's absence could only be confirmed as due to "*bona fide* illness" for the purposes of article 8.9.2 from and after the time he was examined by a physician and obtained a medical certificate. The Company's position is that on balance the fact that the grievor was diagnosed on the 18th of August as having a viral sinus infection does not amount to confirmation that on the days prior, namely August 15, 16 and 17, he was suffering from a "*bona fide* illness".

The Arbitrator cannot agree. Clearly in such matters as these each case must be considered on its own specific merits. The collective agreement contains no definition of the phrase "*bona fide* illness" to which the Arbitrator was referred. While Appendix G of the collective agreement deals with the right of the Company to require medical reports, including circumstances when a supervisor considers that a person's absence is suspect, it provides no guidance as to what does or does not constitute a *bona fide* illness.

I am satisfied that by *bona fide* illness the parties intended to mean nothing more than legitimate or actual illness. While it is true that in the case at hand there is no specific evidence, in the form of a current medical diagnosis, as to the grievor's condition on the first three days of his absence, there is evidence from which it can be responsibly and reasonably inferred that he was suffering from a *bona fide* illness. Firstly, it is not disputed that the grievor has no record of irregular or suspicious absenteeism over the entire period of his employment. On the contrary, he has been virtually devoid of absenteeism problems over his entire employment, spanning almost twenty years. Secondly, it is not unreasonable, in these circumstances, to conclude that the diagnosis of his physician of a viral sinus infection on the 18th of August is reasonably indicative of the very illness that commenced his absence from work on August 15, 2005. What evidence is there to make that link? The grievor's word. In this case I am satisfied that the grievor's word can be accepted, coupled with the medical diagnosis which he obtained from his physician. In the result, he has demonstrated, on the balance of probabilities, that he suffered *bona fide* illness from August 15 through 19, 2005.

The grievance is therefore allowed. The Arbitrator finds and declares that the Company violated the collective agreement by denying the grievor access to his banked overtime, as requested. The Arbitrator directs that the grievor be allowed to withdraw thirty-two hours from

the overtime bank to cover his loss of earnings in relation to the period August 15 – 19, 2005 inclusive.

December 20, 2005

(signed) MICHEL G. PICHER
ARBITRATOR