

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

**CASE NO. 3617**

Heard in Edmonton, Tuesday, 12 June 2007

concerning

**CANADIAN PACIFIC RAILWAY**

and

**TEAMSTERS CANADA RAIL CONFERENCE**

**DISPUTE:**

Grievance advancing the appeal of discipline assessed Conductor C. Richard of Thunder Bay who was issued 10 demerits for failing to demonstrate an acceptable attendance level and a pattern of absenteeism.

**JOINT STATEMENT OF ISSUE:**

Following a formal investigation on January 19, 2006, Conductor Richard was issued 10 demerits on January 30, 2006. The discipline issued to Conductor Richard was related to allegations of pattern absenteeism between May 1 and December 10, 2005.

The Union's position is that Conductor Richard has provided a reasonable explanation [for] her absences due to illness and that the Company has not met the burden of proof necessary to sustain formal discipline related to allegations of pattern absenteeism. Additionally, the Union contends there was no reason why the Company could not have accommodated Ms. Richard's medical absences as it would not have created any hardship to the employer. The Union submits that the employer has discriminated against Conductor Richard on the grounds of a medical disability.

The Union seeks removal of the discipline and that Conductor Richard be made whole for lost wages, mitigation of discipline or such remedy as the arbitrator should see fit.

The Company has declined the grievance.

**FOR THE UNION:**

**(SGD.) D. W. OLSON**  
**GENERAL CHAIRMAN**

**FOR THE COMPANY:**

**(SGD.) R. HAMPEL**  
**FOR: ASSISTANT VICE-PRESIDENT**

There appeared on behalf of the Company:

C. Ayotte	– Labour Relations Officer, Calgary
R. Hampel	– Manager, Labour Relations, Calgary
J. Anderson	– Yard Manager, Calgary
B. Thiede	– Manager, Operations, Calgary

And on behalf of the Union:

M. S. Church	– Counsel, Toronto
D. Olson	– General Chairman, Calgary
D. S. Finnsen	– National Vice-President, Calgary
D. Roberts	– Local Chairman,
C. Richard	– Grievor

### **AWARD OF THE ARBITRATOR**

The Company assessed ten demerits against the grievor for absenteeism. In essence, the Company asserts that the fifty-three days of absence recorded by the grievor between May 1, 2005 and December 10, 2005 were not justified and effectively constitute a fraud upon the Company.

The Arbitrator cannot accept that submission. The employer, which bears the burden of proof in this matter, offers no direct evidence to suggest malingering or falsifying of illness by the grievor. Nor is there any indication that at any time during the period in question the Company insisted upon Ms. Richard providing medical certificates to justify her absences, even though her rate of absenteeism was obviously higher than that of others. In essence, the Company simply allowed the passage of close to eight months and then questioned the grievor on the details of some fifty-three days when she was absent.

Not surprisingly, she did not have full recall of each and every incident. She did, however, establish two ongoing medical conditions of some concern. The first concerned menstrual difficulties for which she had been prescribed medication, medication which itself provoked an allergic reaction which aggravated her condition and caused her, on at least one occasion, to obtain hospital treatment. Secondly, a substantial number of her absences were occasioned by migraine headaches, a condition which she has experienced since 1995 and for which she was prescribed Oxycocet.

Nor can the Arbitrator share the Company's view with respect to the suggestion that the grievor's pattern of absenteeism tended to be take days in tandem with her assigned days off. By the Company's own account, 25% of her sick days were on either the day immediately before or after the grievor's day off. Assuming a five day work week that would suggest one absence in four might be attached to rest days. In my view that would indicate that the substantial majority of her absences were in fact not connected to days off. In the result, the objective evidence simply does not sustain the pattern of an absentee employee who seeks primarily to extend weekends and holidays or is engaged in a pattern of fraud or deception.

It is rare to see employers dealing with absences through discipline, save perhaps in egregious cases supported by eye witness or surveillance evidence that is justified. The Company has previously been recognized by this Office as properly applying an enlightened policy of monitoring innocent absenteeism whereby the merits of a high rate of absenteeism are not questioned, even though such innocent absenteeism at a high rate may justify non-disciplinary termination after suitable counselling. (See, e.g., **CROA 2656**.) In the instant case, the Arbitrator accepts the evidence of the grievor with respect to her medical problem. It is notable that by her own unchallenged account her difficulties with migraine headaches were effectively resolved after she underwent surgery for impacted wisdom teeth. It appears that that condition was a triggering cause of her headaches, a condition which she no longer experienced following the emergency dental surgery which she had on November 16, 2005. Unfortunately, that information and explanation was not provided to the Company in a clear fashion until shortly before the arbitration of this matter.

The grievance is therefore allowed. The Arbitrator directs that the ten demerits assessed against the grievor be stricken from her record.

June 18, 2007

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