CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3619

Heard in Edmonton, Tuesday, 12 June 2007

concerning

CANADIAN PACIFIC RAILWAY

and

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The dismissal of Conductor C. Richard of Thunder Bay who was dismissed from Company service on March 27, 2006 for failure to disclose a known medical condition and medication when applying for employment and for providing untruthful information during a formal investigation conducted January 19, 2006.

JOINT STATEMENT OF ISSUE:

Following a formal investigation March 2, 2006, Conductor Richard was issued notice on March 27, 2006, advising she had been dismissed from Company service. The discipline issued related to her alleged failure to disclose a known medical condition and medication she was using at the time she applied for employment. In addition, it was alleged she had provided untruthful information during a formal investigation conducted January 19, 2006, in relation to this condition.

The Union's position is that Conductor Richard provided a reasonable explanation that this information was conveyed to the examining physician during the medical assessment. Additionally, the Union contends that the Company has not met the burden of proof necessary to sustain formal discipline related to the allegations that the information provided during the investigation was not accurate.

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:	FOR THE COMPANY:
(SGD.) D. W. OLSON	(SGD.) R. HAMPEL
GENERAL CHAIRMAN	FOR: ASSISTANT VICE-PRESIDENT

There appeared on behalf of the Company:

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

And on behalf of the Union:

M. S. Church	– Counsel, Toronto
D. Olson	– General Chairman, Calgary
D. S. Finnson	– National Vice-President, Calgary
D. Roberts	– Local Chairman,

C. Richard – Grievor

AWARD OF THE ARBITRATOR

While the evidence and arguments surrounding the grievor's termination were relatively extensive, the issue in this grievance remains fairly narrow. Did the grievor fail to disclose a known medical condition and prescribed medication when she applied for employment and did she provide the Company false information with respect to that condition during the course of an investigation conducted on January 19, 2006?

As noted in a prior award (see **CROA&DR 3617**), the grievor has suffered from migraine headaches since 1995. While being investigated for alleged fraudulent absenteeism, during the course of an investigation conducted on January 19, 2006, Ms. Richard was asked "Were you prescribed any medication for this condition?", referring to her migraines. She answered "Yes, the same as what was laid out on my medical report when I was hired on with CP Rail."

The Company maintains that a review of the Personal Medical History Report filled out by the grievor at the time she was hired on December 12, 2003 fails to disclose, in a portion dedicated to her medical history, that she had suffered from migraine headaches or that she had a prescription for Oxycocet for that condition.

A review of the evidence indicates that the medical history form lists some 78 specific ailments, but does not identify headaches or migraines as an ailment which the applicant could respond about by simply ticking "yes" or "no" as provided on the form. The Company submits, however, that the grievor misled the employer when she responded "no" to the residual final question "Any other medical problems not listed above …". During its presentation the Company also objected to the fact that the grievor failed to indicate that she was taking Oxycocet for her migraine condition.

The grievor gives a substantially different account of what transpired when she filled out the medical history documents and was interviewed by the Company's physician at Thunder Bay upon being hired. Firstly, she relates that at that point in time her migraine headaches had been in remission for a period of approximately eight months. It would appear that while she would not dispute that it is a condition which might have been listed under the heading of "other medical conditions", it is not something which occurred to her at that time as falling within the same category as the named ailments listed on the form. Additionally, with respect to the issue of medications, what the document states under the heading "general history" is the following question: "List all medications or over-the-counter drugs that you are **currently** using" (emphasis added). In the grievor's view, as stressed by counsel for the Union, she was not then "currently" using any drug other than Ziaban, a medication she was then using to quit smoking, which she duly listed on the form.

Additionally, according to the grievor's recollection, she did indicate to the physician who interviewed her at the time that she had suffered migraine headaches for which she had been prescribed Oxycocet. According to the Union's representation, the grievor's recollection is that she had a discussion with the physician at that time "… to the effect that she ought not to go to work if she was taking the medication at the time of her shift." The physician's portion of the grievor's medical history record filled out at the time of her hire makes no reference to migraine headaches or the use of Oxycocet. On that basis the Company has concluded that the grievor was duplicitous when she filled out the form and is not telling the truth now.

The Arbitrator has some difficulty with the position asserted by the employer. It must be borne in mind that the employer has the burden of proof in this matter. It calls no evidence other than the recorded documentation to prove what it maintains is a fraudulent course of conduct on the part of the grievor. It is trite to say that the standard of proof must generally be commensurate with the gravity of the misconduct alleged. Fraud in obtaining employment is obviously a high level of misconduct. The Company's own form, signed by the employee, indicates that any false statement might result in discipline up to and including discharge.

At the arbitration hearing, however, the only person privy to the conversation between the grievor and the Company's physician at the time she was hired was the grievor herself. For reasons it best appreciates, the Company did not call the physician who interviewed the grievor to testify. It did not, in other words, call any direct testimony to rebut the direct testimony which the grievor has given with respect to what transpired when she was hired. In the result, the grievor's unchallenged evidence is that she did discuss her migraine condition with the physician who interviewed her at the time she was hired. It is that assertion which she made during the course of the investigatory statement taken on January 19, 2006 which is cited as part of the reason for her dismissal.

In coming to the conclusion that the grievor is to be believed, the Arbitrator is also influenced by two aspects of the evidence. Firstly, not unreasonably, the medical history form which refers to conditions such as diabetes, cancer and thyroid disease, does not list headaches or migraines as a condition to be reported. It would not in my view be unreasonable to overlook them when filling out the form. Secondly, the grievor did disclose that she had undergone knee surgery for the removal of cartilage, an admission which could well have jeopardized her application to work in a physically demanding job. On the whole, her responses do not appear to be fashioned to mislead or conceal. I am satisfied that this is not a case of deliberate deception, as was found in **CROA&DR 3475**.

Can it be said that the grievor did violate her obligation of full disclosure at the time she filled out her medical history form? I believe that the answer to that is affirmative, but that her omission was more technical than substantive. As I accept the account of Ms. Richard that she had not suffered migraine headaches for a period of some eight months at the time of her hiring interview and medical examination, it is entirely credible that she simply overlooked headaches as a medical condition to be noted on the form, given the extensive lists of specific serious or major diseases and conditions listed on that form. That failure, coupled with her subsequent discussion of the migraine condition with the Company's physician, substantially mitigates the gravity of her infraction on that occasion. In the Arbitrator's view it would merit no more than a reprimand. Nor does there appear to have been any effort on the part of the grievor to conceal from others at work that she had a problem with migraine headaches. The Company's theory of deliberate and fraudulent concealment is simply not borne out on all of the evidence, albeit a technical infraction is established.

In the result, the Arbitrator is satisfied that the Company did not have just cause to terminate the grievor's employment. She is therefore to be reinstated without loss of seniority and with full compensation for all wages and benefits lost. She shall be subject to a written reprimand for her oversight on the filling out of the medical history form and shall also, as a condition of reinstatement, be subject to a medical examination of physical fitness similar to that administered by the Company at the time she was hired. Should there be any dispute between the parties with respect to the interpretation or implementation of this award the matter may be spoken to.

June 18, 2007

(signed) MICHEL G. PICHER
ARBITRATOR