CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3776

Heard in Edmonton, Wednesday, 10 June 2009

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the assessment of 45 demerits to Employee X.

JOINT STATEMENT OF ISSUE:

On October 12, 2006, Employee X was assessed 45 demerits for alleged "Failure to provide a full and complete disclosure of all relevant information, upon the submission of your pre-employment medical form to the Company's Chief Medical Officer on October 19, 2005."

The Union contends that the investigation was not conducted in a fair and impartial manner per the requirements of the collective agreement. For this reason, the Union contends that the discipline is null and void and ought to be removed in its entirety and the grievor be made whole.

The Union contends that the grievor was wrongfully held out of service, contrary to the collective agreement and requests he be made whole for his losses plus interest.

The Union further contends that the Company has not met the burden of proof necessary to justify formal discipline or in the alternative, that the penalty is excessive. In addition, the Union contends that the assessment of discipline violates, *inter alia*, the *Canadian Human Rights Act*.

The Union requests that the discipline be removed entirely from the grievor's record, and that he be made whole for any losses incurred as a result of this discipline. In the alternative, the Union requests that the penalty be mitigated as the arbitrator sees fit.

The Company disagrees and denies the Union's request.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) D. OLSON	**(SGD.) A. AZIA GARCIA**
GENERAL CHAIRMAN	**FOR: ASSISTANT VICE-PRESIDENT, OPERATIONS**

There appeared on behalf of the Company:

B. Deacon	– Labour Relations Officer, Calgary
D. Corrigan	– Labour Relations Officer, Calgary
D. Hoppenreys	– Service Area Manager, Moose Jaw
C. Ruff	– Manager, Operations, Medicine Hat

R. Hampel – Counsel, Calgary

And on behalf of the Union:

K. Stuebing – Counsel, Toronto
D. Olson – General Chairman, Calgary
D. Fulton – Vice-General Chairman, Calgary
B. Hayden – Local Chairman,
Employee X – Grievor

AWARD OF THE ARBITRATOR

The grievor, who is twenty-three, had brain surgery when he was twelve. He suffered from epilepsy as a young man before the surgery. The grievor filled out a pre-employment medical form on October 19, 2005. He did not disclose his prior medical condition in the form. The grievor then went on to successfully complete his six month conductor training program.

The grievor's medical condition only came to the attention of the Company in August 2006. On August 11, 2006, the grievor was deemed medically unfit and removed from service. The grievor was removed from service after a telephone interview between the grievor and Dr. Corbet of the OHS department. The grievor confirmed in that discussion that he had had epilepsy as a youth prior to the brain surgery, He also confirmed to Dr. Corbet that he was cured of the disease and was not taking any prescribed medication.

During his telephone interview with Dr. Corbet about his medical history, the grievor was asked specific questions that were not based on his original medical examination report form that he signed on October 19, 2005 (Rev 01-02-15), but rather a later version of the same form (Rev 09-21-05). The two forms are different,

particularly as it relates to the questions concerning the epilepsy condition. The older form, in that regard, only lists “Seizures” under the heading *‘Nervous System Problems’* while the newer form states “Epilepsy, seizures or convulsion” under the same heading.

I agree with the Union’s position that the investigation was flawed. The grievor was called on to answer questions at his investigation on a document that he did not even sign at the time he applied for employment. The whole case for discipline is based on the grievor’s answers provided in the medical form Rev 01-02-15 and yet that key document was never put to him by the Company at any point during the investigation. Indeed the questions put to the grievor during his investigation were “paraphrased” extracts taken entirely from Rev 09-21-05 as opposed to the original questionnaire, Rev 01-02-15. He was never asked any questions at any point during the investigation about the answers he provided in the medical examination report, Rev 01-02-15. I note the comments in **CROA&DR 3619**:

> 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. …

The grievor can only be called on to account for his actions on the basis of the actual document which confirms the purported misrepresentation and not on some other subsequent document such as the later medical form. Any responses from the grievor to the later version of the form during the investigation cannot be given any weight under the circumstances.

I would also add that, in the circumstances of this case, it was not too late in my view for the Union to raise the absence of the original medical form subsequent to the interview. Although the Union did not raise the absence of the original document at the investigation in the initial grievance filed by the Local Chairperson on December 1, 2006, it did so on February 7, 2008 as the matter proceeded through the grievance procedure from the General Chairman's office. The Company in turn rejected the General Chairman's position on the issue when the grievance was denied on March 24, 2009. In my view, the Company was properly notified of the issue during the course of the grievance procedure as the matter proceeded through to arbitration. Further, there is no evidence before me that the Company was prejudiced as result of the absence of earlier notice of the Union's position concerning the medical form.

In conclusion, I agree with the Union that the Company breached the collective agreement requirements for a fair and impartial hearing and the discipline is declared to be *v*oid *ab initio*. The forty-five demerits imposed by the Company for this incident shall be removed from the grievor's disciplinary record.

June 24, 2009

(signed) JOHN M. MOREAU, Q.C.
ARBITRATOR