

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

**CASE NO. 3943**

Heard in Montreal, Thursday, 14 October 2010

Concerning

**CANADIAN PACIFIC RAILWAY COMPANY**

and

**TEAMSTERS CANADA RAIL CONFERENCE  
RAIL CANADA TRAFFIC CONTROLLERS**

**DISPUTE:**

The denial of Weekly Indemnity Benefits for Rail Traffic Controller Hugh Nugent.

**JOINT STATEMENT OF ISSUE:**

On March 18, 2010 Rail Traffic Controller Hugh Nugent informed the Company that he would be going off on sick leave and subsequently filed with Manulife for Weekly Indemnity Benefits. On April 22, 2010, Mr. Nugent received notification from Manulife that his claim was denied stating that his employer had relieved him from duties on March 18, 2010 and subsequently he was held out of service and an inactive employee as of the date of his disability (March 22nd). Therefore he was not an eligible employee and consequently not entitled to Weekly Indemnity Benefits.

The Union contends that Mr. Nugent was not out of service and was an eligible employee at the time of his application for benefits and therefore was entitled to claim Weekly Indemnity Benefits.

The Union requests that Mr. Nugent be immediately returned to service and made whole for all wages and benefits.

The Company disagrees and denies the Union's request.

**FOR THE UNION:**  
**(SGD.) S. BROWNLEE**  
GENERAL CHAIRWOMAN

**FOR THE COMPANY:**  
**(SGD.) J. DORAIS**  
MANAGER, LABOUR RELATIONS

There appeared on behalf of the Company:

D. Burke	– Labour Relations Officer, Calgary
A. A. Garcia	– Director, Labour Relations, Calgary
R. Hampel	– Counsel, Calgary
P. Couture	– Manager, Montreal Operations Centre
B. Deacon	– Labour Relations Officer, Calgary

And on behalf of the Union:

- S. Brownlee – General Chairwoman, Stony Plain
- F. Zamarría – Vice-Local Chairman, Montreal
- C. Clark – Local Chairman, Montreal
- T. Beaver – General Chairman, TCRC (LE), Oshawa

### **AWARD OF THE ARBITRATOR**

This arbitration concerns the status of Rail Traffic Controller Hugh Nugent following certain events on March 18, 2010. The Company maintains that as of that date the grievor was effectively held out of service and was no longer an active employee. The Union claims that he remained on the active employee list, was not laid off or held out of service and was therefore entitled to claim sick leave benefits, as he did, effective March 22, 2010.

The record discloses that Mr. Nugent was hired on November 15, 2005 as a crew dispatcher. In January of 2008 he qualified as a Rail Traffic Controller working in the Montreal Operations Centre. It appears that he qualified on all desks in the Montreal Operations Centre save the MacTier desk on which he was unable to qualify notwithstanding two attempts and additional training. As a result of layoffs in January of 2010 Mr. Nugent became the junior most employee at the Montreal Operations Centre and was soon transferred to the Seaway Tower as an Interlocking RTC. He commenced working on the Seaway Spur on February 24, 2010. It appears that two serious errors made on his first day on duty at the Seaway Tower resulted in two separate heads of discipline being assessed against him for important rules violations. As of February 26

an arrangement was put in place whereby the grievor was not allowed to work without supervision and was obliged to re-familiarize himself with the Seaway Spur territory.

On March 18, 2010 Mr. Nugent was re-evaluated on the Interlocking RTC desk for the Seaway Spur. Trainer Steve Harrison and the Operations Manager at the Montreal Operations Centre, Mr. Paul Couture, were involved in that process. The record reveals that during the course of that tour of duty the grievor made two errors in respect of blocking switches and signals, failing to insert locking pins as required. Mr. Nugent's repetition of that error, and his subsequent inability to recall the instructions he was given in relation to a TOP provided to a Track Foreman, caused Mr. Couture to become concerned. It seems that while the grievor was excused from his desk for a short time Mr. Couture communicated with the Manager of Operations at the Montreal Operations Centre, Mr. Jim Blotsky, advising that he could not qualify the grievor and that his evaluation was to be terminated. It appears that an understanding was reached between Mr. Couture and Mr. Blotsky that Mr. Nugent would be sent home without completing his tour of duty for that day.

A meeting of approximately twenty minutes then ensued between Mr. Couture and Mr. Nugent. It does not appear disputed that Mr. Couture then informed the grievor that he had not qualified for the Interlocking RTC desk at the Seaway Spur. According to the Company's account of events the grievor expressed to Mr. Couture concerns that he would be given two weeks' notice and then be dismissed. It seems that Mr. Couture responded that dismissals were not handled in that way and must involve an

investigation of “all possible scenarios”. Shortly thereafter Mr. Nugent was informed by Mr. Couture that he was relieved of his duties, that he would be compensated for the remainder of his shift and that he should go home. It appears that he was also told that a member of management would contact him on March 22, 2010, being the Monday following Thursday March 18.

Later the same day, some three hours after being relieved of his duties, Mr. Nugent emailed Mr. Couture advising that he was going on sick leave and would update Mr. Couture as to his status the following week. The grievor subsequently submitted forms to Manulife to claim Weekly Indemnity Benefits (WIB). Those documents indicate the first date of illness and treatment as being March 22, 2010. It appears that the grievor’s application for WIB was initially unsuccessful for want of documentation. It would seem that the documentation was eventually obtained and, after some uncertainty Manulife appears to have reached the point where it indicated that it was prepared to provide him WIB. However it appears that the Company then interceded, advising the insurer that in fact the grievor had ceased to be an employee on active duty as of March 18, 2010, and was therefore not entitled to Weekly Indemnity Benefits.

The Company’s position is that the grievor was pulled out of service by Mr. Couture during the course of his tour of duty on March 18, 2010 and that thereafter he could not claim wages or benefits under the collective agreement, including Weekly Indemnity Benefits. The Company points to article 35.03.01 of the collective agreement which provides:

**35.03.01** When an employee has been suspended for investigation, a decision shall be rendered as quickly as possible but not later than ten calendar days from the date of the suspension or such other period as might be mutually agreed upon by the parties. If held out of service more than 10 calendar days, or such other period agreed upon, awaiting result of investigation at the Company's instance the employee will be paid schedule wages for the time in excess of 10 calendar days, or such other agreed upon period, whatever the decision may be.

The Union relies on certain documentation within the Company's records to argue that in fact the Company viewed the grievor as having been on sick leave. In that regard it points to email correspondence between the Company and Manulife. That correspondence reveals that initially the Company's communications with the insurer were to the effect that the grievor's application should be processed and properly documented. In the early stages of those communications there was no position taken by the Company to the effect that the grievor was in fact not an active employee at the time of his claim. It would seem that on April 16, 2010 Manulife's claims officer communicated to her Company correspondent that the documentation was finally reviewed and that based on the information provided the claim would be approved, asking whether the Company had any concerns. Ultimately on April 19, 2010 the Company advised the insurer that "... we determined that this [employee] was effectively held out service upon his DOD ...". That conclusion is also reflected in other emails between Company officers, including a message from John Dorais to Ms. Judy Au on April 16 stating: "After reviewing with REW our view is that he was relieved of his duties due to safety concerns, thus HOS, and is therefore an inactive employee. Consequently, I don't believe that he would be entitled to benefits, correct?"

As noted above the Union relies on these communications, and the initial approach taken by the Company which appears to have been to process the grievor's WIB claim, as well as the fact that work schedules, apparently down to the present time, show Mr. Nugent as being on sick leave. It submits that these facts effectively confirm that at the time he made his claim for Weekly Indemnity Benefits he was viewed by the Company as entitled to do so.

In the Arbitrator's view in assessing the instant case it is substance, and not form, which must prevail. The issue at hand is what was the precise status of Mr. Nugent as of the moment he was instructed to go home by Mr. Couture on March 18, 2010? After careful review, the Arbitrator is compelled to accept the Company's characterization of the grievor's status at that time. As is reflected in the account of events related above, Mr. Nugent was effectively being carefully monitored in the performance of his duties, in a manner akin to a probationary status, albeit that was not his situation, in handling RTC duties on the Seaway Spur. That resulted from the fact that he committed two serious rules infractions on his first day of duty at the Seaway Tower on February 24, 2010. When the grievor made two serious errors, and was unable to recall instructions given, he was immediately taken off duty by Mr. Couture.

In the Arbitrator's view it is significant to understand the nature of the discussion which transpired with Mr. Nugent at that time. The Union offers no evidence to rebut the Company's submission that upon being taken off his desk by Mr. Couture the grievor inquired as to whether he would be given two weeks' notice and effectively terminated.

The supervisor's response to him was that termination was not done in that fashion, and that an investigation would be conducted. The Arbitrator has difficulty in viewing the conversation which took place between Mr. Nugent and Mr. Couture as anything but a clear exchange which placed the grievor on notice that he was no longer working and that he would be investigated and possibly terminated. Indeed the record further discloses that following these events the Company attempted, without success, on repeated occasions to communicate with the grievor to have him attend an investigation. Those primarily responsible for his employment status clearly viewed him as suspended pending the investigation.

While it is true that certain internal correspondence would indicate that some within the Company felt that since the grievor's claim was made on a day when he was in fact at work, it should be processed in the normal fashion. There is no reason to believe, however, that those who made that judgement were in fact privy to the decision made by Mr. Couture and clearly communicated to Mr. Nugent some three hours prior to when he made his claim for Weekly Indemnity Benefits. I must agree with the representatives of the Company that at best what transpired was an administrative error in the handling of the grievor's file. There is nothing in the material which persuades the Arbitrator that in fact Mr. Nugent was viewed, for any practical purposes, as being an active employee by those responsible for his employment status from and after his discussion with Mr. Couture and the instruction given him to leave the workplace pending the investigation process.

In the result, the Arbitrator is satisfied that the grievor was in fact removed from active service some three hours prior to the time he attempted to claim Weekly Indemnity Benefits. It is not disputed that under the collective agreement, and policy governing those benefits, he could only be entitled to them if he was an active employee at the time of his claim. In fact he was not. On that basis, the grievance must be dismissed.

October 18, 2010

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