

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 3977**

Heard in Montreal, Thursday, 10 February 2011

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

MAINTENANCE OF WAY EMPLOYEES DIVISION

EX PARTE

DISPUTE:

Claim on behalf of Employee "X".

UNION'S STATEMENT OF ISSUE:

On June 23, 2010, the grievor experienced a dizziness/fainting spell at work. He went to the hospital where the attending physician described the episode as syncopal (i.e. resulting from a drop in blood pressure). Subsequent testing revealed some inflammation of the liver. The grievor returned to work but was reduced to a non-safety sensitive position. Some four months later, in October 2010, he was removed from service without pay. In November 2010 he was required to sign an EFAP and OHS "Contract for Successful Treatment" before being permitted to return to a non-safety sensitive position. He was also required to sign an Undertaking that he would adhere to the EFAP Contract and to the terms of the letter from OHS dated November 18, 2010 before receiving any compensation for the time he was held out of service. With all this in mind, the grievor signed the EFAP Contract and the Undertaking and, as a result, was returned to service with compensation for the time he was held out of service. The parties have agreed that the remaining issues relating to the grievor's situation will be dealt with within the framework of a single statement of issue.

The Union contends that: **(1)** The grievor is an employee with more than twenty years of service who, in the circumstances of this case, has been blatantly and overtly bullied by the Company. **(2)** No evidence of any kind exists that the grievor has ever experienced any kind of behavioural, alcohol, substance abuse or impairment issues at work or is incapable of working in a safety sensitive position. **(3)** After June 23, 2010 the grievor worked without incident until

the end of October when he was summarily removed from service without pay. **(4)** The dizziness/fainting spell that occurred on June 23, 2010 was a unique and onetime event. **(5)** The Company's decision to reduce the grievor to a non-safety sensitive position in June 2010 was not based on any kind of behavioural or performance issues and was therefore unwarranted and illegitimate. **(6)** The Company's decision to remove the grievor from service in October 2010 was not based on any kind of behavioural or performance issues and was therefore unwarranted and illegitimate. **(7)** The Company's requirement that the grievor sign and adhere to an EFAP and OHS Contract for Successful Treatment before being permitted to return to a non-safety sensitive position or to receive any back pay for the time held out of service was heavy-handed and illegitimate. By the end of November the grievor had been out of work without pay for some five weeks. The grievor supports a family and the Christmas season was looming. In effect, the Company starved the grievor into submission leaving him with no choice but to sign the EFAP agreement. In view of this, the EFAP agreement is null and void *ab initio*.

The Union requests that: **(1)** the grievor was wrongly reduced to a non-safety sensitive position; **(2)** the grievor was subsequently wrongly removed from service without pay; and **(3)** the grievor was wrongly required to sign and adhere to an EFAP and OHS contract before being able to return to service or to receive back pay.

The Union further requests that: **(1)** the EFAP and OHS agreement the grievor signed be declared null and void and of no force or effect; **(2)** the grievor be returned to work immediately in a safety sensitive position; **(3)** the grievor be made fully and completely whole for all wages, benefits, expenses and seniority lost back to June 23, 2010.

The Company denies the Union's contentions and declines the Union's requests.

COMPANY'S STATEMENT OF ISSUE:

On June 23, 2010, the grievor collapsed while at work. At this time he was occupying the safety sensitive position of Crane Operator. He was transported to hospital where he was assessed and treated as a result of his collapse. The attending physician reported an abnormality of the liver which, based on his admission of consumption was consistent with possible alcohol abuse. On that basis, the grievor was advised to seek medical follow-up when he returned to his home location. Pending receipt of those assessments, the grievor was returned to work in a non-safety sensitive position.

...

The Company contends that: **(1)** The grievor has been treated fairly, in a manner so designed to protect both his safety and well-being, as well as the interests of the Company, fellow employees and the public at large. **(2)** The Company's decision to restrict the grievor to a non-safety sensitive position was based solely on medical evidence which required further medical assessments to remove the conditions. **(3)** The Company's decision to remove the grievor from service as a result of an independent medical evaluation (IME) was justified under the circumstances as was the requirement for the grievor to enter into an EFAP contract prior to being allowed back to work.

The Company request that: **(1)** the Company's decision to restrict the grievor to a non-safety sensitive role, subsequent to his June 23, 2010 collapse and consequent to the medical information provided, be deemed appropriate and this grievance be dismissed. **(2)** the grievance for lost wages be dismissed in its entirety as the grievor has not suffered any loss of wages

based on his restrictions. **(3)** the arbitrator hold that the requirement for the grievor to sign and complete the provisions of the EFAP contract be sustained prior to his return to work recognizing the interests of all parties.

**FOR THE UNION:
(SGD.) WM. BREHL
PRESIDENT**

**FOR THE COMPANY:
(SGD.) K. HEIN
MANAGER, LABOUR RELATIONS**

There appeared on behalf of the Company:

R. Hampel	– Counsel, Calgary
Dr. R. Baker	– Consulting physician, Richmond
M. Goldsmith	– Labour Relations Officer, Calgary

And on behalf of the Union:

Wm. Brehl	– President, Ottawa
D. Brown	– Counsel, Ottawa
W. Phillips	– Local Chairman, Belleville

The hearing was adjourned by the Arbitrator to April 2011.

On Wednesday, April 13, 2011, there appeared on behalf of the Company:

R. Hampel	– Counsel, Calgary
Dr. R. Baker	– Consulting physician, Richmond
M. Goldsmith	– Labour Relations Officer, Calgary

And on behalf of the Union:

Wm. Brehl	– President, Ottawa
D. W. Brown	– Counsel, Ottawa
A. R. Terry	– Vice-President, Ottawa

AWARD OF THE ARBITRATOR

The record before the Arbitrator confirms that on June 23, 2010, while working in the safety sensitive position of Crane Operator, the grievor fainted into unconsciousness. During his subsequent examination in a hospital he advised the attending physician that he regularly consumed eight or more beers per day. Upon the pursuit of medical tests it was revealed that he had elevated liver enzymes, a condition consistent with an alcohol use disorder. Based on the information gathered the grievor was removed from operating any heavy machinery or performing safety sensitive work

and, it appears, he also lost his driving privileges as the treating physician was obliged to advise the provincial Ministry of Transport of the incident and the grievor's condition.

In essence, the Company has effectively demoted the grievor from working in any safety sensitive capacity. As indicated at the hearing, implicit in that demotion is the possibility that he can be restored to safety sensitive work should he eventually provide to the Company proper medical certification to confirm that his liver has returned to normal and that he is no longer vulnerable to blackouts which might be caused by an alcohol use disorder. Indeed, the submission of the Union is that the grievor has made considerable progress with respect to the abstinence from the consumption of alcohol and his participation in the activities of Alcoholics Anonymous.

The Arbitrator cannot find, however, that the Company violated the grievor's rights with respect to his treatment, including his removal from safety sensitive work and the requirement that he sign and observe the conditions of an EFAP&OHS employment contract as a condition of continued employment. To be clear, the Arbitrator is satisfied that given the grievor's inexplicably having passed out in the early morning hours of a work day, coupled with his admitted regular heavy consumption of alcohol and his elevated liver enzyme levels, the Company was entitled, if not obligated, to remove him from safety sensitive work pending proper medical documentation which would confirm that he could safely be returned to such service. Nothing in this award prevents his return to safety sensitive work when he is medically certified for that purpose.

For all of the foregoing reasons the grievance must be dismissed.

April 18, 2010

(signed) MICHEL G. PICHER
ARBITRATOR