CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3997

Heard in Montreal, Wednesday, 13 July 2011

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The allegation of the Union with respect to the Company's failure to return Employee X to active service.

COMPANY'S STATEMENT OF ISSUE:

On September 29, 2010, The Canadian Human Rights Tribunal upheld the complaint of Employee X dealing with the matter of family status discrimination under the *Canadian Human Rights Act* and ordered the reinstatement of the grievor.

The Company's Chief Medical Officer reviewed the grievor's medical file and all information and medical reports submitted by the grievor and her physician with regards to her return to active service performing safety critical work. After this review Dr. Leger requested that additional medical information be provided before the grievor could be deemed medically fit to work. To date the grievor has not provided the requested information to the Chief Medical Officer and therefore the grievor has not been cleared for return to work in a safety critical position. The grievor denied access to her medical file in this matter to CN Labour Relations.

The Union contends that the Company has misinterpreted prior physician reports concerning the grievor's fitness for duty and that the Company has improperly held the grievor out of service. The Union requests that the grievor be made whole for all losses while being held out of service.

The Company disagrees with the Union's contentions.

FOR THE COMPANY:
(SGD.) P. PAYNE
FOR: DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Company:

Wm. Hblichuk	– Counsel, Montreal
P. Payne	– Manager, Labour Relations, Edmonton
S-P Paquette	– Counsel, Montreal
K. Morris	– Sr. Manager, Labour Relations, Edmonton
Dr. D. Leger	– Chief Medical Officer, Montreal
D. VanCauwenbergh	– Director, Labour Relations, Toronto
D. Crossan	– Manager, Labour Relations, Prince George
K. Smolynec	– Sr. Manager, Occupational Health Services, Montreal
J. Kwan	– Compensation Advisor, Montreal
N. Hart	– Superintendent, Vancouver

And on behalf of the Union:

M. A. Church	– Counsel, Toronto
B. R. Boechler	– General Chairman, Edmonton
R. A. Hackl	– Vice-General Chairman, Edmonton
J. Robbins	– General Chairman, CN Lines Central, Sarnia
Employee X	– Grievor

AWARD OF THE ARBITRATOR

On September 29, 2010 the Canadian Human Rights Tribunal issued a decision in favour of the grievor following her complaint that she had been denied rights under the **Canadian Human Rights Act** by the Company. Essentially she alleged, successfully, that the Company discriminated against her on the basis of her family status by failing to accommodate her parental obligations and terminated her employment when she declined to be forced to take a conductor's position in Vancouver, which would have required her to leave her family. The Tribunal ordered the payment of compensation to the grievor for wages and benefits lost from March 1, 2007 to September 29, 2010, the date of the decision. At paragraph 180 of its decision the Tribunal ordered the Company to reinstate the grievor into her conductor's position at the Jasper Terminal "… after she has, if necessary, updated her rules and medical certificates."

Subsequently, the parties were unable to agree on the method of the grievor's reinstatement, particularly in relation to her medical certification. It appears that the grievor duly passed her rules test and successfully underwent a full pre-employment

medical evaluation with a view to returning to work. Notwithstanding that she successfully passed that examination, the Company's Occupational Health Services asked the grievor's physician, Dr. Caffaro of Edmonton, to provide confirmation as to the status of several conditions experienced by the grievor in the past, including a loss of consciousness in 1994, a neck fracture in 2005 and left knee injury in 2006. By letter dated November 9, 2010 Dr. Caffaro advised the Company's Nurse Case Manager, Nurse C. Kuemper, that the grievor "… has no ongoing symptoms that require medical involvement or impact her ability to significantly carry out pleasurable and other daily tasks. … There are not current or foreseen restrictions for this patient. … There is no evidence before me that would disqualify the patient from performing tasks required to operate/control trains in an appropriate manner."

That response did not satisfy Nurse Kuemper. On the same date she drafted a response to Dr. Caffaro. She requested "… the relevant medical documentation" regarding the three medical incidents in the grievor's record. Dr. Caffaro responded, apparently by facsimile the following day, including appended information with respect to the neck and knee injuries, and with regards to the loss of consciousness in 1994 simply noting: "no information available on my chart."

The record discloses that at the time of the grievor's single incident of having lost consciousness, apparently in late 1994, she came under the care of Neurologist Dr. Ted Roberts. In a report which he prepared dated December 18, 1995 Dr. Roberts reported, among other things: "MRI normal", "EEG non epileptic". His report further noted that she had been seizure free for more than a year, since August 1994. Having been last examined by him on September 20, 1995, he then declared her prognosis to be good and that she was fit to return to work without restrictions.

Unfortunately, the Company's new OHS Nurse, Nurse Sandra Hanna, misread Dr. Roberts' report, interpreting his writing to state "EEG now epileptic" rather than "EEG non epileptic". In the Arbitrator's view that error was not unreasonable, at least on the face of the writing, as Dr. Roberts did write the word "non" in such a way as the final

'n' was indistinguishable from a 'w'. However, it does not appear disputed that that interpretation was, in the nurse's own words "contradictory given the attached EEG report dated July 26, 1995." On the strength of her impression Nurse Hanna wrote to the Company's Chief Medical Officer, Dr. Daniel Leger, indicating the "EEG now epileptic" notation and asking, in part: "Would you still like neurological report completed before return to work? What follow up would you like?" To that Dr. Leger responded:

> We should obtain a neuro report. Could be filled out by FP if he feels comfortable (don't know if he has the neuro info on file; maybe we could send him …), or by neuro. We should have confirmation of last seizure approximate date, and history since including meds. If no EEG since 1995, we should have one.

On November 29, 2010 Dr. Leger wrote to Employee X. Dr. Leger's letter reads, in part, as follows:

> On your Occupational Health Services medical file are several documents related to the 1994 "loss of consciousness".
>
> On September 15, 1994, you were seen in consultation by Dr. Javidan who reported abnormal activity on the right temporal lobe on the EEG and events suggestive of an underlying seizure disorder.
>
> September 16, 1994 a medical summary report signed by Dr. T. Roberts, Neurologists indicated you were unfit for your usual job and an MRI was pending.
>
> A consultation report from Dr. Ted Roberts, Neurologist, dated September 23, 1994 indicated he had seen you on several occasions. To him, the available data suggested you suffered from a grand mal seizure, probably on 2 occasions. He prescribed medication and advised you not to drive for 1 year. He believed you could not return to the position of train conductor.
>
> On October 26, 1994 MRI of the head reported as "normal examination".
>
> On February 7, 1995 Dr. Lewin (General Practitioner) referred to the Occupational Medical consultation clinic at the University of Alberta.
>
> On February 17, 1995 (report dated March 12, 1995) you were seen in consultation by Dr. Cocciarella, who agreed with Dr. Javidan and Dr. Roberts that you have a low threshold for seizures. She advised you that you could not continue with your prior job because of safety concerns for yourself, your colleagues or the public if you were to have a seizure and that it would be advisable for you to be on medications.
>
> On December 18, 1995, Dr. Roberts reported to CN that the MRI was normal and that the July 26, 1995 EEG is "now epileptic".

> In conclusion, the diagnosis of grand mal epilepsy was established and was confirmed by neurologists and EEG. This condition would not be incompatible with a Safety Critical Position. Under the current medical practice and according to the Canadian Railway Medical Rules, as long as you have been seizure free for a period of 5 years, and there is no epileptiform activity in a EEG performed within 6 months of the return to work, you may be considered fit. After return to work, it is recommended that no rotating shifts and no overtime resulting in sleep deprivation be done so as to reduce the risk.
>
> Since I have no information after 1995 concerning your seizure disorder, I am asking that a physician confirm the date of the last seizure activity and that you provide us with a normal EEG before returning to a SCP.

To reduce the instant dispute to its simplest terms, the grievor refused to undergo the medical examination, including an EEG, as required as a pre-condition to returning to employment by the Company's Chief Medical Officer. Her position was that Dr. Roberts had originally stated in his report: "EEG non epileptic". As she had not suffered any seizures in the fifteen year period since 1995 and was then found to not be epileptic, she apparently formed the view that the Company's request was conceived in error, was unreasonable and would not be complied with. The Company, on the other hand, took the position that the grievor's medical history did justify an updating of her neurological condition, which could be obtained by the taking of a more recent EEG or, at a minimum, certification by a Neurologist that she is not epileptic. Unfortunately, this standoff continued between the parties, and the Union filed a grievance on behalf of Employee X on February 1, 2011. The grievance letter clearly points out to the Company that the finding of Dr. Roberts in 1995 was "non epileptic" and not "now epileptic". The Union's representative, General Chairman Bryan Boechler, suggested in the grievance letter that the Company should contact Dr. Roberts to clear up any misunderstanding.

Unfortunately the matter remained unresolved. Notwithstanding that the Company offered to pay for the grievor's medical assessment, Employee X declined to release any of the documents in her medical Company file to the Company's Human Resources or Operations officers. Nor did she, until shortly prior to the hearing, herself obtain any medical reports to give satisfaction to the Company's Chief Medical Officer.

Finally, a few days before the arbitration hearing, the Company was provided with medical documentation confirming that the grievor was not diagnosed as epileptic in 1995 and has suffered no seizure recurrences since August of 1994. That diagnosis and information is confirmed in letters from Dr. Roberts, the grievor's Neurologist, and her family physician, Dr. Caffaro, in letters dated July 6 and June 30, 2011, respectively. On the strength of that documentation she has now been reinstated.

The issue in this grievance is whether the grievor should receive compensation for what the Union alleges is her wrongful withholding from reinstatement into service in the period between October of 2010 and July of 2011. The Company maintains that its Chief Medical Officer was at all times acting reasonably and within his obligations pursuant to the **Railway Safety Act** to ensure that all employees in safety sensitive positions are medically fit to perform their tasks safely. Counsel for the Union stresses that it would have been a simple matter for the Company to communicate with the grievor's Neurologist to obtain clarification of the disputed report and dispel the error in the reading of the phrase "EEG non epileptic" which triggered the unfortunate sequence of delay which unravelled over the months thereafter.

The Arbitrator can hardly conceive a more unfortunate standoff created by the equally matched high-minded convictions of two parties diametrically opposed. For its part the Company, in the best of good faith, harboured a concern as to the possible contradictory information in the original Neurologist's report in its possession. Being properly conscious of its obligation to ensure the fitness for work of employees in accordance with the **Railway Safety Act**, its Chief Medical Officer opted for the grievor to undergo a new neurological examination and EEG prior to returning to service. It does not appear disputed that other alternatives could have been pursued. Indeed, once Dr. Roberts and Dr. Caffaro did provide more current and complete reports which were given to the Company only days before the arbitration hearing, the Company did agree to reinstate Employee X into her position as a conductor, as directed by the Human Rights Tribunal. For its part, the Union adamantly defended the grievor's right to

not release her Company medical records to Human Resources or Operational officers, supported her in her refusal to undergo any further neurological medical examination and did nothing itself to obtain a more current and clear diagnosis from the grievor's physicians until only a few days prior to the arbitration hearing.

In my view, while I accept that both parties acted in the best of good faith at all times, I am compelled to conclude that they share equally in the responsibility for the unfortunate ten month delay in the grievor's reinstatement. It was clearly open to the Company to have simply communicated with Dr. Roberts as early as November of 2010 to obtain clarification of what the Company's OCS Nurse acknowledged seemed to be a diagnosis which was contradictory to the actual EEG reading attached to Dr. Roberts' report. While it is also true that the Company's Chief Medical Officer was properly entitled to have more recent data, data which might take the form of a more EEG, current data as to the grievor's condition and the history of her condition since 1994 could also have been obtained, as it ultimately was, from Drs. Roberts and Caffaro.

I am also satisfied that the Union acted in the best of good faith. That said, however, nothing prevented the Union, at any point from the filing of the grievance in February of 2011, from itself obtaining the information from Dr. Roberts and Dr. Caffaro which it eventually did, but in a more timely manner. It is also arguable that the Union could have grieved on behalf of Employee earlier than February 1, 2011, some four months after the order of reinstatement order issued by the Human Rights Tribunal.

On the whole of the record, I am satisfied that the parties share equal responsibility for the unfortunate delay in this matter. It was open to either of them to obtain the information which led to the grievor's reinstatement in a far more timely fashion than in fact occurred. As a result, any order of compensation must take into account the equal contribution of the Company on the one hand, and the grievor and the Union on the other, in prolonging the resolution of this dispute.

The grievance is therefore allowed, in part. The Arbitrator directs that Employee X be compensated for one-half of all wages and benefits lost for the period between October 1, 2010 and the date of the grievor's actual reinstatement following this award, with such reinstatement not to be unreasonably delayed.

July 19, 2011

(signed) MICHEL G. PICHER
ARBITRATOR