

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4069**

Heard in Montreal, Thursday, 15 December 2011

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

MAINTENANCE OF WAY EMPLOYEES DIVISION

DISPUTE:

Dismissal of D. Nesbitt.

JOINT STATEMENT OF ISSUE:

The grievor, Mr. D. Nesbitt, received a Form 104 stating that he was being dismissed from Company service due to his failure to supply the Company with timely notice of a material change to his medical condition thereby creating undue financial hardship for the Company. A grievance was filed.

The Union contends that **(1)** The grievor's dismissal was unfair and unwarranted in the circumstances. **(2)** The Company failed in its duty to accommodate the grievor.

The Union requests that the grievor be reinstated forthwith and compensated for all wages and benefits from the time he was cleared to return to work until the present.

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

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

**FOR THE COMPANY:
(SGD.) W. SCHEUERMAN
LABOUR RELATIONS OFFICER**

There appeared on behalf of the Company:

M. Chernenkoff	– Labour Relations Officer, Calgary
M. Moran	– Manager, Labour Relations, Calgary
M. Pilon	– WCB Specialist, Montreal

There appeared on behalf of the Union:

Wm. Brehl	– President, Ottawa
D. Brown	– Counsel, Ottawa
A. R. Terry	– Vice-President, Ottawa
H. Helfenbein	– Director, Pacific Region
G. Doherty	– Director, Prairie Region
Wm. Brake	– Director, Eastern Region
A. Della Porta	– Director, Atlantic Region

AWARD OF THE ARBITRATOR

The record confirms that in June of 2003 the grievor was injured while working as a track maintainer / truck driver in Romford, Ontario. He remained unable to work until he had surgery in 2006 to repair damage to his ankle injury. Still later, in May of 2007 his treating physician declared him unable to return to his regular duties and, given his restrictions, he was unable to be accommodated by the Company. As a person with permanent medical restrictions the grievor was retrained by the WSIB of Ontario. The grievor's condition resulted in his being awarded a permanent bi-weekly payment from the WSIB of approximately \$480. That benefit is paid regardless of his level of physical impairment or his actual earnings.

It appears that some twenty-one days after being notified of his status as a person entitled to a permanent disability pension the grievor notified the Company that he was now fit to return to work without restrictions. In fact, based on documents provided by his physician, the Company's Occupational Health Services confirmed on or about February 12, 2010 that the grievor was fit to return to work without restrictions in the safety sensitive of a track maintainer / truck driver.

Needless to say, the grievor's full recovery, just after he became entitled to an unqualified life-time disability pension, caused the Company puzzlement and concern. The Company scheduled an investigation which revealed little in respect of the grievor's recovery and confirmed that he had not notified the WSIB or the Company of any progress in his physical condition before his permanent pension became locked in on or about December 17, 2009. Being faced with the prospect of the grievor returning to work at full wages while continuing to receive in excess of \$900 per month as a permanent disability pension, paid as well by the Company, it was decided that the grievor should be dismissed from service for having failed to keep the Company and the WSIB advised of the progress in his physical condition, to a degree which destroyed the employee/employer bond of trust. The Union maintains that the grievor did not deliberately defraud the Company or withhold information, and that his dismissal is unreasonable in the circumstances. It seeks his reinstatement into employment with full compensation for wages and benefits lost.

In the Arbitrator's view this is not an appropriate case for compensation, albeit a conditional reinstatement would appear to be appropriate, subject to an obvious condition. I therefore direct that the grievor be reinstated into his employment forthwith, provided he accepts to reimburse the Company for the amount of all permanent disability pension payments he receives so long as he remains in a full time unrestricted position. It appears that his ability to return to work on a full time basis, without restrictions, has not yet been medically determined. It is therefore further directed that

the grievor be subject to a functional abilities examination to determine his fitness to return to work, with or without restrictions.

On the foregoing basis the matter is returned to the parties for implementation. Should there be any dispute with respect to that question the matter may be spoken to.

February 20, 2012

(signed) MICHEL G. PICHER
ARBITRATOR