

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4077**

Heard in Montreal, Wednesday 11 January 2011

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

EX PARTE

DISPUTE:

Administrative closure of the employment file of Employee R on May 12, 2011.

COMPANY'S STATEMENT OF ISSUE:

During a period of suspension the grievor was contacted by CN Occupational Health Services and advised that the Chief Medical Officer had reviewed his medical file and documentation related to the March 5, 2011 incident and authorized a medical assessment. The assessment was also confirmed as a condition of the grievor's return to work in a safety critical environment.

The Company instructed the grievor to attend investigations on May 3, 2011 and May 10, 2011 with respect to his alleged refusal to participate in the medical assessment for the purpose of determining his fitness for duty, resulting in the of returning the grievor to active service. The grievor failed to appear for either investigation. On May 12, 2011 the grievor was advised of the administrative closure of his employment file with the Company.

The Union contends that: (1) The Company has improperly required the grievor to attend medical/psychological evaluations and held him off work without sufficient cause. (2) If the Company was of the view that the grievor was in any way medically unfit or disabled, then it was incumbent of the Company to try and find a means of accommodating the grievor.

The Union submits that the Company has acted improperly and unreasonably and as such the grievor ought to be reinstated forthwith and that he be made entirely whole.

The Company denied the request and disagrees with the Union's contentions.

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

There appeared on behalf of the Company:

P. Payne	– Manager, Labour Relations, Edmonton
D. VanCauwenbergh	– Director, Labour Relations, Toronto
K. Gilks	– Trainmaster, Edson
K. Smolyneec	– Sr. Manager, Occupational Health Services

There appeared on behalf of the Union:

M. Church	– Counsel, Toronto
B. R. Boechler	– General Chairman, Edmonton
R. A. Hackl	– Vice-General Chairman, Edmonton
Employee R	– Grievor

AWARD OF THE ARBITRATOR

The material before the Arbitrator confirms that following the investigation of an incident which occurred on March 5, 2011 for which the grievor was assessed a thirty day suspension, the Company's Chief Medical Officer, after consultation from the grievor's supervisors, determined that he should subject to a physical and psychiatric assessment prior to returning to service. On two separate occasions the grievor refused to be so examined.

On April 26, 2011 the Company's Occupational Health Services received advice from the physician who was to examine the grievor on April 12, 2011. The physician reported that Employee R attended, but refused to participate in the assessment process and left the doctor's office. Given that fact, and the grievor's refusal to attend a prior scheduled appointment, the Company gave the grievor notice of an investigation into his actions. On April 27, 2011, the grievor communicated to the Company by email to advise that he would not be able to attend his investigation scheduled for May 3, 2011 by reason of dental problems. Subsequently the Company indicated to him that he must provide medical confirmation to justify his failing to attend the statement. No such

documentation was provided and on May 3, 2011 the grievor did not appear at the investigation.

A second notice of investigation was sent to him for an investigation to be held on May 10, 2011. On May 4, the grievor sent an extensive email to the Company essentially indicating that he felt that the Company was improperly pushing a psychiatric examination notwithstanding that he was fit to work. His message stated, in part:

I fear for my safety, my freedom and my ability to earn a living on cn rail or any other place of employment due to this massive very aggressive harassment from cn rail demanding things. ... I will not step a foot onto cn rail property with ongoing criminal investigations and very serious allegations being made from cn rail and cn rail tried to force me to see a psychiatrist under the guise of a medical psychiatric examine to see if I was able to occupy a safety sensitive position, when all along it is a form of evidence cn rail is trying to use against me.

The Company then forwarded to the grievor a letter on May 12, 2011 advising him that his employment file with the Company was closed by reason of his refusal to attend the Company's formal investigation. Three months following that letter the Union filed the instant grievance on behalf of Employee R.

Although the grievance alleges that the Company improperly required the grievor to attend medical/psychological evaluations, at the arbitration hearing the Union does not take issue with the right of the Company to demand a physical and psychiatric evaluation in respect of the grievor. Rather, it submits that the Company acted improperly in closing the grievor's employment file and that in all of the circumstances it was incumbent on the Company to find some means of accommodating the grievor.

Having carefully considered all of the evidence, the Arbitrator is of the view that this grievance can be partially allowed, but that the Company did not act improperly in demanding that the grievor undergo a medical and psychiatric evaluation, in light of all of the facts in the possession of the Company, some of which are touched upon in **CROA&DR 4076**. In my view it is appropriate to roll back the closing of the grievor's file, to give him one final opportunity to accede to the Company's request that he cooperate in undergoing an independent medical examination to evaluate his physical, emotional and psychiatric fitness to return to work. In the Arbitrator's view, however, the opportunity for the grievor to comply with that requirement cannot be extended indefinitely, as the parties are entitled to a degree of certainty and finality in this matter.

The grievance is therefore allowed, in part. The Arbitrator directs that the Company restore the grievor to the employment rolls and that it revoke the closure of his employment file accordingly, restoring him to his employment status without loss of seniority and without compensation for any wages or benefits which he has lost. The grievor shall have a period of sixty days in which to comply with the Company's request that he undergo a physical and psychiatric examination to determine his fitness for duty. Should he fail to comply with that requirement within the sixty day period from the date of this award the Company shall then be justified in closing his employment file.

January 16, 2011

(signed) MICHEL G. PICHER
ARBITRATOR