

CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4286

Heard in Montreal, February 12, 2014

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the closure of Locomotive Engineer M. B's employment file.

UNION'S EXPARTE STATEMENT OF ISSUE:

By letter on February 28, 2012, the Company closed Mr. B's employment file. In its February 28, 2012 letter, the Company contends that Mr. B had failed to provide medical information to OHS to support his absence beyond November 7, 2011, and had failed to cooperate with and appear at scheduled investigations, most recently on February 23, 2012.

The Union submits that Mr. B was absent for medical reasons at all times and had notified the Company of these reasons. The Union further submits that Mr. B has provided the legitimate explanation for failing to appear at scheduled investigations. The Union also notes that Mr. B did and was available for an investigation on February 23, 2012.

The Union contends the Company's closure of Mr. B's file is in violation of the Collective Agreement, the *Canadian Human Rights Act* and Section 239, Division XIII of the *Canada Labour Code*, for issuing discipline to an employee because of absence due to illness. The Union requests that Mr. B be reinstated without loss of seniority and benefits, and that he be made whole.

FOR THE UNION:
(SGD.) D. Able
General Chairperson

FOR THE COMPANY:
(SGD.)

There appeared on behalf of the Company:

B. Sly	– Director Labour Relations, Calgary
G. Squires	– Superintendent Operations, Alberta North

There appeared on behalf of the Union:

D. Ellickson	– Counsel, Caley Wray, Toronto
G. Edwards	– Vice General Chair, Revelstoke
G. Lawrenson	– Local Chair, Calgary

D. Able	– General Chair, Calgary
D. Kelly	– Former Local Chair, Calgary
D. Olson	– General Chair, Calgary

AWARD OF THE ARBITRATOR

The Union grieves the closure of the employment file of B. It is common ground that B's last working shift was on or about July 2, 2011. It appears that he then took a permitted leave of absence for overseas travel relating to a family medical situation. Although initially a one month compassionate leave was requested, additional one month leaves were requested and granted on two more occasions, apparently extending to November 7, 2011. After that date B failed to return to work. In fact, it appears that the Union notified the Company that it had received a message from the grievor on or about November 6, asking whether he could obtain an indefinite leave of absence, or "for as long as he could obtain." It further appears that on November 11, 2011 the grievor forwarded an email to his supervisor essentially requesting an indefinite leave of absence citing "a potentially serious medical condition," and going on to condemn the Company for the "...distress they meet out to their hapless Running Trade crews."

Faced with the grievor's continuing absence and having received no medical documentation to confirm his condition, the Company scheduled a disciplinary investigation to inquire into the circumstances of B's situation. The grievor failed to appear at the investigation scheduled for December 13, 2011 citing the fact that he was under a physician's care. That caused the Company to institute yet another

investigation with respect to his failure to appear. Again, B failed to appear at either investigation.

It appears that the Company sent the grievor yet another notice of investigations scheduled for December 29, 2011, relating to his absence since November 7, 2011 and his failure to attend at the prior investigations. It does not appear disputed that the notice sent to the grievor also indicated to him that failure to appear might result in his employment file being closed, with a copy being sent to the Union.

Shortly thereafter, on December 24, 2011 the grievor emailed the Company indicating that he was then residing in Red Deer “close to medical assistance” stating that he was unfit for duty and that he could provide medical certification upon request. Thereafter the grievor continued to be absent and did not in fact provide any medical documentation to the Company to confirm that he was unfit to perform his regular duties or participate in a disciplinary investigation.

When the investigation remained scheduled for December 29, 2011 the grievor attended on that date and indicated to his supervisors that he would be undergoing further medical procedures, including the taking of a MRI. Finally, on January 11, 2012 the grievor forwarded an email to his supervisor, Mr. Squires, stating, in part :

Just to be perfectly clear, my absence from the workplace has only been partially precipitated by physical incapacity. Moreover, the overriding reason for my absence is that I, and others, have been regarded with contempt by CPR as an employer which, has willfully and consistently waged a subjective and pernicious campaign of mistreatment against me for years in the workplace, mostly because, I postulate at least latterly, of my robust stance as a Union officer.

He concludes his letter stating :

I am simply not prepared to labour under these circumstances until I feel fully able to return in good conscience regarding the ability of CPR to be a just and responsible employer, free of discrimination, harassment, and as safe as humanely possible.

Shortly thereafter, on or about January 12, Mr. Squires requested the grievor to have his physician fill out a functional abilities form. The grievor declined to have that form completed and provided a written response which essentially indicated that he refused to return to work under conditions which he considered unacceptable and further demanded a written apology from the Company.

Following those facts, on February 20, 2012 the Company renewed its notices of investigations, scheduled for February 23, 2012. The Company submits that B in fact failed to appear for that investigation, which prompted the Company to finally close his employment file.

The Union stresses that the grievor did in fact attend the Company's premises at 11:00 hours on February 23, 2012. He was then advised, according to the Union, that the Company had decided to cancel the taking of his statements. It appears that he and the Union's local chairman were advised that the statements would be rescheduled. In fact, five days later the Company issued a letter advising the grievor that his employment file was closed.

How, then, is the instant dispute to be resolved? Firstly, it should be stressed that the Arbitrator is in possession of medical documentation which now appears to confirm

that the grievor has suffered "severe stress". A report by his physician reviews the employment related stress suffered by the grievor and diagnoses his condition as "Post Traumatic Stress Disorder". On the basis of the material filed, I am prepared to accept the submission of the Union that the Company's action in closing the grievor's employment file may arguably have been hasty, and done without a full appreciation of his condition. I should stress, however, that the Company is in no way at fault in that regard, as it is plainly clear that the grievor did not provide to the Company the kind of medical documentation which it requested and to which I am satisfied it was entitled. Most fundamentally, however, I must agree with the Union's representatives that the facts of the instant case raise compassionate grounds for a reinstatement of the grievor to his employment, albeit on conditions fashioned to protect the Company's interests.

The grievance is therefore allowed, in part. The Arbitrator directs that the grievor be reinstated to his employment status, and that he be permitted to continue on his medical leave of absence. However, should the grievor's condition remain unimproved, or should there be no prognosis for his return to productive employment forthcoming within the period of one year from this Award, at the expiry of that time the Company shall be at liberty to consider a non-disciplinary closure of the grievor's employment file, for medical incapacity.

February 17, 2014

MICHEL G. PICHER
ARBITRATOR