

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 4585

Heard in Montreal, October 10, 2017

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the administrative closure of H. Toor's employment effective September 28, 2015.

JOINT STATEMENT OF ISSUE:

On February 11, 2014, the Grievor was involved in an automobile accident that prevented him from working as a Conductor. The Grievor received disability benefits from February 11, 2014 to July 13, 2014, thereafter he was capable of working modified duties and did so until December 17, 2014.

On June 28, 2015 the Grievor's disability benefits were terminated as he was deemed medically fit to return to his Conductor's position. Despite the Company's numerous attempts to contact the Grievor and have him return to work or substantiate his ongoing absence, the Company was unable to contact the Grievor. On September 28, 2015 the Grievor's employment file was administratively closed.

The Union appealed the Company's decision to administratively discharge the Grievor, alleging the Company failed to accommodate the Grievor and closed his employment file without warning. The Union requested that the Grievor be reinstated into employment and made whole for all lost earnings and benefits.

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

FOR THE UNION:
(SGD.) R. S. Donegan
General Chairman

FOR THE COMPANY:
(SGD.) D. Crossan for K. Madigan
Vice-President, Human Resources

There appeared on behalf of the Company:

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| D. Crossan | – Manager, Labour Relations, Prince George |
| K. Morris | – Senior Manager, Labour Relations, Edmonton |
| C. Michelucci | – Director, Labour Relations, Montreal |

And on behalf of the Union:

- K. Stuebing – Counsel, Caley Wray, Toronto
- J. Thorbjornsen – Vice General Chairman, Saskatoon
- H. Toor – Grievor, Surrey

AWARD OF THE ARBITRATOR

Nature of the Case

1. The TCRC grieved CN's September 28, 2015 decision to close, on an administrative basis, Conductor Harman Toor's employee file. Mr. Toor had been in receipt of disability benefits because of a motor vehicle accident.

2. During Mr. Toor's absence, CN had attempted on numerous occasions to contact him about his medical situation. Mr. Toor alleged that he never received most of CN's communications. The TCRC argued that CN had failed to respect its duty to accommodate Mr. Toor's disability.

3. For the reasons which follow, the arbitrator has decided to dismiss Mr. Toor's grievance due to his failure to respond to CN's numerous attempts to obtain an update from him about his situation.

Facts

4. Mr. Toor had almost five years of pensionable service with CN. Following his accident, he received both short and long term disability payments. CN also provided a modified position for him for a portion of this period.

5. In April 2015, Mr. Toor's "return to work restrictions report" (RTWRR) indicated he still had significant physical restrictions. In June 2015, however, Great West Life (GWL) notified Mr. Toor that it would be ending his long term disability payments based on the medical information in his file. As a result, CN wanted Mr. Toor either to return to work or to provide further medical information.

6. It was at this point that CN's challenges in contacting Mr. Toor began. The parties' versions of events cannot be reconciled. The arbitrator must determine which party is more credible, as this Office is often called upon to do: [CROA&DR 4540](#).

7. CN described its repeated attempts to contact Mr. Toor both by phone and by registered mail. Mr. Toor claimed he never received the calls, except for the one he did return in June 2015, or the registered letters and reminders, except for the one which indicated his file had been closed.

8. Mr. Toor advised CN in June 2015 that he had written to GWL to appeal its LTD decision. He further mentioned at the hearing that he had called GWL on several occasions and left messages, but that GWL never returned his calls. CN's evidence indicated that GWL had never received any letter or forms from Mr. Toor regarding an appeal. Mr. Toor did not produce a copy of the letter he says he sent to GWL.

9. Mr. Toor received CN's September 28, 2015 letter regarding the closing of his file. That letter had been sent to the same address as CN's previous letters. The TCRC grieved the closing of Mr. Toor's file on the basis that CN had failed to accommodate Mr. Toor's disability.

Analysis and Decision

10. CN argued the closing of Mr. Toor's file was not disciplinary; rather, he had simply abandoned his employment. The TCRC argued that faced with conflicting medical evidence about Mr. Toor's fitness to work, CN had an obligation to accommodate him.

11. Given the conflicting evidence, and as best as one can do within CROA's expedited arbitration process, the arbitrator prefers CN's evidence about the events in question. There are several reasons supporting this conclusion.

12. Mr. Toor claimed he sent a letter and/or forms to GWL appealing its June 2015 decision, yet GWL had no record of any correspondence. Mr. Toor himself did not produce his alleged letter, despite insisting at the hearing that he had sent it.

13. Similarly, it is difficult to reconcile Mr. Toor's claim that he was not aware of most of CN's registered letters, reminders and phone calls. This is not a case where an employer inadvertently used an incorrect address or phone number. CN used a correct address and at least one accurate phone number, as evidenced by Mr. Toor's responses.

14. The arbitrator concludes that Mr. Toor, for reasons known only to him, ignored CN's efforts to contact him to discuss his situation following GWL's termination of his LTD benefits.

15. Given this evidentiary conclusion, the grievance will be dismissed for the following reasons.

16. CN's decision must be analyzed as of the time it was made in September 2015. Arbitrator Picher noted in a similar situation in [CROA&DR 3847](#), "...the Company's actions must be assessed on the basis of the objective evidence at the time the Company made its decision". For example, an October 2015 medical note inexplicably first appeared as an attachment to Mr. Toor's May 2016 grievance. There was no evidence or suggestion that Mr. Toor ever provided this note to CN prior to this date.

17. The arbitrator agrees with the TCRC that there may have been issues to discuss regarding Mr. Toor's fitness for work. The GWL letter, the RTWRR, as well as a March 2015 periodic medical from Mr. Toor's doctor, appear to contain differing conclusions. These matters could have been discussed as part of the tripartite accommodation process. However, Mr. Toor short-circuited that process by refusing to stay in touch with CN or respond to its legitimate requests for additional information.

18. Several past CROA cases have confirmed an employee's obligation to stay in touch with an employer when they are off work, but maintaining their employment relationship. In [CROA&DR 3847](#), Arbitrator Picher concluded an employee absent for medical reasons had abandoned his employment:

The fact of an injury or medical leave of absence does not absolve an employee from his or her responsibility to communicate on a reasonable basis with his or her employer. I do not consider that it was inappropriate for the Company to seek the medical updates which it did not to confirm, given the apparent long silence from the grievor, that he intended to continue in his employment at CN. His failure to give any response is, in my view, evidence which the Company could use to conclude that he had effectively abandoned his employment. In the Arbitrator's view this is not a circumstance in which the Company was under an obligation to conduct a disciplinary investigation, as the action taken constituted a non-disciplinary, administrative closure of Mr. Vlutters' employment file. For the reasons related above, I am satisfied that the grievor is the author of his own misfortune and that he did, as the Company asserts, effectively abandon his employment.

19. In [CROA&DR 4276](#), Arbitrator Schmidt concluded that a failure to communicate amounted to the abandonment of a position:

In this case the grievor failed in fulfilling his obligation of communicating with the Company after his medically supported leave became an unauthorized leave of absence. Even if I accepted that the grievor informed the Company that he was leaving the country on October 11, 2012, which I do not, the grievor had ample opportunity upon receipt of the Company's and GWL's correspondence upon his return on November 22, 2012 to communicate with the Company. He did not do so. In such circumstances the Company was entitled to close his employment file. There are no mitigating circumstances, such as a clean disciplinary record or extraordinary years of service with the Company, that would warrant my considering the grievor's reinstatement.

20. In a situation involving the duty to accommodate, the employee has obligations which, if not met, will end the employer's continuing duty. Accommodation is not a one-way street, as noted in [CROA&DR 4504](#):

20. The duty to accommodate does not apply only to the employer. The employee has significant obligations as well. For example, an employee may lose an entitlement to any further accommodation if he/she turns down a reasonable accommodation offer. Similarly, an employee loses the right to maintain an employment relationship, despite providing no services, by failing to provide the important medical information and updates an employer requires when managing an accommodated work scenario.

21. Mr. Toor chose to ignore CN's legitimate requests for information. The arbitrator concludes on the facts and on the above authorities that Mr. Toor abandoned his employment with CN.

22. The arbitrator dismisses the grievance.

November 1, 2017



GRAHAM J. CLARKE
ARBITRATOR