CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2371

Heard at Montreal, Tuesday, 8 June 1993

concerning

ONTARIO NORTHLAND RAILWAY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE – BROTHERHOOD:

Dismissal of the grievor, Mr. R. Snow, on the grounds of excessive absenteeism.

DISPUTE – COMPANY:

The termination of Temporary Track Maintainer, Mr. R. Snow, on the grounds of innocent absenteeism.

BROTHERHOOD'S STATEMENT OF ISSUE:

On December 30, 1992, the grievor was discharged from the Company for excessive absenteeism over the course of his nine years with the Company. The grievor began to suffer from significant health problems shortly after entering service.

The Union contends that: **1.)** The grievor's absenteeism has resulted from bona fide medical conditions entirely beyond his control. **2.)** Generally speaking, the grievor's absenteeism levels are declining. **3.)** The high level of absenteeism recorded in 1988 resulted from a Company-imposed, year-long work restriction order. The Company's claim that this work restriction was based on a valid medical opinion is incorrect. **4.)** Through its discharge of the grievor the Company has violated Article 18.6 of Agreement 7.1 by dealing unjustly with the grievor.

The Union therefore requests that Mr. Snow be reinstated to his former position and compensated for all lost wages and benefits as of December 30, 1992.

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

COMPANY'S STATEMENT OF ISSUE:

Mr. Snow's employment relationship with Ontario Northland was closed effective December 30, 1992 because of innocent absenteeism over the period of his employment.

The Company maintains that the termination of Mr. Snow does not fall within the scope of Article 18.6, nor any other terms of Collective Agreement 7.1. It is, therefore, the position of the Company that the matter is not arbitrable.

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD.) G. SCHNEIDER	(SGD.) P. A. DYMENT
SYSTEM FEDERATION GENERAL CHAIRMAN	PRESIDENT

There appeared on behalf of the Company:

M. J. Restoule	– Manger, Labour Relations, North Bay
T. McCarthy	– Labour Relations Assistant, North Bay
J. H. Huisjes	– Superintendent, Maintenance of Way, North Bay

And on behalf of the Brotherhood:

P. Davidson	– Counsel, Ottawa
G. Schneider	– System Federation General Chairman, Winnipeg

AWARD OF THE ARBITRATOR

The Company raises an issue as to the arbitrability of the grievance. It submits that section 18.6 of the collective agreement does not provide for the arbitration of a claim that an employee has been discharged for non-disciplinary reasons. Its is common ground that Mr. Snow was not disciplined, and that he has been terminated for innocent absenteeism.

Section 18.6 of the collective agreement deals with the grievance and arbitration process, and provides, in part, as follows:

> **18.6** A grievance concerning the interpretation or alleged violation of this agreement, or an appeal by the employee who believes he/she has been unjustly dealt with shall be handled in the following manner.

The grievance comes to this Office under the terms of the Memorandum of Agreement establishing the Canadian Railway Office of Arbitration. Article 4 of that memorandum provides, in part, as follows:

> **4** The jurisdiction of the Arbitrator shall extend and be limited to the arbitration, at the instance in each case of a railway, being a signatory hereto, or of one or more of its employees represented by a bargaining agent, being a signatory hereto, of:
>
> **(A)** disputes respecting the meaning or alleged violation of any one or more of the provisions of a valid and subsisting collective agreement between such railway and bargaining agent, including any claims, related to such provisions, that an employee has been unjustly disciplined or discharged; ...

The Arbitrator cannot accept the position advanced by the Company. It is, to say the least, startling in its ramifications. If the Company's position is correct, it could arguably terminate any employee at will, so long as it did not do so on the basis of discipline. That, however, is entirely inconsistent with the law of collective agreements in Canada.

The cases are legion which involve the arbitration of the discharge of employees for innocent absenteeism. (*See, generally, Brown & Beatty,* ***Canadian Labour Arbitration****, 3rd Edition, 7:3210.*) Some arbitrators hold to the theory that the termination of an employee, even for innocent absenteeism, is a form of discipline which can be dealt with under the just cause provisions of a collective agreement. Other arbitrators take the view that the termination of an individual's employment for innocent absenteeism is a non-culpable, non-disciplinary matter which is, nevertheless, subject to arbitration. One approach within that school of thought, reflected in the decision of this Office in **CROA 2363,** holds that it is an implied term of any collective agreement that an employee who has been hired, has been qualified, has successfully bid upon a position and has been absent due to illness is, when fully recovered, entitled to resume his or her job. To conclude otherwise is to effectively undermine the concept of an employee's job security and the vested character of the rights and protections which have accrued to the employee under the terms of a collective agreement. This general approach to the interpretation of collective agreements on a broad and purposive basis is long established in Canadian law. (*See,* ***Re Peterboro Lock Mfg. Co. Ltd. and U.E.W., Local 527*** *(1954), 4 L.A.C. 1499 (Laskin) at pp. 1501-02.*)

In **CROA 2363**, which concerned the claim of a union to the right of an employee to return to work following a medical leave of absence, this Office made the following comment with respect to the issue of arbitrability:

> In the Arbitrator's view, the [grievance] grounds an arbitrable claim. It is an implied term of any collective agreement that an employee who has been justifiably absent due to illness, injury or other medical incapacity is, as a general matter, entitled to return to work when he or she is medically fit to do so. Disputes between employers and unions with respect to the fitness of an employee to return to work are commonly heard and disposed of in this Office. (*See, e.g.,* ***CROA 2190.***)

In the case at hand, it is an implied term of the contract of employment that, in return for holding a permanent position with the Company, Mr. Snow is to provide regular attendance and faithful discharge of his duties. While, as the jurisprudence reflects, the failure of the employee to maintain his part of that bargain may justify the employer treating the employment relationship as being at an end, the converse is also true. The Company cannot terminate the grievor's employment for innocent absenteeism unless it is established that his rate of absenteeism is unacceptable, and that there is no reasonable basis to expect that it will improve in the future. Within that context, the termination of Mr. Snow's status as an employee under the collective agreement is an arbitrable matter. I therefore reject the position of the Company and find that I have jurisdiction to deal with the grievance. In light of that conclusion it is

not necessary to deal with the submission of the Brotherhood on the meaning of "an appeal ... [that] he/she has been unjustly dealt with ..." in section 18.6 of the collective agreement.

Upon a careful review of the merits of the grievance, I have substantial difficulty with the position advanced on behalf of Mr. Snow. The evidence establishes, beyond controversy, that for a number of years he has suffered a severe form of epilepsy, with recurring grand mal seizures. The Brotherhood does not take issue with the fact that Mr. Snow has a high incidence of absenteeism. While there is some dispute as to his attendance in 1990, there is no argument as to the gravity of his absenteeism over a number of years. For example, in 1986 Mr. Snow was absent on 307 days, in 1988 on 317 days and in 1992 (prior to August 28) he was absent for a further 241 days. His rate of absenteeism is, very simply, well in excess of the norm, and in the Arbitrator's view beyond a rate which can reasonably be expected can be tolerated by the Company.

In **SHP-284**, a railway shopcrafts arbitration award between Canadian Pacific Ltd. and the International Brotherhood of Firemen and Oilers, dated November 23, 1989, the Arbitrator stated the following:

> It is generally accepted that for an employer to be entitled to invoke its right to terminate an employee for innocent absenteeism it must satisfy two substantive requirements, namely that the employee has demonstrated an unacceptable level of absenteeism as compared with the average of his peers over a sufficiently representative period time, and, secondly, that there is no reasonable basis to believe that his or her performance in that regard will improve in the future.

For the reasons related above, I am satisfied that the first part of the two-fold requirement is satisfied. Clearly the grievor has demonstrated an unacceptable level of absenteeism over a substantial period of time. The next issue is whether there is any reasonable basis to believe that his performance in respect of attendance at work will improve in the future.

Counsel for the Brotherhood suggests that the Company bears the burden of proof in that regard, and that it has advanced no evidence to support such a conclusion. Even if I should accept that the Company does bear the burden of proof with respect to that element, I cannot agree with the Brotherhood's characterization of the evidence. It is generally accepted by boards of arbitration that where an employee has a substantial record of absenteeism which is, in large part, linked to a medical condition or disability, absent compelling evidence with respect to the cure or control of that condition or disability, it may reasonably be inferred that the employee's record of attendance will not improve in the future. That inference may be the very basis of the Company's judgment as to the viability of the employment relationship and, absent contrary evidence, may suffice to discharge the employer's burden.

Regrettably, that is the state of the evidence before me in the case at hand. While the Brotherhood placed a letter from the grievor's family physician, Dr. Larry Malo, dated May 4, 1993 before the Arbitrator, the content of that document is far from compelling as to the prognosis for the grievor's future. In his letter the physician notes that Mr. Snow's seizures are no better now than they were five years ago. He expresses the hope that an adjustment in his medication will bring some improvement. As understandable as that hope may be, and as much as it is to be desired that the grievor overcome his condition, the evidence adduced falls short of rebutting the compelling inference which, I think, must be drawn from the entirety of the grievor's employment and absenteeism record, that his continued absenteeism problems will, on the balance of probabilities, continue into the future. I must, therefore, conclude that the Company has satisfied the second part of the requirement that would justify its decision to terminate Mr. Snow's employment for innocent absenteeism.

For the foregoing reasons the grievance must be dismissed.

June 11, 1993

(signed) MICHEL G. PICHER
ARBITRATOR