# CANADIAN RAILWAY OFFICE OF ARBITRATION

# CASE NO. 2608

Heard in Montreal, Thursday, 13 April 1995

concerning

## CANADIAN PACIFIC RAILWAY LIMITED

and

## CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS (UNITED TRANSPORTATION UNION)

## EX PARTE

**DISPUTE:**

Withholding Mr. F.D.S.T. Florison, Winnipeg, Manitoba, from active service pending the completion of medical examination and psychological evaluation.

**COUNCIL'S STATEMENT OF ISSUE:**

Mr. Florison sustained a personal injury while on duty on January 10, 1994 which was properly reported and became a claim for Workers' Compensation benefits. He remained on WCB until he was given permission to return to active duty on February 11, 1994.

The Corporation refused to permit Mr. Florison's return to active duty be way of a letter dated January 26, 1994 from Superintendent M.L. Hedden, until Mr. Florison satisfied the Corporation that his overall health and judgment were sound.

The Corporation was supplied with two medical certificates attesting that Mr. Florison was fit to return to full duties/activities on February 11, 1994. This information was considered to be insufficient and Mr. Florison was refused to be permitted to return to active service.

It is the Union's position that Mr. Florison has provided the Corporation with sufficient information concerning his recovery from his compensable injury of January 10, 194 to be permitted to return to active service. It is our further position that the Corporation's refusal to allow Mr. Florison's return to work unless and until he supplies them with detained medical information and a psychological evaluation is unreasonable and without probable grounds.

We request his immediate reinstatement without loss of seniority and with payment for all time lost and no loss of benefits that would have been accrued during his time out of service.

**FOR THE COUNCIL:**

**(SGD.) L. O. SCHILLACI**
**GENERAL CHAIRMAN**

There appeared on behalf of the Company:

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| L. Guenther | – Labour Relations Officer, Vancouver |
| M. E. Keiran | – Manager, Labour Relations, Vancouver |
| M. L. Hedden | – Division Manager, Calgary |
| R. M. Smith | – Labour Relations Officer, Montreal |
| R. E. Wilson | – Manager, Labour Relations, Toronto |

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| R. J. Martel | – Labour Relations Officer, Toronto |

And on behalf of the Council:

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| H. Caley | – Counsel, Toronto |
| L. O. Schillaci | – General Chairperson, Calgary |
| T. G. Hucker | – National Legislative Representative, BLE, Ottawa |
| R. S. McKenna | – General Chairman, CCROU[BLE], Ottawa |
| F.D.S.T. Florison | – Grievor |

## AWARD OF THE ARBITRATOR

The issue to be resolved is whether the Company violated the grievor's rights under the terms of the collective agreement by requiring that he submit to a psychiatric examination prior to returning to his employment following a knee injury sustained on the job. The Council submits that the Company did not have reasonable grounds to impose such a requirement upon Mr. Florison. The Company maintains that his prior employment history justifies the requirement that it placed upon him, and that it had just cause to hold him out of service in light of his refusal to submit to a psychiatric examination.

The grievor's permanent employment with the Company commenced in September of 1977. On two separate occasions, in May and October of 1982, he sought leaves of absence from work. On the second occasion he wrote to Assistant Superintendent K.P. Johnson that:

> At present my mental and physical well-being is jeopardized because of constant stress, anxiety, and hypertension: I am plagued with severe tension headaches and muscle strain. If not already so, I am on the verge of manic-depression; and I am taking a prescribed tranquilizer. All this is a result of the tragic events concurrent with my mother's demise.

The leave of absence was granted, although the assistant superintendent noted that medical confirmation of the grievor's fitness to return to duty would be required before he could resume his employment. The record discloses that in fact when the grievor advised the Company of his intention to return to work in December 1982 he was referred to the Chief of Medical Services, and obtained medical authorization prior to resuming his functions.

It is common ground that the death of the grievor's mother created considerable stress in his life for a substantial period of time. His stress appears to have been occasioned by efforts on his part, along with his father, to commence malpractice proceedings in respect of physicians involved with her treatment. In seeking a further leave of absence in October of 1983 he advised his superintendent, "My father and I am encountering resistance to initiate a civil malpractice case with regard to my late Mother's demise because of the legal profession's reluctance to bring the medical mafia to justice."

Matters seem to have aggravated by the spring of the following year. In May of 1984 the grievor wrote to Superintendent Minto, requesting further time off stating, in part, the following:

> ... that all previous efforts to procure competent counsel with moral ethics have been in vain to NO avail; and in this the impending malpractice suit has inflicted much stress, anxiety and hypertension. In the circumspection [sic] of all the aforementioned, the **psychological oppression** by "the Establishment" has left me **Emotionally and Physically exhausted** with no alternative but to respectfully request an indefinite leave of absence of approximately 1 month **in fear** of endangering the lives of fellow co-workers and jeopardizing the safety of the General public.
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> (original emphasis)

Although on that occasion a leave of absence was granted only until June 15, the grievor remained absent longer, and advised the Company in a letter dated July 4, 184 that he was "... currently under doctor's care for stress, anxiety and tension." The record discloses that local management then developed some concerns about the grievor's mental and emotional fitness to return to work. In December of 1984 Superintendent D.J. McMillan advised the grievor that his extended absence would require that he be examined by the Chief of Medical Services prior to returning to active service. The Superintendent then communicated to the Chief of Medical Services, in part, "We have some concern whether this employee is mentally fit to resume duty."

It appears that nothing further was heard from the grievor until January 21, 1985. Thereafter, a report was sent to the Chief of Medical Services from the grievor's physician. The Chief of Medical Services, Dr. Grimard, then advised Superintendent McMillan as follows, on March 6, 1985:

> ... We have received a three-line report from his physician Dr. Tomy which gives no indication that [Mr. Florison's] mental problems have been addressed in any way shape or form. In fact Dr. Tomy's statement is simply that [Mr. Florison] is fit for work and that blood tests results are at his office. In short, it is a most unsatisfactory report as it does not address the requirements that were clearly spelled out in the letter to [Mr. Florison] of December 5, 1984. It will consequently be necessary to request again a complete report and to ask this employee to show the letter to his physician so as to avoid further misunderstanding as to what is required.

It would appear that the grievor's failure to respond to the Company's overture to return to work related to his still being enmeshed in attempts to commence legal proceedings in relation to his mother's death. Upon being summoned to an investigation into his continued absence on March 20, 1985 the grievor responded on March 25, 1985 to the superintendent, in part: "The WRONGFUL DEATH of my mother is attributed to MORAL TURPITUDE and your indifference is CONTRA BONES MORES."

An investigation was conducted on April 4, 1985, concerning the grievor's unauthorized absence since June 15, 1984. The Company's officers were then satisfied that the grievor was in a satisfactory mental state, and fit to return to work, and so advised the Company's medical officer. On that basis Mr. Florison was returned to work, although it appears that there was further delay of one month before he resumed active duty. It appears that his travails relating to his mother's death ended in 1985, although there were some further leaves of absence during that year.

The record discloses that the grievor has an unfortunate penchant for virulent verbal attacks upon persons, including supervisors, whom he perceives as acting contrary to his interests. In September of 1986, when he had a conflict with Assistant Superintendent McGarry in relation to the submission of an accident report the grievor wrote that: "... McGarry's delinquent display of MORAL TURPITUDE exemplifies unjustifiable HARASSMENT ..." He further stated that Mr. McGarry was using intimidation tactics "... causing EMOTIONAL STRESS deleterious to my health."

In October of 1986 the grievor was subject to an investigation for having failed to appear at a prior disciplinary investigation. He then wrote a letter charging Superintendent McMillan with "... maliciously maligning my reputation directly or by insinuation or irony in words." He subsequently grieved the assessment of twenty demerits and, during the course of the grievance correspondence, accused the superintendent of "vile innuendo".

The record reflects little in the way of personal controversy between 1987 and 1991. It appears, however, that in August of 1989 the grievor made a request for time off because he was "... encountering stressful problems in a family matter that is affecting me in a psychophysiological way ...". It also appears that in 1991 a sharp exchange in correspondence between the grievor and the Company occurred in relation to a medical leave of absence, apparently occasioned by injuries sustained in a motor vehicle accident.

The sequence of events leading to the instant grievance appears to have originated in February of 1993. The grievor alleged that he had been threatened by a fellow employee on February 11, 1993, during a meeting held to discuss his complaint about employees smoking in the workplace. A formal investigation was conducted by the Company at Winnipeg in relation to that allegation on March 1, 1993. Although the record is not complete in respect of the triggering incident, it would appear that tension evolved between the grievor and other employees by reason of his complaints about employees smoking in the South Hump area of the Winnipeg Yard. The record of what transpired in relation to the smoking incident investigation need not be elaborated here. Suffice it to say that it is a case study in pettiness gone out of control. Mr. Florison is plainly not one given to the arts of conciliation, and the record includes a memorandum from the grievor characterizing the conduct of others with the use of such words as "contrivance, misrepresentation, misleading sin of omission, commission of false statements, conspiracy, connivance and vile act of moral turpitude". He demonstrates no restraint from inflicting insult at a personal level. Mr. Florison came to refer to the meeting of February 11, 1993, called to discuss the smoking problem in General Yardmaster Zeglinski's office, as the "Ziegfeld Follies". On a later occasion, he referred to a letter written by Superintendent Hedden dated April 1, 1993 as the "April Fools' Day letter".

It appears that the grievor, unsatisfied with the Company's handling of the smoking issue, wrote a complaining letter initially to the CP Police Department, and thereafter to the Winnipeg Police. The tenor of the grievor's written

communications in relation to those complaints reflect the view of a person who feels persecuted and conspired against by everyone around him. Being unsatisfied with the outcome of the Company's disciplinary investigation into the smoking incident and the alleged threats to himself, the grievor addressed a 94 page "Documentary Letter of Petition and Grievance" to Union General Chairman L.O. Schillaci and General Manager F.J. Green referring, in part, to the "sham investigation of fraudulent concealment and defamatory letter of disparaging instructions and deception" against himself. Unfortunately, he makes reference to Superintendent Hedden in such terms as "questionable character" and "supercilious superintendent" stating that he "... did exhibit his DEPRAVED mind and depravity of heart". When nothing further came of his complaints, the grievor turned his anger on his union representatives, as well as against Superintendent Hedden, charging that Local Chairman Gudmundson "... did practice an act of INFIDELITY exhibiting corrupted morals or depravity of heart ...", referring to him as a "backstabber". The grievor further related, in writing, that he had been referred to the psychology department of a Winnipeg hospital for stress management, and that he had been diagnosed as anxious and tired and, among other things, as suffering from traumatic stress syndrome.

On January 10, 1994 the grievor suffered an injury to his knee when he was struck by a car in an adjacent track while he was riding on the side of a car during a switching operation. After a leave of absence for his physical injury, the grievor provided a certificate from his physician, Dr. E.T. Lawrence, indicating that he "... is fit to return to full duties on 11/2/94." It appears that he further provided the Company with a medical certificate from a chiropractor also stating that he was fit to return to work effective February 11, 1994.

Superintendent Hedden, however, took another view. In a letter dated January 26, 1994 the superintendent instructed the grievor, in part, as follows:

> I have taken the opportunity to review your file and after doing so, I have consulted with our medical consultants. In my view, only an individual with severe health troubles would continue to carry on in the fashion that you have chosen to conduct your business. As such, I can only conclude that at the present time, you overall heath is somehow flawed and your judgment impaired.
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> The position of Yardman/Yard Foreman is keenly safety-sensitive and I am not prepared to place at risk the safety of yourself, your fellow employees and the public at large by allowing you to return to active duty until such time as I am satisfied that your overall health and judgment is sound.
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> Accordingly, it will be necessary for you to obtain authorization from Occupational & Environmental Health before resuming duty.
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> In this regard, you will need to have your personal physician (who we understand to be Dr. E.T. Lawrence) submit a full report on your condition. The report should identify you by name, date of birth, position and location. It should contain a precise diagnosis, treatment received, response to treatment an any medication you may or should be taking, as well as any limitations/restriction you may have. **The report must be complete based on a recent medical examination and psychological evaluation.** (emphasis added)

By letter dated February 14, 1994 Dr. Lawrence advised the Company in writing that the grievor had instructed him not to give the Company further details as to his mental and physical health ".. other than the note that I have given him saying that he is fit to return to work on February 11, 1994."

Before the Arbitrator there is no issue as to the grievor's physical fitness to return to work as of February 11, 1994. The record discloses that the grievor did, in fact, receive Workers' Compensation Board benefits for a claim submitted in relation to his work related injury of January 10, 1994. Benefits were paid through February 10, 1994, at which point the board took the view that the grievor was fit to return to work.

In light of Superintendent Hedden's refusal to allow the grievor to work pending a psychiatric examination, the Union interceded on his behalf, filing a grievance dated March 3, 1994. Thereafter, Dr. G. Berthiaume, the Company's Corporate Medical Advisor, wrote the grievor on April 15, 1994 advising that he had scheduled an appointment for Mr. Florison to be examined by Dr. R. Albak. Dr. Berthiaume stated, in part, "I am requesting to resolve the issue that you attend to an appointment with Dr. Albak to determine your fitness to work as a yard foreperson in all capacities." When, in a letter of response, the grievor inquired of Dr. Berthiaume whether the

proposed medical examination was to be under section 35 of the Railway Safety Act, Dr. Berthiaume responded by letter dated May 4, 1994. He then stated that the request was not made under the Railway Safety Act:

> I want to clarify the fact that my request to attend an appointment with Dr. Russell Albak is not based on section 35 of the Railway Safety Act, Chap. R-4.2. or any other law. I have made this request to resolve the issue and you are under no legal obligation to answer my request.

The grievor thereafter declined to attend at the appointment with Dr. Albak, and has since taken the position that he is under no obligation to comply with Superintendent Hedden's direction that he be subject to a psychiatric examination before returning to work. The sole issue before the Arbitrator is whether the Company has wrongfully deprived the grievor of the opportunity to return to work, by requiring, as a condition of his return, that he undergo a psychiatric examination, by a specialist of his own choosing, to confirm his mental and emotional fitness to return.

Counsel for the Council submits that the Company did not have a proper basis to demand that the grievor provide a medical certificate of psychiatric fitness in the circumstances of the case at hand. He stresses that the Company is protected by the provisions of the **Railway Safety Act** which provides, in part, as follows:

> **35(1)** A person who holds a position in a railway company that is declared by regulations made under paragraph 18(1)(b) to be a position critical to safe railway operations, referred to in this section as a "designated position", shall undergo a company-sponsored medical examination, including audio-metric and optometric examination, at least every twelve months.
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> **2)** Where a physician or an optometrist believes, on reasonable grounds, that a patient is a person described in subsection (1), the physician or optometrist shall, if, in the physician's or optometrist's opinion, the patient has a condition that is likely to constitute a threat to safe railway operations,
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> **(a)** by notice sent forthwith to the Chief Medical Officer of the railway company or to a physician or optometrist specified by the railway company, inform the Chief Medical Officer or the specified physician or optometrist of that opinion and the reasons therefor, after the physician or optometrist has taken reasonable steps to first inform the patient, and
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> **(b)** forthwith send a copy of that notice to the patient,
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> and the patient shall be deemed to have consented to the disclosure required by paragraph (a).
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> **(3)** A person who holds a designated position in a railway company shall, prior to any examination by a physician or optometrist, advise the physician or optometrist that the person is the holder of such a position.
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> **(4)** A railway company may make such use of any information provided pursuant to subsection (2) as it considers necessary in the interests of safe railway operations.
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> **(5)** No legal, disciplinary or other proceedings lie against a physician or optometrist for anything done by that physician or optometrist in good faith in compliance with this section.

Further, in Counsel's view, the Company is limited by Canadian arbitral jurisprudence in respect of its ability to require that an employee submit to a psychiatric evaluation, absent compliance with certain procedures, and absent reasonable and probable grounds to do so. He points, in part, to the following passage in the award of Arbitrator Weatherill in **Re Firestone Tire and Rubber Co. of Canada Ltd. and United Rubber Workers, Local 113** (1973) 3 L.A.C. (2d) 12 where, at p. 13, the following appears:

> There is no doubt that an employer has both the entitlement and the obligation to satisfy itself as to the fitness of its employees to carry out the tasks to which they will be assigned. What is proper will depend, in each case, on the nature of the work and the circumstances to which it is to be performed. In **Re U.A.W., Local 525, and Studebaker-Packard of Canada Ltd.** (1960), 11 L.A.C. 139 (Cross), it was held that it was a paramount right of management to require that employees be physically fit to perform the work that they are required to do and to satisfy itself by medical opinion if necessary, that this is so. In **Re U.A.W., Local 89, and Reflex Corp. of Canada Ltd.** (Weatherill), referred to in **Re U.A.W., Local 27 and Eaton Automotive Canada Ltd.** (1969), 20 L.A.C. 218 at p. 220 (Palmer), the **Studebaker** case was approved and it was

added that there must be reasonable and probable grounds for the imposition of such a requirement. In the **Reflex** case, it was said:

> Clearly, where an employee returns from an absence due to illness, the occasion is proper for the company to require some certification of fitness. Where the certificate is not satisfactory, the company could properly require a further certificate, or could direct its own medical examination. Such a procedure, however, must be carried out in accordance with ordinary principles of fairness. If, as in the instant case, the company is to reject the medical certificate offered by the returning employee, it must state the grounds for such objection, and must point out to the employee what it requires before it well permit his return. If the certificate in itself is not satisfactory, the employee must be advised of that, so that he may either protest the reasonableness of the company's rejection of it, or request a more ample certificate from his doctor. If a further medical opinion is required, then again the company must advise the employee of that fact.

Counsel for the Council submits that in the case at hand there was nothing in the circumstances of the grievor's knee injury which could give the Company grounds to doubt his fitness to return to work for any mental or emotional reason. In his submission, the position taken by the Superintendent Hedden was motivated by the personal animosity between himself and the grievor, and cannot be said to have been the result of any medical or other professional opinion in relation to the grievor's mental state. In this regard Counsel stresses that although Superintendent Hedden's letter reflects an indication of having consulted with doctors, it contains no reference to any medical opinion supporting the view that the grievor should be required to undergo a psychiatric examination before returning to work following his knee injury. Nor was any such evidence adduced before the Arbitrator. Further, Counsel stresses the fact that Dr. Berthiaume, the Company's own physician, did not take the position with the grievor that he was requiring him to be examined psychiatrically by reason of the Railway Safety Act, or any other law, stressing that the grievor was under no obligation to comply with his request.

The Company submits that the request made of Mr. Florison was reasonable in the circumstances, and that the Superintendent had ample reason to question his emotional stability, in light of a number of factors. Firstly, it cites the fact that the injury suffered by Mr. Florison on January 10, 1994 occurred in circumstances closely approximating the situation in another section of the yard which he had raised as a safety hazard in a previous complaint. The concern is that he may have injured himself deliberately, to make a point. Additionally, reference is made to the numerous pleas on the part of Mr. Florison, as reflected in the correspondence received from him over the years since 1984, to the effect that personal circumstances had repeatedly caused him severe psychiatric and emotional stress. Also, the Company refers the Arbitrator to the general conduct and demeanor exhibited by Mr. Florison in his relations with supervisors, fellow employee and union representatives alike, including his use of inflammatory and insulting language, and his propensity for apparently uncontrollable obsession in relation to relatively petty and insignificant matters. On the whole, the Company submits that it had reason to be concerned about the grievor's mental stability, that its concerns had in fact pre-dated his injury of January 10, 1994, and that it had reasonable grounds to require a medical opinion certifying his mental or psychiatric fitness to return to work prior to reinstating him following the leave of absence occasioned by his knee injury of January 10, 1994.

In support of its position the Company refers the Arbitrator to the following awards: **Re Monarch Fine Foods Co. Ltd. and Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local 647** (1978) 20 L.A.C. (2d) 419 (M.G. Picher); **Re Thompson General Hospital and Thompson Nurses M.O.N.A., Local 6**, (1991) 20 L.A.C. (4th) 129 (Steel); and **Re Brinks Canada Ltd. and Teamsters Union, Local 141** (1994) 41 L.A.C. (4th) 422 (Stewart).

I turn to consider the merits of the dispute. The issue of the right of an employer to require an employee to subject himself or herself to a physical or psychiatric examination is one of considerable sensitivity, which has been given much consideration by boards of arbitration in Canada over the years. Firstly, it may be noted that the passage from the award of Arbitrator Weatherill in the **Firestone Tire** case cited above has received substantial approval among arbitrators in Canada. In the **Monarch Fine Foods Co.** case, cited by the Employer, there was no dispute as to the employee's fitness to work. However, the employer insisted on the employee being examined by its doctor to verify the truth of a medical certificate in relation to a claimed injury which had resulted in an extention of his annual leave. The arbitrator rejected the employer's position and commented as follows at pp. 421-22:

> It is well established that persons do not by virtue of their status as employees lose their right to privacy and integrity of the person. An employer could not at common law assert any inherent right to search an employee or subject an employee to a physical examination without consent: **Latter v. Braddell et al.** (1881), 50 L.J.Q.B. 448 (C.A.). Thus there is nothing that can be described as an inherent management right to subject an employee to what would otherwise be a trespass or an assault upon the person. The right of an employer to require an employee to submit to an examination by a doctor of the employer's choice was reviewed by the Court in **Re Thompson and Town of Oakville** (1963), 41 D.L.R. (2d) 294 (Ont. High Ct.). In that case two constables were effectively discharged for refusing to submit to a medical examination when ordered to do so by their chief constable. The orders of the municipal council discharging the constables were quashed on certiorari on the basis that there was no lawful authority in the employer to impose the requirement of a medical examination upon them. In coming to that conclusion McRuer, C.J.H.C., stated [at p. 302]:
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> > The right of employers to order their employees to submit to an examination by a doctor of the choice of the employer must depend on either contractual obligation or statutory authority.
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> Normally, where an employment relationship is governed by a collective agreement, the authority of an employer to require an employee to submit to a medical examination must, apart from statutory authority, be either expressed or implied in the collective agreement. In the instant case no statutory authority to order a medical examination was claimed by the company. It then becomes necessary to determine whether the authority asserted can be found expressed in the collective agreement or be implied either from the agreement or from some established past practice of the company.
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> The arbitration cases which have dealt with this issue most frequently are those in which an employee returns to work after an absence due to illness and an issue arises as to the ability and fitness of the employee to return to work. Boards of arbitration have consistently held that it is implicit in the rights of management to require that employees be physically fit to perform their work efficiently and safely. Thus it has been found that an employer may, where reasonable and probable grounds exist, require that the employee pass a medical examination by the company's doctor or by a medical practitioner named by the company to determine an employee's fitness to return to work: see **Re Studebaker-Packard of Canada Ltd. and U.A.W., Local 525** (1960), 11 L.A.C. 139 (Cross); **Re Eaton Automotive Canada Ltd. and U.A.W., Local 27** (1969), 20 L.A.C. 218 (Palmer); **Re Firestone Tire and Rubber Co. of Canada Ltd. and United Rubber Workers, Local 113** (1973), 3 L.A.C. (2d) (Weatherill).

The principles which govern in a case of this kind, which have chiefly developed in relation to issues of physical disability, were canvassed as follows by the Arbitrator in the **Re Thompson General Hospital** case at pp. 134-36:

> An employer has the right and the obligation to assure itself that an employee returning to work after an illness is fit to resume her work (**Re Firestone Tire & Rubber and U.R.W., infra**, app. A).
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> This entitlement may arise from specific provisions in the collective agreement or from the general provision on management rights:
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> > To the extent that it falls within management's rights to ensure itself that an employee is fit and able to work in return for the pay he receives, the employer's discretion in that regard is reviewable by a board of arbitration to determine whether the employer acted arbitrarily, discriminatorily or in bad faith. This duty on the part of the employer is implied in every collective agreement whether or not said agreement contains specific provisions to that effect.
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> (**Re Tele-Direct (Publications) Inc. and O.P.E.I.U., Loc. 131, infra**, p. 175)
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> ...

Where, on reasonable grounds, the employer is not satisfied with the certification offered by the employee, some arbitrators have stated that the employer may demand that the employee secure additional medical certification or under further medical examination by a physician designated by the employer, or that he or she waive the confidentiality of personal medical records and permit the employer to secure such information from the employee's physician (Brown and Beatty, **Canadian Labour Arbitration**, 3rd ed., para. 7:3250).

Before the employer can place additional requirements on the employee, it must, in accordance with ordinary principles of fairness, state the grounds of its objection to the medical certificate offered by the grievor and must point out to the employee what it requires before it will permit his return. "If the certificate in itself is not satisfactory, the employee must be advised of that, so that he may either protest the reasonableness of the company's rejection of it, or request a more ample certificate form his doctor. If a further medical opinion is required, then again the company must advise the employee of that fact" (**Re Firestone Tire & Rubber Co. of Canada Ltd., infra**, p. 175).

However, the degree and sufficiency of medical evidence required will vary depending on a number of factors. First, the employee's work or the employer's position may require a higher standard of care than in other situations. The medical certificate should provide an indication that they can perform the particular work requested of them. For example, in the case of **Re Sunnybrook Hospital and Sunnybrook Hospital Employees, infra**, at p. 88 the duties of a nurse were considered:

> In the instant case the grievor's duties are to care for the sick and the disabled. It is imperative that she have the physical ability to carry out her duties. The grievor noted that oftentimes she must look after "total-care patients" whose label clearly demonstrates their complete dependence on the grievor's physical well-being. The employer is not only entitled here to ensure that the grievor has the fitness to carry out her tasks but would be delinquent in its own responsibilities if it failed to do so.

(See also **Re Good People Sea & Shore**, at p. 344.)

Second, most arbitrators have recognized that the employer has a right, and according to some, a duty independent of simply receiving the medical certificate submitted, to satisfy itself that the employee is medically fit. The right is premised on the employer having reasonable and probable grounds for assuming that the employee is unfit or would present a danger to himself, his fellow employees, or to company property:

> For example, it would clearly be proper for the employer to demand additional medical certification attesting to the employee's recovery if the employee had initially presented a standard medical form which did not contain any diagnosis of the grievor's illness, prognosis for recovery, or details as to the mature of the treatment provided.

(Brown and Beatty, para. 8:3342.)

In summary, once an employee produces a medical certificate stating unequivocally that he is fit to return to work, the onus shifts onto the employer to establish that he is not fit to return to work. If the employer has reasonable grounds on the facts of the case to question the validity or the completeness of the opinion stated in the medical certificate, then it must explain clearly to its employee the reason the medical certificate is not acceptable and what specific information is requested so that the employee can return to its treating physician and obtain the proper information. If the explanation is not satisfactory the company may, after consultation with the concerned employee, require that a medical examination preferably by an independent doctor, be undertaken (**Re Tele-Direct (Publications) Inc., infra**, p. 177).

Of course, the standard of proof required with respect to fitness cannot be unreasonable. An employer may not refuse to allow an employee to return to work on the mere possibility of medical problems in the future, although the precise degree of risk that the employer must bear is a matter of some debate among arbitrators and will depend upon the facts of each case.

The **Thompson General Hospital** case itself concerned the mental or emotional fitness of a nurse to return to the duties of a head nurse position in a busy hospital. In that case it was common ground that the grievor had suffered clinical depression which gave rise to the leave of absence from which she sought to return. The arbitrator concluded that the employer did have reasonable grounds to request information additional to the rather general statement provided in a medical certificate from the grievor's physician. In doing so, he expressed the view that he must consider the nature of the work, the medical condition of the employee precipitating the concern of the hospital and the quality of the medical information made available to the employer in support of the employee's request to return to the full range of her duties.

The **Brinks Canada Ltd.** case also involved an employee whom the employer believed suffered emotional difficulties. It appears that he went on a leave of absence following a confrontational meeting with his employer, submitting a note from his family physician to the effect that he was "... suffering from an acute and severe situational reaction", coupled with the recommendation that he go off work until the situation should improve. In that circumstance the company refused to reinstate the grievor, who carries a firearm as part of his employment, until such time as he obtained a certificate of psychiatric fitness to return to work. The arbitrator reviewed the jurisprudence and found, on the facts, that the demand of the employer was not reasonable, and ordered the reinstatement of the grievor with compensation. At p. 431, Arbitrator Stewart reasoned, in part, as follows:

> ... The evidence before me relating to Mr. Matchett's actions simply do not support the conclusion that the employer was reasonably compelled to immediately seek a psychiatric assessment. I am unable to accept the validity of the employer's position that stress or emotional problems are necessarily, and in all circumstances, beyond the competence of a general practitioner to assess, treat and provide a valid opinion upon in relation to the ability of the employee to resume employment and that, therefore, there would be no value in obtaining this information. If the employer has a reasonable basis for the view that the information/opinion available from this source is inadequate then the matter could appropriately be pursued further and other avenues, such as a psychiatric evaluation, could be explored.
>
> I agree with Mr. Riendeau that given the nature of the grievor's responsibilities, in particular the possession of a firearm, the diagnosis and brief information provided to the employer through the notes prepared by Dr. Wong and Dr. Potter gave rise to a reasonable basis for the employer to wish to obtain further information regarding Mr. Matchett's ability to perform his duties without danger. The fact that Mr. Matchett is required to carry a firearm in the course of his duties is a matter that the employer reasonably required to be addressed in a medical opinion as to his fitness to return to work. However, in the absence of making further inquiries with respect to the matter through the avenues that were available to it that I have referred to earlier, it is my conclusion that in the circumstances that existed at the relevant time, the employer's insistence on a psychiatric evaluation by Dr. Margulies at that point was unreasonable.

As the cases disclose, boards of arbitration strive to balance the interests of the employer in assuring itself of the fitness an employee to resume his or her duties with the rights of privacy and dignity of the employee in sensitive and personal matters of physical and mental health. Given the stigma which, rightly or wrongly, can attach to a label of emotional or psychiatric abnormality, boards of arbitration must generally require compelling evidence to establish that an employer has reasonable and probable cause to require that an employee undergo a psychiatric examination as a condition of continued employment.

What does the evidence in the case at hand disclose? Clearly, the grievor has exhibited a history of confrontational relations with his supervisors, fellow employees and union representatives. With little concern for the sensibilities of others, or for generally accepted norms of civility, he verbally attacks anyone he perceives as acting contrary to his interest with a zeal that is beyond the acceptable. On a fair review of the evidence the Arbitrator cannot but conclude that Superintendent Hedden, and other Company officers, and no doubt Union officers, have been extremely patient and considerate in dealing with Mr. Florison. The Arbitrator makes no comment on whether his actions and comments in the past might not have fairly warranted serious measures of discipline. Clearly, nothing in this award should be taken as approval of the style of communication and personal relations exhibited by the grievor.

It is, however, an extremely serious matter for an employer to require an employee to subject himself or herself to a psychiatric examination as a condition of continued employment. At a minimum, as the cases reflect, the

employer must have reasonable and probable grounds to do so. There may be circumstances, I am sure, where such grounds may arise simply on the face an individual's conduct, without the need for a professional medical opinion. If for example an employee should begin to hallucinate or act in an entirely irrational fashion in the work place, such conduct might, of itself, justify an employer requiring a physical and psychiatric certification of an employee's fitness to resume his or her employment.

Other cases may, however, fall within a gray area. If an employee's conduct, over a period of time, is not of itself grossly irrational or necessarily dangerous, but is of a nature to give rise to reasonable concerns, it may be appropriate for an employer to consult its own physician to obtain a medical opinion as to whether a psychiatric examination should be required. Indeed that is what was done, quite properly, in the grievor's case in light of his circumstances in the early part of 1985, although at that time the Company decided ultimately not to insist on a psychiatric examination and allowed him to return to service.

In the gray area, however, great caution must be exercised. The fact that an employee may, for example, espouse bizarre political, religious or social views, or may appear to be strangely obsessed with matters which may be extraneous to the performance of his or her duties, should not necessarily be viewed as indicating mental illness, and should be dealt with with a substantial degree of caution. Demanding that an individual undergo a psychiatric examination is not a neutral event. Consequently, although each case must turn on its own specific facts, as a general rule when the behaviour of an employee can fairly give rise to reasonably held differences of opinion as to his or her mental state, an employer asserting that it has reasonable and probable cause to demand a psychiatric examination must provide substantial evidence to sustain that view. In some cases, absent other sufficient evidence, it may have to obtain a preliminary medical opinion to support the requirement that an employee undergo a psychiatric examination as a condition precedent to returning to work.

In the case at hand there is no evidence of conduct on the part of Mr. Florison which has ever jeopardized his own safety or the safety of others, or his ability to perform his work in an efficient manner. There is, of course, ample evidence that he has demonstrated an inability to get along with others, including supervisors, in situations of disagreement. For reasons which it best appreciates, however, the Company has not disciplined Mr. Florison for his actions in that regard.

What recourse did the Company have? It appears to the Arbitrator that the **Railway Safety Act** was fully available to the Company, as argued by Counsel for the Council, at least as a means of securing an opinion as to whether a psychiatric examination was in order. The language of section 35 of the **Act** appears to contemplate the identifying of a medical problem during the course of an employee's annual medical examination, but it can, I think, be construed to confirm the right of an employer to require a medical examination when it is reasonable to do so.

Further, quite apart from the **Act**, the Company is fully able to protect itself in relation to concerns as to the emotional or psychiatric stability of any individual employed in a safety sensitive position. It could, in the case at hand, have obtained a medical opinion, as it did in 1985, based on the record of the grievor's actions, leaves of absence and the correspondence which was placed before the Arbitrator, to determine whether in the opinion of its own physician there was reasonable and probable cause to require the grievor to be subjected to a psychiatric examination prior to his return to work. It did not do so however. The evidence before me is devoid of any such medical opinion or advice obtained by Superintendent Hedden, and no medical documentation whatsoever in support of the Company's position has been placed in evidence.

For the reasons touched upon above, the ability of a lay person to direct an individual to undergo a psychiatric examination is one of considerable sensitivity. The Arbitrator rejects out of hand any suggestion that in the instant case Mr. Hedden used his authority to direct the grievor to do so as an instrument of retribution for personal attacks on himself. However, concern for the possible misuse of such managerial authority is not unreasonable. The possibility that employees who are viewed as eccentric, unpleasant or just "different" might too easily be subjected to psychiatric examinations without compelling evidence to support such an extreme measure explains why boards of arbitration and courts follow a cautious approach in this area, fully sensitive to the need to give due protection to the dignity of the individual.

The evidence discloses that in the early to mid 1980's the grievor related to his employer that he was under medication for emotional stress. In that circumstance, I think, little exception could have be taken to the course which the Company followed. It obtained the opinion of its own physician that further confirmation of the grievor's emotional and mental state should be required prior to his return to work after a long leave of absence.

However, a different circumstance presents itself now, some ten years later. Firstly, over the years Mr. Florison has apparently fulfilled his duties and responsibilities without apparent risk or danger to himself or others. While he has, on occasion, referred to himself as being under stress, there is no evidence of his suffering from any diagnosed clinical condition or of his being treated by a physician for any condition or mental disturbance in the period preceding his knee injury. Most importantly, there is no evidence that the grievor's supervisors obtained any medical opinion to sustain the view that there was reasonable cause to require a psychiatric examination of the grievor in January or February of 1994. The position of Dr. Berthiaume to the effect that the grievor was not required to undergo a psychiatric examination in 1994 stands in sharp contrast to the position expressed by Dr. Grimard in 1985.

The Arbitrator appreciates that Mr. Hedden has endured much as the grievor's supervisor, particularly in relation to his obsessive pursuit of the smoking meeting issue. With respect, however, I cannot sustain the view that, absent the endorsement of some medical opinion, he was, in the circumstances, entitled to apply his layman's judgment that the grievor had "severe health troubles" or that his "overall health is somehow flawed and [his] judgment impaired" so as to justify his requirement of a psychiatric examination as a condition of the grievor's re-entry to the workplace.

The reflections of this award should not be taken as any ultimate conclusion as to the rights of the Company, by the pursuit of proper procedures, to require the grievor to submit to a psychiatric examination, whether now or in the future. If, for example, it could be shown that a medical opinion supported such a course of action, the conclusion of the case at hand would be substantially different. However, the evidence does not go so far. I am therefore compelled to conclude that, while the Company had every reason to be concerned about the grievor's propensity for confrontation in his relations with his supervisors and fellow employees, it has not demonstrated reasonable and probable cause for Mr. Hedden, as a layman, to require that the grievor undergo a psychiatric test as a condition of his reinstatement into employment. In this regard, it should be stressed that while the superintendent's letter makes reference to having consulted with physicians, no evidence of any such consultation, and no medical opinion of any kind, has been tendered in evidence before the Arbitrator.

For the foregoing reasons the grievance must be allowed. The grievor shall be reinstated into his employment forthwith, with compensation for all wages and benefits lost, and without of loss of seniority. As noted above, nothing in this award should be taken as restricting the Company's ability to deal with any legitimate concerns, supported by appropriate evidence, as to the grievor's fitness to perform his duties.

April 26, 1995

**(signed) MICHEL G. PICHER**
**ARBITRATOR**