CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2945

Heard in Calgary, Tuesday, May 12, 1998

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Denial of weekly indemnity sickness benefits on behalf of Mr. G. Gariano for the period August 14, 1996 to September 17, 1996.

JOINT STATEMENT OF ISSUE:

On January 28, 1997, the grievor was denied weekly indemnity sickness benefits from Sun Life of Canada for the period claimed from August 14, 1996 to September 17, 1996 under Contract No. 25036.

The Union contends that: **1.)** The medical evidence provided by Mr. Gariano and his doctor provides sufficient medical information to warrant payment of benefits for the period claimed. **2.)** The reason Mr. Gariano took ill was due to the way his situation was handled by his supervisor and the Company which caused his medical condition. **3.)** The Company and Sun Life of Canada have unreasonably denied Mr. Gariano weekly indemnity sickness benefits.

The Union requests that the grievor, Mr. Gariano, be compensated in the form of weekly indemnity benefits, with interest, for the period from August 14, 1996 to September 17, 1996.

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

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD.) R. F. LIBERTY	(SGD.) S. BLACKMORE
SYSTEM FEDERATION GENERAL CHAIRMAN	FOR: SENIOR VICE-PRESIDENT, WESTERN CANADA

There appeared on behalf of the Company:

S. Blackmore	— Labour Relations Officer, Edmonton
J. Torchia	— Director, Labour Relations, Edmonton
J. Bauer	— Human Resources Business Partners, Great Plains District, Transportation, Edmonton
J. Dixon	— Assistant Manager, Labour Relations, Edmonton
D. Van Cauwenbergh	— Labour Relations Officer, Edmonton
R. Opar	— Track Supervisor, Winnipeg

And on behalf of the Brotherhood:

P. Davidson	— Counsel, Ottawa
R. F. Liberty	— System Federation General Chairman, Winnipeg
J. Dutra	— General Chairman, Edmonton
D. W. Brown	— Sr. Counsel, Ottawa
L. P. Gladish	— General Chairman, Secretary/Treasurer, Winnipeg

AWARD OF THE ARBITRATOR

The first issue to be resolved in this dispute is whether, as the Company contends, the grievance is inarbitrable. The Company submits that the weekly sickness indemnity benefits which the grievor claims are not a matter arising out of the collective agreement, but rather that they relate entirely to the application and administration of the weekly indemnity plan document overseen by Sun Life.

The Arbitrator cannot sustain the Company's position on the issue of arbitrability. As Counsel for the Brotherhood points out, the insurance policy which is the subject of this dispute is fully incorporated by reference within the terms of the collective agreement. In this regard article 41.1 provides as follows:

> **41.1** Health and Welfare benefits will be provided in accordance with Employee Benefit Plan Supplemental Agreement (the "EBP") dated July 25, 1986, as revised, amended or superseded by any agreement to which the parties to this collective agreement are signatory.

I am satisfied that by the foregoing provision the parties agreed that the Company bears the collective agreement obligation to provide benefits as described in the plan referred to, and that any failure to provide such benefits is a matter which can be grieved as part of the enforcement of article 41.1. Consequently, the rejection of an employee's claim for reasons which are arguably beyond the terms of the benefit plan must itself be arbitrable. Any doubt about the Arbitrator's jurisdiction in this regard is now, in my view, fully resolved by recent jurisprudence pleaded by Counsel for the Brotherhood, including the decision of the Supreme Court of Canada in **St. Anne-Nackawic Pulp & Paper Co. Ltd v. Canadian Paper Workers Union, Local 219** (1986), 28 D.L.R. (4th) 1, as well as the decision of the same court in **Weber v. Ontario Hydro** (1995), 125 D.L.R. (4th) 583, and, more specifically, the decision of the Ontario Court of Appeal in **Pilon v. International Minerals & Chemical Corporation (Canada) Limited et al** (1996), 31 O.R. (3rd) 210. As pointed out by Counsel for the Brotherhood, an arbitrator's jurisdiction in such circumstances was thoroughly reviewed and analysed by Arbitrator M.G. Mitchnick in **Re Honeywell Ltd. and CAW - Canada** (1997), 65 L.A.C. (4th) 37.

I turn to consider the merits of the dispute. The grievor's indemnity claim arises from a period of absence from work for approximately one month, being August 14, 1996 to September 17, 1996. It appears that when the grievor was denied a requested leave for August 17 and 18, he advised his supervisor that he would be taking the time off anyway. Thereafter he remained absent from work for approximately one month, asserting that he was unable to work by reason of work related stress. When it became known to the grievor's supervisor, Mr. Julian Kawalilak, that the grievor was making a claim for Sun Life indemnity payments, the supervisor directed an e-mail to the Sun Life claims examiner, the substance of which was to cast doubt on the grievor's claim and to suggest that he was not legitimately ill. It appears that Mr. Gariano had submitted certain doctors' notes in support of his indemnity claim, the content of which was deemed not sufficient by the insurer for the purposes of accepting the claim.

When the grievor's parallel claim for Workers' Compensation benefits was denied he re-submitted his claim to the insurer. It appears that his subsequent claim was ultimately augmented by a more thorough letter from his physician, dated January 16, 1997. That letter advised that he had been seen by the doctor on several occasions in August and September of 1996 when he was "… diagnosed as having a generalised anxiety disorder". The doctor's letter also relates that the grievor had complained of abdominal bloating and stomach upset, which he diagnosed as "a gastric irritability problem which was precipitated by stress." The doctor advised the insurer that on the basis of his opinion the grievor was unfit to work until September 16, 1996. Shortly thereafter, on January 28, 1997 Claims Examiner Madeleine Manning finally rejected the claim stating, in part:

> The information clearly indicates that Mr. Gariano was off work due to a work situation. This situation should have been resolved through his place of employment and not through disability claim.
>
> We are therefore unable to accept this claim and our file is now closed.

To resolve this dispute the Arbitrator must necessarily determine whether the grievor was in fact entitled to benefits under the indemnity plan. Unfortunately, the evidence before me with respect to the actual terms of the plan is less than satisfactory. The Brotherhood's materials do not appear to contain the actual plan, but rather a description of the plan published for the informational assistance of employees. Nor are the full terms of the plan found in the materials provided to the Arbitrator by the Company. Rather, as part of its brief it excerpts the following segment which it submits is contained under the heading "Proof of Claim":

> Written proof of Full Disability **satisfactory to Sun Life** must be made to and received by Sun Life's claim office within 30 days of the commencement of any period of disability for which benefits are payable. If proof is received later than 30 days from the commencement of disability, benefits will commence, subject to all other Plan provisions, on the date of receipt of proof at Sun Life's Claim Office.
>
> Notwithstanding approval by Sun Life of proof of your Full Disability, Sun Life may at any time or times thereafter request proof satisfactory to Sun Life of the continuance of Full Disability, and Sun Life will have the right to have a Doctor of its choice medically examine you.
>
> If such proof is not furnished at Sun Life's request, your full Disability will be considered to have ceased and your Weekly Benefits will be discontinued.
>
> (emphasis added)

The Company submits that the record before me indicates that the grievor's claim of full disability was not satisfactory to Sun Life, as revealed in the ultimate rejection of the grievor's claim. However, I am not persuaded that the mere assertion of a conclusion by the insurance administrator is of itself sufficient to dispose of the claim and grievance. A similar issue was dealt with in **CROA 2849**, an award between **CanPar and the Transportation Communications (International) Union**, dated May 30, 1997. In that case the insurance administrator on behalf of the employer CanPar was Metropolitan Life. The proof of claim provision of the insurance plan required, in part:

> Written proof of Full Disability satisfactory to Metropolitan must be made to and received by Metropolitan's Claim Office within 31 days of the commencement of any period of disability for which benefits are payable.

In that case the Arbitrator rejected the grievance, commenting as follows:

> As is apparent from the foregoing, the parties have contractually agreed to establish Metropolitan Life as the primary judge of the merit of an individual employee's claim to weekly indemnity benefits. The Arbitrator is satisfied that the insurance company's opinion is to govern, subject only to it being given for reasonable and valid business purposes, and not for motives that are arbitrary, discriminatory or in bad faith. There is no such suggestion in the case before me. Plainly, the very sketchy report as to the grievor's condition provided by his family physician was, understandably, not deemed by the insurance company to be a satisfactory account of his condition, or to constitute sufficient proof of his inability to perform his job. On that basis the Arbitrator can see no violation of the collective agreement.

I am satisfied that the above principles should apply in the instant case. On what basis, therefore, can the Arbitrator in this matter determine whether the decision of the insurance company's claims examiner was rendered in good faith, for valid business purposes and without arbitrariness or discrimination? In this matter the Brotherhood bears the burden of proof. All that is presented to the Arbitrator are the medical opinion of the grievor's physician, which it appears the insurance examiner rejected, and the written opinion of the grievor's supervisor, communicated to the insurer, to the effect that he was malingering and that his claim was without merit. As the Courts have indicated, a conclusion that a person or corporation has acted in bad faith or in an arbitrary fashion should be based on evidence commensurate with so serious a finding.

In this case the Arbitrator is without any meaningful ability to understand or analyse the reasoning of the claims examiner or, for that matter, of the grievor's physician. It was, of course, open to the bargaining agent to use this Office's subpoena power to obtain the presence of those individuals, and to bring forth testimony which would have allowed a more substantial basis for a determination of the merits of this matter. Absent any such evidence, however, I am compelled to the conclusion that the Brotherhood has failed to discharge its burden of proof to establish, on the balance of probabilities, that the decision of the insurance examiner, and by extension of the Company, was taken in a manner which was arbitrary, discriminatory, in bad faith or without any valid business purpose.

For these reasons the Arbitrator is unable to determine that the grievor did have a meritorious claim, or that the insurer acted beyond the scope of the plan in coming to its conclusion.

For these reasons the grievance must be dismissed.

May 19, 1998

(signed) MICHEL G. PICHER
ARBITRATOR