CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3503

Heard in Edmonton, Wednesday 13, July 2005

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

EX PARTE

DISPUTE:

Removal from service of Mr. Dennis I. Werboweski.

UNION'S STATEMENT OF ISSUE:

On April 7, 1999, Mr. Werboweski was removed from service due to a seizure he suffered on March 21, 1999. Mr. Werboweski was held out of service until July 14, 1999. The Company contends that freedom from seizures is a *bona fide* occupational requirement for persons employed in a safety sensitive position.

The Union contends that: **(1)** The Employer unjustly removed Mr. Werboweski from service without giving proper consideration to medical evidence provided by his treating physicians indicating that Mr. Werboweski was fit to return to work; **(2)** The Employer failed to obtain from their own physician – consultant an assessment of Mr. Werboweski's condition in a timely manner; **(3)** The Employer refused to provide Mr. Werboweski with modified work during the time he was removed from service; **(4)** The Employer removed and withheld Mr. Werboweski from service unjustly.

The Union requests that Mr. Werboweski be compensated with interest for all lost wages and benefits resulting from his removal from service.

The Employer denies the Union's contentions and declines payment.

FOR THE UNION:

(SGD.) M. J. RUTZI
FOR: GENERAL CHAIRPERSON

There appeared on behalf of the Company:
B. Laidlaw – Manager, Labour Relations, Winnipeg

L. Chorley	– Occupational Health Services, Edmonton
D. Brodie	– Manager, Labour Relations, Edmonton
J. Torchia	– Director, Labour Relations, Edmonton
K. Morris	– Manager, Labour Relations, Edmonton
S. Blackmore	– Manager, Labour Relations, Edmonton

And on behalf of the Union:

D. Ellickson	– Counsel, Toronto
B. R. Boechler	– General Chairperson, Edmonton
R. A. Hackl	– Vice-General Chairperson, Edmonton
R. Barr	– Vice-General Chairperson, Regina
G. Bate	– Local Chairperson, Canora
S. LeBlanc	– General Chairperson, BC Rail, Prince George

AWARD OF THE ARBITRATOR

The Union grieves what it claims is the wrongful removal from service of the grievor, Mr. Dennis I. Werboweski from April 7, 1999 to July 14, 1999. It asserts that the Company ignored medical evidence which indicated that the grievor was fit to return to work following a seizure and that the Company failed to accommodate the grievor's condition. The Company denies that it was unreasonable or unfair in its treatment of the grievor, given the circumstances.

The facts pertinent to the grievance are not in substantial dispute. Being fifty-three years old, the grievor commenced his employment with the Company in 1971. In 1995 he experienced a seizure, apparently occasioned by a benign brain tumour which was successfully removed by surgery. He then remained off work for a period of some four months, and returned to work experiencing no seizures thereafter. However, on Sunday March 21, 1999 Mr. Werboweski suffered another seizure, apparently brought on by a combination of the consumption of alcohol and fatigue. That diagnosis is

contained in a report of his specialist, Dr. Robert Griebel, dated March 26, 1999. In that report Dr. Griebel recommended that the grievor continue using Dilantin for a period of at least one year, and that he should be weaned off the medication after one year if he should remain seizure free over that period. The report also indicates that the doctor felt that the grievor could continue driving a motor vehicle while he was on his anti-convulsant.

The Union takes the view that Dr. Griebel's letter certified the grievor as fit to return to work. While the Arbitrator is not prepared to conclude that the Union has deliberately attempted to mislead this tribunal, the brief contains the following statements: "… this expert report gave a clear, uncontradicted indication that the worker was medically fit for active service." The grievance also states, in respect of the Company's decision to withhold the grievor from service: "This decision made no reference to Dr. Griebel's clearance of the grievor."

Whatever the intention of the author, those statements are not accurate and they are misleading. An examination of Dr. Griebel's report of March 26, 1999 gives no indication that the doctor certified the grievor fit to return to work, with or without medication, with or without any given conditions or limitations. It is simply not an issue that was addressed in the report of Dr. Griebel, a specialist who was simply communicating with the grievor's personal physician, Dr. M. Davies.

The fitness to work of an employee in a highly safety sensitive industry, particularly an employee who has suffered a spontaneous seizure or loss of consciousness, is a serious matter, to be addressed in a serious manner. The record reveals that upon learning of the grievor's seizure, and the fact that he was thereafter placed on anti-convulsant medication, he was removed from service. On April 13, 1999 the Company's MedCan Medical Director, Dr. Martin Fogel, communicated to the grievor that he was restricted from any safety sensitive work for a period of one year, a limitation which would be lifted if it could be shown that he remained seizure free over that period while remaining on anti-convulsants. The record discloses that the grievor and his Union did not agree with the limitations established by Dr. Fogel. Additionally, his physician wrote the following on May 28, 1999:

> "…This pleasant gentleman was in to see me the other day and is still seizure-free. He seems to becoming somewhat distraught with the fact that he is unable to return to work. I realize that you have very specific rules and regulations regarding anti-convulsant therapy and seizure disorders with return to work but I would appreciate it if you spend some extra time in reviewing this gentleman's case."

As a result of some fairly extensive communications, including communication with Dr. Griebel and the review of Dr. Griebel's opinion by a specialist retained by the Company, the grievor was returned to work, subject to the signing of a contract of medical follow-up, dated July 5, 1999.

The Arbitrator cannot agree that the course of events revealed in evidence constitutes any violation of the collective agreement by the employer or a denial of fair

treatment to Mr. Werboweski. While it would appear that there may have been some initial confusion as to whether the grievor suffered from epilepsy, which he apparently does not, the Company initially acted on the advice of its physician given the undisputed fact that the grievor was directed by his own specialist to remain on anti-convulsant medication for a period of not less than a year, and that he would be removed from that medication only if he remained seizure free for that time. Significantly, as noted above, the initial opinion Dr. Griebel did not address the question of the grievor's fitness to work in a safety sensitive position.

What the material before the Arbitrator discloses is a relatively normal reaction on the part of any employer responsible for safety sensitive operations when faced with information that an employee has suffered a seizure and has been placed on anti-convulsant medication for a period of one year. While Dr. Fogel's initial restrictions imposed upon the grievor were reconsidered in light of the further information which came to his attention, partly by reason of the efforts of the grievor and his Union, the case at hand discloses no arbitrary or discriminatory treatment on the part of the employer. On the contrary, it is clear that faced with the questions which were raised in the grievor's case the Company quite properly retained its own expert physician to evaluate Dr. Griebel's assessment of Mr. Werboweski's condition. Only upon receipt of that opinion, issued by Dr. Remillard on June 10, 1999, did the Company then take the necessary steps to return the grievor to work on the conditions established. In the Arbitrator's view the period of three and one-half months to deal with an examination of the circumstances of the grievors' illness was not unreasonable. I cannot agree with the

suggestion of counsel for the Union that the whole matter should have been disposed of in a period of not more than three weeks. During all of the time period in question the grievor was in receipt of sick leave benefits. While it may be that his overall income may have suffered, that is not a result which can be attributed to any violation of the collective agreement or of any statutory obligation owed to the grievor by the Company. I am satisfied that given the uncertainty which the Company encountered concerning the grievor's condition, and the time period involved, there was no violation of the duty of accommodation.

For the foregoing reasons the grievance must be dismissed.

July 19, 2005

(signed) MICHEL G. PICHER
ARBITRATOR