# CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

# CASE NO. 3847

Heard in Montreal Wednesday, 14 January 2010

Concerning

**CANADIAN NATIONAL RAILWAY COMPANY**

and

**TEAMSTERS CANADA RAIL CONFERENCE**

**EX PARTE**

**DISPUTE:**

The termination of G. Vlutters of Vancouver, BC, for failure to respond to recall as indicated by way of letter from the Company on August 20, 2002.

**UNION'S STATEMENT OF ISSUE:**

The grievor, Gerritt Vlutters, suffered a knee injury on August 2, 2000. The grievor's doctor provided regular updates to Great West Life with respect to this matter. These updates were sent up until September 6, 2001. After that, apparently, no more updates were sent.

The grievor however was not made aware of this fact. The next correspondence the grievor received was a letter dated August 20, 2002. This letter informed the grievor that he had been terminated in accordance with article 111 of agreement 4.2. It also mentioned a letter dated May 14, 2001 which the grievor had not received.

The Union filed a grievance with respect to this matter and the parties met to discuss it. The Company claimed they had concerns that the grievor had been reported to have built a house some four hours away from Vancouver and had requested information from the grievor on May 14, 2001. That letter however was not sent to the grievor's home address. Although other Company documents were regularly mailed to the grievor for some reason the May 14 letter was sent to a different address. The Company claimed that the grievor had not properly updated the Company notwithstanding the fact that he had been receiving other mail from the Company.

The Union provided updated medical information to the Company which has not been considered.

The Union requests that the grievor be reinstated and made whole on the basis that the had properly informed the Company of his mailing address and that he could not have responded to a letter he did not received. The Union additionally submits that the grievor was dismissed without an investigation contrary to the collective agreement.

The Company disagrees.

**FOR THE UNION:**

**(SGD.) R. A. HACKL**
FOR: GENERAL CHAIRMAN

There appeared on behalf of the Company:

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| D. Crossan | – Manager, Labour Relations, Prince George |
| K. Morris | – Sr. Manager, Labour Relations, Edmonton |

And on behalf of the Union:

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| D. Ellickson | – Counsel, Toronto |
| B. Boechler | – General Chairman, Edmonton |
| R. A. Hackl | – Vice-General Chairman, Edmonton |
| R. Thompson | – Vice-General Chairman, Edmonton |

## AWARD OF THE ARBITRATOR

The issue in the case at hand is whether the grievor effectively abandoned his employment, at least to a sufficient degree so as to justify the Company closing his employment file.

The record discloses that on August 4, 2000 the grievor reported an off duty injury. He remained off work with no further contact with the Company until February 20, 2001. He then advised the Company of a change of address. Following that communication the Company issued a letter to the grievor dated May 14, 2001 seeking information with respect to his ongoing absence. That letter reads, in part, as follows:

> As you have now not returned to active work at CN for a period in excess of 9 months and as the last information that the company received from your doctor indicated that an approximate date of your returning to work would be at the end

> of August 2000, it will be necessary for you to provide some medical information in support of your continued absence from work since August 2, 2000.
>
> That information and continued information over intervals of approximately two month periods from this date forward, will provide for the continuation of your employment status with the company. As such it would be in your best interest to attend to this matter.
>
> As it is also in our mutual best interest to have you return to CN as a healthy employee, I would appreciate some additional information in terms of an estimated date of recovery, which would allow for your return to work.
>
> I am also aware that you are now permanently residing in a new home which is close to a 4 hour drive from Greater Vancouver. In light of this situation, if the medical information pertaining to your expected return date is not known or cannot be anticipated, I would still appreciate any information regarding your persona intention of returning to work for CN in the Vancouver area.

Notwithstanding the statement of issue, it is agreed that the grievor received the letter. The grievor did not himself respond to the Company's letter, nor give any indication as to whether he intended to return to work for CN in the Vancouver area, as requested. At most, several months later, his doctor provided a report to the Company's Occupational Health Service (OHS) on September 6, 2001. A subsequent inquiry from the OHS sent to the grievor's residence on November 27, 2001 asking for further updates received no reply. Neither did a still later communication from OHS entitled "Second Request", sent on February 1, 2002.

Having heard nothing from the grievor for close to one year, on August 20, 2002 the Company issued a formal notice to the grievor advising him that his services were terminated and that his employment file was being closed for his failure to keep the Company apprised of his status and to provide the medical information requested.

On behalf of the grievor the Union suggests that the Company's decision was in fact made to avoid having to deal with the grievor's general medical condition, including a condition of multiple sclerosis (MS). In essence, the argument is that the Company wished to avoid having to accommodate the grievors' disability in relation to that condition. The Company disputes ever having had any knowledge of the grievor's MS condition. Its representative submits that a check with the OHS records indicates no trace of any such information in the Company's records nor, it would seem, any such knowledge on the part of any of the grievor's past supervisors. The Union maintains that a personal journal entry recently uncovered by the grievor would indicate that he did communicate his condition to the Company allegedly some two years prior to the closing of his file.

If it were necessary to resolve the controversy, the Arbitrator is satisfied that the Company's position is to be preferred. There would appear to be no clearly documented record of any knowledge of the Company of the grievor's condition of MS. Indeed, the excerpt from his journal filed in evidence does not expressly say that he advised Company officers of anything other than that he was "sick", even though he had been diagnosed with MS. More fundamentally, it is not clear to the Arbitrator that the grievor's condition in that regard is relevant, save to raise the most speculative theory as to the Company's motive for closing his file.

The issue as to the Company's actions must be assessed on the basis of the objective evidence at the time the Company made its decision. In the Arbitrator's view it

is difficult to question the Company's position at the time. On May 14, 2001 the Company sent the grievor a clear letter requesting regular medical updates, and separately asking him whether he intended to maintain his employment at CN. For reasons he best appreciates, Mr. Vlutters never responded to that letter. According to his Union representatives, he felt that the matter had been sufficiently delegated to his doctor to communicate with the Company, a position which the Arbitrator simply cannot share. Apart from a single communication from his doctor in September of 2001, the Company heard nothing from Mr. Vlutters, notwithstanding its continued requests for information sent directly to his residence. On August 20, 2002, having heard nothing from the grievor or his physician for close to a year the decision was made to close his file on the basis that he had effectively abandoned the Company.

Regrettably, the Arbitrator is compelled to agree that the objective circumstances did justify the closure of the employee's file. It if difficult to understand the grievor's apparent indifference in respect of the letter of May 14, 2001. That letter clearly put the grievor on notice that he was to give the Company periodic updates as to his condition and, more specifically, to advise whether he had intentions of returning to work at CN. Inexplicably, Mr. Vlutters made no response to that letter himself, apparently taking the view that it was entirely a matter for his doctor to deal with.

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 nor 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.

For all of the foregoing reason the grievance is dismissed.

January 18, 2010

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