

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2414

Heard in Montreal, Wednesday, 10 November 1993

concerning

CANADIAN PACIFIC LIMITED

and

**CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS
[BROTHERHOOD OF LOCOMOTIVE ENGINEERS]**

DISPUTE:

Discipline assessed Locomotive Engineer G.B. Klyne, Winnipeg, Mb.

JOINT STATEMENT OF ISSUE:

Following an investigation in connection with Locomotive Engineer Klyne's reporting personal injury of May 27, 1992, disabling him from work and his subsequent personal activities held July 15, 1992, the Company dismissed Locomotive Engineer Klyne for deliberately misrepresenting himself to the Company as being physically incapacitated and unable to perform his normal duties due to a work related ankle injury, and then personally engaging in physically demanding activities during a time frame in which he had claimed Workers' Compensation Benefits; a deliberate, calculated and willful attempt to mislead and defraud the Company, June and July of 1992, at Winnipeg, Manitoba.

The Brotherhood contends that by not having a competent medical practitioner specializing in the field of compensable injuries view the video tape evidence to ascertain the extent of Locomotive Engineer Klyne's injuries prior to conducting the investigation, the Company did not conduct a fair and impartial investigation, thereby prejudicing the investigation.

The Brotherhood requested that the Company reinstate Locomotive Engineer Klyne to Company service without loss of seniority and compensation for all lost wages, benefits and pensionable service with the present rate of bank interest applied to all lost wages.

The Company declined the Brotherhood's request and denied the Brotherhood's contention that the investigation was not fair and impartial.

FOR THE BROTHERHOOD:

(SGD.) D. C. CURTIS
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) F. J. GREEN
GENERAL MANAGER, OPERATIONS & MAINTENANCE, HHS

There appeared on behalf of the Company:

R. E. Wilson - Labour Relations Officer, Vancouver
R. N. Hunt - Labour Relations Officer, Montreal

And on behalf of the Union:

D. C. Curtis - General Chairman, Calgary
T. G. Hucker - Vice-President, Brotherhood of Locomotive Engineers, Ottawa
R. S. McKenna - General Chairman, BLE, Ottawa
D. A. Warren - General Chairperson, UTU, Toronto

AWARD OF THE ARBITRATOR

It is not disputed that Locomotive Engineer Klyne suffered a bona fide injury which caused him to be absent in late May and June of 1992. He received Workers' Compensation benefits for that injury, up to and including June 20, 1992. The issue is whether he extended his absence fraudulently, into July of 1992, to receive further benefits when he was in fact physically capable of returning to work for the Company.

The best evidence before the Arbitrator with respect to Mr. Klyne's intention in late June is a telephone conversation which transpired between the grievor and Assistant Superintendent Barham on June 22, 1992. In the days prior to that conversation Mr. Klyne had been observed doing physical labour on his property, in relation to building a fence. He then told the supervisor that he was keeping his ankle elevated and staying off it. When specifically asked if he was doing chores around the house he responded that he was not. In fact, later the same day he was observed once again working on the fence project. Mr. Klyne made similar representations in a further conversation with Mr. Barham on June 25, 1992.

The Arbitrator finds it extremely difficult to square the assertions made by Mr. Klyne to his supervisor, on two occasions, with the evidence of the physical labour that he was involved in respecting the construction of a fence at his home at the time. The video tape evidence reveals Mr. Klyne walking, bending, reaching, extending on to the tips of his toes and, one occasion, running to answer a telephone. While the Arbitrator appreciates that there should be some latitude for a degree of light activity in the latter stages of convalescence from an injury, the evidence at hand discloses a dramatic difference between Mr. Klyne's actions and his representations to the Company. The Arbitrator is compelled to find, on the balance of probabilities, that the prolongation of Mr. Klyne's claim of injury beyond June 20, 1992 involved a deliberate attempt to defraud the Company between that date and July 6, when Mr. Klyne reported himself fit to return to duty. Nor can I find that there was any violation of the terms of the collective agreement governing the investigation of the grievor's activities.

The facts of the instant case are not substantially distinguishable from those in **CROA 2184** and **2302**. I am regrettably compelled to conclude that the grievor has irrevocably undermined the bond of trust essential to his employment relationship.

For the foregoing reasons the grievance must be dismissed.

12 November 1993

(Sgd.) MICHEL G. PICHER
ARBITRATOR