CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2651

Heard in Montreal, Thursday, 13 July 1995

concerning

CANADIAN PACIFIC RAILWAY LIMITED

and

TRANSPORTATION COMMUNICATIONS UNION

DISPUTE:

The dismissal of Ogden Storeperson Mike Agnew effective November 14, 1994.

JOINT STATEMENT OF Fact:

On November 9, 1994, an investigation was conducted with Mr. Mike Agnew in connection with his work related injury of October 20, 1994, and subsequent compensation claim.

On November 14, 1994, Mr. Agnew was notified by way of Form 104 that he had been dismissed for "deliberately attempting to defraud the Company by alleging a work related injury on October 20, 1994, and subsequently filing a claim for Workers' Compensation."

JOINT STATEMENT OF ISSUE:

The Union maintains that Mr. Agnew's injury was legitimate and has requested that he be reinstated without loss of seniority, wages, benefits or an opportunity to place into the CSC in Winnipeg if his seniority would enable him to do so.

The Company has declined the Union's request.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) D. J. KENT	(SGD.) C. M. GRAHAM
GENERAL CHAIRMAN	FOR: DIRECTOR OF MATERIAL MANAGEMENT OPERATIONS

There appeared on behalf of the Company:

C. M. Graham	– Labour Relations Officer, Montreal
D. J. David	– Labour Relations Officer, Montreal
B. E. Benner	– Manager of Materials, Calgary
R. A. Michaud	– Director, Material Management - Ops, Montreal

And on behalf of the Union:

D. J. Kent	– Divisional Vice-President, Winnipeg
L. Hildebrand	– Assistant Divisional Vice-President, Winnipeg
G. Bernard	– Local Chairman, Calgary

AWARD OF THE ARBITRATOR

It is not disputed that the grievor claimed to have injured his back while at work on October 20, 1994. According to his evidence he strained his lower back while attempting to lift a heavy propane tank. The evidence discloses, to the Arbitrator's satisfaction, that the grievor reported the incident to his supervisor, was given first aid at work and taken by his supervisor to the Heritage Medical Centre where he was examined by a physician on call. The evidence further discloses that the doctor placed him off work for a period of approximately one week, and that Mr. Agnew commenced physiotherapy at a clinic on October 21, 1994, and continued his treatment until November 9, 1994. It also does not appear disputed that the grievor would have been able, from the outset of his injury, to perform certain light duty functions at work.

The grievor's supervisors were suspicious of his motives in respect of the true nature of his injury, largely because he had expressed displeasure at the prospect of being required to work a midnight shift at Alyth Store commencing October 20, 1994. The Company's representative suggests that the grievor may have made comments to other employees to the effect that he might fake injury to avoid that assignment. There is, however, no direct testimony to sustain that allegation placed before the Arbitrator.

In a case of this nature, as in any case of discipline, the burden of proof is upon the Company. In the case at hand it seeks to rely chiefly on certain video tapes, of approximately twelve minutes' duration, which show the grievor at home, and at a supermarket in Calgary on October 22 and 23, 1994. Normally such evidence is placed in evidence through the testimony of the investigator who operated or directed the operation of the video camera. Not infrequently such testimony is accompanied by a written report by such an investigator. In the case at hand, although it is admitted that the Company retained a private investigator for the purpose of maintaining surveillance of the grievor, no such evidence was adduced. In the result, the Arbitrator, and the Union, are unable to know whether there was other taped material of the grievor's activities which might or might not sustain his position that he was in fact suffering from a back injury. Given the highly prejudicial nature of such evidence, a board of arbitration must necessarily be wary of attaching significant weight to video tape surveillance evidence when it is presented without any supporting testimony by the person or persons responsible for gathering it. In the case at hand, for example, it is simply impossible to know whether any tape or material of the grievor carrying himself or behaving in such a way as to support his claim of injury might have been edited or omitted from the materials presented.

Quite apart from the above considerations, the Arbitrator is less than persuaded by the video tape evidence relied upon by the Company. The first segment of the material presented shows Mr. Agnew walking between his house and his car, starting the vehicle and returning to his house. While on one occasion he quickens his pace, apparently to join one of his children, as a general matter he walks slowly and with some stiffness, and on at least one occasion is seen to place pressure on his lower, left back with his left hand.

The lifting and bending activities engaged in by Mr. Agnew during the course of the video tape material are also less than conclusive. Parts of the material show the grievor in the parking lot of a grocery supermarket in the company of his two young daughters. At one point he is seen lifting his two year old daughter from the ground to his shoulder level, and placing her inside his car. Later, at home, Mr. Agnew is seen carrying three bags of groceries from his car to his home. Mr. Agnew submits that the bags in question did not contain heavy objects, and there is nothing in the evidence before me that would rebut that evidence. Indeed, one of the bags from the supermarket is seen to be carried from the car to the house by the older of his two daughters, who appears to be some five or six years old.

In the past this Office has had occasion to consider the seriousness of fraudulent claims of injury, when presented with compelling video tape evidence to sustain the Employer's allegation. (See, e.g., **CROA 2184, 2302**.) In an appropriate case, where the evidence establishes, on the balance of probabilities, that an employee has knowingly engaged in an attempt to defraud the Employer of sick leave, insurance benefits or Workers' Compensation benefits, the seriousness of such action has been sustained by the arbitrator, with discharge generally being found to be appropriate in light of the breach of the relationship of trust fundamental to the employment contract.

In the case at hand the evidence adduced by the Company falls short of the standard necessary to establish, on the balance of probabilities, that Mr. Agnew knowingly engaged in an attempt to defraud the Employer. The medical records filed in evidence confirm that the grievor was diagnosed as having suffered a lower back injury, was counselled by the physician to remain off work, and followed a course of physiotherapy. The actions of the grievor

reflected in the video tape surveillance evidence adduced at the hearing are simply not of the order of heavy activity or exercise which can be said to be incompatible with the condition which he claimed to suffer. The grievor's case is to be distinguished from those of other employees who, for example, were observed working on house renovation projects or, in **SHP 280**, actively participating in competitive sports. On the whole, therefore, the Arbitrator is satisfied that the grievor did in fact sustain a back injury on or about October 20, 1994, for which he was off duty at the relevant time.

To so find does not, however, fully dispose of the equities of the case at hand. The evidence discloses that the grievor remained fully unavailable for work for an extended period of time, and did not make himself available for duties until approximately November 7, 1994. It is not disputed that for all of that period Mr. Agnew was capable of performing light duties, but made no effort whatsoever to so advise his employer. Indeed, as the video tape evidence does indicate, the grievor was able to perform many kinds of movement and activities during the earlier days of his leave of absence. In the circumstances, the Arbitrator is of the view that the case is best characterized as one in which fraud is not proved, but a serious departure from the grievor's obligation of candour to his employer in respect of his ongoing condition is disclosed, particularly as regards his ability to perform light duties. As a consequence, although I am satisfied that the grievor should be reinstated into his employment, in light of his failure of obligation to his employer, this is not a case for an order of compensation.

For all of the foregoing reasons the Arbitrator directs that the grievor be reinstated into his employment forthwith, without compensation and without loss of seniority.

14 July 1995

(signed) MICHEL G. PICHER
ARBITRATOR