

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3323

Heard in Calgary, Thursday, 13 February 2003

concerning

CANADIAN PACIFIC RAILWAY

and

CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS (UNITED TRANSPORTATION UNION)

DISPUTE:

Appeal of 30 demerits issued to Conductor M.W. Auld of Kenora, and claim of lost wages to attend investigation.

JOINT STATEMENT OF ISSUE:

On May 17, 2000 Conductor M.W. Auld reported an injury to the Company upon completion of his regular tour of duty. The injury report details described the injury as being:

“strain lower back lumbar area when stepping up on side ladder to apply hand brake at Ignace Yd.,”

On August 14 and September 21, 2000 Mr. Auld provided formal statements to the Company in connection with “your personal injury during your tour of duty on train 435-14 on May 17, 2000.

On October 11, 2000 the Company issued 30 demerits to the record of Conductor Auld for:

“failing to properly report an alleged on duty injury and for providing false and misleading information concerning the facts surrounding your alleged injury on an injury report, during a Company investigation and to a WSIB Claims Adjustor;”

The Union appealed the discipline and lost wages as the Company failed to meet the burden of proof necessary to issue formal discipline and the terms of the collective agreement respecting formal investigations has been violated. In any event, the discipline is too severe and ought to be mitigated.

The Company has declined the grievance and denies the Union’s contentions.

FOR THE COUNCIL:

(SGD.) D. H. FINNISON

FOR: GENERAL CHAIRPERSON

FOR THE COMPANY:

(SGD.) D. T. COOKE

FOR: GENERAL MANAGER, OPERATIONS

There appeared on behalf of the Company:

D. Freeborn	– Labour Relations Officer, Calgary
J. Copping	– Manager, Labour Relations, Calgary
C. Graham	– Labour Relations Officer, Calgary
S. Bromley	– General Manager, Operations, Calgary
M. Fodey	– Manager, Claims Division, Calgary

And on behalf of the Council:

M. A. Church	– Counsel, Toronto
L. O. Schillaci	– General Chairperson, Calgary
D. H. Finnson	– Vice-General Chairperson, Calgary
W. G. Scarrow	– Vice-President, UTU, Ottawa

AWARD OF THE ARBITRATOR

The Company has assessed thirty demerits against Conductor M. Auld of Kenora for "...failing to properly report an alleged on duty injury and for providing false and misleading information concerning the facts surrounding your alleged injury on an injury report ...".

The grievor has a back condition of long standing which apparently occasioned his absence from work in March and April of 1994. Although he did suffer an absence from work due to an aggravated back injury in 1997, that time lost was not work related and did not result in any claim for compensation.

The grievor claims that he sustained a workplace injury to his back on May 17, 2000. He says that he did so while attempting to step onto the ladder of a Dymont pit car at Ignace. He believes that the lowest step of the ladder was unusually high to reach because of the level of the terrain on which he was standing, and that as he shifted his leg upwards and turned his body he felt pain in his lower back. According to his account he was not convinced that it was a serious injury at the time, and he proceeded to complete his work that day. He does relate, however, that during the course of his tour of duty he left his train briefly in Dryden to obtain some ice which he applied to his back during the balance of the shift.

At the conclusion of his tour of duty, upon arrival at Kenora, Mr. Auld did report his injury to Train Supervisor R. Milko, duly filing a personal injury report. It appears that the following day he visited a chiropractor in Kenora and was given some minor preliminary treatment, with instructions to see his own chiropractor upon his return to his home in Thunder Bay. Mr. Auld relates that believing that the injury might still be minor he completed another round trip between Kenora and Ignace, at which point he reached his maximum earnings for the allowable mileage period. It appears that it was only following his return to his home at Thunder Bay that he began to experience more serious pain from his lower back.

The grievor's visit to the chiropractor on May 18th resulted in the filing of a report by the chiropractor which initiated a claim to the Ontario Workplace Safety and Insurance Board. Learning of the claim the Company immediately took a position questioning whether the injury in fact related to the grievor's work duties. On May 31, 2000 WCB specialist Robert Stockwell wrote to the WSIB stating, in part:

We would ask that when reviewing this case, that the medical details be examined, in addition to the fact that while the alleged injury occurred on May 17, 2000, Mr. Auld continued to perform usual duties until booking off due to accumulated mileage. On May 24th this office was advised that he would be off for a week and would see his doctor the following week. Our records indicate that Mr. Auld was off due to non work related lumbar strain from October 19, 1997 to May 29, 1998.

It also appears that Mr. Auld regularly consulted a Chiropractor and seems to have waited some six days from the date of reporting the injury May 17th, until he consulted his Chiropractor only on the 24th of May.

We feel that Mr. Auld's problem is not work related, but rather an ongoing medical condition which has required Chiropractic treatment since before 1994.

The Council raises an objection based on the content of the above letter. It submits that the letter, which was sent to the WSIB in advance of the Company's own disciplinary investigation of the grievor, reveals a pre-judgement of the grievor's case by the Company, in a manner inconsistent with the right of an employee to a fair and impartial investigation prior to the imposition of discipline. The Arbitrator cannot agree. On its face the letter does not allege any falsehood or other wrongdoing by Mr. Auld. What it does, in my view understandably, is to place on the record for the WSIB the grievor's prior history of back problems, raising the possibility that the flaring of his back injury may not have been work related. In my view the Company, which bears the ultimate cost of any WSIB benefits, had every reason to be properly concerned as to whether the injury sustained by Mr. Auld was the result of work which he was performing or was, in whole or in part, attributable to his pre-existing back condition. For these reasons the Arbitrator cannot sustain the submission of the Council to the effect that the filing of the above-quoted letter with the WSIB constituted a pre-judgement of the facts or a violation of the grievor's right to a fair and impartial investigation under the terms of the collective agreement.

With respect to the merits of the grievance, however, the Arbitrator has greater difficulty with the position of the Company. The discipline assessed against the grievor appears to have been based on two grounds: firstly, that

Mr. Auld failed to properly report his injury and secondly, that he gave the Company misleading or false information concerning the facts surrounding his injury. With respect to the second ground the material before the Arbitrator simply does not sustain the Company's view. During both the Company's investigation and in his report to the WSIB Mr. Auld was consistent in expressing his own belief that it was the attempt to swing his leg onto the higher than normal lowest rung of the ladder on the rail car which caused the initial pain in his back. I cannot agree with the Company's view that at one point in his investigation he indicated that he sustained the injury while manipulating a hand brake. A careful review of his statement reflects that he at all times maintained that it was during the course of boarding the ladder of the rail car to perform the hand brake operation that he first encountered the pain in his back. On the whole, I can see nothing that is materially inconsistent in his account to the Company and the report provided to the WSIB. The fact that in the latter report the grievor may have given an estimate of the height of the ladder does not, in my respectful opinion, constitute false or misleading information. During the questions put to him by the Company during its own investigation Mr. Auld was never asked for any such estimate, and obviously volunteered none. He was, however, clear in his statement that he believed that it was the attempt to get his foot onto the lowest rung of the ladder on the rail car which caused his back to suffer the injury. On the whole, therefore, the Arbitrator cannot sustain the position of the Company to the effect that the grievor engaged in some measure of deception, exaggeration or falsification with respect to the circumstances surrounding what he believed to be the cause of his injury.

With respect to the first ground of the grievor's alleged misconduct there is reason to sustain the Company's view, albeit partially. As indicated above, there can be no doubt but that the grievor did file a report of his injury, although he did so only at the end of his tour of duty. In my view it may not be unreasonable for an employee to delay the reporting of what may at first seem to be a minor injury, perhaps in the belief that he or she has only suffered a bruise or other minor ailment that should soon disappear. I would therefore not sustain the assessment of any discipline against Mr. Auld for failing to immediately report the twinge in his back to the rail traffic controller at the moment it occurred. I must agree with the submissions of the Company's representatives, however, that as the tour of duty progressed Mr. Auld reasonably should have known that there was cause to make a report. As noted above, the pain in his back obviously became sufficiently aggravated to justify his leaving his train at Dryden to obtain ice to apply to the injured back. It would seem to the Arbitrator that at that point in time the grievor knew, or reasonably should have known, that his back injury was sufficiently serious so as to justify an immediate report of the incident to the Company.

On the foregoing basis the Arbitrator is satisfied that the grievance must be allowed, in part. The Arbitrator finds and declares that the Company had no basis to assess any amount of discipline against Mr. Auld for the alleged falsification or misrepresentation of the circumstances surrounding his injury. It did, however, have some basis to assess discipline against him for failing to provide a prompt report of the injury, waiting until the end of his tour of duty upon the arrival of his train at Kenora. Given the grievor's length of service and the fact that he has only once previously been assessed any discipline, I am satisfied that the assessment of ten demerits would have been appropriate as discipline for his failure in that regard. The Arbitrator therefore directs that the grievor's record be amended to reflect the assessment of ten demerits for failing to promptly report the injury which he sustained at Ignace on May 17, 2000.

February 17, 2003

(signed) MICHEL G. PICHER
ARBITRATOR