CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3375

Heard in Montreal, Wednesday, 15 October 2003

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Dismissal of Mr. J. McCorriston.

BROTHERHOOD'S STATEMENT OF ISSUE:

By way of a form 780 dated January 20, 2003, the grievor was discharged for "falsification of an accident report to the Saskatchewan Workers Compensation Board on 15 August 2002 in an attempt to obtain WCB benefits to which you were not entitled, for failure to report wages received from the Company for which you were not entitled while off work between 13 July and 15 August 2003."

The Union contends that: **(1.)** The discipline assessed was excessive and unwarranted. **(2.)** The reasons given in the form 780 are inaccurate as a characterization of what actually occurred. **(3.)** The grievor was honest and sincere with respect to the impugned actions and all subsequent events and investigations.

The Union requests that the grievor be immediately reinstated into his employment with no loss of seniority and full compensation for all lost wages and benefits.

The Company denies the Brotherhood's contentions and declines its request.

FOR THE BROTHERHOOD:

(SGD.) S. DAWSON
SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

B. Laidlaw	– Manager, Human Resources, Winnipeg
J. Spratt	– Program Co-ordinator, Winnipeg
J. Tavares	– Track Maintainer / Truck Driver, Sioux Lookout
S. Blackmore	– Manager, Human Resources, Edmonton

And on behalf of the Brotherhood:

P. Davidson	– Counsel, Ottawa
S. Dawson	– System Federation General Chairman, Winnipeg
D. Brown	– Sr. Counsel, Ottawa
J. Bourassa	– Witness
J. McCorriston	– Grievor

AWARD OF THE ARBITRATOR

After a careful review of the evidence the Arbitrator cannot sustain the view of the Company that Mr. McCorriston deliberately attempted to falsify an accident report to obtain workers' compensation benefits. The evidence confirms that on or about July 2, 2003 the grievor noticed a welt on the outside of his left ankle at the end of his working day. At first he suspected that it might be an insect bite sustained during that day's work. That possibility, as well as a tentative diagnosis of gout by his physician, was overruled following a medical examination and blood tests taken on his subsequent days off. On thinking back over that day the grievor also recalled rapidly descending an embankment to tend to a dog which was lying on the road, having been struck by a vehicle. He appears to have eventually come to the conclusion that he must have rubbed his ankle against some brush on the embankment, thereby causing the welt and eventually the swelling to his ankle. It is common ground that he subsequently suffered an extensive reaction to anti-inflammatory medication prescribed by his physician, resulting in internal bleeding and his eventual hospitalization and absence from work for several weeks.

Counsel for the Brotherhood stresses that to this day the grievor cannot have any certainty as to the cause of his ankle condition, save that it must have been sustained on the day he first discovered the welt on his ankle, July 2, 2003, which was a working day. The Arbitrator must agree with the Brotherhood that the successive theories of an insect bite, gout and the injury sustained while descending the embankment do not represent an inconsistent attempt to "change his story" as suggested by the Company's representative. Rather, they were a good faith attempt on the part of the grievor to get to the bottom of what was obviously a painful ankle condition, a condition which unfortunately led to more severe complications and his eventual hospitalization. The evidence does not sustain a course of conduct on the part of the grievor calculated to defraud Workers Compensation Board authorities or his employer. Indeed, at the hearing a fellow employee testified without contradiction about the grievor speaking openly about his ankle problem on the day following its occurrence, a fact which is own supervisor indicated might have occurred.

Nor can the Arbitrator accept the Company's submission that the grievor perpetrated a fraud upon the Company by failing to declare the continued payment of his wages over two pay periods of his absence from work. I am satisfied that it was the responsibility of his supervisor to advise the necessary payroll administrators that the grievor would be absent from work, as Mr. McCorriston in fact advised Supervisor José Tavares on the evening of July 15th. It should also be noted that from the outset, at least as of Friday July 5, 1002 he did file a first aid report with the Company's Prairie Division, first indicating a problem with his sore left ankle, noting that he had first noticed it on the evening of the 2nd.

The submission of the Brotherhood, which is essentially unchallenged, is that in some circumstances Company supervisors have maintained injured employees on the payroll in circumstances of what appear to be short term injuries. On behalf of the grievor it is related that as an extra gang foreman he was himself instructed to maintain full wage payment for persons who had gone home to recover from short term injuries. Specific examples are cited from 1987 and 1995. Against that background, the grievor relates that when he received his wages by direct deposit, a fact of which he became aware on or about August 19, 2003, the day before he returned to work, he assumed that someone in management had issued a similar directive with respect to his salary treatment, in the expectation that he might have to repay any WCB benefits which he might ultimately recover.

The Arbitrator cannot accept the suggestion advanced on behalf of the Company that the grievor was responsible for the error which led to the continued payment of his salary. While it is true that certain responsibilities concerning payroll were part of his duties as extra gang foreman, those duties plainly cannot be said to have continued from the time he left the workplace as a result of his injury and medical complications. There is no basis upon which the Arbitrator can conclude that it was incumbent upon the grievor to communicate with the Company's payroll authorities in Moncton, New Brunswick concerning his absence from work. That responsibility, which was plainly not discharged, fell to his immediate supervisor. This is not, therefore, a case where it can be said that there was any active gesture on the part of the grievor to claim wages for the period in question or to deliberately defraud or mislead the Company.

This Office well understands the importance of the bond of trust underlying the employment relationship. Prior awards of the Office have sustained the discharge of employees engaged in fraudulent activity. This is plainly not such a case. For the reasons related above, I am satisfied that the grievor did sustain an ankle injury, that he was unsure of its origin and pursued a number of possibilities, ultimately coming to the conclusion that it must have been

caused by striking against brush while descending an embankment, as he indicated in his WCB claim. That does not, in my view, constitute a fraudulent claim. Nor am I satisfied that the grievor knowingly concealed from the Company that he was in receipt of wages which, on the basis of his own testimony which I accept, he concluded were being paid as a result of a practice which he himself had been involved in concerning other employees with short term injuries in the past. Again, the evidence falls well short of establishing any fraudulent intent or deliberate misleading of his employer.

The Arbitrator can appreciate the Company's perspective. Partial statements by two separate physicians and a Workers Compensation Board report create what could be construed as a confusing and contradictory picture. I cannot sustain the suggestion of counsel for the Brotherhood that the Company acted in bad faith or conspired to deprive the grievor of his rights and ultimately of his very employment. For the reasons related above, however, I am not satisfied that the Company has discharged its onus to show that there was just cause for discipline against the grievor in all of the circumstances.

The grievance is therefore allowed. The Arbitrator directs that the grievor be reinstated into his employment forthwith, with compensation for all wages and benefits lost, and without loss of seniority.

October 21, 2003

(signed) MICHEL G. PICHER
ARBITRATOR