

CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4198

Heard in Montreal, April 10, 2013

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAILWAY CONFERENCE

DISPUTE:

Appeal of the discharge to Mr. Berndt for conduct unbecoming.

JOINT STATEMENT OF ISSUE:

On March 9, 2012, Mr. Berndt attended a formal investigation in connection with "Your employee work history between February 11, 2012 and March 3, 2012 including you booking sick on February 21, 2012." Following this investigation, the Company discharged Mr. Berndt "For conduct unbecoming an employee as evidenced by you booking sick inappropriately to obtain unauthorized time off work and For your submission a fraudulent wage claim resulting in your receipt of spareboard guarantee wages to which you were not entitled to, while employed as a trainman in Kamloops, B.C., during the period from February 19th 25th, 2012."

The Union contends that the investigation was not conducted in a fair and impartial manner per the requirements of the Collective Agreement. For this reason, the Union contends that the discipline is null and void and ought to be removed in its entirety and Trainman Berndt be made whole. It is the Union's position that there is no just cause for Trainman Berndt's discharge and that this penalty is discriminatory, excessive and unwarranted in all of the circumstances. The Union contends that the Company's actions are in violation of Mr. Berndt's privacy and PIPEDA.

The Union requests that the discipline assessed to Mr. Berndt be removed in its entirety and that Mr. Berndt be ordered reinstated and be made whole, with no loss of seniority and benefits. In the alternative, the Union requests that the discipline be substituted for such lesser penalty as the Arbitrator sees fit.

The Company disagrees and denies the Union's request.

FOR THE UNION:
(SGD.) D. Fulton for D. Olson
General Chairperson

FOR THE COMPANY:
(SGD.) A. Becker
Labour Relations Officer

There appeared on behalf of the Company:

M. Thompson	– Manager Labour Relations, Calgary
B. Mittleman	– Director Employee Relations Chief Privacy Officer, Calgary
A. Becker	– Labour Relations Officer, Calgary

There appeared on behalf of the Union:

K. Stuebing	– Counsel, Toronto
D. Olson	– General Chairperson, Calgary
D. Fulton	– Vice General Chairperson, Calgary
J. Linnell	– Local Chairperson, Kamloops
N. Berndt	– Grievor, Kamloops

AWARD OF THE ARBITRATOR

The grievor was discharged for what the Company alleges was a fraudulent claim for wages. Conductor Berndt who, according to the Company, was hired on November 29, 2010, worked in 2012 as a trainman on the trainpersons spareboard in Kamloops. The record confirms that the grievor took scheduled annual vacation between February 13 and February 19, 2012 and that he applied Earned Days Off (EDOs) for additional leave between February 22 and February 25, 2012. In the result, he remained recorded as available and on the spareboard at Kamloops for the period between February 19, and February 22, 2012.

The record confirms that on the afternoon of February 21 the grievor contacted the CMC requesting a bridge between his annual vacation and the period of his Earned Days Off. He was then in Kitimat, some thirteen hour drive from Kamloops. Mr. Berndt was then advised that he could not be granted a bridge to his EDO's as there was then a significant shortage of manpower at Kamloops. The record confirms that the grievor then called Road Foreman Bill Balyx and left a message on the Foreman's telephone, explaining that the Mr. Berndt was in Kitimat and that the rapid movement of the spareboard caused him concerns as to whether he could protect work. In fact, shortly thereafter, on that same afternoon, at 16:30, the CMC called the grievor for duty but

received no answer to that call. The evidence records that some nine minutes later the grievor called the CMC and booked himself off sick. He remained in that status until the commencement of his Earned Days Off, on February 22, which extended to 08:00 on February 25. In the result, although he was in Kitimat, the grievor was on the spareboard and presumably available for work between February 19 and February 22, 2012. It appears that when his annual vacation period ended the grievor called to be informed that he was some twenty-six times out on the spareboard. Based on that knowledge he remained in Kitimat, apparently confident in the knowledge that a flight was available to take him from Kitimat to Kamloops at 09:00 on February 21. It would seem that when he checked the VRU on the evening of February 20 he was then still sixteen times out.

However, when the grievor awoke on the morning of February 21, sometime after the flight had departed, the grievor communicated with the VRU system and then realized he was only two times out. It appears that he then called the CMC to attempt to obtain a bridge to his Earned Days Off. When that request was declined he left a message with Supervisor Balyx describing his actual situation. As noted above, it is after missing his call for work at 16:30 on the afternoon of February 21 that the grievor booked himself off sick. It is not disputed that he then booked sick for reasons other than a bona fide illness. It further appears that after the completion of his EDO's, on February 25 at 08:00 the grievor's name appeared as being available for duty of the spareboard. However, it seems that in fact spent that day making the thirteen hour drive from Kitimat to Kamloops and that he was in fact not available for duty during that period.

Prompted mainly by the knowledge that the grievor had booked sick in doubtful circumstances, the Company conducted a disciplinary investigation. The notice to the grievor described the investigation as dealing with “Your employee work history between February 11, 2012 and March 3, 2012 including you booking sick on February 21, 2012.” It emerged during the investigation that Mr. Berndt submitted a GN wage claim, which is a claim for the spareboard guarantee, in an amount of some \$468.81. By doing so he effectively sought the payment of the guarantee for the entire period between February 13 and February 26, 2012. With allowance for his annual vacation, he was effectively claiming guarantee payments for February 21, 25, and 26 of 2012.

The position of the Company is that the grievor could only claim the spareboard guarantee if in fact he was truly available to be called. Based on the fact that the grievor was at all material times thirteen hours away from his home terminal, the Company concluded that his claims for the spareboard guarantee for the dates February 20, 21, 25, and 26, 2012 were in fact submitted fraudulently. It does not appear disputed that what the grievor in fact did, in accordance with the then common practice, was to file a claim for the payment of \$0.01, with the request that his claim should be “adjusted accordingly.” In doing so the grievor was following a general practice with the knowledge that claims made in that fashion are directed to an auditor. The Company conducted an investigation into the claims made by the grievor and ultimately concluded that he had deliberately defrauded the Company by seeking to claim the spareboard guarantee for dates on which he was plainly not available to be called to service, even though his name was maintained on the spareboard. Somewhat ironically, it appears

that on the same day the grievor received his notice of termination he also received payment of the monies which he claimed.

The Union raises an objection with respect to the regularity of the investigation. It submits that the notice provided to the grievor was inadequate and effectively violated his entitlement to a fair and impartial investigation. Specifically, its counsel submits that the notice should have included an allegation of fraud if that is what the Company intended to pursue.

The Arbitrator has some difficulty with that objection. At most it would seem that the Company's knowledge which prompted the investigation involved the fact that the grievor sought and did not obtain bridging to his Earned Days Off and that being unsuccessful to that regard, he booked sick, albeit only after having missed a call. I am not satisfied that the Company was then possessed of knowledge which would have required an expressed notice to the effect that fraud was being investigated. Nor do I consider that the actual form of the notice, which plainly indicated to the grievor that the Company would be examining the events surrounding the dates of his absence in Kitimat, in any way prejudice the grievor in his ability to prepare for or respond to the investigation.

As complex as the fact situation described above may appear, the issue in this grievance is relatively simple. Did the grievor knowingly engage in an attempt to fraudulently mislead the Company by filing the claim which he did, a claim which might well result in the payment of the spareboard guarantee? Upon a careful review of the

evidence I am persuaded to accept the characterisation of the grievor's actions advanced by the Union. While I accept that the grievor could not properly claim the spareboard guarantee for days which he was plainly not available, and arguably should not have been on the spareboard, the material before me falls short of establishing a deliberate attempt on the part of the grievor to mislead his employer. As noted above, Mr. Berndt clearly made it known to his supervisors, through his telephone messages, that he was in fact in Kitimat. They knew, or reasonably should have known, that he was in Kitimat when he failed to respond to a call, and when he booked sick on February 21, 2012. While it may be that the auditor who eventually allowed the guarantee payment made to Mr. Berndt did not have the same knowledge as the grievor's immediate supervisors as to his whereabouts and availability, I am not satisfied that the Company has demonstrated that it was the result of any deliberate fraud or deception on the part of Mr. Berndt.

The above remarks should not be taken to suggest that the grievor was not subject to any discipline. The material before me amply confirms that the grievor was plainly negligent, if not reckless, in the manner of which he handled his wage claim and, arguably, in allowing his name to stand on the spareboard when he was in fact away on an extended leave of absence. I find it difficult to square that carelessness with the grievor's fundamental obligation of clarity and candor to his employer in respect of his availability for work and the receipt of any wages based on that availability. But overall, I must agree with the characterisation of these facts by the Union, which stresses that the burden upon the Company to prove fraud requires a significant standard of proof based on clear and cogent evidence (CROA 3409, 3433, 2854).

For the foregoing reasons, I am not satisfied that the grievor's actions were such as to irreparably break the bond of trust between himself and his employer. While I am satisfied that a serious degree of discipline is justified, given the grievor's carelessness, I believe that this an appropriate case for the reinstatement of a relatively junior employee with no prior disciplinary record. I am also satisfied that no violation of the grievor's privacy interests under *PIPEDA* is made out. Tracing the location of a cell phone does not, in my view, violate any meaningful expectation of privacy.

For the foregoing reasons the grievance is allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without compensation for any wages or benefits lost, and without loss of seniority.

April 15, 2013

MICHEL G. PICHER
ARBITRATOR