CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4280

Heard in Montreal, January 16, 2014

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the termination of Conductor Mark Hammett.

JOINT STATEMENT OF ISSUE:

Following investigation taken on July 11, 2012, Conductor Hammett was discharged on July 30, 2012 for "Your deliberate submission of inappropriate/fraudulent wage claims, including bereavement claims, during the period between March 3rd and April 15th, 2012, while employed as a Locomotive Engineer Trainee in Cranbrook, B.C."

The Union contends that Conductor Hammett's dismissal is unjustified, unwarranted and excessive in all of the circumstances. The Union requests that the discipline be removed in its entirety, that Conductor Hammett be ordered reinstated forthwith without loss of seniority and benefits, and that he be made whole for all lost earnings with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company disagrees with the Union's contentions and has denied the Union's request.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) D. Olson	**(SGD.) A. Becker**
General Chairperson	**Labour Relations Officer**

There appeared on behalf of the Company:

D. Guerin	– Director Labour Relations, Calgary

There appeared on behalf of the Union:

A. Stevens	– Counsel, Caley Wray, Toronto
B. Knight	– Local Chairman, Cranbrook
D. Olson	– General Chairman, Calgary
D. Fulton	– Vice General Chairman, Calgary
M. Hammett	– Grievor, Fort Steele

AWARD OF THE ARBITRATOR

Mr. Mark Hammett ("the grievor") was employed as a locomotive engineer trainee ("LET") in Fort Steele, British Columbia at all relevant times. Hired by CP ("the Company") in 2007, he had worked as a conductor prior his acceptance into the locomotive engineering training program. At the time of the grievor's discharge, he had been submitting claims for wages under the Crew Management Application ("CMA") system for approximately four and a half years. The CMA system relies on the integrity and honesty of employees who submit their own wage claims, which are paid out automatically.

On July 30, 2012, the grievor was discharged for allegedly submitting inappropriate/fraudulent wage claims during the period between March 3, 2012, and April 15, 2012.

On March 2, 2012, the grievor had completed the first classroom portion of his engineer training in Calgary. He was expected to return to Fort Steele, British Columbia, to commence his on-the-job training. As part of his classroom training the grievor received a package setting out the Company's expectations for LETs. Those expectations were explained to the grievor. At no time did the Company suggest to the grievor that he was eligible to submit wage claims when he was not available for work. In fact, the Company's position has consistently been that LETs are not entitled to submit wages claims when they are unavailable for work.

Article 75.12 of the collective agreement sets out how LETs are to be paid when they are in the engineering training program. It reads in part:

> Candidates selected for training for Locomotive Engineer will be paid the greater of 3800 miles per month at the Conductor's rate of pay or the individual's earnings for the past year (1/52 of working service). This rate will be applied to classroom training, technical training, when operating as an additional employee and Road Service familiarization when not performed in conjunction with regular duties.
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> This rate will be paid bi-weekly, pro-rated on a daily basis during the classroom, technical, and practical one-on-one training when not working as an active Conductor.
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> Note: Employees who elect to receive payment based on 1/52 of the past years earnings, will receive that rate for the duration of that training period and general wage increases, if any, shall not be applied to that rate once established.

Article 36.11 of the collective agreement provides as follows:

> Employees withdrawn from active to attend service promotion to Locomotive Engineer will be compensated as per the provisions of the Collective Agreement for each day they are withheld for such training and examination. This rate shall include on the job training and classroom instruction.

The chronology of events that gave rise to the Company's audit leading to the investigative interview held on July 11, 2012, is as follows. Prior to the audit, on May 3, 2012, the Company conducted an investigation into the grievor's absenteeism and work history. In May 2012, the grievor was assessed 15 demerit points because he had falsely booked off sick on April 8, 2012. That day he had been observed at the Fort Steele Heritage Park Easter event.

The Company then undertook an audit into the grievor's time slips. It revealed that the grievor had not made a claim for wages for April 8, 2012. However, he did make a claim for wages for April 9, 2012, when he did not book himself back on until 22:15 hours. The audit also revealed that the grievor had submitted wage claims for March 4,5, and 6, 7, and April 9, 2012, when he was unavailable for work. The grievor had also claimed 3 days wages for bereavement leave for April 13, 14, and 15, 2012.

At the hearing, the Union made submissions about the propriety of the Company's investigation raising issues of timeliness, estoppel and double jeopardy. My jurisdiction is limited to the Joint Statement of Issue ("JSI") before me. The JSI in this case restricts my inquiry to an assessment whether or not the discharge was unjustified, unwarranted and excessive in all the circumstances. I therefore decline to deal with the other collateral issues raised by the Union.

I now turn to the facts surrounding the claims upon which the Company relies to justify the grievor's discharge.

March 3 – March 7, 2012 claims

The Grievor submitted wage claims for Sunday March 4, 2012 through Wednesday, March 7, 2012.

On March 3, 2012 the grievor drove back from Calgary to Cranbrook, British Columbia, his place of residence. On March 7, 2012 the grievor met with Trainmaster Merriam, who had attempted to contact the grievor without success on Sunday, March 4, 2012, and Tuesday, March 6, 2012, to arrange his training schedule. In his statement of July 11, 2012, the grievor was unable to explain why his Trainmaster had been unable to reach him on both days.

The Trainmaster's evidence is that when the grievor returned his call on Tuesday March 6, 2012, he told him that he taken a couple of days off to spend with his family. During that conversation, the Trainmaster's evidence is that he reminded the grievor that he was to contact a manager prior to taking time off and to come by his office to discuss his training. On March 7, 2012, the Company's expectations were reiterated to the grievor. He was told in no uncertain terms that it was unacceptable to take time off under any circumstances without prior authorization. The Trainmaster and grievor made work plans for the rest of the week and the grievor agreed that he would try to find a locomotive engineer trainer, who he would follow, commencing the following week.

In the course of the Company's investigation into the grievor's absenteeism, on May 3, 2012, the grievor stated that his Trainmaster had told him to take a couple days off and that he would meet with him on Wednesday March 7, 2012. The grievor did not say when his Trainmaster had told him this. It is inconsistent that the Trainmaster would have been trying to call the grievor on March 4 and 6,

2012, if he had told to him that there would be no need to connect until March 7, 2012. For this reason, coupled with the grievor's inability to explain why he could not be reached on March 4 and 6, 2012, suggesting that he was aware that he was expected to answer those calls, I prefer Trainmaster Merriam's evidence to the grievor's.

There is no dispute that the grievor ultimately received authorization for what he characterized as personal time off on March 4,5 and 6, 2012. That authorization was retroactive, however, and his statements during the investigation raise concerns about the grievor's credibility.

On July 11, 2012, during his investigation statement the grievor agreed that he had never before been paid for taking personal time off work. Nor, had he ever been given any indication from anyone that he could be paid for such time. The grievor did not inquire from Trainmaster Merriam on March 7, 2012, whether he could be paid for his personal time off, nor did the grievor submit an IP claim. In submitting such a claim, an employee signals to the Company that his claim may be uncertain and requires a ruling as to its correctness. Otherwise, as set out above, the wage claim is paid automatically.

One of the grievor's explanations for asserting his belief that he was entitled to claim wages for March 5, 6 and 7, 2012, was that he was soliciting locomotive engineer trainers on those days. Significantly, during his interview statement on

July 11, 2012, when asked to provide some of the names of the potential trainers he had solicited during that time, he was unable to name one person. Instead the grievor stated that he "must have sent out a good 45-50 letters to various engineers." None of the letters were produced in the course of the hearing. Had the grievor been engaged in consulting trainers, I would expect that he could remember at least one or two names from the 45-50 he said he contacted, or produce a few sample copies of the letters he claims he sent to them. I do not accept that the grievor's search for engineer trainers on March 5,6, and 7, 2012 took place as recounted by the grievor, nor do I accept that he believed he was entitled to be paid despite his unavailability.

During the grievor's July 11, 2012 statement, the Union set out its position that article 75.12 of the collective agreement provision reproduced above entitles LETs the to make wage claims 7 days a week, even if they are unavailable for work. For the duration of his statement, the grievor stated that he relied on the Union's stated position on the interpretation of the relevant article to defend his having submitted wage claims for his personal leave days on March 4,5 and 6, March 7, 2012, when he was unavailable, and on April 9, 2012 when he was booked off sick until 22:15 hours.

April 9, 2012 claim

The grievor booked off sick on Sunday April 8, 2012, but made no wage claim for that day. He did not do so because he stated that he did not believe he was entitled to claim wages when he was sick. The grievor did not book back on to work until 22:15 hours on April 9, 2012, meaning he was unavailable to work that day as well. However, he explained that he made a wage claim for April 9, 2012 on the basis that he had spent the day looking for what he refers to as his “coach” (who I took to mean the locomotive engineer the grievor was following at the time) and on the basis of the Union’s interpretation, which he now adopted as his own.

April 13, 14 and 15, 2012

On these days the grievor booked himself as unavailable because he was on bereavement leave. When the grievor initially submitted his claim for 3 days compensation in the CMA system he did not cite his relationship to the deceased. The claim was denied. The grievor then re-submitted his claim identifying his grandfather as the deceased. The death of an employee’s grandfather attracts this negotiated benefit. The claim was approved on April 30, 2012.

Upon receiving approval on April 30, 2012 for his resubmitted claim for bereavement leave for the death of his grandfather, the grievor also learned of the investigation the Company planned to initiate into his attendance and work history on May 3, 2012. Two days later, the grievor rescinded this claim for bereavement leave on the basis that he had been mistaken about his relationship to the

deceased. He said that his father had revealed to him that the deceased was in fact the grievor's uncle, not the grandfather the grievor had always been led to believe. Coincidentally at the end of April 2012, according to the grievor, his father shared with him that the man he thought was his grandfather his entire life was in fact his father's brother.

Contrary to grievor's statement that he was unaware that uncles were not covered when he submitted the claim, I do not believe him. As a result of having made an erroneous bereavement claim in 2008, I accept the Company's contention that the grievor was educated the applicable provisions of the collective agreement and knew, at the time he submitted his claim that the deaths of grandparents were covered by the collective agreement but that the deaths of uncles were not.

Decision

The issue in this case is whether the grievor knowingly attempted to defraud the Company by making claims for wages and/or paid bereavement to which he was not entitled.

The Company's allegations are most serious and it must discharge its burden to prove them on the basis of clear and cogent evidence.

I must agree with the Company's submission, having carefully reviewed the comments made by the grievor during his investigative interview and in the circumstances described above, that the grievor could not have assumed that he was entitled to be paid when he took time off to be with his family in early March, when he was unavailable for work.

In support of my conclusion, I note that the grievor was unable to explain why Trainmaster Merriam was unable to reach him March 4 and 6, 2012 in the circumstances described above. Leaving aside the fact that he grievor knew he had to have advance permission to take personal leave (which he obtained after the fact) he knew he was not entitled to claim wages for those days off. The grievor was hoping to escape being detected as unavailable on March 4, 5, and 6, and was less than forthright about the circumstances surrounding his decision to take that time off.

A thorough review of the grievor's statement leads me to conclude that when he made wage claims from March 3 through March 7 and April 9, 2012, he was not under the impression he may have been eligible for payment when he was unavailable to work, on personal leave or booked off sick. In fact, he believed he was not eligible. If there were any doubt in his mind, which there would have been if he had contemplated the Union's perspective before he submitted his claim, an IP claim could have been submitted thereby signalling to the to the Company that his claim may be uncertain and required a ruling as to its correctness. In submitting his

claim for wages as he did, the grievor sought to deceive the Company to obtain wages that he did not believe he was entitled to receive. That conduct is fraudulent. The grievor is precluded from invoking an interpretation he admittedly was unaware of and had never considered until July 11, 2012 as a defense to such conduct.

I understand that the interpretation of article 75.12 of the collective agreement is not before me. Nevertheless, having read it, I have no difficulty reconciling it with what I have found in this case – that the grievor did not believe that he was entitled to wages when he was unavailable to work. The grievor's true belief that he was not entitled to wage claims explains his attempt to justify them by making a less than credible claim that he was entitled to make them because he was working by soliciting engineers.

Finally, there is no other reasonable conclusion to draw regarding the bereavement leave claim than the grievor knowingly attempted to obtain the benefit of paid leave in circumstances where he was not eligible. His explanation concerning the true identity of the deceased is implausible, self-serving and entirely coincidental. I find that the reason the grievor withdrew his claim for bereavement leave is that he was concerned that his deception would be revealed in the course of the upcoming investigation.

For all these reasons, the Company has met its burden. As I have found the grievor made wage claims with the intent to defraud the Company, his dismissal was justified. No mitigation of penalty is properly considered in the circumstances of this case.

January 27, 2014

CHRISTINE SCHMIDT
ARBITRATOR