CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4319

Heard in Edmonton, June 12, 2014

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the dismissal of Locomotive Engineer A.B.

JOINT STATEMENT OF ISSUE:

Following an investigation, Engineer A.B. was dismissed on August 15, 2013 for "conduct unbecoming an employee as evidenced by your misrepresentations with respect to your physical abilities and restrictions affecting the performance of your duties, resulting in your receipt of benefit payments to which you were not entitled, while employed as a Locomotive Engineer in Thunder Bay, Ontario."

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.In the alternative, the Union contends that the discipline assessed is unwarranted and/or excessive in all of the circumstances.

The Union contends that the Company's termination of Engineer A.B.'s employment breaches the Collective Agreement and the *Canadian Human Rights Act,* including its duty to accommodate Engineer A.B.'s disability and ensure a discrimination/harassment-free work environment under the *Act.* The Union further asserts the actions of the Company in this case violated the rights of EngineerA.B. as contained in the *Workplace Safety and Insurance Act,* the *Personal Information Protection and Electronic Documents Act* and the *Canada Labour Code.*

The Union requests that Engineer A.B. be ordered reinstated forthwith without loss of seniority and benefits, and that she 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 and denies the Union's request.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) D. Able	**(SGD.) L. Smeltzer**
General Chairperson	**Labour Relations Officer**

There appeared on behalf of the Company:

B. Sly	– Director, Labour Relations, Calgary
D. Burke	– Manager, Labour Relations, Calgary

J. Evans – Return to Specialist

There appeared on behalf of the Union:

A. Stevens – Counsel, Caley Wray, Toronto
G. Edwards – Senior Vice General Chairman, Revelstoke
D. Able – General Chair, Calgary
D. Roberts – Local Chair, Thunder Bay
D. Fulton – Senior Vice General Chair, Calgary

AWARD OF THE ARBITRATOR

The parties have agreed that the grievor's identity will be kept confidential as the matter before me concerns sensitive personal health information. As set out in the JSI, at issue is Locomotive Engineer A.B.'s termination.

I am satisfied that the grievor's discharge was for just cause,that the Company conducted a fair and impartial investigation, that the videotape surveillance undertaken by the Company is properly admitted in this case, and that there are no mitigating factors which would justify a reduction of penalty.

Factual Background

The Company hired the grievor in 1986. In 1995, while working as a Yard Helper she sustained a workplace injury to her left ankle. The injuryled to ruptured ligaments in her leg. The grievorunderwent several surgeries and remained off work for six years.In 2001, the grievor participated in six unsuccessful Return to Work ("RTW") attempts.

In 2001, the Company provided the grievor with an accommodation opportunity and arranged for her placement in the Locomotive Engineering Training Program. In

July 2002 the grievor qualified as a Locomotive Engineer. Immediately after the completion of the programshe went off on maternity leave through 2003. Following that, she remained off work until 2005.

In 2006, the grievor felt a pull on her left ankle while in training and reported the injury to the WSIB. She remained off work for six more years until 2012.

In March 2012, the Company wrote to WSIB concerning the grievor's ongoing delay in the providing of medical information, which, in its view significantly delayed the RTW process. On March 28, 2012, and again on June 1, 2012, the WSIB sent a letter to the grievor to review her obligations and responsibilities while in receiptof WSIB benefits.

A RTW meeting was held on May 16, 2012 following the Company's receipt of a functional abilities form ("FAF") outlining the grievor's restrictions. The restrictions provided for limited climbing of vertical ladders, no prolonged walking on uneven ground (up to 30 minutes) and no prolonged static standing. The FAF also provided for the lifting of 20 pounds regularly to 50 pounds occasionally. A graduated RTW plan was agreed to.

Within a month, the Company was provided a more restrictive FAF. It was recommended that the grievor wear a boot to accommodate an ankle brace that had

been purchased for her earlier that year. Soon thereafter, the grievor complained about the weight of her boot and it felt like she had razors in it.

On June 20, 2012, an occupational therapist conducted a workplace assessment to assess the suitability of the locomotive engineer position. That assessment made slight modifications to the May 16, 2013graduated RTW plan to address the grievor's stated challenge in making the first step into the locomotive: the Company provided the grievor with a lightweight step stool and she could remove her boots when in the locomotive.

On June 21, 2012, the Company wrote to WSIB requesting benefit cessation. The Company's view was that the grievor was not cooperating in the RTW process;the Company had not been in receipt of objective medical information to support the new barriers the grievor had raised during theprocess. The WSIB declined the Company's request by letter dated July 1, 2012 and the RTW progressed.

The grievor began her new accommodation in July 2012. She complained that she was having trouble walking after a pain injection and went off work on September 24, 2012.

Prior to going off work in September 2012, the Company's RTW specialist received a call from the grievor's WSIB case manager about mileage claims for doctors' appointments pertaining to dates the grievor may have been at work. The grievor made

over $1000.00 in mileage claims to the WSIB to which she was not entitled. WSIB did not pay the claims.

For the purposes of the determination I must make - whether the grievor misrepresented her physical abilities and restrictions to the Company –among key documents are the FAFs informing the grievor's next RTW plan established on May 15, 2013.

Between September 2012and May 23, 2013 the grievor's family physician submitted 4 FAFs. On November28, 2012, the grievor's physician reported that the grievor was totally unfit for any work. The grievor was to be reassessed on January 10, 2013. OnJanuary 28, 2013, Dr. Lau, the grievor's orthopaedic surgeon, wrote in his report:"she [the grievor] was to wear the AFO brace [ankle foot and lower leg brace] for ambulation and at work." He indicated a reluctance to support more surgery (ankle arthroscopy), more injections or follow-up appointments. He was also of the opinion that no more physiotherapy was necessary. Thegrievor had been provided with a home exercise program.

The Company received the grievor's next FAF on March 13, 2013. The grievor was able to return to work on a graduated basis once her AFO brace was fitted and adjusted.

The March FAF, as well as those completed on April 16 and May 23, 2013, all indicated the grievor's functional limitationsfor walking as: "unable to walk without the assistance of a cane."Other limitationswith respect to walking, included: "no prolonged periods,""not more than 100 metres", and "level surfaces only, no uneven ground."The March 2013 FAF had indicated that the grievor could climb "limited stairs, stationary." The May 23, 2013 FAFwas revised only to the extentthat the grievor then had an ability to walk on uneven ground for short distances.

An occupational therapy onsite assessment was scheduled for March 22, 2013. Its purpose was to determine whether the grievor could get on and off the locomotive. On March 8, 2013, the grievoragreed she would bring a large boot to the assessment. The day before the scheduled assessment the grievor sought to postpone it. She did not have a boot to bring.

The Company RTW Specialist told the grievor that that the Company would supply the boot. The grievor attended the assessment. The occupational therapist made the following recommendations:

> ABis to participate with gait training through the OT as arranged by CP Rail. She is to ensure she follows the recommendations of using the stable footstool entering and exiting the locomotive, use 3 point contact routine as taught by the OT and is to ensure she wears her work boot with ankle brace at all times while on CP Rail grounds and entering/exiting the locomotive. When inside the locomotive, she can wear comfortable shoes.
>
> The employer is to limit the assignment of locomotives to the worker requiring her to use the "deadman's switch." If this type of locomotive will be used intermittently, the worker will switch the pedal to be used with her right foot, rather than her left foot.
>
> The WSIB will monitor the implementation of the return to work plan.

The occupational therapist recommended that grievor use her upper extremities to support her weight as much as possible. When climbing up the stairs, she should not carry anything,should lead with the right foot then bring the left foot up to join it (step-to gait). When climbing down the stairs, the grievorshould lead with the left foot and bring the right foot down to join it.

During the assessment the grievor was able to demonstrate safely climbing up and down the stairs to two locomotives while wearing the AFO brace. She used a step stool to climb on and off the stairs with no difficulty.

After the assessment, the grievor then claimed that she needed custom boot orthoses. The Company ordered new boots (manufactured with an internal ankle brace and rocker heal). The grievor also claimed she still needed gait trainingwith the physiotherapist who had previously treated her.

The grievor saw her physician on April 16, 2013, andshe revised the grievor's FAF with respect to stairs: the grievor could no longer climb stairs.

The custom boots were ready on April 28, 2013. The grievor spoke with the Company RTW specialist and reiterated that she still required gait training with a physiotherapist before any possible return to the workplace.

On May 2, 2013 the grievor sent to WSIB a prescription from her family physician. She had prescribed physiotherapy contrary to Dr. Lau's January 28, 2013 recommendation (subsequently confirmed by several other medical health professionals that physiotherapy was no longer necessary).

The WSIB recommended that the occupational therapist perform another onsite assessment to assess the grievor's new work boots and to make recommendations for any adjustments. That assessment was carried out on May 8, 2013.

Notwithstanding the above, the grievor asked if physiotherapy would be part of the RTW program. The report stemming from the May 8, 2013 assessment did not recommend physiotherapy. It recommended that the grievor participate in an ongoing maintenance exercise program, which she had previously been provided.

On May 15, 2013 a RTW plan was drafted for the grievor's gradual return to work commencing June 3, 2013 for two-hour shifts through to June 17, 2013, followed by four hours per day through to the end of June 2013 and so on, until the grievor was capable of working eight hour shifts.

The Company'sview was that grievor had prolonged her recovery and unnecessarily delayed her return to work. The Companyhad also received reports from employees that the grievor had been seen in town walking normally without a cane and in high heels. Armed with the knowledge that the grievor had improperly claimed

mileage expenses from WSIB and that she had shown up at a RTW meeting wearing sandals, the Company decided to have a private investigator undertake video surveillance of the grievor.

The videotaping of the grievor's activities spanned a 9-day period between May 16 and June 24, 2013.The unedited footagetotals 2 hours and 31 minutes. It was disclosed to the grievor in advance of her formal statement,which commenced on July 6, continued on July 7, 2013, with a supplemental statement taken July 24, 2013.

During the investigation the grievor confirmed that it was indeed her carrying out all the activities as represented in the footage.

The videotape has the grievor walking (at times at a hastened pace) without a caneon uneven ground, on one occasion on gravel wearing wedge heels, without any apparent discomfort.

The most notable footage of events occurred on May 29, 2013 and June 24, 2013. On May 29, 2013, the grievor is seen walking normally without a cane for a period of over 40 minutes at Walmart. Later, she is seen walking with a cane at the workplace using it to assist with a slight limpand then minutes later, walking comfortably at a credit union. She continued with her day tending to two more errands without the use of her cane.

Similarly, on June 24, 2013, the video shows the grievor purchasing two bags of produce at a local stand, and walking with haste back to her truck without apparent difficulty. She is then seen supporting her weight on her left ankle as she steps into her truck while carrying the bags in her right hand. Sheproceeds immediately to BioPed(the orthotics footwear clinic)where she then used her cane to assist her walk. The grievor continued with two more errands unassisted by a cane only to rely on it when she attended at the Company at approximately15:00 hours. After work, she is seen coming out of a house, walking normally without a cane on uneven ground and carrying a visibly weighted box in one arm.

The grievor maintained throughout the investigation that the stated limitation on the functional ability forms pertaining to her inability to walk without the use of cane and to her other restrictions pertained only to the workplace. At one point, she initially suggested that there was no requirement either at or outside of work for her to use a cane for walking. In any event, the use of a cane outside the workplace was at her discretion. Outside work related to her “private life”which was between her and her doctor.

At the hearing, and in support of the grievor’s assertion that herfunctional limitations applied only to the workplace, the Union submitted two letters. One is from the physiotherapist whom the grievor thought she needed to continue to see even though, according to four other health professionals, it was not medically supported.

The other letter is from the grievor's physician and author of theFAFs from March through May 2013.

The grievor's physician did not attend the hearing. Her correspondence dated September 13, 2013, is reproduced below in its entirety:

> Ms. A.B. is a patient in my family practice, who I have known for more than 10 years. I write at her request, in response to her receipt of your letter of dismissal in which you state she misrepresented her disability. **She tells me that you do not understand that she can move within her own home without a cane, although she is required to use it at the workplace.**
>
> Ms. A.B. suffers from an unstable ankle, with chronic pain subsequent to a workplace injury. This is well documented by a multitude of healthcare professionals assessments and imaging studies, and corroborated by findings at surgery. These reports have been made available to your company.
>
> Throughout her illness, Ms. A.B. has remained at all times fully compliant with treatment recommendations. She has remained motivated to return to work. Unfortunately, she does not seem to have had full cooperation from her employer to facilitate her timely return to work (delayed response to her seeking information on CP Rail guideline narcotic safety critical position, failure to purchase recommended aids (ie step stool), and most recently failure to provide work within her restrictions.
>
> The workplace restrictions were recommended by her healthcare providers not Ms. A.B. they were based on repeated functional assessments, and on knowledge of the physical dysfunction of her ankle. **I am aware of no evidence that Ms. A.B. has altered documentation of the restrictions recommended for her** and would be most interested to see if such if available.
> **Due to the physical conditions of the workplace, she requires greater support (use of cane, work boots, brace) than she does within the home).** Within her home,she is not required to manoeuver on uneven ground, cross rail lines, set her pace to catch a train or walk long distances while remaining attentive to moving trains. Such details are an essential element of physical abilities assessments.
>
> In my opinion, Ms. A.B. remains entitled to benefit payments resulting from her disability. I have no evidence that she ever misrepresented her disability.
>
> I hope that you will reconsider your opinion.

Decision

The Union alleges that the Company's investigation violated article 23.04 of the collective agreement because it wasbiased. In support of its position, the Union points out the Company had written to the WSIB in 2012 requesting benefit cessation and reminds me that the investigators had been provided with a summary of a RTW meeting from May 30, 2013, which the Union asserts had inaccurate information about the grievor. The memo references the grievorhaving previously told the RTW specialist that she used her cane all the time.

I am unable to sustain the Union's submission. Investigations are normally conducted in circumstances where there may be some reason to believe that some form of misconduct or dereliction of duty has taken place.The letters to WSIB were not malicious as assertedby the Union, and the fact that the WSIB did not decide to cease benefits at that time does not necessarily imply bias on the part of the Company. Nor does the investigator's review of a memo referencing the grievor's alleged comments necessarily imply bias by the Company investigator.

It would be unrealistic to expect that an employer-led investigation would be conducted in an entirely neutral fashion. Sometimes hard and uncomfortable questions must be put to the witnesses in the course of investigations. Here, the Union did not direct me to anything in the investigative statements to support its allegation.It may very well have been that the investigator had an opinion about the answers the grievor was providing. The investigation does not, however, offend against the general rule that the

questioning must remain be open–minded and conducted in such a manner as to reflect general impartiality and a withholding of judgment.

The Unionalso objects to the admissibility of the video surveillance. It argues that the facts did not justify it, and that in proceeding as it did the Company violated her right to privacy. According to the Union, since the investigator did not appear at the hearing or swear an affidavit to the videotape's authenticity, on that basis alone it should not be admitted (see *Re Toronto Star Newspapers Ltd. and Southern Ontario Newspaper's Guild, Local 87 (1992)*, 30 L.A.C (4^{th}) 306 (Springate).

At the hearing, I reserved on the Union's objections as to the admissibility of the videotape and following the practice reflected in those awards cited in **CROA 2707**, allowed the videotape to be presented, subject to an ultimate ruling as to its admissibility.

In **CROA 2707**, Arbitrator Picher reviewed the relevant jurisprudence and set out theapplicable two-part test:

> 1. Was it reasonable, in all of the circumstances, to undertake surveillance of the employee's off-duty activity?
> 2. Was the surveillance conducted in a reasonable way, which is not unduly intrusive and which corresponds fairly with acquiring information pertinent to the employer's legitimate interests?

In applying the test to the circumstances before me, the Union reminds me that there is no dispute here that the grievor suffers from a legitimate medical condition. In the Union's view there is no support for the Company's assertion that the grievor had

prolonged the RTW process or was delaying her return to work. The grievor was cleared to work when the surveillance started.

In the Union's submission, the Company should have asked the grievor if she was unable to walk without the use a cane or other limitations applied outside the workplace, rather than undertake the extraordinary step of surreptitious surveillance. The Union submitted that the video surveillance was unduly intrusive as it captured images of the grievor's daughter getting off of the school bus and playing in the yard, as well as images of other individuals who ventured onto the grievor's property.

In addition, the Union points out that it does not have particulars of employee reports of the grievor walking around town without a cane and in high heels. Since the grievor wore orthotic sandals to the RTW meeting – which had been approved by WSIB – the Union contends that her so doing would not properly raise any suspicion by the Company as to the grievor's representation of her physical abilities. As for the expense for mileage claims made in the approximate amount of $1000.00, while they were admittedly disallowed, there is no indication that the grievor had acted dishonestly.

In support of its position, the Union directed me to a number of cases from this office, which it distinguished on the facts,where surreptitiously obtained video surveillance was admitted (**CROA 2707** and **2302**). The Union also directed me to *Re Labatt Ontario Brewers v. Brewery, General & Professional Workers' Union, Local 304 (Admission of Evidence Grievance)*42 L.A.C. (4th) 151, where Arbitrator Brandt ruled the

videotape evidence inadmissible. The Union submitted that the facts before me are more favourable to the Union's argument than the ones in *Re Labatt*.

In the *Re Labatt* case, the grievor called his employer on May 3, 1994, to inform it that he had been in a car accident the night before. Video surveillance was initiated on May 17, 1994. The grievor explained that he had been released from hospital and that he would be seeing his physician later in the week. He also called his manager on May 4, 1994 to let him know that he had been in an accident and would not be in until further notice. Communication between the grievor and health services continued with the grievor providing a status update on May 16, 1994.

The employer initiated the surveillancethe next day because of his poorattendance record in 1993 and in the first four months of 1994 (without raising that issue with him), coupled with a suspicion the grievor was working for another business. In respect of this latter suspicion, the employer had twice previously raised the concern with the grievor and he had denied it. In response to those denials, the employer had conducted surveillance on April 14, 1994, and came up with nothing. The grievor's next absence was that resulting from the car accident.

In the circumstances described above, in his award, Arbitrator Brandt put considerable weight on the fact that the employer could have and should have raised its concerns about the employee's absenteeism record before resorting to video surveillance.

The facts in the *Re Labatt* case are not analogous to those before me. Nor, in my view, are the facts before me more favourable to the Union's argument than the ones in *Re Labatt*.

In contrast to the *ReLabatt*case, having regard to the whole of the record, it would be difficult for the Company not to suspectthat the grievor was prolonging her recovery and delaying the return to work process. In the face of reports from other employees that the grievor was walking around town without a cane, and considering the changes in the grievor's restrictions in the FAFs, the attempt by the grievor to cancel an assessment on short notice, the insistence by the grievor for physiotherapy when the attending health professionals said it was unnecessary, and the grievor's improper mileage claims, the Company had reason to suspect that the grievor may not have been honest with the Company with respect to her physical abilities.

While the Union emphasized that the grievor was in her fourth week of her return to work when she was taken off work on June 25, 2013, that fact does not carry much weight in the analysis about whether the Company had reasonable grounds to conduct the surveillance in the first place.

With respect to the Union's submission that the surveillance itself was unduly intrusive, beyond the inherent intrusiveness of surreptitious surveillance, I cannot find even on the Union's facts alone,that it was unduly so. None of the footage showing the

grievor at the workplace and public areas would give rise to a concern about privacy. The grievor could not reasonably have had an expectation of privacy in those situations.

Finally, with respect to the Union's argument that the videotape was not authenticated, that argument cannot be sustained either. It is true that in**CROA 2707**, the investigator who undertook surveillance for the Company was in attendance at the hearing. Here, the grievor herself authenticated the videotape footage during the course of the investigation and again at the hearing.She acknowledged that the videotape accurately represented her in the activities she had engaged. She disagreed with the investigator's perception about what the surveillance demonstrated.

I have reviewed the surveillance in its entirety. A summary of what the surveillance shows is set out earlier in this award. The only conclusion to be drawn from the grievor's behaviour, as illustrated by the use and non-use of her cane throughout the videotape, coupled with the manner in which she is able to walk without the cane, in one instance for a prolonged period, and considering her facility in supporting her weight on her left foot as she climbed into her truck leads me to conclude that she has misrepresented her physical abilities to the Company.

The Union argued that because the on-site occupational assessments only refer to the grievor walking to the locomotive in the train yardthat the functional limitation for walking was only in respect of the workplace. I can see no reason why the occupational therapist would refer to the grievor's use of a cane outside the workplace given the

nature and purpose of those assessments. The wording of the reportsdoes not advance the Union's argument.

More fundamentally, it defies credulity that when a physician reportingher client's functional ability as it pertains to walking is limited as it was here, that such limitations are limited to the workplace.

The grievor's own physician's letter dated September 13, 2013, confirms that the grievor has essentially continued to make false representations to her physician. Just as the grievor had her physician misrepresent her physical abilities to the Company and WSIB, she misrepresented to her physician the Company's stated reasons for her termination.

At the hearing, the grievor suggested to me that her physician did not accurately reflect what she (the grievor) had told her as the reason for the letter in the first place. The letter states, "She [the grievor] tells me that you do not understand that she can move within her own home without a cane, although she is required to use it at the workplace." In the circumstances of this case, and given the physician's conspicuous absence at the hearing, I have no difficulty accepting the physician's accurate reporting of the circumstances informing the drafting of her letter over the grievor's self-serving explanation.

The letter goes on to suggestthat the grievor conveyed to her physician that the Company had accused the grievor of altering documentation. There would simply be no other reason for the physician to write: “I am aware of no evidence that Ms. A.B. has altered documentation of the restrictions recommended for her” unless the grievor had told her that the Company had accused her of such misconduct.

Finally, the physician’s letter is largely irrelevant to the issues in this matter. It emphasizes the capacity of the grievor to get around freely in her home as compared to her difficulties in navigating the workplace. This does not answer the obvious question raised by the video footage: Why was the grievor not able to make her way unassisted in the workplace, but clearly was able to move around with ease in public areas and to enter her own vehicle with no difficulty whatsoever? The physician’s letter does not address that contradiction.

Having regard to all of the above, I find that the evidence adduced by the Company demonstrates the grievor’s deliberate misrepresentation of her physical abilities - for which she demonstratedno remorse, or even insight. That misrepresentation, resulting in continued receipt of WSIB benefits is culpable behaviour for which discharge is the appropriate penalty.

For these reasons the grievance is dismissed.

July 3, 2014

CHRISTINE SCHMIDT
ARBITRATOR