CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4338

Heard in Montreal, October 15, 2014

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the termination of Conductor Scott Boorman effective December 17, 2013.

UNION'S EXPARTE STATEMENT OF ISSUE:

Following an investigation including statements on November 21, 2013 and December 9, 2013, Conductor Boorman's employment was terminated by the Company "for Fraudulent Extended Health Care Claims in 2010 and 2012, two of which you were reimbursed for while employed as a Conductor in London, Ontario."

The Union contends that the investigation was fatally flawed and not conducted in a fair and impartial manner per the requirements of the Collective Agreement. There is a clear apprehension of bias in the circumstances. For this reason, the Union contends that the discipline is null and void and ought to be removed in its entirety and Conductor Boorman be made whole.

The Union further contends that there is no cause for discipline whatsoever in the circumstances, or in the alternative, that the penalty of discharge is excessive and unwarranted. The Union requests that Mr. Boorman be reinstated 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 and denies the Union's request.

FOR THE UNION:
(SGD.) B. Hiller
General Chairperson

FOR THE COMPANY:
(SGD.)

There appeared on behalf of the Company:

N. Hasham	– Legal Counsel, Toronto
G. Benard	– Manulife, Senior Investigator, Waterloo
M. Moran	– Labour Relations Officer, Calgary
B. Medd	– Labour Relations Officer, Calgary

There appeared on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
B. Hiller	– General Chairperson, Bowmanville
W. Apsey	– Vice General Chairperson, Smith Falls
D. Newby	– Local Representative, London
B. Brunet	– General Chairperson, Piedmont
S. Boorman	– Grievor, London

AWARD OF THE ARBITRATOR

As a result of a comprehensive investigation undertaken by Manulife Financial ("Manulife"), the administrator for the Company's benefit plans, on November 6, 2013 Manulife notified the Company in writing that Conductor Scott Boorman ("the grievor") had been identified, together with four other Company employees, as likely to have taken part in a fraudulent cash split arrangement with a medical supplier, Canadian Institute of Orthopaedics ("CIO").

The notification set out that Manulife had interviewed 23 plan members and that 21 of them admitted their involvement in the submission of false claims for medical devices and splitting funds received for those claims with CIO. Manulife had, as part of its investigation, compared the claims of the 23 plan members with other plan members who Manulife had not interviewed (including the grievor) and found them to be the same in all material aspects. On that basis, Manulife suspected the grievor had most probably not received the devices and that he had likely taken part in in cash split arrangement with CIO.

The notice to the Company identified four claims for medical devices submitted by the grievor on January 17, 2011, February 22, 2011, February 6, 2012 and May 16,

2012. The total amount paid out by Manulife for the grievor's alleged false claims based on its investigative findings was $14,537.60.

On November 8, 2013, the Company's Director of Labour Relations contacted the General Chairmen East for the Union, providing the names of the five employees identified by Manulife as the subjects of their investigation. The Company presented the General Chairmen with a time-limited offer for the subject employees to tender their resignations in consideration for the Company's commitment not to pursue the employees in any forum. The Company provided only the general nature of the allegations to the Union and it chose not to inform its members of the offer.

Prior to the grievor's first investigative statement conducted November 21, 2013, the Company investigator, Superintendent Gionet, met with the Manulife investigator, who had authored the notification to the Company, together with the Company's Director of Labour Relations. The Company was seeking clarification with respect to the notification. Together with the evidence from the Manulife investigation, the notification document was disclosed to the Union pursuant to its obligation to disclose all relevant evidence in its possession as part of the investigative process.

The Union argues that in the circumstances described above, the Company's investigation was fatally flawed and not conducted an impartial manner given what it says is a clear bias on the part of the Company. In the Union's view the Company's tactic in making the offer to permit the grievor to resign demonstrates its impartiality in

its prejudgment of the matter. Also, the Union says that since it was neither invited to the meeting between Superintendent Gionet, the Manulife investigator and the Director of Labour Relations, nor given any evidence stemming from it, that the Company had violated 70.01 (4) of the collective agreement.

Article 70.01 (4) of the collective agreement reads:

> "The notification [for the investigation] shall be accompanied with all available evidence, including a list of any witnesses or other employees, the date, time, place and subject matter of their investigation, whose evidence may have a bearing on the employee's responsibility."

I do not agree that the time limited offer to settle made to the Union means that the Company investigation was impartial or somehow demonstrates bias on its part. To offer to settle the matter upfront on the terms identified was not, in my view, an indication that the Company had predetermined the grievor's guilt or that it would not conduct a thorough investigation into the matter. It was a pre-emptive offer to settle what it had reason to believe could result in the imposition of severe discipline. To void the discipline because of an offer to settle at the front end, as urged by the Union, would serve to discourage the early settlement of disputes.

Further, there is nothing in the grievor's statement or supplemental statement to suggest that the investigative process was tainted in any way by the Company's alleged "prejudgment" of the matter. The investigating officer may have formed an impression going into the investigation. However, any such impression was tested during the investigation by way of probing questions put to the grievor. In this case the

investigator's recommendation for discipline was because the grievor's explanations did not, in the investigator's view, reconcile with the evidence adduced during the investigation.

Nor am I persuaded that the investigation was unfair and impartial, or that there was a violation of article 70.01(4) as a result of the meeting in which the Manulife investigator provided clarification of the contents of the written notification. No additional evidence was provided to the Company in the course of that meeting. The situation bears no resemblance to that in **CROA&DR 3322**, where the Union was not provided with the medical opinion that formed the basis of the Company's decision in that case to discipline the grievor for misrepresenting an alleged injury. In the case before me the Manulife notification disclosed to the Union the basis of Manulife's belief and the Union was given all of the evidence in the Company's possession that had a bearing the grievor's responsibility for the alleged misconduct.

For these reasons I am unable to sustain the Union's submission that the Company's investigation was unfair and impartial or otherwise constituted a breach of the collective agreement.

I now turn to the merits of the case before me.

The grievor attended at his first statement on November 21, 2013. A supplementary statement was conducted December 9, 2013, at which time the grievor produced bank records, and evidence that he had received the medical supplies at issue, including a set of knee and hip braces and their replacements. The grievor was unable to produce the TENS machine that had been prescribed for the grievor together with the first set of knee braces.

The grievor essentially claimed that he was a victim of Kamille Ramsundar (“Dr. Ramsundar”) and CIO rather than a willing participant in any claim funds splitting scheme.

During the relevant time period, the grievor worked as a Conductor in the East Pool of the London Terminal. Since early 2011, he rented a home in London.

It is not disputed that grievor has suffered from back pain since sustaining a workplace injury in January 2008. The grievor says that it was due to chronic back pain that he first attended at CIO in Scarborough on or about December 13, 2010. He says he was responding to a flyer targeting people living in chronic pain that was posted in the Company Agincourt office.

At CIO the grievor received a prescription for two knee braces for osteoarthritis/daily wear and a TENS machine for lower back pain to be used for 6 months. The invoice for the devices totaled $4,430.00. Approximately a month later on January 13, 2011, the grievor was prescribed a left hip Abduction brace for osteoarthritis/daily wear and a pair of custom orthotics. That invoice was for $3,937.00. A year later, on January 23, 2012 the grievor was prescribed replacement knee braces due to weight gain and also, according to the grievor, given the condition of the braces previously prescribed. The replacement cost for the new knee braces was $4,314.00. On April 28, 2012, the grievor was prescribed a replacement left hip abduction brace for the same reasons as the replacement knee braces. It cost $3,679.00.

The grievor never wore the knee or hip braces at work, despite their prescription for daily wear. The grievor stated that Dr. Ramsundar explained to him that the devices would provide core strengthening in his daily life and when he did his core strengthening exercises. The grievor said that his concern with wearing the braces at work was that it could be a hindrance to getting on and off equipment and working around heavy equipment.

The grievor says he paid the invoices totaling $16,364.00, in cash to CIO. He explained that he would call CIO and find out how much he had to pay CIO once Manulife had deposited claims monies into his bank account. The invoices issued by CIO indicate that the grievor made payment to CIO by cheque, and the claims forms

submitted by CIO to Manulife indicate that they are not made in relation to any occupational accident.

The grievor contends that he paid cash to CIO, in his words, as a “matter of ease as Dr. Ramsundar did not have a credit or debit machine and he pushed cash as the prime method.” The grievor also contends that Dr. Ramsundar told him that CIO would take care of the claim and submit all the paperwork to Manulife, and that he never saw or signed any of the claims for the devices. Then Manulife would deposit funds for the claims directly into the grievor’s bank account. The grievor says he would then, within 3 or 4 days after receiving the Manulife funds, drive to Toronto from London to deliver the cash and pick up the devices at CIO. The grievor did not know if he had been given receipts. He did not produce any.

In the course of the investigation, the grievor stated that he never received statements from Manulife showing the refund details paid to him. He acknowledged that Manulife may have sent him statements, but his generic answer in respect of all claim statements was that he may have been at a different address or he may not have bothered opening what was sent to him.

The grievor says that his bank records support his contention that he paid the total amounts of the invoices to CIO. Those records reveal the following.

On February 17, 2011, $4,219.00 of the $4,434.00 claimed for the first two knee braces and the TENS machine was deposited by Manulife into the grievor's bank account. On February 18, 2011, the grievor withdrew a money order for $1,570.00, which he said was used to obtain cash to pay CIO. That same day, the grievor withdrew another $2,500.00 from the same account ostensibly to pay CIO for the equipment. To account for the difference between $4,070 and the total invoice amount of $4,434.00 the grievor stated that he had cash left over from two ATM withdrawals for $500.00 on February 3 and 5, 2011, respectively, reflected in the bank records, and that he withdrew another $60.00 on February 21, 2011 from an ATM in Scarborough, which is the date the grievor surmised he picked up the 3 devices.

At his November 21, 2013, investigative statement, the grievor's evidence was that he thought that he had never received a reimbursement from Manulife for the TENS machine.

All of the CIO invoices contain handwritten notes that reflect the actual amount of each Manulife deposit into the grievor's account. In respect of this first invoice the grievor thought $3,219.00 was handwritten, which allowed for the explanation at the grievor's first investigative statement of the discrepancy between the amount he thought had been reimbursed by Manulife versus the amount of the invoice. However, at the grievor's December 9, 2013 statement, when the bank records he brought with him that day revealed that $4,219.00, not $3,219.00 had been deposited into his account the

grievor revised his answer to state that he knew he was short paid for the invoice mistakenly believing that it was the full amount of the TENS machine.

The grievor stated, that he had never contacted Manulife to find out why this claim (and two others) was not fully covered.

On March 24, 2011, Manulife deposited $3,397.00 in respect of the second claim for the left hip device and custom orthotics. Again, this was less than the amount of the invoice CIO issued to the grievor ($3,937.00). In order to pay CIO and obtain the devices, the grievor made an ATM withdrawal of $200.00 from his account on March 26, 2011. That was followed by a money order for $1,400.00 on March 28, 2011, a further withdrawal on March 30, 2011 for $500.00 at an ATM in Scarborough and another $500.00 withdrawal at an ATM in Dorcherster (near London) on April 1, 2012, amounting to total withdrawals of $2,600.00 of the $3,937.00 the grievor says he would have delivered to CIO within 3 or 4 days of March 24, 2011.

The grievor's explanation as to where he got the difference between $2,600.00 and $3,937.00 cash to pay to CIO was that he borrowed $1,500.00 from his mother to cover it as his wife had cashed cheques he had issued to her for child support and hockey that he says he and his wife had earlier agreed she would not cash.

The invoice for the first hip device and orthotics contains a handwritten amount of $3,397.00 dated March 23, 2011 - the amount of the Manulife deposit to the grievor's account the next day, on March 24, 2011. The grievor stated that he had no idea how that could be. He postulated that maybe someone at CIO was getting the deposit information from Manulife. The grievor said that, when he informed CIO each time that he had received Manulife money, he never disclosed to CIO the dollar amount of the deposit.

On March 26, 2012, Manulife deposited into the grievor's bank account $4,239.00 of the $4,314.00 claimed in respect of the replacement knee braces, which the grievor says were necessary to replace the first pair because of his weight gain of at least 30 pounds over the course of the previous year together with the condition of the first pair of knee braces.

In order to pay CIO and obtain the replacement equipment, the grievor withdrew $1,000.00 from the bank account on March 27, 2012. That was followed on March 28, 2012 with the grievor emailing a money transfer out of his account in the amount of $1,000.00, which the grievor said went to his mother, who then provided him with further cash to pay CIO. The grievor said it was "easier to transfer it to her." Later the same day, the grievor withdrew another $1,000.00 from the bank. He withdrew another $600.00 from his bank on March 29, 2012 and says that he sent another $1,000.00 to his mother via email transfer that day. She then gave him the equivalent cash to pay for the replacement knee braces.

The total withdrawals from March 26 through March 29, 2012 total $4,600. When asked why he had not simply taken out the full amount from the bank, the grievor explained that he had a $3,000.00 daily limit on his account. When the investigator followed up with why had not withdrawn $2,000.00 from the bank rather then breaking up transactions into email transactions and withdrawals, the grievor postulated that it may have been that he conducted the transactions when the bank was closed, and he was subject to $1,000.00 limits on ATM withdrawals and email transfers.

On July 4, 2012, Manulife deposited the full amount claimed of $3,679.00 into the grievor's account for his replacement hip brace. To make this payment to CIO, the grievor withdrew $500.00 from an ATM on July 5, 2012 and made a further email transfer out of his account in the amount of $1,000.00 that same day. The grievor was unable to explain why he had only taken out $500.00 on July 5, 2012. He withdrew another $1,300.00 from the bank on July 6, 2012. The grievor says he transferred another $832.00 to his mother on July 7, 2012. These latter monies also paid for a cell phone bill.

The total withdrawals from July 4, 2012 through July 7, 2012 come to $3,632.50. The grievor says he took that cash and some that he had on hand to pay CIO and obtain the second hip device.

Decision

The allegation of fraud against the grievor is a very serious allegation. The Company must prove the misconduct on a balance of probabilities, based on clear and cogent evidence. In my view, the Company has met that onus. The version of events offered by the grievor in the course of the investigation was simply not credible, for the reasons set out below.

The investigation demonstrated that the grievor delegated to CIO the paperwork surrounding the extended health care claims to Manulife for knee braces for osteoarthritis, a TENS machine for back pain, a left hip brace for osteoarthritis and custom orthotics, as well as the replacement braces for the same condition due to weight gain.

The grievor admits that he received the four payments for claims submitted in the significant amounts as described above before he says he went to deliver the cash he says he paid for them when he picked up the devices. As mentioned above, the grievor says he would only find out the amount he would have to pay for the devices when he called CIO after the receipt of Manulife reimbursements for claims submitted by CIO on his behalf.

The grievor says that he paid $16,364.00 to CIO in cash payments for the devices in the manner recounted above. It defies logic on a number of levels. First of

all, no legitimate clinic would demand that its patients pay for properly prescribed devices with huge amounts of cash. No reasonable individual would participate in the arrangement described above for the convenience of a bona fide business. No reasonable person could think the arrangement was legitimate.

Secondly, it does not make any sense that the grievor went to the lengths he did to obtain and pay for the devices. It is simply not believable that he spent days and days scrimping together (and virtually draining his bank account) in an extremely convoluted manner for the funds necessary to pay for these expensive devices and then travel from London to Toronto to pay for them in person. Thirdly, it does not make sense that the grievor made no inquiries why on three occasions Manulife did not reimburse him the full amount of his claims.

Fourth, the knee and hip braces (which claims represent $15,184.00) were prescribed for “osteoarthritis/daily wear.” There is no medical documentation to suggest that the grievor suffered from osteoarthritis. Despite the Union’s attempt at the hearing to link the grievor’s workplace injury from 2008 and his chronic back pain to legitimate claims for knee and hip braces prescribed for osteoarthritis, no such link is made out.

Fifth, the grievor did not wear the devices at work when they were prescribed for daily wear, nor did he make any attempt to try them at work. Accordingly, he had no basis for speculating that the equipment would interfere in his physical activities at work. It is a convenient, but not a credible excuse.

Nor do I believe the grievor's rationale for purchasing the second set of knee braces and the second hip device. Certain medical documentation submitted by the Union suggests that the grievor's weight in 2008 (205 pounds) was the same in 2013. The grievor has not satisfactorily explained how it is that in a one year period from 2011 to 2012 he gained 30 pounds. Again, it is a convenient unverified claim by the grievor. Considering the grievor's lack of credibility on the totality of the evidence, I don't believe that the grievor experienced the "weight gain" referenced by him to justify the prescription of replacement devices.

The only evidence in the grievor's favour is that he produced knee and hip braces and their alleged replacements between the first investigation statement held November 19, 2013 and the second investigation statement on December 9, 2013. There is no documentation linking the devices that the grievor produced with the ones allegedly prescribed, invoiced and which he said he picked up at CIO. Considering the entirety of the scenario revealed during the investigation, and the grievor's fundamental lack of credibility, while I am unable to determine where the grievor obtained the devices he produced during the Company investigation, I find it highly improbable that he procured them from CIO or that they were the devices for which the claims were made.

As is apparent, on the totality of the record before me, I cannot accept that the grievor believed that Dr. Ramsundar was treating his legitimate back condition at CIO. Although I am unable to determine with any degree of certainty the exact amount of the

funds received by the grievor from Manulife that the grievor then paid to CIO, on careful review of the grievor's bank records, coupled with the grievor's explanations, I conclude that it was significantly less than what the grievor professed, and significantly less than what he received from Manulife. The only reasonable conclusion to draw in all the circumstances is that the grievor paid some portion to CIO and retained the other portion for his own personal benefit.

Irrespective of the grievor's length of service with the Company – 19 years – the nature of the misconduct demonstrated by the grievor is such that the bond of trust between him and the Company has been broken. The grievor was not being truthful in his denial of any involvement in an insurance fund splitting scheme during the Company's investigation or, for that matter, at the hearing of this case. There is no basis to consider substitution of a lesser penalty than that imposed by the Company.

For all of the above reasons, the grievance is therefore dismissed.

November 10, 2014

CHRISTINE SCHMIDT
ARBITRATOR