

CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4348

Heard in Toronto, March 25, 2015

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the termination of Conductor M. Spanger effective December 17, 2013.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Following an investigation including statements on November 19 and 29, 2013, Conductor Spanger'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 Toronto, 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 Spanger 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. Spanger 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.

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

FOR THE COMPANY:
(SGD.)

There appeared on behalf of the Company:

N. Hasham	– Counsel, Toronto
G. Gionet	– Retired Superintendent, South Western Ontario, London

There appeared on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
B. Hiller	– General Chairperson, Toronto
J. Diggler	– Local Chairperson, Mactier
M. Spanger	– Grievor, Toronto

AWARD OF THE ARBITRATOR

Mike Spanger (the grievor) was employed by the Company from June 26, 1995 until he was dismissed on December 17, 2013 for allegedly making fraudulent extended health care claims.

At the time of his dismissal, the grievor was working as a conductor and he had fifty demerits on his record.

The circumstances giving rise to the grievor's dismissal, arise from an investigation conducted by Manulife Financial ("Manulife"), the administrator of the Company's benefit plans.

On November 6, 2016 Manulife notified the Company that a recent investigation of a Toronto based medical equipment supplier, the Canadian Institute of Orthopaedics (CIO), disclosed a number of false claims for medical supplies. The medical supplies were devices commonly used by persons suffering from osteoarthritis. Manulife interviewed twenty-three plan members. Of the twenty-three plan members interviewed, twenty-one admitted to being involved in the submission of false claims for medical devices and subsequently splitting the funds received for those devices with CIO.

Manulife also identified a number of other claims by plan members employed by the Company (who they had not interviewed) whose claims appeared to be fraudulent and part of the fraudulent benefit splitting scheme. The grievor was one of the plan

members identified by Manulife. The grievor had three claims for reimbursement of medical devices supplied by CIO, which Manulife believed were part of the benefit splitting scheme. Those three claims are as follows:

- November 18, 2009 for service on November 5, 2009 to supply a custom right knee brace, a left knee brace and orthotics for a total of \$4,320.00.
- December 15, 2009 for service on December 1, 2009 to supply a custom left hip abduction brace for a total of \$3,425.00.
- February 23, 2010 for service on February 10, 2010 to supply a right hip abduction brace for a total of \$3,997.00.

Manulife made the following deposits to the grievor's bank account with respect to the three claims:

- December 10, 2009 (on account of the November 18, 2009 claims) \$3,080.00.
- January 26, 2010 (on account of the December 15, 2009 claim) \$3,025.00.

In total Manulife deposited \$7,205.00 dollars in the grievor's bank account.

On May 18, 2010 Manulife requested additional information from the grievor with respect of the February 23, 2010 claim. Manulife received no additional information so that claim was denied.

The details of Manulife's investigation was shared with the Company during a meeting on October 20, 2013, attended by John Bairaktaris (Director of Labour Relations) and Gerry Gionet (who would later be the Investigating Officer).

On November 8, 2013 Mr. Bairaktaris offered the Union an opportunity to convey to the grievor, and other employees who were identified by Manulife, the option of resigning their employment before a formal investigation was conducted. The Union was not provided with any particulars of Manulife's allegations. The Union, not surprisingly, refused to convey the offer to the grievor and other employees. Mr. Gionet was unaware of the offer when he conducted his investigation.

I see nothing wrong with the Company making such an offer in order to resolve the matter before having to conduct an investigation, which might result in the imposition of severe discipline. I am also of the view that the making of the offer did not in any way adversely affect the legitimacy of the investigation. In this regard, I agree and adopt the comments of Arbitrator Schmidt in **CROA&DR 4338**. That being said, I can also appreciate why the Union refused to convey the offer to the grievor when they had no details with respect to the allegations.

On November 13, 2013, the grievor was notified of an investigation to take place on November 16, 2013. The grievor was provided with the Manulife memorandum (including evidence) as well as his work history.

On November 19, 2013 an investigation was conducted by Mr. Gionet. The grievor attended the investigation with Union representation. No objection was raised during the investigation by either the Union or the grievor. Mr. Gionet questioned the grievor about the evidence provided by Manulife. The grievor denied any fraudulent misconduct. The

grievor acknowledged attending at CIO based on a referral by someone at work. The grievor also acknowledged seeing a doctor at CIO, who prescribed one right knee brace. The grievor denied filling out any of the forms for the claims submitted to Manulife. The grievor claimed he paid \$1,890.00 in cash for his right knee brace. The grievor acknowledged being reimbursed the \$1,890.00 by Manulife for the right knee brace. The grievor also claimed that he wore the right knee brace “all the time”. The grievor advised that he no longer had the right knee brace, as it had been destroyed in a house fire that occurred some eighteen months prior. When asked why he had not replaced the right knee brace, the grievor replied that he didn’t have the money to pay for it up front. During the investigation the grievor agreed to provide a “complete record” of his bank account in which he received funds from Manulife.

A supplemental interview occurred on November 29, 2013. Prior to the supplemental interview, the grievor was provided with a summary of the payments deposited to his bank account by Manulife.

The grievor contested the amounts paid by Manulife. The grievor provided a heavily redacted copy of his bank records for the dates of November 18, 2009, December 15, 2009, and February 23, 2010. Mr. Gionet pointed out that the heavily redacted bank records were not very helpful because they did not indicate amounts that were withdrawn to pay for the medical devices or the amounts deposited by Manulife. At this point the grievor stated he no longer wished to participate in the investigation. The grievor went on to state that he had nothing further to say and he left the investigation.

At the hearing, the Union conceded that in addition to the right knee brace, the grievor also received a hip abduction brace. The grievor testified that the hip abduction brace was also destroyed in a fire on April 27, 2012 at his uncle's home. The grievor claims that he left the two devices at his uncle's home after they were trapping because the devices were wet.

The grievor also testified that he left the investigation meeting "under extreme duress" and on account of a flare up of his psychological condition. The grievor maintained that he provided the Company with the information that they requested and they were not listening to his explanation. According to the grievor he was instructed by his health professional to leave such a situation. The grievor indicated that he was mentally done with the whole process and had no capacity to continue with the investigation.

There is no dispute that the grievor did not convey this information to the Company at the time he left the meeting. Furthermore, it is not disputed that the grievor was given a subsequent opportunity to attend at the investigation but he refused. I note that the grievor's medical records indicate that he did not see his family physician until December 30, 2013, at which time the only notation in his family physician's notes is that the grievor appeared to be anxious+++. While there is medical documentation supporting the grievor's claim of psychological issues, there is no evidence linking those issues with what occurred during the investigation meeting or to the alleged misconduct.

The grievor's medical records do contain a record of ongoing chronic low-back pain. There is also a reference in December 2011 to knee issues. The only treatment prescribed for the grievor's chronic low-back pain was pharmaceutical in nature (Percocet). The medical records make no mention of any medical devices being utilized for the period when the grievor attended at CIO to obtain the devices (November 2009 to February 2010). Nor is there any mention in the grievor's medical records of the devices being destroyed. In fact, there is no mention in the grievor's medical records of any right knee brace or hip abduction brace. The only medical devices of any kind mentioned in the medical records are as follows:

- April 11, 2011 elastic lumbar support.
- May 16, 2011 using corset.

The grievor has not provided any evidence to contradict the evidence of Manulife that they deposited \$7,205.00 into his bank account for the claims.

The evidence in this matter is clear that the grievor was provided with all the evidence in the Company's possession that had a bearing on his responsibility for the alleged misconduct. The grievor was also given ample opportunity to review the information prior to the investigation. The questioning during the investigation was fair and reasonable. At no point did Mr. Gionet's questions betray any bias or prejudgement. The investigation was carried out in a reasonable manner and not at all like **CROA&DR 2934**, which the Union relies upon. The grievor was even afforded additional time to provide information to counter the Manulife evidence. The grievor may have suffered

some psychological episode during the supplemental interview, but he was also provided every opportunity to provide a full answer and explanation for the alleged misconduct. There is just no basis for finding that the investigation in this matter was not conducted appropriately.

In **CROA&DR 4338** Arbitrator Schmidt addressed an appeal by a different employee who was terminated as a result of the same Manulife investigation. The Union made the same arguments with respect to the investigation being “fatally flawed”. Arbitrator Schmidt found that the investigation was proper and fair. I see no difference in the facts before me that would lead me to conclude any different. I agree with Arbitrator Schmidt and adopt her reasons in this matter.

In terms of the alleged misconduct, I acknowledge that the Manulife evidence, relied upon by the Company, is circumstantial. However, I find that that the evidence is sufficiently clear and cogent to support a finding that the grievor committed fraud.

Manulife paid two claims for medical devices supplied by CIO by depositing \$7,250.00 into the grievor’s bank account. The grievor has not provided any evidence to contradict Manulife’s assertion that this amount was deposited into his bank account.

The grievor maintained throughout the investigation that he only received one right knee brace and was paid \$1,800.00 by Manulife. At the hearing, it was conceded that the grievor also received a hip abduction brace. It just does not make any sense that the

grievor could only recall the right knee brace and the specific amount he paid for that device during the investigation but could not recall receiving the significantly more expensive hip abduction brace until much later.

The grievor has not provided any information with respect to how he paid for the devices. It seems quite strange that the grievor would recall the exact amount he paid for the right knee brace but be unable to produce any record with respect to how he obtained the cash to pay for that device or the significantly more expensive hip abduction brace.

I do not believe that the grievor lost the medical devices in the fire that occurred in his uncle's home. According to the grievor he had left the devices at his uncle's home because they were wet. This makes no sense. If the grievor was using the devices all the time, one would expect that he would have them with him all the time. Furthermore, one would expect something in the grievor's medical records about losing the medical devices.

I find that the grievor never received the medical devices. There is nothing in the grievor's medical records to support the use of such medical devices, which the grievor said he used all the time.

Based on all the evidence, I find that the grievor was paid \$7,250.00 by Manulife and paid some portion to CIO, while retaining the balance for his own personal benefit.

I acknowledge that the grievor is a long service employee but I have found that he has committed an intentional fraud, which has broken the bond of trust between him and the Company. The grievor's continued denial of any wrong doing is an aggravating factor that makes substituting a lesser penalty untenable.

Therefore, for all the reasons stated above, the grievance is dismissed.

April 8, 2015

A handwritten signature in dark ink, appearing to read 'JS', with a horizontal line extending to the right.

JOHN STOUT
ARBITRATOR