CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4357

Heard in Montreal, January 15, 2015

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the assessment of discipline and discharge of Conductor D. Gaymer.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

The instant dispute involves an assessment of 25 demerits and subsequent dismissal related to Mr. Gaymer's work place injury.

Assessment of 25 Demerits:

Following an investigation, Conductor Gaymer was assessed 25 demerits on September 9, 2013 "For your failure to immediately report the injury sustained to your left knee while working the A62-12 called for August 12, 2013 as outlined in GOI section 2 item 1."

The Union contends that the discipline assessed was untimely and beyond the mandatory time limits of 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 Conductor Gaymer be made whole.

The Union further contends that the assessment of discipline is unjustified, unwarranted and excessive in all of the circumstances. The Union requests that the discipline be removed in its entirety and that Conductor Gaymer be made whole. 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.

Assessment of Dismissal:

Following an investigation, Conductor Gaymer was dismissed on September 30, 2013 for "For your failure to respect the restrictions listed on your Functional Abilities Form (FAF), as evidenced by your engaging in activities outlined in your FAF as well as your failure to properly represent your current condition to your physician."

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 Conductor Gaymer be made whole.

The Union contends that the Company has not demonstrated that it had reasonable and probable grounds to engage in the extraordinary step of subjecting Conductor Gaymer to video

surveillance in his private life. The Union contends that the Company's conduct of video surveillance breached Conductor Gaymer's rights under the Collective Agreement and PIPEDA.

Finally, the Union further contends that the discipline assessed to Conductor Gaymer is unjustified, unwarranted and excessive in all of the circumstances. The Union requests that the discipline be removed in its entirety and that Mr. Gaymer be made whole. 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.) D. Fulton
General Chairperson

FOR THE COMPANY:
(SGD.)

There appeared on behalf of the Company:

N. Hasham	– Legal Counsel, Toronto
G. Squires	– Superintendent, Edmonton
B. Medd	– Labour Relations Officer, Calgary

There appeared on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
D. Fulton	– General Chairperson, Calgary
W. McCotter	– Local Chairman, Edmonton
R. Finnson	– Vice-General Chairman, Wynard
D. Gaymer	– Grievor, Edmonton

AWARD OF THE ARBITRATOR

This case is about two disciplines issued to the grievor; one for late reporting of an injury and the other for the alleged failure to accurately represent his physical abilities and restrictions and exceeding his medical restrictions. The investigation material discloses that on August 12, 2013 the grievor began to feel tightness in his left knee as he was walking along tracks, performing his duties. Later in the shift, his knee progressively worsened at which time he mentioned it to an Assistant Trainmaster and ultimately to a Trainmaster upon arrival at the station. The Company submits that the passage of time described, which spans over two hours, justified twenty-five demerits for failing to immediately report an injury.

The grievor had no demerits on his record at the time of the left knee injury. He has had a number of workplace injuries and issues with absenteeism. The grievor has for years experienced problems with his knee. The Company contends his rate of injury is much higher than the average Company employee. The grievor went to his doctor on August 13, 2013, the day after he experienced the pain in his knee, and was told he had sustained a soft tissue injury. The grievor verbally reported his restrictions, which were not to walk on uneven ground for over 50 meters or to lift heavy objects. He did not have a completed Functional Abilities Form (a "FAF") from his doctor at that time but was told to obtain one. The grievor was placed on modified duties. It was on these facts that the Company instituted video surveillance of the grievor from August 16th – 24th, 2013.

On August 21, 2013 the grievor returned a completed FAF to his manager. The FAF contained essentially the same restrictions that the grievor had advised his supervisor of on August 14, 2013. The FAF indicated a three week recovery period. It provided that the grievor could do modified work from August 13, 2013 and regular work beginning on September 1, 2013. The Company compared the FAF to the video surveillance.

In asking the Arbitrator to consider the video surveillance the Company asserts that it meets both the relevancy and the reasonableness tests. *Ready Bake Foods v. U.F.C.W., Locals* 175 & 633, (2009) 184 L.A.C. (4th) 37. And *VIA Rail Canada Inc. and CAW-Canada*, [2003] CarswellNat 6773 (Hope).

The Union objects to the surveillance and asserts that the employer had no reasonable suspicion that justified it being conducted. The Company responds that it arrived at its decision to conduct the video surveillance because the grievor reported his injury late and worked for hours after it occurred and did not present a FAF or a doctor's note to his supervisor even though he stated he had been to the doctor and was given light duty work. The Company also relied on the higher than average frequency of injury.

The Company contends that the grievor's conduct has irreparably damaged the employment relationship. It argues that the failure to conform to the FAF restrictions was a culminating incident.

In this case the video surveillance and subsequent discharge was directed at whether the grievor was exceeding his restrictions when at home or in his private life. In **CN and CAW SHP 604** 2005 CarswellNat 4668, 145 L.A.C. (4th) 217, 83 C.L.A.S. 350 the Arbitrator stated:

> The Company also sought to place on the record the fact that Mr. Rudney may have worked at a friend's scrap yard business. The evidence is that while a friend of his has a scrap yard, Mr. Rudney never performed any physical work whatsoever at that location, and apparently may have relieved his friend at a desk during meal breaks on some occasions. There is no evidence to suggest that the Company had any different information. Even accepting that the grievor's injury reports over the years may have been more frequent than those of other employees, the Arbitrator can see nothing in his prior record to justify recourse to surreptitious surveillance of his private life.
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> In approaching this particular case concern also arises with regard to the reason for the surveillance. The Company does not suggest that the grievor was faking his injury to receive compensation. Rather, as can best be gleaned from the totality of its case, it resorted to the surveillance to determine whether in fact the grievor was engaged in activities which went beyond the medical restrictions

> imposed upon him by his physician. In other words, in his private life was he over-exerting his right arm? The Company used the results of the video surveillance to draw its own conclusion that Mr. Rudney was using his right arm in a way which was inconsistent with the restriction contained in his own physician's note.
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> Given the conclusions which I draw from the evidence, I do not consider it necessary to enter into the analysis of whether the Company could legitimately place an employee under surveillance, not to determine whether he or she was dissembling an injury for fraudulent purposes, but rather to see whether he or she was disobeying his physician's orders while functioning at home and elsewhere in his private life. Assuming, without finding, that the grievor was behaving recklessly by disregarding his physician's directives while at home, it is less than clear to the Arbitrator that the Company can assert any legitimate interest in that fact.
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> Having regard to the information which the Company maintains justified its decision to subject the grievor to surreptitious surveillance, and the purpose of the surveillance itself, which was in fact not to uncover any fraudulent activity, I am satisfied that the Company has not discharged the onus of demonstrating that it had reasonable and probable grounds to engage in the extraordinary step of subjecting its employee to surveillance in his private life. The video tape evidence is therefore not admissible.

I adopt the reasoning in that case and find that the video surveillance evidence is not admissible. It is notable that the FAF inconsistencies relied upon by the company were not known to it when the video surveillance was initiated. In any event, the activity relied upon by the company and in light of the descriptions and explanations provided by the grievor in the investigation material, the penalty of discharge would not have been warranted. Of significance was an occasion where the grievor lifted a heavy weight beyond restrictions (the grievor says while taking medication which alleviated the pain, and that he did not lift alone). Fundamentally, in the investigation material arising out of the video, the grievor is seen limping. It is clear that the grievor had a leg injury. There is no evidence that the grievor could have performed the physical requirements of his regular job.

As to apparent discrepancies between the FAF and the restrictions, the grievor first saw his physician on August 13, 2014 when his injury was acute. He saw him again on August 21, 2014 when it was improved. Some clarity would have been preferable as to the state of his leg injury, but again there is no evidence that the grievor did not have a leg injury during the relevant time.

On the issue of the late reporting twenty-five demerit points is excessive in these circumstances. The grievor's knee began to hurt and he worked through it and reported it two hours later when it worsened. As stated by him during the investigation, he thought it was an ache or a pain and reported it when it worsened. Perhaps the grievor should have been more diligent in the reporting his injury, however twenty-five demerits is excessive. Consistent with the decisions in **CROA&DR 3323, 3774,** those demerits are to be removed from the grievor's file and substituted with a letter advising the grievor of the necessity of the prompt reporting of injuries.

The grievance is allowed in part. The twenty-five demerits issued for the late reporting of his accident are to be removed from the grievor's record and replaced with a written warning. The grievor is to be reinstated to employment without loss of seniority and benefits and with full compensation.

February 12, 2015

MARILYN SILVERMAN
ARBITRATOR