

**CANADIAN RAILWAY OFFICE OF ARBITRATION**  
**& DISPUTE RESOLUTION**  
**CASE NO. 4367**

Heard in Montreal, February 12, 2015

Concerning

**CANADIAN PACIFIC RAILWAY COMPANY**

And

**TEAMSTERS CANADA RAILWAY CONFERENCE**

**DISPUTE:**

Appeal of termination of Conductor S. Jawanda.

**THE UNION'S EXPARTE STATEMENT OF ISSUE:**

Following an investigation, Conductor Jawanda was terminated on November 20, 2013 for allegedly "providing false and misleading information with regards to the alleged injury sustained on October 31, 2013".

The Union contends that the entire incident was a result of a misunderstanding between Conductor Jawanda and the Company and should not have given rise to any disciplinary consequences. The Union requests that Conductor Jawanda be reinstated into his employment and that he be made whole for all lost earnings and benefits.

Alternatively the Union contends the penalty assessed was excessive in all of the circumstances and the penalty of termination ought to be reduced and Conductor Jawanda reinstated on terms the Arbitrator deems appropriate.

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

**FOR THE UNION:**  
**(SGD.) D. Fulton**  
**General Chairperson**

**FOR THE COMPANY:**  
**(SGD.)**

There appeared on behalf of the Company:

B. Medd	– Officer, Labour Relations, Calgary
M. Jackson	– Superintendent, Revelstoke
N. Hasham	– Legal Counsel, Toronto

There appeared on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
R. Finsson	– Vice General Chairman, Wynyard
J. Linnell	– Local Representative, Kamloops
S. Jawanda	– Grievor, Kamloops

### **AWARD OF THE ARBITRATOR**

1. This was a relatively simple matter that became unnecessarily complicated through a web of lies that was distracting and misleading. For reasons that will become clear, the Grievor was responsible for the unhappy outcome of this matter, but not entirely.

2. Shawn Jawanda, a Conductor, is a short-serving employee, with less than two years employment with the Company starting in January 2012. During that time he was laid off in March 2012, recalled in June 2012, laid off again, and recalled in October 2012. Effectively he worked for a little over a year for the Company before the circumstances leading to his termination.

3. The Grievor had injured his left foot previously, in December 2012, not at work. On October 31, 2013, climbing down off a train, the Grievor again injured his left foot. He thought he had aggravated his old injury. He told his crewmates and proceeded to the yard office. There he spoke to Assistant Trainmaster Justin Young and advised him that he had re-injured his foot, aggravating an old injury. The Grievor drove himself home. He planned to go to the hospital for medical attention.

4. Prior to leaving for the hospital by taxi, the Grievor received a phone call at home. The call was from Karen Nakonechny, the Company's Coordinator of Administrative Services. She advised him to ensure he did not tell the doctor his injury happened at work as the Company had not put in an injury report because the Grievor

had said that it was an aggravation of a previous injury that had not occurred at work. She told him this to avoid having to unnecessarily file workers' compensation forms when the injury was not work-related and would be rejected if WCB forms were filed.

5. Ms. Nakonechny's advice created difficulties. The Grievor was not medically trained. He could not express a professional opinion on his injury. He thought he had re-injured himself, but he did not know that. She should not have given him the advice she did in order to save her, what she referred to as, the "headache" of filing WCB papers unnecessarily. A re-injury of a previously incurred injury might itself generate a valid WCB claim, and she was wrong to preclude that possibility. Further she was wrong not to have simply told the Grievor to tell his doctor exactly what happened.

6. The Grievor proceeded to the hospital. He had not previously had a workplace injury so had no experience beyond what Ms. Nakonechny had told him to say. There he acted in a manner that he thought was in compliance with her direction, but was, in fact, a fabrication much beyond what she had suggested. He told the attending physician, Dr. Keith Hutchison, that his injury had occurred at home while walking on uneven ground. There was no need for this lie.

7. After the Grievor returned from the hospital, he called Trainmaster Lewis and advised that he had seen the doctor, that he needed to rest his foot and that he should be able to return to work two days later. The doctor had said he needed a short period

to recover. Trainmaster Lewis advised Mr. Jawanda that he would discuss this with Assistant Superintendent Frank Bonanno, and call him back.

8. Mr. Bonnano phoned the Grievor. The Grievor repeated what he had told the doctor at the hospital. He thought this was the line he had to pursue. He told Mr. Bonnano that he had re-aggravated an old injury, and that he had injured himself at home. The Grievor said it was scar tissue from his previous injury that was irritated by just walking. He confirmed to Mr. Bonnano that he had not injured himself at work. Mr. Bonnano required him to obtain a medical certificate of when he would be fit to return to work.

9. In responding to Mr. Bonnano as he did, the Grievor thought he was following what Ms. Nakonechny had told him to do. In fact he was being untruthful to the senior Company manager at his workplace.

10. The Grievor returned to the hospital and to Dr. Hutchinson to obtain a medical note. Dr. Hutchison told the Grievor he should not return to work as a Conductor for 10-14 days to give his foot time to heal. Dr. Hutchison explained to the Grievor that he had not aggravated a previous injury, but that he had a new injury in a different part of his foot. In further discussion between the Grievor and the doctor, the Grievor advised of the truth, that he had injured himself while alighting from a train a few hours earlier. Dr. Hutchinson then told the Grievor to file WCB documents through his employer. Dr. Hutchinson's medical note records that the Grievor incurred a fresh injury, not a

recurrence of his former injury. The note gave the Grievor a period of 10-14 days to recover.

11. The Grievor then phoned Trainmaster Lewis. In this conversation he explained that he had injured his foot at work and that he would need 10-14 days off to recover. The Grievor could give no good explanation why his version of events had so radically changed. Clearly the reason was that the doctor had informed him of the fact that he had sustained a fresh injury, not an aggravation of his previous injury. The Grievor failed to explain this to Mr. Lewis.

12. Mr. Bonnano then again telephoned the Grievor. By now Mr. Bonnano knew of the Grievor's conversation with Mr. Lewis and that he was claiming to have been injured at work. Mr. Bonnano accused the Grievor of lying about his injury. Mr. Bonnano was under the impression that the injury had occurred at the Grievor's home (as the Grievor had told him in the first conversation) and yet he was claiming workers' compensation. Mr. Bonnano accused the Grievor of trying to defraud the Company by claiming WCB for his injury. Mr. Bonnano then quizzed the Grievor about exactly where at work he incurred the injury, and he plainly did not believe the Grievor's answers.

13. On the next day, November 1, 2013, WCB Specialist Brenda Salter contacted the Grievor and advised him that modified sedentary work was available for him, but he declined. His reason for doing so was that the hospital doctor told him he should be off his foot, not walking for 10-14 days and he wanted to rest it.

14. The Grievor never claimed WCB benefits.

15. On November 10, 2013, the Grievor was assessed by a different doctor and cleared to return to his Conductor duties. On November 12, 2013 the Grievor received notice of an investigation into his injury. That investigation resulted in his termination, which is the subject of the grievance.

16. The Company initiated the investigation because of the reversal of what the Grievor had previously advised. The Company was under the impression, from what the Grievor had told management, that he had aggravated an old injury he had suffered at home, not at work. The Grievor had also said that he would be returning promptly to work. Both bits of information were incorrect. The first because, unbeknown to the Grievor, he had in fact suffered a fresh injury, and he had done so at work. The second because he thought the injury was less serious than it was. This became clear once the Grievor returned to Dr. Hutchinson to obtain a medical report. It was then that he was given the longer period off work on sick leave than he had initially conveyed. To address these apparent contradictions, the Company held the investigation.

17. I find, on all the evidence and documentation, that the Grievor injured his foot when he hurt it at work on October 31, 2013. He thought he had aggravated an old injury and said so. In fact, he had incurred a new injury. He was entitled to workers' compensation for that injury. He did not fabricate the workplace injury. He needed

between 10 days and two weeks to recover and return to work. Virtually everything the Grievor said about this was unreliable, resulting in the mistaken conclusion that he had fabricated a workplace injury to the doctor and to the Company, for which he was terminated.

18. The Company refers to a number of cases where employees lied to cover for their misconduct, and this Office upheld the termination of those employees. The situation in this case is quite the opposite. Here we have an employee who lied for no useful purpose, nor for any improper purpose. He got himself trapped in untruths out of fear, uncertainty and misleading advice.

19. There was no fraud by the Grievor, but he cannot be excused for his lying, particularly to Mr. Bonnano. He was guilty of “providing false and misleading information” regarding his injury on October 31, 2013.

20. What is the appropriate response to the Grievor’s misconduct? I have no doubt that, as the Union submits, the Grievor was put in an awkward situation by Ms. Nakonechny’s advice. Her advice set him on a course of conduct that may not have occurred had she not done so. She created a misleading impression in his mind that he could not mention that he had been injured at work. That explains, though does not excuse, the lies he initially told the doctor, to Mr. Lewis and to Mr. Bonanno. Ms. Nakonechny’s contribution serves to mitigate the Grievor’s misconduct.

21. The Employer seeks to suggest that the Grievor lied during the investigation of his misconduct. I am not persuaded of that. His answers clarify what he believed he said to various people he was questioned about. I find his answers were forthright and genuine efforts to explain what had actually happened. I find that effort by him to be honest and to clarify what actually happened also to mitigate his previous misconduct.

22. In the circumstances, despite the Grievor's short service, dismissal was too severe a sanction for his dishonesty. He needs to learn, though, that, fundamental to an employment relationship is the need to be truthful. He is to be given a second chance to re-establish the trust between him and the Company.

23. The grievance is partially upheld. The Grievor is reinstated in employment, without loss of seniority, but without compensation and benefits for the period between his dismissal and the date of this award.

24. I remain seized of the implementation of this award.

March 5, 2015



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CHRISTOPHER ALBERTYN  
ARBITRATOR