

CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4368

Heard in Montreal, February 12, 2015

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAILWAY CONFERENCE

DISPUTE:

Appeal of the dismissal of Conductor S. Shymko.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Following an investigation, Conductor Shymko was dismissed on August 16, 2013 for "conduct unbecoming an employee as evidenced by your misrepresentation 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 Conductor in Moose Jaw, Saskatchewan."

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 Shymko to surveillance in his private life. The Union contends that the Company's conduct of surveillance breached Conductor Shymko's rights under the Collective Agreement and PIPEDA and seek a declaration to this effect.

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.

Finally, the Union further contends that the discipline assessed to Conductor Shymko is entirely unjustified and unwarranted in all of the circumstances. The Union requests that the discipline be removed in its entirety and that Mr. Shymko 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:

B. Medd
M. Jackson

– Officer, Labour Relations, Calgary
– Superintendent, Revelstoke

There appeared on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
R. Finnsen	– Vice General Chairperson, Wynard
W. Zimmer	– Local Representative, Moose jaw
S. Shymko	– Grievor, Moose jaw

AWARD OF THE ARBITRATOR

1. Shawn Shymko is a Conductor. He was injured at work on January 31, 2010 and had been off work from then on WCB until his dismissal on August 16, 2013. His injury was to his back. He had 30 demerits incurred before he went off work. He entered the Company's service on January 5, 2004, so had 6 years service by the time he was injured.

2. As a result of the Grievor's injury, he was deemed totally unfit for any type of work, including modified duties. Several restrictions were noted, including not operating moving equipment, no above shoulder reaching, no driving Company vehicles, no prolonged periods of walking for more than 30 minutes and not more than 100 meters, no stairs, no working at heights, sedentary strength up to 10lbs occasionally, and no standing or sitting for more than 30 minutes.

3. He was dismissed because video surveillance of him at home showed him doing things outside of the range of his purported disability. His dismissal was for defrauding the Company by continuing to receive Saskatchewan WCB benefits while apparently being much fitter than he claimed.

4. The videotape was initiated because of reports the Company received that the Grievor was not as restricted as his medical reports stated.

5. Video surveillance was done in May and June 2013. It apparently shows the Grievor doing some tasks in his yard at home (on different occasions, watering, pulling a hose, digging up a bush, cleaning the yard, pushing a wheelbarrow with empty flower pots, digging up trees, digging holes for the trees and replanting the trees), moving a Watercraft (tongue weight of 22lbs) and an easy roll trailer (18-20lb pull weight) (together a 42lb weight), lifting a steel barrel weighing 36lbs, and repairing a boat motor. On one occasion he was observed working straight through for 1 hour 16 minutes, consistently bending over, riding a lawn mower, trimming grass, lifting things of more than 10lbs, walking across his property and riding an ATV with multiple trailers being hooked up and taken off. Some of these activities are beyond his restrictions. The Grievor was seen climbing on and off a boat, crouching and bending over for extended periods of time. The Grievor explained that he could do these activities because the pain medication he was taking made the activities tolerable, though he admitted he should not have exceeded his restrictions. He said his doctor had recommended he try to keep active. He had specifically raised with his WCB Case Manager the fact that he performed yard work from time to time. The recommendation by his doctor that he keep active was important because the Grievor had suffered from severe depression for a long period following his injury as a result of his extreme pain and inactivity. Whatever activity the Grievor felt he could do was recommended to him by his doctor.

6. The pain medication has had some effect on the Grievor's mental functioning, making him unfit to perform safety sensitive work. His doctor's advice was the following:

[The Grievor's] prescription of Lyrica is potentially dangerous for a safety sensitive position, and he has also had prescriptions over the last few years of Buspar, Zoloft, Valium, and Cyclobenzaprine, all of which may affect concentration, and could be dangerous in the work environment, particularly in a safety sensitive company such as CPR. Therefore, during the periods that he was on the medications, I had not recommended that he return to work.

7. What is clear from the evidence is that the Grievor's back injury is genuine. He has had four surgeries to his back, two of them since his dismissal by the Company. The first was to fuse two vertebrae; the second was to remove the fused discs, insert a titanium cage between the vertebrae, and then re-fuse them. These operations were unsuccessful in reducing the Grievor's pain. He has been in almost constant pain since his injury, and he has been required to take strong pain-reducing medication. His surgeries have been primarily to address the constant pain of his injury. The last two surgical procedures, in September 2013 after his dismissal by the Company and in 2014, involved the implant of a spinal neuromodulation electro-stimulator for control of his chronic neuropathic pain, which was affecting his left lower extremities. This surgery was undertaken because conventional pharmacotherapy was not alleviating his symptoms.

8. The activities the Grievor undertook on the video recording were intermittent, and generally fit within his doctor's encouragement that he do what physical activities he

could muster in order to strengthen his muscles and relieve the tedium of his general inactivity.

9. The Company submits that the investigation established that the Grievor had the ability to perform more activities than what the Company had been advised of. That is so. The Company goes on to suggest that the Grievor's continuing to receive benefits associated with his workplace injury despite his doing the activities identified demonstrates fraudulent behavior. I am not persuaded of that.

10. There is a difference between occasional intermittent activities, even with moments of relatively strenuous action, and the regular requirements of the physically demanding work of a Conductor. The duties of a Conductor are physical and demanding, such as occasional lifting 80lb weights, frequently throwing switches upwards of 60lbs, traversing uneven terrain, entraining and detraining, among others.

11. This point is well made by the Grievor's specialist treating neurosurgeon:

The observations that he was doing some activities at home may not offer the best judgment for his abilities because the home environment is well controlled and he can limit the type of activities and the pace at which he is carrying them out which is totally different from the work environment. I believe that our recommendations to keep [the Grievor] off work were based on medical judgment.

12. I am not persuaded that the Grievor's observed activities suggest that he was not disabled and so not entitled to continue to receive compensation benefits. Taking account of the activities the Grievor undertook, and of the medication he was using, he

remained unfit for regular or light duties. This is because his doctor's decision was that the Grievor could not return to work until all of his surgeries were completed. Although some of what he was shown to be doing on the video exceeded his specific work restrictions, that did not detract from the fact that he had, and continues to have, a serious back injury that his doctor decided would not permit him to resume work.

13. This case is different from the circumstances in **CROA&DR 2184** and **CROA&DR 2414**, where fraud was established. That is not the case here. The Grievor informed his doctor of his activities, and, barring a few excessive activities, he believed he was complying with his doctor's recommendation to keep active. Here there was not a course "of deliberate fraudulent conduct", as there was in those cases. As in **CROA&DR 3409**, the Grievor's activities do not suggest the actions of someone seeking to deceive the Company in order to obtain a benefit to which he was not entitled.

14. The information contained on the video recordings was referred to the Saskatchewan WCB for their consideration. They conducted a full investigation and determined that the Grievor was not guilty of any wrongdoing. They maintained his WCB benefits following their investigation.

15. Like the Saskatchewan WCB, I am satisfied that the Grievor has throughout before bona fide in his activities and in compliance with the medical exhortation of his

doctor that he try to keep active. I find therefore that the Grievor's dismissal for fraud must be set aside. He therefore continues as an employee of the Company.

16. The Union challenges the fairness of the investigation conducted by the Company following the video surveillance. It argues that the investigation was flawed because medical evidence supportive of the Grievor was not presented, so prejudicing its fairness. The Union submits the discipline against the Grievor should be set aside because of the serious procedural flaws in the investigation. Given the conclusions I have reached on the merits, it is not necessary for me to address the Union's claims of bias and unfairness in the investigation.

17. Although the Union challenged the Employer's reliance on video tape evidence, the Company did not seek to have the videotape record accepted into evidence. The case was addressed on the basis of the information contained in the investigation into the Grievor's alleged misconduct and on the basis of the admissions he made during the investigation. In the circumstances I do not need to decide on the admissibility of the videotape evidence.

18. For the reasons given I uphold the grievance. There was no just cause for the Company to discipline the Grievor, and his dismissal is set aside.

19. Following the Grievor's fourth surgery, he remained on WCB benefits until December 2013, when he commenced employment with a new employer, until his

duties there aggravated his back injury too much. This suggests the Grievor was not fit to return to work. The extent of his fitness to return to work is referred back to the parties. Subject to the extent of the Grievor's fitness to have resumed work, he is reinstated in employment, with compensation for lost wages, if any, had he been able to work and had there been work available for him within his limitations, and for lost benefits, without loss of seniority.

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

February 27, 2015



CHRISTOPHER ALBERTYN
ARBITRATOR