

CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4401

Heard in Calgary, May 14, 2015

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the termination of L's employment.

UNION'S EXPARTE STATEMENT OF ISSUE

Following an investigation, on December 17, 2013 the Company terminated L's employment "For conduct unbecoming an employee of Canadian Pacific as evidenced by your providing false and/or misleading information to a Company Officer during a formal investigation on November 13, 2013 and for your failure to properly report two workplace injuries immediately while employed as a Conductor in Calgary, Alberta."

The Union contends that the Company's conduct of its investigation breached the requirements of a fair and impartial investigation, rendering L's termination void ab initio. In addition, the Union contends that the Company egregiously breached L's privacy rights in the course of its investigation, contrary to the Alberta Personal Information Protection Act and the Alberta Health Information Act.

The Union further contends that L's termination is unjustified and unwarranted, contrary to the Company's Attendance Management Policy, Canada Labour Code and Canadian Human Rights Act. The Union requests that L's 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.) D. Fulton
General Chairperson

FOR THE COMPANY:
(SGD.)

There appeared on behalf of the Company:

L. Smeltzer	– Labour Relations Officer, Calgary
D. Guerin	– Director Labour Relations, Calgary
D. Cote	– Labour Relations Officer, Calgary
D. Pezzaniti	– Labour Relations Officer, Calgary

There appeared on behalf of the Union:

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| R. Church | – Counsel, Caley Wray, Toronto |
| D. Fulton | – General Chairman, Calgary |
| D. Edward | – Vice General Chairman, Medicine Hat |
| D. Kennedy | – Local Chairman, Calgary |
| L. | – Grievor, Calgary |

AWARD OF THE ARBITRATOR

The grievor is a twenty-five year employee of the Company. He has been discharged for conduct unbecoming a CP Rail employee in relation to sick calls. The Company highlights that the grievor has had substantial discipline including rules violations and attendance issues and has been subject to reinstatements. At the time of this discipline the grievor had no demerits on file.

The Company asserts that the grievor provided false and/or misleading information regarding his absences. It says further that he failed to report in a timely fashion, two injuries sustained while on duty.

The grievor had returned to work under a reinstatement agreement in September 2013. As a result of a series of absences in October and November 2013, an investigation meeting was held on November 13, 2013.

At that time the Company had two notes from the grievor's doctor: one dated November 8, 2013 and one dated November 13, 2013.

The November 8th note indicated that the grievor was unable to work due to injury/illness from November 8 -10. The note indicated that the grievor had told the doctor that he injured himself on November 6.

The November 13th note detailed that the grievor was ill on October 4 as well as six days up until November 13, 2013. The note also referred to the November 8 visit for ankle and groin pain and concluded that the grievor had been a patient at the clinic “during this entire time”.

In the investigation material the grievor explained that he had the flu on October 18 and in fact was physically ill in the presence of his supervisor. The grievor contacted his doctor and received telephone advice. On November 2, 2013 the grievor said he had an ankle injury. At the November 13, 2013 investigation meeting and at the request of the Company the grievor was asked to contact his doctor and to ascertain the exact dates of the visits. He tried to do so at the time but was not able to contact the doctor.

On the day following the investigation meeting, the investigating officer received a copy of a doctor’s note on his desk in relation to the grievor’s absences. The investigating officer called the doctor to confirm the absences. The doctor advised the investigating officer of the grievor’s dates of attendance at his office, as well as noting days that the grievor did not attend at the office but told the doctor he was sick and missed work. A doctor’s note of April 29, 2015 indicates that the grievor was under the doctor’s medical care during the relevant times, being October 4, October 18, November 4 and November 8.

The Company's case relies on inconsistencies between the information received from the doctor and that provided by the grievor in the November 13, 2013 investigation meeting. It assigned a different investigating officer to a subsequent meeting. The grievor was then discharged.

The Union strenuously objects to any reliance on the evidence obtained in the phone call between the doctor and the investigating officer on the basis of breach of privacy rights and on the basis that, in the absence of the grievor and the Union's participation during the conversation with the doctor, the investigation lacked fairness. The Company argues that the Union did not advance privacy concerns at any stage of the grievance procedure and so cannot rely on it at the hearing. However, during the grievance process, the Union did raise issues of the fairness in contacting the doctor, during the investigation process, without the participation of the grievor and the Union.

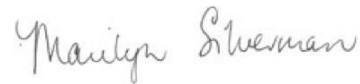
I am not prepared to consider the information that investigating officer received from the doctor in the phone call of November 14, 2013. The Union and the grievor were not involved in the process of obtaining information from the doctor as part of the investigative process. The fairness and impartiality of the investigative process requires vigilance to procedural protections and concerns. These processes are crucial to the expedited process established between these parties. As such the elements of a fair and impartial hearing were not adhered to. (**CROA&DR 3221**).

I note that while there is a degree of confusion in the information that the grievor provided the Company, the material and information discloses that the grievor was ill and sought attention for two injuries sustained during the relevant period. A doctor's note of April 29, 2015 indicates that the grievor was under the doctor's medical care (even though not physically in the office on those exact dates) during the relevant times, being October 4, October 18, November 4 and November 8.

On the issue of timely reporting of injuries, the grievor did admit that he failed to report injuries sustained while on duty in a timely manner. In the investigation material the grievor states that he understands the Company's concern and will endeavor to ensure that it does not happen again. A written warning is to be entered on the grievor's file in respect of his not reporting his injuries in a timely manner.

Accordingly the grievance is allowed in part. The grievor is to be reinstated to his employment without loss of seniority and benefits and with full compensation. His record shall reflect a written warning for failure to report workplace injuries in a timely manner.

July 8, 2015



MARILYN SILVERMAN
ARBITRATOR