

CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4407

Heard in Montreal, June 9, 2015

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the assessment of discipline for two alleged infractions to Locomotive Engineer G. Meloro of Revelstoke, B.C. resulting in his dismissal.

JOINT STATEMENT OF ISSUE:

The first dispute involves the assessment 10 Demerits to Engineer Meloro on August 14, 2014 "For pattern absenteeism as noted in your work history between March 1 and June 16, 2014, at Revelstoke B.C."

The second dispute involves the dismissal of Engineer Meloro on August 14, 2014 "For deliberately misrepresenting a workplace injury in order to obtain unauthorized time off work and in rejection a temporary workplace accommodation in a sedentary position, and for willfully attempting to claim WCB benefits to which you were not entitled, associated with an alleged injury sustained during your tour of duty June 22nd, 2014 while employed as a locomotive Engineer at Revelstoke, B.C."

10 Demerits: The Union contends the Company failed to meet its burden of proof necessary to support discipline, and that by assessing him with 10 demerits, the Company was in violation of the Collective Agreement and the Canada Labour Code. The Union requests that the 10 demerits assessed to Locomotive Engineer Meloro be removed from his record and that he be made whole for all lost wages in relation to this matter.

Dismissal: The Union contends there was no fair and impartial investigation in this case and in accordance with our Collective Agreement, the Company was not free to assess any discipline in this case. Alternatively, the evidence shows that Engineer Meloro was following the instructions from his Doctor at all times and the Company has not proven any culpable behaviour. Finally, even if any culpable behaviour could be established, the ultimate penalty of dismissal was excessive, unwarranted and unjustified in this case.

The Union requests that Mr. Meloro be reinstated without loss of seniority and that he be made whole for all lost earnings and benefits with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company disagrees with the Union positions and has denied the Union's requests.

FOR THE UNION:
(SGD.) G. Edwards
General Chairperson

FOR THE COMPANY:
(SGD.) D. Guerin
Director Labour Relations

There appeared on behalf of the Company:

D. Cote	– Labour Relations Officer, Calgary
J. Bairaktaris	– Director Labour Relations, Calgary
S. Oddstad	– RTW Specialist, Calgary

There appeared on behalf of the Union:

A. Stevens	– Counsel, Caley Wray, Toronto
G. Edwards	– General Chairman, Calgary
S. Cudden	– Vice Local Chairman, Revelstoke
J. Meloro	– Grievor, Revelstoke

AWARD OF THE ARBITRATOR

1. The Grievor, a locomotive engineer, entered the Company's service on November 1, 1987. He has almost twenty-seven years of service. Prior to the incidents resulting in the discipline challenged in these grievances, the Grievor had only two instances of discipline, both cautions, one in 2001, the second in 2004.

2. The Grievor was disciplined for using sickness absence for personal time off in December 2013 and January 2014, but, by agreement with the Union, the discipline was removed. The statement of the Company's allegation of misuse of sick leave, without the discipline, remains on his personnel file. This record made the Company suspicious of the Grievor's use of unfit and sickness absences giving rise to the discipline that is the subject of this award.

The 10 demerits grievance

3. Ten demerits were issued for alleged culpable absences. The absences were as follows:

- Saturday, March 29 to Monday, March 31, 2014 (39 hours);

- Tuesday, April 15 to Thursday, April 17, 2014 (39 hours);
- Thursday, May 29 to Friday, May 30, 2014 (30 hours);
- Friday, June 6 to Sunday, June 8, 2014 (59 hours);
- Saturday, June 14 to Monday, June 16, 2014 (42 hours).

4. None of these absences were challenged at the time. No request was made for medical proof of sickness absence at the time, nor for an explanation for these absences. The investigation into the absences occurred only after the circumstances giving rise to the Grievor's termination, described below.

5. The explanation for the absences are as follows:

- March 29 – March 31: unfit because not properly rested for duty;
- April 15 – April 17: unfit because the Grievor's mother went into cardiac arrest and the Grievor needed to be with her at the hospital;
- May 29 – May 30: unfit because of continuing need to attend to his mother;
- June 6 – June 8: unfit, had bronchitis, visited doctor and was prescribed medication;
- June 14 – June 16: unfit, still fighting bronchitis.

6. There is no challenge to these explanations. The Grievor also produced the prescription for the June 6th medication.

7. The Company suggests the absences occurred mainly on weekends. While there is some weekend correlation, the explanations given for the absences are bona fide. I am persuaded that the evidence leads to the conclusion that these were not culpable absences for which discipline is warranted.

8. In the circumstances, the Grievor's discipline of 10 demerits is set aside.

The Termination

9. The Grievor was terminated for allegedly fraudulently claiming to have had a more severe workplace injury than he actually had. The Employer disputes that the Grievor sustained an injury and, if he did sustain an injury, the Company disputes the severity of the injury claimed by the Grievor.

10. The Grievor claims he sustained an injury to his back while riding in the locomotive seat of CP5976, on June 22, 2014. Engine CP5976 is an SD40 locomotive likely manufactured in the 1980s. The seat in that engine is no longer installed on CP locomotives. The seats now are air ride chairs, which dampen the vibrations from movement of the engine. The Grievor explained that the locking bolt on the side of the chair kept loosening with the vibrations of the moving engine. His lower back and right leg became numb. He stood up to operate the train, but this was no better than sitting in the chair. By the time he arrived at his destination he was in severe pain. He made reports during the course of the journey of his increasing discomfort.

11. The Company later tested the chair in the engine and found nothing wrong with it. The test does not appear to have been done under the operating conditions the Grievor experienced.

12. The Grievor went to his doctor, and to other physicians to whom he was referred, several times after he sustained the injury. He filed a workers' compensation claim with Work Safe BC. The Company sent a Functional Abilities Form (FAF) on June 24, 2014. The form was completed by the Grievor's physician on that day. She reported that the Grievor was totally unfit for any work.

She determined the date of expected return to work was “undetermined”. She said his reassessment would be after two weeks. She conveyed this to the Grievor. She told the Grievor he should exercise to strengthen his back.

13. As is the Company’s practice, upon receipt of the June 24 FAF, the Grievor was offered alternative, sedentary work. He declined that work on his understanding from his doctor that he was not fit to work for an indefinite period. He underwent an x-ray to his back that day, and was to see his doctor again once the x-ray report was received.

14. On June 26, 2014, the Company’s return-to-work specialist sent a return-to-work plan to the Grievor’s doctor, inquiring of the Grievor’s restrictions. The doctor replied on June 27, 2014, advising that the Grievor would be fit for light duties on July 7, 2014, that he could walk, but not for prolonged periods of over thirty minutes, nor more than 100 metres; that his strength enabled him to lift up to 10lbs, occasionally 20lbs, among other restrictions.

15. On July 1, 2014, Canada Day, the Grievor attended the Canada Day parade in Revelstoke, his home. The walk is about 2.5kms long and took an estimated thirty-five minutes to complete at a steady walking pace. A Company witness saw the Grievor carrying a child at some point during the day. The Grievor denies this. The Grievor says he walked some of the parade.

16. On July 2, 2014 the Grievor consulted a pain specialist. The specialist administered right facet joint injections to relieve the Grievor’s lumbosacral pain. He was recommended physiotherapy and oral medication, failing which, a repeat of the ultrasound-guided facet joint injections.

17. On Friday, July 4, 2014 the Grievor saw his doctor. She confirmed she had signed CP’s

FAF for the Grievor to return to modified duties, as the Company had recommended, effective July 7.

18. On Monday, July 7, 2014 the Company received apparently verbal notice that Work Safe BC would be declining the Grievor's workers' compensation claim. On the same day, the Grievor contacted the Company to advise that he had been cleared for modified duties on his doctor's instructions and inquired when he might do so. The Grievor claims he was unaware that his workers' compensation claim had been denied at the time he made contact. Whether or not that is true, his doctor had previously advised the Company, on June 27, of his availability for modified duties on July 7.

19. On July 8 and July 9 the Grievor again contacted the Company to check if could start modified duties. The Company's return-to-work specialist sought clarification of whether the Grievor was fit for a graduated return to work or for full-time work in a modified position. The Grievor saw his doctor on July 9. The doctor's medical note that day confirmed that the Grievor was cleared for full-time modified work forthwith (from July 9) and full-time return to work for regular duties on August 3, 2014.

20. Despite such clearance and the Company's former offer of modified work, the Grievor was not given modified work during the period July 9 until August 3, 2014. There is no explanation for this.

21. The Grievor received a letter from Work Safe BC, dated June 8, 2014, sent by regular mail, a few days after that date, confirming that his workers' compensation claim had been denied. He has appealed that decision.

22. On July 11, 2014 the Grievor again saw the pain specialist. He still had lumbosacral pain. Again ultrasound guidance facet joint injections were administered to him. He was advised to continue physiotherapy.

23. Throughout the period of the Grievor's treatment he was receiving physiotherapy and doing the physio exercises recommended to him.

24. The Grievor was examined by his doctor again on July 18, 2014. The diagnosis of his condition was a flare-up of his degenerative lumbar disc disease with right sciatic nerve compression. The Grievor has chronic vertebral damage. The cause of the flare-up was said to be the whole body vibration induced by the workplace equipment, the chair on the locomotive.

25. The Grievor again saw his doctor on July 29, 2014 and the necessary forms were signed confirming his fitness to resume his regular work on August 3.

26. On August 3, 2014 the Grievor returned to regular duties. On August 4 he was required to attend the investigation that resulted in his termination.

27. From the above, the Company drew the conclusion that the Grievor fraudulently exaggerated his back pain complaint to justify time off from work. This conclusion resulted from the Grievor being seen walking in the Canada Parade and holding a child.

28. The medical evidence shows that the Grievor has chronic degenerative lumbar disc disease, which flared up on June 22, 2014, that required medical attention involving lumbar injections for pain relief, and physiotherapy. The evidence of the chronology of events and communications shows that the Grievor was likely not aware of the walking and weight limitations

his doctor had sent to the Company, and that, at the time he walked in the Canada Day parade, he was complying with his doctor's instruction to exercise to strengthen his back. The chronology also shows that the Grievor was willing, and sought, to return to modified duties on his doctor's recommendation, before he was notified that his workers' compensation claim had been denied.

29. In the circumstances I find no fraud by the Grievor. He suffered an aggravation on June 22, 2014 to a chronic existing medical condition, for which he was medically treated. He acted in accordance with his doctor's instructions and took the necessary steps, and received the treatment, to restore his fitness for work. He was available for modified work on July 9, 2014 and for full duties on August 3, 2014.

30. I therefore find no just cause for the Grievor's termination. No discipline was warranted. The grievance is therefore upheld. The Grievor is to be reinstated in employment without loss of seniority, with full compensation for lost income, benefits and pension.

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

June 22, 2015



CHRISTOPHER ALBERTYN
ARBITRATOR