CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4417

Heard on September 8, 2015

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the dismissal of Conductor Geoffrey Fuoco.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

On April 7, 2014, following an investigation, Conductor Fuoco was dismissed from Company service for conduct unbecoming an employee of Canadian Pacific as evidenced by your providing the Company with false and misleading reasons for your inability to participate in a return to work plan that met the restrictions provided by your personal physician for the dates February 28, March 1, 2, and 3, 2014, while in receipt of WSBC wage loss benefits, while employed as a Conductor in Revelstoke B.C.

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

Finally, the Union further contends that the discipline assessed to Conductor Fuoco is unjustified, unwarranted and excessive in all of the circumstances. The Union requests that the

discipline be removed in its entirety and that Mr. Fuoco 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: **FOR THE COMPANY:**

(SGD.) D. Fulton **(SGD.)**

General Chairperson

There appeared on behalf of the Company:

C. Clark	– Manager Labour Relations, Okotoks
D. Guerin	– Senior Director Labour Relations, Calgary
B. Thempleton	– Assistant Superintendent, Kamloops

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
D. Fulton	– General Chairman, Calgary
J. Kiengersky	– Local Chairman, Revelstoke
R. Hackl	– Vice President, Saskatoon
G. Fuoco	– Grievor, Salmon Arm

AWARD OF THE ARBITRATOR

This arbitration concerns the discharge of Conductor Geoff Fuoco ("the grievor"). At the time of his discharge, the grievor had ten years of service with the Company and his disciplinary record was clean.

The grievor was discharged for providing false and misleading reasons for his inability to participate in a return to work plan ("the RTW plan") for four days, specifically February 28, March 1, 2, and 3, 2014, while in receipt of WorkSafeBC ("WSBC") benefits. Implicit in the Company's reasons for discharge is that the grievor was not entitled to receive WSBC benefits because he deliberately misled the Company about his inability to attend at work in accordance with the RTW plan.

The Company initially questioned the *bona fides* of the grievor's injury, and challenged the reasonableness of his "refusal" to do the modified work offered to him on February 27, 2014. However, at the hearing there was no dispute that on February 17, 2014, the grievor sustained a right shoulder workplace injury. Moreover, though the Company challenged the grievor's receipt of WSBC benefits for the period at issue, and it reviewed and then appealed the WSBC's decision to grant the grievor benefits, ultimately the Company lost its review and appeal based on the medical documentation referred to below. Notwithstanding the finding by the WSBC that the grievor's refusal to participate in the Company's RTW plan was reasonable, the Company's position in this proceeding is that the grievor's refusal was unreasonable.

The Company engaged the services of CKR Global Investigations ("CKR") to conduct surreptitious surveillance of the grievor. The surveillance, upon which the Company seeks to rely on in support of its position, consists of one hour and thirty-four minutes of video footage disclosed to the grievor at his investigation statement taken on April 2, 2014. The video footage commenced on February 28, 2014 at approximately 3:57 in the afternoon. The footage is intermittent and is carried out every day from February 28, 2014 through March 4, 2014. The Union objects to the admissibility of the video surveillance.

I turn to the facts concerning the grievor's injury and the Company's attempt to get him back to work.

The grievor suffered a workplace injury on February 17, 2014. He did not seek medical attention on that date but he did report the injury to the Company. On February 19, 2014, after returning to his home terminal in Revelstoke, the grievor informed the Company that his pain had worsened and that he would be seeking medical attention.

The Company provided the grievor with a Functional Abilities Form ("FAF") on February 19, 2014. That same day, the grievor saw Dr. O'Connor, a locum physician working out of his family physician's practice at the time. Dr. O'Connor filled out the FAF and the grievor let the Company know that he be would be off work for two to four weeks, totally unfit for work, and that he had been prescribed Tylenol 3s.

Late in the afternoon on February 19, 2014, one of the Company's WSBC specialists, WCB Specialist Salter made the Employer's Report of the Injury to WSBC. The Company objected to the grievor's claim for benefits. The Company asserted, without any basis, that the grievor was a bodybuilder, that he might be using steroids, and that the Company suspected an underlying, non-work related cause for the grievor's reported condition. WCB Specialist Salter indicated that the Company was offering the grievor sedentary, one-handed office duties on February 19, 2014.

On February 20, 2014, the grievor's supervisor, Mark Jackson ("Superintendent Jackson") called the grievor in for a meeting on February 21, 2014, with his Union representative. In the course of the meeting, Superintendent Jackson told the grievor that the information provided to him was that he was able to perform light duties. The

grievor stated that he would prefer to speak with his physician before he agreed to anything.

The grievor saw Dr. O'Connor again on February 21, 2014. She completed another FAF. Like the one dated February 19, 2014, she declared the grievor to be totally unfit for work, identified the right bicep injury for a second time, set out the medication prescribed to the grievor, including Tylenol #3s, and indicated that the prescribed medication adversely affected the grievor's alertness.

On February 26, 2014, notwithstanding the two previous FAFs in to which the Company had access, an OHS nurse, OHN Biltek, contacted Dr. O'Connor, unbeknownst to the grievor. She provided Dr. O'Connor with a RTW plan with modified duties indicating (wrongly) that the grievor was offered the modified work on February 25, 2014, to commence immediately. Dr. O'Connor mistakenly assumed that the grievor's condition had improved and that the grievor had conveyed his improved condition to OHN Biltek, when in fact nothing of the sort had occurred. Dr. O'Connor therefore agreed to the proposed RTW plan without speaking to her patient.

On February 27, 2014, the day after Dr. O'Connor approved the RTW plan proposed by the Company, a telephone conference was held between OHS, Superintendent Jackson, the grievor and his union representative for the purpose of offering the grievor modified duties in accordance with the RTW. It was during this telephone conference that the Company presented the RTW plan approved by Dr.

O'Connor to the grievor. It consisted of sedentary office type, in-door duties based on eight-hour work days, five consecutive days a week, to commence the next day, Friday, February 28, 2014.

The grievor was resistant to the proposed RTW plan. He informed the Company that he had physiotherapist appointments booked for February 28, March 1, and March 3, 2014. In reality, the grievor's appointment on March 1, 2014 was for a massage, not physiotherapy. In fact, during the RTW telephone conference the grievor took a phone call privately and then informed the Company that the March 1, 2014 appointment had just been rebooked for March 2, 2014.[1]

Superintendent Jackson proposed that the grievor come to work after his physiotherapy appointment on February 28, 2014. The grievor explained that physiotherapy was strenuous and that he was incapable of performing any type of work after physiotherapy.[2] Superintendent Jackson responded by indicating that he would honour the appointments but that the grievor would be required to work on March 2, 2014 (at which point the grievor had not yet informed the Company of the change of

[1] At the investigative meeting on April 2, 2014, by means of a letter from Jodie Hearn from "About Face Body Care," Ms. Hearn confirmed that the grievor had two massage appointments booked with her on March 1 and 2, 2014. She cancelled both. According to the grievor, after the telephone conference, but before March 2, 2014, the masseuse cancelled the March 2, 2014, appointment. The grievor acknowledged during his investigative statement that he should have contacted the Company to let them know about the cancelled appointment. The Company points out that the letter dated April 1, 2014 is unsigned and it suspects that it is not authentic.

[2] Kim Scraton, one of the physiotherapists who treated the grievor confirms by letter provided to the Company at the investigative meeting that it is not unusual to have an exacerbation of symptoms after treatments. It is unclear from the evidence before me when the grievor actually first began physiotherapy. It was prescribed to start on February 19, 2014.

appointment from March 1 to March 2). This too the grievor resisted. He stated that he needed a day of rest following treatment. He attempted to compromise by negotiating a start time of 22:00 hours on March 2, 2014, which Superintendent Jackson denied.

At one point during the RTW teleconference, the grievor asked his union representative who was participating in the call what he thought of the situation. The union representative was hesitant to give an opinion but thought the Company was being reasonable.

The grievor asked if the Company was aware of the effects of taking Tylenol 3s, which he stated made him unfit to drive. The Company requested medical evidence to support this contention and offered to provide transportation to the grievor for his approximately one-hour commute to and from work.

The telephone conference concluded with a request by the Company for additional medical documentation and Superintendent Jackson informing the grievor that the Company believed that it had provided a suitable RTW plan in accordance with the restrictions provided by Dr. O'Connor. Superintendent Jackson advised the grievor that the Company would therefore be informing WSBC that the grievor was refusing to accept reasonable work.

On March 3, 2014 the grievor’s medical appointment was rescheduled to March 5, 2014, through no fault of his own. By then Dr. O’Connor had finished her locum and

Dr. Organ, a resident physician working at the grievor's family physician's practice, took over the grievor's treatment. In the March 5 FAF, Dr. Organ, as Dr. O'Connor had done, declared the grievor unfit for any work, and noted the adverse effects of medications on the grievor's alertness and attention. On March 11, 2014, Dr. Organ completed another FAF indicating that the grievor was fit for modified work. However, that same day WSBC Specialist Salter informed the grievor that the Company was no longer prepared to offer him modified work.

In the interim, on March 3, 2014, WSBC approved the grievor's claim for benefits. In doing so the WSBC Entitlement Officer referenced the FAFs dated February 19 and February 21, 2014. The WSBC decision noted that the grievor had declined the offer of light duties. It made no mention of the RTW plan to which Dr. O'Connor had agreed on February 26, 2014.

Also in the interim, and as mentioned above, the video footage commenced on February 28, 2014. In support of its position that it was reasonable to engage in surreptitious surveillance, the Company refers to a number of facts in its brief. The Company says it first had suspicions about the extent of the grievor's injury because he waited two days to seek medical attention. It also points out that when the grievor's colleagues heard about the grievor's four weeks off, rumours circulated about the grievor conveniently having the capacity to attend a local hockey tournament. No specifics are provided about these rumours in the Company brief. However, Assistant Superintendent Brad Templeton ("Assistant Superintendent Templeton") was called at

the hearing as a witness to testify about the rumours. Finally, the Company refers to inaccurate information on the grievor's FAF (although it is unclear which FAF the Company is referring to or how the FAF is inaccurate).

In its brief, the Company also states that Superintendent Jackson and Assistant Superintendent Templeton sought additional information from a minor hockey website to determine if there was any validity to the rumours, and learned that a team that the grievor coached was a participant in a local hockey tournament.

Assistant Superintendent Templeton's testimony was that generally "people" were tired of the grievor getting time off with respect to "leaves of absences," "sick time" as well as "weekly indemnity benefits." He also confirmed that it was only after the weekend of February 28, 2014, that he heard through a friend (who also works for the Company) that the grievor was at a hockey game. He did not look up any minor hockey league website before the commencement of the video surveillance.

Finally, in its brief, the Company submits that it was reasonable to undertake video surveillance of the grievor because:

- the grievor was reluctant to participate in the RTW plan, and "aggressively" indicated he needed time to rest following physiotherapy rather than return to the workplace;
- the grievor made no attempts to see how he felt after physiotherapy, before stating he would be too tired;
- the grievor attempted to negotiate a different start time on March 2, which the Company took to be an admission that he was capable of working;

- the grievor had not prior to February 27, 2014 informed the Company of the side effects of his medication when attempting to avoid the RTW;

- the grievor claimed to have booked physiotherapy sessions on days when in fact the clinic was closed.

The Company dismissed the grievor on April 7, 2014.

On April 16, 2014, WSB Specialist Salter appealed the WSBC's decision dated March 3, 2014, allowing the grievor's claim for benefits. She submitted that his refusal to work was not reasonable and directed the WSBC to Dr. O'Connor's letter of February 26, 2014, agreeing to the proposed RTW plan. In her submissions WSB Specialist Salter advised that the grievor had misled the Company by claiming that he had booked physiotherapy on a weekend when, in fact, the Company "had since learned" that the physiotherapy clinic was not open on weekends. (By that point, however, the grievor had clarified to the Company that the change in appointments was for massage not physiotherapy.) Finally, WSB Specialist Salter informed the WSBC that (based on the Company's surveillance evidence) the grievor had spent his time off coaching a hockey tournament.

The WSBC representative who dealt with the Company's review rendered a decision dated July 14, 2014, which reads, in part:

> In reaching my decision, I considered the APs [Attending Physician's] letter of February 26, 2014. In that letter, the AP agreed with the return to work planning offered by the employer. The employer offered the worker "administrative/office tasks such as printing/sorting paperwork, distributing paperwork to cruise, computer work (left arm only)." The employer also noted that the worker could be assigned "any other sedentary" duties as delegated by management.

The employer is correct that the APs letter from February 26, 2014 supports a finding that the worker's refusal was unreasonable. However there is subsequent medical evidence that supports a finding that it was not unreasonable.

For example:

The worker was assessed by another AP (“AP2”) on March 5, 2014. AP2 considered the nature of the worker’s medication use and noted that it had a significant sedating effect on him as it impaired his attention and alertness. AP2 also noted that since the worker was right-hand dominant, even light activities such as driving caused him significant pain. AP2 indicated that the worker was not capable of returning to work in any capacity for 7-13 days.

There is also a function abilities form dated March 5, 2014 in which the worker’s physician again noted that the worker was totally unfit for any work.

In May 2014, the worker was assessed by an occupational rehabilitation program (”ORP”). The ORP found that the worker had significant right arm symptoms, which required two weeks of intense physiotherapy before he could even begin ORP.

Given the subsequent medical evidence, it seems to me that, at the time of the decision under review, the worker's refusal was reasonable. AP2’s medical evidence indicates concerns not only with the worker's right shoulder symptoms, but also with symptoms the worker was experiencing due to the medications he was using. These symptoms affected his driving ability among other things. As the worker was having problems with attention and alertness driving to and from work would've been a concern. Moreover, work requiring alertness and attention was contraindicated. This would rule out such things as computer work. In addition, the ORP's report confirmed that the worker had significant symptoms that required intensive therapy.

I also have some concerns with the nature of the employer’s offer. The offer was very general. For example, the employer did not specify what other sedentary duties the worker might be asked to perform. This makes it difficult to determine whether those duties would have been productive or otherwise satisfy policy requirements.

In any event, in light of the subsequent medical evidence noted above, I agree with the board's decision that the worker's refusal was reasonable.

Though the Company challenged the grievor's credibility in its appeal submissions to the WSBC, and suggested that the grievor engaged in a form of

"physician-shopping" after Dr. O'Connor's agreement to the RTW, the WSBC review officer gave the Company submissions no weight.[3]

The Company appealed the WSBC decision dated July 14,2014. Vice Chair Miller of the Workers' Compensation Appeal Tribunal ("WCAT") denied the Company's appeal and also found the grievor's "refusal" to accept the RTW plan was reasonable. His decision, dated December 8, 2014, reads, in part:

> [13] The employer has made a number of allegations regarding the truthfulness of the statements the worker made about his schedule and abilities. In addition, they allege he was Dr. shopping to find a doctor who would certify him as unable to work, even to do the one-handed duties offered.
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> [14] The allegation of physician shopping is refuted by Dr. MacLeod in his letter of June 1, 2014. The other allegations, whether accurate or not are not relevant to my decision. The Board was required to assess the reasonableness of the worker's refusal to perform light duties, not based on the worker's credibility or whether the worker had legitimate medical appointments or was coaching hockey, but based on the evidence from his own doctor regarding the suitability of the offered light duties given the worker's injury. I acknowledge the approval of Dr. O'Connor, dated February 26, 2014, but I also note the opinion of Dr. Brown (sic) on March 5, 2014 and Dr. O'Connor on February 21, 2014. The preponderance of credible medical evidence is that the work activities were not medically suitable for the worker at the time of the Board decision on March 3, 2014. Therefore the worker's refusal to agree to lay duties was reasonable. I confirm the board and RD decisions.

Decision

The Union challenges the admissibility of the video surveillance. The two-part test to determine its admissibility is established by the CROA jurisprudence. The

[3] In the material before me is a letter dated October 19, 2014, from the grievor's family physician, Dr. McLeod, explaining why the grievor had seen other physicians during the relevant period. The letter also reinforces that the grievor's absence from work was medically supported until he was cleared for light stationary duties on March 11, 2014.

Company must persuade me that at the time it made the decision to engage this extraordinary measure it had reasonable grounds to do so. The Company must also persuade me that the surveillance itself was conducted in a reasonable manner.

Despite the Union's request for production of all documents pertaining to the Company's decision to conduct surveillance, no production was forthcoming. The Company brief submitted at the hearing did not set out who made the decision to conduct video surveillance, or when exactly the decision was taken. Nor did the Company provide any information concerning the extent to which CKR followed and observed the grievor in his private life - the footage itself covers only one hour and thirty-four minutes over the course of five consecutive days of surveillance.

After the hearing, I asked the Company to provide me with this basic information. The Union did not object. The Company has advised that all the footage received from CKR was that which was disclosed. The Company has also advised that the initial contact with CKR was by telephone after the RTW on February 27, 2014. That information is vague. It does not identify the date on which the Company made its decision to conduct surveillance. It does not identify who made the decision. It does not disclose who contacted CKR, and what instructions were given to CKR.

I am unable to find that the Company has met its burden in this case. First, an employee’s injury is not necessarily suspicious merely because the employee reports the injury to the employer but does not follow up immediately by seeking medical

attention. Secondly, the rumours about which Assistant Templeton testified were very general and did not pertain to the hockey tournament. In fact, he said that he heard nothing about the grievor being at a hockey game until after the weekend of February 28, 2014. Assistant Templeton's testimony raises concerns about the veracity of statements made in the Company brief. Thirdly, the grievor was essentially "ambushed" in the course of the teleconference on February 27, 2014 with the RTW plan to which Dr. O'Connor had inadvertently agreed. At that point, the grievor had not had the opportunity to speak with Dr. O'Connor to verify that she had approved the RTW plan and to discuss why she thought it was appropriate. It is perhaps not surprising that, in the circumstances, the grievor was caught off guard and was hesitant to participate immediately in a RTW plan of which he had no advance notice. Fourth, in arriving at its decision to engage surreptitious surveillance of the grievor, the Company did not know at that point that the grievor had "created" physiotherapy sessions out of massage sessions, nor did it know then that the physiotherapy clinic was closed on weekends. Finally, there was no objective reason for the Company to think that the FAFs were inaccurate or not based upon a *bona fide* medical opinion.

Even assuming the Company had met the two-part test established by the CROA jurisprudence to justify surveillance of the grievor, there is nothing revealed in the surveillance video that persuades me that the grievor's activities on February 28, March 1, 2, or 3, 2014 (or, for that matter, March 4, 2014), including such activities as opening doors, carrying coffee, coaching and clapping during a hockey game or eating in a shopping mall (and the grievor is generally favouring his left arm/hand throughout the

footage) are inconsistent with his refusal to participate in the RTW or with the FAF's provided to the Company, all of which found the grievor unfit to work even light duties until March 11, 2014.

There is a difference between attending at work full-time even on sedentary duties when prescribed pain medication and engaging in what can only be characterized as low-impact daily leisure activities, such as those revealed in the video footage.

From the outset, the Company suspected the *bona fides* of the grievor's injury. This suspicion gave rise to some rather questionable tactics by the Company. One of these was to make baseless accusations to the WSBC about the grievor being a bodybuilder and possibly using steroids. Another example is the Company's misguided zeal to force the grievor's premature return to work. Despite having access to two FAFs that declared the grievor unfit for any work, the Company took it upon itself, without the grievor's knowledge, to contact his physician to obtain authorization on the Company's proposed RTW plan, which the physician appears to have done under a mistaken impression (from OHS) that the grievor had reported an improvement in his condition.

The Company then essentially sprang the RTW plan on the grievor during the February 27, 2014 teleconference, knowing that the physician had not spoken to the grievor since she had twice declared him unfit for any work. The Company then relied

upon and produced the RTW plan as part of its failed attempt to get the WSBC to reverse its initial decision granting the grievor benefits.

On the other hand, having carefully reviewed the entirety of the record before me, I have come to the conclusion that the grievor also bears some responsibility for the way in which events unfolded in this matter. Once the grievor discovered in the course of the telephone conference that the Company had obtained Dr. O'Connor's approval of the RTW plan without consulting him, rather than insisting that the teleconference be rescheduled until such time as he could speak to his doctor, the grievor threw up every road block he could conceive of to decline returning to work on the weekend of February 28, 2014. The grievor also conveniently misspoke when he said he had a physiotherapy appointment on March 1, 2014, when in fact he had a massage appointment (which, incidentally and also conveniently, was not part of his prescribed treatment). Later in the call, when the grievor conveyed to the Company that the March 1, 2014 "physiotherapy" appointment had been rebooked, it is suspicious that the grievor did not then advise the Company that, in fact, he had a massage appointment. I do not disagree with the Company that there is some doubt as to the authenticity of the letter from grievor's masseuse dated April 1, 2014. However, on the evidence before me, I am unable to draw any legal conclusion based on that doubt.

Quite apart from the guileful manner in which the Company dealt with the grievor's injury, with particular regard to the totality of the medical documentation, I am compelled to agree with the WSBC decision upheld on review and on appeal at WCAT,

that the Company's proposed RTW plan was not medically suitable to the grievor because he was unfit to work. It was therefore reasonable for him to refuse to participate in the proposed RTW plan. I am therefore unable to find that the Company's outright discharge of the grievor was justified, even though he was less than forthcoming with his employer.

Having regard to all of the foregoing, I direct that the grievor be reinstated to his employment forthwith and that he be compensated for all wages and benefits lost. A substituted penalty of twenty demerits for conduct unbecoming associated with the RTW meeting held February 27, 2014 shall be placed on the grievor's record.

October 5, 2015

CHRISTINE SCHMIDT
ARBITRATOR