CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4438

Heard in Toronto, January 13, 2016

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the dismissal of Conductor B.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

On March 13, 2015, following an investigation, Conductor B. was dismissed from Company service "For conduct unbecoming an employee of Canadian Pacific as evidenced by your fraudulent wage claim submissions between January 19, 2015 to February 5, 2015 (total of 14 separate wage claims), while performing light duties on assignment ET2 in Toronto. Ontario."

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 B. be made whole.

The Union further contends that the penalty of discharge is excessive in all of the circumstances. The Union contends that the Company's termination of Ms. B. employment breaches the Collective Agreement and the Canadian Human Rights Act, including its duty to accommodate Ms. B. disability (i.e., clinical depression) under the Act.

The Union requests that Ms. B. be reinstated without loss of seniority and benefits, and that she 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.) B. Hiller
General Chairperson

FOR THE COMPANY:
(SGD.)

There appeared on behalf of the Company:

J. Bairaktaris	– Director, Labour Relations, Calgary
B. Scudds	– Assistant Director Labour Relations, Toronto
S. Afonso	– Disability Manager East, Toronto

There appeared on behalf of the Union:

D. Ellickson	– Counsel, Caley Wray, Toronto

B. Hiller	– General Chairman, Toronto
W. Apsey	– Vice General Chairman, Smith Falls
R. Hackl	– Vice President, Ottawa
B.	– Grievor, Toronto

AWARD OF THE ARBITRATOR

The grievor is fifty years of age and entered in service with the Company as a Yard Helper in March 1989. She was laid off and re-entered service in September 2005. At the time of the incident, she had nine and half (9.5) years of service and was employed as a Conductor/Yard Person.

The grievor did not report to work from January 19 through February 5, 2015. During that period, she submitted fourteen (14) separate wage claims, while absent from work without authorization.

A few days before January 19, 2015 in response to an email written by RTWS Ms Afonso, in which she requested an update on her working conditions, the grievor confirmed the same day that she was still working with restrictions and will provide an update the following week.

On January 22, 2015, the grievor sends an email at 4:20 PM and informed Ms Afonso:

> "Hi Silvia,
> An FAF was faxed to Occupational Health Services today…. I still have the same lifting restrictions.

> Please contact me only or have OHS contact me and not my Doctor regarding any forms or updates that need to be updated or filled out.
> Thank you.
> S."

The same day, January 22, 2015, Ms Afonso emailed Ms B.'s physio and she advised Ms. Afonso that she had not seen the grievor since November 27, 2015 despite numerous phone calls and cancelled appointments and that Ms. B had an appointment that day. During the month of December, on the 4th, Ms B. informed Ms. Afonso by email that she was doing "a lot of exercises in physio as well as strength training". When asked to explain the latter discrepancy during the investigation held on February 23, 2015, the grievor gave as an explanation that she "was performing the exercises at home with weights and elastics".

The grievor also justified her decision to file false wage claims to the investigator as follow:

> "I have been dealing with major depression to the point where I have told my sister that I want to die. I cannot get motivated to get out of bed to do anything. I have a letter coming from my family physician in Burlington to my new family physician in Orangeville which is being faxed today. I contacted the EFAP on Friday February 20th 2015 for assistance and I have an appointment this Thursday February 26th 2015.
> (...)
> My landlord was trying to evict me. I just could not make it into work."

The grievor also stated that her depression had started sometime during the spring of 2014. Shortly after, Ms. B. maintained that "lately, she has not been herself. Since the beginning of 2014 she has been under the care of a physician for depression

and that they are currently trying different drug therapies with little success." At the end, the grievor shared her feeling of shame and embarrassment.

In the present matter, the grievor admitted that she submitted fourteen unjustified wage claims from January 19 through February 5, 2015. She therefore committed fraud (theft). Theft constitutes a major employment offence and generally results in the discharge of the offending employee. The Union contends that dismissal is not the appropriate measure because the grievor was suffering from a major depression at the time of the events and should be therefore accommodated. The Union also asserts that given the circumstances, her conduct is so aberrant that she cannot be held responsible.

I share, arbitrator Shime's analysis regarding employers rights to discipline an employee that committed a serious offense (theft) even when the employee is entitled to some rights (accommodation) under the Canadian Human Rights Act:

> **90** To this point I have proceeded on the basis of the Union's argument, that there is an obligation to reinstate the grievor if the risk is minimal, pursuant to the duty to accommodate under the Canadian Human Rights Act. However, theft by an employee is considered to be a major employment offence, and in my view, the duty to accommodate under Human Rights legislation is to integrate employees who have illnesses into the workforce. The legislation does not mandate that employees be protected or absolved from major employment offences merely because of an illness. An employee cannot shelter behind Human Rights legislation so as to absolve him/her from serious or major employment offences. Re Toronto Transit Commission and Amalgamated Transit Union (1998), 72 L.A.C. (4th) 109 (O.B. Shime, Q.C.). The grievor has not been discriminated against or treated differently from other employees at Canada Post who have engaged in theft. If the Union is right in its contention, an employy suffering from an illness would be immune from discharge for major employment offences and, indeed, would receive preferential treatment when compared to other employees. The Corporation's right to discharge the grievor exists independently of the duty to accommodate under the

> Canadian Human Rights Act. In that respect I Can only repeat what was stated in the Toronto Transit Commission case at p.125:
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> > One should be careful in assessing the responsibility of the employer. The employer has a duty to accommodate but it also has the right to discipline. While the duty and right may conflict or intersect in certain situations, that conflict does not arise in this case. There is no reason why the duty to accommodate should eliminate the Commission's right, under the collective agreement, to discipline, up to and including discharge, for major employment offences. The issue would have been quite different if the grievor had sought accommodation prior to the accident. In those circumstances, if the Union's argument was accepted, then an employer could never discipline or discharge an employee who suffered an illness, even where that employee committed a major employment offence. In our view, the right to discipline or discharge, in the circumstances of this case, exists independently of the employer's duty to accommodate, or to put it another way, the duty to accommodate cannot pre-empt the employer's right to discipline and discharge, in these circumstances. Accordingly, the Union's argument that the right to discharge is rendered void, by the operation of the Human Rights Code, cannot succeed. [1]

Furthermore, the evidence does not show a relationship between Ms. B's medical condition and her conduct.[2] The medical file reveals that Ms B was at the time of the events (January 19 through February 5) depressed and by her own account, she had been suffering from a major depression for at least for the past six months, but not to the point of losing contact with reality or "irrational" or even totally "disorganized" behaviour. The email exchange between the grievor and Ms Afonso during the first week of her absence at work is a clear example of her state of mind and capacity.

The grievor's conduct and responses provided during the investigation held a few days after the incidents demonstrate a person acting normally. The grievor's allegations

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[1] Canada Post Corp. and Canadian Union of Postal Workers (Zachar Grievance, CUPW 626-95-3-00978) [1998] C.L.A.D. No 811.

[2] See Canada Safeway Ltd. V. United Food and Commercial Workers Union, Local 175 (Goodridge Grievance) [2002] O. L.A.A. No 35; Great Atlantic & Pacific Co. Of Canada v. United Food and Commercial Workers International Union, Local 175 (Flude Grievance), [2000] O.L.A.A. 193; CROA&DR 2183; CROA&DR1835.

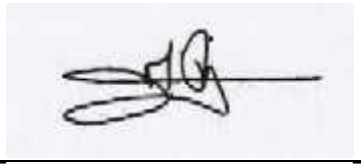
of suicidal thoughts and difficulties coping with her condition and medication do not suffice to establish a link between her medical condition and her conduct. Perhaps, she did feel very depressed and discouraged at the time of the events, up to the point of not being able to show up for work, but such state of mind cannot justify theft. The evidence shows that the grievor was well aware of her actions when she committed her misdeeds, she knew that theft was wrong, and aware that her actions could result in her termination.

While I feel sympathy for the grievor and her personal difficulties, her expression of shame and her justifications are not sufficient to outweigh the seriousness of her actions and to overcome the damage she had done to the trust that is essential to the rebuilding of the employment relationship. The grievor committed a serious offense and was dishonest to the employer and that conduct was not an isolated incident. The evidence reveals that the grievor acted deceitfully in her updates on her condition during the last months of her employment.

The grievor made a bad decision. She took a chance when she decided to file fourteen false wages claims, fourteen times, one per day.

Lastly, given the employer's right to discipline as stated previously, Unions contentions regarding the process are unfounded. The employer could terminate the grievor's employment without further investigation concerning the medical condition of the grievor.

In the circumstances, the Arbitrator is compelled to conclude that the Company had reasonable grounds to terminate the grievor's services, in light of her deliberate act of fraud (theft). The grievance must therefore be dismissed.



January 20, 2016

MAUREEN FLYNN
ARBITRATOR