CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4490

Heard in Edmonton, September 14, 2016

Concerning

ALGOMA CENTRAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE
MAINTENANCE OF WAY EMPLOYEES DIVISION

DISPUTE:

Dismissal of Y. Chouinard.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

By way of Form 780 dated March 20, 2016, the grievor, Mr. Y. Chouinard, was dismissed by Company for an alleged breach of trust due to false information given by Mr. Chouinard when he completed a pre-placement health assessment questionnaire on May 31, 2012. A grievance was filed.

The Union contends that the grievor simply made a mistake on the pre-employment medical form. He was confused about what he had to disclose as a previous injury.

The grievor never had a prior WSIB claim and had never missed time because of injury.

The Company's decision to dismiss the grievor was a serious overreaction that was improper and unwarranted in the circumstances.

The Union requests that the grievor be reinstated into Company service immediately without loss of seniority and with full compensation for all wages and benefits lost.

The Company denies the Union's contentions and declines the Union's request.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) G. Doherty	**(SGD.)**
President	

There appeared on behalf of the Company:

F. Daignault	– Labour Relations Manager, Montreal
A. Daigle	– Labour Relations Manager, Montreal
L. Waller	– Workers Compensation Officer
C. Reid	– Engineering Manager,

There appeared on behalf of the Union:

H. L. Helfenbein	– Vice President, Ottawa
D. Brown	– Counsel, Ottawa

AWARD OF THE ARBITRATOR

On June 19, 2012 Mr. Yves Chouinard started work with Algoma Central Railway as a track labourer. As part of the hiring process he was required to complete a "Pre-placement Health Questionnaire". That form is designed to allow the Employer to learn, before hiring, whether the potential employee has physical or medical issues that might, during the course of what is potentially a long career, have or develop medical limitations on their ability to do their job.

On February 16, 2016 the grievor reported a workplace injury. In the course of the Employer's investigation of that injury the grievor made statements to management that caused it to explore his pre-employment health record. Following investigation, the Employer concluded that the grievor in the "Pre-placement Health Questionnaire" had misrepresented his history by the answers he gave to the following four questions:

> 24Q. Have you ever had any claims for disability or workers' compensation?
> 24A. No.
>
> 25Q. Have you ever had functional limitations or restrictions due to a workplace injury or disease?
> 25A. No.
>
> 82Q. Have you ever had problems with muscles in your arms, legs or spine including back problems?
> 82A. No.
>
> 83Q. Have you ever had diseases of your joints or bones (e.g. arthritis)?
> 83A. No.

The form contains the following warning, declaration and consent:

> I understand that if I knowingly have provided false information or have not declared a medical condition, past or current, I will be

> subject to action by CN up to and including dismissal … I also consent for representatives from the Office of the CN Chief Medical Officer to discuss any details of this assessment with my physician. I understand that this information will be reviewed for the purpose of making a fitness to work determination.

For those in doubt, the form offers a toll free assistance number.

The Employer concluded that the grievor had given false information in a way that amounted to a breach of trust. After considering the grievor's disciplinary history, as described in the Form 780, it terminated his employment.

The February 2016 event and disclosures

At the time of his discharge Mr. Chouinard, then aged 29, was working on a track labourer crew. It is a physically demanding job often involving remote work with minimum supervision. On February 11, 2016 he experienced left shoulder pain at work while repetitively swinging a pick axe to try to break up ice on a guardrail at the yard in Oba, Ontario. He initially reported pain to a co-worker and, later that same day, to his supervisor. He went to the hospital in Hearst, Ontario where he was required to fill in a Workers' Safety and Insurance Board Form 6 – Worker's Report of Injury. That form asked, in part: "7. Do you have any prior related WSIB/WCB claims" to which he checked "yes – in Ontario" and "9. When did you first start to have problems with this injury/condition?" to which he answered "with my previous claim". The medical diagnosis for his 2016 pain was scapula bursitis in the shoulder.

The day after the injury, a re-enactment was held. The report of the worker's initial interview, as part of the re-enactment, records the following:

> He reported to his foreman that he felt a pain/cramping in his shoulder thought it would go away.
>
> He reported that he had previously injured this shoulder working in the mine in 2011 and there was a wsib claim.
>
> He also reported that he had a previous non work related lower back injury that he takes medication for but confirmed he has not aggravated lower back pain at work.

Mr. Goudreau, who conducted the re-enactment, confirmed these statements in a memo of March 13, 2016. In a similar memo Mr. Merick Letourneau confirmed similar statements made during the initial investigation. On February 19th the grievor attended a formal interview over the events of February 11th. Information disclosed then resulted in further inquiries and a requirement to attend for a further investigation on March 16th so that he could give his explanation as to why he had not disclosed his previous medical history on the Pre-placement questionnaire. The transcript of the first investigation indicates the following exchange, following his description of his day on February 11th.

> 15Q. Mr. Chouinard, is this a new injury or a recurrence of a pre-existing injury?
> A. I think it is a new injury.
>
> 16Q. Mr. Chouinard, on what date did this original injury happen?
> A. 2011
>
> 17Q. Mr. Chouinard, after the original injury, did you seek treatment in order to prevent this injury?
> A. Yes, 2 weeks off, probably went to chiropractor.
>
> 18Q. Mr. Chouinard, how often did you seek treatment prior to the events on Feb 11th 2016?
> A. Always go; can't remember how often.

> 19Q. Mr. Chouinard, when was the last time you went for treatment before Feb 11th 2016?
> A. Couple months ago, go for my back but not for my shoulder because he was back to my regular duties.
>
> 26Q. Mr. Chouinard did you advise CN Rail on your previous injury on the medical screening prior to hire?
> A. I believe not.
>
> 29Q. Mr. Chouinard, do you have anything further you wish to add that may be pertinent to this investigation?
> A. My previous injury in 2011 I was able to return to regular duties for 5 years.

The 2011 Injury

Mr. Chouinard filled in this Pre-placement Questionnaire in 2012. The events in 2011 were only one year before that. The main issue here is whether he was honest and candid when he filled in the questionnaire, given what he knew and understood as he filled in that document. What he may have learnt subsequently is not directly relevant to whether he was being honest, confused, or deceitful at the time.

In 2011, the grievor worked for a subcontractor of Goldcorp, a firm operating a mine near Timmins, Ontario. It is not disputed that he experienced pain on the job in 2011. The grievor gave the accounts of this incident described above following the 2016 incident in the Oba Yard. He was questioned further on the 2011 incident, and the steps taken following it, in the March 16, 2016 investigation. Then the grievor said the pain was in his higher back and neck, there was no work time lost, and no WSIB claim was filed as a result of the 2011 injury. He agreed he did not advise CN of the previous

injury on the questionnaire, saying he was not aware he had to disclose every time he had pain. He said at the end of his investigation.

> I would like to state that I believe I had filled out my pre-employment questionnaire in a honest manner. I was not attempting to deceive anyone with my answers. I did not believe it was necessary to report the previous injury as I had not received WSIB or had lost time as I was going on day off after the injury. When I was hired I had no lingering health issues that I believe I had to report.

These answers were all given after the grievor learned that he was under investigation for giving false answers in 2012. The Employer views these answers as disingenuous given the statements he made (before the 2012 questionnaire was raised) following the 2016 incident. I accept that he indeed told Mr. Goudreau, at the time of the re-enactment, that he had injured his shoulder working in the mine and that there was a prior WSIB claim. This is supported by the information the grievor gave the WSIB on his Form 6 where he checked off that he had hurt this area of his body before, that he had a prior WSIB claim, and that he first started to have problems with the (current) injury “with my previous claim”.

The Employer believes the grievor was untruthful when he said the 2011 injury involved no lost time. I accept the grievor’s explanation that this was because he was working on a 14 days on 14 days off rotation and was able to rest during the 14 days off. The Company also argues that at one point he is speaking of his higher back and neck and at another his shoulder. With a diagnosis of scapula bursitis in the shoulder, I find this is not a significant point of difference, and is not of itself any indication of dishonesty.

The Union says the entire answer to the first question about claims for disability or workers' compensation is that it was in fact true; he had no such claim. The difficulty with that assertion is that the grievor, up until the issue was raised by the Employer's investigation, believed he in fact had such a claim. I find his comments during the 2016 re-enactment and more particularly his WSIB Form 6, make that fact clear. He only later learnt there was no prior claim, but that subsequent knowledge does not distract from the fact that his 2012 answer was not frank in terms of what he understood to be the facts at the time.

There is no evidence that the grievor's answers to the second and fourth questions are untrue. That cannot be said of his answer to the third question. The injury at the Goldcorp Mine involved his higher back and neck and led him to take chiropractic treatment. A more forthright answer would have been that he had a problem with his higher back but that it had resolved itself, leaving it to the Employer to check and confirm the veracity of that statement. The Union argues that the question implicitly asked did he have problems of the type that might affect his ability to function as an Algoma Railroad employee. That is too narrow an interpretation. The form is not looking for the employee's assessment, but for objective facts it can assess itself.

Certainly the form does not require the reporting of every ache or pain, but the event in 2011 was significant enough to seek treatment and to result in chiropractic care. The Union argues that the chiropractic care related to problems the grievor had with his lower back. If that is indeed why he was seeking chiropractic care in 2011, then

it raises the further question of why the grievor did not disclose problems with his lower back. The Union argues that the grievor's performance, from his hiring in 2012 until the 2016 incident, without restrictions physical limitations or accommodation, is proof positive that the 2011 injury was so insignificant that it did not call for disclosure; that it was not a "problem".

The Union, in the alternative, argues that if any answers in 2012 were less than appropriate, this is not in any case a situation where dismissal is justified. It relies upon the following extract from Palmer and Snyder, *Collective Agreement Arbitration in Canada* (5th ed):

> 12.56 Similar to other misconduct issues earlier discussed, arbitrators previously considered discharge to be the appropriate response in respect or record falsification. The trend of authority, however, has been to move away from this view and, consequently, an examination of various factors has been necessary to support such a result …
>
> 12.58 (The) approach developed by Arbitrator Shime in Gould Manufacturing is generally accepted by modem day arbitrators. It unifies elements of the previous approaches and its starting point is that "not every falsification of an application form constitutes just cause for discharge".
>
> 12.59 One arbitrator "grouped" these factors into the following issues: the nature of the material that was withheld, the circumstances of the withholding, the materiality of the information withheld, the actions of the employer and other circumstances that have occurred during the course of the grievor's employment.

I accept that dismissal is not automatic and that the listed factors are relevant consideration. As in the case of theft, another fundamental breach of trust area, the law now requires a more contextual analysis. See:

> *McKinley v. B.C. Tel* [2001] 2 S.C.R. 161

The Employer argues that, while dismissal is not automatic, it is nonetheless the norm for material misrepresentation.

The Union relies on **CROA&DR 3619**, a case where a grievor had been dismissed for not disclosing a known medical condition during the pre-hire process. The grievor had in the past suffered migraines, did not mention it on the form which did not ask specifically about injuries, but did discuss it with the interviewing company doctor. Finding only a technical breach, Arbitrator Picher substituted a written reprimand for her oversite in filling out her medical history. The Union also provided **CROA&DR 2768**, where a dismissal was upheld of a probationary employee who failed to disclose psychiatric issues and medications; something discovered soon after her hiring when she sought accommodation to avoid swing shifts. She compounded her difficulties by misleading her supervisor as to what she had told the interviewing physician.

I have considered the factors listed in 12.59 (above). It is material that, in answering about WCIB, while the grievor believed he had had a claim, he had not drawn benefits and had not taken any days off work. It is similarly material that, while he had suffered some shoulder pain, it had passed before the pre-placement form was filled out. That may not be the case with his back issues. The point that the grievor has worked successfully for four years without difficulty at a physical job is also worthy of consideration.

The Employer is however, correct in emphasizing the resources it puts into and the importance of pre-employment screening. It is to make sure that:

> "All selected candidates are fit to perform the duties of the job for which they are being considered in order to safeguard their own health and safety, the health and safety of other employees and that of the general public."

Algoma has devoted significant resources to hiring new and qualified employees in response to a large turnover in its workforce in the last five years. Screening applications to ensure it is hiring the right people for the right jobs is expensive. It involves the cost of medical assessment, background checks and then training costs.

Requiring honest answers is also important because it promotes even-handedness between applicants for scarce jobs. There should be no advantage to fudging the pre-employment testing and disclosure requirements so as to obtain priority over other applicants.

The Employer refers to two cases that underscore the importance of trust in the employment relationship. Arbitrator Picher in **CROA&DR 2709** said:

> It is trite to say that a certain degree of trust is essential to the employment relationship, particularly when the work in question is carried out in a largely unsupervised setting. In the instant case the Arbitrator is compelled to conclude that the grievor did falsify records with respect to his own workload with a view to deceiving the Company. For that alone, he was deserving of discipline which would have placed him in a dismissible position.

See also **CROA&DR 1344**. Those two cases involved a breach of trust during the employment relationship. Arbitrator Hodges addressed a situation to involving the

Pre-employment questionnaire in **SHP718**, dismissing a grievance by saying at para. 63:

> Ironically, during the grievance procedure the union argued for employer accommodation of the very same disability that the grievor wilfully neglected to disclose during pre-employment. To paraphrase Arbitrator Keller from CROA&DR 3475 above, Mr. Bader cannot have it both ways – first conceal a medical condition to illicitly secure employment and then claim the protections of the collective agreement once the deception has been brought to light, …
>
> With a review of this decidedly profound commitment, it cannot come as any surprise to Mr. Bader or the union that his employment relationship with CPR came to an end, and that it cannot be restored at this time. As well, given all of the above, the arbitrator was unable to establish any significant level of trust in the grievor during the course of the hearing, so it would be highly unlikely under the circumstances to expect that the employer would be able, going forward, to place any degree of true confidence in him.

The Union argues, based on three decisions; **CROA&DR 2771**, **2847** and **3227** that arbitrators must act on "clear and cogent evidence" and "cannot convert suspicion, however strong, into legal conclusions." Without such evidence, the Employer fails to meet its onus of proof. Here, it says, it is only suspicious that the grievor had an injury from the 2011 incident. All the grievor says is he had pain, from which he quickly recovered.

The Union's main assertion is that Mr. Chouinard was confused when filling out the questionnaire in 2012. On the whole of the evidence (and leaving aside any reference to the 2016 WCB ruling) I find that is the less probable conclusion. I rely primarily on the grievor's own statements which I find inconsistent with "confusion in 2012". In 2012, the 2011 incident would have been fresh in his mind. He had not at that point learnt in fact there had been no formal WCIB claim. He made no mention of

shoulder or lower back issues. I conclude that this was due to deliberate under reporting not to confusion.

Mr. Chouinard's record over the three years of his employment shows the following:

2015/08/06	3 day Suspension	Not complying with CN Drivers manual, Daily crane log not filled out
2015/03/03	Written Reprimand	Failure to fill out crane logs
2014/10/08	Written Reprimand	Yves did not back up his frmn (foreman)

The Union emphasizes nothing in this record speaks of dishonesty or lack of candour, which I accept. However, I find this is a case of misrepresentation on the pre-screening questionnaire. It provides just cause for discipline. It is not a case where mitigation of the penalty is justified. The grievance is denied.

November 9, 2016

ANDREW C. L. SIMS
ARBITRATOR