CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4513

Heard in Calgary, November 10, 2016

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Grievance regarding the Company's failure to accommodate, and dismissal of Conductor Cameron Knight of Medicine Hat, AB.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Mr. Knight became absent after a work related incident on January 28, 2015. The associated injury was originally diagnosed as an aggravation of a pre-existing condition, however following further medical testing the diagnosis was deemed to be a new injury resulting from the incident of January 28th. Mr. Knight then reported the injury with the Worker's Compensation Board which was subsequently met with the Company's removal of their offer to accommodate his condition, and the requirement to attend a formal investigation. Following the investigation, Mr. Knight was dismissed which was described as "please be advised that you have been dismissed from Company service as you have broken the bond of trust necessary for continued employment while employed as a Conductor in Medicine Hat, AB, as evidenced by the following:

- On July 17, 2015 you submitted a WCB Worker Report of Injury or Occupational Disease alleging a work place accident on January 28, 2015 when no such accident occurred; and
- You provided false and misleading information to a company official, namely Melanie Brace, WCB Specialist, when you responded to her letter of July 30, 2015; and
- You provided false and misleading information to a company official, namely Rob McNulty, Trainmaster, during your statements taken on August 28, 2015 and September 16, 2015 in the investigation into this matter.

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.

The Union contends the Company has failed to properly recognise significant mitigating factors as well as the medical evidence supplied, and improperly terminated Mr. Knight's

employment as a result thereof. The Union also contends the Company has failed to meet the burden of proof required to sustain formal discipline related to the allegations outlined above.

The Union submits that the Company failed to fulfill its' duty to accommodate Mr. Knight's disability contrary to the terms of Article 85 of the Collective Agreement, the Company's Workplace Accommodation Policy, Return to Work Policy and the Canadian Human Rights Act. The Union further contends that the Company has failed to demonstrate that to do so would constitute undue hardship, which has resulted in discriminatory treatment in the instant matter.

The Union also contends the Company has dismissed Mr. Knight as a result of his bona fide medical condition, contrary to the Canada Labour Code.

The Union seeks an order that the Company has violated the above-cited Collective Agreement, policies and legislation. The Union further seeks an order that the Company cease and desist from these violations and that it be directed to comply with these provisions as described.

The Union seeks a determination that the Company has not to this point demonstrated undue hardship. The Union further seeks an order that Mr. Knight be reinstated to Company service, provided with suitable accommodation and made whole for all loss incurred, including wages and benefits with interest.

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:

B. Medd	– Manager Labour Relations, Calgary
D. Pezzaniti	– Labour Relations Officer, Calgary
C. Gingras	– Trainmaster T&E, Medicine Hat
M. Brace	– WCB Specialist, Calgary
J. Goldade	– Manager Disability Management, Calgary
E. DiFruscia	– Disability Management Specialist, Calgary

There appeared on behalf of the Union:

D. Ellickson	– Counsel, Caley Wray, Toronto
D. Fulton	– General Chairman, Calgary
D. Edward	– Senior Vice General Chairman, Calgary
B. Weisgerber	– Local Chairman, Medicine Hat
C. Knight	– Grievor, Medicine Hat

AWARD OF THE ARBITRATOR

The grievor was hired into Company service as a conductor on March 31, 2014. The Company records show that on January 28, 2015 the grievor worked from 18:00-02:30 hrs on a switcher assignment. The grievor claims that he hurt his left knee during the course of his shift when he fell through some ice. He stated that his limping

afterwards was observed that night by Trainmaster Gingras who suggested the grievor get treatment.

The grievor saw a physician, Dr. J. Gill, about his injury on January 29, 2015. Dr. Gill recommended that the grievor attend the Medicine Hat Regional Hospital for x-rays. Dr. Gill completed a Functional Abilities Form ("FAF") on January 29, 2015 (a form required by the Company's OHS Department) which stated that the grievor had a soft tissue injury to his left knee, and that he was totally unfit for work. On January 30, 2015, following the instructions of his physician, the grievor attended the emergency department of the Medicine Hat Regional Hospital for x-rays. The grievor then booked off sick due on January 31, 2015.

The grievor met with his regular family physician, Dr. Saujani, on February 8, 2015. Having received the test results (x-rays) from the Medicine Hat Regional Hospital, Dr. Saujani diagnosed a meniscus tear in the grievor's left knee and prescribed medications and a further MRI. Dr. Saujani saw the grievor again on February 12, 2015. He completed a further FAF which indicated the grievor continued to be totally unfit for work.

Dr. Saujani filled out an Attending Physician Statement ("APS") on February 28, 2015 for the purpose of allowing the grievor to apply for short-term disability benefits with Manulife, which are available to CP employees for non-related work injuries. In the APS of February 28, 2015 Dr. Saujani answered "yes" to the question whether the

grievor's condition was due to injury or sickness arising out of the patient's employment. He answered "No" to the question of whether a claim was being submitted to any type of worker's compensation board. Dr. Saujani further indicated in the same APS that the grievor's return to work depended on the results of the MRI and if surgery was needed.

An MRI was performed on the grievor's left knee on May 27, 2015. Contrary to what was earlier suspected to be a torn meniscus, the MRI indicated there was a *"… direct contusion type injury directly to the femoral metaphysic".* Up until this time, the grievor had been in receipt of weekly disability benefits. His 15 weeks of weekly disability benefits from his short-term disability insurer, Manulife, expired on May 23, 2015. The grievor stated that he then applied for EI as he was required to do under the terms of the Manulife policy.

On June 15, 2015, Dr. Saujani completed an FAF Report indicating that the grievor had bone marrow edema of the left knee. The diagnosis was based on the results he received from the May 27, 2015 MRI.

On July 17, 2015, the grievor completed a WCB Worker Report. He indicated in the Worker Report that he had reported his January 28, 2015 injury to Trainmaster Daryl Schlenker on February 8, 2015. In answer to the question *"if not reported immediately, give the reason",* the grievor answered *"waiting for doctor's and test results to learn unfit for work".*

On July 21, 2015 the Company's RTW specialist, Jennifer Goldade, wrote to Dr. Saujani proposing a return-to-work plan for the grievor. Ms. Goldade anticipated in the return-to-work plan that the grievor would begin modified duties on July 27, 2015. Dr. Saujani completed a form on August 1, 2015 indicating that the grievor could perform the suggested modified duties.

The grievor was contacted by the Company by letter on July 30, 2015, pursuant to the requirements of the Worker's Compensation Act. The introductory paragraph to the correspondence written by WCB Specialist Melanie Brace indicates that the grievor had been *"...non-compliant with Canadian Pacific's Return to Work Policy. You have not reported a work-related injury immediately (or at all) to your Front-Line Manager or Supervisor".* The grievor was asked in the same correspondence why he did not report a work-related injury to which he replied: *"My doctor originally diagnosed it as a pre-existing condition that wouldn't keep me out long. And I assumed getting injured while on duty with a trainmaster that CP would know about it*". In answer to a follow-up question with respect to why he delayed reporting a work-related injury to WCB the grievor replied: "*Same reason as above about the misdiagnosis of a pre-existing condition. The MRI proved otherwise and I contacted WCB*."

On August 19, 2015 WCB wrote to the grievor indicating that his claim was declined on the basis that his injury did not arise or occur in the course of his employment. The letter indicated that WCB did not have enough information to determine that the accident had occurred while he was at work on January 28, 2015.

The letter further indicated that the accident was not reported to the Company at the time of the accident or otherwise. It further indicated that the WCB did not have medical reporting on file from the time of the accident to support that the accident had occurred on January 28, 2015.

On August 25, 2015, the Company received a copy of the grievor's WCB Workers Report dated July 17, 2015. The Company determined after reviewing the Workers Report that it contained discrepancies, including the reference to the accident of January 28, 2015 and the late reporting to Trainmaster Schlenker on February 8, 2015.

On August 28, 2015, the OHS Department received an FAF from the grievor's new family physician, Dr. Martin Wong, indicating the grievor had been examined by him on August 25, 2015, had referred him to a specialist orthopaedic surgeon and that he was fit for modified duties.

The grievor attended for a Statement on August 28, 2015. Following his Statement, Ms. Goldade emailed the grievor on September 8, 2015 requesting that he supply an ER report of his January 29, 2015 attendance at the Medicine Hat Regional Hospital no later than September 11, 2015. Following this request, the Company's OHS department received a list of services that the grievor received at the Medicine Hat Hospital as well as confirming that he attended the hospital on January 30, 2015 for left

knee pain. The list of services does not indicate that the assessment of the grievor by the emergency physician was for a work-related injury.

As noted in the Company's brief, citing Mitchnick and Etherington, in *Labour Arbitration in Canada* (para. 1.11):

> Arbitrators and judges have long viewed honesty and trust as the cornerstones of a viable and productive employment relationship. As a result, dishonesty and breach of trust by employees are considered very serious form of misconduct warranting discipline".

This case turns entirely on whether the grievor was honest about the events surrounding his left knee injury.

The grievor was asked in his Statement of August 28, 2015 whether he reported being injured to Trainmaster Gingras on January 28, 2015. The grievor replied: *"I told him that this had happened that night while I was working with him during our lunch break".* He was then asked whether he filled out a MARVIN incident/injury report form reporting his injury prior to going off duty that night. The grievor replied *"No".* The grievor was also asked near the end of his interview the following:

> Q: 71: Do you understand that according to the Prairie Region Alberta Summary Bulletin effective December 1, 2014, on page 4, under reporting of ALL INJURIES/OPERTING OFFICERS, it states ALL PERSONAL INJURIES MUST BE REPORTED IMMEDIATELY, to the on-duty supervisor or applicable RTC, in order to ensure proper handling. Employees seeking medical attention as a result of an injury or an accident must notify the immediate supervisor or company officer prior to seeing a doctor, except in the case of an emergency. Appropriate MARVIN form must be submitted for your tour of duty or shift is completed?
>
> READ AND DISCUSSED
>
> A: Yes

In the absence *of prima facie* evidence such as the grievor's reporting of his alleged injury in a MARVIN report, which the grievor admittedly understood was to be completed before the end of his tour of duty on January 29, 2015, the onus shifts from the Company to the grievor to corroborate that he did in fact report his injury during his tour to his Trainmaster, as he says he did. Or that he subsequently spoke with Trainmaster Schlenker on February 8, 2015, as he indicates in his July 17, 2015 WCB Workers Report. No such witness evidence was called by the grievor in either his initial or supplementary Statements to corroborate his claim that he injured his knee by falling through some ice while performing his switching duties on January 28, 2015.

Further, I find that the grievor's credibility suffers from the fact that he asserts on the one hand that he reported the incident to Trainmaster Gingras and then later reports to WCB several months later that he in fact reported the incident to Trainmaster Schlenker. His explanation for the discrepancy is that he did not receive his diagnosis until February 8, 2015 when Dr. Saujani got the x-ray test results from the Medicine Hat Regional Hospital. That explanation rings hollow given that the person most likely to know about the injury, if in fact it was reported at all, was Trainmaster Gingras who was working with the grievor that night.

I also note that the grievor attended for an MRI on May 27, 2015, as scheduled by Dr. Saujani. Dr. Saujani reports the results of the MRI in the FAF dated June 4, 2015. The FAF confirms that the MRI was performed by another physician on a referral. The diagnosis reported by Dr. Saujani was *"bone marrow edema left knee".* When asked by

the Company WCB specialist, Melanie Brace, in a conference call discussion with the grievor and Ms. Goldade on August 24, 2015 about who ordered the MRI, the grievor replied Dr. Wong. The grievor confirmed in that same conversation that he switched from Dr. Saujani to Dr. Wong in mid-July, 2015. When asked about the discrepancy in dates at his Statement on August 28, 2015, the grievor stated (Q64): *"Because I had not switched over doctors yet, Dr. Saujani had all my files but he wasn't really doing anything for me, and while my mom went to Dr. Wong, I went with her to an appointment and that is when Dr. Wong ordered the MRI and when he went over my results in July, he recommended that I apply for WCB".* That answer stretches the truth in my view given the clear indication that it was Dr. Saujani who indicated as far back as February 20, 2015 in the Manulife Physician's Statement that the treatment included an MRI. Further, as noted, the results of the MRI were documented by Dr. Saujani-and not by Dr. Wong- in the FAF of June 4, 2015.

The grievor was requested by Ms. Goldade on September 8, 2015, after his statement on August 28, 2015, to produce an ER report from his January 30, 2015 visit to the Medicine Hat General Hospital. The grievor did not produce an actual ER report but rather only a document noting the treatments he received. The hospital records he produced do not mention anything about the grievor suffering a work-related injury. Yet the grievor maintains in his supplementary Statement on September 16, 2016 that he told the emergency physician where he worked and that his injury happened at work. He further stated in that regard: (Q: 26) "*When I explained the cause of my injury that*

was it. I don't know why the doctor did not file a report to WCB". The grievor also indicated that he advised the triage nurse that his injury occurred while he was at work.

I am doubtful that the grievor mentioned that his injury was work-related as he says he did to the emergency physician or the triage nurse. Again no witnesses were called to corroborate his version of his emergency hospital visit and the documents he produced for OHS and Ms. Goldade say nothing about a work injury. It is highly unlikely that the emergency physician, who is required to report all work-related injuries to WCB, would have not documented the injury as being work-related if that is what he was told by the grievor that night.

I also note that the WCB denied the grievor's claim on August 19, 2015. The letter indicates that there was not enough information produced to support the claim that the accident happened while the grievor was at work. The letter also states that the accident was not reported to the grievor's employer at the time nor was there any medical reporting produced from the time of the accident to support the grievor's claim that the accident had occurred on January 29, 2015.

I agree that there must clear evidence to support a termination where an employee's job is at stake. I believe that the Company has met that onus in this case. The grievor has been unable to provide any supporting evidence other than his own word that he suffered a work-related injury on the night of January 28, 2015. He initially ignored the rules to file a MARVIN report on the night the injury occurred. His

explanation for his delayed reporting of his injury is not supported by any documentary or witness testimony nor is there any medical proof that a work-related injury occurred that evening. His reason for delaying reporting his work-related injury to WCB was because he was misdiagnosed earlier (as he claimed in his response to Ms. Bruce after her July 30, 2015 correspondence), is another uncorroborated assertion which makes little sense when weighed against the obligation on the emergency physician to report work-related injuries.

I find based on the evidence before me that the grievor was dishonest from the outset with the Company about his injury. He failed to report the alleged injury to his left knee on the night it supposedly occurred, as he knew he was required to do, and then months later tried to leverage the results of an MRI on his left knee, which had been previously injured in 2011, into a WCB claim. The grievor's evidence does not stand up to scrutiny and leads to an inference that he was trying to profit from an injury which was not work-related, if indeed it had occurred at all. His acts of deception throughout this whole matter has breached the bond of trust and done irreparable harm to the employment relationship.

For these reasons, the grievance is dismissed.

December 5, 2016

JOHN MOREAU
ARBITRATOR