

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 4526

Heard in Montreal, January 10, 2017

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

UNIFOR – COUNCIL 4000

DISPUTE:

The discharge of Ms. J. Kratky for allegedly failing to protect her assignment on October 15, 2015 and allegedly deliberately providing a falsified doctors note in an attempt to mislead the Company regarding her sickness.

JOINT STATEMENT OF ISSUE:

The Union contends that the discipline assessed was inappropriate and there are mitigating facts that must be considered including by not limited to the fact that the grievor suffers from substance abuse and is being treated for such.

The Union requested reinstatement to service without loss of seniority and that she be made whole for all lost.

The Company disagrees with the Union's contentions and has declined the Union's grievance.

FOR THE UNION:
(SGD.) R. J. Fitzgerald
National Representative

FOR THE COMPANY:
(SGD.) R. Campbell
Manager, Labour Relations

There appeared on behalf of the Company:

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| R. Campbell | – Manager Labour Relations, Winnipeg |
| S. Blackmore | – Senior Manager Labour Relations, Edmonton |
| S. Roch | – Manager Labour Relations, Montreal |
| L. Williams | – Manager Labour Relations, Toronto |

And on behalf of the Union:

- | | |
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| R. Fitzgerald | – National Representative, Toronto |
| R. Shore | – Regional Representative, Vancouver |
| J. Kratky | – Grievor, Edmonton |

AWARD OF THE ARBITRATOR

The present case concerns the dismissal of Ms. Jessi Kratky for allegedly failing to protect her assignment on October 15, 2015 and allegedly deliberately providing a forged doctor's note in an attempt to mislead the Company regarding her absence.

The Grievor began working for the Company on May 14, 2007 and therefore, at the time of the incident, had accumulated approximately eight years and a half of service. She was working as a Service Delivery Representative (hereinafter "SDR") in Edmonton.

As demonstrated by the Grievor's disciplinary record, progressive measures had been previously applied. Indeed, at the time of the incident, Ms. Kratky had accumulated 110 career demerits and had been suspended twice during the month prior to discharge. She had also been suspended for attendance concerns on October 2014 as well as July 2009. At the time of dismissal, the Grievor had fifty-five active demerits.

On October 15, 2015, the Grievor was absent from work. Due to prior attendance issues, the Grievor was asked the next day to provide a doctor's note justifying her absence. Ms. Kratky provided one, which stated that she consulted a physician and booked off sick on the 15th.

Alerted by similarities between the note and a previous one that was provided to the Company, the clinic from which the document originated was contacted by CN's Occupational Health Services to assess the legitimacy of the document. It was confirmed that the Grievor did not present herself to the clinic on the 15th and did not see her doctor.

During the ensuing formal investigation on October 24, 2015, Ms. Kratky acknowledged that she had forged the doctor's note:

Q. Ms. Kratky, how was this document, Exhibit B, produced if it was not produced by a Medical Practitioner?

A. Someone I know scanned a note for me. I was obviously away on October 15. Shauna had asked me for a doctor's note when I returned to work on the 16th. I didn't have one and I panicked."

When asked to provide a reason for the falsification, she explained:

Q. Ms. Kratky, please explain why you did not provide valid documentation from a Medical Practitioner?

A. It was not a medical reason as to why I was off on October 15. And knowing my current standings within the department and knowing we don't have personal days."

She further stated that:

Q. Ms. Kratky, please explain why you did not speak to your supervisor if you were having trouble obtaining documentation from a Medical Practitioner instead of falsifying documentation?

A. I have no valid reason for that. I think that with a lot of stress that I have been under and just knowing office policy on personal days, that we don't have them. I am embarrassed and humiliated with what I have done."

The Grievor had essentially replaced the date of a previous medical note that she obtained in earlier months to avoid consequences for her unauthorised absence.

Also on the day of the investigation, the Grievor mentioned for the first time having substance abuse issues to her Employer. Ms. Kratky also mentioned having contacted the Company's Employee Family Assistance Program (hereinafter "EFAP") after the October events. Following her dismissal, the Grievor has taken part in a rehabilitation program for substance abuse.

The Union argues that Ms. Kratky should be reintegrated because said substance abuse should be considered a handicap and that, as such, the Employer should accommodate her. The Company holds that Ms. Kratky should have been more forthcoming in that she should have told her employer about her substance abuse problem prior to her dismissal. It also adds that her wrongful act was not related to her substance abuse.

The forging of medical documentation is a very serious offense that damages the bond of trust between a company and its employee. A review of the jurisprudence reveals that the dismissal of an employee for forgery is often upheld in arbitration courts. In *Windsor Casino Ltd.*, arbitrator Jolliffe stated the following:

"[35] These cases cited at hearing all confirm the seriousness with which an employee's misconduct is treated for having altered, forged or in some other way falsified substantiating medical documentation, in submitting a claim for illness leave. As I have had to observe in some previous cases, including my award in the *TDS Automotive* case, there are numbers of arbitration awards where the gravity of an employee's conduct in falsifying medical records has been specifically addressed, including

Howard Brown's decision table at hearing in *Canada Post Corp. v. A.P.O.C.*, where the learned arbitrator has cited and relies on arbitrator Shimes' earlier remarks in *Re Canada Post Corp. and CUPW* (unreported May, 1984). As quoted by Mr. King [counsel for employer] in his argument, he stated:

"As a general rule it has been held that defrauding an employer is serious misconduct justifying discharge and the submission of false medical certificates takes advantage of the employer's necessity to depend on the good faith of its employees. Also, this type of fraud is easily committed and difficult to detect and a harsh penalty is necessary to deter other employees from attempting the same thing..."

[36] Arbitrator Brown upheld the discharge as appropriate and in doing so relied on other Canada Post cases where there had been dismissals for having produced forged medical certificates to cover absences. [...]"¹

While it is also possible for arbitrators to reinstate employees that forged medical documents, there must be ample mitigating circumstances to justify such a measure.² This Office has upheld the discharge of employees for having forged or altered various documents, including medical ones. The mitigating and aggravating factors to be considered are the same as other types of grievances considered before this Tribunal.³

In the present case, I see no mitigating factors that could outweigh the gravity of the Grievor's acts. She only confessed to having forged her document once confronted by the Company and, moreover, has a less than enviable discipline record, standing at 55 active demerits and having accumulated a total of 110 demerits over the course of

¹ *Windsor Casino Ltd. v. CAW-Canada, Local 444*, [2005] CarswellOnt 7790 (Ontario Arbitration). See also: *TDS automotive v. National Automobile Aerospace, Transportation and General Workers Union of Canada and its Local 222*, [2002] CarswellOnt 9434; 70 C.L.A.S. 191 (Ontario Arbitration).

² *Ibid*

³ See *CROA 4463* and *SHP 365* for cases where the grievor's dismissal was ultimately upheld for having forged medical records. See *AH638* for a case involving the forgery of non-medical document. These three cases also present various mitigating and aggravating factors.

her relatively short career at CN Rail. She was also suspended twice in the month prior to the incident.

Considering the Grievor is 5 demerits away from dismissal under the Brown system, substituting another form of discipline would be unreasonable, especially since the Employer has reasonably applied progressive discipline in view of the jurisprudence⁴.

Then remains the argument presented by the Union that the Grievor was suffering from substance abuse. It does seem indeed that Ms. Kratky had been suffering from it during or around the events of October 15 and that she has consulted with CN Rail's EFAP. Based on this information, the Union asserts that the Grievor should be reinstated, since her actions can be explained by her addictive behaviors, making her termination discriminatory under the *Canadian Labour Code*.

However, it is important to underline that the Grievor was terminated because she forged a medical document to evade sanctions for an unauthorized absence, not because of her substance abuse problem.

The Union cannot simply claim that the Grievor's substance abuse caused her to forge a medical document, a causal link between her condition and said fraudulent act

⁴ See CROA 3000 and CROA 1674

must be established. The Court of Appeal of British Columbia, in *Health Employers Assn. of British Columbia v. B.C.N.U.*, stated that:

[41. It is important not to assume that addiction is always a causal factor in an addicted employee's misconduct [...]. To find prima facie discrimination, there must be evidence that the employee's misconduct was "caused by symptoms related to" the disability [...].

In AH 638, arbitrator Schmidt explained that:

"In order for this grievance to succeed, the Union must establish on the face of the undisputed facts, that the grievor was not culpable for his conduct because of his disability or that the penalty of discharge is too severe, taking into account any mitigating circumstances. The Union accepts that arbitrators require that the medical evidence proffered must substantiate a link between the misconduct at issue and the medical condition."

Nothing in the evidence presented before me can allow such an inference to be drawn. No facts indicate that the Grievor committed forgery because of her substance or alcohol abuse; no such conclusion can be reached. The Union has failed to discharge itself of its onus.

While I sympathise with the Grievor and commend her efforts towards rehabilitation, this cannot constitute a mitigating factor in the present case. At the risk of repeating myself, forgery, not substance abuse, was the reprehensible act which prompted the Company to dismiss Ms. Kratky.

As such, for the above-mentioned reasons, the grievance is dismissed

A handwritten signature in black ink, appearing to read 'M. Flynn', is centered within a light gray rectangular box.

January 17, 2017

**MAUREEN FLYNN
ARBITRATOR**