CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4484

Heard in Edmonton, September 13, 2016

Concerning

CANADIAN NATIONAL RAILWAY

And

UNITED STEELWORKERS – LOCAL 2004

DISPUTE:

The discharge of P. Houston for late reporting of his injury of October 2, 2015.

JOINT STATEMENT OF ISSUE:

On November 25, 2015 the Company held a formal investigation.

On December 17, 2015 the grievor was discharged from CN Rail for the following reason, "Late reporting of your injury of October 2, 2015".

On January 31, 2016 the Union filed a Step 3 grievance regarding this matter in accordance with Article 18: 18.6, 18.5, 18.2 of Agreement 10.1 contending that the discharge is unwarranted and excessive. The Union also stated violations of Article 1.5 of agreement 10.1 and of Section 7 a) and b) of the *Canadian Human Rights Act*.

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

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) M. Piche	**(SGD.) S. Prudames**
Staff Representative	**Manager Labour Relations**

There appeared on behalf of the Company:

F. Daignault	– Manager Labour Relations, Montreal
S. Blackmore	– Senior Manager Labour Relations, Edmonton
C. Reid	– Engineering Manager,
L. Waller	– Workers Compensation Officer,

There appeared on behalf of the Union:

M. G. Piché	– Staff Representative, Toronto
T. Cotie	– Chief Steward, Capreol
P. Houston	– Grievor, Claremont

AWARD OF THE ARBITRATOR

On December 17, 2015 CN dismissed Assistant Track Maintenance Foreman Paul Houston for “late reporting of your injury of October 2, 2015”.

The grievor is forty-nine years old and lives in Pickering, Ontario. He has an adult son and a ten year old daughter. He began working with CN on April 4, 2011.

The grievor’s record involved fifteen demerits received on December 3, 2012 for failing to wear required PPE and ten more demerits on September 24, 2013 for not being on CN property. On August 4, 2014 he received a suspension for operating a Hi-Rail vehicle outside his limits. On August 13, 2015 he recouped twenty demerits for twelve consecutive months of active service free from discipline. This left him with five outstanding demerits at the time of discharge.

The evidence disclosed that, on September 16, 2015 Mr. Houston visited his family doctor and described soreness in his right shoulder. His doctor sent him for an MRI. It is common ground that on October 2, 2015 Mr. Houston was working on track. His evidence is that in the afternoon, while lifting a 25 lb keg of spikes into his TFO truck, he injured his right shoulder. He did not report this at the time to Mr. Alex Murray, who was his immediate supervisor.

Mr. Houston, by prior experience and by admission, knew he was obliged to report workplace injuries. Page 31 of the "On the Job Training Guide for Track Employees" provides:

> It is the employee's responsibility to report immediately any occupational injury or illness to their immediate supervisor, regardless of the severity.
>
> Prompt medical treatment reduces the probability of complications that could result in greater pain, suffering and loss of productivity.

On October 21, Mr. Houston attended for the MRI appointment recommended by his doctor on September 16. The resulting report includes:

> Impression: High-grade partial with focal full-thickness tear of the distal supraspinatus tendon. Attenuated bicep tendon.

On November 2, 2015 Mr. Houston again attended at his doctor's office and was then told the MRI revealed a torn tendon in his right shoulder. The next day, November 3, Mr. Houston told his immediate supervisor of the MRI results, reported the October 21 incident for the first time, and completed a CN Injury form (F-98) and a WSIB Workers Report and Injury Form. His written and signed account of the injury reads:

> On Monday, October 2/15 at approx.. 14:10 pm I was loading a keg of spikes off the rear step of the TFO to put in the back of the truck so we could clear the track when I got back into the truck my shoulder felt tight and sore. That night when I went home it gradually got more sore. I attributed it to a strain or arthritis used heat and ice packs, but it gradually kept getting worse till I went to see my doctor. He sent me for an MRI at Markham/Stouffville Hospital on Wednesday Oct. 25, the results were a completely torn tendon which I need to go see a specialist for because I need an operation and physio.

Several processes unfolded thereafter. CN obtained a "Return to Work – Restriction Report" from the grievor's doctor and found no modified duties were needed since his work requirements fell below any listed restrictions. On November 4, along

with his two assistant track supervisors and injury specialist Laura Waller, but without a Union representative, Mr. Houston attended a re-enactment designed to replicate the circumstances of the injury. Statements attributed to the grievor were recorded in the Re-enactment Report.

On November 10, the Employer required Mr. Houston to attend an investigation meeting saying: "You are required to provide a Formal Employee Statement in connection with late reporting and an injury that happened on October 2, 2015." That investigation took place on November 13, 2015. Mr. Houston received and acknowledged having sufficient time to review the various documents referred to above. Dismissal ensued on December 17 followed by this grievance.

Meanwhile, on December 4 the WSIB denied the grievor's claim. They did so initially on November 23, 2015, and again on November 27 following a review of a letter sent by Mr. Houston's doctor. That same doctor provided a letter on January 25, 2016 reading:

> This is to confirm that Paul's shoulder injury is a result of his heavy lifting at work."

The letter contains nothing further, and so gives no indication as to how he arrived at his opinion as to causation. He was qualified to describe the state of the grievor's injury, but in speaking to its causation the doctor presumably just reflected what was reported to him by the grievor.

CN's position shows it is highly suspicious of the grievor's report of an injury at work on October 2. The Employer now knows the grievor went to his doctor, and was sent for an MRI, on September 16, two weeks before the reported incident. It was only once he had the results of the MRI that he reported the October 2 event. The Company views this as evidence of deceit. As a motive, the Employer argues that, by declaring an injury as work related, the grievor could receive additional salary, replacement and health benefits, if not now then in the future. It asserts that, on the balance of probabilities, the employee did not notify the treating physician that the injury was work related simply because it was not. In the Company's view the grievor's past sports injuries to his shoulder and his ongoing involvement in hockey are the more likely cause. Further, it suspects that the incident lifting spikes on October 2 was not a contributing factor to the tendon tear in his right shoulder.

CN argues that termination is a justifiable response to the submission of a fraudulent injury claim. It refers to two cases where termination has been upheld in such circumstances; **CROA&DR 2488** and **CROA&DR 3384**. The arbitrator in both cases found deception in reporting an injury had been established and that discharge was the appropriate result. I note however that the Joint Statement of Issue in each case showed that each grievor was terminated for making a fraudulent injury claim. A third case, **CROA&DR 4367**, involved an employee who actually had a workplace injury, but assumed initially he had simply aggravated an old injury. That grievor's reporting was complicated by poor instructional advice from a Company officer and then by some unnecessary lies by the grievor. Medical evidence supported the fact of a new

injury but the Employer was suspicious that the grievor, by changing his story drastically, was seeking unjustifiably to obtain Workers' Compensation coverage. He was terminated for providing false and misleading information, something not expressly alleged here. The arbitrator set aside the termination and substituted reinstatement without compensation. All these cases support the argument that fraudulently reporting a workplace injury can justify termination.

The grievor was terminated for, and appeals because, he was late reporting an injury that happened on October 2, 2015. The arguments presented raise two discrete questions. The first is, in the circumstances as they are now known, should the grievor have reported the events of October 2, 2015 to his supervisor, or as the Union alleges, were they sufficiently minor at the time to make failing to report at that time reasonable. The second is, as the Employer maintains, was the late report less than genuine, and instead an effort to present a potentially pre-existing injury as one caused by a workplace event in order to be able, now or in the future, to maintain that his shoulder problems emanated from a workplace incident. The Union maintains that the later issue is not even relevant here because it is not the specified reason why the grievor was disciplined.

The Union makes a valid point that not every twinge or pain felt during or after a day's work gives rise to an obligation to report a workplace injury. In SHP 692 Arbitrator Picher wrote:

> The issue before the Arbitrator is whether the Company had just cause for the discipline which it assessed. I am satisfied that it did not. Firstly, it is not unreasonable to conclude that the event which

> occurred when the grievor fell some three feet from the ladder/scaffold he was working on, landing on his feet, was in fact a workplace accident. Such a fall or stumble is likely not uncommon in any workplace and, on the moment it happened, the grievor felt no injury or ill effects. Whether an event does or does not constitute a "workplace accident" is obviously a gray area requiring an examination of the facts on a case by case basis. I do not consider that it was unreasonable for the grievor not to consider that he had been involved in a workplace accident when the event occurred. He simply descended three feet on to the ground from a horizontal ladder, landing on his feet and feeling no injury or other adverse effect.

In **CROA&DR 3774** Arbitrator Moreau found an employee had an obligation to report a minor passing injury pointing to the remedial and preventative purpose of the duty to report. However, there he saw it as more as a technical violation, noting the grievor was forthright about the incident in the investigation. He substituted a warning letter for the twenty demerits that had initially been imposed.

I find the grievor should have reported the incident that occurred on October 2, 2015, if not that day then soon after. He concedes being aware of the requirement to report a workplace injury to a supervisor. His description of what he felt on October 2, 2015 is that:

> 15.Q. In the re-enactment it states that you first noticed symptoms at home and you did not feel a sharp pain or hear any popping while at work. Do you agree with this statement?
> A. Yes.
>
> 16.Q. In your employee statement you said that you felt tight and sore when you got back into the TFO truck. Is this statement correct?
> A. Yes I felt it.
>
> 17.Q. To clarify when you first felt the pain was it at work? Or was it at home?
> A. First felt something wrong when I got into my truck, I felt a pop when I was lifting the keg of spikes. The pain didn't come on to a hour later.

> 18.Q. To review question 15, did you not just agree with the statement that while during the re-enactment you said at the time on October 2, 2015 you did not feel a pop? Now your telling me you did?
> A. I did feel a pop.

Assuming the grievor is being accurate rather than inconsistent in his answers, his description still suggests he experienced a pop and increasing pain following the lift he described. At that time, the grievor also knew that he had previously experienced sufficient pain in the same shoulder area to consult with his doctor on September 16 and, on September 16, be sent for an MRI. The grievor also said in his reporting statement made November 3, but referring to October 2, that the pain got worse to the point where he went to see his doctor. The date is unclear but it was before the MRI. That fact alone should have prompted him to report the injury to CN at the same time, if he had a real concern that it was caused by or aggravated by the October 2 events.

The grievor's explanation during the investigation as to why he did not report the October 2, 2015 incident until November 3rd was:

> 10A. Because I had been told by my doctors' orders not to report it because he believed I was suffering from something like arthritis or a strain and it wasn't until I received my MRI that he realized I had a completely torn off tendon.

The difficulty the Arbitrator has with the Employer's submission is not with their suspicion that the grievor was reporting this incident on November 3 to support the view that it was a workplace injury. Rather, it is that rather than charge, investigate, and impose discipline for falsely or misleading reporting an injury, they proceeded with an allegation that the reporting was late. The fact the report was one month late is only a minor part of their real concern.

Here, the grievor's decision not to report the incident once he realized it was causing or aggravating his pain denied the Employer a timely opportunity to investigate the incident for preventative purposes and to move immediately to assess the *bona fides* of the grievor's claim that the injury shown in the MRI was or was not caused by the October 2 event.

Had the Employer given notice of an investigation more directly related to its claim, it would have squarely put the grievor on notice, and allowed him to defend himself in the investigation, against its more substantial allegation. That is that, when he reported the October 2 incident, he neglected to disclose his pre-existing back and shoulder issues and the important point that the prescription for an MRI arose before October 2. His statement clearly reports the incident in a way that suggests the prescription for the MRI was something new, and given as a direct result of his pain following the October 2 incident. That cannot be characterized as forthright.

The penalty imposed has to be proportional to the workplace transgressions alleged. That is a significant aspect of the requirement for a fair process. Dismissal in this situation is too severe a penalty for the lateness of the report. It is replaced with a twenty demerit point penalty. It can reasonably be inferred that, if the allegation had more accurately reflected what was argued; that is dishonest, deceitful and fraudulent conduct, the penalty might be significantly different.

The Union alleges in part that the grievor's termination was motivated by a wish to release itself from the obligation of an Employer to a person with shoulder and back injuries, contrary to Human Rights legislation. I am not satisfied that is the case and have defined what I find was the Employer's justification above, that is what it viewed as deceitful conduct.

The grievance is allowed to the extent the dismissal will be set aside and replaced with a twenty demerit point penalty. The grievor will be reinstated to his job and otherwise made whole.

November 7, 2016

ANDREW C. L. SIMS
ARBITRATOR