CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2488

Heard in Calgary, Tuesday, 13 June 1994
concerning
CANADIAN NATIONAL RAILWAY COMPANY

and
CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS
[BROTHERHOOD OF LOCOMOTIVE ENGINEERS]

DISPUTE:

Appeal the discharge of Locomotive Engineer A. Paziuk of Prince Albert, Saskatchewan for fraudulent submission of injury claim form on October 27, 1993.

JOINT STATEMENT OF ISSUE:

On October 27, 1993, Mr. Paziuk filed an injury claim Form 3903 after coming on duty at 0345 for Train 594, ordered for 0400 at Prince Albert Yard. The particulars of the accident were shown on the Form 3903 as "Stepping out of Engineers' Booking in Trailer, step was icy, slipped off step hurting left ankle". The apparent cause of accident was shown as "icy step" and the time the Form 3903 was filed was shown as 0345.

An investigation was held in connection with this incident, which included an initial employee statement on November 5, 1993, followed by supplemental statements on November 22 and December 16, 1992. Upon completion of the investigation, the Company determined that Mr. Paziuk submitted a fraudulent injury claim on October 27, 1993 and he was subsequently discharged.

The Brotherhood contends that: 1.) Mr. Paziuk's injury claim of October 27, 1993 was not fraudulent but was an aggravation of a work related injury that occurred on October 5, 1993. 2.) The Company used the incorrect burden and standard of proof when assessing the evidence. 3.) Mr. Paziuk was not afforded a fair and impartial hearing as required by Article 86 of Collective Agreement 1.2. 4.) Mr. Paziuk was not advised in writing of the decision of the Company within 28 calendar days of Mr. Paziuk's statement as required by Article 86 of Collective Agreement 1.2.

The Brotherhood requests that Mr. Paziuk be reinstated and compensated for all lost time and benefits.

The Company has denied the appeal.

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD.) W. A. WRIGHT	(SGD.) B. LAIDLAW
GENERAL CHAIRMAN	FOR: SENIOR VICE-PRESIDENT, WESTERN CANADA

There appeared on behalf of the Company:

B. Laidlaw	– Labour Relations Officer, Edmonton
G. C. Blundell	– Manager, Labour Relations, Edmonton
M. A. King	– Solicitor, Edmonton
R. Pelesh	– District Superintendent, Transportation, Saskatoon
R. A. Gadd	– Manager Train Service, Biggar
B. J. Schmidt	– Acting Transportation Officer, Saskatoon
C. W. Hawkins	– Witness, Prince Albert

S. B. Hansen – Witness, Prince Albert
And on behalf of the Brotherhood:
M. D. Popescul, Q.C. – Counsel, Prince Albert
W. A. Wright – General Chairman, Saskatoon
M. Simpson – Sr. Vice-General Chairman, Saskatoon
A. Paziuk – Grievor

AWARD OF THE ARBITRATOR

The instant case involves a substantial amount of documentation, including the record of investigations and statements taken by the Company, as well as the statements and affidavits of a number of individuals filed by both parties. The grievance turns substantially on credibility, with the Company on the one hand alleging that the grievor fraudulently submitted an injury claim while the Brotherhood asserts that he was legitimately injured during the course of his employment as a locomotive engineer. As noted in the Joint Statement of Issue, the Brotherhood also alleges a violation of the grievor's procedural rights in respect of article 86 of the collective agreement.

The case advanced by the Company, if accepted, discloses a calculated attempt by the grievor to defraud the employer in respect of an injury which was not in fact sustained during the course of his employment. It alleges that Mr. Paziuk's injury to his ankle occurred during the course of a hockey game, and that he subsequently falsified the injury claim of October 27, 1993.

It is not disputed that on October 27, 1993 Mr. Paziuk was called for duty at the Prince Albert Yard for 0345. According to his account, as he was stepping out of the engineers' book in trailer he slipped and injured his left ankle. He completed his tour of duty, however, submitting an injury claim form to the manager, train service at the end of his shift, at approximately 1230 on the 27th.

On the portion of the injury claim form reserved for describing the particulars of the accident the grievor wrote: "Stepping out of Engineers' Book In Trailer, step was icy, slipped off step hurting left ankle. On the same form, under the heading "Apparent Cause of Accident" the grievor entered: "icy step".

On November 5 the Company obtained a statement from Mr. Paziuk with respect to the events surrounding his injury. During the course of that statement he effectively acknowledged that there was in fact no ice in front of the doorway of the book in trailer on the morning in question. He then elaborated that it was raining and cold, and that when he stepped on the mat outside the trailer door it moved, causing him to stumble. Three photographs tendered in evidence confirm that there is in fact no step as such from the trailer door to the platform outside, save for a drop of perhaps one to two inches. The mat is located immediately outside the door on the deck, from which three wooden steps lead to the ground.

In the circumstances, in the Arbitrator's view, the original statement made by the grievor on his injury claim form referring to icy conditions and stating, in part, "Slipped off step" is such as to raise obvious questions as to what in fact transpired. According to Mr. Paziuk's account at the first investigation

conducted by the Company on November 5, 1993 there was in fact no ice, nor was there a step in fact involved in his injury, although he continued to refer to the location of the mat as a "step".

During the course of his initial statement Mr. Paziuk also indicated that he sought immediate medical attention for his injury. Question and Answer 15 are recorded as follows:

> Q Did you see a doctor immediately after the injury to your left ankle?
>
> A I didn't think injury was serious enough to delay train or to book off. I then went to see Doctor Walton at Victoria Square at approx. 1300 on Wednesday, October 27.

When asked his doctor's diagnosis he replied by stating that the doctor found torn ligaments and swelling of the left ankle which would require casting and staying off it for some three weeks. He confirmed that a cast was applied on October 29, 1993.

Information subsequently obtained by the Company caused it to doubt the explanation advanced by Mr. Paziuk in his first statement of November 5, 1993. The Company learned that Mr. Paziuk had in fact visited Dr. Walton on October 26, the day before his purported injury at work, for attention to an ankle injury. That is confirmed in a letter written by Dr. Walton, dated November 8, 1993 and filed before the Arbitrator. A second physician, Dr. M. Klingler, wrote a medical certificate dated November 19, 1993 confirming his own involvement with the grievor's ankle injury which commenced on October 5, 1993. His report reads, in part:

> ... There was no way this injury could have healed by October 25 because he was working. The shooting pain in his left ankle continued October 26. The pain worsened on October 27, 28 and 29, 1993 and a cast was applied. The exacerbation of his pain was a complication of the October 5, 1993 injury.

The information which the Company obtained caused it to hold a second disciplinary investigation on November 22 and 23, 1993. Among the information which the Company had received were statements from Conductor T.R. Hislop, who worked with Mr. Paziuk on the morning of October 27, 1993, as well as Engineman/Watchman E.N. Riley. Both employees confirmed that at or about the time of the incident Mr. Paziuk told them that he had injured his ankle while going into the enginemen's booking in trailer, rather than upon leaving it.

During the course of his second disciplinary statement Mr. Paziuk confirmed that he did in fact see his physician on October 26. He then explained that he originally injured himself on October 5, 1993 while detraining a locomotive upon the completion of his tour of duty. He relates that the following morning his ankle was swollen, and that he went to Dr. Klingler that afternoon, when x-rays were taken. These revealed a tearing and stretching of the ligaments in his left ankle. He further relates that October 25, 1993, while entering a taxi to return to Prince Albert after his tour of duty to Shelbrook he again felt a sharp pain in his left ankle which he described as a "shooting" pain. Mr. Paziuk relates that the next morning, October 26, he went to visit Dr. Walton, as his left ankle was still swollen. According to the grievor following the slip at the booking in trailer he

decided to follow up on the recommendation made earlier to him by Dr. Walton, to have his ankle casted. In answer to the Company's inquiry, therefore, he elaborated that on the 27th, while he did not in fact see Dr. Walton, he went to the doctor's office to book an appointment with his secretary to have his ankle casted on October 29.

There is no doubt that Mr. Paziuk was suffering from an injured ankle on or about October 27, 1993. Nor does it appear substantially disputed that the same ankle was injured on or about October 5, 1993 and that he had received medical attention in relation to it, as described above. What is substantially in dispute is what originally caused the injury, and whether in fact there was any aggravation of it at all on October 27, 1993.

Subsequent to the investigation of November 22 and 23, 1993 the Company received yet further information which caused it to believe that the grievor's ankle injury was sustained during the course of a hockey game at Prince Albert on or about October 4, 1993. Relying upon statements obtained by CN Police from two persons who allegedly played against the grievor on the evening of October 4, the Company concluded that in fact the grievor's injury, for which he obtained medical attention on October 6, was sustained in a hockey match, and not while he was at work. The statements in question, from Mr. Doug Kalinowski and Mr. Darren Byers, state that they played against the grievor's hockey team, "known as Uncle Charlie's ... in early October" that the grievor was playing goalie, and was injured and had to leave the game, according to Mr. Byers "... with a hurt leg or ankle".

This further information, apparently obtained in the form of written statements by CN Police on December 13 and 15, 1993, caused the Company to reconvene the disciplinary investigation to examine the grievor still further with respect to the events which caused his injury and injury claim.

In addition to the information related above, the Company also came into possession of statements from three employees which substantially questioned the bona fides of the grievor's injury claim. Mr. C.W. Hawkins was employed as conductor on Train 594 on October 5, 1993, as part of the crew working with Mr. Paziuk when he alleges he first sustained his injury upon detraining a locomotive. In a statement taken on December 16, 1993 Mr. Hawkins relates that the grievor was limping at the time he booked on for his tour of duty shortly after 0400 on October 5, 1993. According to Mr. Hawkin's account Mr. Paziuk informed him that he had injured himself playing hockey. His statement relates, in part, the following:

> I was called for work for 0400 CDT on 1993 October 05. Mr. Paziuk was my engineman. Mr. Paziuk came into conductors' booking in room shortly after 0400 CDT. I noticed at this time he was limping. ... After we got on locomotive, Allan started to tell me what happened to his ankle. Mr. Paziuk informed me he was playing hockey the night before (October 04) and that he had sprained his ankle and damaged a muscle or ligament or something. He further stated to me that if his ankle didn't get better soon the next time he came to work he was going to twist his ankle detraining a locomotive and go on compensation. I told Allan at this time that I don't want to hear it ...

The Company further came into possession of statements by employees Scott B. Hanson and Chris Pocha. Mr. Hanson, a yard conductor, relates that he spoke with the grievor at Prince Albert on October 27, 1993 when the grievor's train was in coming. He relates, in part:

> Al Paziuk was on 594 and he stopped at the switch to talk to me. He spoke of how he could hardly walk as he fucked up his ankle playing hockey. He then asked me what compensation paid. I told him it would be 90% of your net earnings. Then he asked what light duties paid. I told him it is 1/30th per day of your monthly earnings. He then said that he was going to put in a 3903. I said Whatever ... Our conversation ended, I lined the shops for the yard engine and walked toward the booking in room.

Mr. Pocha, in a very brief statement dated November 18, 1993, states that he worked with Mr. Paziuk on the "outpost" on October 13, 1993, and that "... he mentioned that he hurt his ankle playing hockey."

During the course of the continuation of the Company's investigation of Mr. Paziuk, in light of the statements obtained in November and December of 1993, the grievor denied that he had sustained an injury during the course of a hockey game in early October. To this effect he provided the Company, as indeed the Brotherhood provided the Arbitrator, with signed statements and affidavits from a number of teammates stating that Mr. Paziuk did not play for his hockey team, also known as the Cherry Insurance Hockey Team, on October 4, 1993. The thrust of these statements is that another player, Mike LaPointe, in fact played as goalie on that date. Among the affidavits tendered at the arbitration hearing is a statement of Mr. Paziuk's brother, to the effect that the grievor was not in attendance at the hockey game on October 4, 1993 and of a friend of Mr. Paziuk's, Ms. Lisa Bayda, relating that she was with Mr. Paziuk on the evening in question at the Kinistino Hotel in Kinistino, Saskatchewan, and returned Mr. Paziuk to his home in Prince Albert at approximately 11:30 p.m. From the content of the affidavit it is clear that Ms. Bayda is or then was Mr. Paziuk's girlfriend.

The material before the Arbitrator discloses a substantial conflict of credibility. On the one hand is the statement of the grievor, supported by statements and affidavits of teammates, his brother and girlfriend, attesting to the fact that he did not play in the hockey game at Prince Albert on October 4, 1993. In stark contrast are the statements obtained by the CN police, from two players on the opposing team, which confirm that Mr. Paziuk did play and was injured to the leg or ankle. In support of their account are the statements of three employees, each of whom confirmed that the grievor openly admitted that he had been injured during a hockey game, and in at least two instances, as related by Mr. Hawkins and Mr. Hanson, expressed his intention to falsely claim a work related injury.

The Arbitrator does not dispute the assertion of Counsel for the Brotherhood who invokes the principle that in a case of this kind the standard of proof should be commensurate to the gravity of the misconduct alleged, and that an allegation of deliberate fraud should require clear and compelling evidence. That said, however, the Arbitrator is satisfied that a close examination of

the entire record leaves ample scope for an informed and reasoned assessment of the grievor's credibility in this matter.

There are, in my view, a number of substantial contradictions in the statements provided by Mr. Paziuk himself, as the Company's investigation progressed, the nature of which seriously call into question the good faith of his injury claim. As noted, when he filled out the injury claim form, at a time when there was no particular discussion of the merits of his claim, Mr. Paziuk stated "step was icy, slipped off step ...". During the course of the first interview, when he was asked about the precise nature of the weather, he confirmed that in fact there was no ice, but that it was raining. Further, he then stated that he did not slip on a step, but rather on the door mat situated outside the door of the book in trailer. That difference alone, coming as it did in the span of time between October 27 and November 5, 1993 raises natural concerns about Mr. Paziuk's candour in both the formulating and explanation of his alleged injury.

Examination of the medical documentation, in comparison to statements made by the grievor during the course of his statements of November 22 and 23, 1993 cause further concerns. At Question and Answer 15 of his statement of November 22, 1993 Mr. Paziuk states, in part, in answer to a question as to why he did not earlier report his injury of October 5:

> ... I feel the other injury on October 05 in my mind was just about healed. I didn't miss any work. On October 27, when I slipped and heard a "pop", that in my mind was when I felt my injury was serious enough to submit a 3903 because the pain in my ankle was extreme and I felt that then I might be missing work because of this injury.

The above statement is, in the Arbitrator's view, difficult to reconcile with part of the report of Dr. Klingler tabled in evidence. Far from reflecting that prior to 27th of October the grievor felt that his ankle injury was healing, Dr. Walton's report of November 19, 1993 confirms that the grievor came to see him on October 26 and that "... the shooting pain in his left ankle continued October 26."

The Brotherhood has adduced no substantial evidence to explain why three fellow employees, including a conductor who worked with Mr. Paziuk on October 5, 1993, would fabricate false statements in relation to his having sustained his injury during the course of a hockey game. The inconsistencies in Mr. Paziuk's own statements, and the ultimate inadequacy of his general explanation, including the suggestion that he failed to report the October 5, 1993 injury for fear of being disciplined, leave the Arbitrator in substantial doubt as to the credibility of his account of events and, indeed, the legitimacy of his injury on duty claim. The obvious failure of candour on the part of the grievor during the initial stages of his claim, both in relation to the statements in the claim form and the embellishment, if not outright alteration, of his explanation from the time of the first disciplinary interview cause me to be satisfied that the statements related by Mr. Hawkins and Mr. Hanson are to be preferred to those tendered in evidence from the grievor's teammates, brother and girlfriend, as well as his own denial of wrongdoing. In the result, notwithstanding the volume and

complexity of the evidence, I am satisfied that the Company has discharged its burden of establishing, on the balance of probabilities, through clear and compelling evidence, that Mr. Paziuk knowingly engaged in a falsehood in respect of his injury on duty claim of October 27, 1993. On that basis I am satisfied that the decision to terminate his services was justified, and that this is not an appropriate case for the substitution of a different penalty.

The Arbitrator has further reviewed the material in respect of the allegation of the Brotherhood that the procedure followed by the Company in respect of the disciplinary investigation was in violation of the obligation of a fair and impartial hearing, as well as the time limits, provided for under article 86 of the collective agreement. Much has been written by arbitrators in this Office with respect to the elements of a fair and impartial investigation. Suffice it to say that the jurisprudence has long acknowledged that a Company investigation into a disciplinary matter need not be conducted on the model of civil trial, or indeed of an arbitration. The process is intended to assist the Company in determining the facts of an incident, with a view to assisting its decision as to whether to assess discipline, while at the same time affording the employee an opportunity to state his or her side of the matter by way of denial or explanation in mitigation. The Arbitrator cannot accept the submissions made by Counsel for the Brotherhood that the parties intended, by the language of article 86 of the collective agreement, to elevate the process to one of a judicial or quasi-judicial hearing to which all of the rules of natural justice, as they have evolved since the hallowed decision of Lord Loreburn in Board of Education v. Rice [1911] A.C. 179 (H.L.) to more recent decisions of the Canadian courts with respect to the duty of fairness in statutory decision making are to have any direct application. The purpose and limits of the concept of a fair and impartial hearing have been amply discussed in the decisions of this office, and need not be further elaborated here (see CROA 628, 1163, 1575, 1858, 2280 and CROA 2073 where the following comment was made:

> As previous awards of this Office have noted (e.g. CROA 1858), disciplinary investigations under the terms of a collective agreement containing provisions such as those appearing in Article 34 are not intended to elevate the investigation process to the formality of a full-blown civil trial or an arbitration. What is contemplated is an informal and expeditious process by which an opportunity is afforded to the employee to know the accusation against him, the identity of his accusers, as well as the content of their evidence or statements, and to be given a fair opportunity to provide rebuttal evidence in his own defence. Those requirements, coupled with the requirement that the investigating officer meet minimal standards of impartiality, are the essential elements of the “fair and impartial hearing” to which the employee is entitled prior to the imposition of discipline. In the instant case, for the reasons related above, I am satisfied that that standard has been met.)

The record before the Arbitrator does not disclose a departure from the general standards of a fair and impartial hearing in the

manner in which Mr. Paziuk was treated through the course of the admittedly extensive process of disciplinary investigation. The record discloses that the length of the hearings was in substantial part occasioned by the grievor's own requests for adjournments before answering questions put to him by the employer. There was not, in my view, any failure of particularity in the notices provided to Mr. Paziuk, as it was evident from the outset that all of the investigations concerned the bona fides of his injury on duty claim. Where, for example, the investigation was reconvened following the obtaining of inculpatory statements by the Company in relation to the grievor's alleged involvement in the hockey game, the rules governing a fair and impartial hearing are sufficiently satisfied if, at the outset of the hearing, the grievor is made aware of all statements or allegations then in the possession of the Company. This was done and I can see no unfairness or prejudice having operated against Mr. Paziuk. As is evident from the record related above, information of an inculpatory nature came into the Company's hands on a piecemeal basis, generally after it had concluded receiving a statement from Mr. Paziuk, and often in the course of attempting to verify the accuracy of his statements. In the circumstances the Company followed the only course available to it, and one which in my view was reasonable in the circumstances.

Nor can I find a violation of article 86 in the timing of the notice to the grievor of his discharge. Mr. Paziuk was discharged on December 20, some four days following the last statement received by the Company, on December 16, 1993. In my view, for the purposes of this grievance, the investigation can fairly be said to have concluded on that date. Moreover, for reasons reflected in CROA 1696, the time limits provided for in article 86 have been found to be directory, rather than mandatory, in relation to the assessment of discipline. In the circumstances I cannot find that there has been any violation of the procedural requirements of the collective agreement.

For all of the above reasons the grievance must be dismissed.

6 June 1994

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MICHEL G. PICHER
ARBITRATOR