

**CANADIAN RAILWAY OFFICE OF ARBITRATION**

**CASE NO. 3384**

**Heard in Calgary, Thursday, 13 November 2003**

**concerning**

**CANADIAN PACIFIC RAILWAY**

**and**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**EX PARTE**

**DISPUTE:**

Dismissal of Mr. Tony Benincasa.

**BROTHERHOOD'S STATEMENT OF ISSUE:**

The grievor maintains that, on Sunday, October 6, 2002, he worked cleaning boarding cars located at Glacier, B.C. During the course of that day, the grievor was injured while working and was later diagnosed with stretched ligaments in the outside of his left ankle. The Company maintains (at least by inference) that the grievor did not work on October 6, 2002. As a result, the Company dismissed the grievor for filing both a fraudulent wage claim and a fraudulent injury report. The Brotherhood grieved.

The Union contends that: **(1.)** In dismissal situations, the Company must provide clear, cogent and convincing proof that the dismissal was justified. In the present case, it is unable to do so; **(2.)** The dismissal of the grievor was unjustified and, therefore, illegitimate.

The Union requests that the grievor be reinstated into Company service forthwith, without loss of seniority and with full compensation for all losses incurred as a result of this matter.

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

FOR THE BROTHERHOOD:

(SGD.) J. J. KRUK

SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

M Moran – Labour Relations Officer, Calgary  
E. Maclsaac – Manager, Labour Relations, Calgary  
D. Guérin – Labour Relations Officer, Calgary  
T. Miller – Track Programs & Equipment Supervisor  
L. Monteith – Extra Gang Labourer  
J. Legresley – Camp Attendant  
D. Tukeman – Machine Operator

And on behalf of the Brotherhood:

P. Davidson – Counsel, Ottawa

J. J. Kruk – System Federation General Chairman, Ottawa  
D. Brown – Sr. Counsel, Ottawa  
H. Helfenbein – General Chairman – Pacific Region  
T. Benincasa – Grievor

### **AWARD OF THE ARBITRATOR**

The issue in the case at hand is one of credibility. The grievor maintains that he injured his ankle while performing cleaning duties on the morning of Sunday, October 6, 2002 on the thirty-three car boarding facility of the Pacific No. 3 Steel Crew, stationed adjacent to the main line at Glacier, British Columbia. According to the grievor's account, the injury occurred while he was working at or about noon on that day, that he then proceeded to his vehicle, parked in a concealed location at a considerable distance, and that he then drove to a fellow employee's motel room in Revelstoke, returning to the camp later that evening. Mr. Benincasa states that he had parked his car in a concealed location, behind a bunk house utilized by running trades crews, because he did not want to be troubled by other employees asking him to give them rides. The grievor reported his injury to Supervisor T.S. Miller the following Monday morning. It is common ground that the grievor made an injury-on-duty claim and received Workers' Compensation benefits for his ensuing absence from October 7 to November 6, 2002.

The issue is whether the grievor was in fact at work, or indeed present in the camp, at the time in question. The evidence of a number of employees indicates that Mr. Benincasa was last seen by his co-workers at or about 10:00 p.m. on Saturday evening, when he left a recreation car where they had been watching movies. His bunk car roommate, Mr. Dave Tukeman, states that he returned to the camp at approximately 1:30 a.m. on Sunday morning, and that he did not see the grievor when he went to bed at that time. Statements taken from employees Jacques Legresley, Les Monteith, John Myles and Arthur Hooper, all of whom were present at the boarding car site on Sunday October 6, is that none of them saw the grievor, or his vehicle until he returned to the camp after approximately 6:00 p.m. on Sunday evening. Mr. Legresley, who is responsible for maintaining the power generators, as well as the heating and electrical system throughout the boarding cars, states that he walked the full length of the cars on a number of occasions during the course of the day, commencing at approximately 8:00 a.m., and that he did not see the grievor. Employee Les Monteith states that he had occasion on Sunday to search through the train in an attempt to find the grievor, but was not successful. He further states that while searching for Mr. Benincasa he noticed that the boarding cars had not been cleaned.

Based on the evidence gathered during the course of its own investigation the Company concluded that in fact Mr. Benincasa was not at work on the morning of Sunday, October 6, 2002 when he claims to have suffered a work related injury. Given its conclusion that he had deceived the Company in an attempt to gain fraudulently a leave of absence with compensation payments, he was discharged on January 30, 2003.

The Arbitrator agrees with the submission of counsel for the Brotherhood to the effect that the burden of proof rests upon the Company, and that a charge of fraudulent misrepresentation in a wage or benefit claim requires clear and cogent evidenced to sustain a conclusion justifying termination. The fact remains, however, that in a civil case such as this the evidence must be weighed according to the preponderance of probabilities.

What, then, does the evidence disclose? There can be little doubt that a number of other employees were present at the boarding car facility on Sunday, October 6, 2002. None of those

employees saw the grievor at any time prior to the evening of that day. Perhaps most significantly, the grievor's bunkmate, Mr. Tukeman, states that he cannot recall having seen him in their shared bunkroom when he returned and went to bed at 1:30 in the morning on that Sunday. Additionally, while the grievor states that he saw Mr. Tukeman at their bunk car immediately after spraining his ankle, Mr. Tukeman states that in fact he did not see him until considerably later, that evening. When that evidence is considered together with the evidence of Mr. Legresley and Mr. Monteith, who moved through the entire length of the train without seeing the grievor, one of them observing that cleaning work had not been performed, the Arbitrator is compelled to the conclusion that the preponderance of the evidence would support the view of the Company, which is that Mr. Benincasa was not present at the boarding car facility on the morning of October 6, 2002 and did not sustain the injury to his ankle while in the course of performing work. While the Arbitrator appreciates that there are certain inconsistencies and disagreements in respect of some aspects of the testimony of the witnesses relied upon by the Company, evidence on the essential point of no-one having seen the grievor at any time during the course of the day on Sunday, October 6 remains fundamentally unshaken. Additionally, in accepting the grievor's account of events, it is less than clear why, with an injured ankle, he would not have enlisted the assistance of his roommate, Mr. Tukeman, who was in the car apparently adjacent to where the accident occurred, to bring his car from where it was parked, at an estimated distance of one-half mile.

Having regard to the whole of the evidence, after a careful review of each of the investigatory statements, and the testimony of the employees at the arbitration hearing, I am compelled to the conclusion that, on the balance of probabilities, the grievor was not present at the workplace on the morning of October 6, 2002 and did not sustain his injury during the course of his employment.

In these circumstances, for reasons well established in prior jurisprudence, I am also compelled to the conclusion that the termination of the grievor's services was justified. The grievance must therefore be dismissed.

November 17, 2003

(SIGNED) MICHEL G. PICHER  
ARBITRATOR