

CASE NO. AH 700

IN THE MATTER OF ARBITRATION

BETWEEN

CANADIAN PACIFIC RAILWAY

(the "Company")

and

CANADIAN SIGNALS AND COMMUNICATIONS
SYSTEM COUNCIL NO. 11 OF THE IBEW

(the "Union")

Dismissal of "JC"

#9422513

AH 700

Arbitrator:

Richard I. Hornung, Q.C.

For the Company:

Diana Zurbuchen - Manager Labour Relations
Lauren McGinley - Assistant Director Labour Relations
Jodie Sokolosky - Assistant Director S&C Operations
Jeff Switzer - GM S&C Operations

For the Union:

Denis Ellickson - Counsel
Lee Hooper – General Chairman IBEW SC No. 11

Heard in Calgary, January 8, 2020

AWARD

I

1. At the request of the Union, the Grievor's name is being withheld and replaced by the initials "JC" having regard to the sensitive nature of the information contained in this award, particularly as it pertains to his son.
2. The Grievor began his employment with the Company on September 12, 2005 and after 13 years of service, was dismissed by letter of April 11, 2019 (Company Tab 1) for the reasons as set forth below:

Please be advised that you have been dismissed from Company Service for the following reason(s):

Your attendance and falsified SAP claims entered for full days of work on January 7-11, 13-17, 21-25, 28-31, 2019 and February 4-8, 11-14, 18-22, 25-28, 2019 as well as for falsifying regulatory inspection reports between the dates of January 3, 2019 to February 28, 2019, specifically at locations Miles .2 Milk River Spur, Mile 12.16 Montana Subdivision and Mile 81.99 Taber Subdivision.

Summary of Rules violated:

| <i>BOOK</i> | <i>SECTION</i> | <i>DESCRIPTION</i> |
|--|-----------------------|--|
| <i>Signals & Communications Requirements</i> | <i>Item 9.3.1.b</i> | <i>When Place in Service and at Intervals not to Exceed One Week</i> |
| <i>Signals & Communications Requirements</i> | <i>Item 9.3.2.1 a</i> | <i>When Place in Service at Intervals not to Exceed One Month</i> |
| <i>S&C Recommended Practice 1003 Batteries</i> | <i>Item 8.0 a.</i> | <i>Inspections and Tests</i> |
| <i>S&C Recommended Practice 1003 Batteries</i> | <i>Item 8.1c.</i> | <i>Voltage and Standby Power Tests</i> |
| <i>SPC 41 M/W Rules and Instructions</i> | <i>1.2</i> | <i>Employee Responsibilities</i> |

3. The relevant facts are not in dispute.
4. The Grievor was an S&C Maintainer whose safety sensitive position required him to perform a variety of maintenance work and Transport Canada mandated tests on signals and communications equipment vital to the operation of crossings. The role is crucial to the safe operation of trains and, in his function, the Grievor was responsible to not only perform the mandatory testing and inspections but also to report them in accordance with Transport Canada's requirements.
5. An investigation of the Grievor's conduct revealed that on 27 instances he falsified records and represented that he had conducted the safety sensitive tests that were required of him when, in fact, he had not.
6. In addition, on 9 occasions, the Grievor falsified his time sheets (SAP) to represent that he was working for the Company when, in fact, he spent significant periods of time at his home or his father's home.
7. Prior to the misconduct described in this grievance, the Grievor had no demerits on his record and had not incurred any discipline in the seven prior years.
8. The circumstances of this case are sad and unfortunate. The reasons provided by the Grievor for his failure to carry out his safety sensitive duties and the falsification of his time sheets was because of the necessity for him to care for his son who had developed an addiction to opioids.
9. His 16 year old son lived with him at their home in Lethbridge. His addiction to opioids became apparent in October 2018. On two occasions he overdosed and the Grievor rushed him to the hospital in Lethbridge. On three other occasions, the Grievor had to administer naloxone as a result of his son's overdosing. The Grievor spent virtually all his non-working hours caring for and looking out for his son's wellbeing.

10. In October 2018, in an attempt to seek help for his son, the Grievor contacted EFAP. The Grievor also sought assistance to address the stress being caused by his family issues. This consultation ultimately resulted in OHS removing the Grievor from service for alleged alcohol and substance abuse issues.
11. After he advised Company Managers that he was out of service because he was having difficulties away from work, the Grievor was placed back into service and compensated for the 20 days that he was wrongfully held from service. The evidence does not suggest that the Grievor disclosed the nature of the difficulties he was experiencing.
12. As reflected in the GPS readings, in the nine instances where the Grievor submitted fraudulent time sheets for his time spent at work, he was either at his own home or at his father's home looking after his son.
13. While conceding that the circumstances as alleged by the Company reflect the relevant facts, the Union argues that the penalty of termination is excessive having regard to the fact that: the Grievor took full responsibility for his actions; he did not try to deflect responsibility; he had earlier advised the Company of the "severe family issues in his life"; and that his actions were not the willful behavior of an employee attempting to defraud the Company but rather that of an individual suffering from deeply personal issues.
14. Mr. Hooper notes the following in his letter dated May 1, 2019 (Union Tab 5):

One does not dispute that Mr. "JC" provided time entries that upon scrutiny were found to be incorrect. He also failed in his mandatory obligations to protect the safety of the public and fellow employees during this dark period in his career. "JC" took full responsibility for his actions at the subsequent investigation. He did not attempt to deflect responsibility but advised the Company that he was currently dealing with severe family issues in his life that resulted in his failed employment obligations over the last few months. He reiterated during the interview process that this was not the willful behavior of an employee attempting to defraud the Company but that of an individual suffering from deeply personal issues. This was reaffirmed by a medical

professional that “JC” had sought after his attendance issues came to light and continues to meet with regularly.

II

Decision

15. I accept that the stress of dealing with his son’s condition was a factor in the Grievor’s misconduct. Most of any of us can understand the stress and anxiety which he must have faced over the period of time while his son was in the grasp of the opioid addiction (he now lives in Montreal with his mother and has completed a 90-day inpatient rehabilitation program).

16. While the Union does not assert that the psychological stress over his son’s addiction negated the Grievor’s culpability, it argues that his son’s circumstances is a pervasive mitigating factor which – taken with others (including his long service) - should lead me to the conclusion that dismissal is not warranted.

17. As stated by Arbitrator Schmidt in *CN Railway and the IBEW System Council No. 11, Ad Hoc 638*:

The difficulty with the Union’s position in this case is that, quite apart from the grievor’s failure to perform essential tests necessary to ensure overall safety of train operations, he was persistently dishonest and deceptive towards the Company over a period of months. There is every indication that the grievor knew exactly what he was doing throughout the period in question.

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. ... arbitrators require that the medical evidence proffered must substantiate a link between the misconduct at issue and the medical condition.

[Emphasis added]

18. Although Arbitrator Schmidt’s case (supra) dealt with the impact of an alleged medical condition on the Grievor’s behaviour, her references to considerations for varying a penalty involving theft (which includes the theft of time) are instructive

for our purposes here. She refers to comments by Arbitrator Ish in: *Re Canada Safeway Ltd. and RWDSU (MacNeil) (1999), 82 L.A.C. (4th) (para. 64)*:

*We do accept that theft is a very serious employment offence which prima facie is just cause for termination. Especially where the theft is premeditated ..., the onus that shifts to the Union to establish that the penalty of discharge should be substituted is quite a high one. **Where illness or psychological circumstances arise** which are relied upon to explain the aberrant conduct, there are a number of necessary elements that must be established before an arbitration board can feel secure that reinstatement under any conditions is the proper course of action. ..., (they) would appear to include the following:*

(1) It must be established that there was an illness, or condition, or situation being experienced by the grievor. Sometimes this is a true illness while other times it might be circumstances in a person's life that cause considerable psychological strain and can be as debilitating as a fully recognizable illness. ...

(2) Once an illness or condition has been established, then a linkage or nexus must be drawn between the illness or condition and the aberrant conduct. The mere existence of psychological stress does not automatically lead to improper behaviour such as theft. Again, most commonly this is established by expert evidence. ...

(3) If a linkage between aberrant conduct and the illness or condition is established, an arbitration board must still be persuaded that there was a sufficient displacement of responsibility from the grievor to render the grievor's conduct less culpable. ..., it still may be concluded that the grievor possesses sufficient responsibility for his or her actions so that a substitution of penalty is not appropriate. ...

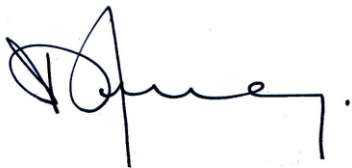
(4) Assuming the three elements set out above have been established, the arbitration board must be satisfied that the grievor has been rehabilitated. This involves an acceptance by the arbitration board that the grievor's fundamental problems are under control. ... there must be a sufficient degree of confidence that the employee can return to the workplace as a fruitful employee and that the underlying problems that led to the improper behaviour in the first place have been resolved so that the risk of that behaviour, or similar behaviour, occurring in the future is minimized. Again, in addition to the evidence of the grievor, it is usual that expert evidence would be submitted to establish that rehabilitation has occurred.

19. Notwithstanding: the existence of the psychological circumstances; the Grievor's nearly 14 years of service; his commendable discipline record; his acceptance of responsibility; and, his genuine remorse, the reality is that, between January 3, 2019 until February 28, 2019, he not only failed to carry out his workplace obligations, but also falsified inspection records regarding the same. Equally

egregiously, during the same period of time, he falsified his SAP records and claimed for a full days' work on nine separate when, in fact, he was either at his home or at his father's home for significant periods of time; but, in all events, not at work.

20. His transgressions were not momentary or involuntary aberrations. They continued over a period of almost two months. Given the same, the inescapable inference is that they were premeditated. While I sympathize with the Grievor's plight and have considered the mitigating circumstances raised by Mr. Hooper, I conclude that the prolonged, persistent and consistent nature of the Grievor's dishonesty on his SAP claims, let alone the jeopardy in which he put the operational safety of the Company by the abandonment of his duties and falsification of inspection records, are simply too significant to be outweighed by the circumstances to such degree to warrant his reinstatement.
21. Regrettably, I conclude that the Grievor's misconduct cannot be reconciled with his continued employment with the Company.
22. The grievance is dismissed.

Dated at Calgary, Alberta this 24th day of March, 2020.

A handwritten signature in black ink, appearing to read "R. Hornung", with a stylized initial and a long horizontal stroke ending in a vertical line.

Richard I. Hornung, Q.C.
Arbitrator