SHP730

ARBITRATION TRIBUNAL

CANADA
PROVINCE OF QUEBEC

Submission no.:

Date: September 11, 2017

THE PARTIES BEFORE THE ARBITRATOR ARE: Me Sophie Mireault

UNIFOR LOCAL 100
Hereinafter the "Union"
And

CANADIAN NATIONAL RAILWAY COMPANY
Hereinafter the "employer"

Grievances: CN160915Garneau
CN181215Garneau
CN170915Garneau (Philippe St-Amand)

Arbitration pursuant to Part I of the Canada Labour Code
File: **YM2718-3981**

ARBITRATION AWARD

PREAMBLE

The procedure used for this arbitration is similar to that used for the "expedited railway arbitration process (CROA)."[1] Although Unifor local 100 is not a member of the Canadian Railway Office Arbitration (CROA), a similar process has traditionally been used for this type of arbitration.

In these cases, the parties read their briefs and formulate a reply after the briefs have been read. Witnesses may be called at the hearing, but this is an exception. As a general rule, the decision to hear the evidence under oath is set aside until both parties have presented their briefs. From that point forward, the disputed facts are more clearly identified and the witnesses' testimony may be limited to the facts.

> The CROA system forces the parties to make that discovery on their own, before the hearing, and not at its conclusion. The resulting difference in time and cost expended is significant[2].

DISPUTE:

Grievance CN160915Garneau - Assessment of 25 demerits to the discipline record of Philippe St-Amand, car mechanic, for having slept during his work shift on September 15, 2015.

Grievance CN181215Garneau - Assessment of 20 demerits to the discipline record of Philippe St-Amand for failing to make the necessary arrangements at the appropriate time to comply with the recommendations of the Bureau d'évaluation médical (BEM [medical assessment office].

The addition of these 20 demerits to the Grievor's discipline record resulted in his dismissal as a result of having accumulated 60 demerits. On June 12, 2015, 20 demerits had been assessed to the Grievor for "*Allegedly using an inadequate work procedure on track s231 on June 12, 2015.*"[3] This incident is not under dispute.

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[1] Remarks by Abe Rosner, AD-HOC ARBITRATIONS ON CANADIAN RAILWAYS, presented to the 50th Annual Meeting of the National Academy of Arbitrators, May 23, 1997, Chicago; Michel G. Picher, **The Canadian Railway Office of Arbitration**: **Keeping Grievance Hearings on the Rails, LABOUR ARBITRATION YEARBOOK 1991 volume 1,** Edited by William Kaplan, Jeffrey Sack, Morley Gunderson, Toronto, Butterworths-Lancaster House, 1991.

[2] **The Canadian Railway Office of Arbitration: Keeping Grievance Hearings on the Rails,** cited above, note 1.

[3] Discipline history of Philippe St-Amand.

Grievance CN170915 Garneau - Dismissal of Philippe St-Amand for having made a false declaration concerning an alleged work accident on September 17, 2015, and for having made a false declaration with respect to claim 500996863.

ASSESSMENT OF DEMERITS

The Employer uses the Brown system of discipline. This system involves the use of progressive and cumulative discipline based on the assessment of demerit points *"so that the employee can understand the seriousness of a unique incident or succession of similar or different incidents*." [translation] The accumulation of 60 or more demerits results in dismissal. Twenty demerits are removed from the employee's record for each consecutive twelve-month period during which he was not subject to any discipline measure. The Employer may also use other forms of corrective measures such as demotion, suspension or dismissal[4].

[4] Company submission.

EX PARTE STATEMENT OF ISSUE

The parties were unable to agree on a joint statement of issue.

The following people were present at the hearing:

FOR THE UNION:

B. Stevens – *National Rail Director, Unifor* (hearing of December 16, 2016)

M. Germain – *Local Area Director, Unifor* (hearing of May 25, 2017)

K. Hiatt – *Chairman, Local 100*

J. Guimet – *Vice-Chairman, Local 100*

P. St-Amand – *Employee (Grievor)*

S. Moreau – *Representative for Lodge 72, Local 100*

FOR THE COMPANY:

D. Laurendeau – *Director - Human Resources*

D. Fisher – *Senior Manager, Labour Relations*

P. Rathé – *District Officer, Mechanical Department*

S. De Roy – *Workers' Compensation Claims Adjuster*

FACTS

[1] On September 9, 2009, Philippe St-Amand (the Grievor) was hired by the Employer as a car mechanic. On November 27, 2014, he sustained a work accident when he stepped on a rock as he was leaving the shop. The CSST (workers' health and safety board) cited a diagnosis of a sprain to his left ankle. The Grievor was off work until September 8, 2014, following which he returned to work with modified duties. On December 24, 2014, he went back on sick leave due to consequences from his accident of November 27 and he returned to work on modified duties on January 30, 2015. These modified duties consisted of repairing cars on a stable floor inside the shop.

[2] On April 21, 2015, Dr. Alain Quiniou, orthopedist, diagnosed that the sprain to his left ankle had stabilized and did not require any treatment, that there was no anatomicophysiological deficit (APD) or functional limitation, while on May 12, 2015, Dr. Philippe Lebrun concluded that the Grievor's injury had not healed, that he walked unsteadily and needed physiotherapy.

[3] On July 14, 2015, Dr. Jean-Pierre Dalcourt of the Bureau d'évaluation médical (BEM [medical assessment office]) examined the Grievor at the Employer's request in view of the difference of opinion between doctors Alain Quiniou and Philippe Lebrun as to the date of stabilization and the need for treatment following the work accident of November 27, 2014.

[4] In his opinion dated July 15, 2015, Dr. Dalcourt of the BEM determined the injury stabilization date to be July 14, 2015, and concluded *"permanent impairment of the patient's physical integrity (sprain of the left ankle with functional consequences [ankylosis] 2%) and functional limitations."* He thus determined that the Grievor "*should avoid performing repetitive tasks on unstable ground or in an unstable position (scaffolding) and should wear a high ankle stabilizer boot*."

[5] On July 24, 2015, the CSST rendered a decision confirming the conclusions of

the BEM.

[6] On August 25, 2015, Samuel De Roy, the Employer's workers' compensation claims adjuster, informed the Grievor by email that a meeting had been scheduled with representatives from the CSST to assess, among other matters, his residual work capacity. Samuel De Roy thus informed him that the Employer was disputing the CSST's decision regarding the conclusions made by the BEM on July 15, 2015.

[7] On September 15, 2015, while he was temporarily assigned to the 11:00 PM to 7:00 AM night shift at the Company's Garneau Yard where he worked, the Grievor, who was supposed to be assigned to repair railcars, was apparently caught by his supervisor, Richard Tremblay, sleeping on a chair next to a computer used by the machinists.

[8] On September 17, 2015, the Grievor declared another work accident again involving his left ankle. In his claim, he wrote: *"At around 1:00 AM on September 17, 2015, when I was moving wheels with the loader I had to walk to move the trackmobile as it was in my way. I climbed down the loader ladder. I walked a few steps and twisted my left ankle in a 'hole.' It was foggy and the ground was uneven and poorly lit."*

[9] He met Dr. Bélier that same day, who gave him a medical certificate with a diagnosis of a repeated sprain to his left ankle and prescribed a two-week work stoppage.

[10] Shortly after, the Employer hired the firm Rapide Investigation to "*perform surveillance on Philippe St-Amand to determine his daily physical activities and survey his limitations.*"[5] Rapide Investigation kept the Grievor under video surveillance on September 19, 20, 21 and 28, 2015.

[11] According to the Employer, railroads are subject to legal obligations regarding health and safety. Work accidents—particularly those that result in the employee

[5] Investigation report by Rapide Investigation, p. 3.

being unable to work—must undergo a joint re-enactment process.

[12] Thus, on September 21, 2015, the Grievor took part in a joint re-enactment of the alleged accident. Present at this re-enactment were Samuel De Roy; Yannick Pichette, a colleague of the Grievor; Robert Champagne, Mechanical superintendent; Richard Tremblay, supervisor; and Christian Laforest, risk management officer. During this re-enactment, the Employer's representatives found that the Grievor did not wear the high ankle stabilizer boot prescribed in the July 15, 2015, notice issued by the BEM following Dr. Dalcourt's examination. The Employer decided to launch an official investigation regarding the Grievor's failure to comply with the recommendations of the BEM.

[13] On September 29, 2015, the investigation firm submitted its surveillance report.

[14] On October 8, 2015, the CSST rendered a decision accepting the Grievor's claim for the work accident of September 17, 2015. The diagnosis was for a sprain to the left ankle.

[15] On October 14, 2015, Dr. Mario Giroux performed a medical assessment at the Employer's request. He diagnosed a sprain to his left ankle related to the incident of September 17, 2015. He is of the opinion that there are no residual signs of this sprain and that the current problem is the result of chronic instability of the left ankle due to weakness of the lateral ligamentous complex. He recommended a stabilization date of October 14, 2015, with no permanent impairment or functional limitations.

[16] Following this incident, the Grievor was absent from work from September 17 to December 17, 2015. Upon his return, he was told not to report for duty pending the Employer's investigation.

[17] In a supplementary report dated December 4, 2015, Dr. Giroux wrote that he

had viewed the Grievor's shadowing videos and declared that the Grievor could be seen wearing regular sneakers and walking normally, without limping, moving his ankles freely and without any signs of pain.

[18] On December 11, 2015, Dominic Barbeau, assistant Mechanical manager, sent a notice to the Grievor informing him that he had been summoned to an investigation during which he would be required to produce three official statements:

> 1. For allegedly having slept during your regular work shift on September 16, 2015. (…)
> 2. Concerning the circumstances of an alleged work accident during your shift on September 17, 2015, and an alleged false declaration concerning claim #500996863. (…)
> 3. For allegedly having failed to comply with the recommendations of the Bureau d'évaluation médical (BEM) [medical assessment office], further to your assessment of July 14, 2015. (...)

[19] On December 18, 2015, the Grievor was questioned during the Employer's investigation by Dominic Barbeau regarding the three matters under investigation. Union representative Alain Campagna accompanied the Grievor.

[20] On January 8, 2016, the Grievor was dismissed for having accumulated 60 demerits, for having made a false declaration concerning an alleged work accident on September 17, 2015, and for having made a false declaration with respect to claim 500996863.

[21] On January 12, 2016, the CSST rendered a decision following an application for review whereby it confirmed the decision of October 8, 2015, declared that the employee had sustained a work injury (left ankle sprain) on September 17, 2015, and declared that the claimant was entitled to the benefits provided by law.

[22] On January 28, 2016, the Union submitted the company's decision to dismiss Philippe St-Amand for appeal under Step II of the grievance procedure. The three

grievances in the dispute have been described previously.

[23] Article 27.7 of Agreement 12 between the Employer and the Union states:

> **Step I**
>
> Within 35 calendar days of the alleged grievance the authorized local union representative(s) may progress the grievance in writing, outlining all pertinent details and date of grievance to the designated railway officer (...).
>
> A decision shall be rendered in writing within 28 calendar days from the date of receipt of the grievance and a copy will be furnished to the employee and the authorized union representative.
>
> **Step II**
>
> If the matter remains unresolved, within twenty-eight (28) calendar days following receipt of the decision under Step I, the Regional Vice-President of the Union may appeal the decision in writing to the designated Company Officer… (…)
>
> Where the appeal concerns the interpretation or alleged violation of the collective agreement, the appeal shall identify the Rule(s) and clause of the Rule(s) or Appendix involved. The appeal shall be accompanied by a copy of the Company's decision rendered at Step I of the grievance procedure.
>
> A decision shall be rendered in writing within twenty-eight (28) calendar days of receipt of the grievance.
>
> (…)

[24] The grievances were submitted to arbitration in accordance with article 28.1 of the collective agreement on or around August 24, 2016:

> A grievance concerning the interpretation or alleged violation of this Agreement, or an appeal by employees that they have been unjustly disciplined or discharged, and which is not settled through the grievance procedure may be referred by either the Headquarters Labour Relations Department, Canadian National Railway Company or Unifor Local 100 herein defined as the parties to a single arbitrator for final and binding settlement without stoppage of work.

[25] On September 20, 2016, the general manager of the Canadian Railway Office of Arbitration and Dispute Resolution appointed the undersigned arbitrator to decide on the outcome of the above-cited grievances.

PRELIMINARY OBJECTION

[26] On the first day of the hearing—December 16, 2016—the Company made a preliminary objection concerning the Union's statement of issue disputing before the arbitrator the admissibility of the surveillance videos of the Grievor as evidence, alleging this was an unreasonable incursion into his private life.

[27] The surveillance videos show the Grievor taking part in everyday activities such as pushing a child's pram at the Festival western de Saint-Tite, pushing shopping carts and carrying fairly heavy objects outside shops and in front of his home.

I) EMPLOYER'S POSITION

[28] The Employer is of the opinion that the Union should not raise the question as to whether the surveillance videos are admissible as evidence at the arbitration step as this argument was not presented at the appropriate time during the grievance procedure set out in Agreement 12.

[29] According to the Employer, for the dispute concerning the admissibility of the surveillance videos as evidence to be submitted to arbitration, it must have first been raised during the grievance procedure. In support of its argument, the company referred to decision SHP599[6] by Arbitrator Michel G. Picher, who wrote:

> It is well established that the grievance and arbitration provisions of a collective agreement are designed to avoid surprise to either party. Just as it is not open to an employer to change the grounds of discipline at the threshold of arbitration, nor is it available to a union to raise an essentially different provision of a collective agreement never previously raised during the grievance procedure as a separate head of violation, only on the eve of arbitration.

[30] According to the Employer's preliminary objection: "*The Union's Ex Parte Statement of Issue expands the grievance by including an argument not previously*

[6] SHP599 - *CN Railway Company* & *National Automobile, Aerospace, Transportation and General Workers Union of Canada (Caw-Canada) Local 100* (Arbitrator Michel G. Picher), July 19, 2005.

made during the investigation or grievance procedure: specifically, the contention that CN's engagement of a *third party to conduct surreptitious surveillance and video taping of the grievor, was an unreasonable incursion into his private life and did not meet the reasonable grounds test as laid out in arbitral jurisprudence and should not be relied upon."*

II) UNION'S POSITION

[31] The Union wrote in its statement: "*The Union contends that CN's engagement of a third party to conduct surreptitious surveillance and video taping of the grievor, was an unreasonable incursion into his private life, and did not meet with the reasonable grounds test as laid out in arbitral jurisprudence and should not be relied upon.*"

[32] It maintains that it should be able to raise the issue of the admissibility of the surveillance videos during the hearing. The Union points out that the arbitrators should not adopt an overly technical approach concerning the procedure and the interpretation of grievance documents, as they are often written by individuals who do not necessarily have a legal background.

[33] The Union submits decision SHP706 in which Arbitrator Michel G. Picher wrote:

> This is not a case where the Union's Ex Parte Statement of Issue effectively raises entirely new provisions of the collective agreement or different sets of rights or obligations. Effectively, from the outset the Union has taken the position that there should be either a reduced form or discipline or no discipline whatsoever on the facts of the instant case. That, in my view, has not changed as between the drafting of the original grievance and the deposit of the Union's Ex Parte Statement of Issue. Nor, in my view would it serve the labour relations process well to develop arbitral jurisprudence which would compel the drafters of grievances to expressly address each and every possible legal contingency which might arise in the presentation of a grievance. The system of collective bargaining and grievance arbitration in Canada has evolved well beyond that kind of pleading technicality.[7]

[7] SHP706 - *CN Railway Company* & *National Automobile, Aerospace, Transportation and General Workers Union of Canada (Caw-Canada)* Local 101 (Arbitrator Michel G. Picher), May 2, 2013.

[34] The Union is therefore of the opinion that its dispute as to the admissibility of the surveillance videos as evidence should be heard by the arbitrator and requires that the arbitrator exclude these surveillance videos from the evidence as it considers them to be an unreasonable and unjustified incursion into the Grievor's private life.

III) DECISION

[35] Article 27.7 Step II of Agreement 12 states:

> "(...) Where the appeal concerns the interpretation or alleged violation of the collective agreement, the appeal shall identify the Rule(s) and clause of the Rule(s) or Appendix involved. The appeal shall be accompanied by a copy of the Company's decision rendered at Step I of the grievance procedure. (...)"

[36] In paragraph 10 of its statement on the preliminary objection, the Employer cited decision CROA 3265[8] concerning a dispute on the method used to calculate the seniority of a unionized employee.

[37] In this decision, Arbitrator Michel G. Picher allowed the company's preliminary objection opposing the Union's invocation of article 11.5 of the Agreement[9] during the arbitration process as this article had not been brought up in Step II of the grievance procedure. Arbitrator Picher explained (...) "*the Union seeks to advance the operation of an article [of the Convention] as a freestanding and separate substantive basis for the success of the grievance.*"

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[8] CROA3265 - *CN Railway Company* & *National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)* (Arbitrator Michel G. Picher), June 14, 2002.

[9] **11.5**: *No change shall be made in the seniority date accredited an employee which has appeared on four consecutive seniority lists unless the seniority date appearing on such lists was protected in writing with the 60-calendar day period allowed for correctional purposes. Names which have not appeared on four consecutive lists shall not be restored to such seniority lists except in accordance with paragraph 11.13 or by agreement with the designated National Representative of the Union.*

[38] During the grievance procedure for this matter, the Union cited article 11.9(a)(i) of the Agreement[10] which, according to the arbitrator, involved a substantive right separate from that dealt with in article 11.5. As the Union had not cited article 11.5 during the grievance procedure, Arbitrator Picher allowed the Employer's preliminary objection and disallowed the Union's arguments concerning article 11.5, citing the procedural requirements of the Agreement:

> In the instant case, where paragraph 5 of article 11 is first raised at the filing of the Union's statement of issue, there is an obvious departure from the requirements of 24.5, to the extent that the article raised constitutes a separate and independent allegation which, standing alone, would arguably cause the grievance to succeed.[11]

[39] In this case, the procedure described in article 27.7 and cited by the Employer in support of its preliminary objection, like that described in CROA 3265, requires citing the specific article, paragraph or appendix at Step II of the grievance procedure in order for the alleged violation of the Agreement to be the subject of a subsequent appeal before an arbitration board.

[40] In this case, the Union is not alleging a violation of an article of the Agreement that it had not brought up at Step II of the grievance procedure. Rather, it is opposed to the Employer submitting as evidence a surveillance video that it allegedly obtained in violation of the Grievor's constitutional right to privacy. The question of whether such a surveillance video is admissible must be decided upon in light of an analysis of the alleged violation of the fundamental right to privacy, which is protected under the Charter of Human Rights and Freedoms. It is therefore necessary to distinguish between this case and the situation in decision CROA 3265 wherein the Union cited during arbitration a substantive right set out in an article of the Agreement that it had not brought up at the appropriate time during the grievance settlement procedure.

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[10] **11.9(a)(i)**: *The name of employees holding seniority under this Agreement who were (i) filing permanent official or excepted positions with the Company, or its subsidiaries, prior to June 14, 1995, will be continued on the seniority list and shall continue to accumulate seniority until June 30, 1996. Following this period, such employees shall no longer accumulate seniority but shall retain the seniority rights already accumulated up to June 30, 1996.*

[11] CROA3265 - *CN Railway Company* & *National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)* (Arbitrator Michel G. Picher), June 14, 2002.

[41] The two other decisions submitted by the Employer in support of its preliminary objection, SHP 599[12] and CROA 3511[13] also concern matters where the Union had introduced in its statement of issue a specific article of the Agreement that it had not cited in an earlier step of the grievance settlement procedure. These decisions should be distinguished from the matter at hand, as in this case, the Union is not alleging a violation of a specific article of the Agreement, but rather an unreasonable and unjustified intrusion into the Grievor's private life.

[42] Decision SHP604[14] submitted by the Union is more relevant to the analysis of the preliminary objection in this matter. In this decision, the arbitrator declined the Employer's preliminary objection opposing the Union's objection concerning the admissibility of a surveillance video taken of a worker who was suspected of failing to comply with his doctor's medical restrictions, even though the Union had not raised this matter prior to the arbitration stage. Arbitrator Picher wrote:

> With respect to the second leg of the Company's preliminary objection, the Arbitrator has some difficulty. There is no violence done to the grievance procedure for the Union to argue, at the arbitration stage, that it was inappropriate for the Company to engage in the surreptitious video-taping of the grievor in his private life. To assert that position is not to raise an alleged violation of the collective agreement. Rather, it is to invoke the accepted jurisprudence which holds that it is incumbent upon the Company to establish two things if it wishes to tender a video-tape into evidence: **firstly,** it must show that it had reasonable grounds to resort to the surreptitious surveillance of an individual in his or her private life and **secondly** that the surveillance itself was conducted in a reasonable manner.[15]

(Underlining added.)

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[12] SHP599 - *CN Railway Company* & *National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) Local 100* (Arbitrator Michel G. Picher), July 19, 2005.

[13] CROA3511 - *Canadian National Railway Company and National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)* (Arbitrator Michel G. Picher), September 19, 2005.

[14] SHP604 - *Canadian National Railway Company and National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)* (Arbitrator Michel G. Picher), November 30, 2005.

[15] SHP604 - *CN Railway Company* & *National Automobile, Aerospace, Transportation and General Workers Union of Canada* (Arbitrator Michel G. Picher) November 30, 2005.

Admissibility of the surveillance videos as evidence

[43] In the decision *Bridgestone-Firestone*[16], the Court of Appeal of Quebec wrote about the shadowing of an employee by his employer outside the work place:

> Essentially, although it comprises a prima facie breach of the right to privacy, surveillance outside of the work place may be admissible if it is justified by rational reasons and conducted via reasonable means, as required by article 9.1 of the Quebec charter. Thus, one must first find a link between the measure taken by the Employer and the operational requirements of the business or establishment in question (A. Lajoie, loc. cite, supra, p. 191). It cannot be an arbitrary decision applied randomly. The Employer must already have reasonable grounds before deciding to subject its employee to surveillance. It may not create such grounds after the fact, when it has already performed the surveillance under dispute. [translation]

[44] In this case, the Court of Appeal pointed out that the Employer must, firstly, have rational grounds to shadow an employee outside the work place, and secondly, make sure that surveillance is conducted in a reasonable manner.

[45] In the matter at hand, the Grievor already had a history of chronic instability with his left ankle. In November 2014, he filed a claim with the CSST for a sprain to his left ankle following a similar accident to the one that occurred on September 17, 2015, in similar circumstances.

[46] Following this accident, he was off work until December 8, 2014, following which he returned to work with modified duties. Except that on December 24, he went back on sick leave due to consequences from the accident of November 27, 2014. He returned to work on modified duties on January 30, 2015.

[47] The work accident of November 27, 2014, gave rise to an extended absence and different opinions from doctors Alain Quiniou, on April 21, 2015, and Philippe Lebrun, on May 12, 2015, as to the date of stabilization and the need for treatment

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[16] *Syndicat des travailleuses et travaillleurs de Bridgestone-Firestone de Joliette (C.S.N.)* v. *Trudeau* [1999] R.J.Q. 2229 (C.A.).

following the work accident of November 27, 2014, as well as the July 14, 2015, examination by Dr. Jean-Pierre Dalcourt of the BEM.

[48] The Grievor declared the work accident of September 17, 2015—two days after his supervisor allegedly caught him sleeping at work. The Employer had reasons to doubt the existence of this new work accident that occurred under circumstances similar to the accident of November 2, 2014. By alleging a work accident and being able to take off work while receiving benefits, the Grievor was able to avoid being disciplined for being caught sleeping at work. His discipline record already had three reprimand letters and 20 demerits.

[49] In this case, the sequence of events meant that the Employer had reasonable grounds to believe that the Grievor has acted dishonestly or had lied about the work accident he had sustained. He already suffered from chronic instability with his left ankle. His first work accident on November 27, 2014, involving the same ankle took place in similar circumstances and gave rise to a difference of opinions among doctors, particularly as regards the stabilization of his injury. Moreover, the accident of September 17, 2015, was reported two days after he had been caught sleeping during his work shift by his supervisor. Clearly, this cannot be considered a purely arbitrary decision applied randomly.

[50] Lastly, the surveillance was conducted using reasonable means—through spot observations limited to times and places where the Grievor could be *observed* by the public.[17]

[51] Consequently, the shadowing of the Grievor was justified and the surveillance videos submitted by the Employer are admissible as evidence.

GRIEVANCES

[17] *Syndicat des travailleuses et travailleurs de Bridgestone-Firestone de Joliette (C.S.N.)* v. *Trudeau,* cited above in note 16.

25 DEMERITS FOR SLEEPING DURING THE WORK SHIFT

I) EMPLOYER'S POSITION

[52] The Employer submits that sleeping contravenes Rule 4.1.6 of the General Operating Instructions that state that sleeping at work is forbidden. It also cites the Canadian Rail Operating Rules, that state, *"except as provided for in company policies, sleeping or assuming the position of sleeping is prohibited."*

[53] The Employer states in paragraph 26 of its statement that, when questioned about his knowledge of safety rules during the investigation of December 18, 2015, the Grievor allegedly admitted that he knew that sleeping was forbidden at work, but blamed his drowsiness on his sleep apnea.

[54] According to the Employer, the Grievor in such a case was obliged to report his health problems in accordance with section 126 c) and g) of the Labour Code.

[55] It submits that the Grievor never submitted a request for accommodation related to an impairment caused by sleep apnea. According to the Employer, his health did not justify his unacceptable behaviour (i.e., sleeping during his work shift).

[56] The Employer submits decisions wherein employees who had slept during their work shift were assessed 20 to 30 demerits. It requests that the argument regarding sleep apnea be rejected as a mitigating factor.

II) UNION'S POSITION

[57] The Union believes that the evidence submitted by the Employer is insufficient to conclude, based on the balance of evidence, that the Grievor had slept during his work shift. In paragraph 14 of its statement, it notes that "*given the quantity and quality of daylight in the video, that it could not possibly have been 5:50 AM as suggested by Supervisor Tremblay in his memo. According to the*

National Research Council of Canada, sunrise on the morning of September 15, 2015, occurred more than 40 minutes later, sometime around 6:28 AM. (for Trois-Rivières).''

[58] The Union calls into question the credibility of Richard Tremblay, pointing out that he apparently filmed the Grievor while "sprawled out" on the chair to make fun of him with his colleagues, and that as a supervisor he should have woken him up instead of leaving him sleeping on the chair, some time after he finished his shift.

[59] Additionally, the Union submits that if the arbitrator concludes that the Grievor slept during his work shift, he should consider extenuating factors, i.e., "*his recent reassignment from day shift to midnight shift (April 28, 2015) and his well-known sleep disorder issues."*

[60] The Union produced a medical certificate dated September 15, 2015, and signed by Dr. Dominique Caron certifying that the Grievor has sleep apnea and has been receiving CPAP treatment since 2012. The Union maintains that since drowsiness is one of the symptoms of sleep apnea, the Grievor's medical condition should be taken into account in analyzing the seriousness of his misconduct.

[61] The Union believes that in view of these extenuating factors, it would be appropriate to substitute the 25 demerits with a written reprimand.

III) DECISION

According to the balance of probabilities, in light of the evidence, must one conclude that the Grievor had slept during his work shift?

[62] In a statement submitted during the employee's official investigation on December 18, 2015, Richard Tremblay wrote:

I, Richard Tremblay, supervisor Mechanical at Garneau, arrived on September

15, 2015, at 5:50 AM to start my work day. I had assigned Philippe St-Amand that night to cushion a car. When I arrived, I unlocked my office and started to prepare my report. I thought it was very quiet in the garage considering the work that was supposed to be done, so I went over to see Philippe St-Amand to see how his work was going and found he was not there. When I looked out the window, I saw Philippe St-Amand was asleep on the chair next to the machinists' computer. (Sic)

[63] During this December 18, 2015, investigation, Dominic Barbeau questioned the Grievor about the incident of September 15. The transcription reads:[18]

(…)

16. Q. Supervisor Richard Tremblay notes in his statement submitted as exhibit 3, that he saw you sleeping at around 5:50 AM on September 15, 2015, on a chair next to the machinists' computer. Can you explain why?

A. Firstly, it was definitely not 5:50 AM, as I was repairing the car when supervisor Richard Tremblay arrived at his post. If I was drowsy that morning it was because of my health.

(…)

17. Q. The video on exhibit 2 shows you sitting on a chair with your eyes closed and in a sleeping position. Can you tell us what you were doing when the video was being taken?

A. I was sleepy—like I always am, night or day.

18. Q. M. St-Amand, if I understand correctly, you are saying that you were drowsy and in a sleeping position at work because of your sleep apnea. Is that right?

A. I was not in a sleeping position. I was sitting.

19. Q. Mr. St-Amand, you say your drowsiness on the morning of September 15, 2015, was due to your sleep apnea. Is that correct?

A. Yes.

[18] Excerpt from the claimant's statement of December 18, 2015 (for having slept during the work shift).

(…)

26. Q. Mr. St-Amand, could you please describe the symptoms you still have today, even after four years of treatment?

A. I feel tired all day long, and it gets worse by the end of the day.

27. Q. Mr. St-Amand, regarding your answer to question 17 where you said you are sleepy 24 hours a day, so you think it is safe for you, your colleagues and the public for you to report for duty when you are drowsy?

A. Instead of drowsy I should have said tired. Yes, it is quite safe. When a task requires concentration, I am fit and alert, but when I sit down I might doze off—but it is never a deep sleep. (Sic)

[64] During this hearing, the Grievor testified that he was repairing cars when he saw his supervisor Richard Tremblay arrive in his truck.

[65] According to him, he had finished his shift when he went into the office to fill out the repair forms. He finished completing the forms at 7:00 AM. He took a step back and may have become drowsy. He checked the time on the computer when he got back up. It was 7:15 AM.

[66] Regarding his sleep apnea, he explained that the continuous positive airway pressure (CPAP) treatment he is receiving works up to a point, that he had used it on the day of the incident, and that he is followed up every six months. His condition prevents him from sleeping for more than 15 minutes at a time. He adds that around three days later a colleague told him that Richard Tremblay had filmed him and showed the video to other colleagues.

[67] As he was not able to attend the hearing, the parties agreed to proceed with an affidavit concerning the testimony of the Grievor's supervisor, Richard Tremblay. In his statement signed on May 4, 2017, he states:

September 15, 2015 (…)

> I came in to the office around 5:50 AM. When I arrived, I unlocked my office door and turned on the lights and my computer like I do every morning. (…)
>
> When I started entering the information needed for my operations report on the computer at around 6:10 AM, I noticed there was no sound coming from the shop even though work was supposed to be going on there at that time. I thus went around the outside of the shop to see the work. Looking through the window of the machinists' office, I saw Philippe St-Amand sleeping in a chair in the office at around 6:15 AM. I then used my cellphone to film Mr. St-Amand through the office window. His eyes were closed, he was not moving at all and was stretched out on a chair in the machinists' office.
>
> I remember dawn was breaking and the sky was becoming increasingly light as the sun was rising, although it was not yet above the horizon. It was light enough to see through the window and to identify Mr. St-Amand.
> (...)
> When I went into the shop, I saw that the work assigned to Mr. St-Amand had not been finished. I remember that the car had not been brought back down; it was still on the jack and the coupler knuckle had not been put back. I had to assign another employee to finish the work, and it took around two hours to finish the job left undone by Mr. St Amand, whom I had found asleep.
> I then alerted my superiors, Pascal Rathé and Gilles Massicotte, to the situation.[19]

[68] The versions of the Grievor and Richard Tremblay are contradictory.

[69] However, certain allegations in the Grievor's version raise doubts as to its credibility.

[70] First, he admits that he never advised his employer in writing about his medical condition (sleep apnea) or provided a medical certificate to this effect. No request for accommodation related to an impairment that could be caused by sleep apnea was ever submitted to the Employer. In his investigation, he said the following with respect to his sleep apnea: *"It's no secret to anyone here at Garneau. I informed Gilles Massicotte verbally*."

[71] Still on December 18, 2015, he stated that he was drowsy at the time of the incident, like he is all day long, that he continued having symptoms even after treatment and that he felt tired throughout the day, and it got worse at the end of the day.

[19] Excerpt from the affidavit signed by Richard Tremblay on May 4, 2017, at Lévis.

[72] The prescription for CPAP treatment is dated November 29, 2011, while the Grievor himself stated he had been under treatment for close to four years. The only plausible reason the Grievor had for talking about his sleep apnea at this investigation, which he had never previously reported to his employer, is that he was caught by his supervisor finding him asleep during his work shift.

[73] The fact that he declared himself to be sleepy all day long is not consistent with the car mechanic position he occupies and which requires him to be vigilant for safety reasons. When questioned about his knowledge of safety rules, the Grievor admitted that he knew that sleeping was forbidden at work. However, he did not think it was necessary for him to report his condition in due form to his employer. These statements about his symptoms undermine his credibility on the subject and as well as confidence in his ability to perform his work.

[74] According to *"Apnea Health: Sleep apnea diagnostics and treatment"*[20] submitted to the file as an exhibit, CPAP treatment can provide:

- Reduction in EDS (Excessive Daytime Sleepiness)
- Improved job performance
- Reduction in daytime sleepiness

[75] This is different from the symptoms described by the Grievor, whereby he states he feels tired all day, and gets worse as the day progresses.

[76] In comparison, Richard Tremblay's version is accurate and consistent. There is nothing in the evidence to suggest that he made the video recording of the Grievor to mock him with his colleagues.

[77] However, the Union maintains that the quantity and quality of daylight in the video suggest that it could not have been 5:30 AM when it was taken as the sun

[20] http://www.apneesante.com/english/home.html

came up at 6:28 AM on September 15, 2015, according to the National Research Council of Canada.

[78] In his May 4, 2017, affidavit, Richard Tremblay stated that on September 15, 2015, he arrived at the office at around 5:50 AM and that it was only at around 6:15 AM that he found the Grievor sleeping on a chair. He added that dawn was breaking and the sky was becoming increasingly light. This statement does not contradict the information from the National Research Council of Canada indicating that the sun rose at 6:28 AM on that date.

[79] Moreover, no expert assessment has been presented to call into question the quality of the video or to analyze the light level or the time the video was allegedly made.

[77] According to the balance of evidence, there is reason to conclude that the Grievor was discovered sleeping by Richard Tremblay at a location where he should not have been, given the tasks that had been assigned to him during his shift. According to Richard Tremblay's statement, he had to ask another employee to finish the work left undone by the Grievor.

If so, was the assessment of 25 demerits an appropriate sanction?

[80] In decision SHP568[21], Arbitrator Picher write about sleeping on the job:

> "It is trite to say that the obligation of an employee to report for duty fit to work, and to remain awake and available to perform productive service for his or her employer during the whole of the employee's scheduled tour of duty. The Arbitrator cannot avoid the conclusion that the grievor failed to honour that obligation when he was found sleeping on the job in his vehicle at the workplace on April 7, 2002. No good excuse or medical documentation was produced to explain the grievor's conduct, and the grievor was therefore liable to discipline."

[21] SHP568 *Canadian Pacific Railway Company Mechanical Services* and *National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-TCA) Local 100* (Arbitrator Michel G. Picher) July 14, 2003.

[81] The Union maintains that since drowsiness is one of the symptoms of sleep apnea, the Grievor's medical condition should be taken into account in analyzing the seriousness of his misconduct.

[82] In CROA 4334, arbitrator Schmidt noted, *"if the Grievor seeks to be exonerated of culpability for the inappropriate conduct, it is incumbent on him to provide medical evidence to support a causal link between the medical condition and the misconduct itself.*"[22]

[83] No correlation has been established between the Grievor's sleep apnea and the fact that he was found sleeping during his work shift. No medical explanation has been provided to support the allegation.

[84] Moreover, alleging a medical condition at a later time should not be considered a mitigating factor. In decision CROA 1341[23], the arbitrator writes about an employee who made belated use of the Employee Assistance Program:

> I am of the view that in order for an employee to take proper advantage of the Company's EAP Programme, that employee must come forward and voluntarily submit to it prior to any incident that may give rise to a legitimate disciplinary response on the employer's part. The EAP Program is not designed to be used as a "Shield" for a breach of Rule 'G' after the fact. At that time, the threat to the safety of the company's railway operations has occurred and such risks should not be seen to be condoned by a belated recourse to the Company's EAP grievance is denied.
>
> For all the forgoing reasons, the grievance is denied.

[85] The Grievor's sleep apnea is not a mitigating factor that would justify reducing the sanction.

[86] In decision SHP 568[24], between Canadian Pacific and the National

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[22] CROA&DR 4334, *Canadian National Railway* and *Unifor* (Arbitrator Christine Schmidt) October 30, 2014.

[23] CROA1341 - *Canadian National Railway Company* and *Brotherhood of Maintenance of Way Employees* (Arbitrator David H. Kates) March 5, 1985.

[24] SHP568 - *Canadian Pacific Railway Company Mechanical Services* and *National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-TCA) Local 101* (Arbitrator Michel G. Picher) July 14, 2003.

Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-TCA), Local 101, cited previously, the employee, Engine Attendant, was assessed 30 demerits.

[87] In another matter, SHP 244[25] between VIA Rail and the Brotherhood of Railway Carmen of Canada, the arbitrator upheld the assessment of 25 demerits and dismissal for accumulating of demerits, when a car washer had been found sleeping at work. Lastly, in case CROA 2030[26] between CN and the United Transportation Union, the arbitrator upheld the assessment of 30 demerits leading to dismissal for accumulating of demerits for a yard coordinator who was found sleeping during working hours.

[88] Based on the balance of evidence, the Grievor was found asleep during his work shift, and the assessment of 20 demerits to his record is justified.

20 DEMERITS FOR HAVING FAILED TO RESPECT THE RECOMMENDATIONS OF THE BUREAU D'ÉVALUATION MÉDICALE (BEM) [MEDICAL ASSESSMENT OFFICE])

I) EMPLOYER'S POSITION

[89] Further to the accident of November 27, 2014, in an opinion dated July 15, 2015, Dr. Dalcourt of the BEM wrote that the Grievor "*should avoid performing repetitive tasks on unstable ground or in an unstable position (scaffolding) and should wear a high ankle stabilizer boot.*"

[90] The Employer maintains that the evidence demonstrates that the Grievor did not respect the recommendations of the BEM indicating that he should wear a high

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[25] SHP244 - *Via Rail Canada Inc.* and *Brotherhood Railway Carmen of Canada* (Arbitrator J.F.W. Weatherill) August 4, 1988.

[26] CROA2030 - *Canadian National Railway Company* and *United Transportation Union* (Arbitrator Michel G. Picher) June 15, 1990.

ankle stabilizer boot.

[91] In his official statement dated December 18, 2015, Samuel De Roy indicated that during the accident re-enactment of September 21, 2015, the Grievor admitted that he did not wear the stabilizer boot recommended by the BEM physician following the alleged accident of September 17, 2015:

> Still pursuant to the investigation, I asked him if he wore the stabilizer boot recommended by the BEM physician in July 2015. He told me that he did not. Instead, he tried to wear an orthosis of the type sold in pharmacies but it was not compatible with his work boots. It appears that he also tried to find a solution with the pharmacy but was unsuccessful.

[92] During the questioning of December 18, 2015, led by Dominic Barbeau, the Grievor admitted that he only obtained the high ankle stabilizer boot recommended by the BEM on November 10 from Groupe Savard Ortho and thus was not wearing it during the alleged accident of September 17, 2015.

[93] In support of the assessment of 20 demerits, the Employer cited paragraph 4.3.1, section 8, of the General Operating Instructions, which states:

> In general, everyone on CN property is required to wear personal protective equipment (PPE) appropriate to the work location and the job being done. The following personal protective equipment applies to employees and contractors, as required by their work activities:
> - (...)
> - Protective footwear (minimum 6 inches high, laced to top, defined heel);

[94] The BEM recommendations requiring the employee to wear a stabilizing boot complement safety rule 4.3.1 to provide additional protection to the Grievor. They constitute a clear instruction and failure to comply should be interpreted like any other failure to comply with a safety rule.

II) UNION'S POSITION

[95] The Union believes that the Grievor complied with the recommendations of

the BEM following the assessment conducted by Dr. Dalcourt on July 14, 2015, as well as the company's policy on the use of safety boots. The Union therefore considers the discipline assessed for non-compliance with the recommendations of the BEM to be unjustified.

[96] According to the Union, the boots worn by the Grievor at the time of the alleged accident of September 17, 2015, complied with the Employer's requirements as set out in section 3.3 of the Personal Protective Equipment Standard. These requirements are more specific than the BEM recommendation, which is limited to a *"stabilizing boot."* As the type of boot required by the Employer must cover and support the ankle, it therefore complies with the recommendation of the BEM.

III) DECISION

[97] Although the Grievor indicated in his statement of December 18, 2015, that he did not obtain the boot recommended by the BEM until November 10, 2015, the Employer has not demonstrated that the boot worn by the Grievor at the time of the alleged accident of September 17, 2015, did not comply with the recommendation made by the BEM on July 15, 2015.

[98] The only evidence submitted by the Employer to support its assertion that the Grievor did not comply with the recommendation of the BEM, and thus of paragraph 4.3.1, Section 8 of the General Operating Instructions, which require safety footwear to be worn, rests on the Grievor's admission that on September 17, 2015, he had not yet obtained the boot recommended by the BEM.

[99] Questioned by union representative Alain Campagna on this subject during the December 18, 2015, investigation, the Grievor stated that the boot he was wearing at the time of the alleged accident of September 17, 2015, could be described as stabilizing boots.

[100] Orthotist Marie-Pier Hébert of Savard Ortho Confort, from where the Grievor obtained the stabilizing boot recommended by the BEM, wrote a letter dated

December 15, 2015, stating, "*the boot chosen (by the claimant) is a stabilizing boot like any other regular work boot. Upon purchase of the boot, it needs only to be checked for adequate stiffness around the ankle to be considered to have a stabilizing effect, but it is still a standard boot"* (underlining added). [Translation]

[101] Section 3.3 of the Employer's Personal Protective Equipment Standard on protective footwear states:

> **3.3.3 Standards**
> Protective footwear shall meet or exceed the standards set out in Canadian Standard Association - CSA Z 195 and/or The American Society for Testing and Materials - ASTM F2413 which supersedes ANSI Z41 for footwear Approved protective footwear shall cover and support the ankle and have a defined heel. In Canada, the defined heel must be 9 mm (3/8 inch) and shall not exceed 25 mm (1 inch). In the US, the defined heel must be a minimum of 12 mm (1/2 inch) and shall not exceed 25 mm (1 inch).
>
> Boots need to cover and support the ankle. Boots need to be equipped with laces, which must be laced to the top and tied. (...)
>
> (Underlining added.)

[102] According to the balance of evidence, the boots work by the Grievor at the time of the alleged accident of September 17, 2015, complied with the Employer's requirements set out in section 3.3 of the Personal Protective Equipment Standard indicating that protective boots shall cover and support the ankle and be equipped with laces which must be laced to the top and tied.

[103] The Employer did not submit any evidence to indicate that the Grievor wore footwear that did not meet the requirements of section 3.3 of the Personal Protective Equipment Standard. The boots required by the Employer complied with the recommendation of the BEM; the Grievor did not contravene this recommendation.

[104] The Employer has failed to demonstrate that, according to the balance of probabilities, the Grievor contravened the recommendations of the BEM. The assessment of 20 demerits was therefore not justified.

DISMISSAL FOR HAVING MADE A FALSE DECLARATION CONCERNING

AN ALLEGED WORK ACCIDENT

I) EMPLOYER'S POSITION

[105] The Employer maintains that on September 17, 2015, the Grievor deliberately and falsely reported a work accident in order to receive income replacement indemnities from the CSST to which he was not entitled, thereby forcing it to bear an additional financial burden.

[106] By alleging a work accident resulting in time off, the Grievor was able to avoid being disciplined for being caught sleeping at work on September 15, 2017.

[107] According to the Employer, it is *"strange"* that the Grievor injured himself a second time in circumstances similar to another work accident that occurred on November 27, 2014. It alleges that the Grievor deliberately and knowingly chose to claim a work accident which provided him with an income clearly higher than what he would have received had he submitted a claim for short-term disability benefits under the benefits plan.

[108] The Employer states that the version provided by the Grievor at the December 18, 2015, investigation contained contradictory and implausible elements.

[109] According to the Employer, the images captured while shadowing the Grievor, as well as the supplementary report of December 4, 2015, by Dr. Giroux, showed that the Grievor did not have the symptoms of someone who had a severe enough sprain to warrant prescribing a two-week work stoppage.

[110] The Grievor lied and acted dishonestly. He broke the bond of trust with the Employer, and the final dismissal was an appropriate measure in the circumstances.

II) UNION'S POSITION

[111] According to the Union, the Employer's approach from the time the Grievor reported the workplace accident and injury on September 17, 2015, was one of suspicion and incessant opposition.

[112] The Union maintains that the Grievor did not have an in-depth and impartial investigation in accordance with article 27 et. seq. of the agreement. The obligation to conduct a fair and impartial investigation requires that the Employer present the grounds of its allegations to the Grievor and give him the opportunity to reply.

[113] Moreover, the Employer did not inform the Union or the Grievor of the false statement allegedly made by the Grievor as part of his CSST claim. It refused to provide a response at Step II of the grievance settlement procedure on this question. It has an opportunity at that time to inform the Grievor of the alleged false declaration. This silence has consequently prejudiced the Grievor and the Union, which found no such information in the 43 questions asked to the Grievor and the 45 pages of the transcription of the investigation of December 18, 2015.

[114] From September 18, 2015, the Employer had determined that the Grievor made up an injury on September 17, 2015, to avoid discipline measures resulting from his behaviour of September 15, 2015—i.e., having been caught sleeping during his shift—which was only brought to the Grievor's attention in the middle of December 2015.

[115] The Union alleges that the hiring of a surveillance team in the hours following the reporting of a work injury, even before the investigation required under the Canada Occupational Health and Safety Regulations, SOR/86–304 (COH&S) (Sec 15.4), suggests a reasonable apprehension of bias.

[116] The Union has asked the Employer to produce the document required by article 15.8 of the COH&S, which it has failed to do.

> **15.8 (1)** The employer shall make a report in writing, without delay, in the form set out in Schedule I to this Part setting out the information required by that form, including the results of the investigation referred to in paragraph 15.4(1)(a), where that investigation discloses that the hazardous occurrence resulted in any one of the following circumstances:
>
> **(a)** a disabling injury to an employee;

[117] According to the Union, it is quite realistic to conclude that the flagrant disregard for this requirement demonstrates the Employer's intent to continue its campaign of suspicion in order to maintain the appearance of deniability and justify the decision to terminate the Grievor's employment.

[118] Moreover, the Union doubts the credibility of the investigation firm's opinion regarding the Grievor's walking during the surveillance. The Grievor had no restriction or limitation preventing him from pushing a grocery cart or other similar object that could provide support and help him move around.

[119] The accident of September 17, 2015, was recognized by the CSST. Furthermore, on January 12, 2016, following an application for review by the Employer, the CSST confirmed its decision of October 8, 2015.

[120] The Employer acted on suspicions and it is so convinced of its version of the facts that it refuses to accept the conclusions of the CSST, particularly as it has invested a great deal in the version of the facts it presented.

III) DECISION

Quality of the investigation

[121] There is nothing in the evidence to suggest that the Employer's investigation process was not conducted in accordance with the rules or that the Grievor did not have an in-depth and impartial investigation.

[122] According to the documents submitted at the hearing, the Grievor and the Union received copies of the statements that would be presented to the Grievor at the Employer's investigation and they had an opportunity to review them before the start of the investigation.

[123] The Grievor was assisted by a representative during the investigation. After questioning him about each of the grievances, officer Dominic Barbeau asked the Grievor's union representative and if he had any questions and asked the Grievor if he had anything to add.

[124] The Grievor and his representative chose not to avail themselves of their right to question witnesses during the investigation.

However, a dismissal may not be considered unfair solely because of an alleged violation of procedural fairness during the Employer's investigation when the arbitrator determines, based on the balance of probabilities, that the employee committed actions that constitute just and sufficient cause for dismissal.[27]

Dismissal for having made a false declaration concerning an alleged work accident

[125] On November 27, 2014, the Grievor injured himself at work when he stepped on a stone as he was leaving the shop, resulting in severe twisting of his left ankle. At that time, he was diagnosed with a sprain to the left ankle.

[126] On September 17, 2015, the Grievor reported another work injury when he stepped in a hole or on a rock or uneven ground, again with his left foot. According to him, his ankle twisted inward, resulting in a sprain.

[27] *Yeung* v. *HSBC Bank of Canada,* [2006] C.L.A.D. No. 175.

[127] On October 14, 2015, when the Grievor met Dr. Giroux he described having twisted his ankle when he stepped on a rock. On December 18, 2015, the Grievor sent Gilles Massicotte, senior supervisor - Mechanical at Garneau Yard, an email explaining the circumstances of his work accident. He states that he twisted his left ankle *"in a hole."* When questioned about the accident during the investigation of December 18, 2015, his explanation was more evasive: *"... I stepped on uneven ground or a rock—I'm not sure which—it was very dark*."

[128] At the December 18, 2015, investigation, the Grievor was questioned about his walking during the joint accident re-enactment conducted on September 21, 2015:

> 24. Q. Can you explain to us why you were limping that morning when you reported to Garneau Yard?
>
> A. I had a limp for 5–10 minutes after I got out of my vehicle. (Sic)

[129] He was later asked about his walking when the shadowing officers filmed him carrying a bag on his shoulder:

> 25. Q. The officer wrote on page 24 of his report: "His walking is normal." How do you explain the fact that you no longer had a limp?
>
> A. Because I had been in the store for 5 to 10 minutes and I didn't limp any more. (Sic)

[130] However, also during the December 18 investigation, he later gave a different explanation about his walking difficulty:

> Q. … How do you explain that on September 21—one day after you had been seen with no limp—you told Mr. De Roy that you had been limping constantly since your September 17 accident? (Sic)
>
> R. I had a constant limp—I still do. (Sic)
>
> 32. Q. In his statement, Mr. de Roy goes on to say: "(...) He went on to say that he had a constant limp. As he put it, he had 'one heck of a limp'

since the September 17 accident. What do you mean by 'one heck of a limp'?" (Sic)

A. I limp regularly; I start to limp as soon as my ankle gets tired; I start to limp as soon as I get up. (Sic)

[131] We may conclude from these excerpts from the transcription of the Employer's investigation that the Grievor adapted his answers according to the circumstances, particularly with respect to his answers regarding the shadowing performed by the investigation firm.

[132] Looking at the surveillance videos, one can see that the Grievor does not show any of the symptoms of someone who sprained an ankle a few days before, while he should have shown a loss of mobility in his movements. He seemed to have no difficulty walking, supporting his weight and carrying fairly heavy objects.

[126] Moreover, in his supplementary report, Dr. Giroux commented on the shadowing videos and concluded:

We confirm that there are discrepancies between the reported elements and the behaviour observed in the video. Mr. St-Amand alleges that he had difficulty walking, although we did not observe any problem regarding his left ankle. He is able to stand and walk without any problem, and shows no sign of limping.

The shadowing took place a few days after his accident. Mr. St-Amand's normal walk is not consistent with an ankle sprain diagnosis made two to three days earlier. Had such a sprain occurred, he would have been limping and unable to walk for extended times, he would be in pain and have an incapacity that should have been constantly apparent in his walk.

(…)

In the case at hand, we note that Mr. St-Amand does not present any problem regarding his ankle and that his allegations are not consistent with what we can observe from the video."

[133] Moreover, as the Employer submits, by alleging a work accident and being off work while receiving benefits, the Grievor was able to avoid being disciplined for

being caught sleeping at work.

[134] The Union maintains that this infraction was not brought to the Grievor's attention until the middle of December 2015.

[135] In his testimony given at the hearing of December 16, 2016, the Grievor declared that after his work accident of September 17, 2015, one of his colleagues called to tell him that his supervisor had filmed him on September 15 and had shown the footage to his colleagues. This statement contradicts the argument whereby he was allegedly not informed of these facts until the middle of December 2015 and casts doubt on his credibility.

[136] The Union argues that the hiring of a surveillance team in the hours following the reporting of a work injury, even before the investigation required under the Canada Occupational Health and Safety Regulations (COH&S), suggests a reasonable apprehension of bias.

[137] The Employer was under no obligation to conduct an investigation before hiring a surveillance firm. This type of surveillance is usually done soon after the occurrence of an alleged accident when the Employer has reasonable grounds to request such surveillance, as was the case here.

[138] While shadowing the Grievor, the representatives of the investigation firm only noted observations. There is no reason to doubt their credibility.

[139] The Union also argues that the accident of September 17, 2015, was recognized by the CSST on October 8, 2015, and that on January 12, 2016, the CSST rendered a decision confirming its decision following an application for review by the Employer.

[140] The Employer appealed the decision regarding the CSST's administrative review.

[141] In the matter 4418 of the Canadian Railway Office of Arbitration and Disputes Resolution (CROA&DR)[28], the arbitrator wrote:

> This matter consists of establishing whether the Grievor made a false declaration concerning an alleged work accident. The Company's allegation is very serious. It should be noted, however, that what is important to determine in this matter is not whether the Grievor was entitled to receive compensation for a work accident pursuant to the applicable legislation, but rather to determine whether the Grievor might have misled his employer about the injury he allegedly sustained on the job which would justify the application of disciplinary sanctions. It needs to be established whether the Grievor made a deliberate attempt to mislead his employer regarding his interests.

[142] The Grievor's contradictory statements, the surveillance videos and Dr. Giroux's supplementary report overwhelmingly lead one to conclude that the Grievor deliberately mislead his employer regarding the injury he allegedly sustained on September 17, 2017. He made a false declaration concerning an alleged work accident.

Is the Employer's decision to dismiss the Grievor an appropriate measure?

[143] In case 4418[29], cited previously, the arbitrator added the following with respect to the employee's dismissal after having falsely declared a work accident:

> The Company is entitled to expect the Grievor to be honest and trustworthy. In the present matter, the Company has met the burden of proof by demonstrating that the Grievor had not been honest about an injury that allegedly occurred on August 17, 2014.
> (…)
> In the case before me, the Grievor shows the same unawareness. He does not appreciate the seriousness of his deceitfulness. According to the evidence presented to me, the Grievor deliberately misled the Employer about his injury by deciding after the fact that it had occurred at work on August 17, 2014. He continued to maintain this lie before me and has broken the essential bond of trust with the

[28] Case No. 4418 - CN and USW - Local 2004, (CROA&DR) (Arbitrator Christine Schmidt), November 18, 2015.

[29] Case No. 4418 - CN and USW - Local 2004, cited above in note 28.

Company.

As this concerns an employee with very little seniority, and for the above-mentioned reasons, I see no reason to modify the Company's decision. The grievance must therefore be dismissed.

[144] Similarly, in SHP 564[30], the arbitrator upheld the dismissal of an employee who had falsely declared a work accident. He wrote:

> [73] A review of the authorities supports the conclusion that falsifying claims of disabling injuries is extremely serious misconduct which, in the absence of strong mitigation factors, is deserving of dismissal. In that context, Arbitrator Picher noted in CROA No. 2302, that "to the present the grievor appears not to understand the seriousness of his actions and inconsistencies." That factor is present in this dispute and is exacerbated by the fact that the Grievor was untruthful about receiving a light duties form.
>
> [74] In CROA No. 2651, Arbitrator Picher confirmed prior decisions to the effect that:
>
> > [W]here the evidence establishes, on the balance of probabilities, that an employee has knowingly engaged in an attempt to defraud the employer of sick leave, insurance benefits or Workers' Compensation benefits, the seriousness of such action has been sustained by the Arbitrator, with discharge generally being found to be appropriate in light of the breach of the relationship of trust fundamental to the employment contract.

[145] The fact that the Grievor has had close to seven years of continuous service cannot be considered a significant factor given the seriousness of the misconduct. Moreover, his discipline record already had three reprimand letters and 20 demerits as at September 17, 2015.

Employees have an obligation of loyalty to their employer. Honesty is integral to the duty of loyalty.

[146] According to the balance of evidence, the Grievor made a false declaration concerning a work accident and such behaviour demonstrates a lack of integrity and by its very nature causes serious and irreparable harm to the relationship of trust with the Employer.

[30] SHP 564 - VIA Rail Canada Inc., and National Automobile, Aerospace, Transportation and General Workers Union of Canada (Arbitrator H. Allan Hope), July 8, 2003.

[147] Given the seriousness of the misconduct and his dishonest and untrustworthy attitude and the fact that his credibility is called into question by his contradictions and statements, further to a review of the surveillance videos and the supplemental report by Dr. Giroux, and considering the loss of trust by his employer, the decision to dismiss the employee was appropriate.

[148] Consequently, this tribunal declines grievance CN170915Garneau.

CONCLUSION

[149] **FOR ALL OF THE ABOVE-MENTIONED REASONS,** the arbitration tribunal:

DECLARES that the surveillance videos of the Grievor are admissible as evidence;

DECLINES grievance CN160915Garneau- Assessment of 25 demerits to the discipline record of Philippe St-Amand, car mechanic, for having slept during his work shift on September 15, 2015;

UPHOLDS grievance CN181215Garneau - Assessment of 20 demerits to the discipline record of Philippe St-Amand for failing to make the necessary arrangements at the appropriate time to comply with the recommendations of the Bureau d'évaluation médical (BEM) [medical assessment office];

DECLINES grievance CN170915Garneau - Dismissal of Philippe St-Amand for having made a false declaration concerning an alleged work accident on September 17, 2015, and for having made a false declaration with respect to claim 500996863;

CONFIRMS the dismissal of Philippe St-Amand for having made a false declaration concerning an alleged work accident on September 17, 2015, and for having made a false declaration with respect to claim 500996863.

Montreal, September 11, 2017

Sophie Mireault, Arbitrator

For the Grievor: Brian Stevens
Myriam Germain

For the Employer: Denis Laurendeau

Dates of hearing: December 16, 2016, and May 25, 2017