CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4612

Heard in Calgary, February 6, 2017

Concerning

BOMBARDIER TRANSPORTATION

And

TEAMSTERS CANADA RAIL CONFERENCE – DIVISION 660

DISPUTE:

On March 23, 2016, the Company sent the grievor F. Sahibi (Customer Service Ambassador), a letter of discharge, notifying him of his termination of employment as a result of his unapproved absence from work.

JOINT STATEMENT OF ISSUE:

"…As a result of your continued unapproved absence from June 12, 2015 to date, this letter will serve as confirmation that the Company considers that you have abandoned your position with Bombardier Transportation and your file will be closed…"

By letter dates May 20, 2016, the Union appealed the Company's dismissal of the grievor. The Union has maintained that the grievor was terminated without due process, that other provisions of the collective agreement ought to have been applied, and that terminating the grievor's employment was unfair and unreasonable.

The Union and the Company met to discuss the case on February 28, 2017, and the company declined the Union's appeal at Step 3 by letter dated March 24, 2017, highlighting the duration of the grievor's absence from work.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) G. Vaughan	**(SGD.) A. Ignas**
General Chair	**Manager, Human Resources**

There appeared on behalf of the Company:

A. Gallop	– Counsel, Norton Rose Fullbright, Toronto
A. Ignas	– Manager Human Resources, Toronto
R. Dean	– Manager Train Operations, Toronto
P. Robinson	– Manager Customer Services, Toronto

There appeared on behalf of the Union:

D. Ellickson	– Counsel, Caley Wray, Toronto
G. Vaughan	– General Chairperson, Toronto
L. Torrouce	– Vice General Chairperson, Toronto
F. Sahibi	– Grievor, Toronto

AWARD OF THE ARBITRATOR

The grievor, a customer service ambassador, has a seniority date of February 19, 2014. His duties involved ensuring safe passage for Toronto's GO Transit's passengers. Part of those duties included lowering and lifting wheelchair ramps.

The grievor suffered an off-duty injury on May 27, 2015. He injured his left shoulder while attempting a shoulder press at the gym. He attended an appointment with his family physician on May 29, 2015 for treatment. He was diagnosed with a shoulder strain and prescribed anti-inflammatory medication as well as physiotherapy.

The grievor called in sick from May 28, 2015 to June 8, 2015. He then tried working for a few days on his regular shift. He found that he was unable to perform his duties because of his ongoing shoulder pain. The grievor's last day of work was June 12, 2015.

The grievor contacted Michelle Grant at the Employer's Human Resources office on June 24, 2015 to inquire about applying for STD benefits through the Employer's insurer, Blue Cross. He was directed to contact Ms. Morgan Mackay, a Human Resources Advisor with the Employer. Ms. Grant confirmed in an email to Ms. Mackay on June 24, 2015 that the grievor's *"last day worked and paid was June 12, 2015."* The grievor had by that time provided two medical notes to the Employer which indicated that he was unable to work. One was dated May 29, 2015. It indicated that the grievor had been off work since May 29, 2015. The other was dated June 24, 2015 and

indicated that the grievor would be off work from June 6, 2015 to June 27, 2015. The June 24, 2015 medical note further stated that the grievor would be able to return to work on June 28, 2015. That did not occur.

On July 8, 2015 Ms. MacKay sent the grievor two claims forms that Blue Cross required in order to process his STD claim: an Attending Physician Statement and an Employee Statement. On July 15, 2015, Ms. Mackay e-mailed the grievor to remind him to complete the two STD forms because the 30-day deadline to submit the Employee Statement was imminent.

On July 21, 2015 the grievor e-mailed the Employee Statement to Ms. Mackay who in turn forwarded it to Blue Cross. The grievor's physician did not complete the Attending Physician Statement until September 8, 2015. Ms. Mackay did not receive the Attending Physician Statement from the grievor until September 21, 2015. Ms. Mackay sent the Attending Physician Statement on to Blue Cross the same day.

The grievor had an MRI scheduled for September 23, 2015 but missed his appointment because he said that he was unfamiliar with the locale. The MRI appointment was subsequently rescheduled to February 13, 2016.

The grievor's attending physician's notes confirmed that he was first prescribed physiotherapy on May 29, 2015 for left shoulder strain. An entry on the grievor's medical file for September 4, 2015 indicates that the grievor was *"willing to start physiotherapy".*

The Blue Cross Attending Physician's Statement dated four days later on September 8, 2015 indicated that he grievor *"had just started"* physiotherapy.

On October 16, 2015 Ms. Mackay asked the grievor for further medical documentation which she required in order to demonstrate that he still needed to be off work. The previous medical note on her file was the one dated June 24, 2015 which indicated the grievor could return to work on June 28, 2015. Ms. Mackay also requested that the grievor complete a Functional Abilities Form which she explained would be required after his recovery was complete.

The grievor forwarded a number of medical documents to Ms. Mackay on November 10, 2015. Included in the medical documents was a further doctor's note dated October 29, 2015 indicating that the grievor had been unable to attend work since October 4, 2015. The return-to-work date on the doctor's note indicated *"unknown at this time",* as had the return-to-work date on several of the other doctor's notes submitted by the grievor at that time.

The medical documents provided by the grievor to Ms. Mackay on November 10, 2015 did not meet Blue Cross's requirements. They did not include the detailed clinical records or the contact information for his physiotherapist. Blue Cross required this additional medical documentation in order to properly assess the grievor's claim. The grievor provided the name of his physiotherapy contact information on November 19,

2015. As it turned out, significantly, he did not actually commence physiotherapy treatments until December 11, 2015.

On December 2, 2015 a Disability Claim Specialist (“DCS”) from Blue Cross sent the grievor a letter requesting the medical information previously requested on October 16, 2015. The letter stated that if Blue Cross did not receive the information by December 27, 2015 it would proceed to close its file.

On December 11, 2015 the grievor sent Ms. MacKay a copy of a letter dated December 10, 2015 from the grievor’s physician summarizing his injuries. The letter indicated that the grievor should stay off work until his MRI appointment on February 13, 2016. Ms. Mackay forwarded the medical note to Blue Cross for review. The medical note again did not contain the medical information Blue Cross had previously requested back on October 16, 2015.

Blue Cross did not receive the necessary medical information that it requested until January 6, 2016. Blue Cross in turn referred the file to a medical consultant for review. The medical consultant recommended obtaining a copy of the grievor’s MRI results to assess the claim.

On February 26, 2016 Blue Cross sent the grievor a follow-up letter confirming a verbal request by the DCS to the grievor for his MRI results. That verbal request took place in a conversation with the grievor on February 4, 2016. The grievor, according to

a file note by the DCS on February 4, 2016, had promised the DCS that he would send in the MRI results after his February 13, 2016 MRI appointment. The February 26, 2016 letter also indicated that Blue Cross would be closing its file on March 13, 2016 if it did not receive the MRI results. On March 9, 2016 Blue Cross wrote to the grievor again requesting the results of his MRI. The letter also reiterated that it would be closing its file on March 13, 2016 if it did not receive the requested MRI medical information.

On March 15, 2016 Blue Cross advised the grievor that his file was being closed. On the same day, Ms. Mackay advised Blue Cross that she would also be closing her file as well. The grievor faxed in the MRI report to Blue Cross on March 17, 2017.

On March 23, 2016 the Employer terminated the grievor in a letter from Ms. Mackay dated March 23, 2016 as a result of his unapproved absence from June 15, 2015 to March 23, 2016.

The Employer submits that the grievor's employment was deemed terminated pursuant to article 14.1(b) of the collective agreement because he was absent from work without permission for more than three consecutive days. The provision reads in part:

> Seniority rights shall cease and employment deemed terminated for any of the following reasons:
>
> a) if an employee voluntarily quits the employment of the Company;
>
> b) If an employee is discharged for cause or if an employee overstays a leave of absence or remains away from work without permission for a period of more than three (3) consecutive working

> days and such employee is not reinstated pursuant to the provisions of the collective agreement.

Counsel for the Employer notes that a deemed termination provision is a strict liability provision and not a disciplinary provision; accordingly, the Employer is not required to prove just cause for termination. The Employer, under a deemed termination provision, is only required to demonstrate that it did not act in a manner that is arbitrary, discriminatory, or in bad faith. There is no evidence that the Employer acted in such a manner. The Employer further points out that it was willing to hold off applying the deemed termination provision while the grievor's short-term disability claim was pending. But the grievor ignored the Employer's requests and acted in a cavalier manner throughout the whole period of time he was absent from work due to his non-work related injury. His absences from June 15, 2015 onward were properly considered to be without leave and triggered the deemed termination provision.

The Union's position is that the Employer was not entitled to simply rely upon the insurer, Blue Cross, closing its file in order to terminate the grievor's employment. The Employer was under an obligation to make some independent inquiries of the grievor and to give him notice that his job was in jeopardy. The Employer took no further action including independently requesting the grievor provide further medical evidence or undergo an independent medical examination.

The arbitrator notes that the Employer repeatedly characterized the grievor's behaviour in its submissions as cavalier. That is not an inappropriate description of the grievor's dealings with the Employer and with Blue Cross. He was repeatedly asked for

written updates by Blue Cross over the course of the last months of 2015 including physician reports, physiotherapy attendances, copies of his MRI reports and other related medical information. Blue Cross required that information in order to make a proper medical assessment within the terms of its STD policy.

The MRI, in particular, was critical to the grievor's prognosis and anticipated return-to-work date. In the Attending Physician's Report (a Blue Cross form), dated September 8, 2015, the grievor's attending physician was only able to say that the grievor's prognosis was "*Guarded".* As to whether or not the grievor was a suitable candidate for a work re-entry program, the physician stated in the same report that *"we need to wait for results MRI".* The grievor's physician clearly indicated the rationale for requiring the MRI results in a follow-up medical report dated December 10, 2015. The physician indicated in that regard that the grievor most likely had a left shoulder labral tear that would require surgery.

The grievor finally did attend for his rescheduled MRI on February 13, 2016 and the results were available on February 18, 2016. The grievor was called by a representative of Blue Cross on February 4, 2016 whose file note indicates the following conversation took place:

> I call EE *(employee)* to explain that MC *(medical consultant)* needs to have results MRI to make an opinion. EE explain to me that he will have his MRI next week (Feb 13) and I explain to him that his claim is pending until we received the MRI result and the referrals to MC. He is relieved because his file is pending (and not refused).

The MRI report was signed by the MRI clinic on February 18, 2018. It indicated "*no obvious labral tear. IMPRESSION: Unremarkable".* Knowing full well that Blue Cross needed the MRI results in order to approve his STD benefits, the grievor still took no steps on or shortly after February 18, 2016 to obtain a copy of the MRI results-either from the MRI clinic or his physician.

On February 26, 2016, the DCS wrote to the grievor specifically seeking the MRI report that the grievor promised in their conversation of February 4, 2016. The grievor was warned in the same letter that his file would be closed if the results were not received by March 13, 2016. The grievor still did not provide a copy of the MRI report, even after the DCS called him on March 1, 2016 and he promised in that conversation to fax it in *"in the next days".* Another reminder letter was sent to him by Blue Cross on March 9, 2016 seeking the same MRI report and again reminding him that his file would be closed if he failed to comply with the request. The grievor, as noted, finally faxed in the MRI report to Blue Cross on March 17, 2016 after his file was closed.

The onus falls on an employee at all times to abide by his or her duty to report to work. The parties in this case have specifically set out the consequences of a failure to do so. Under article 14.1(b), an employee will be "deemed terminated" if the employee "...remains away from work without permission for a period of more than three (3) consecutive working days."

The Union submits that, even in the face of such a provision, there is a duty to warn an employee that their job is in jeopardy. With respect, the arbitrator disagrees and relies on the following comments set out in *Cargill Value Added Meats v. UFCW* 2011 CarswellOnt 5920 at para. 58:

> ....In any event, the company was under no obligation to draw the grievor's attention to article 11.03(c) or warn him that his employment was in jeopardy. There is nothing wrong with an employer warning or cautioning an employee in that respect. It may even be prudent to do so. But all employees are deemed to be aware of their obligations under the collective agreement, and article 11.03(c) itself is all the warning they are entitled to.

Article 14.1(b) is clear that, absent bad faith, an Employer has the unfettered right to terminate an employee if they fail to report to work without permission for more than three consecutive days. The Employer never waived that right in this case. It was prepared to cooperate with the grievor while his Blue Cross STD claim was being dealt with but it never forfeited its deemed termination rights, either expressly or through its conduct.

Months went by while the disability insurer patiently waited for the grievor to provide the required medical documentation. Instead of being proactive in securing that necessary medical documentation, the grievor did the opposite by essentially ignoring the reasonable deadlines set by Blue Cross. He had the opportunity in particular to obtain a copy of his MRI on February 18, 2018, well ahead of the Blue Cross deadline of March 13, 2016. There is no evidence which indicates he even tried to contact Blue Cross during that period of time.

By once again ignoring the explicit warning from Blue Cross about the March 13, 2015 deadline, the grievor risked the Employer invoking the deemed termination clause. That is exactly what occurred and the reason for the grievor’s termination, as set out in the last paragraph of the March 23, 2016 termination letter:

> As a result of your continued on approved absence from June 12, 2015 to date, this letter will serve as confirmation that the company considers that you have abandon your position with Bombardier Transportation and your file will be closed.

For all the above reasons, I find that the grievor was properly terminated pursuant to article 14.1(b). The grievance is dismissed.

February 21, 2018

JOHN M. MOREAU, Q.C.
ARBITRATOR