

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 3932

Heard in Montreal, Wednesday, 15 September 2010

Concerning

CANPAR TRANSPORT L.P.

and

UNITED STEEL WORKERS (LOCAL 1976)

DISPUTE:

The dismissal of Mr. Quang Ly on December 7, 2009 from Canpar Transport L.P.

JOINT STATEMENT OF ISSUE:

On November 30, 2009 Mr. Ly was sent home by the Company for allegedly counselling fellow employees to work slowly and participating in a work slowdown. On December 04, 2009 an interview was held by the Company with Mr. Ly to determine his involvement in the matter. On December 07, 2009 Mr. Ly was dismissed from his employment at Canpar Transport for "counselling and participating in a work slowdown".

The Union grieved the dismissal on January 13, 2010 stating that there was no justification for the dismissal of Mr. Ly, that the burden of proof that Mr. Ly directly or indirectly instructed or gave counsel to any worker to partake in any type of work slowdown of any kind.

The Union requested Mr. Ly be reinstated immediately without loss of wages, benefits and/or seniority.

The Company denied the Union's request January 15, 2010.

FOR THE UNION:

(SGD.) D. NEALE
VICE-PRESIDENT

FOR THE COMPANY:

(SGD.) L. FUACO
VICE-PRESIDENT, OPERATIONS

There appeared on behalf of the Company:

L. Fuaco	– Vice-President, Operations, Mississauga
D. Johnson	– Regional Manager, Mississauga
C. Mathewson	– Investigator, Garda, Mississauga

And on behalf of the Union:

- D. Neale – Vice-President, Montreal
- R. Pagé – Staff Representative, Montreal
- D. Byfield – Chief Steward, Mississauga
- A. Therrien – Recoding Secretary, Mississauga
- Q. Ly – Grievor

AWARD OF THE ARBITRATOR

The evidence before the Arbitrator establishes that the grievor separately approached two employees to instruct them that they should work more slowly in the unloading of parcels from trailers in the Company's facility at Courtney Park, Mississauga. Statements are provided by two employees, one of whom is a private investigator retained by the Company to obtain information with respect to what appeared to be dysfunctional relations and productivity problems within the facility. The evidence confirms that the undercover employee in question, Mr. Chris Mathewson, was told on a number of occasions by the grievor that he should work more slowly, to allow the grievor to be able to work a full eight hour shift. It is common ground that when the work is completed the shift is terminated, generally before the full term of eight hours. A second statement, from a temp employee, a Mr. Anil Persad, corroborates that he too was approached on a number of occasions by the grievor and told to work more slowly so as to increase the length of the shift and the corresponding earnings of the employees.

In a preliminary matter the Union submits that the Company failed to observe the provisions of the collective agreement in a manner in which the disciplinary investigation of the grievor was conducted. Firstly it maintains that Mr. Persad was not present at the

grievor's interview and accordingly the Union was denied the opportunity to ask questions of him. It is not disputed, however, that Mr. Persad's statement was provided to the Union.

The Arbitrator cannot sustain the Union's preliminary objection. Article 6.3 of the collective agreement deals with employee interviews and reads as follows:

6.3 Whenever an employee is to be interviewed by the Company with respect to his work or his conduct in accordance with article 6.1, an accredited Union representative, selected by the employee, must be in attendance. In the event the accredited Union representative selected by the employee is not available another accredited representative selected by the employee will be substituted. Such interview and any subsequent interviews dealing with the incident must be held within 14 calendar days from the date the incident became known to the Company, unless mutually agreed. Such agreement will not be unreasonably withheld. The employee to be interviewed shall be notified in writing, no less than 24 hours prior to the scheduled interview time. This notice shall include the reason the interview is being held, including the subject matter with applicable details, to be investigated. Whenever a written statement by a person employed by the Company is entered at the interview, the employee will have the right to request the presence of that person at the interview. The employee and his Union representative may ask appropriate questions to all parties at the interview.

In the case at hand it is not disputed that the Union was provided, in a timely manner, with a copy of the statement of Mr. Persad. For reasons it best appreciates, it did not at that time or at any time subsequent request the presence of Mr. Persad for the opportunity of asking him questions. The Arbitrator cannot see on what basis the Union can now object to the procedure followed. On the whole I can see no violation of article 6.3 in the actions of the Company.

The Union also objected to the presence of the private investigator, Mr. Mathewson, who posed as an employee and provided a report of being instructed by the grievor to slow down his work to increase the hours available to employees. It is common ground that there was no statement of Mr. Mathewson which was made part of the employee's investigation. On that basis nothing was provided to the Union with respect to his information.

The Arbitrator has some difficulty with the submission of the Company that it was under no obligation to provide any information to the Union with respect to the statements given to it by Mr. Mathewson, and that it could effectively conceal his evidence until the arbitration. It appears to the Arbitrator that article 6.3 must be read in concert with article 6.8 of the collective agreement which provides as follows:

6.8 During the interview the employee or his accredited representative shall have the right to read, review and ask questions concerning any documents, tapes or videos as they are presented by the Company and copies will be presented at that time. Copies of the interview notes will be provided to the employee and the Unit Chairperson within 4 working days of the interview.

When these provisions are read together with the whole of article 6, it appears apparent to the Arbitrator that the parties intended the investigation process to be a reasonable forum for the employee to learn the case against him or her. It defies logic to believe that the parties would have agreed to allow the Company to have two forms of evidence, namely statements which it files into the employee interview, and statements which it decides to withhold until the arbitration stage. In the Arbitrator's view it would require clear and unequivocal language to suggest that the parties would have intended such a bifurcation of process, so inconsistent with the most fundamental precepts of

natural justice. Quite simply, the provisions of article 6 would be rendered meaningless if the Company could choose to receive statements from employees that it then simply does not put forward during the investigation, while nevertheless fully relying upon them for its decision to terminate an employee, both in its own decision process and subsequently at an arbitration hearing.

What is the consequence of the Company's failure? In the Arbitrator's view there can be no question but that article 6.4 is categorical. The investigation as at it was conducted must be viewed as null and void. That, in any event, is well in keeping with the jurisprudence of this Office with respect to the failure to provide a fair and impartial investigation under most of the collective agreements which are interpreted and administered in this Office.

In the result, I have no alternative but to find that the Company's actions with respect to the grievor, as understandable as they may be, must be viewed as a nullity, void *ab initio* by reason of the withholding of Mr. Mathewson's reports. The grievor is therefore to be reinstated into his employment forthwith, with compensation for all wages and benefits lost.

September 20, 2010

(original signed by) MICHEL G. PICHER
ARBITRATOR