

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

CASE NO. 3964

Heard in Montreal, Thursday 16 December 2010

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

**TEAMSTERS CANADA RAIL CONFERENCE
MAINTENANCE OF WAY EMPLOYEE DIVISION**

DISPUTE:

Claim on behalf of employee Greg Nilsson for all hours held from service while under investigation.

JOINT STATEMENT OF ISSUE:

Mr. Nilsson was removed from service on December 6, 2007 while under investigation by the company in connection with alleged improper access, use and disclosure of employee personal information and Company information on or about July 12, 2007, including employee expense account reports, for purposes other than that which it was intended.

The Union contends that: (1) The Company has violated Sections 15.1 and 15.7 of wage agreement 41. The offence being investigated was not dismissible of itself. (2) The continued employment of this long service, discipline free employee could not reasonably be said to be in jeopardy. (3) There were no concerns regarding the safety of the employee. (4) Therefore, a grievance was initiated and progressed. (5) The grievance was not responded to within the prescribed time limits of 15.7.

The Union requests that Mr. Nilsson be compensated with all lost wages, including overtime, incurred as a result of this violation.

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

**FOR THE UNION:
(SGD.) WM. BREHL
NATIONAL PRESIDENT**

**FOR THE COMPANY:
(SGD.) DAVID**

There appeared on behalf of the Company:

M. Thompson	– Labour Relations Officer, Calgary
K. Hein	– Manager, Labour Relations, Calgary
B. Lockerby	– Labour Relations Officer, Calgary

There appeared on behalf of the Union:

Wm. Brehl	– President, Ottawa
D. Brown	– Counsel, Ottawa
W. Phillips	– Local Chairman, Belleville

AWARD OF THE ARBITRATOR

The record before the Arbitrator confirms that the grievor attended an investigation that commenced at 07:30 on December 6, 2007 at a hotel in Moose Jaw, Saskatchewan. He was then being investigated for what the Company believed was the improper copying and sharing of the personal records of employees, documents to which he would have had access through his position as a timekeeper. It seems that the information in question would have been provided to the Union to assist it in prosecuting employees, under the terms of its constitution, for their actions during the course of a strike.

At the outset of the investigation the grievor's Union representative took issue with what he believed was an improper approach to the recording of objections by the investigating officer. It appears that that concern was triggered by the Union representative's objection to the fact that no job briefing, in the sense of reviewing the safety features of the building which they were in, was conducted by the investigating officer and that he indicated that he would not record that fact as part of the record of the investigation. It would appear that the investigating officer also indicated that there might be other kinds of objections that he might not consider appropriate for recording.

Faced with that the Union's representative declared the investigation to be over. The grievor then left the investigation with the two Union representatives who had accompanied him. Shortly following his action, the grievor was advised by Track Programs and Equipment Manager Steve Main that he was removed from service by reason of the fact that he had walked out of a properly scheduled investigation and refused to participate.

The record indicates that in fact the Company convened another investigation, which the grievor attended and did not abandon and at which the Company agreed, without prejudice, to conduct a job briefing prior to the commencement of the investigation. At that point the grievor had been held out of service for five days.

The sole issue in this grievance is whether the Company was entitled to hold the grievor out of service for the five days in question. I am satisfied that it was. The right of the Company to conduct a disciplinary investigation is well established within the terms of the collective agreement. The Arbitrator is directed to no provision of the collective agreement which would entitle the employee being investigated simply walking out on the basis of a procedural objection or dissatisfaction with respect to the way an investigation is being conducted. Absent extreme abuse at the hands of an investigating officer, a standard not revealed in the instant case, it is obviously the obligation of an employee to answer questions which are put during the course of an investigation, with the ability for the employee or his Union representative to raise and seek to have recorded proper objections. Should the investigating officer not record objections to the satisfaction of the grievor or his Union representative that may be a matter for a

separate grievance, but it does not give the employee a right to refuse to continue any further with the investigation. In this as in other workplace endeavours, the “work now – grieve later” principle has its application.

The issue of an employee being held out of service during an investigation is addressed within section 15.1 of the collective agreement which provides as follows:

15.1 No employee shall be disciplined or discharged until a fair and impartial investigation has been concluded and responsibility established.

An employee is not to be held out of service unnecessarily in connection with an investigation. An employee may be held out of service for an investigation for the following reasons:

- The nature of the offence is dismissible in and of itself, or,
- The continued employment of the individual is in jeopardy, or,
- There are concerns regarding the safety of the employee.

In such case, an employee held out of service more than five (5) work days, or as mutually extended, will be paid a regular day's pay, at the basic rate of pay, exclusive of overtime, for each day held out of service in excess of five (5) work days, or such other agreed upon period, whatever the decision rendered by the Company.

If an employee is unavailable for investigation, the five (5) day period shall be extended by a period equal to the period the employee is unavailable.

In the event that an employee is held out of service, the investigation is to be conducted as soon as possible.

NOTE: the Company will advise the Union when an employee is held out of service. The appropriate Service Area Manager or Track Program & Equipment Manager, if requested, will have a meeting with the Union, to discuss alternatives, with the purpose of lessening undue hardship on the employee and their family. Such meeting can be in person or by telephone. This will not apply to violations of the Lifesaving Rules.

In the Arbitrator's view the second condition which would allow the Company to hold an employee out of service during an investigation, namely “the continued employment of the individual is in jeopardy,” clearly came into play in the case at hand.

It is also arguable, in my view, that the nature of the offence, the unauthorized dissemination of personal employee information could itself have been viewed by the Company as an offence that was dismissible. Setting that aside, at the point in time when the grievor, obviously faced with a serious charge, walked out of the investigation with no indication that he intended to return or ever answer the Company's questions concerning his alleged conduct, he can be fairly said to have entered that perilous territory where indeed his continued employment was being put in jeopardy. It is true, as the Union stresses, that the grievor is a long service employee with a positive disciplinary record. However, it is less than clear to the Arbitrator that an employer might not reasonably view an employee who is being investigated for the misappropriation and misuse of confidential information in relation to employees who then refuses to participate in the resulting investigation as an employee who could well face termination, regardless of that individual's prior service.

In the result, I am satisfied that the Company acted within the contemplation of section 15.1 of the collective agreement when it decided to hold the grievor out of service following his refusal to participate in the Company's investigation. The grievance is therefore dismissed.

December 22, 2010

(signed) MICHEL G. PICHER
ARBITRATOR