CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4345

Heard in Montreal, November 12, 2014

Concerning

CANADIAN PACIFIC RAILWAY

And

UNITED STEELWORKERS – LOCAL 1976

DISPUTE:

1. The violation of article 27: Mr. G. Murillo was improperly and needlessly held out of service for an excessive period of time.

2. Dismissal of G. Murillo

UNION'S EXPARTE STATEMENT OF ISSUE:

1. On February 26, 2014, the Company notified both Mr. Murillo and the Union that he was to be held out of service pending four investigations. On February 27, 2014, the Union questioned Mr. Dorais as to the reason why Mr. Murillo was being held out of service. Two distinct investigations were subsequently held. On April 8, 2014, the Company dismissed Mr. Murillo from Company service.

The Union grieved the Company's decision to hold Mr. Murillo out of service was based on the incorrect application of Article 27.2b because it specifically states the reason for holding an employee out of service. The Union contends that the Company did not have sufficient cause to hold Mr. Murillo out of service. The Union also contends that the Company held Mr. Murillo out of service for an excessive period of time as the notices were issued on February 25, 2014 and the dismissal was on April 8, 2014, approximately 45 days.

The Union grieved the suspension and requested the Company pay Mr. Murillo for all wages and benefits with accrued interest for all time lost while he was held out of service.

The Company denies the grievance.

2. On February 26, 2014, the Company notified Mr. Murillo that he was to be held out of service pending four investigations. The Company notified the Union on February 26, 2014 that Mr. Murillo was being held out of service.

On February 27, 2014, the Union questioned the Company as to the reasons why Mr. Murillo was being held out of service. The Company's response was that his continued employment may be in jeopardy.

On March 17, 2014 the Company conducted an investigation concerning the events surrounding any communications he had with Canadian Pacific's employee Relation advisor Kari Giddings or Manulife case manager Cindy Fuller on or around October 24 and 25, 2013.

On March 20, 2014, the Company conducted an investigation concerning the events surrounding allegations and complaints that he made pertaining to Manulife's denial of his health benefits and allegations of harassment he made against Company Officer Gurprit Parmar on or around October 1, 2013. The Company also used frustrating the investigation process as a justification for dismissal.

The Union grieved that the Company did not meet the burden of proof as most of the allegations were in the form of personality styles and personal opinion of the parties involved. The Union also grieved that the Company did not conduct a fair or impartial investigation.

The Union further contends that even had the Company proved its case, which the Union does not concede, the discipline issued is excessive in the extreme and certainly does not follow the path of education nor progressive discipline.

The Union requests that the Arbitrator order the Company to return Mr. Murillo to service immediately with all wages, seniority and benefits paid with interest from the date he was held from service.

The Company denied the grievance

FOR THE UNION: **FOR THE COMPANY:**
(SGD.) R. Summerside **(SGD.) M. Moran**
Chairman Board of Trustees

There appeared on behalf of the Company:

M. Moran	– Labour Relations Officer, Calgary
J. Bonham	– Senior Director Transportation, Calgary

There appeared on behalf of the Union:

R. Summerside	– Chairman Board of Trustees, Calgary
N. Lapointe	– Staff Representative, Montreal
N. Lapointe	– Recording Secretary, Montreal
G. Murillo	- Grievor, Calgary

AWARD OF THE ARBITRATOR

This matter concerns two grievances. The first grievance alleges that on February 26, 2014, the Company improperly held the grievor out of service. The second grievance challenges the Company's decision to terminate the grievor on April 8, 2014.

The Company asserts that they had just cause to terminate the grievor. In the termination letter, the Company alleges that the grievor placed harassing and verbally abusive phone calls to both a Manulife Case Manager and an Employee Relations Advisor, and filed a false claim of harassment against CMC Management and purposely

frustrated the investigation process during formal investigations on March 17, 2014 and March 20, 2014.

The grievor is 43 years old and began his employment with the Company in 1996. At the time of his dismissal, the grievor's discipline record had zero demerits. The grievor has also served as a Local Chairperson for TC Local 1976 USW.

The grievor suffers from anxiety and at all relevant times was under the care of his family physician and a psychologist. The grievor submitted a claim to Manulife (the Company's insurance provider) for Weekly Indemnity Benefits (WI) for an absence from work commencing September 28, 2013.

On October 1, 2013, the grievor contacted the Company's Employee Relations Department and filed a harassment complaint against his supervisor, alleging that his supervisor had spoken inappropriately and hung up the phone on him.

On October 24, 2013, the grievor phoned Kari Giddings, an Employee Relations Advisor, to complain about his Manulife claim not being approved from the date he went off work. The grievor alleged that the denial of his WI benefits was further harassment by the Company. The grievor also inquired about his earlier complaint, asking if Ms. Giddings had listened to the audio-tapes of the grievor's phone conversation with his supervisor. Ms. Giddings advised that she had not had an opportunity to listen to the tapes.

Ms. Giddings alleges that the grievor raised his voice during their conversation and swore at one point. The grievor does not deny this allegation. In fact, the evidence is clear that the grievor raised his voice and was very assertive in demanding that his benefits be approved. However, there is no evidence that the grievor personally attacked Ms. Giddings. Further, Ms. Giddings did not make a memo to file about the incident until October 28, 2013, which was subsequent to a complaint being received from a Manulife Case Manager on October 25, 2013.

On October 25, 2014 the grievor called a Manulife Case Manager complaining about the status of his WI benefit claim. That same day, the Manulife Case Manager sent the Company an email complaining about the grievor's phone calls alleging that he screamed at her and demanded that she forward to him emails received from the Company relating to his WI benefit claim. The Manulife Case Manager indicated that she hung up the phone on the grievor and advised that the Company's HR department "is not helping the matter".

On November 7, 2013, Ms. Giddings sent the grievor a letter advising that she had completed her investigation into the grievor's two recent harassment complaints (one raised on October 1, 2013 against his supervisor and the other raised during the October 24, 2013 phone call). Ms. Giddings found no evidence to support the grievor's claims of harassment. She concluded her letter by stating that it was her determination that the two allegations were "false complaints of harassment" and as such a breach of

the Company's Discrimination and Harassment Policy 1300. The grievor was advised that an investigation would be initiated.

In addition to the false complaints investigation, the Company decided to also commence an investigation into the events surrounding the phone calls on October 24 and 25, 2013. At the time of this decision, the grievor was still absent from the workplace for medical reasons. The Company decided to wait until the grievor returned to work before conducting the investigation.

On February 12, 2014, the grievor provided an updated Functional Abilities Form (FAF) indicating that he would be fit to return to work on a graduated return to work program consisting of two 8 hour shifts per week between Monday and Friday for an indefinite period of time.

On February 26, 2014, the Company commenced the investigation but did not permit the grievor to return to work. Instead, they held the grievor out of service pending the investigation.

The investigation was undertaken on March 17 and 20, 2014. The evidence of the investigation clearly indicates that the grievor was confrontational, adversarial and uncooperative. On one occasion, the grievor informed the Investigating Officer that he was taking a break instead of respectfully requesting a recess. However, the record also

indicates that the grievor advised that he suffered from a medical condition and “if this (the investigation) becomes too much, he will simply have to leave and go home”.

After carefully reviewing the record, I am satisfied that the grievor frustrated the investigation process. I will address what flows from this finding later in this Award.

On April 8, 2014, the grievor was terminated for the reasons stated earlier in this award.

The first issue to be addressed is whether the Company violated the collective agreement by holding the grievor out of service on February 26, 2014. The relevant article of the collective agreement provides:

> 27.2(b)
> An employee is not to be held out of service unnecessarily in connection with an investigation but, where necessary, the time so held out of service shall not exceed ten working days (eighty regular hours) and the employee will be notified in writing of the charges. The President of the Union, or authorized designate, must be notified in writing if an employee is held out of service in excess of five working days (forty regular hours), Failure to notify the President will result in payment of all time held out in excess of forty hours.
>
> It is understood that employees may be held out of service where:
>
> - The nature of the offense is dismissible in and of itself, or;
> - There are significant workplace safety concerns;
> - The continued employment of the individual is in jeopardy
>
> In a case where the incident has the potential to culminate in dismissal but where the culminating incident is not dismissible in and of itself, it is understood that wages will not be withheld from the employee while they are out of service.”

The language of the collective agreement is clear that the parties have agreed that employees will not be held out of service “unnecessarily in connection with an investigation”. The parties have also agreed that in three certain situations an employee may be held out of service.

The first two situations are in my view fairly straightforward. An offence that is dismissible in and of itself would be a major offence such as theft. A significant workplace safety concern is also fairly straightforward and might include situations involving threats of violence.

The third situation is not as precise and the parties did not provide me with any decision interpreting this language. In my view, the language must be examined in the context of the entire provision, which generally provides that employees will not be held out of service unnecessarily.

I note that the language chosen by the parties that may trigger holding an employee out of service is more imperative. The parties chose the words “is in jeopardy” as opposed to “may be in jeopardy”.

Further, the parties have also provided that employees who are held out of service for a culminating incident (which would normally mean an employee’s employment is in jeopardy) that is not dismissible in and of itself, will not have wages withheld.

In my opinion, the language in the third situation must mean that the allegations against the grievor, if proven, will put the grievor's continued employment in jeopardy. If such an allegation is a culminating incident, then the employee will not have wages withheld.

In this situation, the allegations against the grievor, viewed in context are not allegations of a major industrial offence such as theft. I also do not see how the allegations raise a significant workplace safety concern. The grievor did not threaten anyone in any way shape or form. At its highest, the allegations are of a belligerent employee who feels victimized by his supervisor's conduct and the manner in which his WI benefit claim was being adjudicated. In my view, the allegations against the grievor do not fall within the exceptions that may result in an employee being held out of service. Accordingly, I find that the Company violated the collective agreement by holding the grievor out of service unnecessarily.

Turning to the grounds for termination, I find that the Company over reacted and the termination was without just cause. That is not to say the grievor is without any blame. The grievor's conduct was clearly unacceptable and deserving of some discipline.

There is no doubt in my mind that the grievor was guilty of misconduct that deserved discipline. The grievor's conduct on October 24, 2013, during his discussion

with Ms. Giddings, was inappropriate and unprofessional. The grievor's conduct on October 25, 2013 during the phone call to the Manulife Case Manager was equally unacceptable.

The grievor clearly has a temper and anger issues that need to be addressed. However, his misconduct did not involve threats or personally demeaning insults towards any of the individuals involved.

I also acknowledge that the grievor was suffering from anxiety, as well as being frustrated and upset about how his WI benefit claim was being handled. That being said, it was not necessary for him to be disrespectful and scream at these two people.

In terms of the allegations of making "false harassment complaints", I note that the complaints made by the grievor were not similar to the serious allegations of drug use referenced in the **SHP 669** Award of Arbitrator Picher, which was relied upon by the Company.

I am also concerned about Ms. Giddings investigation into both of the grievor's complaints. Ms. Giddings continued to investigate the two complaints after she asserted that the grievor acted inappropriately towards her during the phone call on October 24, 2013. I fail to see how Ms. Giddings could have been impartial in these circumstances. My concern is amplified by the fact that Ms. Giddings determined that the grievor made "false complaints" as stated in her report to the grievor on November 7, 2013.

In my view, Ms. Giddings made findings that went well beyond what was necessary in the circumstances. Ms. Giddings had a duty to investigate the allegations to determine if they were substantiated. If the complaints were not substantiated, then Ms. Giddings could have advised that there was cause to investigate whether the complaints were false. In my opinion, Ms. Giddings went too far when she made a finding that the complaints were false.

Furthermore, the Union provided evidence that the grievor has filed similar unsubstantiated complaints in the past and the Company took no action against him. In these circumstances, I am of the view that at a minimum the grievor was entitled to a warning before any significant action was taken in disciplining him.

This brings me to the grievor's conduct during the investigation, which I find to be an aggravating factor. The grievor's conduct during the investigation was without a doubt unacceptable and a complete frustration of the investigative process. I agree with the Union that the Company cannot rely on the investigation as a separate ground for discipline. However, it is fair for the Company to consider the grievor's conduct during the investigation as an aggravating factor in determining the appropriate penalty. In my mind the Company would be justified in administering a more significant penalty based on the grievor's conduct during the investigation. His conduct indicated a complete failure to appreciate that his earlier conduct was inappropriate and unacceptable.

There are a number of mitigating factors in the grievor's favor. The grievor is a long service employee and he had no demerits on his record at the time of the incidents. The grievor suffers from anxiety, which was affecting him enough to cause him to be absent from work. I also appreciate that the grievor was experiencing frustration regarding the processing of his WI benefit claim.

After carefully considering the evidence and submissions in this matter, I find that in these circumstances progressive discipline ought to have been applied by the Company to correct the grievor's behaviour. In my view, a short suspension or 30 demerits and a referral to anger management to correct the grievor's behaviour would have been appropriate to address the grievor's original misconduct. In light of the grievor's uncooperativeness during the investigation, I find that a three day suspension is the appropriate penalty.

Accordingly, for all the reasons stated above, the grievance is allowed and the grievor is to be reinstated in employment without any loss of seniority. The grievor's record is to be amended to reflect a three day suspension. The grievor is to be compensated for the balance of his lost wages and benefits. The grievor's reinstatement shall be subject to the Company having the right to require the grievor to participate in educational training with respect to the Discrimination and Harassment Policy as well as anger management.

The grievor should understand that his conduct is unacceptable and should not be repeated. The grievor should also now be aware that making false complaints might result in discipline up to and including discharge.

I remain seized to address any issues arising from the interpretation and implementation of this Award.

November 20, 2014

JOHN L. STOUT
ARBITRATOR