CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4491

Heard in Edmonton, September 14, 2016

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE
MAINTENANCE OF WAY EMPLOYEES DIVISION

DISPUTE:

Dismissal of Mr. A. Rwigamba.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

On March 2, 2015, the grievor Mr. A. Rwigamba, was dismissed by the Company for conduct unbecoming of an employee as evidenced by him claiming weekend and meal expenses for which he was not entitled to throughout 2014. A grievance was filed.

The Union contends that the grievor never acted with fraudulent intent.

The Company's investigation violated sections 15.1 and 15.2 of the collective agreement.

Employees are not required to keep expense receipts in such circumstances. The Company's actions violated section 12.9 of the collective agreement.

The Company bears the burden of proof and its evidence constitutes nothing more than assumption and innuendo. It certainly does not constitute the kind of clear, cogent and convincing evidence required in such circumstances.

The grievor's dismissal was unwarranted an improper.

The Union requests that the grievor be reinstated into Company service immediately without loss of seniority and with full compensation for all wages and benefits lost as a result of this matter.

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

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) G. Doherty	**(SGD.)**
President	

There appeared on behalf of the Company:

B. Medd	– Labour Relations Manager, Calgary

There appeared on behalf of the Union:

H. L. Helfenbein	– Vice President, Ottawa
D. Brown	– Counsel, Ottawa

AWARD OF THE ARBITRATOR

At the time of his termination, Mr. Alpha Rwigamba was fifty-three years old and had worked for CP as a Machine Operator for eleven years. His duties involved considerable travel within Alberta. Article 12 of the collective agreement entitled the grievor to claim for a travel allowance and mileage.

The Company employs a Forensics and Investigation (Corporate Risk) Group (essentially internal auditors) who periodically check various CP expenditures. For 2014, they undertook a review and analysis of weekend mileage and per diem allowances paid out to unionized Maintenance of Way employees in the Pacific Region. They:

- Performed data analytics using certain criteria and flagged forty employees for further detailed review;
- Obtained payroll information and hotel stay information, including sign-in sheets, and assessed the reasonableness of mileage claims (distances traveled during the weekend) submitted and reimbursed to employees; and
- Conducted surveillance on identified employees as required.

The grievor was flagged for a more detailed review, based on data showing a principle residence in Fort McMurray and claims of 73,000 kms for weekend mileage totalling $17,347 along with per diem allowances of $16,270. Further investigation (prior to any Union or grievor notice or involvement) suggested to the audit group that several weekend mileage claims were questionable as it would not be possible to drive the distances claimed by the grievor on his scheduled days off. Four weekends were

identified as particularly suspect. The Audit Group produced a large and detailed document, the findings of which were:

> - Based on Mr. Rwigamba's work cycles (payroll records) and hotel stay information (check in/out times per sign-in sheets completed and signed by the employee), several weekend mileage claims reimbursed are questionable as it would not be possible to drive the distances claimed during the employee's scheduled days off (Refer to Tab 7 "Summary of Questionable Mileage Claims" for details).
>
> - It is questionable whether Mr. Rwigamba's current PPR is … Fort McMurray, AB as declared on his TD4 form. Based on public records Mr. Rwigamba resides in Calgary, AB (Refer to Tab 8 "Public Records" for details).
>
> Recommendation
>
> This case warrants a formal investigation.

Mileage and allowance entitlements are set by Articles 12.9(a) and 12.9(b), each as explained in Appendix D – Expense Claims Q & A's.

This case raises several important CROA process issues. Before addressing them, I outline how this matter unfolded. On January 21, 2015 the grievor was given a notice to attend on January 28, 2015 for a formal investigation at CP's headquarters in Calgary. The notice provided:

> (The) investigation will be in connection with the expense claims submitted by you in 2014. Please bring along any pertinent food, lodging or fuel receipts, detailed maintenance invoices, phone records showing location details of outgoing and incoming cell calls, debit card receipts and/or statements with account numbers blacked out, credit card receipts and/or statements with account numbers blacked out, bus or air fare receipts or any other documents that may conclusively support expense claims for that period.

The grievor attended with his Union representative and prior to the start of the investigation, was given the full audit and supporting documents. An hour and twenty minutes later the investigation began. The Union representative put the following objections on the record:

> The Union objects on the grounds that the notice to appear is a violation of Mr. Rwigamba rights afforded him under article 15.2 of Wage Agreements 41 and 42 as the notice to appear was far too vague to be considered a proper notification of subject matter. Furthermore, the Union can only see the company's deliberate lack of forthcoming as evidence that this investigation is nothing more than a fishing expedition and arbitrator Picher has stated in SHP563 "that a fishing expedition, if that's all it is, will be viewed as arbitrary and abusive with the result being that the investigation will not be considered proper or fair and impartial." Mr. Picher stated in his ruling for CROA&DR2280 that "an employee should have a reasonable opportunity to know the precise nature of the accusations against him". This has not been afforded to Mr. Rwigamba due to the vague nature of the notice to appear making this also a violation of article 15.1.

Immediately following this, the grievor was asked:

> Q3 Prior to the commencement of this investigation you were provided with the above list of documents. Have you had ample time to review these documents?
>
> A3 Yes.

While the documents given to the grievor were large, the essence of the auditor's conclusions are set out in a three page Executive Summary and the appended seven page "Summary of Questionable Mileage Claims". Most of the other material consists of original records like time sheets, hotel sign in sheets and payroll logs. No request was made to adjourn the investigation.

The grievor answered specific questions about the four weekends the audit had most directly called into question. He admitted that on a few occasions he had submitted excessive mileage claims and agreed to pay these sums back, although these could easily be attributed to a mistake over the rules, and only totalled $174.22. At the end of the investigation the grievor was asked:

> Q61 Can you supply me with any documentation to support any of the trips claimed in 2014
>
> A61 I don't have any here today.

It was implicit then that information provided subsequently would be taken into account. This conclusion was reinforced when, on February 20, 2015, before any decision to dismiss the grievor was made, he was sent the following letter:

> Further to the investigation held January 28, 2015 concerning expense claims. During the investigation you were given the opportunity to provide to the company any receipts, credit card information or any documentation to substantiate costs incurred and claimed. None was provided during the investigation. If you would like to submit any documentation to support your claims, you will have to end of business February 23, 2015 to do so. If you decline to do so, the Company will assess discipline based on the information on hand.

I am satisfied the grievor knew he could do so and made a deliberate decision not to. On March 2, 2015 he was dismissed for the reasons set out above.

CIRB Proceedings

Right after the Company's denial, the grievor filed an application with the *Canadian Industrial Relations Board* alleging that the Union had failed in its duty of fair representation. Correspondence was exchanged and, on July 12, 2015, that Board

dismissed his complaint. The Employer, in its arbitration submission, sought to make extensive reference to the CIRB record. The Union took exception to their doing so. This Arbitrator ruled that the Employer could not rely upon documents produced in that CIRB process to prove its case in arbitration.

The *Canada Labour Code* gives to those represented by a trade union a process to ensure they are fairly represented, a frequent consequence of which is that the Union will continue to represent the grievor vis-à-vis the Employer in their original grievance, either because the grievor's complaint was misguided or because it was valid and the Union is proceeding because of a CIRB direction to do so. In either event, the grievor who has had to disclose his or her full dealings with the Union in an attempt to vindicate a right to fair representation should not be put in a worse position in their original grievance than if the Union's representation had gone unquestioned.

The Employer argues that the CIRB's correspondence advises parties to its proceedings that "all records provided to the Board in connection with this matter will be placed on the public record" and that the Board's Regulation 2012 SOR/2001-520 provides that, presumptively, documents are placed on the public record subject to a specific CIRB power to protect confidentiality. However, those rules do not determine admissibility in these grievance proceedings. In some future case this may need to be addressed in depth. Here, it is sufficient to record that the decision was made without reference to the record in the CIRB proceedings.

Union Arguments

The Union pleads lack of impartiality, an attempt at a “fishing trip”, a failure to meet the burden of proof, and inadequate notice.

Impartiality

The Company is said to have showed a lack of impartiality (a) by drawing on the forensic report’s statement that the grievor “was identified for claiming questionable weekend mileage expenses” and (b) because the investigator asked the grievor certain questions. It argues:

> It is submitted that the language used by the investigating officer is most revealing: At Q48, the investigating officer stated “the Company believes it is impossible that you made that trip since there was not nearly enough time to make that trip.” At Q49, Q50, Q51, Q53, Q54 and Q55, the investigating officer stated “the Company believes it is unlikely you made that trip …” At Q59, the investigating officer stated that a claim the grievor made “appeared to be intentionally fraudulent” and, at Q60, the investigating officer said to the grievor that he had received payments for “incorrect claims”.

I note, initially, that it is the investigation that has to be fair and impartial. In such situations persons within the Company, other than the investigating officer, may well be making serious allegations based on information they have, and may not be impartial. It is the investigating officer’s job to sort that out after a fair process. I find nothing in the investigating officer’s questions that indicate any lack of impartiality. His references to what the “Company believes” is quite clearly a reference to the results of the audit rather than an indication of prejudgment.

Fishing Trip

The “fishing trip” objection has always been popular more for its imagery then its legal precision. Before you can call someone in to involuntarily answer questions you need to have a clear idea what it is they may have done wrong; some reasonable grounds to believe a disciplinable infraction occurred.

In this case the material in the auditor’s report was sufficiently detailed and well analyzed to justify further inquiries. While circumstantial, it raised sufficient and serious concern that the grievor was not returning to Fort McMurray but instead staying in Calgary. That justified calling on the grievor for an explanation. Absent some explanation, it was sufficient to allow inferences to be drawn that the grievor had been claiming expenses based on repeated return trips to a residence in Fort McMurray when in fact he was overnighting elsewhere.

Burden of Proof

The Union maintains that the Employer in this case has failed to meet its burden of proof through clear and cogent evidence, particularly since the proof necessary is of a fraudulent intent, not just of a few miscalculations.

The Employer's reply is that the audit report provided sufficient information that, if unrebutted, leads to the conclusion that the Grievor had not travelled as claimed. Having put forward such a *prima facie* case, and indicated an ongoing willingness to accept any credible exculpatory evidence, in the absence of a reply, the Employer maintains an adverse inference can be drawn against the grievor. The Union raised the "fishing trip" objection, but beyond that argues that the grievor was under no obligation to maintain receipts and similar documents capable of providing proof of his travels or location.

The Employer suggests it would have accepted, and the grievor could have provided, for example:

- Receipts from locations along the route of travel or at the destination;
- Banking records that show location of purchases along the route of travel or at the destination;
- Phone records that show calls made along the route of travel or at the destination;
- Credible firsthand accounts of witnesses that the Grievor was present at the destination, or
- Any other credible document(s) that demonstrate the Grievor travelled as claimed.

The grievor objected to being put in the position of providing such documentation. In the Employer's view, this justifies its drawing, and an arbitrator drawing, the inference that no such proof is available. Despite the argument that the grievor is not obliged to

retain receipts etc., it was clearly (absent some unusual explanations) open to the grievor and within his ability to obtain at least some of the information the Employer says it would have accepted. There is a particular evidentiary onus on an individual when the evidence in question is peculiarly within the witness's own power to obtain. Palmer, *Collective Agreement Arbitration in Canada* discussed adverse inferences at sections 6.63-6.64:

> 6.63. More commonly, adverse inferences are drawn when a witness (including the grievor), who might reasonably have been expected to provide relevant evidence and to be called by a particular party, is not called by that party, or where one party refuses to respond to seemingly compelling evidence presented by the other side. In either case, an "adverse inference" may be drawn against the party refusing to tender the expected evidence. In other words, the adjudicator may infer that the evidence, had it been presented, would not have been favourable to the party presenting it. This principle is said to flow from Lord Mansfield's dictum in *Blatch v. Archer*.
>
> > It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.
>
> 6.64. The principle applies with equal force whether there has been failure to call a witness or to produce obviously relevant documents.

The grievor chose not to provide any of the exculpatory or explanatory information that it was within his ability to obtain, either in the investigation process prior to the decision being made, or in these proceedings. An adverse inference was justified.

Adequacy of the Notice of Investigation

The Union maintains that the notice of investigation was wholly inadequate. Its lack of specificity is argued to render the discipline void *ab initio*. It argues there has been a breach of collective agreement provisions 15.1 and 15.2 which provide, in part:

> 15.1 No employee shall be disciplined or discharged until a fair and impartial investigation has been conducted and responsibility established.
>
> 15.2 When an investigation is to be held, the employee will be notified, in writing, of the time, place and subject matter of such hearing. He may, if he so desires, have a fellow employee and/or an accredited Representative of the TCRC MWED present at the hearing.
> …
>
> The employee will have the opportunity to review all evidence taken, immediately prior to the commencement of the hearing, and he shall be furnished with a copy of the statement, and, on request, copies of all evidence taken.

The adequacy of the subject matter description in the notice of investigation is clearly related to but subtlety different from the adequacy of the material the employer had (which the employee is entitled to see at the outset of the investigation) that justifies its inquiry. They are different in that the notice may allege more than is justified by the available information, or it may fail to identify sufficiently the allegations arising from that available information. The parties referred to several prior cases on the sufficiency of notice and more generally on the nature of the process required by Article 15. In **CROA&DR 2280** Arbitrator Picher described the process as follows:

> The underlying principle is that, before being disciplined, an employee should have a reasonable opportunity to know the precise nature of the accusation made against him or her, with reasonable access to any pertinent statements or documents in the possession of the Company, and be afforded a fair opportunity to offer an explanation, response or rebuttal to the information or material in the Company's possession.

This speaks of knowing the precise nature of the accusations before being disciplined. Article 15.2 refers to notice of the subject matter of the hearing. How precise must the notice itself be, as opposed to the information provided before the commencement of the hearing? That question was addressed in AH 521 where the notice said it is "in connection with alleged failure to meet work obligations while employed as a Conductor … between January 4 and February 7, 2003." Arbitrator Picher found the allegation too broad, saying:

> Notice is one of the most essential rights and protections available to an employee facing disciplinary charges. It is, needless to say, important for an employee to know in advance the precise conduct or events which will be the subject of the investigation that may result in his or her discipline. The language of article 82.1 is plainly intended to allow employees the ability to know clearly, forty-eight hours in advance, the specific charges against them. The requirement that the charges be written and that at least two days' notice be provided gives the affected employee a fair opportunity to think about the events or incident which will be the subject of inquiry, review any pertinent documentation and make inquiries of others who may be material witnesses, if necessary. Obviously, it is essential for the employee to have a clear understanding of the precise nature of the conduct which is alleged if he or she is to have a meaningful opportunity to prepare himself or herself to respond to the investigating officer's questions and offer any rebuttal, if appropriate. It seems to the Arbitrator self-evident that if, for example, an employee receives a notice to attend at an investigation for something as broad as "… failing to meet your obligations as an employee on the following dates …" he or she is placed in the position of having to determine the nature of the offence alleged by surmise or inference, given that an individual's employment may involve any number of different "work obligations". That is plainly not the standard of clear notice intended as part of a fair and impartial proceeding within the meaning of article 82.1 of the collective agreement. With respect, the phrase "… alleged failure to meet work obligations …" could encompass a host of possible infractions ranging from absenteeism to insubordination to the use of alcohol or drugs in the workplace.

One purpose of the Article 15 process is to give the person under investigation a clear indication of what is alleged and to provide an opportunity to explain, recognizing there may be more than one side to any story. Arbitrator Picher said in SHP371.

> The procedures under that rule have a two-fold purpose which involves a balancing of the interests of the Company and of the employee. On the one hand, the Company is to have an opportunity to question the employee who is the subject of the investigation, prior to making a decision with respect to the possible assessment of discipline. On the other hand, it provides to the employee, and his union, a minimum degree of due process, whereby the employee has at least one day's notice of the investigation and the matter to be investigated, the assistance of an authorized representative of the union and, if requested, copies of all pertinent statements, reports and other evidence in the possession of the investigating officer which may be used against the employee. The right to a fair and impartial investigation implies that the employee be afforded the opportunity to respond to the statements or evidence in the possession of the Company, and be given the opportunity to make a full answer and explanation.
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> The process so contemplated is not a trial nor a hearing which must conform in all respects with judicial or quasi-judicial standards. It is, rather, an information gathering process fashioned, in accordance with the requirements or the collective agreement, to give the employee the opportunity to know the information gathered, and to add to that information before any decision is taken with respect to the assessment of discipline.

The parties, in structuring the unique CROA process have agreed that decisions should follow prior CROA jurisprudence. In this case, the Union, relying on these prior cases, argues that the notice of inquiry was void *ab initio*. Some thought needed to be given to that proposition in light of the Supreme Court of Canada's decision in:

> *Dunsmuir v. New Brunswick* [2008] 1 S.C.R. 190

It reversed a longstanding approach in relation to statutory office holders, disparaging the concept of a procedural breach voiding a termination. The Alberta Court of Appeal following that approach, saying:

> 33 It is clear since the decision in *Dunsmuir* that a breach of procedural provisions such as those found in Article 28.02 is not irredeemably fatal. The breach is undoubtedly a breach of contract, but it no longer renders the entire dismissal "void". The law no longer assumes that the dismissal which obviously did happen, never happened. It is therefore up to the arbitrator to decide what remedy should be awarded for that breach of contract. In selecting the remedy the arbitrator must often decide what damage flowed from the breach of contract, which inevitably leads to asking whether the outcome would have been any different if the procedural provisions (such as those in of Article 28.02) had been complied with.
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> *Alberta Union of Provincial Employees v. Alberta* (2010) 196 L.A.C. (4th) 371 (Alta. C.A.)

See also:

> *Alberta Health Services (Calgary Area) v. H.S.A.A*. [2011] ABCA 306 at paragraph 28
>
> *Calgary Coop and Union of Calgary Coop Employees (CF Remedies)* [2013] CanLii 61820 (Ponak)

When arbitrators have addressed the sufficiency of notice, in a contextual way, and in deciding whether to set aside the discipline for inadequate notice, or to impose some lesser remedy for a breach, they have generally distinguished between the adequacy of notice given before an investigation and the adequacy of the notice of grounds once an investigation is complete. Arbitrator Albertyn said of this distinction:

> The collective agreement requires post-discharge notice; the cases referred to by union counsel concerned pre-discharge notice. The different is important. Prior notice of a discharge meeting is to enable a union to effectively represent a worker at the disciplinary meeting, with a view to possibly persuading management at the meeting to eschew or ameliorate the discipline, and to try to ensure that any decision by management to discipline or terminate the worker is made on reasonable

> grounds. A post-discharge notice serves a different, more limited, purpose. It is intended to inform the union of the discharge so that the union has a reasonable opportunity to decide whether a timely grievance challenging the discharge should be pursued. This is a procedural entitlement.
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> *Pepsi Bottling Group Inc. v. Teamsters Local 938 (Hooper Grievance)* [2004] OLAA No. 430

See also:

> *Dupont Canada Inc. v. CEP Local 28* (2003) 123 L.A.C. (4th) 158
>
> *Invista Canada v. Communication, Energy and Paperworkers Union of Canada Local 280* (2006) 151 L.A.C. (4th) 222

Considering this point, I find that, even if an inadequate notice of investigation does not render the discipline void *ab initio* as a matter of law, setting aside the discipline for breach of such a substantive requirement can still lead to the same result. As a consequence, the underlying logic of Arbitrator Picher's decision in AH521 still applies even though, since then, the law has moved forward somewhat.

In this case, I find I must agree with the Union that the notice of investigation given was way too vague and falls four-square within arbitrator Picher's comments in AH521. All the notice says is that "it is in connection with expense accounts submitted by you in 2014". I find that to be particularly so because the Employer had available to it, and could easily have included with Mr. Rwigamba's notice the far more precise (and thus informative) executive summary in the audit report or the "Summary of Questionable Mileage Claims" or both.

The Employer's choice of a vague and terse notice led to a preliminary objection and to the grievor's then standing on what he viewed to be the lack of any contractual duty to keep records or to answer questions. This may well not have happened had a more fulsome notice been given. I cannot, as a result, find that the breach of Article 15 as interpreted in prior CROA decisions, caused no harm. I recognize that the Employer gave additional opportunity for the grievor to produce exculpatory evidence, but this did not render the initial inadequacy inconsequential. As a result, I uphold the grievance. The initial notice of investigation was too vague and imprecise as to what was alleged to allow for a fair investigation under Article 15 as that has hitherto been interpreted in CROA decisions.

For these reasons I uphold the grievance, set aside the discipline and direct that the grievor be made whole.

December 5, 2016

ANDREW C. L. SIMS
ARBITRATOR