CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4782

Heard in Gatineau and via Zoom Video Conferencing, July 13, 2021

Concerning

CANPAR EXPRESS

And

UNITED STEELWORKERS – TC LOCAL 1976

DISPUTE:

The dismissal of Mr. L. McIntyre.

THE UNION'S EX PARTE STATEMENT OF ISSUE:

On February 17, 2020 and until March 17, 2020, Mr. McIntyre took annual vacation.

Failing to feel completely healthy following his vacation time, Mr. McIntyre called Jen, his terminal manager on March 19, 2020 and requested modified duty. At that time, he was told she thought he was retired.

The Union requested proof of Mr. McIntyre's retirement.

The Company replied that he heard that Mr. McIntyre had retired but did not have proof.

The Union contends that the Company failed to provide definitive proof that Mr. McIntyre requested his retirement, nor did he set a date in the future to do so. The Union therefor requested that Mr. McIntyre be immediately reinstated as an active employee of Canpar-Express with no loss of seniority or benefits as well as any lost wages since March 22, 2020.

The Company denied the grievance.

FOR THE UNION:

(SGD.) N. Lapointe
Staff Representative

FOR THE COMPANY:

(SGD.)

There appeared on behalf of the Company:

S. King	– Manager, Human Resources, Toronto
J. Guile	– National Director of Operations, Toronto

And on behalf of the Union:

A. Daignault	– Representative, Montreal
G. Rankine	– National Business Agent, Vancouver
L. McIntyre	– Grievor, Dundas

AWARD OF THE ARBITRATOR

1. The grievor was employed as a driver representative with the Company's Package and Courier division.

2. The issue to be determined is whether the grievor retired or was constructively dismissed in March 2020. At the time, he was seventy-one (71) years old and had thirty-eight (38) years of service.

3. The Company filed documentary evidence consisting mainly of emails from its vice-president and the grievor's former supervisor and colleagues, summarizing the relevant events. These documents were generated after the grievor's last day of work. The Union objects to the admissibility of this evidence, on the ground that it was not filed in advance of the hearing. I reject the Union's objection, as there is no prescribed requirement to file evidence in advance under the *Memorandum of Agreement Establishing the CROA&DR*. Also, in this case, the timing of the Company's filing does not cause prejudice to the Union's case. As I explain in more detail below, while the documents are relevant to the issue to be determined, I find them insufficient to establish the Company's case.

4. The Company's position can be summarized as follows. The grievor had discussions with his supervisor about his intention to retire. He indicated that rather than using his vacation in the summer, as per his habit, he would exhaust it in early 2020, along with his sick days and float days entitlement, and then immediately transition to retirement. The exact dates were verbally confirmed by the grievor to his supervisor during a meeting on Wednesday, January 29, 2020. The grievor would start his vacation on Monday, February 3, 2020 and officially start his retirement on March 20, 2020.

5. According to the supervisor's summary email, the grievor had previously stated that he did not want the usual retirement celebration at the terminal. Therefore, the retirement jacket normally offered to retirees as a parting gift was presented to him in private during the January 29, 2020 meeting. The grievor wanted to arrange his own retirement party and wished to post flyers in the facility to inform his coworkers. On February 7, 2020, the grievor informed his lead hand that the party was scheduled for February 14, 2020, at his clubhouse. This information was communicated to the warehouse clerk who prepared and posted the flyers, a copy of which was filed in evidence. It is unclear whether the party took place or not – the grievor denies planning it and attending.

6. The grievor's supervisor retired and was replaced by a new terminal supervisor effective March 13, 2020. According to a summary of events prepared by the new supervisor and dated September 30, 2020, she was a former colleague of the grievor and had known him for a few years. They had regularly chatted about his upcoming retirement and he seemed excited about it. When she started in her new position as supervisor, she

understood the grievor to be on pre-retirement vacation. The grievor went to see her shortly after she started her new role, while he was still on vacation, indicating he wanted to go back to work but that he would need a helper, as he could no longer perform the physical duties on his own. She replied that he was already retired and referred him to human resources (HR). The Company maintained that he had retired.

7. The Union's position is as follows. The grievor took his annual vacation from February 17 (not February 3, as alleged by the Company) to March 20, 2020, in order to deal with some health issues. Not feeling well enough to return to work at the end of his vacation, he spoke with the new supervisor on March 19, 2020 and requested modified duties, which were denied. The new supervisor indicated she thought he was retiring after his vacation. On March 26, 2020, the Union contacted HR, requesting evidence of the grievor's intention to retire. The director of HR replied that he had heard the grievor had retired but did not have any evidence. He said he would investigate but did not provide the Union with further information. On April 20, 2020, the grievor's treating physician filled out a short-term disability insurance claim form for him – he indicated a diagnosis and recommended self-isolation as "essential until pandemic declare[d] over". The Company maintained that he was already retired. The Union argues that the grievor did not fill out a retirement form or otherwise confirm his intention to retire in writing, nor did he draw his pension.

8. In the oft-cited decision *Beggs v. Westport Foods Ltd.*, 2011 BCCA 76 (CanLII), the British Columbia Court of Appeal described the test for voluntary resignation as follows:

> [36] It is common ground that both a dismissal by an employer and a voluntary resignation by an employee require a clear and unequivocal act by the party seeking to end the employment relationship. There is a distinction, however, in the tests to be met in order to establish each of these methods for ending the employment relationship. […] A finding of resignation requires the application of both a subjective and objective test: whether the employee intended to resign and whether the employee's words and acts, objectively viewed, support a finding that she resigned.
> [Emphasis added]

9. In *Nutrien Ltd. v United Steelworkers, Local 7689 (Dale Hansen)*, 2021 CanLII 54674 (SK LA), Arbitrator Ish recently summarized the arbitral jurisprudence regarding resignations as follows:

> [60] […] An effective resignation has both a subjective and an objective element – "an employee must first have resolved to do so, and then done something to carry the resolution in effect' (Mitchnick and Etherington, at p. 485). This two-fold test has been described by Brown and Beatty at 7:7100 as follows:
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> > In answering that question, from the earliest cases arbitrators have insisted that the act of quitting embraces both a subjective intention to leave one's employ and some objective conduct which manifests a continuing effort to carry that intention into effect. […]
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> …
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> > In many cases, the difference between the parties centres on whether an employee who expressly declared an intention to quit really meant what he or she said. It is not uncommon for people in a highly emotional state to declare an intention to resign which is not sincere. If, on the facts of a case, the employee's statement was made on the spur of the moment, or out of anger or frustration, for example, it will typically be found to lack the subjective element that is necessary to establish a quit. "Resignations" made under duress and undue pressure, emotional turmoil and stress, or provocation, or by persons whose mental and medical condition deprived them of the capacity to make such decisions rationally, are treated the same way. On the other hand, if the arbitrator is of the opinion that the person simply opted to resign rather than face a less desirable alternative (such as a criminal prosecution and/or discharge) or made an ill-considered decision, acting unwisely and/or on a mistaken belief, the employee will, in the absence of any

> extenuating circumstances, likely be held to his or her declared intentions.
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> Whether an announcement of quitting will be found to be real depends, of course, on the facts of each case. Arbitrators take into account a wide range of factors, including the context in which the statement was made; the amount of time the employee had to reflect on his or her decision; whether the employee had the benefit of his or her union's advice; and what the employee did immediately thereafter. Putting a resignation in writing is usually taken to be objective evidence that the employee did intend to quit, but there can be circumstances, such as when the document is prepared by the employer, when it is not.

10. In this case, although there are some factual inconsistencies about the details, I find the Company's version of events generally plausible, in that the grievor discussed his retirement plans with his supervisor and colleagues, a retirement party was advertised for the grievor and he received a retirement jacket. I am not convinced by the Union's assertion that the grievor used up his vacation in order to deal with health issues. If he was unable to work for health reasons starting in February 2020, it seems more plausible that he would have applied for short-term disability benefits, as he tried to do in April 2020, rather than exhaust his vacation. For these reasons, I find that the grievor must have been contemplating and planning to retire imminently.

11. However, I find it surprising that an employee would leave on retirement with effectively two days working notice (alleged notice given verbally to his supervisor on Wednesday, January 29, for last day of work on Friday, January 31, 2020), and without the Company generating any documentation confirming this significant event and change in an employee's status, such as a retirement form or emails between the supervisor and HR to administratively prepare or process the grievor's retirement.

12. I am also sensitive to a comment made by the warehouse clerk, in her email summary of events, that there was "some uncertainty leading up to [the grievor's] retirement". Although she adds that the grievor made it clear to her that he did not have any plans to return to work once his vacation was used up, the uncertainty she refers to is likely the cause of the parties' diverging interpretation of events in this case.

13. While I accept that the Company was under the genuine impression that the grievor intended to retire after exhausting his vacation, it took no action to formalize its understanding that the grievor had reached a final decision to retire and remove the uncertainty that existed, for example by seeking written confirmation of the grievor's decision to retire.

14. In the circumstances, based on the objective and subjective tests referred to in the case law cited above, I find that the Company did not meet the onus of establishing that the grievor clearly and unequivocally intended to retire, nor confirmed this to the Company. While he was contemplating and planning to retire, there is no clear evidence to show, on a balance of probabilities, that the grievor made a final decision to retire immediately after his vacation, nor that he communicated such to the Company.

15. Therefore, I find that the grievor was constructively dismissed when the Company took the position, when he sought to return to work after his vacation, that he had retired and that the employment relationship was severed.

16. I order that the grievor be reinstated retroactively to the end of his 2020 vacation, with benefits. Considering the grievor's inability to work during the pandemic due to his disability, as confirmed by his treating physician, the grievor shall not be entitled to lost wages (except through benefits, if applicable).

17. The grievance is allowed in part.

18. I remain seized with respect to any and all disputes arising from this decision.

July 30, 2021

JOHANNE CAVÉ

ARBITRATOR