CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION

CASE NO. 3660

Heard in Calgary, Thursday, 13 March 2008

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

EX PARTE

DISPUTE:

The dismissal of Conductor Brad Zalkowsky of Edmonton, AB for his alleged "fraudulent claim of educational expenses".

UNION'S STATEMENT OF ISSUE:

In July 2004, the Grievor was returned to work following a mediated settlement between the Parties with the assistance of the Arbitrator as detailed in CROA 3440.

On January 26, 2006, the Grievor was paid some $2,300 pursuant to the minutes of settlement of CROA 3440. On February 2, 2007 the Grievor was issued a notice to appear for an investigation as the Company now alleged the Grievor was fraudulently in receipt of monies that he had received pursuant to the agreed upon Minutes of Settlement arrived at in CROA 3440.

An investigation was held on February 8, 2007. On March 23, 2007, the Company issued the Grievor CN form 780, discharging the Grievor.

A grievance was filed on June 18, 2007. The grievance also raised the timeliness of the discipline assessed to the Grievor in the circumstances.

On December 19, 2007 the Company sent a full Step III response without benefit of meeting or discussing the merits of the grievance with the Union, maintaining that the discharge was warranted. The Company did not, however, address the Union's contention that the lateness of the discipline assessed rendered such discipline null and void.

The Union contends that the Grievor was assessed discipline contrary to the collective agreement and, as such, the discipline ought to be expunged, the Grievor reinstated without loss of seniority or benefits, and be made whole. The Union contends, in the alternative, that the penalty of discharge be mitigated on such terms as the Arbitrator sees fit.

The Company disagrees.

FOR THE UNION:

(SGD.) R. S. THOMPSON
GENERAL CHAIRPERSON

There appeared on behalf of the Company:

K. Morris	– Manager, Labour Relations, Edmonton
D. VanCauwenbergh	– Director, Labour Relations, Edmonton
D. Brodie	– Manager, Labour Relations, Edmonton

And on behalf of the Union:

M. S. Church	– Counsel, Toronto
R. S. Thompson	– General Chairperson, Edmonton
W. Franko	– Vice-General Chairperson
S. Hartley	– Local Chairperson
B. Zalkowsky	– Grievor

AWARD OF THE ARBITRATOR

The Union, subsequent to the close of the proceedings, withdrew its allegation that the lateness of the discipline assessed rendered such discipline null and void.

The grievor began employment in October 1980 and at time of his termination had approximately 27 years of service. The grievor was first dismissed from the Company in July 2002 and reinstated with full compensation by the arbitrator on December 23, 2002 (**CROA 3306, 3307 & 3308**). Later, in July 2004, a mediated settlement was reached between the parties with the assistance of the arbitrator (**CROA 3340**) which allowed the grievor to return to work. One of the terms of the mediated settlement, as set out in the Minutes of Settlement, reads as follows:

> 9. The Company shall reimburse Mr. Zalkowsky the sum of $2300 upon Mr. Zalkowsky providing receipts and documentation that he has paid for and successfully completed the marketing and management course at MarTech College and the Business Management Course at Stratford Career Institute and that Mr. Zalkowsky provide a statutory declaration that he is not being reimbursed for those courses by any other party.

On July 14, 2004 the lawyers for the Employer sent a typewritten version of the Minutes of Settlement, which included the above provision, to counsel for the Union. Attached to the Minutes of Settlement was a statutory declaration. The Statutory Declaration, reads as follows:

> STATUTORY DECLARATION
>
> | | | |
> |---|---|---|
> | CANADA |) | IN THE MATTER OF |
> | PROVINCE OF ALBERTA |) | CROA CASE 3440 |
> | TO WIT: |) | |
> | |) | |
>
> I, Brad Zalkowsky of Edmonton, Alberta, do solemnly declare as follows:
>
> 1. That I have paid for the Marketing and Management Course at MarTech College and the Business Management Course at Stratford Career Institute (collectively "the Courses").
>
> 2. I have not been reimbursed for my payment of the Courses by any other party.
>
> 3. I make this solemn declaration as part of the Minutes of Settlement in CROA 3340.
>
> AND I MAKE this solemn Declaration conscientiously believing it to be true and knowing it is of the same force and effect as if made under oath.
>
> DECLARED BEFORE ME at the City of Edmonton in the Province of Alberta, this 6th day of Dec. 2004 (sgd.) Brad Zalkowsky
>
> (sgd.) Erin Kuefler
>
> A commissioner of Oaths in and for the Province of Alberta

On November 22, 2005, some 16 months after the settlement, the grievor approached Manager Labour Relations Kerry Morris, claiming that the Company had violated the terms of the settlement by refusing to pay the grievor a $2,300 lump sum. Mr. Morris was unfamiliar with the matter and indicated that an investigation would be undertaken to review the events that had occurred since the grievor's reinstatement in 2004. The grievor maintained

at the time that he had already provided receipts for the payment of the courses to Manager Labour Relations S. Blackmore. Ms. Blackmore maintained that the grievor did not provide her with the required documentation. The grievor then claimed he was mistaken and in fact had provided the documentation to the Superintendent of Operations, but the Superintendent likewise had no recollection of receiving any documentation from the grievor.

The grievor was then advised that he was not in compliance with the settlement agreement because he had not demonstrated that he had paid for any educational expenses nor provided the Statutory Declaration. On December 6, 2005, the grievor advised the Company that he had secured copies of his receipts and would be sending them along with the Statutory Declaration. The next day, the Company received copies of the receipts representing that the grievor had paid expenses to attend MarTech College and the Stratford Career Institute, as well as the Statutory Declaration. The Company then processed the payment of $2,300 which the grievor received in late January 2006. The receipt from the MarTech College details an amount of $8,250 as the cost for tuition and books while the Stratford Institute's cost for tuition is $1,000.72, for a total cost of $9,250.72.

In early February 2006, the Company had discussions with the WCB about the grievor's workplace accommodation program, to which he had been assigned due to his inability to perform his normal duties. During those discussions, the Company was advised by the WCB that the grievor had been reimbursed for the tuition and book expenses. In that regard, the WCB paid the grievor $230.00 on July 19, 2004 and a further $6,075.00 on September 8, 2004 for a total of $6,405.00. The Company was also not aware, at the time the grievor submitted his expenses on December 7, 2005, that the Government had provided the grievor with student loan relief of $3,080 for the MarTech College tuition as well as further relief for a study grant of $1,360.

As a result of the grievor's absence from work due to illness since March 2006, the Employer was unable to obtain a statement from the grievor until February 8, 2007. On March 23, 2007, the grievor was terminated for fraudulent claim of educational expenses. The Employer alleged that the grievor made a false statement in his Statutory Declaration by failing to divulge that he had been reimbursed by the WCB. The Company noted that the combination of the WCB reimbursement and the government subsidy left the grievor in a position that he had not personally incurred any expenses.

The Company maintains that it is significant that the grievor never disclosed his reimbursement or subsidies when demanding payment from the Company for the $2,300 in November 2005. By that time, the grievor had already signed a statutory declaration indicating he had not been reimbursed for his expenses. The Company submits that the grievor undertook a deliberate and elaborate scheme to obtain a monetary benefit to which he clearly was not entitled. The Union maintains that the grievor did not receive a "net gain" because the loan relief of $1,800, and the Canada student grant of $1,360, were cancelled by Canada Student Loans. As such, the Union maintains that the actual amount of reimbursement, after factoring in the cancellation of the student loan**,** was $605, which ultimately resulted in a $645 out-of-pocket expense rather than any "net gain".

Turning to the merits, I agree with the Union that an allegation of an act of fraud must be supported by clear evidence. As noted by Arbitrator Picher in **CROA 3409**:

> The Arbitrator has considered carefully the submissions of Counsel for the Council in this matter, the thrust of which are that the grievor has, at most, engaged in an error of judgement or carelessness, rather than a considered course prompted by a fraudulent intent. I do not consider that it is necessary, for the purposes of these proceedings, to find that there was any deliberate fraud on the part of the grievor. He would, in my view, be subject to a serious degree of discipline if he effectively abused weekly indemnity benefits, even if he did so out of wilful blindness or carelessness, acting in negligent disregard of his obligation both to his employer and to the insurer. At a minimum I am satisfied that he did so conduct himself. Given the doubtful quality of his credibility before the Arbitrator, I find it difficult to reject the position of the Company that in the circumstances disclosed he has broken the bond of trust between himself and his employer. In all of the circumstances I can see no basis upon which to reverse the decision taken by the Company.

The grievor in this case reached an agreement with his Employer at the time of his reinstatement that he would be reimbursed $2,300 upon production of the educational receipts and a statutory declaration. The Statutory Declaration is brief but contains a succinct clause for the grievor to acknowledge that he had not been reimbursed for payment of the courses by any other party. The grievor swore that declaration on December 6, 2004. The evidence is clear that the WCB in fact reimbursed the grievor $230.00 on July 19, 2004 and a further $6,075.00 on September 8, 2004 for tuition and book expenses. Notwithstanding those two payments, the grievor expressly

declared before a Commissioner for Oaths on December 6, 2004 that he had not been reimbursed for the courses by any other party. That assertion in writing and under oath was untrue and a clear violation of paragraph 9 of the Settlement Agreement which states that, in addition to providing receipts, the grievor is to receive the $2300 reimbursement "… on the condition that he is not being reimbursed for those courses by any other party." With full knowledge of his obligations under the Settlement Agreement, the grievor then approached the Employer in September 2005 seeking to be reimbursed the $2,300. The grievor finally produced the supporting receipts and the Statutory Declaration on December 7, 2005, a full year after the Statutory Declaration had been sworn. The Employer then paid out the $2,300 in reliance on the grievor's receipts and the false Statutory Declaration.

The grievor at no time ever produced documentation indicating that he had been already reimbursed over $6,000 by the WCB. It was only by sheer coincidence that the Employer was able to uncover the WCB payment. But for that coincidence, the grievor would have been successful in perpetrating his scheme to be paid both by the WCB and the Employer, in clear contravention of the Statutory Declaration and the Settlement Agreement. His excuse that he in fact was never overpaid because of the student loan demand is of no relevance. The central point is that he attempted to defraud his Employer by simultaneously accepting monies from the WCB and the Company, when he knew that the condition for receiving the $2,300 from the Company was that he not be reimbursed for the courses from any other source.

The grievor's deceit merits a severe disciplinary response. There are no mitigating factors which persuade me to alter the penalty under the circumstances, including the grievor's lengthy service.

The grievance is dismissed.

April 4, 2008

(signed) JOHN M. MOREAU, Q.C.
ARBITRATOR