CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4578

Heard in Edmonton, September 13, 2017

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Grievance regarding the Company's failure to accommodate, and dismissal of Conductor R. Canning (a pseudonym) of Cranbrook, BC.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Following an investigation, Ms. Canning was dismissed from Company service on July 23, 2015, which was described as "for providing false and misleading information with regards to your medical restrictions and ability to participate in return to work activities between February 18, 2013 and April 14, 2013."

The Union contends that the investigation was not conducted in a fair and impartial and manner per the requirements of the Collective Agreement. For this reason, the Union contends that the discipline is null and void and ought to be removed in its entirety and Ms. Canning be made whole.

The Union submits the Company undertook unduly intrusive and unreasonable steps in accessing personal and private information from a third party, which as a result has violated Ms. Canning's privacy rights. The Union therefore contends the Company has violated PIPEDA and the Canadian Pacific Privacy Policy as a result.

The Union further contends the Company has failed to meet the burden of proof required to sustain formal discipline related to allegations of fraud.

The Union contends the Company has failed to properly recognise the medical evidence supplied, and improperly terminated Ms. Canning's employment as a result thereof.

The Union contends that the Company failed to fulfill its' duty to accommodate Ms. Canning's disability contrary to the terms of Article 85 of the Collective Agreement, the Company's Workplace Accommodation Policy, Return to Work Policy and the *Canadian Human Rights Act.*

The Union further contends that the Company has failed to demonstrate that to do so would constitute undue hardship, which has resulted in discriminatory treatment in the instant matter.

The Union also contends the Company has dismissed Ms. Canning as a result of his medical condition, contrary to the *Canada Labour Code.*

The Union seeks an order that the Company has violated the above-cited Collective Agreement, policies and legislation. The Union further seeks an order that the Company cease and desist from these violations and that it be directed to comply with these provisions as described.

The Union further seeks an order that the Company improperly and unlawfully obtained information in the instant matter, and that all information improperly obtained, in any and every form whatsoever, be permanently removed from any records of the Company, including the personnel, medical and grievance files of Ms. Canning.

The Union requests that the discipline be removed in its entirety, that Ms. Canning be ordered reinstated forthwith without loss of seniority and benefits, provided with suitable accommodation, and that she be made whole for all lost earnings with interest. Further, the Union seeks damages, in amounts to be determined, resulting from the aforementioned violations. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company disagrees and denies the Union's request.

FOR THE UNION: **FOR THE COMPANY:**
(SGD.) D. Fulton **(SGD.)**
General Chairperson

There appeared on behalf of the Company:

D. Pezzaniti	– Manager Labour Relations, Calgary
S. Oliver	– Labour Relations Officer, Calgary

There appeared on behalf of the Union:

M. Church	– Counsel, Caley Wray, Toronto
D. Edward	– Senior Vice General Chairman, Calgary
J. Smoroden	– Vice Local Chairman, Cranbrook
B. Pitts	– Vice General Chairman, Moose Jaw
G. Edwards	– General Chairman, Calgary
R. Canning	– Grievor, Cranbrook

AWARD OF THE ARBITRATOR

This grievance concerns the termination of Ms. R. Canning (a pseudonym, adopted at the parties' request, to protect her privacy). She was terminated from her position as a Conductor with CP Rail by the following letter (rather than the more customary form 104):

> This letter refers to the Company's attempt to complete an investigation with you in regards to your work history from January 1, 2013 to April 20, 2013. As you know, the company attempted to conduct investigations into this matter in 2013, you didn't attend until recently on July 13 and 16, 2015. The investigation was cut short on July 16, 2015 by you with a rescheduled date of July 17, 2015, you

> did not appear for the remaining portion of the investigation. As was discussed prior to you leaving the investigation on July 16, 2015, failure to appear for the conclusion of the statement would leave the Company with no other option to make a determination based on the information we have on record relating to notice of investigation.
>
> In reviewing the information that we have on record, we have concluded that:
>
> (1) When you chose to ski on multiple dates after reporting an on duty injury you were performing activities beyond your medical restrictions.
>
> (2) The information which you provided to OHS, the return to work specialist and your doctor with regards to your physical restrictions and your working conditions for return to work activities were false and misleading.
>
> (3) On January 18, 2015 [sic – this can only logically refer to 2013] you booked sick for work when you were not actually sick.
>
> Your actions and your failure to complete the properly scheduled investigation have left us with no other option but to conclude the above.
>
> In view of all of the above, please be advised that your employment relationship with the Company is being terminated effective today for providing false and misleading information with regards to your medical restrictions and ability to participate in return to work activities between February 18, 2013 and April 14, 2013.

As the *ex parte* statement shows, the Union argues that the termination cannot be sustained for several reasons. However, it begins with a preliminary objection, that this termination was void *ab initio* because the investigation was neither fair nor impartial, in breach of Article 70.04 of the collective agreement. It reads, in part:

> 70.04 Employees will not be disciplined or dismissed until after a fair and impartial investigation has been held and until the employee's responsibility is established by assessing the evidence produced. No employee will be required to assume this responsibility in their statement or statements. (*emphasis added*)

The Union refers to prior CROA decisions that hold discipline, in such an event, void *ab initio*. In **CROA 3322**, Arbitrator Picher wrote:

> It is not disputed that the foregoing provision establishes the basis for what has generally been characterized as a "fair and impartial" investigation, a precondition to the assessment of discipline against any employee. Central to the issue in the case at hand is the right of the employee "... to hear all of the evidence submitted and ... be given an opportunity through the presiding officer to asks questions of witnesses whose evidence may have a bearing on the employee's responsibility."
> …
>
> This Office has had a number of prior occasions to consider the principles which govern the application of provisions such as article 82.2 of the instant collective agreement. It is well settled that a violation of these provisions amounts to the denial of a substantive right, the consequence of which is to render any discipline void *ab initio*, regardless of the merits of the case. The reason for that firm rule is to safeguard the integrity of the expedited grievance and arbitration process established within the railway industry and the Canadian Railway Office of Arbitration.
>
> [Arbitrator Picher then cited **CROA 1734**]
>
> In the Arbitrator's view this case raises issues fundamental to the integrity of the process of expedited hearings that is vital to the operation of the Canadian Railway Office of Arbitration. By long established practice, this Office relies on written briefs, including the transcript of investigations conducted by the Company the content of which forms the basis of the decision to assess discipline against an employee. If the credibility of the expedited hearing process in this Office is to be preserved both the parties and the Arbitrator must be able to rely, without qualification, on a fair adherence to the minimal procedural requirements which the parties have placed into the Collective Agreement to facilitate the grievance and arbitration process in discipline cases. Needless to say, irregularities at the investigation stage, particularly those which depart from the standard of full and fair disclosure reflected in Article 18.2(d) have the inevitable effect of undermining the integrity of the entire grievance and arbitration process so vital to the interests of both parties.

In **CROA 4558** this arbitrator held, at p. 26:

> I note that, while it is common for collective agreements between parties subscribing to CROA to set out standards of fairness and procedural requirements to apply at the investigative stage, those standards are not uniform and can be varied through collective

> bargaining. Some agreements provide for wider disclosure, or broader powers to question, than others. When standards have been adopted, then CROA adjudicators have viewed, and enforced them, in accordance with the following approach described in **CROA 3221**.
>
> > For reasons elaborated in prior awards of this Office, the standards which the parties have themselves adopted to define the elements of a fair and impartial hearing are mandatory and substantive, and a failure to respect them must result in the ensuing discipline being declared null and void **(CROA 628, 1163, 1575, 1858, 2077, 2280, 2609** and **2901**). While those concerns may appear "technical", it must again be emhasized that the integrity of the investigation process is highly important as it bears directly on the integrity of the expedited form of arbitration utilized in this Office, whereby the record of disciplinary investigations constitutes a substantial part of the evidence before the Arbitrator, and where the testimony of witnesses at the arbitration hearing is minimized. (See, generally, Picher, M.G. "**The Canadian Railway Office of Arbitration: Keeping Grievance Hearings on the Rails**" Labour Arbitration Yearbook 1991 pp 37-54 (Toronto 1991).) (*emphasis added*)

At the time of this hearing, there was a question outstanding as to whether the void *ab initio* approach remained good law in view of the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick* [2008] 1 S.C.R. 190 and subsequent cases. This arbitrator, in **CROA 4558**, found the void *ab initio* approach remained good law because of the unique nature of the CROA process, and because the parties, in the context of that process, negotiated mandatory due process clauses like Article 70.04. As noted, the contractual due process standards in the railway industry are common but not uniform. For this case, the collective agreement provides quite a strong clause in Article 70.04. It is reinforced by provisions elsewhere in Article 70 such as:

> 70.01 When an investigation is to be held, each employee whose presence is desired will be notified, in writing if so desired, as to the date, time, place and subject matter.
> …
>
> (3) The notification shall include advice to the employee of their right to request witnesses on their own behalf. If the Company is agreeable and the witness is a Company employee, the witness will

> be at the Company's expense. If the Company is agreeable and the witness is not a Company employee, it will be at the Union's expense.
>
> 70.03 If the employee is involved with responsibility in a disciplinary offence, they shall be accorded the right on request for themselves or an accredited representative of the Union or both, to be present during the investigation of any witness whose evidence may have a bearing on the employee's responsibility, to offer rebuttal thereto and to receive a copy of the statement of such witness.

The preliminary issue; whether this termination was void *ab initio,* therefore turns on whether prior to the decision to terminate, there was "a fair and impartial investigation" in which "the evidence produced was assessed" and Ms. Canning's "responsibility was established." This requires a brief summary of what led up to the 2015 investigation and what took place during that investigation.

In January 2013 the grievor suffered what was said to be an on the job injury involving a wrist strain. She continued to work, exascerbating the injury. There is some controversy as to how and why the grievor applied for Manulife disability insurance coverage rather than Workers' Compensation benefits, and also over the availability and suitability of modified duties. On April 5, 2013 Ms. Canning returned to work performing sedentary duties. Up until then she had been receiving Manulife coverage.

On April 13, 2013, while skiing, Ms. Canning, collided with a tree, suffering concussions, facial lacerations and broken teeth. Her physician advised the Company that she was totally unfit for work for an unknown period of time. This injury proved to be more debilitating than might initially have been expected and led to treatment and

surgeries for what her doctor described as traumatic brain injury, through to at least mid-2015.

As a result, the Company's investigation was held in abeyance for over two years. The record suggests both skepticism and impatience on the part of the Company's officers over the initial events and over this delay. By July 2015 they were anxious to conclude the matter. Part of this skepticism is illuminated by the steps the Employer took to question the *bona fides* of Ms. Canning's original injury and her capacity to work at the time.

A few days after her April 13, 2013 accident, the Employer approached the ski resort where the accident happened to seek information about the use of her ski pass. The Union takes several objections including one under B.C.'s privacy legislation to this having been done, and to any use of the information obtained. A complaint against the resort for breach of the privacy legislation was successful. A letter to Ms. Canning of May 10, 2013 called on her to attend an investigation meeting to be held on Monday, May 13, 2013. The investigation was said to be in connection with "your work history between January 1, 2013 and April 20, 2013 and in particular your personal injuries on February 18, 2013 and April 13, 2013. The letter appended 15 items, the scope of which indicate that the validity of her leaves and injuries during the period were under scrutiny and that the form of the scrutiny raised many of the controversial issues alluded to above. Ms. Canning has put forward medical support for her inability to attend those

proposed investigations. During the two years she was off work, Ms. Canning submitted the required medical certificates attesting to her inability to work.

On May 7, 2015 Ms. Canning's treating physician completed a CP form "Functional Abilities Form – Safety Critical Positions", based on his examination of her that day. He certified that the grievor remained totally unfit for work, set a July 7, 2015 date for reassessment and, under "Date of expected RTW" wrote "goal July 2015."

On July 7, 2015, without any indication that Ms. Canning was indeed fit to return to work, the Company sent her the following letter:

> This is to advise you that your presence is required for statements in connection with your work history from January 1, 2013 to April 20, 2013 and with your failure to appear for properly scheduled investigations on May 13, 2013 and August 30, 2013. The statements will start on Thursday July 9, 2015 at 15:00 pst in my office at the Fort Steele Station.
>
> I have included copies of the evidence that will be presented at the investigation for your review in advance.
>
> [The letter then listed 22 Exhibits]
>
> As per your Collective Agreement you are advised that you have the right to have an accredited representative of your union attend your investigation. Also, you have a right to request witnesses on your own behalf. If you have any evidence you wish to enter into the investigation, please forward it to me as soon as you can.

The investigation was rescheduled to July 13, 2015, by consent. It began that day and was conducted by Superintendent Mark Jackson. The record includes the following questions and answers:

> 5. Do you understand that investigations are conducted in an effort to determine facts pertaining to incidents and CP expects its employees to answer all questions in a truthful manner and to give false or

> misleading information in an investigation may result in disciplinary action up to and including dismissal?
>
> A. Yes I understand. I am here against my medical clearance; I am completely unfit for any type of work and am here under duress. This is the third time that CP has attempted to conduct an investigation with me with my FAF indicating I am completely unfit for work.

Shortly after the investigation began Ms. Canning's union representative raised objections to the use of the number of the Company's proposed exhibits, including Exhibits 20-22 about the scheduled investigation meetings in 2013, when in the Union's submission, she was under a doctor's care at the time and unable to attend any investigation.

The Union then tendered Exhibits 23-37 which it proposed to rely upon. The Union representative advised that "we also have voice recordings from conversations which occurred on March 1, 2013". The investigating officer asked for a copy of the recordings. The record then shows that the investigator adjourned until 8:00 a.m. on July 16, 2015 and resumed that day with the following note:

> … provides voice recording file at start of investigation. The file is in a format which is unplayable, the investigating officer will attempt to play on a different computer and bring results to the investigation when available.

Questioning took place throughout the morning, during which time the Union raised further procedural objections, particularly one in relation to what it alleged was a breach of privacy. In addition, the Union sought adjournments for breaks at 9:50, 10:19 and 11:20. After the last break the Union said:

> As stated at the beginning of this investigation, Ms. Canning is here against her doctor's orders against medical advice, she is suffering

> from a medical condition and is not in the right frame of mind to be answering these questions.

After nine more questions, including three further objections, the record shows:

> Employees calls for a halt to the statement for the day as she is unable to continue. Reconvene 08:00 on the July 17
>
> 62. Do you understand that by leaving an investigation you may leave the company with no choice but to render a decision based on the evidence we aleady have in our possession if you do not return as scheduled?
>
> A. yes

The next morning the grievor was not present. The record notes:

> Employee fails to appear for remaining portion of the statement July 17, 2015
>
> Union Rep: Ms. Canning is unable to attend due to medical reasons.
> Investigator: Does Ms. Canning plan to complete this investigation?
> Union Rep: I am not sure, she has mentioned that she has other material and questions due to this matter.

What the record shows is a further 33 questions, including the last which reads:

> 94. Ms. Canning, once again, do you have anything further you wish to add to this statement?

It is not clear from the evidence whether this is just a list of questions the investigator intended to ask, or whether, without the grievor there, he asked them in any event. Some suggest certain conclusions, adverse to Ms. Canning, had already been drawn.

On July 14, Ms. Canning had obtained the following note from her treating physician which was given to the Company on July 15 but not formally acknowledged:

> Please be advised that Ms. Canning is currently being managed for an ongoing medical condition (traumatic brain injury) which I understand is the focus of her upcoming investigation with her work place. I expect that she may have difficulty sustaining concentration during a lengthy interview. As such she may require intermittent breaks throughout the interview process and may ultimately be unable to tolerate a lengthy meeting.

The investigator obviously felt, from his actions and his cautions the day before, that if Ms. Canning failed to show up the next morning he was justified in making a decision "on the evidence we already have in our possession". This, without any reference to or regard for the medical information and objections raised. I find that to be highly unfair in the circumstances and contrary to his contractual and due process obligations. First, Ms. Canning was suffering from a traumatic brain injury. She had provided medical evidence to support that fact and its impact on her ability to either work, or to deal with a lengthy interview process.

To assume that, on the morning of the 17th, she was deliberately not showing up, being defiant, or abandoning her right to a fair hearing is unjustified given the events of the day before. It is also indicative of an attitude towards the grievor that falls short of the impartiality expected in such circumstances. The Union argues that this action itself amounted to discrimination and a failure to accommodate the grievor. That may be, but it is sufficient to say it was not fair.

There were options at that point. The investigator could have asked for further medical proof of an inability to attend (although the July 15 letter seems clear enough). The investigator could have taken a break to inquire further of the grievor's whereabouts and condition, or he could have adjourned until the grievor was in an improved state.

The consequences of closing down the investigation was that it deprived the grievor of the ability to address the exhibits she had produced, some of which at least provided cogent counter-arrangements to the Employer's exhibits. It deprived her of the opportunity to address the Employer's exhibits, over which some cogent objections had already been raised by her Union representative. It eliminated the opportunity to speak to the voice recording or even to determine that it had been listened to.

The investigator proceeded to make his decision (uncharacterically, he was the investigator and the decision maker) without the information necessary to assess fairly the full body of evidence. I find this is unfair, which is sufficient to hold the termination void *ab initio*, which I find to be the case. It was also in my view the result of a less than impartial process, although my decision stands, even independently of that second finding.

This decision, that the grievor's termination was void from the outset, now requires the parties to address the grievor's position, based on the fact she is and has been an employee throughout. I do not have evidence of the grievor's current fitness for work, which will need to be assessed both on a go forward basis and for the

purposes of determining such losses as she experienced while she was employed. The record before me is itself deficient due to the truncated investigatory record. Rather than try to address this now, I urge the parties to meet and seek a mutually agreeable solution to this overall situation. This should include the matters raised by the grievance that are not addressed by the finding that the termination is a nullity. I retain jurisdiction to deal with all other aspects of this matter and direct that it be rescheduled for a further hearing, if necessary, at the request of either party, such a request to be accompanied by a statement (hopefully joint) of the remaining outstanding issues.

February 28, 2018

ANDREW C. L. SIMS, Q.C.
ARBITRATOR