AH736

IN THE MATTER OF AN AD HOC RAILWAY ARBITRATION

BETWEEN

TEAMSTERS CANADA RAIL CONFERENCE – MAINTENANCE OF WAY EMPLOYEES DIVISION (TCRC-MWED)

And

CANADIAN PACIFIC RAILWAY COMPANY (CP)

Grievance contesting the termination of Mr. W. Brehl

Date: November 19, 2021
Arbitrator: Graham J. Clarke

Appearances

TCRC-MWED:

D. Brown	Legal Counsel, TCRC-MWED
W. Phillips	President, TCRC-MWED
W. Brehl	Grievor

CP:

M. MacKillop	Legal Counsel, SOM LLP
T. Weisberg	Legal Counsel, SOM LLP
D. Guerin	Senior Director, Labour Relations
F. Billings	Labour Relations Manager
J. Hadlaw-Murray	Articling Student

Heard in person in Ottawa on September 20-21 and October 13-14, 2021. Additional evidence heard on October 15 via videoconference. Final oral submissions provided via videoconference on October 29, 2021.

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Award

INTRODUCTION

1. On October 18, 2019, CP terminated Mr. William Brehl's employment for "harassment and conduct unbecoming of a Canadian Pacific employee" via two separate dismissal letters[1]. Mr. Brehl had worked for CP since 1981. From 2004-2015, he served as the TCRC-MWED's elected National President. In 2015, Mr. Brehl returned to the bargaining unit and worked as an Extra Gang Labourer on BC Tie #1.

2. CP raised multiple incidents in support of its grounds for termination, including one allegation of providing inappropriate material to a CP Investigating Officer who was also a visible minority. In this award, the arbitrator will use the term "visible minority", which the parties employed throughout the hearing, while acknowledging that others might prefer the terms "racialized" or "BIPOC"[2].

3. The TCRC-MWED raised both procedural and substantive grounds to contest Mr. Brehl's termination. CP alleged it had just cause from the 2019 events themselves as well as under a culminating incident analysis, including for an allegedly similar incident which resulted in a signed 2017 Dispute Resolution Agreement (2017 DRA), *infra*.

4. For the following reasons, the arbitrator concludes that CP had just cause to discipline Mr. Brehl for the matter involving Mr. Nag. The arbitrator further concludes, given Mr. Brehl's treatment of Mr. Nag and his discipline history, that this is not an appropriate case in which to substitute a suspension for the termination CP imposed.

PRELIMINARY COMMENTS

5. The parties use the railway model of arbitration and adhere to the CROA[3] Rules and Procedures[4]. The railway model can resolve one or more grievances in a single

[1] CP documents, Tabs 36 and 37
[2] See, for example, the OHRC's Racial discrimination, race and racism (fact sheet).
[3] Canadian Railway Office of Arbitration & Dispute Resolution
[4] Memorandum of Agreement Establishing the CROA&DR

day. Over the decades, railway arbitration awards have developed various fairness principles to protect the model's integrity[5].

6. Oral evidence constitutes the exception in railway arbitrations. Such evidence usually focuses on a contested fact or circumscribed scenario rather than the entire case[6]. Exceptionally, the parties agreed to lead extensive oral evidence. For the arbitrator, this raised the novel of issue of making credibility determinations when faced with both a written record, including lengthy investigation interviews, and some supplementary oral evidence.

7. In other words, this case constituted a hybrid between the parties' railway model and the regular labour arbitration model used throughout Canada. The arbitrator will note in this award how this hybrid arbitration format impacted some of the essential credibility findings. CROA 3670 has already referenced a similar situation, but not in the context of an oral hearing like this one which lasted almost 5 days:

> On the basis of the foregoing considerations the Arbitrator is satisfied that there was no just cause for the Company to assess discipline against Mr. Geiler. Even if it should be found that that conclusion is incorrect in law, the Arbitrator would also be compelled, by the rules of evidence, to give the Union the benefit of the doubt as to the content of the conversation between Mr. Geiler and the Transport Canada inspector. **The only evidence before me as regards her view of what was said is a hearsay written statement filed in evidence by the Company. On the other hand, the grievor was present at the hearing, available for cross-examination. It must, therefore, be concluded that the better evidence in that regard is advanced by the Union**.
>
> (Emphasis added)

8. The parties agreed to follow this procedure at the hearing[7]:

> For clarity we would like to confirm that the hearing will be proceeding in the following manner:
>
> 1. The Company will read its Brief;
> 2. The Union will read its Brief;
> 3. The Company will have opportunity to reply;

[5] See, for example, International Brotherhood of Electrical Workers System Council No. 11 v Canadian National Railway Company, 2021 CanLII 41839 at paragraphs 8-25.
[6] Canadian National Railway Company v International Brotherhood of Electrical Workers System Council No. 11, 2018 CanLII 52755 at paragraphs 26-27.
[7] CP email dated September 21, 2021.

4. The Company will call Orgo Nag as a witness (chief, cross, and re-examination);

5. The Union will call the grievor and Mr. Rob Marshall (chief, cross, and re-examination);

6. The Company will make argument on the oral evidence heard;

7. The Union will make argument on the oral evidence heard; and,

8. The Company will have an opportunity to reply.

CHRONOLOGY OF KEY DATES

9. These are the key dates when events took place. This award will later examine the oral evidence about some of these events in greater detail.

10. **April 11, 2019 (Thursday):** CP supervisor Mr. Orgo Nag conducted an investigation interview for Mr. Evan Foster. Mr. Brehl acted as Mr. Foster's TCRC-MWED representative. CP's concerns arose from an off the record discussion Mr. Nag had with Mr. Brehl. Mr. Nag had also told Mr. Brehl that he felt he had been racially profiled at a supermarket during a lunch break, *infra*.

11. **April 12, 2019 (Friday):** Mr. Nag conducted an investigation interview for Mr. Robert Kapsha. Mr. Brehl again acted as the TCRC-MWED representative. The parties dispute most of the facts about this incident, but not that Mr. Brehl read this passage from an old railway rule out loud to Mr. Nag:

> Overseers must not strike a negro with any other weapon than a switch except in defence of their person. Where a negro requires correction, his hands must be held by the overseer and he will whip him with an ordinary switch or strap not to exceed 39 lashes at one time nor more than 60 for one offense in one day, unless ordered to do so by the supervisor in his presence.

12. Mr. Nag asked Mr. Brehl to send him the text he had read (hereinafter "Extract") which he promptly did.

13. The Extract came from an 1858 U.S. document entitled the *Tallahassee, Pensacola and Georgia Railroad's Book of Rules*[8]. Mr. Brehl had posted the Extract on Facebook, along with this commentary, roughly 1.5 hours prior to the investigation interview:

[8] Ex-6, TCRC-MWED submission at paragraph 11.

> Lately I've been re-reading the history of railroads, our union and its members and I came across this. It's an excerpt from the Tallahassee, Pensacola & Georgia Railroad rules book (circa late 1800's)
>
> And one of the reasons the maintenance of way organized.
>
> This was the accepted mindset that America has grown from. And it was, and is shameful.
>
> The halcyon days that the white nationalists harken back to… were only 'good' if you were white. And were even better… if you were white, rich and male!
>
> Let's not pine over a 'better' past that never really was.
>
> Let us instead, continue to build an inclusive future which our children's children will look back on with pride.

14. **April 15, 2015 (Monday):** Mr. Nag wrote an email to a labour relations manager, with copies to his supervisors, describing the April 11 and 12 investigations:

> On Thursday April 11th and Friday April 12th 2019, I conducted two investigation with Mr. William Brehl as the union representative. The following are two counts of events which occurred during the time the investigation took place.
>
> > On Thursday April 11th, I conducted an investigation in Castlegar, in which Mr. Brehl asked to speak off the record away from the employee being investigated. I obliged, followed Mr. Brehl out of the conference room. Mr. Brehl proceeded to tell me how there were mitigating circumstances around this investigation that I should be aware about. I informed Mr. Brehl that maybe it is for the best I am not aware of these circumstances as it is my duty to be fair and impartial in this investigation process.
> >
> > > Mr. Brehl continued to delve into information that was unsolicited for by myself. He informed me that Mr. Foster (employee being investigated) had lost a step son. He had also mentioned the numerous amounts of time the employee had sought out and attended counselling and that Mr. Foster uses Cannabis on his off cycle to help sleep. Lastly, Mr. Brehl said how himself, Mr. Foster and Mr. Scott MacDonald are in the "same boat" and mentioned how it would look when he sees this investigation come across his desk. To which I replied what boat are you speaking off and Mr. Brehl mentioned that Scott had lost a son too.
> >
> > On Friday April 12th, I conducted an investigation in Cranbrook, in which Mr. Brehl brought up the following information that did not pertain to the

> investigation. While Mr. Kapsha (employee being investigated) and I, were wrapping up our thoughts on a question, Mr. Brehl shared the information which I have attached to this email. Mr. Brehl claimed that I would be interested in something he had read and shared those thoughts, reading out loud the contents of what is in the picture.
>
> > I subsequently asked Mr. Brehl if he could send me those pictures. (sic).

15. **June 19-21, 2019:** CP Supervisor Mr. Tom Wincheruk, as the Investigating Officer (IO), interviewed Mr. Brehl about the alleged inappropriate conduct in April 2019 with Mr. Nag, including his reading of the Extract. CP's Mr. Marc Cote attended as "Observer"[9]. The TCRC-MWED alleged that IO Wincheruk was aggressive, imposing and lacked impartiality. CP alleged that Mr. Brehl's conduct was manipulative, calculated and abusive with the purpose of sabotaging the investigation. Mr. Wincheruk filed a complaint against Mr. Brehl which resulted in one of the later dismissal letters.

16. **July 18-19, 2019:** CP General Manager Operations Mr. Greg Squires took over the Nag investigation as IO. Mr. Bruce Naylor attended as an "Observer" for CP. The investigation also included the Wincheruk complaint. A stenographer recorded the sessions and prepared a transcript[10].

17. **July 22-24, 2019:** IO Squires investigated the Wincheruk complaint, again with the use of an official stenographer[11].

18. **August 19, 2019**: IO Squires continued his investigation with Mr. Naylor attending as an observer[12].

19. **August 27, 2019:** CP's General Roadmaster Mr. Paul Purser, with Mr. Naylor as Observer, took over as IO for meetings on August 27, August 29 and September 19, 2019[13].

[9] TCRC-MWED documents, Tab 4
[10] TCRC-MWED documents, Tab 7
[11] TCRC-MWED documents, Tab 8
[12] TCRC-MWED documents, Tab 9
[13] TCRC-MWED documents, Tabs 10-12

20. **September 17, 2019:** CP took a statement from Mr. Nag[14].

21. **September 24, 2019:** Mr. Teddy Tooke acted as IO for this final investigation interview[15] which reviewed the September 17 statement from Mr. Nag. A Mr. Gregory Naylor acted as Observer.

22. **October 18, 2019:** CP terminated Mr. Brehl for "harassment and conduct unbecoming" via two distinct dismissal letters. The first letter referenced the events of April 11-12, 2019 with Mr. Nag and set out these particulars:

- Acting in a generally intimidating/threatening manner towards Mr. Nag during the course of the two separate statements;
- Acting in an intimidating and threatening manner towards Mr. Nag by referring to a personal matter of a Senior Company Officer;
- Providing inappropriate and offensive material to Mr. Nag.

The second dismissal letter referenced the June 19-21, 2019 events involving IO Wincheruk and provided these particulars:

- Acting in a generally intimidation/threatening manner towards Mr. Wincheruk during the course of an investigation.
- Refusing to follow the direction of Investigating Officer Wincheruk during the course of an investigation;
- Making disparaging remarks towards Mr. Wincheruk during the course of an investigation;
- Slamming a door in the face of Mr. Wincheruk which nearly struck him. (sic)

23. **December 31, 2019:** TCRC-MWED grieved both dismissals.

24. **February 3, 2020:** CP denied the grievance.

25. **January 18, 2021:** The parties jointly retained the arbitrator and requested, despite the ongoing pandemic, an in-person hearing due to the need for oral evidence. That oral evidence, and argument, took 6 sessions (5 days in total) to complete.

[14] TCRC-MWED documents, Tab 18
[15] TCRC-MWED documents, Tab 13

ISSUES

26. The arbitrator must decide 4 issues:

1. Was CP "hunting" Mr. Brehl as the TCRC-MWED alleged?

2. Did CP fail to conduct a fair and impartial investigation?

3. Did CP have just cause to discipline Mr. Brehl in the Wincheruk matter? and

4. Did CP have just cause to discipline Mr. Brehl for the Nag matter?

ANALYSIS AND DECISION

1. Was CP "hunting" Mr. Brehl as the TCRC-MWED alleged?

27. The TCRC-MWED alleged that CP's actions arose due to Mr. Brehl's career as its National President, among other union roles.[16] In other words, and the TCRC-MWED acknowledged the challenge of proving this theory, it alleged this case is about punishing a union member for his union activities. Mr. Brehl testified that he felt he was "hunted" because many CP senior managers did not like him. During his time as the National President, he had led a strike, bargained hard and filed complaints against CP with the Canada Industrial Relations Board.

28. Both labour boards and arbitrators have noted the importance of protecting union officers' activities when representing bargaining unit members. For example, the Canada Industrial Relations Board held that an employer cannot interfere with a union officer's legitimate representation of its members[17]. In that decision, the CIRB referenced a succinct arbitral statement of the applicable principles[18]:

> [34] **An anterior issue to be discussed is the extent of protection or immunity that Mr. Rae may be given because he was a Union officer. There is little doubt that employees acting in their capacity as union officers do have more latitude in dealing with management personnel**. (See Re School District No. 22 (Vernon) and C.U.P.E., Loc. 5523 (Hegler) (2002), 104 L.A.C. (4th) 435 (Taylor)). The theory behind the immunity is that unions and employers must meet each other to discuss common issues as equals. However, as is noted by Brown and Beatty, the protection or immunity is not an absolute one and does not extend to statements that are malicious in the sense

[16] E-6, TCRC-MWED Brief, paragraph 38.
[17] Amalgamated Transit Union, Local 1229 v Acadian Coach Lines LP, 2012 CIRB 654 at paragraphs 68-81.
[18] See Re DHL Express (Canada) Ltd. and National Automobile, Aerospace, Transportation and General Workers Union of Canada, Local 4215 (CAW Canada) (2010), 200 L.A.C. (4th) 263.

> that they are knowingly or recklessly false. **I would add to this that the limits of union officer protection do not extend to statements and conduct that harass or ridicule other employees including management personnel. The vigorous representation of union members and interests of the union are not compromised by union officers who are employees carrying out their functions in a civil and respectful manner**. **Clearly there will be situations in which anger surfaces and the level of discourse may become heated, and may include profane and foul language. However, isolated instances must be distinguished from a course of action carried out over a period of time**.
>
> (Emphasis added)

29. CROA 3670 also described a union officer's protected activities and its limits:

> Even accepting that Mr. Geiler used the words alleged by the inspector, stating that if a serious accident should occur, blood would be on her hands, that is plainly the kind of hard communication which might reasonably be expected of a union representative transacting business that is adversarial or controversial. **In the context of the relationship between Mr. Geiler and the inspector, I do not consider that he was in fact crossing the line of harassment and bullying. Boards of arbitration, including this Office, have well recognized the need for a certain leeway in the communications of union officers discharging their duty**.
>
> (Emphasis added)

30. The arbitrator has considered the TCRC-MWED's suggestion that CP was targeting Mr. Brehl for his past union activities. While the TCRC-MWED did not meet its burden on this issue, CP's reference to a couple of events still require comment since they did cause some concern for the arbitrator.

31. In its Brief, CP included a November 2014 newspaper article[19] about an internal union incident involving Mr. Brehl which led to criminal charges. While the TCRC-MWED did not object, the arbitrator gives zero weight to evidence of an event which occurred 4.5 years before the events in question. While Twitter and some media treat allegations, including criminal charges, as the uncontested truth of what occurred, labour arbitration does not. The 2014 incident further formed no part of Mr. Brehl's discipline record[20]:

[19] CP documents, Tab 7.
[20] International Brotherhood of Electrical Workers System Council No. 11 v Canadian National Railway Company, 2021 CanLII 41839.

> 46. A previous non-disciplinary incident is irrelevant to the arbitrator's consideration of the appropriate penalty. CN no doubt had its reasons for not treating the previous DUI incident as a disciplinary matter. But, given its previous determination, it cannot now rely on it in this case to buttress its argument about the appropriate penalty.

32. Similarly, an employee's discipline record speaks for itself. An arbitrator does not go back and examine the merits of past disciplinary matters. In this case, the 2017 DRA[21] speaks for itself. Despite this well-known rule, CP included the lengthy 2016 written allegations against Mr. Brehl[22] and its letter engaging a third-party investigator, which again included numerous allegations[23]. Those allegations went far beyond the text of the 2017 DRA.

33. If CP intended to plead "similar fact" evidence, then it had the burden to overcome the hurdle that such evidence is "presumptively inadmissible"[24]. The same "presumptively inadmissible" principle applies to "bad character evidence" which seems to be why CP produced the newspaper article from 2014[25]. To be fair to CP, the TCRC-MWED's Brief also included similar "bad character evidence" about Mr. Wincheruk[26].

34. In the absence of any arguments from the parties about this presumptively inadmissible evidence, the arbitrator will not consider it.

35. Subject to those comments, and after considering the Record and the oral evidence, the arbitrator concludes that the TCRC-MWED did not demonstrate that CP trumped up the 2019 events to "hunt" Mr. Brehl. Some things clearly happened involving Mr. Brehl and Mr. Nag/Mr. Wincheruk. The analysis of those specific events, and the witnesses' credibility, will determine the outcome of this case.

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[21] CP documents, Tab 10.
[22] CP documents, Tab 8.
[23] CP documents, Tab 9.
[24] R. v. Handy, 2002 SCC 56 at paragraph 55.
[25] R. v. Calnen, 2019 SCC 6
[26] TCRC-MWED Brief paragraphs 105 and following.

2. Did CP fail to conduct a fair and impartial investigation

36. The TCRC-MWED alleged that CP failed to conduct a fair and impartial investigation[27] despite the requirement to do so in section 15 of the collective agreement:

> 15.1 No employee shall be disciplined or discharged until a fair and impartial investigation has been conducted and responsibility established.

37. CP conducted both the Nag and Wincheruk investigations pursuant to collective agreement section 17 which deals with human rights. In the TCRC-MWED's view, Mr. Nag never filed a human rights complaint and therefore CP used the incorrect collective agreement section. Moreover, it argued that Mr. Wincheruk's complaint did not involve any prohibited grounds and should therefore have proceeded under s.15.

38. The TCRC-MWED further alleged that CP failed to produce an audio tape from the stenographer until the very start of the oral hearing in September 2021. Similarly, the TCRC-MWED argued that the use of a stenographer and the resulting problems also deprived Mr. Brehl of a fair and impartial hearing[28].

39. For the following reasons, the arbitrator dismisses these procedural objections about the fairness of CP's investigation.

40. The arbitrator accepts, based on Mr. Nag's testimony, *infra*, that his April 15, 2019 email about the events of April 11-12 constituted a complaint.

41. The TCRC-MWED did not demonstrate that CP failed to disclose a keystone document. Such a failure, unless trivial in nature[29], will almost always lead to an arbitrator declaring any discipline void *ab initio*[30]. In this case, however, the TCRC-MWED knew about the stenographer's recording and explicitly referenced it in its grievance[31]. Mr. Brehl testified that he had heard the recording during his investigation when they were verifying the transcripts.

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[27] TCRC-MWED Brief at paragraph 43.
[28] TCRC-MWED Brief, paragraph 121.
[29] Teamsters Canada Rail Conference v Canadian National Railway Company, 2021 SKCA 62
[30] International Brotherhood of Electrical Workers System Council No. 11 v Canadian National Railway Company, 2021 CanLII 41839 at paragraphs 19-20.
[31] TCRC-MWED documents, E-7, Tab 1.

42. In these circumstances, the recording was not a keystone document that the TCRC-MWED had never known about prior to the hearing[32]. The TCRC-MWED also had roughly 7 months after the arbitrator's appointment to request an order for production[33] if such was needed to support a legal argument.

43. The arbitrator tends to agree with the TCRC-MWED that section 17 in the collective agreement appears limited to the "prohibited grounds" under the *Canadian Human Rights Act*[34]:

> 17.1 The Company and the Union agree that there shall be no discrimination, interference, restriction or coercion permitted in the workplace **with respect to race, national or ethnic origin, color, religion, age, sex, marital status, family status, sexual orientation, disability or conviction for which a pardon has been granted**.
>
> 17.2 **Harassment is any conduct based on any of the grounds listed above** that offends or humiliates and is a type of discrimination. Harassment will be considered to have taken place if it reasonably ought to have been known that the behavior was unwelcome or inappropriate in the workplace. Harassment may take many forms, including but not limited to:
>
> - threats
> - intimidation
> - verbal abuse
> - unwelcome remarks
> - innuendo
> - offensive and inappropriate material
> - hate literature
> - offensive jokes
>
> (Emphasis added)

[32] Teamsters Canada Rail Conference v Canadian Pacific Railway, 2019 CanLII 89682 at paragraphs 47-48.
[33] Canadian Signals and Communications System Council No. 11 of the IBEW (IBEW) v Canadian Pacific Railway Company, 2021 CanLII 37611
[34] RSC 1985, c H-6

44. However, that observation does not mean that CP failed to conduct a fair and impartial investigation. The context is essential.

45. First, the TCRC-MWED did not identify in what way Mr. Brehl failed to receive a fair and impartial hearing beyond suggesting that CP ought to have proceeded under s.15. The procedure CP followed, other than the additional steps taken to ensure confidentiality in human rights matters, appeared identical to that of any other investigation.

46. Second, the collective agreement also contains a "Note" just prior to section 15.1 which reads "See Section 17 for Human Rights Formal Investigations". In other words, sections 15 and 17 both deal with investigations. Moreover, a section 17 investigation incorporates the protections of a section 15 investigation but modifies them, such as by protecting the confidentiality of the documents:

> 17.10 **In investigations involving alleged Human Rights violations, Section 15 is modified as follows**:
>
> …
>
> (c) In order to maintain the strictest of confidentiality in the case of an investigation conducted as a result of an alleged violation of this Section, all known evidence used in the investigation including but not limited to copies of statements, stenographic reports and all other evidence shall be returned to the Investigator upon completion of the taking of the statement until such time, if any, that discipline is issued against the employee(s) being investigated in regard to this Section.
>
> (Emphasis added)

47. Third, Mr. Wincheruk's complaint arose out of his investigation into Mr. Nag's complaint which CP conducted under section 17. In that circumstance, given that one complaint arose out of the other, the use of section 17 maintained the confidentiality required for the Nag complaint. That confidentiality ultimately may not have been needed, but one can only come to that conclusion after the fact.

48. The TCRC-MWED also did not persuade the arbitrator that the long delays and use of a stenographer's transcript rendered the discipline void *ab initio*. The arbitrator has reviewed the voluminous transcripts. They suggest instead that the parties' railway model does not always work, at least for this type of case.

49. That conclusion is not a criticism. The employers and trade unions in the railway industry have for decades worked together to create their own written Record on which they rely for their expedited arbitrations. Their self-governing process constitutes a huge exception to how labour arbitrations function in Canada.

50. Regular labour arbitration almost always involves *viva voce* evidence. A neutral third-party arbitrator runs the process in accordance with procedural fairness principles. That arbitrator resolves, *inter alia*, any production issues and objections contesting the appropriateness of questions put to the witnesses.

51. By analogy, and the arbitrator is not trivializing the extremely serious issues in this case, regular labour arbitration uses a referee, as do most sporting events. But the railway model has functioned more like Ultimate since the parties have for decades succeeded in governing themselves. Whether this exceptional success can continue given today's realities remains up to the parties.

52. For the foregoing reasons, the TCRC-MWED did not convince the arbitrator that CP's investigation entitled Mr. Brehl to a declaration that his discipline was void *ab initio*.

3. Did CP have just cause to discipline Mr. Brehl in the Wincheruk matter?

53. CP argued that Mr. Brehl sabotaged the investigation into Mr. Nag's complaint. That conduct continued for Mr. Wincheruk's complaint. CROA 4157 has upheld this type of argument given that such conduct runs counter to the essence of the railway model:

> Moreover, it cannot be said that the grievor was denied his rights under article 86 of the collective agreement. He was duly presented with all of the statements and documentation in the possession of the Company, and upon which the Company intended to rely, absent any satisfactory explanation or rebuttal on his part. A central purpose of the investigation process is to give the employee the opportunity to know and respond to the evidence in the possession of the Company. For reasons which the grievor and his representative best appreciate, they chose to squander that opportunity. The manner in which the grievor and his representative responded to the Company's attempt to conduct an orderly investigation, which in my view bordered on abusive, was tantamount to a waiver of the grievor's rights to pursue the matter any further.

54. The Wincheruk complaint alleged that Mr. Brehl had acted in an intimidating and threatening manner at the investigation. It also alleged that Mr. Brehl had slammed a door in Mr. Wincheruk's face.

55. CP did not call Mr. Wincheruk to testify. It relied solely on his written comments and statements from other CP employees[35].

56. The TCRC-MWED called Mr. Brehl and Mr. Rob Marshall to testify.

Mr. Brehl's evidence

57. Mr. Brehl related how he took offence at the start of the interview to Mr. Wincheruk's reference to the "rules of engagement" and his having "no dog in this hunt"[36]. He found those statements incompatible with a fact-finding investigation. He further alleged that Mr. Wincheruk added his own opinions to the transcript.

58. Mr. Brehl acknowledged that he had closed the door loudly. But he denied slamming it in Mr. Wincheruk's face. He alleged that Mr. Wincheruk had yelled at him that he had to finish his break in 5 minutes.

59. Mr. Brehl indicated that conducting the investigation under section 17 contributed to the investigation's significant delays since he had no right to keep copies of the evidence. He could only review the documentation during the interview. Under a section 15 investigation, he noted he would have received the evidence 2 days before and could have kept copies of it. In his view, the use of multiple investigating officers also contributed to the delay since some would repeat questions which had already been asked.

60. Mr. Brehl testified that both CP and the TCRC-MWED spent a lot of time reviewing the stenographer's audio tapes and resulting transcript. Everyone agreed that the transcript had multiple mistakes which took time to correct. He also testified that on

[35] CP documents, Tabs 18-20 & 22.
[36] CP documents, Tab 17, pages 1-2.

one of the tapes they heard CP suggest they needed a complaint. Mr. Brehl alleged that CP refused to replay that portion of the audio despite his request.

Mr. Rob Marshall's evidence

61. The arbitrator confirmed at the hearing that witnesses in a railway arbitration are no different from witnesses at regular arbitration. They provide the facts rather than opinions, unless a party first qualifies them as an expert. The arbitrator upheld CP's objection over any questions asking for Mr. Marshall's opinions, including on investigations.

62. Mr. Marshall testified in a forthright and helpful manner throughout his examination in chief and cross-examination. He had attended CP's investigation into the Wincheruk complaint as a human rights representative pursuant to section 17 of the collective agreement.

63. For the door slamming allegation, Mr. Marshall agreed that the door had closed louder than one would have expected. The incident arose when Mr. Wincheruk advised the parties that they had 5 more minutes of preparation time or else the interview would be adjourned. Mr. Marshall confirmed that Mr. Brehl told Mr. Wincheruk they would take as much time as they needed.

64. The door incident led to Mr. Wincheruk adjourning the investigation, saying he was tired of the bullying and intimidation. Mr. Marshall insisted that he be allowed to put an objection on the record which stated that Mr. Brehl had not been intimidating and that there was no reason to shut down the investigation.

65. Mr. Marshall attended the investigation's continuation when Mr. Squires took over as IO. He agreed there were a lot of objections. Delays were also long due to concerns over the accuracy of the stenographer's transcript. He also indicated that a section 17 investigation takes more time since no documents can be taken out of the room.

66. In cross-examination, Mr. Marshall agreed that he was friends with Mr. Brehl. They had been friends on Facebook. He also took exception to Mr. Wincheruk's comment of "no dog in the hunt" since it sounded like Mr. Brehl was being hunted.

67. Mr. Marshall also defended his objection to QA148 on the basis Mr. Brehl had no malice. The objection was noted but Mr. Brehl did respond to the question. Mr. Marshall also objected to QA71 and CP's reference to "hate literature" whereas the union characterized the Extract as "historic literature on railroad beginnings". The objection was noted and Mr. Brehl then commented further on the Extract.

CP failed to meet its burden of proof

68. The arbitrator previously concluded that CP's investigation did not entitle Mr. Brehl to a declaration that his discipline was void *ab initio*. But CP did not meet its burden of proving that Mr. Brehl acted in the ways set out in his termination letter for the Wincheruk matter.

69. The arbitrator agrees with the TCRC-MWED that CP's failure to call any witnesses prevented it from meeting its burden. In contrast, the TCRC-MWED called both Mr. Brehl and Mr. Marshall to testify about the circumstances. This incident does not present the clear credibility issues found in the Nag complaint, *infra*.

70. Both Mr. Wincheruk and Mr. Marc Cote[37] had been present for some or all of the key events. The arbitrator considered the Record's written evidence which included, *inter alia*, Mr. Wincheruk's and Mr. Cote's statements. But ultimately a decision maker will rarely prefer written statements to oral testimony which includes cross-examination. The situation would have to be exceptional.

71. CP did not have just cause to discipline Mr. Brehl for the Wincheruk complaint.

4. Did CP have just cause to discipline Mr. Brehl for the Nag matter?

72. On April 11 in Castlegar, Mr. Nag, acting as CP's Investigating Officer, questioned Mr. Foster. Mr. Brehl acted as the TCRC-MWED union representative for Mr. Foster. On April 12 in Cranbrook, Mr. Nag, acting again as CP's Investigating Officer, questioned Mr. Kapsha. Mr. Brehl again acted as the TCRC-MWED union

[37] CP documents, Tab 19 (Marc Cote memo)

representative for Mr. Kapsha. Both investigations involved drug policy violations, one for marijuana and the other for cocaine.

73. The Record contains significant written evidence of Mr. Nag's and Mr. Brehl's recollection of events. The parties also called them to testify about those events. The arbitrator will summarize in some detail their testimony given its importance to this arbitration.

Mr. Nag's version of events

Examination in Chief

74. At the time of the April 2019 events, Mr. Nag was 26 years old and an engineer in training at CP. He described himself as a visible minority. He knew Mr. Brehl both from working at CP and from using the same gym. Mr. Nag described their gym interactions as involving just cordial "hellos". They never discussed at the gym either Mr. Brehl's loss of his son or that of CP's Senior Vice-President, Mr. Scott MacDonald. Mr. Nag did not know prior to the April 11, 2019 investigation that both Mr. Brehl and Mr. MacDonald had lost a son.

75. Mr. Nag related that during the April 11 investigation, Mr. Brehl had asked him to exit for an off the record conversation. Mr. Brehl advised that Mr. Foster had lost a stepson, that he (Brehl) had lost a son and that Mr. Scott MacDonald had also lost a son. Mr. Nag extended his sympathies.

76. Mr. Brehl allegedly said something to the effect of how would it look if this file crossed Mr. MacDonald's desk? Mr. Nag found this improper. He also objected when Mr. Briel put the information about Mr. Foster's son on the record rather than Mr. Foster himself[38].

77. Mr. Nag related a second incident when he got lunch at a local supermarket. He used the self checkout and felt that a hovering employee had racially profiled him. Mr. Nag, who grew up in Calgary, had never experienced racial profiling before and discussed it with Mr. Brehl who indicated it was not proper for this to happen. Mr. Nag indicated he felt upset by the experience.

[38] TCRC-MWED documents, Tab 2, QA11.

78. Mr. Nag also related how Mr. Brehl was combative during the investigation, including by putting in evidence despite a request not to do so.

79. The next day on April 12, Mr. Nag questioned Mr. Kapsha. He testified that the transcript did not record everything. He alleged that Mr. Brehl said he (Mr. Nag) would like something and then read out loud an old railway rule from a book:

> Overseers must not strike a negro with any other weapon than a switch except in defence of their person. Where a negro requires correction, his hands must be held by the overseer and he will whip him with an ordinary switch or strap not to exceed 39 lashes at one time nor more than 60 for one offense in one day, unless ordered to do so by the supervisor in his presence.

80. Mr. Nag indicated he had not said anything which would have prompted Mr. Brehl to read the Extract to him. He considered it completely irrelevant to the investigation and did not add the incident to the interview transcript. He asked Mr. Brehl for a copy of the Extract to ensure he had heard the words correctly. After the interview, he raised the event with his superiors.

81. Mr. Nag denied that Mr. Brehl mentioned anything about a Facebook post. Moreover, he denied inserting himself into a conversation Mr. Brehl was having with Mr. Foster wherein they were allegedly discussing a Facebook post. Mr. Nag further denied ever telling Mr. Brehl and Mr. Kapsha that he was a history buff.

82. Mr. Nag indicated the reading of the Extract made him feel uneasy and that it was chilling to hear Mr. Brehl read the words. He felt Mr. Brehl was trying to undermine the investigation and get a reaction from him. Mr. Nag did not raise this with Mr. Brehl who he felt was trying to sidetrack the investigation. He felt intimidated, disrespected and believed Mr. Brehl was referencing his skin colour to get a reaction out of him.

83. Mr. Nag indicated that his April 15 memo[39] about the incidents of April 11-12 constituted a complaint. He did not feel it was appropriate to include in the memo how he felt during the investigations. Mr. Nag sent the email to CP's Labour Relations department and copied his superiors. Mr. Nag also later gave a statement dated

[39] CP documents, Tab 13

September 17, 2019[40] and testified he stood behind everything he related in that document.

84. Mr. Nag testified that Mr. Brehl had never apologized to him for the incident.

85. Mr. Nag conducted another investigation on April 25 where Mr. Brehl again acted as the union representative. He alleged that Mr. Brehl again tried to frustrate the process. He stopped the investigation and asked Mr. Brehl to leave. Mr. Nag filed a complaint but did not know what had become of it. Mr. Nag could not recall the name of the person being interviewed at that April 25 meeting.

Cross-examination

86. Mr. Nag agreed that he had started working for CP in May 2017 and was not overly experienced with investigations.

87. Mr. Nag noted he felt bullied and harassed during the investigations but agreed that the transcripts did not indicate that Mr. Brehl was acting in a racist manner or bullying. It was more the tone Mr. Brehl exhibited and his combativeness. Mr. Nag disagreed that asking the following question in an investigation was threatening or humiliating[41]:

> Q23: Do you understand that investigations are conducted in an effort to get to the facts of any given situation or incident and that the company expects its employees to answer all questions in a truthful manner and to give false or misleading information in an investigation will result in the appropriate disciplinary actions being taken?
>
> A23: yes

88. Mr. Nag explained why he waited 3 days between the April 11-12 investigations to send his Monday April 15 email. He testified that over the weekend he had spoken with close friends, including friends at CP, when deciding whether to escalate the matter to his superiors. Mr. Nag agreed that his email does not explicitly allege bullying, harassment or intimidation but he added it was implied.

[40] CP documents, Tab 31
[41] CP documents, Tabs 11 and 12; Exhibit 9

89. Mr. Nag indicated that the April 15 email, including the photo of the Extract, constituted a complaint because he had escalated it to his superiors.

90. Mr. Nag explained why he felt that the April 11 off the record discussion was inappropriate. In his view, mitigating circumstances should be raised at the end of the investigation. He felt that Mr. Brehl's reference to Scott MacDonald during the off the record discussion was not correct.

91. The TCRC-MWED, in an implicit reference to *Browne v. Dunn*[42], advised Mr. Nag that Mr. Brehl would deny ever mentioning Mr. MacDonald during the April 11 investigation, including making any suggestion about how the investigation might look if it crossed his desk. Mr. Brehl would also deny ever indicating during that meeting that Mr. MacDonald and he were in the "same boat". Mr. Nag agreed that it was an assumption on his part that Mr. Brehl would take the matter to Mr. MacDonald. In his view, that reference was not relevant to the investigation and he as the IO did not need to know about Mr. MacDonald's private situation.

92. Mr. Nag agreed that he assumed Mr. Brehl had connections at CP and that he could use them to harm him. He further agreed that union representatives are there to protect the worker, but still must be respectful and not use tactics. Mr. Nag presumed Mr. Brehl was trying to threaten him since he felt and still feels that he was threatened.

93. Mr. Nag denied that Mr. Brehl and he had ever discussed Mr. Macdonald at the gym.

94. Mr. Nag agreed that no one at the supermarket said anything to him which led to him feeling he had been racially profiled. But he indicated that he knows when someone is hovering around him at a self checkout. Mr. Nag also indicated that Mr. Brehl could feel the discomfort coming from his having been profiled at lunch on April 11.

95. For the April 12 investigation, Mr. Nag agreed that Mr. Brehl had read him the Extract and that he asked Mr. Brehl to send it to him, which he did immediately. Mr. Nag recalled Mr. Brehl saying words to the effect of "I think you will enjoy this" just before reading the Extract. Mr. Nag testified he was in shock and finished off by asking Mr.

[42] Corporation of the City of Brantford v CUPE, Local 181, 2020 CanLII 56203 at paragraphs 11-21.

Brehl to send him the item he had read. He felt it was the best way to record what had been said.

96. Mr. Nag acknowledged that he had not told Mr. Brehl the Extract was inappropriate and that perhaps he should have said that at the time. He added that he just wanted to get the interview over with since the situation was uncomfortable. The TCRC-MWED asked Mr. Nag how Mr. Brehl was supposed to know he found the situation inappropriate without reading his mind. Mr. Nag responded that he found himself in a room with a seasoned individual who was trying to take over the investigation.

97. Mr. Nag agreed that the April 12 transcript did not reference Mr. Brehl reading the Extract. He explained that it was not pertinent to the investigation. In his view, inappropriate and irrelevant material does not need to be included in the transcript. Mr. Nag also disagreed that they were on a lunch break when Mr. Brehl read the Extract.

98. Mr. Nag assumed that his mention of his racial profiling the day before had prompted Mr. Brehl to read the Extract during the second investigation.

99. Mr. Nag agreed that the investigation on April 25 also involved Mr. Kapsha[43]. During chief, he could not remember who the employee was. Mr. Nag confirmed he had felt unsafe with Mr. Brehl. Mr. Nag did not mention he felt unsafe in his September statement. He indicated that he was not asked that specific question.

100. The TCRC-MWED asked Mr. Nag that if he smiled and looked like he was "putting on a straight face", as described in his September 17 statement[44], then how was Mr. Brehl supposed to know the situation was offensive? Mr. Nag responded that anyone would know it was offensive. In Mr. Nag's view, the context showed that reading the Extract was intimidating and had no place in a formal investigation.

101. Mr. Nag further agreed that he did not know what happened to his complaint arising from the April 25 investigation. Mr. Nag commented on the time delay between his April 15 email and his September 17, 2019 statement. He explained that he gave the

[43] Exhibit 9.
[44] CP documents, Tab 31; Final question.

statement when asked. He had no control over timing. He did not know why this occurred 5 months later.

102. In re-exam, Mr. Nag indicated that Mr. Brehl had raised the Extract with words to the effect that “you will enjoy this”. Mr. Nag asked for the document to verify what he had heard and to note what Mr. Brehl had brought up. Mr. Nag indicated he first heard that the Extract was part of a Facebook post in his September 17 interview. He further denied calling himself a “history buff” as alleged by Mr. Brehl.

Mr. Brehl’s version of events

Evidence in Chief

103. For his actions on April 11, 2019, Mr. Brehl indicated that Mr. Foster admitted smoking marijuana at night to help him sleep, in part due to the loss of his stepson. Mr. Brehl indicated he spoke to Mr. Nag off the record given the possibility of the matter proceeding under section 17 rather than 15.

104. Mr. Brehl denied ever speaking to Mr. Nag about Mr. MacDonald during this off the record discussion. He did testify that at the gym he had mentioned Mr. MacDonald to Mr. Nag. He denied he would ever mention being in the “same boat” as someone else. Mr. Brehl did acknowledge that he had mentioned the loss of his son at another time.

105. Mr. Brehl denied that he had any power to impact Mr. Nag’s career. He had no influence with CP’s leaders.

106. For the Kapsha interview on April 12, an incident which involved cocaine, Mr. Brehl indicated that they had stopped the interview for lunch at 11 am as was standard in Cranbrook. He had even shared some of his lunch with Mr. Nag. The Extract only came up because Mr. Kapsha told Mr. Brehl that he enjoyed his post on Facebook. Mr. Brehl had no idea that Mr. Kapsha was going to raise the posting during the meeting.

107. Mr. Brehl testified that not many days went by when he did not post things on Facebook supporting many of the causes in which he believed like LGBTQ+ rights. He indicated he has posted the Extract perhaps 5 or 6 times over the years.

108. Mr. Brehl denied that he initiated the Extract reading by suggesting that Mr. Nag might be interested in it. Instead, Mr. Nag stated he was a history buff even after Mr. Brehl indicated that the Extract contained historically racist and offensive railway rules. Mr. Nag never objected to being shown the Extract and did not include any mention of it in the investigation transcript.

109. Mr. Brehl testified that he also mentioned to Mr. Nag that he had done a presentation to the National Academy of Arbitrators wherein a discussion of the Extract and other things illustrated the TCRC-MWED's history and why railway workers had organized themselves[45].

110. Mr. Brehl denied knowing if Mr. Nag felt uncomfortable about the April 11 lunch incident when he thought he had been profiled. But he did tell Mr. Nag that such conduct would be shameful.

111. Mr. Brehl indicated that Mr. Nag described himself as a "history buff" and asked if he could borrow the book which contained the Extract. Mr. Brehl offered to send the Facebook post or the Rule. Mr. Nag asked for the latter. Mr. Brehl sent Mr. Nag the Extract only because he had asked for it. He testified he had no animosity towards Mr. Nag and never tried to intimidate him.

112. Mr. Brehl indicated he had no idea that Mr. Nag felt uncomfortable and added that if he had then he would have immediately apologized. Instead, Mr. Nag remained friendly throughout. Mr. Brehl added that he did not learn of Mr. Nag's April 15 email until the initial investigation interview on June 19, 2019.

113. Mr. Brehl did not apologize after learning of Mr. Nag's comments since he alleged that Mr. Nag had lied extensively in his September 17 statement. Mr. Brehl noted that no one had apologized to him for what he had been through.

114. Mr. Brehl described the follow up interview for Mr. Kapsha on April 25. Mr. Nag was more aggressive, but never said that he was uncomfortable or that he felt unsafe. He also denied Mr. Nag's allegation that he had been escorted off the premises.

[45] TCRC-MWED documents, Tab 6.

Cross-examination

115. In response to the question whether he had ever bullied or harassed anyone, Mr. Brehl said he would need to the see any Notifications of investigation to see if those terms were mentioned. He testified that to his knowledge he had never bullied or harassed anyone at CP. He clarified that he did not say he had not been disciplined for it, but that he had never done it.

116. For the 2017 DRA, Mr. Brehl testified that he had been advised he was not admitting to anything by signing it. He reiterated his position that he had never harassed or bullied anyone. He acknowledged that the investigator believed that Mr. Brehl had violated CP's Discrimination and Harassment Policy and its Violence in the Work Place Policy. The investigator also found that there was conduct unbecoming.

117. Mr. Brehl testified that he had first met Mr. Kapsha at his house the night before the April 12 statement. Mr. Brehl agreed that he made the Facebook post at 9:10 mountain time which was 8:10 pacific time. He agreed that Mr. Kapsha's investigation interview commenced roughly 1.5 hours later around 9:45 pacific time. Mr. Brehl agreed that Mr. Nag was not a Facebook "friend" and therefore could not have seen the posting.

118. Mr. Brehl agreed the Extract was racist and offensive. He had mentioned this on numerous occasions in the past. He disagreed however that it was inappropriate material in the context of his Facebook post.

119. Mr. Brehl agreed he knew Mr. Nag would conduct the April 12 interview. He further agreed, when taken to his interview transcript[46], that he knew Mr. Nag had been offended and angry about his being racially profiled on April 11.

120. Mr. Brehl denied knowing if Mr. Nag was a visible minority. He had the same opinion when asked about an articling student in the hearing room.

[46] CP documents, Tab 36, Brehl Statement page 7

121. Mr. Brehl agreed that he did not send Mr. Nag the Facebook post but had offered to do so. Mr. Nag had declined. Mr. Brehl also distinguished between reading the Extract during an investigation and doing so on a lunch break.

122. Mr. Brehl agreed that on July 18 during his investigation that he said would make every effort to contact Mr. Nag and offer his sincere apologies. Mr. Brehl agreed he had not done that and agreed he was not apologetic for his actions on April 12.

Re-exam

123. Mr. Brehl explained why he did not see Mr. Nag as a visible minority. He did not want to get locked into those labels.

Whose version of events is more credible?

124. The competing versions of the facts from Mr. Nag and Mr. Brehl are not just two descriptions of the same event. The versions cannot be reconciled and impact credibility.

125. Labour arbitrators[47] follow a well-known test when making credibility determinations[48]:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. **In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth.** Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him

[47] See, for example, Thames Valley District School Board v Ontario Secondary School Teachers Federation, 2021 CanLII 874 and Toronto District School Board v Canadian Union of Public Employees, Local 4400, 2021 CanLII 80181
[48] Faryna v. Chorny, 1951 CanLII 252 (BC CA)

> because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.
>
> (Emphasis added)

126. On a balance of probabilities, the arbitrator prefers Mr. Nag's version of events about what happened on April 11-12 and, in particular, the events leading up to Mr. Brehl reading the Extract out loud. There are several reasons for this conclusion.

127. The arbitrator found Mr. Nag's testimony compelling in both chief and cross-examination. He explained clearly what had happened to him on April 11 and 12. He maintained the same demeanour throughout the TCRC-MWED's cross examination, particularly when acknowledging that some of his testimony involved feelings he had and assumptions. Mr. Nag had no difficulty agreeing with numerous reasonable propositions that Mr. Brown put to him in cross-examination.

128. The arbitrator had more difficulty with Mr. Brehl's testimony which at times seemed to deflect responsibility. While the TCRC-MWED did not have the burden of proof, it did have an evidentiary burden to respond fully to Mr. Nag's allegations[49].

Mr. Brehl's reluctance to acknowledge that Mr. Nag was a visible minority

129. For whatever reason, Mr. Brehl was not prepared to admit Mr. Nag's self-described status as a visible minority. Mr. Nag's self description was plain and obvious. Mr. Marshall, whose evidence the arbitrator found forthright and helpful, had no trouble accepting Mr. Nag's self description, though he was clearly uncomfortable disagreeing with Mr. Brehl.

130. It is one thing to subscribe to the teaching that people should be judged not by the colour of their skin but rather the content of their character. It is quite another to refuse to acknowledge the obvious.

131. By itself, this may not have been enough to make the essential credibility determination this case requires. People can have their own views about certain things.

[49] International Brotherhood of Electrical Workers Council No. v Toronto Terminals Railway Company, 2019 CanLII 29083 at paragraphs 37-41.

But the same phenomenon of deflecting responsibility occurred again for the 2017 DRA that Mr. Brehl signed.

Mr. Brehl's denying any responsibility under the 2017 DRA he signed

132. Mr. Brehl testified that to his knowledge he never harassed anyone at CP. He suggested he only signed the 2017 DRA because his lawyer told him it would allow him to go back to work. Mr. Briel's position on the 2017 DRA, given his extensive experience with investigation interviews and pleading CROA arbitrations, again struck the arbitrator as an attempt to deflect any responsibility for his actions.

133. The 2017 DRA differs from a standard entry in a discipline file. The arbitrator will review Mr. Brehl's discipline file later in this award. The 2017 DRA is instead a signed settlement agreement. While CP cannot go back and relitigate the original allegations, *supra*, it can refer to the terms of the 2017 DRA.

134. The TCRC-MWED argued that the arbitrator should not consider the 2017 DRA since CP failed to refer to it explicitly in its two termination letters.

135. The arbitrator dismisses that argument. First, the two discipline letters[50] refer to Mr. Brehl's discipline history as well as the concept of a culminating incident:

> Notwithstanding the above mentioned incident, harassment and conduct unbecoming to an employee are major offences under CP's Hybrid Discipline & Accountability Guidelines warranting dismissal in and of itself, based on your previous discipline history this incident also constitutes a culminating incident warranting dismissal.

136. Secondly, the parties to the 2017 DRA, which included Mr. Brehl, had agreed how it could be used in the future:

> 9. This Agreement will remain on the employment record of Mr. Brehl and may be utilized in the event that he appears before an arbitrator regarding this Agreement **or any other future proceeding**.
>
> (Emphasis added)

[50] CP documents, Tabs 37 and 38.

137. In his evidence, Mr. Brehl denied ever harassing anyone despite the investigator's investigation into his conduct when acting as a Fellow Employee Representative. The 2017 DRA contains this text:

> This is also further to Mr. David Ray's findings as follows:
>
> > - Mr. Brehl's conduct toward Ms. Giddings on December 3, 2016 violated the Discrimination and Harassment Policy and the Violence in the Work Place Policy; and
> >
> > - Mr. Brehl also exhibited conduct on December 3, 2016 that was unbecoming an employee.

138. When asked if the investigator found that Mr. Brehl had violated CP's policies, Mr. Brehl responded with words to the effect of "Mr. Ray believes that yes". When asked about the investigator's finding of conduct unbecoming, Mr. Brehl replied "Yes, he says that". But Mr. Brehl maintained throughout his testimony that he had never harassed or bullied anyone.

139. The settlement in the 2017 DRA imposed a 20-day suspension (deferred) on Mr. Brehl and he lost the ability to act as a Fellow Employee Representative[51]:

> 3. Mr. Brehl shall not act as a Fellow Employee Representative in any capacity for any reason, including, without limitation, investigations conducted under the terms of the Collective Bargaining Agreement.

140. Mr. Brehl also acknowledges that he understood the 2017 DRA and testified at the hearing that he had been represented by counsel:

> 8. Mr. Brehl agrees that he has had an opportunity to consider the terms of this Agreement and consult with anyone he wishes, including a lawyer. Mr. Brehl also confirms that he understands the terms of the Agreement and he has signed this Agreement freely and voluntarily.

141. Mr. Brehl is free to take any position he wishes about the 2017 DRA he signed. For this arbitration, however, the arbitrator cannot ignore his denial of any responsibility. His evidence contrasted significantly with how Mr. Nag testified and impacts the crucial credibility determination this case requires.

[51] Mr. Brehl acted in a different representative capacity on April 11 and 12, 2019.

Mr. Kapsha's failure to testify

142. Mr. Nag was the sole CP representative for both the April 11 (Foster) and April 12 (Kapsha) investigations. Mr. Brehl attended both investigations with the respective employees. Both Mr. Nag and Mr. Brehl testified about how the latter came to read the Extract out loud.

143. Mr. Brehl alleged that the entire episode arose only because Mr. Kapsha raised the Facebook post. The Record contains an unsworn affidavit from Mr. Kapsha[52]. However, the TCRC-MWED did not call Mr. Kapsha to testify. CP argued that it was highly improbable that Mr. Kapsha would have been added as a "friend" to Mr. Brehl's Facebook after only meeting each other the night before.

144. Moreover, CP suggested that an employee preparing for an interview about an alleged violation of CP's drug policy due to cocaine might be doing other things than reviewing Facebook postings.

145. The arbitrator has the same view of the written evidence from Mr. Kapsha as was noted above for Mr. Wincheruk's and other CP employees' statements. It will be a rare case where an arbitrator prefers written evidence in a railway arbitration over witnesses' oral evidence at the hearing. In cases as serious as this one, cross-examination remains the essential tool which allows a decision maker to make fact determinations when faced with completely contradictory evidence.

146. The failure to call Mr. Kapsha to testify raises questions about Mr. Brehl's version of the facts and how he came to read the Extract to Mr. Nag.

The lack of evidence about Facebook

147. Despite Mr. Nag's testimony, the TCRC-MWED did not present confirming evidence on certain key points in Mr. Brehl's version of events.

[52] CP documents, Tab 15; TCRC-MWED documents Tab 15. Mr. Foster also provided an affidavit which was sworn: CP documents, Tab 14; TCRC-MWED documents Tab 15.

148. In cross-examination, Mr. Brehl agreed he knew Mr. Nag had been upset on April 11 after feeling racially profiled. Roughly 1.5 hours prior to the April 12 interview, Mr. Brehl made his post on Facebook, which included the Extract. During IO Nag's investigation, Mr. Brehl read him the Extract.

149. This scenario raised several questions. For example, under Mr. Brehl's version of events, how did Mr. Kapsha have access to Mr. Brehl's Facebook if they had just met the evening before? Mr. Brehl admitted in cross-examination that Mr. Nag, who did not have "friend" status, could not have seen his Facebook post. Facebook settings can be highly relevant in such situations, but the arbitrator has no evidence about them.

150. Similarly, while Mr. Brehl explained the Extract posting by indicating he frequently posted about social issues, the TCRC-MWED put forward no evidence in support of this testimony.

151. In final argument, the TCRC-MWED argued that it was just a coincidence that the Extract came up due to the Facebook feature called "Memories". In other words, that Facebook feature had reminded Mr. Brehl about a previous posting involving the Extract. Mr. Brehl did testify he had posted the material 4 or 5 times over the years.

152. If the April 12 posting resulted from Facebook reminding Mr. Brehl about a previous post, then evidence should have been led to support this suggested coincidence. On its face, the Facebook post does not read like a repost and the arbitrator has no evidence to suggest otherwise.

153. For the foregoing reasons, whenever a conflict in the evidence arises, the arbitrator prefers Mr. Nag's version of the events of April 11-12, 2019.

SHOULD THE ARBITRATOR INTERVENE AND MODIFY MR. BREHL'S TERMINATION?

154. The Supreme Court of Canada[53] has described the three-step test for labour arbitrators to apply in discipline cases:

> 49 The first step in any inquiry as to whether an employee has been dismissed for "just cause" is to ask whether the employee is actually responsible for the misconduct alleged by the employer. The second step is to assess

[53] Toronto (City) Board of Education v. O.S.S.T.F., District 15, 1997 CanLII 378

> whether the misconduct gives rise to just cause for discipline. The final step is to determine whether the disciplinary measures selected by the employer are appropriate in light of the misconduct and the other relevant circumstances. See Heustis, supra, at p. 772.

155. The *Canada Labour Code*[54] at s.60(2) describes a federal labour arbitrator's remedial power to substitute a just and reasonable penalty for a discharge:

> 60(2) Where an arbitrator or arbitration board determines that an employee has been discharged or disciplined by an employer for cause and the collective agreement does not contain a specific penalty for the infraction that is the subject of the arbitration, the arbitrator or arbitration board has power to substitute for the discharge or discipline such other penalty as to the arbitrator or arbitration board seems just and reasonable in the circumstances.

156. Given this award's earlier findings, particularly those involving credibility, the arbitrator has concluded that CP had just cause to discipline Mr. Brehl for the Nag complaint. However, CP did not meet its burden of proof for the Wincheruk complaint, so there is mixed success on the issues examined in this arbitration.

157. The question then arises whether the arbitrator should intervene and replace the dismissal with a suspension.

158. The arbitrator has considered Mr. Brehl's long service at CP and his long-time role in the TCRC-MWED. One cannot have but sympathy for Mr. Brehl and the other gentlemen mentioned in this award all of whom tragically lost a son.

159. But the focus of the arbitration is Mr. Nag and what he experienced when trying to carry out his role as an Investigating Officer pursuant to the parties' collective agreement. In that context and given the arbitrator's preference for Mr. Nag's version of events, it is incomprehensible how anyone could think it appropriate to read the Extract to an investigating officer. A formal investigation setting differs completely from referring to the Extract for historical reasons at an academic conference.

[54] RSC 1985, c L-2

160. To aggravate the situation, Mr. Nag had already told Mr. Brehl the day before that he had felt racially profiled for the first time in his life.

161. The arbitrator has also considered Mr. Brehl's disciplinary record since returning to the bargaining unit in 2015[55]. Besides the 2017 DRA 20-day deferred suspension, the record contains the following additional disciplinary events:

- March 1, 2016: 5-day deferred suspension (safety devices);
- May 29, 2018: 5-day suspension (AOR/Waiver) (property damage);
- Nov 30, 2018: 20-day suspension (motor vehicle accident);
- April 19, 2018: 30-day suspension (property damage).

162. Moreover, Mr. Brehl's seeming reluctance to admit the obvious, such as Mr. Nag being a visible minority, coupled with his attempt to deflect any responsibility under the 2017 DRA he signed, do not suggest that his behaviour would change if the arbitrator reinstated him back into his position.

163. The arbitrator notes additionally that Mr. Brehl failed to express any remorse. While he initially mentioned he would apologize to Mr. Nag after learning of the latter's reaction, he never did so. This seemed consistent with an attitude of deflecting responsibility.

164. Given the Record and the oral evidence adduced in this case, the arbitrator will not intervene and modify the dismissal CP imposed for the Nag incident.

DISPOSITION

165. For the foregoing reasons, the arbitrator has concluded that CP had just cause to impose discipline for the Nag incident. Despite Mr. Brehl's long service, the gravity of the Nag incident, coupled with his disciplinary record since his return to bargaining unit in 2015, militate against the arbitrator substituting a suspension for Mr. Brehl's dismissal.

[55] CP documents following tab 50.

166. The arbitrator dismisses the grievance.

SIGNED at Ottawa this 19th day of November 2021.

_____
Graham J. Clarke
Arbitrator