AH837

IN THE MATTER OF AN ARBITRATION UNDER THE *Canada Labour Code, RSC 1985, c L-2.*

BETWEEN:

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS (SYSTEM COUNCIL NO. 11)

(IBEW)

-and-

CANADIAN NATIONAL RAILWAY COMPANY

(CN)

Discharge – Roger Moses

Arbitrator: Graham J. Clarke
Date: October 30, 2023

Appearances:

IBEW:

M. Church:	Legal Counsel
J. Sommer:	Senior General Chairman, IBEW System Council No. 11
B. McCue:	Regional Chairman - CN GLD, IBEW System Council No. 11
S. Martin:	International Representative, IBEW
R. Moses:	Grievor

CN:

P-L. Montgrain:	Labour Relations Manager
J. El Shamey:	Sr. Manager, Labour Relations
J-B. Gilbert:	Sr. Manager, S&C Maintenance
É. Dussault:	Labour Relations intern

Arbitration held on October 26, 2023.

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Award

BACKGROUND

1. On August 3, 2022, CN discharged Roger Moses, an S&C Maintainer with 22 years 9 months seniority, for this reason:

> Circumstances surrounding your violation of CN's Workplace Harassment and Violence Policy and CN's Code of Business Conduct when you uttered threats of violence towards other CN employees and yourself, on September 21, 2021.

2. CN relied on an email from a fellow employee, Mr. Lambert. That email had alleged that Mr. Moses, during a conversation about the federal election and the covid vaccination issue, had stated "If I have to hurt people, I will". The email further alleged that Mr. Moses stated that, if he took the vaccine, he would throw himself in front of a train at work[1].

3. During his investigation statement, Mr. Moses denied ever making these comments[2].

4. CN urged the arbitrator to accept the contents of Mr. Lambert's email and reject Mr. Moses' comments from his investigation statement. The IBEW argued that CN had failed to meet its burden of proof which required it to demonstrate that Mr. Moses had in fact made the statements which led to his dismissal.

5. For the reasons which follow, the arbitrator upholds the grievance and orders CN to reinstate Mr. Moses. CN had the burden of proof to establish why the arbitrator should prefer the content of Mr. Lambert's email over Mr. Moses' answers during his statement. Given the complete conflict in the evidence, the arbitrator finds the Record in this arbitration provided no legally justifiable basis to come to that conclusion.

FACTS

6. The parties' Record contained a significant amount of material which is incorporated into this award. The arbitrator will reproduce only certain key facts.

[1] CN Brief, Tab 3, page 39/281.
[2] IBEW Documents, Tab 13, QA11-16.

7. **June 29, 1998**: CN hired Mr. Moses. For most of his time at CN, Mr. Moses held the position of S&C Maintainer at the MacMillan Yard in Vaughan, Ontario.

8. **April 13, 2016**: CN and the IBEW settled an earlier termination grievance by substituting a six-month suspension. The arbitrator did not find in the Record a Memorandum of Settlement, a document which often sets out a settlement's terms[3].

9. **September 21, 2021**: Mr. Lambert sent his manager Mr. Varga an email about a discussion he had had with Mr. Moses:

> Around 5:50am, I spotted Roger arriving for his shift at 06:00am. He went to the fridge to put his lunch bag away and then went to change into his work clothes. He then went to the computer area and sat down. I noticed he was looking pretty down so I asked him what was going on. He said that he was upset about the election results and that he still wasn't going to get the vaccine and he was going to still show up after the November 01st deadline and "If I have to hurt people, I will." He then continued saying that if he took the vaccine, he would throw himself in front of a train here at work!! He then started saying how the vaccine is causing people to get sick and some of them dying and that it's our fault that we've put him in this position. That's when I decided to leave and not continue this conversation.

10. **September 23, 2021**: Canada Life accepted Mr. Moses' short term disability (STD) application.

11. **November 15, 2021**: CN introduced its mandatory covid-19 vaccination policy (Policy).

12. **January 28, 2022**: Canada Life ended Mr. Moses' STD.

13. **January-March, 2022**: CN alleged that Mr. Moses did not confirm his vaccination status or cooperate with its Occupational Health Services (OHS) which wanted to assess his fitness to return to work[4].

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[3] See, for example, the settlements examined in AH736 - Teamsters Canada Rail Conference – Maintenance of Way Employees Division v Canadian Pacific Railway Company, 2021 CanLII 118656 (paragraphs 132-141) and AH836 - International Brotherhood of Electrical Workers (System Council No. 11) v Canadian Pacific Kansas City Railway, 2023 CanLII 73434 (Last Chance Agreement).

[4] CN Brief, Page 11.

14. **March 3, 2022**: CN advised[5] the IBEW that Mr. Moses, once fit for duties, would be held out of service:

> As information, when the fitness for duties criteria are satisfied though OHS, Roger Moses will be held out of service pending investigation.
>
> The circumstances surrounding Roger leaving that day include an alleged conversation where he made threating comments directed at himself and others.
>
> For the safety of Roger and of fellow CN employees it is required that he not be allowed at work until this situation has been fully investigated.

15. **March 11, 2022**: After CN advised that Mr. Moses would be held out of service, the IBEW contested[6] CN's delay in proceeding:

> Although it is true that Mr. Moses left work on September 21st of his own accord the Company has acknowledged that he was being held out of service at the direction of the Company.
>
> From September 21st 2021 until you email of March 3 2022 the Company has made no attempt to discuss or make arrangement with the Union to waive the required time frame as is clearly mandated in Article 13.1 of Agreement 11.1. It is our understanding that the reasons for Mr. Moses STD did not prevent the Company from conducting an investigation in a timely manner. Had there been any concern about Mr. Moses' ability to participate in a formal investigation the parties would have addressed appropriately and made mutual arrangements to postpone an investigation. As neither of the preceding items took place following the September 21st 2021 event the Union strongly objects to your stated intent to conduct a formal investigation more than 134 days late.
>
> If the Company proceeds to a formal investigation in clear violation of Agreement 11.1 the Union will be forced to address as necessary and appropriate.

CN disagreed with the IBEW's position:

> Thank you for your email.
>
> We disagree with the Union's position. It is not the Company's practice to contact employees who are off on short or long-term disability. The purpose of these absences is to allow the employee to obtain the necessary treatments to restore their health and well-being because they are sick/unwell.

[5] IBEW Documents, Tab 8, Page 39/440.
[6] CN Brief, Tab 8, Page 160/281, Email chain. IBEW Documents, Page 38/440.

> Mr. Moses is currently unavailable for an investigation, as per Article 13.1 of Agreement 11.1

16. **March 16, 2022**: OHS cleared Mr. Moses to return to work[7]. CN placed him on an unpaid leave of absence since he remained non-compliant with its Policy. Mr. Moses had advised the IBEW that he would not get vaccinated[8].

17. **June 14, 2022**: CN suspended its Policy.

18. **June 18 – July 5, 2022**: The IBEW conducted strike activities until reaching a tentative agreement.

19. **July 15, 2022**: CN sent Mr. Moses a Notice to Appear for a July 25, 2022 investigation statement[9].

20. **July 25, 2022**: During the investigation interview[10], Mr. Moses stated the following about the alleged September 21, 2021 comments:

> 10. Q. Mr. Moses do you wish to refute any of the evidence presented?
>
> A. yes.
>
> 11. Q. What would you like to refute?
>
> A. the factual inaccuracy of the letter by Gil Lambert
>
> 12.Q. Mr. Moses in the email dated September 21, 2021; it states the following "He said that he was upset about the election results and that he still wasn't going to get the vaccine and he was going to still show up after the November 01st deadline and "If I have to hurt people, I will." He then continued saying that if he took the vaccine, he would throw himself in front of a train here at work!!" do you recall saying this to one of your fellow employees?
>
> A. no
>
> 13.Q. Did you say any part of a statement like this to a fellow employee?

[7] IBEW Documents, Tab 7.
[8] IBEW Documents, Tab 9, April 3, 2022 email.
[9] CN Brief, Tab 9.
[10] IBEW Documents, Tab 13.

A. no

14. Q. Do you know why someone would come forward with these allegations towards yourself like this?

A. no

15.Q. Mr. Moses, did you have a conversation with Mr. Gilles Lambert on September 21, 2021?

A. yes.

16.Q. Mr. Moses in your own words what did that conversation entail?

A. I was bothered by the results of the election, and I did state that I'm still not going to get the vaccine. I also stated I shouldn't have to lose my job because of this. I did not make any statements that could be even remotely interpreted as threats to anyone. I also never made any statements regarding suicidal actions. I have a wife and two young children to support. Gill was upset at having the same conversation over and over again regarding vaccine mandates. He stated something along the lines of, I have a choice to make take it or not take it, I don't want to talk about this anymore, and he stormed off. I had an anxiety attack afterwards and felt the best and safest option was to leave company property and go home. As per company rules I notified my manager that I was going home and I set up an appointment with my family DR. for my anxiety attack.

21. **August 3, 2022**: CN dismissed[11] Mr. Moses for cause.

22. **August 8, 2022**: The IBEW grieved[12] Mr. Moses' termination and alleged that CN had failed to respect the time limits in the parties' collective agreement. On the merits, the IBEW argued that CN could not prove just cause:

> Given that the scenario of one employee's narrative contradicts the other, and the Company's failure to produce any corroborative or supportive evidence to Lambert's narrative, the Union asserts that the Company has failed to meet the burden of proof warranting such aggravated discipline.

23. **November 9, 2022**: The parties discussed the grievance at Joint Conference.

[11] CN Brief, Tab 11.
[12] CN Brief, Tab 13.

24. **January 31, 2023**: CN responded to the grievance[13] and relied on Mr. Lambert's email to support its decision to terminate Mr. Moses:

> The Company disagrees with the Union's contentions and alleged violations of the Collective Agreement.
>
> On September 21, 2021, the Grievor made threatening, harassing, and violent comments towards a fellow coworker. During a discussion between the Grievor and coworker Gilles Lambert, the Grievor stated that he was "upset about the election results", referring to the Canadian Federal election, that he "still wasn't going to get the vaccine and he was going to still show up after the November 1st deadline", "If I have to hurt people, I will", and "if he took the vaccine, he would throw himself in front of a train here at work". Upon further discussions regarding the alleged ill effects of the vaccine, Mr. Lambert decided to leave the conversation.
>
> Further to a review of the facts, the formal investigation, and evidence related to this dispute, the Company had just cause to assess discipline in the form of a discharge towards the Grievor given the circumstances.

25. **June 28, 2023**: The parties retained the arbitrator to hold this arbitration on October 26, 2023.

ISSUES

26. The arbitrator must determine two issues:

> 1. Did CN violate the collective agreement by failing to conduct its investigation within 30 days? And
>
> 2. Did CN meet its burden of proof when it relied on Mr. Lambert's email and rejected Mr. Moses' evidence from his investigation statement?

1. DID CN VIOLATE THE COLLECTIVE AGREEMENT BY FAILING TO CONDUCT ITS INVESTIGATION WITHIN 30 DAYS?

27. The IBEW relied on article 13.1 of the collective agreement[14] to argue that CN failed to conduct its investigation within the mandatory 30-day time period:

> Discipline
>
> 13.1 Except as otherwise provided herein, an employee who has 150 working days' service will not be disciplined or discharged until he has had a fair and

[13] CN Brief, Tab 14. CN also reproduced a line from a 2016 settlement agreement but, as mentioned above, the Record does not appear to contain that document.
[14] CN Brief, Tab 7, Page 96/281.

> impartial investigation. Investigations will be held as quickly as possible, not to exceed 30 days from the time the incident becomes known to the Company, **unless the employee is unavailable, or the investigation should be delayed due to circumstances beyond the control of the Company**.
>
> (Emphasis added)

28. The general rule in article 13.1 is that investigations must take place quickly. Exceptionally, given some of the unique factors in this case, the arbitrator must nonetheless dismiss the IBEW's objection.

29. Article 13.1 contains an exception when "the employee is unavailable". Mr. Moses went on STD immediately after the alleged incident. In AH836[15] which involved a similar provision but at a different railway, the arbitrator confirmed that an employee's disability might delay an investigation [Footnotes omitted]:

> 71. Secondly, article 12.1 acknowledges that a delay may occur where "the employee is unavailable". Mr. Bursey was absent from October until February 2021. The Record does not indicate that Mr. Bursey was willing to proceed with a formal investigation despite being on disability leave. An employee going on medical leave might delay an investigation. The arbitrator cannot conclude that CPKC's decision to await Mr. Bursey's return from medical leave created a delay which justified granting the grievance.

30. As AH824[16] also demonstrated, this unavailability could last a long time.

31. The parties have clearly negotiated an exception to the 30-day rule when an employee is "unavailable". Mr. Moses' STD made him unavailable. The arbitrator rejects the alternative interpretation which would essentially oblige CN to pursue employees on disability for the purposes of an investigation.

32. The arbitrator comes to the same conclusion for the continuing delay after OHS had found Mr. Moses fit for work. Mr. Moses decided not to get vaccinated against covid-19. CN placed him on a leave of absence due to this unvaccinated status.

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[15] International Brotherhood of Electrical Workers (System Council No. 11) v Canadian Pacific Kansas City Railway, 2023 CanLII 73434

[16] Conférence ferroviaire de Teamsters Canada c Via Rail Canada inc., 2023 CanLII 17658

33. Article 13.1 also contains an exception which references “circumstances beyond the control of the Company”. That exception applied to the continuing delay in this case. For health and safety, as well as legal, reasons, CN adopted the Policy.

34. The IBEW did not convince the arbitrator that article 13.1 required CN representatives to hold an in-person investigation interview with an employee who remained non-compliant with the Policy. They had no way of knowing whether Mr. Moses might expose them to a health risk. The Policy[17] sought to protect CN employees, in part by insulating them from the unvaccinated. In these unique circumstances, which may never occur again, this part of the delay fell within the exception “circumstances beyond the control of the Company”.

35. Similarly, a strike which extended the delay arising from the above factors can impact the general rule given how both parties would be working around the clock to try to negotiate a resolution.

36. Nothing prevented the parties, of course, from agreeing to hold an investigation in some form to deal with these challenges. But article 13.1 did not oblige CN to do so when confronted by these unique circumstances.

37. For these reasons, CN did not violate article 13.1 and the collective agreement’s 30-day delay in the specific circumstances of this case.

38. Nonetheless, a party with the burden of proof always has an interest to investigate as soon as possible after an incident. An employee’s absence on disability does not preclude a partial investigation from taking place[18] [Footnotes omitted]:

> 60. From January 12-14, 2021, CPKC took statements from several of the other employees present when the September 27 incident occurred, including from Mr. Symoens. After Mr. Bursey returned from his disability leave, he provided his statement. Mr. Bursey acknowledged he had not acted appropriately but did not agree with all the allegations made against him.

[17] CN Documents, Tab 5.
[18] AH836 - International Brotherhood of Electrical Workers (System Council No. 11) v Canadian Pacific Kansas City Railway, 2023 CanLII 73434

39. Despite the negotiated exceptions in article 13.1, a party with the burden of proof which delays investigating when events remain fresh does so at its peril.

2. DID CN MEET ITS BURDEN OF PROOF WHEN IT RELIED ON MR. LAMBERT'S EMAIL AND REJECTED MR. MOSES' EVIDENCE FROM HIS INVESTIGATION STATEMENT?

Parties' positions on the contradictory evidence

40. The IBEW argued that CN could not meet its burden of proof given the contradictory evidence in this case:

> 96. However, there is no clear and cogent evidence before the Arbitrator that the Grievor made the comments attributed to him in the lone hearsay evidence relied upon—Mr. Lambert's September 21, 2021 email (Tab 12).
>
> 97. Mr. Moses denied the allegations in Mr. Lambert's email (see Q&A 10-16 of his statement). The Company did not call Mr. Lambert or any other witness to challenge the Grievor's recollection of the brief conversation that he relayed at Q&A 16.
>
> …
>
> 101. As is obvious from all of the above, CN relied completely on hearsay evidence from Mr. Lambert. During his statement, the Grievor denied the critical allegations in Mr. Lambert's short email. CN did not attempt to present any evidence to challenge his denial nor did CN even try to have a supplemental investigation of witnesses clearly available to it.
>
> 102. CN bears the onus to prove on a balance of probabilities that the Grievor committed each alleged offence and that such justifies outright termination of his career of 24 years in these circumstances. Given the flaws in CN's evidence, the Company cannot possibly discharge the onus.

41. In its Brief, CN asked the arbitrator to prefer Mr. Lambert's email to the evidence Mr. Moses gave on his statement:

> 35. Shortly after, Mr. Lambert sent a written statement to a Company Officer confirming the above. Such an immediate reporting response is telling and indicates how distraught he was upon hearing said statements. This is further proven by the fact that he removed himself from the discussion in the first place; he was clearly not comfortable around the grievor that day.

42. In its Reply, CN commented further on this evidentiary issue:

> 21. Paragraph 101: again this is not hearsay, but rather how evidence is routinely provided in support of an investigation and file at CROA.
>
> Again, the Union could have asked Mr. Lambert or Varga to be examined during the investigation, but they made not such request.
>
> It is not the Company's responsibility to provide additional evidence if the grievor denies allegations made against him. It is up to the Arbitrator to appreciate the evidence submitted and whether the statement written by Mr. Lambert is credible or not in comparison to the grievor's own version of the events.
>
> The Union even alludes that a supplemental investigation should have been done. The evidence at hand does not support this. The discussion between Mr. Lambert and Mr. Moses was not heard by anyone else and all evidence available was provided to the Union and the grievor. (sic)

An arbitrator must resolve and explain evidentiary conflicts

43. The fundamental issue in this case asks whether Mr. Moses made the comments that CN used to justify his termination.

44. An arbitrator's role goes beyond making factual determinations. When faced with an evidentiary conflict, the arbitrator must explain why one version of the facts prevailed over another. The railway model can make this essential task more challenging since the parties plead labour arbitrations in a matter of hours. Unlike in "regular" arbitrations, railway arbitrators rarely have the benefit of witness testimony, including cross-examination.

45. Nonetheless, the expediency of the railway model does not relieve an arbitrator from the obligation to resolve and explain factual and credibility issues. Railway arbitrators invariably explain how they came to important factual conclusions based solely on the parties' written Record[19].

46. Implicitly, the parties consent to these determinations in the greater interest of their unique arbitration regime which allows multiple cases to be heard in a single day. In contrast, "regular" arbitration often requires multiple hearing days before an arbitrator can provide the parties with a single arbitral award.

47. However, an arbitrator who simply adopted one version of the facts, without explaining why, would provide the grounds for a simple judicial review application.

[19] See, for example, AH836 (paragraph 73); CROA 4533 and CROA 4756.

48. The arbitrator recently commented on this reality when faced with contradictory medical evidence in AH822[20]:

> 67. The IBEW has satisfied the arbitrator that CP did not respect its duty to accommodate obligations. The arbitrator has some sympathy with both side's positions, however.
>
> 68. For Mr. X, he did everything CP asked of him after the Original Decision ordered him reinstated in his position. He underwent multiple medical exams and understood from his doctors that no medical impediment prevented him from returning to his position as an S&C Maintainer. Despite this evidence, CP placed him in a lower-paying temporary position outside the bargaining unit. Mr. X performed these duties while awaiting the outcome of this arbitration.
>
> 69. For CP, the medical reports may well raise some concerns. CP generally has concerns about ensuring safety in its operations. **But there needs to be some explanation for CP rejecting Mr. X's doctors' opinions, including that of his neurologist.**
>
> 70. **A court would no doubt find an arbitrator's decision arbitrary if a conclusion relied on one party's evidence but ignored the other party's contradictory evidence. The same conclusion by analogy applies in this case. The arbitrator could only find that CP respected its duty to accommodate by ignoring all of the IBEW's medical evidence. There is no rational reason for doing that.**
>
> (Emphasis added)

49. In the civil litigation realm, the Ontario Court of Appeal[21] has reminded judges that they must not just come to conclusions about evidence but must further explain why they came to those results:

> [39] Since the evidence adduced by the appellants was capable of supporting an allegation of misrepresentation and was unchallenged by the respondent in cross-examination, **it was incumbent upon the motion judge to explain why she rejected the evidence**: Neuberger Estate v. York (2016), 129 O.R. (3d) 721, [2016] O.J. No. 1164, 2016 ONCA 191, at para. 124, leave to appeal to S.C.C. refused [2016] S.C.C.A. No. 207; Trotter, at para. 54; Lesenko, at para. 19. **Her conclusory statements were insufficient. While she recited the evidence, she did not weigh it, evaluate it, or make findings of credibility as she was required to do in this case. She could not simply prefer one**

[20] International Brotherhood of Electrical Workers System Council No. 11 v Canadian Pacific Railway Company, 2023 CanLII 13643
[21] Royal Bank of Canada v. 1643937 Ontario Inc., 2021 ONCA 98

> **position over another without providing an explanation that is sufficient for appellate review**: Gordashevskiy v. Aharon, [2019] O.J. No. 1917,2019 ONCA 297, at para. 6.
>
> (Emphasis added)

50. The arbitrator faced a similar challenge in this case. CN's burden of proof required it to demonstrate why the arbitrator should prefer Mr. Lambert's email over Mr. Moses' evidence in his statement.

The Railway Model and evidentiary conflicts

51. Railway case law illustrates how parties resolve these factual conflicts.

52. In AH664[22], a case involving these same parties, the arbitrator faced a similar evidentiary challenge:

> 29. Ultimately, based on the record, the arbitrator can only discern an implicit disagreement on CN's part regarding Mr. Reid's explanation of his actions on June 26, 2017. In the face of these differing views, CN needed to demonstrate to the arbitrator why its position ought to be preferred.

53. CROA 4603 explained a party's obligation, when it had the burden of proof, to demonstrate why the arbitrator should adopt its facts:

> 13. **CP has the burden of proof for disciplinary matters. This involves demonstrating, on a balance of probabilities, that its evidence is to be preferred**. There are two areas where CP did not meet this burden.
>
> 14. **CP did not demonstrate on a balance of probabilities that Mr. Shewchuk failed to have a 3-point stance. CP said he did not; Mr. Shewchuk said he did. This contradiction in the evidence required something further from CP, whether via supplementary investigation or evidence at the hearing, to meet its evidentiary burden**.
>
> 15. CP also did not demonstrate that employees protecting the point had to be located at the very front of the locomotive. The arbitrator could speculate that protecting the point requires a person to be able to see not only what is out front of the locomotive, but also what is directly down on the tracks, especially if travelling across a pedestrian crossing. Indeed, Mr. Shewchuk himself went to the nose on one of the four occasions.

[22] Canadian National Railway Company v International Brotherhood of Electrical Workers System Council No. 11, 2018 CanLII 52755

16. But an arbitrator cannot speculate; a decision must be based on the evidence presented. CP did not subsequently rely on the rules to which Mr. Hill referred during his testimony during the investigation. The bulletin to which CP referred (Bulletin MBNO-098- 15) does not expressly say that protecting the point in a yard requires an employee to be at the front of the nose:

> For train crews working or operating in yards or industry tracks, all employees other than the Locomotive Engineer must be positioned outside of the cab of the Locomotive when the Locomotive is leading in the direction of travel.

17. While CP might consider the employee's positioning to be obvious, the TCRC contested that position. This required further evidence to convince the arbitrator of the requirement to be on the front of the nose.

(Emphasis added)

54. In CROA 4647, the arbitrator commented explicitly on a party's argument that a third-party email should be preferred over evidence obtained during the investigation:

> **8. CP did not follow up with Mr. Singh as part of its investigation but relied on the contents of his April 5, 2017 email.**
>
> **9. CP had the burden of proof in this discipline case. To meet that burden, CP needed to demonstrate why, on a balance of probabilities, its suggested version of the facts should be preferred. It is not enough simply to conclude that certain facts exist without explaining why…**
>
> 10. This Office's expedited arbitration process is wholly dependent on the parties developing a full factual record. That requirement flows from their negotiated investigation process. The arbitrator then hears the parties' representations about the legal issues arising from those facts. The importance of the record explains in part how this Office (and the parties) can resolve 21 arbitration cases each month by scheduling 3 days of hearings with up to 7 one-hour cases assigned to each day.
>
> 11. A third-party complaint brings additional evidentiary complexity but can still be heard under this Office's expedited arbitration system: CROA&DR 4587.
>
> **12. In this case, while CP interviewed the employees involved, no follow-up occurred with Mr. Singh. Mr. Singh's only evidence came from his original email complaint. This raises the issue of how the arbitrator should resolve conflicts in the evidence and related credibility issues.**
>
> **13. CP urged the arbitrator to accept Mr. Singh's version as described in his email, despite the contrasting evidence from those witnesses it**

> **investigated** (E-1; Company Brief; Paragraph 23). It further noted its important obligations regarding a safe and collaborative work environment:…
>
> …
>
> 17. It is more problematic given the conflicting evidence whether Mr. Lewis went further and also commented on the colour of Mr. Singh's skin.
>
> **18. The evidence does not permit the arbitrator to conclude that Mr. Lewis did utter the terrible things to which Mr. Singh made mention in his email. This is not a finding on Mr. Singh's recollection. Rather, it reflects the fact that an allegation differs from an investigation's evidence. CP did not follow up with Mr. Singh during the investigation. The arbitrator must accordingly decide this case based on the record**.
>
> (Emphasis added)

55. In AH736, *supra*, the arbitrator rejected an argument which posited that written evidence should be preferred over witness testimony at the hearing:

> 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.
>
> (Emphasis added)

56. Railway cases have noted that various methods available to help resolve factual conflicts.

57. The first method is to take a statement from other individuals with relevant information. The parties' collective agreement contains protections for this important fact-finding exercise. For example, article 13.4(d)[23] allows an employee and the IBEW to attend those statements:

> d) Where an employee so wishes, an accredited representative may appear with him at the hearing. Prior to the commencement of the hearing, the

[23] CN Brief, Tab 7, Page 98/281.

> employee will be provided with a copy of all of the written evidence as well as any oral evidence which has been recorded and which has a bearing on his involvement. **The employee and his accredited representative will have the right to hear all of the evidence submitted and will be given an opportunity through the presiding officer to ask questions of the witnesses (including Company Officers where necessary) whose evidence may have a bearing on his involvement.** The questions and answers will be recorded and the employee and his accredited representative will be furnished with a copy of the statement and evidence which will be sent to the General Chairman electronically.
>
> (Emphasis added)

58. Nothing prevented CN from having Mr. Lambert provide a statement which would have allowed the IBEW to ask questions.

59. A supplementary investigation can also help resolve contradictory facts[24] [Footnotes omitted]:

> 27. Disclosure by both parties at all stages forms an essential component of this expedited arbitration regime. A railway can also conduct a supplementary investigation should it need to clarify some answers.

60. In SHP563, Arbitrator Picher noted the importance of supplementary investigations and how they interacted with the collective agreement's time limits:

> **The case at hand discloses a course of events in which the Company learned different information at various stages of the investigation process and, quite properly, made efforts to obtain information and to give the grievor the opportunity to respond to that information at a supplementary investigation.** Unfortunately, the truth emerged only from beneath successive layers of falsehood. **In essence, therefore, there was a single continuous investigation caused in no small measure by the grievor's initial failure to tell the truth, a fact evident from his own admission. In the circumstances the Arbitrator is satisfied that the Company did not violate the spirit or the letter of rule 28.3 by extending the investigation process. This is not a case in which the investigation process was prolonged arbitrarily or abusively for the purposes of a fishing expedition. On the contrary, at each step it was extended because of the nature of the information provided to the Company by the grievor himself.** In the result, the fifty-five demerits assessed against Mr. Harrison

[24] See AH826 and AH824 (French award).

> which issued on July 4, 2002 did come some twenty-three days after the conclusion of the investigation of his conduct surrounding the events of April 21, 2002. No violation of the provisions of rule 28.3 is disclosed in these circumstances.
>
> (Emphasis added)

61. Similarly, as noted in AH664[25], a case which involved these same parties, the railway model allows for oral testimony at the hearing to resolve key contradictions in the evidence:

> 26. As the arbitrator mentioned in passing during the hearing about various recent cases, it is challenging when new facts first come to light at an expedited arbitration. Article 13.19 of the parties' collective agreement seems to assume that the parties have fully discussed all relevant facts, especially if a Joint Conference (Article 13.8) has been held.
>
> 27. **Article 13.21 regarding the parties' right to present evidence seems to assume that any oral evidence will focus mainly on key contradictions. Otherwise, if the evidence presented raises new facts, then the parties might as well hold a traditional multi-day arbitration**. Similarly, raising potentially new grounds for discipline can be problematic in any expedited arbitration process: CROA&DR 4628.
>
> (Emphasis added)

Decision

62. As noted in the introduction, CN did not meet its burden of proof in this case. It had the obligation to demonstrate, on a balance of probabilities, that Mr. Moses' had made the comments which led to his dismissal. Mr. Moses denied making them. CN asked the arbitrator to discount his evidence taken pursuant to article 13.1 of the collective agreement and prefer Mr. Lambert's email.

63. CN did not persuade the arbitrator to come to this conclusion. On what basis can the arbitrator prefer an email over the evidence Mr. Moses gave during an investigation?

64. CN could have taken steps to resolve this crucial evidentiary conflict. As noted above, it could have required Mr. Lambert to provide a statement during the investigation. Another option involved conducting a supplementary investigation. In rare cases where

[25] Canadian National Railway Company v International Brotherhood of Electrical Workers System Council No. 11, 2018 CanLII 52755

credibility remains a lynchpin issue, the parties could agree to present oral evidence at the hearing[26].

65. These methods would have provided the arbitrator with a full Record on which to resolve the crucial evidentiary conflict in this case.

66. Given that CN did not demonstrate that Mr. Moses made the comments which led to his termination, the arbitrator must allow the IBEW's grievance. Given this scenario, the extensive submissions about the appropriate penalty lose their relevance.

DISPOSITION

67. This award makes no negative finding about Mr. Lambert and his email[27]. Instead, this award reflects the fact that an allegation differs from an investigation's evidence. CN had an obligation to investigate the facts prior to dismissing a long-term employee.

68. This case also does not dispute the importance of health and safety matters. Both parties at the hearing emphasized how important those issues are, as has the arbitrator in other awards[28]. But a case involving safety issues does not lessen a party's burden of proof.

69. This case involved a party's fundamental obligation to satisfy its burden of proof. As noted above, CN did not prove, on a balance of probabilities, that Mr. Moses made the crucial statements attributed to him. Multiple ways existed to examine the facts, including via a supplementary investigation, but CN did not to pursue those routes.

70. The arbitrator disagrees with CN's suggestion that the IBEW could have asked for Mr. Lambert to provide a statement. They could have, but they had no legal obligation to do so. The burden always remained on CN to prove this lynchpin fact.

71. Accordingly, the arbitrator orders CN to:

i) reinstate Mr. Moses forthwith to his employment without loss of seniority;

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[26] See, as just one example, AH736, *supra*.
[27] See CROA 4647, *supra*.
[28] AH810-S: Teamsters Canada Rail Conference v Canadian Pacific Kansas City Railway, 2023 CanLII 83425

ii) provide proper compensation to Mr. Moses for his losses resulting from the termination of his employment; and

iii) remove any reference to the termination from Mr. Moses' employment and disciplinary record.

72. The arbitrator remains seized.

SIGNED at Ottawa this 30th day of October 2023.

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Graham J. Clarke
Arbitrator