CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4558

Heard in Edmonton, June 13, 2017

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal on behalf of Conductor Brad Fleischhacker of Saskatoon, Saskatchewan, appealing his discharge from the Company's employment assessed for "conduct unbecoming of an employee of CN further to posts made by you on the Saskatoon Star Phoenix newspaper website on or about January 24, 2016.

THE UNION'S (REVISED) EXPARTE STATEMENT OF ISSUE:

On or about January 24, 2016, Conductor Fleischhacker admittedly posted derogatory comments towards Aboriginal peoples, in response to a news item on the Saskatoon Star Phoenix newspaper website.

The Company investigated the incident and determined that Mr. Fleischhacker had violated the Company's Social Media and Harassment-Free Workplace Policies, and was deserving of the ultimate discipline of discharge for this behaviour.

(*) The Union contends that the Company's investigation violated Article 117.2 of the collective agreement and related jurisprudence. As such, the discipline assessed ought to be ruled *void ab initio* and expunged. Mr. Fleischhacker should be reinstated with no loss of seniority, earnings or benefits. The Union raises this issue as a preliminary objection but is prepared to deal with this issue at the same time as this case is adjudicated on the merits. (*)

The Union contends that the comments were posted while Mr. Fleischhacker was off duty, using his private equipment and facilities. The comments did not, by any reasonable standard, adversely affect the Company, its employees or its customers. As such, the conduct did not constitute a violation of Company policy. The Union requests that the discipline be removed, Mr. Fleischhacker be reinstated and his record made whole.

In the alternative, the Union requests that the discipline be mitigated and the grievor be reinstated with no loss of seniority on such terms as the Arbitrator deems appropriate.

FOR THE UNION:
(SGD.) R. S. Donegan
General Chairman

FOR THE COMPANY:
(SGD.)

There appeared on behalf of the Company:

S. P. Paquette	– Counsel, Montreal
K. Morris	– Senior Manager Labour Relations, Edmonton
S. D'Andrea	– Articling Student, Edmonton
M. Galan	– Labour Relations Manager, Edmonton
C. Michelucci	– Director Labour Relations, Montreal
D. Houle	– Labour Relations Associate, Edmonton

There appeared on behalf of the Union:

D. Ellickson	– Counsel, Caley Wray, Toronto
J. Thorbjornsen	– Vice General Chairman, Saskatoon
R. S. Donegan	– General Chairman, Saskatoon
B. Fleischhacker	– Grievor, Saskatoon

AWARD OF THE ARBITRATOR

At the outset this matter was not complex. Mr. Fleischhacker posted racist comments on Facebook. CN learned of the post, concluded that the grievor was easily linked to CN, and that the posts violated its policies and harmed its corporate interests. Following a brief investigation, CN terminated his employment. The Union grieved the dismissal.

This case has since been bedevilled by procedural issues. First, there is the influence of two other cases before CROA. Second, the Employer objected to the Union's revision of its *ex parte* statement to add of the paragraph above marked (*). Third, the Union argued that the initial non-production of documents voids the discipline. Fourth, the parties were thought to have resolved some of the procedural issues during the hearing, but later parted company on just what they had agreed upon. This was all exacerbated by two instances where counsel took issue over what had been said between them, something it is particularly difficult for an arbitrator to resolve.

Prior Cases

In 2014 the grievor was discharged as a result of an accumulation of Brown system points, but was reinstated; see **CROA 4342**. By early 2017 the grievor faced three more disciplinary cases; this and two other more routine matters. All three were scheduled to be heard by Arbitrator Moreau on May 9, 2017. On April 20, CN sent the Union previously undisclosed documents it intended to rely upon in the May hearings. By conference call on April 26, 2017 CN sought an adjournment so that an unavailable witness for this case could be called. This case was adjourned, but the other two proceeded, resulting in **CROA 4553** and **4554**, and in a reduction in Mr. Fleischhacker's demerits to below 60 points. One of the awards provided:

> … the grievor is awaiting a further arbitration hearing over other discipline imposed by the Company over this Facebook comments. The parties have agreed that the issue of the grievor's reinstatement will be held in abeyance until after a decision has been rendered by the CROA Arbitrator assigned to the case involving the grievor's Facebook comments.

Aborted Procedural Agreement

During the hearing, the current law surrounding discipline being declared void *ab initio* was raised for comment. (see below) A suggestion was also made that the parties might compromise their differences, so as to narrow the case. Initially, it was understood they had done so. However, it later transpired that this may not have been the case, or if it was, no clear record of that agreement could be established. With regret, I proceed as if no agreement was reached.

Document Disclosure and Article 117.2

The Union alleges that the Employer's failure to disclose documents at the February 2016 investigation violated Article 117.2. The consequence, it argues, is that the discipline is void *ab initio*. Whether that follows as a legal consequence is addressed below. The documents in question were those forwarded to the Union on April 20, 2017. This disclosure, plus the Employer's expressed intent to rely upon the documents, led the Union to amend its *ex parte* statement of issues.

This caused two preliminary objections. The Employer argues that, having failed to raise the 117.2 argument in its initial *ex parte* statement, the Union cannot do so now by amendment. The Union, in turn, maintains that the discipline is null and void. More detail is necessary.

Form 780 gave the reason for termination as: "Conduct unbecoming an employee of CN further to posts made by yourself on the Saskatoon Star Phoenix Newspaper website on or about 2016/01/24." The post Mr. Fleischhacker admittedly made was within a thread of comments responding to an article, posted from the Star Phoenix, about the tragic shooting of four school children in LaCrete. A series of comments preceded Mr. Fleischhacker's comment. His read:

> "End white privilege" Bitch if its weren't for white people you lazy fuckers would running around scalping each other and living in teepees. Sure seem to like all our white cheques in the mail every months.

Replies to his comment followed, including, from a person whose name suggests a First Nations heritage:

> Thaaaanks for the mass genocide and civilizing us savage Indians. We owe you, big time

Mr. Fleischhacker then replied:

> Anytime. And with all the bullshit going on in Saskatoon and Saskatchewan as a whole, gladly do it again.

On January 27, 2016 he was required to attend an investigation.

> … to provide a formal employee statement in connection with Alleged conduct unbecoming an employee of CN by means of posting racist and derogatory comments through your Facebook page on or about 2016/01/24.

He attended with Union representative Cullen Bradford. Question 5, and the reply, read:

> 5. Q. You are now provided with the following information which is entered as evidence that may have a bearing on your responsibility in connection with the matter under investigation:
>
> 1) Copy of NTA
> 2) CN Code of Conduct
> 3) CN Social Media Policy
> 4) Screen shot of Facebook posting 1
> 5) Screen shot of Facebook posting 2
> 6) Enlarged shot of Brad Fleischhacker's Facebook profile picture
> 7) Copy of Brad Fleischhacker Twitter account page
> 8) Copy of Brad Fleischhacker's LinkedIn profile
>
> Note: The union requests full disclosure of all evidence, photographs, voice recordings, audio/video recordings, including any documentation whether paper or electronic, that has been utilized by or is in possession of the company and which may have any bearing in determining responsibility. The Union also objects to the submission of Evidence #7 and Evidence #8 as they are for Twitter and LinkedIn and the allegation is for postings through Facebook.

9) Written Formal Apology of Mr. Brad Fleischhacker

This investigating officer is providing all evidence in the officer's possession and/or being relied upon for the purpose of this investigation.

A. At this time, Mr. Fleischhacker is entering a signed written formal apology for his actions.

While the list in Question 6 did not disclose any complaints, Question 8 alluded to one having been made:

8. Q. Mr. Fleischhacker the Company's ombudsman office received a complaint that comments posted on the Saskatoon Star Phoenix social media forum open to the general public for review and comment were of a racist nature and could be a form of hatred propaganda. The complaint involved screen snapshots of the exchange of comments on the Star Phoenix site that involved a Mr. Brad Fleischhacker. Please confirm the facebook picture associated with exchange of comments on the Star Phoenix site and captured in snapshots made by a Brad Fleischhacker is in fact your facebook image?

A. The Union objects to this question as it is an unfair question as the Company has not submitted the complaint referred to.

Yes

The Union also objected to questions being raised about Mr. Fleischhacker's LinkedIn and Twitter accounts, objections I find unduly narrow. Based on the investigation, I find that:

(a) Mr. Fleischhacker's Facebook page at the time made no reference to his being an employee of, or affiliated with, CN.

(b) The grievor, under the same name, had a LinkedIn account that very clearly identified him as a CN employee.

> (c) A simple Google search of his name yielded links to his LinkedIn and Twitter accounts, each of which revealed that he worked for CN.

The grievor acknowledged, with apologies and an explanation, that he made the first comment. He acknowledged the second comment (a reply) but denied it was in reply to the immediately preceding comment about genocide, although he was unable to explain just what else it might have been in reply to. Question 18 included a further Union objection:

> 18. Q. Mr. Fleischhacker notwithstanding the recent tragic events in Northern Saskatchewan (La Loche) involving the loss of life of four (4) individuals, do you understand the comments posted on the Star Phoenix public forum (snapshots in evidence) are completely unacceptable and violate CN's Code of conduct Policy and Social Media Policy?
>
> A. The Union objects to this self incriminating question as the purpose of the investigation is to determine the facts.
>
> The Union objects to this new evidence being submitted by the investigating officer at this time, as we had formally requested on the record for full disclosure of all evidence. There has not been any facts disclosed during this investigation to justify further evidence. This is a violation of the employee's rights to a fair and impartial hearing.
>
> Yes I agree that they are completely unacceptable and acknowledge that they were rude and hateful but as to my interpretation of the Policies and Code of Conduct there was no violation of those.

The grievor was asked, and under protest replied about, the potential impact of his comments on CN's image.

> 22. Q. Mr. Fleischhacker do you understand racist and or derogatory comments as the ones in question made by a CN employee may have significant adverse effects with respect to CN's legitimate business interests and public image?

> A. The Union objects to this self incriminating question as the purpose of the investigation is to determine the facts.
>
> Yes I understand, but my actions were regretfully done as an individual. I had no intent to harm or discredit CN's business image. With Facebook being my primary social media outlet I have no connection with CN on my profile.
>
> The Union officer asked Question 39.
>
> 39. Q. Mr. Fleischhacker, has the Company provided the entire complaint and how it was submitted as evidence in this investigation?
>
> A. No.

Thus, at the end of the investigation the investigating officer had alluded to one complaint, but had not disclosed its content. The Union had sought full disclosure of all documents, and objected at the time to a lack of some disclosure including the one complaint. There was no follow up disclosure at the time nor any supplementary investigation prior to or after the termination, at least not until April 20, 2017, well over a year later.

A detailed step 3 grievance filed on May 18, 2016, included the following description of the facts:

> 1. On the date in question, Conductor Brad Fleischhacker (the Grievor) posted two comments in response to a news item on the Saskatoon Star Phoenix website.
>
> 2. The comments were admittedly derogatory towards a specific ethnic minority, and could be interpreted as racist in nature.
>
> 3. The comments did not, in any way, reference or mention CN or the Grievor's connection to the Company.
>
> 4. The comments were removed from the Saskatoon Star Phoenix website shortly after posting.

> 5. A complaint was forwarded to the CN ombudsman, by a party or parties unknown to the Union.

The grievance raised the grievor's free speech and privacy rights, the proposition that the comments were not attributed or tied to CN, that CN suffered no harm, and that the comments in question were beyond the scope of CN's policy. It did not raise an issue on Article 117 compliance.

The Employer, in October 2016 and in reply to the Union's grievance, (a) declined to meet to discuss the case and (b) revealed that "these comments were brought to the Company's attention through two communications from members of First Nations". The letter also vigorously expressed CN's corporate interests in maintaining good relations with First Nations:

> CN vehemently disagrees with the Union's position that the grievor's conduct "*did not, in any way, cause harm to the Company or its reputation*". CN operates within or adjacent to more than 200 reserves of 117 First Nations and some Metis territories, in 8 provinces. CN's continued activities and social licence to operate among these communities rest on maintaining a mutually respectful relationship with all First Nations. CN has and will continue to devote substantial efforts towards its relationship with the First Nations. In such a context, it is plain and obvious that having the grievor attest to supporting the genocide of Aboriginals, to say nothing of his other similarly-themed comments, was patently incompatible with his continued employment at CN.

The parties unsuccessfully exchanged proposed joint statements. On January 19, 2017 the Union submitted an *Ex Parte* Statement in the form set out above without the paragraph about Article 117.2. No consent was sought to proceed *Ex Parte*. On April 20, 2017, in anticipation of the CROA hearings scheduled for May 9, CN wrote to the Union, saying in part:

> Enclosed please find copies of documentation which the Company intends to rely upon in its presentation to the Arbitrator in the upcoming May 9, 2017, arbitration hearing in Calgary.

Enclosed were:

- January 25, 2016 email from Bobby Cameron FSIN Chief of Saskatchewan to CN's Ombudsman, headed serious breach of CN code of ethics.

- Reply letter of Jan 26, 2016 from Olivier Chouc, CN Vice President to Mr. Cameron advising of an investigation into the issue.

- Jan 25, 2016 email to CN's Ombudsman, from a person whose name is redacted, complaining of the comments, enclosing a screen shot of the comments before they were taken down, and calling for Mr. Fleischhacker's termination.

- Reply email from Judy Szabo of the CN Ombudsman's office to the (redacted) complainant also indicating an investigation would occur.

- Email on Jan 26, 2016 to the person whose name is redacted, from Mr. Doug Devlin, Manager, Aboriginal Relations and Tribunal Affairs at CN.

- Email from the redacted complainant to Ms. Szabo with thanks for her reply and ending "we will keep you informed as to our course of action we take, which will involve the media and thorough advice from our legal counsel."

- A complaint from another person (name also redacted) dated March 5, 2016.

- March 7, 2016 reply to the new complainant, from Mr. Devlin.

Shortly after this disclosure, CN applied to Arbitrator Moreau to adjourn all of Mr. Fleischhacker's cases from his May sittings as CN wished to call a witness, now known to be Mr. Devlin, who was unavailable in May. This case was adjourned, while the other

two proceeded (see above). After this the Union filed its revised "*Ex Parte* Statement of Issue" with the added paragraph.

The covering letter from Union counsel justified the revision. Arbitrator Moreau's decisions now meant Mr. Fleischhacker's employment depended on the results of this grievance. Counsel asserted that, in the adjournment conference call and at the hearings that did proceed on May 9, 2017, "the Union reserved its right to amend its grievance and *Ex Parte* Statement if required and if the grievor was successful before Arbitrator Moreau on the other two cases". It noted that most of the documents provided on April 20, 2017 were in CN's hands prior to the investigation, but not disclosed. No supplementary investigation involving the documents was held. In addition, the Union advised:

> … the Union will also be objecting to any reliance on any of this material by CN at the arbitration. The Union will also object to any attempt by CN to call any witnesses to speak to this material at the hearing. This is obviously in the alternative and without prejudice to the Union's initial preliminary objection that the entire investigation and discipline is *void ab initio*.

CN replied on May 30, 2017, asserting that CN had not consented, and would not consent, to an amended *Ex Parte* Statement. It also said:

> The Company also denies the Union's allegation that the union stated during a conference call on April 26th and again at the hearing in Calgary May 9, 2017 that it reserved its right to modify its grievance and or *ex parte* statement. The Company never agreed to allow any such deviation from either the Collective Agreement and or CROA rules by the Union.

It argued that the Union knew CN, through its proposed witness, would be relying on the complaints because the purpose of the witness (and thus the adjournment) was to have him speak to the impact the grievor's actions had on CN. This, it says, was discussed in the April 26th conference call with Arbitrator Moreau.

The June hearing thus began with an unfortunate dispute as to the facts over the April 26th conference call and with preliminary objections; the Employer's objection to the addition of the Article 117.2 issue, and the Union's objection that the failure to disclose documents rendered the discipline null and void, that too turning on Article 117.2 which reads in part:

> 117.1 No employee will be disciplined or dismissed until the charges have been investigated; the investigation to be presided over by the employee's superior officer.
> …
>
> 117.2
> (a) At the outset of the investigation, the employee will be provided with all evidence the Company will be relying upon, which may result in the issuing of discipline. The Company will provide sufficient time for the employee and his representative to review the evidence.
>
> (b) Employees may have an accredited representative appear with them at investigations, they will also have the right to hear all the evidence submitted and will be given an opportunity through the presiding officer to ask questions of witnesses whose evidence may have a bearing on the employee's responsibility. Questions and answers will be recorded and the employee will be furnished and a transcript or recording of the statement taken at the investigation.
>
> …
>
> (d) Employees under Company investigation and/or his/her accredited representative shall have the right to attend any Company investigation, which may have a bearing on the employee's responsibilities. The employee and/or their accredited representative

> shall have the right to ask questions of any witness/employee during such investigation relating to the employee's responsibilities.

Both parties provided extensive briefs on June 13, 2017. CN filed two; one on its preliminary objection, and the other on the merits of the case, assuming, that its witness, as well as the documents to which the Union took exception, would be received. The Union, in turn, filed a brief assuming that the case would proceed on the basis of its revised *Ex Parte* statement. As a result of what was thought to be a mutually acceptable understanding, arrived at part way through the hearing on June 10, 2017, CN filed supplementary arguments involving Article 117.2 and the *void ab initio* argument. The Union replied to this on August 2, 2017. CN's counsel wrote on September 5, 2017 taking strong issue with some of the contents of the Union's reply. Union counsel, in turn, requested a conference call which was held on September 12, 2017. Once again the parties disagreed on what was said between them and once again the parties were urged to seek procedural consensus or compromise. They did not.

Can the Union amend its original *Ex Parte* Statement?

CN filed a 19 page brief objecting to the amendments to the *ex parte* statement. The nub of its objection (see para. 25-27 of its brief) is that the question of s. 117.2 compliance was not raised in the original grievance, was a separate issue, had not been raised in the original *ex parte* statement, and had never been the subject of the grievance procedure. Therefore it said, it falls outside this arbitrator's jurisdiction. It

cited the collective agreement grievance and arbitration process, plus the May 20, 2004 CROA memorandum, particularly the following:

> 6. The jurisdiction of the arbitrators shall extend and be limited to …
>
> (A) disputes respecting the meaning or alleged violation of any one or more of the provisions of a valid and subsisting collective agreement … including any claims, related to such provisions, that an employee has been unjustly disciplined or discharged; and
> …
>
> But such jurisdiction shall be conditioned always upon the submission of the dispute to the Office of Arbitration in strict accordance with the terms of this agreement.
>
> 7. … A request for arbitration respecting a dispute of the nature set forth in section (A) of clause 6 shall contain or shall be accompanied by a "Joint Statement of Issue". …
>
> 8. Subject always to the provisions of this agreement and the guidelines appended hereto, the scheduled arbitrator shall make all determinations necessary for the hearing of disputes. …
>
> 9. No dispute of the nature set forth in section (A) of clause 6 may be referred to arbitration until it has first been processed through the last step of the grievance procedure provided for in the applicable collective agreement …
>
> 10. The joint statement of issue referred to in clause 7 hereof shall contain the facts of the dispute and reference to the specific provision or provisions of the collective agreement where it is alleged that the collective agreement had been misinterpreted or violated. In the event that the parties cannot agree upon such joint statement either or each upon forty-eight (48) hours notice in writing to the other may apply to the Office of Arbitration for permission to submit a separate statement and proceed to a hearing. The scheduled arbitrator shall have the sole authority to grant or refuse such application.
> …
>
> 14. The decision of the arbitrator shall be limited to the disputes or questions contained in the joint statement submitted by the parties or in the separate statement or statements as the case may be.

I note that CROA has also promulgated guidelines (May 20, 2004) which begin "these guidelines are intended for the assistance of the parties and may be subject to the discretion of the arbitrator in any given case. The guidelines provide, with respect to preliminary objections:

> Preliminary objections concerning the arbitrability of a dispute should be filed as soon as possible after the dispute is submitted to the Office of Arbitration. The objection must be in writing, outlining the reasons for the objection. A copy of the objection is also to be filed with the other party to the dispute at the same time and in the same manner.
>
> If a request for the hearing of a preliminary objection is made after the grievance is filed in the Office of Arbitration and before the matter has been scheduled for hearing, the hearing shall be solely to deal with the preliminary objection. However, if a preliminary objection is filed after a dispute has been scheduled for hearing, the hearing shall be for the purpose of dealing with both the preliminary objection and the merits of the grievance.

CN cited several CROA cases over efforts to expand arguments beyond a hearing's legitimate scope. In AH 331A the parties agreed upon a joint statement of issue, including the fact the grievor did not dispute having taken certain property. At the hearing, the Union sought to concede his taking some items, but not others. The arbitrator said:

> The Brotherhood cannot, however, in the case at the hand take the position which it now seeks to take, namely to put the employer to the strict proof of all elements of misappropriation. It waived that position in its communication with the Company in respect of the meaning of the joint statement of issue, and cannot now resile from that position.

I note that: (a) the case did not involve a procedural breach such as is alleged here, (b) it involved a joint statement of issue, and (c) did not have to deal with whether

there can be a waiver of a position in the absence of full knowledge of the matter allegedly waived.

That case referred to **AH 281**. A grievor was investigated. Two others were also investigated in respect to related matters, but the grievor was not given the right to read their evidence or offer rebuttal. Arbitrator Picher was of the view the grievor should have been given such access. The joint statement of issue, however, did not refer to this alleged procedural breach. Arbitrator Picher therefore ruled:

> They have agreed that a joint statement of issue is to be filed, and that that statement must make reference to the specific provision or provisions of the collective agreement which it is alleged has been violated. For reasons which it may best appreciate, the Union has not included an allegation of any violation of article 12.3 as part of the joint statement of the dispute submitted to this Arbitrator. As is apparent from the restrictive terms of article 13.7, I am without jurisdiction to amend or disregard the requirements of article 13.4. In all of the circumstances, therefore, I am compelled on these grounds to dismiss the objection of the Union in respect of the alleged violation of article 12.3 of the collective agreement.

The facts in **AH 281** are close to those here except that (a) here there is no joint statement and (b) the Union here maintains it only received the evidence of the breach of Article 117.2, despite questions, objections and assurances in the investigation, in 2017.

CROA 2533 involved an *ex parte* statement, which included no reference to an argument, first substantially advanced at the hearing, that the Employer's action violated the *Canadian Human Rights Act*, Arbitrator Picher found this to be a separate and

distinct issue from the interpretation of the agreement, and beyond the arbitrator's jurisdiction. See also **CROA 2891** and **SHP 86**.

CROA 3292 involved a joint statement of issue. The Union raised a timeliness issue based on a delay in responding to the original grievance. The arbitrator declined to hear the objection saying, at page 2:

> …it is clear that at no time prior to the arbitration hearing was the Company placed on notice that the Union would assert the application of article 9.4 of the collective agreement to claim payment on what is essentially a procedural, rather than a substantive, basis under a separate provision of the collective agreement.
>
> As is well known to the parties, the jurisdiction of the Arbitrator in the CROA is limited to those issues raised in the Joint Statement of Issue, as reflected in the language of paragraph 12 of the memorandum of agreement establishing the Office. In the case at hand the statement of issue is devoid not only of any reference to article 9.4 of the collective agreement, but to any mention of the fact that the Company did not respond in a timely fashion at either step 1 or step 2 of the grievance procedure. In these circumstances I am satisfied that the claim under article 9.4 cannot now be advanced. It would be clearly prejudicial to the Company to allow the Union to argue a provision of the collective agreement for which it did not have the opportunity to prepare its case. The Company's objection with respect to the arbitrability of the article 9.4 issue is therefore sustained.|

I am persuaded that the Union can proceed on the basis of its amended *ex parte* statement and if any consent is needed, I give that consent. What the Union seeks to raise is in the nature of a preliminary objection, that the termination is a nullity; not voidable but void *ab initio*. It is perhaps self evident that discipline that is void *ab initio* is inconsistent with the proposition that the same breach that nullifies the discipline can nonetheless be cured by a later opportunity to cure that breach. That is the difference

between void *ab initio* and voidable. I do not go so far as the Union suggests, and say the Union may never agree not to challenge a breach of the substantive rights in 117.2, but it has not done so here.

In April 2017 the Union received, for the first time, details of the complaints filed with CN's Ombudsman. Despite requests, and an assurance of full disclosure of what CN was relying upon, little if any of this was disclosed. Until April 2017 the Union had no real notice of these matters beyond the references to "a complaint" and then to "two complaints" in the Vice-President's letter. Significantly, in April it also learned that CN intended to rely upon these complaints to demonstrate its sensitivity to First Nations issues. CN had not put forward, to that point or even subsequently, a statement of issue that disclosed the assertion that the complaints themselves supported its argument of corporate harm.

CN argues vigorously that the late disclosure of the complaints caused no prejudice, as the grievor had adequate time, after disclosure, to prepare. However, much the same can be said of the introduction, promptly after the late disclosure, of the Union's Article 117.2 argument. I note in passing that much of this might have been avoided, or at least resolved earlier, had the parties sought the consent anticipated in CROA Memorandum Section 10.

I am not prepared to preclude the Union's right to argue Article 117.2 non-disclosure in the face of its requests and the Investigating Officer's assurances. The

result might have been otherwise had there been fuller disclosure and had a joint statement of issues been agreed upon, implicitly waiving the Union's ability to argue over a known breach. However, waiver requires clear knowledge. The Union presented its revised statement in a timely way once the Employer disclosed the evidence and arguments upon which it intended to rely. I will proceed on the basis of the amended statement of issue.

Article 117.2 breach?

I now turn to the arguments about the alleged breach of Article 117.2 and the effect of any such breach on the CROA process. The Employer and Union emphasize different aspects of that process, and of the relationship between the investigation stage and a CROA hearing. The Employer refers to Arbitrator Picher's observation in **CROA 1858**:

> … investigation procedures such as those contemplated in Addendum 41 are intended to provide an expeditious, fair and open system of fact finding in serious disciplinary cases. The procedure is not, however, intended to take on the procedural trappings of judicial or quasi-judicial hearings.

The Union emphasizes those cases that speak of the importance of fairness and disclosure at the investigation stage without which the CROA process would deteriorate into a series of full blown arbitrations, the antithesis of the expeditious process as the parties here hitherto know (and valued) it to be. One of the clearest expressions of this CROA approach is that given by Arbitrator Picher in **CROA 3322** (see above).

> It is not disputed that the foregoing provision establishes the basis for what has generally been characterized as a "fair and impartial" investigation, a precondition to the assessment of discipline against

> any employee. Central to the issue in the case at hand is the right of the employee "... to hear all of the evidence submitted and ... be given an opportunity through the presiding officer to asks questions of witnesses whose evidence may have a bearing on the employee's responsibility."
> …
>
> This Office has had a number of prior occasions to consider the principles which govern the application of provisions such as article 82.2 of the instant collective agreement. It is well settled that a violation of these provisions amounts to the denial of a substantive right, the consequence of which is to render any discipline void *ab initio*, regardless of the merits of the case. The reason for that firm rule is to safeguard the integrity of the expedited grievance and arbitration process established within the railway industry and the Canadian Railway Office of Arbitration. …
>
> [Arbitrator Picher then cited **CROA 1734**]
>
> > In the Arbitrator's view this case raises issues fundamental to the integrity of the process of expedited hearings that is vital to the operation of the Canadian Railway Office of Arbitration. By long established practice, this Office relies on written briefs, including the transcript of investigations conducted by the Company the content of which forms the basis of the decision to assess discipline against an employee. If the credibility of the expedited hearing process in this Office is to be preserved both the parties and the Arbitrator must be able to rely, without qualification, on a fair adherence to the minimal procedural requirements which the parties have placed into the Collective Agreement to facilitate the grievance and arbitration process in discipline cases. Needless to say, irregularities at the investigation stage, particularly those which depart from the standard of full and fair disclosure reflected in Article 18.2(d) have the inevitable effect of undermining the integrity of the entire grievance and arbitration process so vital to the interests of both parties. (*emphasis added*)

Are these documents such that their non-disclosure violates Article 117.2.

The Company argues that the investigating officer did not have the complaint documents “in his possession at the time of the investigation, and so copies of these documents were not provided until later”. I have some difficulty with this as the

Facebook extracts were part of the complaint. It cites **CROA 1858**, **3436**, and **4180** for the proposition that "it is not a breach of a grievor's right to a fair and impartial investigation for an investigating officer not to produce a document he or she does not have". The question here is more precise, which is whether it is a breach of Article 117.2. I find **CROA 4180** and **3436**, as well as **4156**, of little assistance in that they each deal with the Employer's having declined to call certain potential witnesses. **CROA 1858** dealt with a clause somewhat different to Article 117.2 reading in significant part:

> 4(d) … At the outset of the investigation the employee will be provided with a copy of all the written evidence as well as oral evidence which has been recorded and has a bearing on his responsibility …

On the disclosure point, Arbitrator Picher said:

> The clear thrust of Addendum 41 is that the employees have a right to a fair and impartial investigation. Where rulings as to admissibility or relevance are so egregious as to demonstrate a departure from that minimal standard, it may well be that a violation of the requirements of Addendum 41 will be established …
>
> Secondly, it does not appear disputed that the investigating officer was not in possession of a report of the CN police concerning the statements which its constables may have taken from Supervisor Cook and Crew Dispatcher Paul. If such a report had been in the hands of the investigating officer and had been withheld from the Union representative, an arguable case of unfairness might be made. That is not the case, however, and no violation of the standards of Addendum 41 is disclosed in this regard.

The Union makes the point, which I find well-founded, that these documents were not in the hands of third parties, but of CN itself; both the CN Ombudsman and a Vice-President. That might equally have been said in the case involving CN Police. The

investigating officer had obviously received the Facebook screen shot as a result of the complaints so either had, or had easy access to, the complaints and CN's replies. Notwithstanding this, he put on record "this investigating officer is providing all evidence in the officer's possession and/or being relied upon for the purpose of this investigation". I interpret the use of and/or (at best an ambiguous construct) to mean "or".

Not every minor non-disclosure necessarily triggers an Article 117.2 violation. In **CROA 3452** the arbitrator found a violation where a "keystone document" was withheld. He said, of the documents involved in that case:

> The Union has, without contradiction, stated that it saw various documents for the first time at the hearing. Key to these documents, from this Arbitrator's perspective, is the Reasonable Cause Report Form. This form is the keystone document, the initial building block on which the Employer based its decision to discharge the grievor. The grievor was discharged for an alleged violation of the Employer's Drug and Alcohol Policy. The Employer's own policy requires it to have reasonable cause to order an employee to take a drug test. That reasonable cause must be recorded on the report form. The document serves as the check mark to determine if reasonable grounds exist or not. The Union is entitled to know first, whether the Employer follows its own policy and unquestionably the document in question is fundamental to that issue and second, whether the Employer had reasonable grounds to cause the employee to take the urine test. Again the document in question is fundamental to that issue. It cannot be said that the Reasonable Cause Report Form was not a material document in the instant case.

In the context of a termination under the CROA process he went on to say:

> It is essential with respect to the latter, and in the context of the manner in which these arbitrations are conducted, that full disclosure of documents fundamental to its decision should be shared in order to permit a complete dialogue between the parties both in the stages leading up to arbitration as well as a full defence at arbitration.

> … this Office has found consistently that as basic element of a fair and impartial investigation the grievor be provided with all material documents, the discharge must be held to be null and void *ab initio*.

I find that the documents eventually disclosed in April are such keystone documents. A significant part of the Employer's case, and the Union's argument, is whether the grievor's comments about First Nations people impacted the Employer's interests. That is CN's reason for calling its witness, and the complaints, including who they are from, are important in establishing the sensitivity of the Company to its relations with the many First Nations over whose land it travels, and whose members CN seeks to recruit. Further, the Employer maintains that the grievor's social media presence was such that he could easily be identified as working for CN. These complaints provide some proof of that fact since, even for a posting on-line for perhaps 10 minutes, affected persons were quickly able to identify the grievor as a CN employee. The complaints might, to the contrary, disclose that the complainant already knew the grievor and his connection to CN and complained on that account of (this prospect was partially raised in the step 3 grievance letter).

Does a breach of s. 117.2 still render the subsequent discipline void *ab initio*?

During the June 13, 2017 hearing, the Chair suggested to the parties that, in respect to the argument that non-compliance with Article 117.2 rendered the underlying discipline null and void, they may wish to assess any impact the following three cases might have on that proposition.

Dunsmuir v. New Brunswick [2008] 1 S.C.R. 190

AUPE v. Alberta [2010] ABCA 216

Alberta Health Services v. Health Sciences Association of Alberta [2011] ABCA 306

This suggestion was made because the Alberta cases held, due to *Dunsmuir,* that a procedural breach of a collective agreement did not automatically void discipline. *Dunsmuir* held that the unfair breach of a fixed term appointment for a public sector office holder no longer resulted in a "voiding" of the action, and should only result in ordinary breach of contract remedies, where the damage, and remedy, are both dependent on the nature of the breach. In so holding, the Court overruled the earlier decision in *Knight v. Indian Head (infra)*. Building on *Dunsmuir,* Slatter J.A. in *AUPE* held:

> [33] It is clear since the decision in *Dunsmuir* that a breach of procedural provisions such as those found in Article 28.02 is not irredeemably fatal. The breach is undoubtedly a breach of contract, but it no longer renders the entire dismissal "void". The law no longer assumes that the dismissal which obviously did happen, never happened. It is therefore up to the arbitrator to decide what remedy should be awarded for that breach of contract.

One year later, in *Health Sciences* the Court of Appeal ruled at para. 22:

> [22] The Board held that it was bound to find the termination was "null and void" as a result of the perceived failure to comply with Article 37.10, because the Board found that it was bound by the decision in *Alberta Union of Provincial Employees v. Alberta*, 2009 ABQB 208, 473 AR 151. Neither the Board nor the chambers judge had the benefit of the reasons of this Court overruling this aspect of the judgment relied on: *Alberta Union of Provincial Employees v Alberta*, 2010 ABCA 216, 482 AR 292, 29 Alta LR (5th) 273. The Board and the chambers judge also overlooked the binding decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, which expressly overruled *Knight v. Indian Health School Division No. 19*, [1990] 1 SCR 653, and makes it clear that public law concepts of nullity for procedural errors have no place in the interpretation and enforcement of contractual rights under collective agreements: see

> 2010ABCA216 at paras. 27-30. Even if there were procedural errors in this termination, they would not render the termination void; other remedies might, however, be available because of that contractual breach of the collective agreement. (*emphasis added*)

The impact of *Dunsmuir* and these subsequent cases needs to be weighed against a long line of CROA cases that clearly hold a breach of Articles like 117.2 renders the discipline void *ab initio*. My review of these cases leads me to conclude the CROA authorities still apply. The distinction is that the CROA cases rely not only on simple contract interpretation, but also express contractual terms, as well as on due process and fairness concerns inherent in the structure of the CROA arrangement.

The administrative law fairness and natural justice roots involved in the CROA process are illustrated by **CROA 1562**. Most often the case is referred to for the proposition that "the standard of fairness in decision making [at the inquiry stage] does not necessarily equate to a trial". In particular, the case held that the investigation does not need to include an opportunity to question or cross examine the author of the complaint. However, Arbitrator Picher still set out some basic aspects of fairness that are required.

> It is fair to assume that by adopting the standards of fairness and impartiality the parties intended to import the two most basic principles of natural justice: that the investigator be unbiased, and that the employee be given adequate notice of the accusation against him and an opportunity to be heard. (*See, generally, deSmith, Judicial Review of Administrative Action, 3rd edition, at p. 134*).

Referring to the provision in that agreement similar to 117.1 and 2 here (although not identical), he said:

> The Arbitrator is satisfied that the foregoing provisions contemplate, at a minimum, advance notice to the employee of the charge or accusation against him, as well as the right to be in attendance during the hearing, including those portions of the hearing during which evidence other than his own statement is taken. The employee is, in other words, entitled to hear first-hand what is being said against him. That is implicit in the right of the employee to have notice of the time and place of the hearing.
> …
>
> It should perhaps be emphasized that the overriding requirement of fairness and impartiality must be observed. In this regard the Arbitrator considers it significant, upon a close review of the transcript of the evidence, that the questioning of the grievor by the investigating officer contained no element of contradiction or cross-examination. If, as in fact did not occur, the grievor had been subjected to cross-examination while other witnesses were not, in the Arbitrator's view the fairness of the proceedings would be seriously called into question. A review of the material discloses that the hearing is directed at obtaining statements from each of the persons involved in the incidents in question, giving each witness an opportunity to know the content of the other witnesses' statements. At the hearing the contents of all of the witnesses' statements were given in writing to the grievor, and he was given the fullest opportunity to comment on them.

I note that, while it is common for collective agreements between parties subscribing to CROA to set out standards of fairness and procedural requirements to apply at the investigative stage, those standards are not uniform and can be varied through collective bargaining. Some agreements provide for wider disclosure, or broader powers to question, than others. When standards have been adopted, then CROA adjudicators have viewed, and enforced them, in accordance with the following approach described in **CROA 3221**.

> For reasons elaborated in prior awards of this Office, <u>the standards which the parties have themselves adopted to define the elements of a fair and impartial hearing are mandatory and substantive, and a failure to respect them must result in the ensuing discipline being</u>

> declared null and void **(CROA 628, 1163, 1575, 1858, 2077, 2280, 2609** and **2901**). While those concerns may appear "technical", it must again be emphasized that the integrity of the investigation process is highly important as it bears directly on the integrity of the expedited form of arbitration utilized in this Office, whereby the record of disciplinary investigations constitutes a substantial part of the evidence before the Arbitrator, and where the testimony of witnesses at the arbitration hearing is minimized. (See, generally, Picher, M.G. "**The Canadian Railway Office of Arbitration: Keeping Grievance Hearings on the Rails**" Labour Arbitration Yearbook 1991 pp 37-54 (Toronto 1991).) (*emphasis added*)

Arbitrator Picher was careful to say, in **CROA 3261**, that it is possible, and if adequate, acceptable, to rectify a procedural breach. However, in so doing he was not suggesting that it is adequate to say, “yes we breached the agreed upon rules but you can cure it, once the employee is terminated, at the CROA hearing”. The types of cure he was referring to occurred while still at the investigative stage, or at least at a stage were a further investigations could be convened.

The *Canada Labour Code,* as with most Canadian labour legislation, requires that a collective agreement provide a method of resolving disputes, customarily by arbitration, although not always, nor exclusively. The provision applicable to most railway industry participants reads:

> 57(1) Every collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or employees bound by the collective agreement, concerning its interpretation, application, administration or alleged contravention.

The arbitration process itself is mostly left to the parties to flesh out by contract negotiation. However, arbitration is not just a creation of the parties’ collective

agreement, it is a process mandated by statute as a cornerstone of Canadian labour legislation. The Courts see in this process a deliberate effort to direct collective agreement disputes to a particular form of dispute resolution tribunal to the exclusion of the Courts. See:

Weber v. Ontario Hydro [1995] 2 S.C.R. 929

Arbitration boards, much like administrative tribunals generally, must meet procedural standards usually described somewhere between the two imprecise and flexible terms “fairness” and “natural justice”. They at least include the right to know the case against you; to respond, to challenge the other side’s witnesses and to call your own, to be judged by someone untainted by bias or reasonable apprehension of bias, and to have reasons for any decision rendered. All of this is accomplished within Canada’s mainstream system of third party arbitration, with more or less formality or flexibility.

The CROA system is a longstanding, unique, and consensual modification of that “normal system”. By a combination of collective agreement terms (specific to each bargaining relationship) and adherence to the rules and procedures of the Canadian Office of Railway Arbitration, the parties allocate part of the “due process responsibilities” to the workplace and other parts to the CROA panels. The CROA panels that carry responsibility for the resulting decisions can only ensure that overall due process is met by requiring the parties to adhere strictly to their part of the due process bargain. This is not just a matter of contract law, but of the administrative law

rules that ensure that the basic elements of fairness such as those described above, are met in individual cases.

CROA panels achieve this by ensuring that the parties comply with the pre-termination rules they have themselves agreed to. But it is not only that they have agreed to them, it is because such agreements, despite the variety in content, are essential to the workings of the broader CROA system the parties have adopted. There is also another bargain between the parties that supports this.

> The procedures under that rule have a two-fold purpose which involves a balancing of the interests of the Company and of the employee. On the one hand, the Company is to have an opportunity to question the employee who is the subject of the investigation, prior to making a decision with respect to the possible assessment of discipline. On the other hand, it provides to the employee, and his union, a minimum degree of due process, whereby the employee has at least one day's notice of the investigation and the matter to be investigated, the assistance of an authorized representative of the union and, if requested, copies of all pertinent statements, reports and other evidence in the possession of the investigation officer which may be used against the employee. The right to a fair and impartial investigation implies that the employee be afforded the opportunity to respond to the statements or evidence in the possession of the Company, and be given the opportunity to make a full answer and explanation.
>
> *CP Rail and CAW – TAC Canada Rail Division, Local 101*
> (unreported decision, Picher, Oct. 26, 1992)

Breaches of the collective agreement pre-discipline due process terms go to the core of the CROA process. They are not (if fundamental) just oversights that can be excused because a full *de novo* arbitration hearing might be thought to rectify the breach. Again Arbitrator Picher's comments in **CROA 1734** and **3022** apply.

CROA proceedings were clearly not adopted on the premise that the hearing would itself be a new and independent look at discipline, as is the case in mainstream arbitration where the Employer carries the onus of proof and rarely has the formal opportunity to question the grievor and have that grievor bound by their replies.

To say, based on cases like *Wasaya v. ALPA* 2010 Carswell Nat. 6233, that all deflects that can be mitigated by a *de novo* approach at the hearing is to undermine the entire CROA arrangement. It is to reverse a long line of CROA jurisprudence which the parties have directed us, as CROA arbitrators, to respect.

My conclusion is that the conduct of the investigation that led to this termination violated the requirements of Article 117.2(b). This is compounded by the investigator's assertion that all documents and matters the Company was relying had been produced. Both the Ombudsman and CN's Vice-President had advised the complainants that investigations were being undertaken. It is clear that at the time CN had, to his knowledge, documents that it was relying upon, particularly as they related to its appropriate sensitivity to its relations with First Nations. I find I must hold the discipline void *ab initio*.

I cannot close without saying that procedural objections in the face of clearly abhorrent behaviour are always difficult. Nothing in these reasons should be taken in anyway as criticism of CN's and indeed the Union's, revulsion about what was posted.

Nor should it be taken in any way as a rejection of CN's vigorously expressed concerns about the harm such comments can do in its corporate interests and to the basic humanity of these First Nations people who find themselves reading such uninformed and disheartening comments as they mourn the loss of four innocent children.

There are two additional matters to address.

In its brief, the Union suggests this termination was suspicious because of its proximity (24 hours) to the other discipline the grievor faced. I am not persuaded of that; rather the Company's response, even if procedurally flawed, was an understandable reaction to the grievor's admitted actions. No matter what else was going on, it had a clear interest and even obligations in responding to the complaints it received.

CN argues that, notwithstanding my finding the termination void *ab initio*, I should not direct reinstatement and award damages instead. In my view that is not an option, or at least an appropriate option where the discipline is void *ab initio*.

I remain seized of any remedial matters that the parties are unable to resolve themselves or by reference to Arbitrator Moreau's decision.

February 7, 2018 _____

ANDREW C.L. SIMS
ARBITRATOR