CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4663

Heard in Montreal, January 8, 2019

Concerning

CENTRAL MAINE & QUEBEC RAILWAY

And

UNITED STEELWORKERS – LOCAL 1976

DISPUTE:

The termination of employment of Mr. T. Harding from Central Main & Quebec Railway.

THE JOINT STATEMENT OF ISSUE:

On June 27th, 2018, Mr. T. Harding was informed by way of letter from the Company that his employment with Central Maine & Quebec Railway Canada was terminated immediately. Within the termination letter, the Company points to the major accident of July 5th, 2013 and Mr. Harding's involvement in causing the accident, and mention that, as a result of the accident, the relationship of trust between Mr. Harding and the Company has been irreparably destroyed.

On July 11th, the Union filed a Step 2 grievance stating that Mr. Harding was dismissed and disciplined without having the benefit of a fair and impartial investigation as stipulated in article 8.01 of the collective agreement. The Union further contends that the dismissal of Mr. T. Harding is cruel and excessive, in the Union's opinion, since the Transportation Safety Board report concluded that a series of factors led to this accident. According to the Union, the report notes in regards to the event, shows among other things, MMA's poor safety culture and lack of employee training.

The Union requests that Mr. Harding be reinstated in his work, reimbursed and made whole for all wages and loss of benefits including seniority.

The Company disagrees with the Union's grievance and has denied the request.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) N. Lapointe	**(SGD.) G. Ryan**
Chairman Board of Trustees	Chief Administration Officer

There appeared on behalf of the Company:

G. L. Ryan	– Chief Administration Officer, Bangor
S. Munk-Manel	– Counsel, McMillan, Montreal
K. Pennington	– Counsel, McMillan, Toronto

And on behalf of the Union:

N. Lapointe	– Staff Representative, Ste. Julie
N. Lapointe	– Vice President, Local 1976, St. Amable

F. Daigle – Local 9438 President, Granby
A. Daigneault – Business Agent, St. Hubert
T. Harding – Grievor, Farnham

AWARD OF THE ARBITRATOR

Nature of case

1. The CMQR terminated locomotive engineer (LE) Harding on June 27, 2018 for his involvement in the July 2013 Lac-Mégantic accident. LE Harding had been receiving CNESST benefits following the accident, but in the Spring of 2018 his medical situation allowed him to return progressively to work. Without conducting an investigation pursuant to article 8 of the collective agreement, CMQR terminated LE Harding.

2. The USW argued that the failure to investigate rendered LE Harding's dismissal void ab initio under this Office's longstanding jurisprudence. The CMQR argued, on the contrary, that it was reasonable for it to rely on the extensive investigation conducted by the Transportation Safety Board of Canada (TSBC) when making its decision to terminate.

3. For the reasons which follow, the arbitrator has concluded that the CMQR's failure to conduct the collective agreement's mandatory investigation has rendered LE Harding's dismissal void ab initio.

4. Given the overall circumstances of this case, the arbitrator has decided to award LE Harding monetary compensation, rather than reinstatement, as the appropriate remedy.

Facts

5. LE Harding, whose service dates back to January 1980, worked for Montreal, Maine & Atlantic Railway (MMA) at the time of the July 6, 2013 Lac-Mégantic accident. MMA later filed for bankruptcy. Railroad Acquisition Holdings LLC purchased its assets in June 2014 and established CMQR.

6. LE Harding went on a leave of absence for medical reasons on July 11, 2013. On June 19, 2018, the USW advised CMQR that LE Harding's medical status would permit a progressive return to work beginning on July 5, 2018.

7. On June 27, 2018, CMQR provided LE Harding with a letter which terminated him for cause. No investigation took place prior to this termination.

Analysis and Decision

8. This case raised two issues:

> 1. Did CMQR violate the collective agreement by failing to conduct an investigation?
>
> 2. What is the appropriate remedy?

1. Did CMQR violate the collective agreement by failing to conduct an investigation?

9. The USW at paragraph 25 of its Brief (U-1) argued that the CMQR's failure to conduct an investigation under article 8 of the collective agreement nullified LE Harding's dismissal.

10. CMQR, on the other hand, suggested that it had conducted a proper investigation. It referred to a July 8, 2013 conversation an MMA representative had had with Mr. Harding regarding the accident (E-1; Paragraph 116). CMQR further argued that it relied on the TSBC Report which in its view was fairer and more impartial than any investigation MMA might have done itself (E-1; Para 124).

11. In the alternative, if the collective agreement had been breached, then CMQR argued this only amounted to a minor procedural irregularity which should not vitiate the disciplinary action (E-1; Para 125).

12. There are three key and inter-related reasons why CMQR's failure to investigate renders LE Harding's dismissal void ab initio.

Article 8 of the collective agreement

13. Under article 8 of the collective agreement, entitled "Disciplinary Rules and Procedures", the USW and CMQR have negotiated mandatory procedures for

discipline. Article 8.01 of the collective agreement establishes the fundamental principle underlying the discipline process:

> 8.01 An employee shall not be dismissed, suspended or disciplined without justification and **without a fair and impartial investigation**.
>
> (Emphasis added)

14. Article 8 then sets out the mandatory procedures for a fair and impartial investigation.

15. Article 8.01 has only one possible interpretation: CMQR cannot dismiss an employee without first conducting a fair and impartial investigation. The remainder of article 8 makes it clear that only a specific investigation conducted pursuant to the collective agreement will respect this key contractual obligation.

16. Evidently, the TSBC investigation was not an investigation for the purposes of the collective agreement, though information found therein, and from other sources, could certainly be raised during the collective agreement's investigation.

17. CMQR followed none of the mandatory steps set out in article 8 of the collective agreement. For example, it provided no investigation notice to Mr. Harding and a USW representative (art 8.03 and 8.04). It did not fulfill its responsibilities regarding witnesses (art 8.05). Similarly, CMQR never advised Mr. Harding of his right to representation and the right to present evidence (art 8.06 & 8.14).

This Office's jurisprudence about the importance of investigations

18. For over 50 years, CROA members, like the USW and the CMQR in this case, have enjoyed the significant benefits arising from an effective expedited arbitration regime. In exchange for the parties negotiating and complying with an extensive investigation process, this Office can then schedule up to 7 arbitrations in a single day.

19. On the same day this case was heard, the arbitrator heard a second unrelated case involving these same parties. Both cases took a total of only a couple of hours, rather than the days which would have been required for the same matters to be pleaded in the "regular" arbitration system which most other industries use. The arbitrator also heard further cases on the same day, but for different parties.

20. A fair and impartial investigation is intended to be informal: CROA&DR 4608. As Arbitrator Picher noted in CROA&DR 2073, the investigation is not the equivalent of a civil trial or an arbitration:

> As previous awards of this Office have noted (e.g. CROA 1858), disciplinary investigations under the terms of a collective agreement containing provisions such as those appearing in Article 34 are not intended to elevate the investigation process to the formality of a full-blown civil trial or an arbitration. What is contemplated is an informal and expeditious process by which an opportunity is afforded to the employee to know the accusation against him, the identity of his accusers, as well as the content of their evidence or statements, and to be given a fair opportunity to provide rebuttal evidence in his own defence. Those requirements, coupled with the requirement that the investigating officer meet minimal standards of impartiality, are the essential elements of the "fair and impartial hearing" to which the employee is entitled prior to the imposition of discipline. In the instant case, for the reasons related above, I am satisfied that that standard has been met.

21. This Office has long noted that any investigation which does not meet the standard of being fair and impartial will render the discipline void ab initio. Arbitrator Picher further described the importance of an investigation's written record to this Office carrying out its duties in CROA&DR 3061:

> As noted in prior awards of this Office, in discipline cases the form of expedited arbitration which has been used with success for decades within the railway industry in Canada depends, to a substantial degree, on the reliability of the record of proceedings taken prior to the arbitration hearing at the stage of the Company's disciplinary investigation. As a result, any significant flaw in the procedures which substantially compromise the integrity of the record which emerges from that process goes to the integrity of the grievance and arbitration process itself. **Consequently, in keeping with general jurisprudence in this area, it is well established that a failure to respect the mandatory procedures of disciplinary investigations results in any ensuing discipline being ruled void ab initio**.
>
> (Emphasis added)

22. This Office further emphasized in CROA&DR 3221 that a faulty investigation is not just a minor "technical" issue:

> For reasons elaborated in prior awards of this Office, the standards which the parties have themselves adopted to define the elements of a fair and impartial hearing are mandatory and substantive, and a failure to respect them must result in the ensuing discipline being declared null and void (CROA 628, 1163, 1575, 1858, 2077, 2280, 2609 and 2901). **While those concerns may appear "technical", it must again be 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.
>
> (Emphasis added)

23. This case is unique in the arbitrator's experience, since the issue is not about the adequacy of the investigation but rather the total absence of an investigation. However,

both an unfair investigation and the total absence of an investigation inevitably lead to the same result: a finding that any discipline is void ab initio.

The USW is a party to the collective agreement

24. A third inter-related reason for overturning the discipline arises from the fact that, despite the clear wording of article 8 of the collective agreement, the CMQR, whether intentionally or not, completely ignored the USW's role as bargaining agent for the bargaining unit. As noted above, the USW was entitled to proper notice under article 8 so that, in part, it could respect the statutory obligation placed upon it by section 37 of the Canada Labour Code to represent its members fairly with regard to their rights under the collective agreement.

25. Without getting into the debate of the consequences of this failing if it were a standalone issue, it remains an important consideration for this Office when considering a void ab initio argument.

Summary

26. This case does not examine LE Harding's actions in the Lac-Mégantic matter. CMQR's failure to conduct the mandatory investigation under its collective agreement with the USW prevented it from proceeding to that "on the merits" issue. The complete failure to investigate, as article 8.1 clearly states, prevented CMQR from issuing any valid discipline to LE Harding. This is not a minor "technical" violation of the collective agreement, but rather a fundamental one.

27. LE Harding's dismissal is accordingly deemed void ab initio in accordance with this Office's longstanding jurisprudence.

2. What is the appropriate remedy?

28. Both parties argued in favour of different remedies. The USW argued that Mr. Harding should be reinstated as an LE. In the alternative, the USW referred to Appendix 3 of the collective agreement which would allow Mr. Harding to apply for other positions based on his long seniority.

29. The CMQR suggested, if the arbitrator found it did not have just cause, that damages in lieu of reinstatement would be appropriate given all the circumstances of this case.

30. Given the overall context presented by the parties at the hearing, the arbitrator has concluded that damages in lieu of reinstatement would be appropriate. Since neither party had addressed the appropriate quantum for those damages, that specific issue is remitted back to them for discussion.

31. The arbitrator retains jurisdiction to receive further argument should the parties be unable to resolve this remedial issue.

January 17, 2019

GRAHAM J. CLARKE
ARBITRATOR