AH826

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

BETWEEN:

Teamsters Canada Rail Conference

(TCRC)

-and-

Canadian Pacific Railway Company

(CP)

Grievance re R. Mellquist dismissal

Arbitrator: Graham J. Clarke
Date: April 5, 2023

Appearances:

TCRC:

K. Stuebing:	Legal Counsel
D. Fulton:	General Chairman CTY West
D. Edward:	Sr. Vice General Chairman CTY West
J. Hnatiuk:	Vice General Chairman CTY West
L. Inverarity:	Local Chairman – Moose Jaw
R. Mellquist:	Grievor

CP:

S. Oliver:	Labour Relations Manager, CP Rail
T. Gain:	Legal Counsel Litigation & Labour
P. Sheemar:	Labour Relations Manager, CP Rail
B. MacIsaac:	Director North American Pension Services

Arbitration held via videoconference on March 22, 2023.

Award

BACKGROUND

1. On March 22, 2022, the parties signed a Memorandum of Settlement (Appendix 2) revising the arbitration process in Article 41 of their collective agreement. The arbitrator agreed to hear 4 Ad Hoc cases in 2022 and a further 8 in 2023 on the condition that the parties would plead no more than 2 cases per day.

2. On December 8, 2020, CP dismissed Mr. Mellquist for the following reason[1]:

> In connection with your injury reported while you were observed violently kicking an elevator door to intentionally damage company property resulting in your injury claim on November 23, 2020. A violation of Rule Book for Train & Engine Employees, Section 2 - General, 2.1 Reporting for Duty and 2.2 While on Duty and the Hybrid Discipline & Accountability Guidelines - Conduct Unbecoming Offences.

3. CP argued that Mr. Mellquist's kicking of the elevator door, when considering his disciplinary record, justified his dismissal.

4. The TCRC contested the fairness of the investigation in part due to the Investigating Officer (IO) producing further documentation as he posed his questions. On the merits, the TCRC highlighted Mr. Mellquist's long service, the fact that he reported the incident immediately and the lack of damage to the elevator door.

5. For the following reasons, the arbitrator concludes that CP failed to justify terminating Mr. Mellquist's employment. While CP had grounds to impose discipline, dismissal did not constitute a just and reasonable penalty. The arbitrator orders CP to reinstate Mr. Mellquist, but without compensation. The arbitrator remits to the parties any related issues given that Mr. Mellquist had decided to take his pension following his dismissal.

CHRONOLOGY OF EVENTS

6. **July 1, 1986**: CP hired Mr. Mellquist.

[1] TCRC Exhibits; Tab 6; Form 104

7. **November 22, 2020**: A video showed Mr. Mellquist kicking an elevator door, falling down and injuring himself.

8. **November 23, 2020**: Mr. Mellquist filed an injury claim.

9. **November 26, 2020**: CP took Mr. Mellquist's Statement[2], the salient parts of which include[3]:

> Q4 When did you enter service with Canadian Pacific Railway?
>
> A July '86 I believe
>
> NOTE Union: Braden Robinson - Local Chairman, TCRC - Randy Mellquist takes part in this investigation without prejudice and he retains his right and the right of the Union to grieve discipline imposed (if any) under the collective agreement and/or any applicable status, legislation acts or policies.
>
> The Union requests, at this time, the full disclosure of all evidence, photographs, voice recordings, audio/visual records, including any documentation whether paper or electronic, that has been utilized by, or is in possession of the Company, which will be introduced or referred to which may have a bearing in determining responsibility in this matter
>
> …
>
> Q9 Do you understand that the documents listed above will be used as formal evidence in this investigation?
>
> A Yes
>
> Q10 Do you wish to offer any rebuttal and/or comments regarding these specific documents?
>
> A Referring to Appendix D, when it says I told Trainmaster Heintz that I Injured my leg before my shift, I can only assume this is where I was injured. That was the only thing that was off, that was the only thing that was different in my whole day.
>
> Union Objection: All rebuttals will be handled throughout the body of this investigation.
>
> …

[2] TCRC Exhibits; Tab 4; CP Exhibits; Tab 7
[3] The arbitrator will reproduce the text "as is" from the Statement.

Q15 Referencing Appendix B and C, is this you in the video from the day in question? Showed employee the video to confirm.

A15 that is me.

…

Q23 Where you aware of the date when the doors would require an access card??

A23 No

Investigating Officer would like to enter a 5 page document, referred to in this investigation as IO-01. Documents are Information Bulletin No:

S-043-17

S-003-18

S-077-19

S-131-20

Q24 Referencing IO-01, have you ever seen these bulletins prior to the date in question?

A24 Yes I have

…

Q33 Referencing Appendix B and C, you are seen to kick the elevator door as confirmed in Q29 with your right foot, is that correct?

A33 Yes

Q34 Is kicking the door the acceptable way to access the elevator?

A34 No

Union Objection: Self-incriminating and leading question.

Investigating Officer: noted

Q35 Do you understand that kicking an elevator door is considered intentional destruction of company property?

A35 Yes, my intent was not to damage company property.

Union Objection: Speculative

Investigating Officer, Noted

…

Q37 Referencing Appendix B and C, after you kicked the door with your foot, you are observed falling to the ground, is that correct?

A37 Yes

Q38 Did you feel any pain or discomfort as a result of the kicking of the door or the fall?

A38 yes

Union Objection: Leading question

Investigating Officer, Noted

Q39 Referencing Q38, can you state what initiated the pain, the kicking of the door or the fall to the ground after?

A39 It was in my overextension of my leg.

…

Q.43 Referencing Appendix A , your Incident Report, where it states, "Still no success/ however in my attempt to rattle the elevator door, I had lost my footing when I placed foot to rattle the elevator door. Overextended my reach and lost footing, are you confirming you slipped as you attempted to reach the elevator door?

A43 I was saying that I lost my footing in my attempt to kick the door

Q44 Based on the video footage in Appendix B and C, you are seen kicking the elevator door then falling to the ground. Which foot did you lose your footing with? Right or left? ·

A44 I lost my footing with my left foot

…

Q48 Referencing Appendix A, your Incident Report, where it states, "at Broadview, advised the authority present", who was present in Broadview that has authority to manage a notification of an injury?

A48 It was done by phone , and I believe my first call was to Austin Heintz

Investigating Officer would like to play video footage from Moose Jaw booking in room on November 22nd 2020 at 20:04:18, we will refer to this as IO-02.

Q49 Referencing IO-02, is this you in the booking in room?

A49 yes

Q50 Referencing IO-02, you are seen holding your right knee, is that correct?

A50 yes there was a bit of a numbing there

Q51 Was your right knee in pain?

A51 no

Q52 Did you tell TM Heinz that you were injured?

A52 No

Q53 Mr. Mellquist, if you were injured or pain caused while on duty, do you understand you are to report it to a supervisor as soon as possible?

A53 yes

…

Q54 Was there any reason as to why you didn't report it to TM Heinz when you went upstairs?

A54 No, I didn't feel it was relevant and would not hinder my performance.

Q55 On the date in question, was there an issue with your right knee or leg prior to you being call for duty?

A55 No

Union Objection: Speculative question, the investigating officer is eluding the fact that Mr. Mellquist may have a pre-existing injury.

Investigating Officer: I am attempting to ensure there was not a prior even that may have caused the employee pain or discomfort as he described in the statement.

…

Q85 Have you ever been diagnosed with balance Issues on your left leg, ankle or foot?

Q85 Yes

Q86

…

Union Objection: unfair question. Investigating officer is eluding to the fact that Mr. Mellquist may have preexisting health Issues.

Investigating Officer would like to enter IO-03, an email from Disability Management Specialist Brooke Chasowy, where it states "Balance in formal testing was reduced for the left foot but no loss of balance was observed in testing in the rail yard.

Union Note: There is no exact extent indicated as to the reduced balance on Mr. Mellquist's left foot.

…

Q96 Referencing Appendix A and D you contribute this injury to the incident displayed to you on Appendix B and C?

A96 Yes that is correct. I attribute my mechanics to that video, however I had no idea that the development from that video was going to attribute to the mechanics lost when I got to Broadview. I still had no pain.

Q97 So what was the purpose of the call the TM Heintz?

A97 It was to identify that I wasn't in a safe condition at that end. My leg was in a bad way here and it was tightening up and I was having trouble with my mobility. I wasn't in a position to put myself on the train. He asked if I had pain or need to go to the hospital and I told him no, but I felt like an 80 year old. There is probably a simpler way, that at the first sign of an issue I notified the proper authority.

Q98 You state in your answer in Q98, you didn't need to go to the hospital, however you stated In Q 76 that you were in fact transported to the hospital. How did you end up in the hospital?

A98 The cab driver told me he was ordered to take me to the hospital.

Q99 Did you tell the cab driver you didn't need to go to the hospital?

A 99 No I did not

Q100 Do you have anything you wish to add to this investigation?

A100 When I got my call my intent was to come to work K54-22. Gather up my paperwork and go to work. Nothing in my mind was ever recognized that I would ever end up with the condition I had in my leg. I didn't recognize it, it was just a progression of tightness in my muscles. There was no pain just awareness in my steps. I never intended to not be available for work. Upon recognition of my condition I thought I had well advised my superiors and assisted them with times and so forth with the video to explain how I could possibly have or get this condition. There was never any malice on me person directed to the company or its property. My judgement into my second or third to make aware that my presence was stuck outside, was maybe not the best obviously. However I didn't foresee the tightening up in this manner. I was just looking to get into the building. I was just trying to find out what was going on with my leg to keep me from working. When I got back I took my 48 hours and did as the doctor prescribed because she described soft tissue injuries and what I needed to do to treat it. No prescription drugs were used. I got a braced and used as she told me. Bev, my better half gave me some frozen peas to help and here I am today

like it never happened. I did not seek additional company time off and used my monthly mileage to take my 48 hours rest. I did go to the doctor today and I am cleared to come back to work.

…

Q102 Referencing Q10 and your answer, where you stated " A10 Referring to Appendix D, when it says I told Trainmaster Heintz that I injured my leg before my shift. I can only assume this is where I was injured. That was the only thing that was off, that was the only thing that was different in my whole day" however in Q71 when asked " Did you tell him (referring to TM Austin Heintz) you injured yourself by kicking the elevator door in the breezeway, you answered "Yes". Can you explain for the record the why these answers contradict each other?

A102 When I called TM Austin Heintz on the phone, he had to ask if I was injured or not, and that is what is gave him as an identifiable location of what I could assume was leading to my loss of range of motion.

…

Q107 Referencing Q38 and your answer as well as the union objection for "leading question", You were asked If you felt any pain or discomfort as a result of the kicking of the door or the fall, and your answer was "Yes" was the phone call to TM Austin Heintz as well as the completion on Appendix A, the result of the pain or discomfort felt?

A107 That is correct

…

Q110 For the record can you explain the difference between Appendixes A where you state "I had lost my footing when I placed foot to rattle the elevator door" and the footage shown in Appendix Band C?

A110 I completed this Incident Report after I was up for the day, and wrote it to the best of my ability. The loss of footing happened as a result of the kick to rattle the door.

…

Q112 Do you have anything you wish to add to this Investigation?

A112 It was never my intention to cause damage to any company property or myself.

(Underlining in original)

10. **December 8, 2020**: CP dismissed Mr. Mellquist[4].

11. **January 1, 2021**: Mr. Mellquist retired following his dismissal.

PROCEDURAL OBJECTIONS

12. Both parties raised objections about the pre-arbitration process. The arbitrator dismisses both objections.

Did the TCRC expand its grievance by contesting the fairness of CP's investigation?

13. As the arbitrator understands this objection[5], CP argued that if the TCRC does not contest the fairness of the investigation in its Step 1 grievance, then it is precluded from ever doing so.

14. For the following reasons, the arbitrator dismisses this objection.

15. First, this objection differs from the one CP raised in AH825[6] which the arbitrator upheld. In AH825, the TCRC had made a vague comment about testing at Step 1, but then said nothing further about it at Step 2 or in the JSI. The TCRC then filed its Brief which focused mainly on testing. This resulted in surprise and prejudiced CP's ability to plead the case on which the parties had agreed in the JSI.

16. In this case, however, the TCRC clearly identified for CP at Step 2 and in the JSI that it would contest the fairness of the investigation. This disclosure did not lead to surprise or otherwise prejudice CP.

17. Second, the arbitrator recently commented in AH809[7] on the parties' step-based grievance process and how it escalates the dispute to those with more experience. This ensures that the parties know each other's full and final positions before deciding whether to proceed to arbitration [Footnotes omitted]:

> 24. **This Step format grievance procedure escalates matters to more experienced representatives at each step**. Step 1, if engaged, involves the

[4] TCRC Exhibits; Tab 6; Form 104.
[5] CP Brief at paragraphs 4 and following.
[6] AH825: Teamsters Canada Rail Conference v Canadian Pacific Railway Company, 2023 CanLII 26191
[7] AH809: Teamsters Canada Rail Conference (TCRC) v Canadian Pacific Railway Company, 2023 CanLII 8290

employee and a supervisor, or possibly the Local Chair and the designated Company Officer. Step 2, where a grievance may also start, involves the Local Chair and a designated Company Officer. Step 3 allows the General Chair to appeal the decision to the General Manager, both of whom have significant labour relations experience.

25. **Evidently, the CA's intent is to encourage a full discussion of the dispute and to encourage early resolutions of "differences". Step 3 ensures senior representatives for each party have a solid understanding of "all differences" prior to incurring the significant costs associated with arbitration**.

26. **At Stage 3, unlike during the arbitration hearing, nothing prevents the parties from particularizing their full positions given that the next step will be before an arbitrator**. **In other words, neither the General Chairman nor the General Manager are estopped from putting forward their full and final positions at Step 3. If it were otherwise as CP suggested in its argument, then CP, which failed to respond at Step 2, would be precluded from responding at Step 3**.

27. In the instant case, the TCRC at Step 3 provided further particulars about the CA provisions it alleged CP had violated. The arbitrator finds nothing inappropriate about providing more detailed information to CP at Step 3 than had been provided at Step 2. Putting details into the Record for an arbitrator's later use is an essential component of a successful railway arbitration.

(Emphasis added)

18. Third, under CP's argument, those involved at Step 1, i.e., the employee and the supervisor, who have expertise as railroaders rather than as labour relations professionals, would have to identify and put forward all possible legal positions. That requirement would undermine the purpose of the parties' step-based grievance process. It would almost force the parties to bring in their Step 3 experts, or even legal counsel, at the very beginning of a grievance. Their negotiated wording suggests just the opposite.

19. The arbitrator dismisses CP's objection.

Did CP conduct a fair and impartial hearing?

20. The TCRC alleged that CP failed to conduct a fair and impartial investigation despite the requirements of article 39.01(4):

> 39.01(4) **The notification shall be accompanied with all available evidence, including a list of any witnesses or other employees, the date, time, place and subject matter of their investigation, whose evidence may have a bearing on the employee's responsibility**. Upon request, the Company shall

> confirm to the employee whether or not technical evidence, such as Q-Tron tapes, will be used at an investigation in order that they might arrange for a qualified accredited representative. The employee and their representative will be allowed time to study this evidence as well as any other evidence to be introduced at the commencement of the investigation. **Should any new facts come to light during the course of the investigation, this will be investigated and, if necessary, further memoranda would be placed into evidence during the course of the investigation**. (Note: Formerly July 25, 1989 Letter Re: Investigation & Discipline.)
>
> (Emphasis added)

21. In particular, the TCRC objected to QA23, 49 and 86, *supra*, where the IO introduced further documentation during his questioning. The TCRC also objected to leading questions.

22. CP argued that article 39.01(4), given its reference to "any new facts", allowed it to address new things which came to light during the investigation.

23. For the reasons articulated in AH825, *supra*, which also concerned Mr. Mellquist, the arbitrator adopts the analysis therein concerning leading questions and dismisses that aspect of the TCRC's objection.

24. The arbitrator recently described the parties' negotiated investigation process. It is intended to be informal, though arbitrators, if they deem an investigation unfair, will intervene to declare discipline void *ab initio*[8].

25. The arbitrator dismisses the TCRC's objection about the IO's procedure during the investigation. However, the parties should not interpret this to mean that this type of process can never lead to a finding that discipline was void *ab initio*. It will depend on the facts of each case and the interpretation of the negotiated wording "Should any new facts come to light during the course of the investigation, this will be investigated…".

[8] AH828: Teamsters Canada Rail Conference v Canadian Pacific Railway Company, 2023 CanLII 24771 at paragraphs 10-21.

26. Unlike in most of the cases where an employer's contested documentation surfaced long after the investigation, the IO did provide the documentation to Mr. Mellquist during the investigation. But it was not produced at the start despite the TCRC's request.

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[9].

28. While the arbitrator has decided that the IO's process did not void the discipline in this case, the result could differ in the future depending on the circumstances.

SHOULD THE ARBITRATOR SUBSTITUTE A DIFFERENT PENALTY?

29. As noted in the introduction, CP did not meet its burden to justify Mr. Mellquist's dismissal. The video evidence showed that this was not a simple attempt to rattle the elevator door. Mr. Mellquist violently kicked the elevator door, injured himself in the process and this impacted his tour of duty. The lack of damage attests more to the strength of the elevator door than to a lack of intent on Mr. Mellquist's to engage in conduct which could reasonably be expected to cause damage.

30. While CP satisfied the arbitrator that it had grounds to impose discipline, dismissal was excessive in the context of this case.

31. Subject to any specific penalty for an infraction that the parties have negotiated into their CA, the *Canada Labour Code*[10] (*Code*) sets out arbitrators' remedial authority for disciplinary matters:

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

[9] See, as just one recent example, AH824 - Conférence ferroviaire de Teamsters Canada c Via Rail Canada inc., 2023 CanLII 17658.
[10] RSC 1985, c L-2

32. At arbitration, the parties put forward their best arguments to support their respective positions. The *Code* then requires the arbitrator to determine i) whether to intervene and, if so, ii) the just and reasonable penalty.

33. The arbitrator previously commented on Mr. Mellquist's discipline record in AH825, *supra*, a case which the parties pleaded on the same day as this one. The arbitrator will not revisit the same issue but instead refers the parties to the comments made in that contemporaneous decision.

34. For the following reasons, the arbitrator has decided to order CP to reinstate Mr. Mellquist, but without compensation.

35. First, CP's reliance on CROA 1974[11] does not support Mr. Mellquist's dismissal. Instead, it persuaded the arbitrator to give him another, perhaps final, chance to remain a CP employee.

36. In CROA 1974, an employee with 55 demerits on his record kicked and damaged a photocopier. He received 45 demerits which resulted in his termination due to an accumulation of demerits. Arbitrator Picher reinstated the employee, without compensation, given that the incident arose in the heat of the moment and despite the employee's intent to cause damage to company property:

> **While the case in that award and the instant grievance are similar insofar as they relate to a degree of deliberate damage to Company property, there are also differences of significance**. There was, in the circumstance of Mr. Andrews, a measure of frustration, if not provocation, and his action was more of a lashing out in the heat of the moment than a systematic course of conduct as evidenced in the `punch clock' case. **There is, moreover, no reason to doubt the sincerity of the grievor's remorse in the case at hand. He has openly expressed regret for his action and has offered to pay for the damages caused**.
>
> **For all of the foregoing reasons the Arbitrator is satisfied that, while a serious degree of discipline is warranted, the substitution of a penalty short of discharge is appropriate in the instant case. Given the grievor's long service, the fact that what transpired was a heat of the moment response to a frustrating circumstance, and what the Arbitrator accepts as his sincere statement of remorse, I am satisfied that the substitution of a lengthy suspension, and reinstatement on condition of repayment of the**

[11] CROA 1974

> **damages caused will have the necessary rehabilitative effect**. I am persuaded on balance that he should, on this occasion, be given the benefit of the doubt and a second chance.
>
> **The grievor shall therefore be reinstated into his employment forthwith, without compensation of benefits, and without loss of seniority**. Mr. Andrews' reinstatement is, however, conditional upon his repayment in full of the monetary damages caused to the Company's equipment, the time and method of repayment to be negotiated between the parties. **The grievor's disciplinary record will stand at fifty-five demerits, in consequence of which he must fully appreciate the seriousness of any similar conduct in the future**.
>
> (Emphasis added)

37. Arbitrator Picher also maintained the employee's demerit total at 55 when substituting a suspension for the dismissal.

38. Second, in determining the disciplinary penalty, CP relied on a previous 40-day suspension[12] it had imposed to support its decision to terminate Mr. Mellquist's employment. The problem with that reliance is that the arbitrator in AH825, *supra*, reduced that suspension to 5 days.

39. In AH827[13] the arbitrator noted that the consideration of an employee's disciplinary record must be taken as at the time of the arbitration:

> 26. As AH811 notes, the arbitrator takes the discipline record as it exists at the time of the arbitration. An arbitrator will not apply the employer's original disciplinary measure if the parties later agree to reduce it. If contested disciplinary measures remain outstanding, then the parties may need to find an arbitrator who will hear them all concurrently, as occurred in CROA 4604.

40. Third, the arbitrator agrees with CP that Mr. Mellquist's disciplinary record is far from exemplary. For example, just the year before in 2019, CP had assessed Mr. Mellquist a 20-day suspension for driving his company vehicle into a bridge. The vehicle ended up overturned on its side. Similarly, CP had already agreed to give Mr. Mellquist the benefit of a "Last Chance Agreement" in 2013. That document remains a permanent part of his disciplinary file[14].

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[12] CP Brief; Paragraph 35.
[13] AH827: Teamsters Canada Rail Conference v Canadian Pacific Railway Company, 2023 CanLII 25331
[14] CP Exhibits; Tab 6; Page 77/180

41. Nonetheless, the TCRC quite appropriately highlighted the multiple times when Mr. Mellquist had had demerit points removed due to 12 consecutive months with no discipline[15].

42. Fourth, Mr. Mellquist's detailed evidence in his Statement satisfied the arbitrator that he was candid with CP about the incident. He acknowledged his behaviour was inappropriate and expressed remorse. Mr. Mellquist is also a long service employee having been hired in 1986.

43. For the above reasons, the arbitrator orders CP to reinstate Mr. Mellquist, without loss of seniority, but without compensation for lost wages and benefits.

DISPOSITION

44. The arbitrator orders CP to reinstate Mr. Mellquist in his employment, without loss of seniority, but without compensation for past wages or benefits.

45. The arbitrator remits to the parties all remedial issues given their conflicting comments about the impact of Mr. Mellquist taking his pension following his dismissal.

46. The arbitrator remains seized should the parties fail to resolve these issues.

SIGNED at Ottawa this 5th day of April 2023.

_____

Graham J. Clarke
Arbitrator

[15] TCRC Exhibits; Tab 2; Page 9/274