

**CANADIAN RAILWAY OFFICE OF ARBITRATION**  
**& DISPUTE RESOLUTION**  
**CASE NO. 4294**

Heard in Calgary, March 12, 2014

Concerning

**CANADIAN PACIFIC RAILWAY COMPANY**

And

**TEAMSTERS CANADA RAIL CONFERENCE**

**DISPUTE:**

Appeal of the termination of Yard Foreman effective September 18, 2012.

**THE UNION' EXPARTE STATEMENT OF ISSUE:**

Following investigation on August 28, 2012 and September 4, 2012, Yard Foreman Fossum's employment was terminated by the Company for Conduct unbecoming a Canadian Pacific employee as evidenced by your deliberate failure to complete your assigned duties, your refusal to follow the direct instructions of a Company Officer, and for booking yourself sick after being repeatedly instructed by your supervisor to perform your assigned duties, working as Yard Foreman on the Alyth 1530 Pulldown Tower Assignment on December 7, 2011.

The Union contends that the investigation was not conducted in a fair and impartial manner per the requirements of the Collective Agreement. For this reason, the Union contends that the discipline is null and void and ought to be removed in its entirety and Yard Foreman Fossum be made whole.

The Union further contends that there is no cause for discipline in the circumstances or in the alternative, that the penalty of discharge is excessive and contrary to the Canada Labour Code as well as the Canadian Human Rights Act.

The Union requests that the Mr. Fossum be reinstated without loss of seniority and benefits, and that he be made whole for all lost earnings with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company disagrees and denies the Union's request.

**FOR THE UNION:**  
**(SGD.) D. Olson**  
**General Chairperson**

**FOR THE COMPANY:**  
**(SGD.)**

There appeared on behalf of the Company:

M. Moran – Manager Labour Relations, Calgary  
M. Thompson – Manager Labour Relations, Calgary

There appeared on behalf of the Union:

M. Church – Counsel, Caley Wray, Toronto

D. Olson	– General Chairman, Calgary
D. Fulton	– Vice General Chairman, Calgary
D. Kennedy	– Local Chairman, Calgary
C. Fossum	– Grievor, Calgary

### **AWARD OF THE ARBITRATOR**

This arbitration concerns Yard Foreman's Craig Fossum's ("the grievor") discharge. The grievor had 19 years of service with the Canadian Pacific Railway Company ("the Company") with zero demerits on his record at the time of his discharge. The background to the grievance is reflected in the ExParte Statement of Issue reproduced above.

The issues in this case are as follows. The first concerns the Union's position that the Company violated the grievor's substantive rights in the investigation that led to the grievor's discharge. If it did not, the Union submits there was no cause for discipline and, if there was cause for discipline, the Union argues it was excessive.

#### **The Facts**

On December 7, 2011 the grievor was called to work the 1530 hours Pulldown assignment in the Alyth Yard in Calgary. The Pulldown crew essentially assembles the train. The crews receive lists of tracks from the Pulldown Supervisor ("S.O."). On December 7, 2011, the S.O. was Mr. Devon Zest ("S.O. Zest").

Prior to the exchange with SO Zest that led to the conduct for which the grievor was discharged, Class Yard Coordinator McElmon ("CYC McElmon") told the grievor

that any additional cars that were humped into track 33 could be tied on to train 261 – 07. The crew carried out its assignment. At approximately 2250 hours the train was assembled.

S.O. Zest then called the crew. He told them that one of the additional cars would need to be set off onto another track. In response, the grievor stated: "are you serious?" The grievor then asked for another crew to relieve his. That request was denied. Shortly thereafter, the grievor requested a crew bus to go to the washroom. Before leaving for the bathroom, in apparent frustration with the situation, the grievor said: "fucking retarded. I don't understand it." At the investigation meeting held September 4, 2012, the grievor answered questions about his alleged attempt to delay carrying out his assignment to use the washroom. He denied this was the case and expressed that he had had to go the whole time.

Upon the grievor's return, the crew proceeded to set off the car. The grievor then called S.O. Zest. The grievor told S.O. Zest that the crew would not have enough time to set the train and asked S.O. Zest what he wanted them to do. S.O. Zest asked why there was not sufficient time. The grievor indicated that he was entitled to a second lunch. When the grievor reiterated that there would not be enough time, and S.O. Zest told him to get the train in the track, he responded: "That ain't gonna happen. We don't have enough time, I'm telling you."

S.O. Zest explained to the grievor that he was entitled to his second lunch between the 9th and 10th hour of his shift and that, at the latest, the grievor would take his second lunch at nine hours and 40 minutes into his shift. The grievor disagreed and told S.O. Zest that he would be there by his 9th hour. S.O. Zest then asked the grievor to shove back his train. The tape recording reflects the following interchange between S.O. Zest and the grievor at that point:

S.O. Zest: shove your train into the track please  
 The grievor: I'm telling you Devin we will won't have time  
 S.O. Zest: you will have lots of time shove it into the track Craig right now  
 The grievor: okay I am booking sick

At the investigation meeting held September 4, 2012 the Company asked the grievor to explain why he booked sick at that point in his shift. The grievor answered that he was not feeling well. The following exchange ensued:

Q 59: you book sick after receiving instructions from a supervisor. Is this correct  
 A: That is correct.  
 Q 60: Please explain why you booked sick after receiving instructions from the supervisor.  
 A: I was at the point where I felt I was too sick to continue.  
 Q61: Did it bother you that you are asked to perform extra work?  
 A: I was frustrated by the fact that one supervisor told me the car was okay for the train and another told me I had to switch it out while I was not feeling well.

The Company removed the grievor from service pending the formal investigation. The grievor went to see his doctor on December 13, 2011, and went off on short-term disability.

### **The Investigation**

Shortly after the grievor went off sick, the Company sent the investigation package to the Union and the grievor. In that package was a memo from S.O. Zest

dated December 7, 2011. The memo reflects S.O. Zest's recollection of the sequence of events and interchanges between them on the date in question. For example, one of the facts recounted by S.O. Zest in his memo was that the grievor stated: "are you serious and that's fucking stupid" rather than just: "are you serious" confirmed by the tape and set out in the facts above.

On August 28, 2012 the grievor attended at the investigation meeting. The Union noticed that memo provided was a different version of the same memo that had been provided in the package they had been sent when the grievor was off sick.

The version provided on August 28, 2012, was prepared prior to the one that had previously been sent. When that became apparent, Mr. Cam Tygat, the investigator, adjourned the meeting and the Company determined that a new investigation would be undertaken to remedy the procedural flaw.

Mr. Greg Squires was assigned to the new investigation. The grievor attended for his formal statement on September 4, 2012. At the outset of the meeting, the Union requested that the investigating officer put into evidence the memo that had been provided at the August 28, 2012 meeting in error.

The Company investigator noted that all the evidence from the original investigation had been set aside as invalid and that the only evidence supplied for the new investigation would be referenced. The evidence was the same as it had been for

the investigation held August 28, 2012, with the exception that the memo, which the Company had provided in error on August 28, 2012, was replaced with the one that had been disclosed while the grievor was off sick.

The Union objected to the investigation being held stating that it had already taken place and at that time it came to light that the original memo from S.O. Zest had been changed and there were two conflicting memos.

At the arbitration hearing, the Union expressed that it had had the opportunity to speak with S.O. Zest, who is no longer with the Company. S.O. Zest was the author of the memo inadvertently provided to the Union on August 28, 2012. Mr. Tygat had “cleaned it up” and S.O. Zest had confirmed its accuracy prior to disclosure.

## **Decision**

I turn first to consider the preliminary issue of whether the grievor received a fair and impartial investigation.

The Union’s objection to the Company’s actions reflected in the sequence of events above is that it failed to provide all the available evidence in the investigative process. In failing to provide both memos, the Union asserts that the Company essentially withheld evidence and that the grievor was therefore not afforded a fair and impartial investigation. According to the Union, the grievor was denied the opportunity to offer an explanation, response or rebuttal to the information that was in the Company’s

possession. Moreover, the Company, despite requests made, failed to explain why there were two versions of S.O. Zest memo and the differences between them.

Article 70 of the collective agreement - Investigations & Discipline - governs the investigation process. It provides, in part, as follows:

70.01 When an investigation is to be held, each employee whose presence is desired will be notified, in writing if so desired, as to the date, time, place and subject matter.

...

(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.

...

70.04 Employees will not be disciplined or dismissed until after a fair and impartial investigation has been held and until the employee's responsibility is established by assessing the evidence produced.

I have reviewed the cases provided to me and I have carefully reviewed the two memos both dated December 7, 2011. It is true that the one prepared by S.O. Zest, prior to input from Mr. Tygat in "cleaning it up" and provided to Union inadvertently on August 28, 2012 has a few more details than S.O. Zest's "cleaned up" version. However, the two memos are not materially or significantly different considering the conduct at issue. The two versions of the memo do not contradict each other. The actual events as verified by the transcripts of the taped radio communication and the discrepancy between the transcripts and either version of the memo did not change.

In my view, the Company's use of the "cleaned up" version reviewed by S.O. Zest prior to its disclosure at the investigation without the production of the original memo can in no way be said to have changed the case against the grievor. Nor did the

differences in the memos impact the grievor's opportunity to provide rebuttal evidence in his own defense on September 4, 2012.

I fully appreciate that the notice requirement referenced in article 70.01 (4) is an essential protection in the investigative process. I am satisfied that the setting aside of the original investigation and the Company's reliance on the "cleaned up" version of S.O. Zest's memo in the investigation cannot be said to have denied the grievor a fair and impartial investigation.

I now turn to consider whether there was any cause for discipline in the circumstances and if there was whether it was excessive.

With reference to the circumstances above, I have no doubt that the grievor would have been extremely frustrated when he became aware that an additional car on the train that his crew had fully assembled would have to be removed. That frustration was undoubtedly compounded by the fact that he mistakenly believed he was entitled to a second lunch break at the 9th hour rather than between the 9th and 10th when directed to continue working to remove the additional car.

Despite the grievor's apparent frustration, as reflected in the inappropriate comment as he left for the washroom, I am not persuaded that the Company has established that the grievor went to the washroom to deliberately delay setting off the



additional car. The grievor may well have had to go to the washroom, but held off to complete assembling the train and in anticipation of his second lunch break.

Nevertheless, upon the grievor's return to work, and his learning that he was expected to work beyond when he thought would be his second lunch break, his defiance in asserting that he would be in the lunch room at the 9th hour is clearly culpable conduct. Even had the grievor been correct in his interpretation of the collective agreement regarding the timing of his second lunch break, his response to S.O. Zest's direction to continue setting off the car would still have warranted discipline.

Immediately after asserting that he would be in the lunch room at the 9<sup>th</sup> hour, and following S.O. Zest's order to continue working, the grievor booked off sick.

On a review of the sequence of events, I find that the grievor booked off sick out of frustration to the circumstances that led to the direction that he keep working. While the medical evidence produced by the Union provides some insight into the status of the grievor's health on December 7, 2011, the diagnosis of the grievor's disability does not excuse or explain his booking off sick out of frustration to S.O. Zest's direction.

The Company chose to discharge the grievor outright. He had 19 years of service with the Company at the time and zero demerits on his record. Without condoning or diminishing the seriousness of the grievor's misconduct on December 7, 2011, it would not only be unprecedented in the jurisprudence of this Office, but

inconsistent with the concept of progressive discipline to uphold the grievor's termination in these circumstances.

This grievance must be allowed, in part. I direct that the grievor be reinstated to his employment forthwith and that he be compensated for all wages and benefits lost. A substituted discipline of 15 demerits shall be placed on the grievor's record for conduct unbecoming as reflected in the Form 104.

March 25, 2014



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CHRISTINE SCHMIDT  
ARBITRATOR