

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4299**

Heard in Calgary, March 13, 2014

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

**TEAMSTERS CANADA RAIL CONFERENCE
RAIL TRAFFIC CONTROLLERS**

DISPUTE:

Appeal of Sixty (60) demerits assessed on April 29, 2013 to Rail Traffic Controller Glen DeHaan resulting in dismissal for accumulation of demerit marks.

JOINT STATEMENT OF ISSUE:

On April 29, 2013 Rail Traffic Controller Glen DeHaan was issued Twenty (20) demerits for his alleged failure to complete a proper transfer between RTCs during his shift at the 12th Street Interlocking on May 13, 2012.

April 29, 2013 RTC DeHaan was also issued Forty (40) demerits for conduct unbecoming for his alleged "...deliberate and repeated attempts to frustrate the investigative process and to defeat the Company's ability to conduct an investigation during the period between June 8, 201 and April 26, 2013..." resulting in the Company dismissing Mr. Dehaan for accumulation of demerits. With respect to the 20 demerits assessed, the Union contends that the investigation provided no proof that Mr. Dehaan failed to complete a proper transfer other than the allegation of Mr. Miller with whom Mr. DeHaan had a personal dispute.

The Union submits that in the instance of the 40 demerits assessed for conduct unbecoming the Company was in violation of Article 35.01 which states: *No employee shall be suspended, except for investigation, discharged or disciplined until the employee's case has first been investigated and the employee has been found guilty of the offence charged against the employee.* Mr. Dehaan was never afforded an investigation for the alleged conduct unbecoming before being issued 40 demerits. The Union submits that in neither instance was Mr. DeHaan afforded a fair and impartial investigation.

The Union requests that 60 demerits assessed to RTC DeHaan be removed and that he be returned to service with full seniority and made whole for all lost wages and benefits. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

FOR THE UNION:
(SGD.) S. Brownlee
General Chairperson

FOR THE COMPANY:
(SGD.)

There appeared on behalf of the Company:

- | | |
|-----------|--------------------------------------|
| A. Becker | – Labour Relations Officer, Calgary |
| M. Moran | – Manager, Labour Relations, Calgary |
| B. Free | – Manager, Calgary |

There appeared on behalf of the Union:

- | | |
|---------------|-----------------------------------|
| S. Brownlee | – General Chair, Stoney Plain |
| C. Clark | – Vice General Chair, Okotoks |
| V. Linkletter | – Jr. Vice General Chair, Calgary |
| G. DeHaan | – Grievor, Calgary |

AWARD OF THE ARBITRATOR

This case concerns the Company's imposition of 20 demerit marks and 40 demerit marks reflected in the Joint Statement of Issue reproduced above. At the time of Rail Traffic Controller Glen Dehaan's ("the grievor") discharge, his record stood at 57 demerits.

I turn first to the Company's allegation that the grievor had deliberately attempted to abbreviate the transfer process thereby failing to ensure a safe effective and efficient transfer on May 13, 2012.

The Union claims that discipline is unwarranted against the grievor and that the Company has failed to meet its burden of proof.

FACTS

It is common ground that Rail Traffic Controller Robert Miller ("RTC Miller") worked the night shift from 2300 hours on May 12 through to 0700 hours on May 13, 2012. The grievor relieved RTC Miller for his shift commencing at 0700 hours May 13,

2012. Their recollections of what transpired during the transfer in are irreconcilable. Their respective perspectives are set out below.

RTC Miller's Version

According to RTC Miller, the grievor arrived at approximately 0658 hours to perform the transfer. As he walked in the door, and before saying anything else the grievor told RTC Miller that he "got it," set his bag down, and proceeded to his locker where he again said "got it" "you can leave."

The grievor then approached the desk from his locker as RTC Miller was getting everything together for the transfer. The transfer line-up RTC Miller had prepared reminded him to ask the grievor about whether or not he knew how to do it. RTC Miller explained that there had been an issue with the line-up on the Friday prior. He clarified that it had been difficult to read and information contained was more than eight hours out. After the "line-up conversation" RTC Miller claims the grievor said: "I got it" for a third time and reiterated that RTC Miller could leave.

RTC Miller then told the grievor that he couldn't leave until they did a proper transfer and he was logged on. The grievor said he was going to call the shift supervisor. RTC Miller then said to the grievor that that was fine. The grievor then called the shift supervisor complaining that RTC Miller would not leave. The shift supervisor seemed caught off guard.

According to RTC Miller, after the conversation with the shift supervisor, the grievor logged on. RTC Miller explained that he then tried several times to explain that train 198 was changing off in Depot 1 and that train 2/269 was backing down P1 and then heading south. RTC Miller repeatedly interrupted him saying "got it." The transfer was ultimately completed at approximately 0715 hours and RTC Miller then left.

The grievor's Version of the Transfer

The grievor's formal investigation statement was not given until March 21, 2013. It was delayed approximately 10 months amidst the allegations surrounding the grievor's deliberate and repeated attempts to frustrate the investigative process.

In correspondence delivered to the Company in June 2012, the grievor conveyed to the Company that prior to the transfer on May 13, 2012, RTC Miller had exhibited "hostile and aggressive" behaviours towards him. The grievor wrote that during the transfer process RTC Miller had engaged in a "blast of accusations" and made a "long presentation of his [the grievor's] supposed inadequacies" that lasted between 20 minutes and 30 minutes. Other than the line-up issue (identified by RTC Miller in his statement above), the grievor identified no other alleged "inadequacies." The grievor explained that RTC Miller stayed an additional 10 minutes after he had phoned the shift supervisor to "berate" him. The grievor wrote that he remembered saying "got it" repeatedly to encourage RTC Miller to leave. He could not remember when he said it for the first time. He thought it was around the time he called the shift supervisor.

At the outset of his statement taken on March 21, 2013, the grievor denied that he had arrived at approximately 0658 hours as had been reported by RTC Miller. He confirmed twice during his statement that he did not recall what time he arrived that day. He insisted, however, that it was not possible that RTC Miller's recollection was accurate.

The grievor denied that he walked into the workspace as reported by RTC Miller immediately saying that he "got it," proceeding to his locker where he again allegedly said "got it" "you can leave." He acknowledged that he told RTC Miller "I got it" after the complete transfer, which he asserted was done before he contacted the shift supervisor. He also said that the transfer was not completed until after the call to the shift supervisor. The grievor also stated that after the phone call RTC Miller was not confrontational or hostile towards him.

Later when the investigator went back to the same sequence of events, the grievor said that "he could not recall" whether RTC Miller had said he could not leave until a proper transfer was completed and he was logged on. He also conceded that RTC Miller may have believed that he had not given the grievor the whole transfer, even though he had signed off on it.

The grievor initially stated that he was unable to explain why RTC Miller would lie to the investigator, and then speculated that it was because RTC Miller had "hurled" an office chair at him as he was coming up the stairs in March 2012. He characterized RTC

Miller's conduct towards him as an "outright act of hostility or aggression." The grievor did not report that incident. He said he did not do so because he did not want RTC Miller disciplined.

The grievor postulated that RTC Miller may have fabricated the events of May 13, 2012 because of an earlier incident involving the grievor's toaster. The grievor indicated that he brought a toaster to the workplace, and that RTC Miller moved it from its location on top of the microwave to the top of the fridge. According to the grievor, RTC Miller, repeatedly asked him: "Are you moving in or something?"

When asked by the investigator if he had ever confronted RTC Miller about what he identified as the alleged hostile and aggressive behaviors towards him, the grievor said that he had shared his view that RTC Miller was hostile and aggressive with him during the May 13, 2012 transfer. Allegedly, RTC Miller's response had been to laugh at him.

Later in the same statement the grievor confirmed that he did not believe that RTC Miller threw the chair down the stairs at him to cause him harm. He retracted the accusation and apologized to the investigator for alleging that RTC Miller had attempted to assault him.

RTC Miller Re-interviewed

RTC Miller was re-interviewed once the Company had had an opportunity to take the grievor's statement. The information provided during RTC Miller's supplemental interview was consistent with the information provided in his first statement.

When confronted with the "chair incident" RTC Miller was able extrapolate that the grievor must have been referring to an occasion when the grievor had suggested that they clean a room on the third floor of the story tower. They had spent approximately 30 minutes doing so. RTC Miller's best recollection was that two broken chairs were moved down from the office to the second floor. RTC Miller said that nothing was thrown by him at the grievor.

Without any prompting about the "toaster incident" described above, RTC Miller's perspective was that he and the grievor had "stopped getting along" after RTC Miller had moved his toaster from next to the microwave, to below the counter in a drawer. RTC Miller recollected that the grievor approached him on his next shift and said: "Do you have a problem with the placement of my toaster?" RTC Miller explained that it was at that point that he realized the toaster was the grievor's. RTC Miller then moved the toaster to the top of the fridge with other appliances.

When asked whether the grievor had confronted him about his alleged hostile and aggressive behaviours, RTC Miller freely admitted that the grievor had accused him of creating a "hostile work environment" the morning of May 13, 2012. Miller denied

laughing at the grievor and said that he did not know why the grievor would say that. RTC Miller reiterated that he just wanted to do a proper transfer and go home.

In the supplemental interview held, RTC Miller explained the process for signing the transfer book. He explained that when your relief walks in, you sign off the computer, and sign off the hardcopy of the transfer book. Then the other RTC sits down, logs on, a verbal transfer is completed and the transfer book is reviewed. It is at that point that the incoming RTC signs the book. RTC Miller agrees that he had signed the transfer book at the outset of his interaction with the grievor but had not yet completed the transfer as recounted in his initial statement.

DECISION

The parties agree that a proper transfer between RTCs is imperative to ensure that there is a complete understanding of all necessary information before the relieved RTC departs. RTC Miller had an obligation, among others set out in CROR Rule 148, to ensure that the grievor understood all information being transferred before RTC Miller left. Similarly, the grievor had a corresponding duty to hear all the information being transferred by the RTC transferring off duty.

I must decide whether the grievor deliberately attempted to abbreviate the transfer process by his conduct the morning of Sunday, May 13, 2012. If I find that he did, my view is that such conduct is warranting of discipline. To deliberately attempt to prevent a fellow RTC from conveying all information is of serious concern and is

properly considered culpable conduct because it jeopardizes the transfer, thereby putting other employees and the general public at risk.

I have set out both the grievor's account of what transpired during the transfer and RTC Miller's. As is apparent, those accounts cannot be reconciled. I have no difficulty accepting RTC Miller's account of what transpired during the transfer over the grievor's.

RTC Miller's statements were internally consistent as well as consistent over time. RTC Miller was forthright and direct in the answers he provided. In particular, I note that in his supplemental statement, he was able to provide information that one can readily recognize as probable considering the overall circumstances.

This is in contrast to the grievor's accounts of the transfer, which are replete with inconsistencies. The grievor was unclear in providing answers to straightforward questions and he was at times evasive. Among the inconsistencies was that he was adamant that he did not say: "I got it" until after he had called the shift supervisor. Yet, he also articulated that he called the shift supervisor to get RTC Miller to leave because the transfer was complete. The grievor admitted to not knowing when he had first said "I got it," recalled saying it repeatedly but also suggested that he not made the comment repeatedly. The grievor also contradicted himself when he reported that there was no hostility after the phone call the shift supervisor while alleging that RTC Miller had "berated" him for another 10 minutes.

The grievor's information is fundamentally unreliable and in reading it one is left with the impression that he has very little insight into that being the case.

It must also be noted that the Company's investigation was undertaken, not because of any report initiated by the grievor but because the grievor made a call to the shift supervisor to report that RTC Miller would not leave. One can appreciate that this is not a common occurrence and would be cause for concern.

Prior to providing his formal investigative statement, and after he realized there was going to be an investigation into the transfer, the grievor alleged that RTC Miller had repeatedly engaged in hostile and aggressive behaviour towards him prior to May 13, 2012. Other than the alleged assault, the grievor provided no particulars other than RTC Miller's conduct surrounding the "toaster issue."

The grievor's credibility was severely undermined during his investigative statement. He essentially acknowledged in the course of the interview that he fabricated the chair-throwing incident. It is simply not believable that that incident, coupled with the toaster one motivated RTC Miller to make up his version of the May 12 2013 transfer of duties.

There is no reason for RTC Miller to have fabricated the information he provided to the Company when it investigated the transfer issue. It was the grievor who

fabricated an alleged attempted assault. And it was the grievor who offered an improbable reason (the toaster incident) to explain why RTC Miller was predisposed to lie about the May 13, 2012 transfer incident.

For these reasons, I find that when the grievor attended work at approximately 0658 hours on May 13, 2012, he deliberately attempted to abbreviate the process thereby failing to ensure a safe effective and efficient transfer between RTC Miller and himself.

At the time of the imposition of the discipline giving rise to his dismissal, the grievor's record stood at 57 demerit marks. The grievor has worked for the Company since 1986, and since 1998 he has worked as a RTC. Notwithstanding his long service with the Company, the grievor has an extensive discipline history. Since entering the Company's service, the grievor has been disciplined on 20 occasions for a total of 220 career demerit marks with 12 of the 20 occasions relating to rule infractions, while the remaining eight were conduct-related. Most recently, in 2011, the grievor was disciplined twice for inappropriate conduct.

In all circumstances, I am satisfied that the Company followed the principles of progressive discipline in the application of the Brown system, and that its decision to assess 20 demerits against the grievor should not be disturbed.

Given that the assessment of 20 demerit points is sufficient to justify the grievor's termination under the Brown system, it is unnecessary to address the Company's assessment of 40 demerit points against the grievor for conduct unbecoming as described in the JSI, and I decline to do so.

The grievance is dismissed.

March 25, 2014



CHRISTINE SCHMIDT
ARBITRATOR