

**CANADIAN RAILWAY OFFICE OF ARBITRATION  
& DISPUTE RESOLUTION**

**CASE NO. 4334**

Heard in Montreal, October 14, 2014

Concerning

**CANADIAN NATIONAL RAILWAY**

And

**UNIFOR**

**DISPUTE:**

1. Issuance of 25 demerits to Brampton Intermodal Clerk S. Showkenik for circumstances surrounding his alleged sleeping while on duty on August 6, 2011.
2. Issuance of 30 demerits for his alleged conduct on August 6, 2011 toward Senior Terminal Coordinator William Perry.
3. Issuance of 20 demerits for his alleged inappropriate comments made regarding Senior Manager Intermodal Operations, Great Lakes and Prairie Dan Cater in an email sent on April 23, 2013.

**JOINT STATEMENT OF ISSUE:**

1. On September 04, 2013 a formal employee investigation was conducted with S. Showkenik for circumstances surrounding his sleeping while on duty on August 06, 2011. Following the investigation, on September 24, 2013, Mr. Showkenik was assessed 25 demerits.

The Union contends that the investigation process was flawed, the grievor was in medical distress at the time of the incident and that he was verbally abused by Terminal Manager Bill Perry on the date in question. The Union requests that discipline be expunged from Mr. Showkenik's disciplinary record and that he be made whole with full redress.

2. On September 04, 2013 a formal employee investigation was conducted with S. Showkenik for circumstances surrounding his conduct unbecoming on August 06, 2011, toward Senior Terminal Coordinator William Perry. Following the investigation, on September 24, 2013, Mr. Showkenik was assessed 30 demerits.

The Union contends that the investigation process was flawed, the grievor was in medical distress at the time of the incident and that Mr. Showkenik does not remember making the phone calls due to the medical state he was in at the time.

The Union requests that discipline be expunged from Mr. Showkenik's disciplinary record, that he be reinstated and with total compensation for all lost wages, benefits and reasonable expenses, and to make the grievor whole with full redress.

3. On September 06, 2013 a formal employee investigation was conducted with S. Showkenik for circumstances surrounding his inappropriate comments made regarding Senior Manager Dan Cater in an email sent on April 23, 2013. Following the investigation, on September 24, 2013, Mr. Showkenik was assessed 20 demerits.

The Union contends that the investigation process was flawed, the greivor was harassed while on Company property on April 23, 2012, and that Mr. Showkenik had used "spell check" which auto corrected the word "GEN SUP" to "Gnome".

The Union requests that discipline be expunged from Mr. Showkenik's disciplinary record, that he be reinstated and with total compensation for all lost wages, benefits and reasonable expenses, and to make the grievor whole with full redress.

The Company disagrees with the Union's contentions and has declined the Union's grievance.

**FOR THE UNION:**

**(SGD.) B. Fitzgerald**

**National Staff Representative**

**FOR THE COMPANY:**

**(SGD.) J. Darby**

**Labour Relations Associate**

There appeared on behalf of the Company:

- |              |   |
|--------------|---|
| J. Darby     | – Labour Relations Associate, Toronto       |
| S. Blackmore | – Senior Manager Labour Relations, Edmonton |
| B. Perry     | – Senior Manager Intermodal, Chicago        |
| C. Gilbert   | – Manager Labour Relations, Montreal        |

There appeared on behalf of the Union:

- |               |   |
|---------------|---|
| R. Fitzgerald | – National Staff Representative, Montreal |
| B. Kennedy    | – President, Edmonton                     |
| J. White      | – Regional Representative, Toronto        |
| P. Murray     | – Regional Representative, Moncton        |
| S. Showkenik  | – Grievor, Toronto                        |

### **AWARD OF THE ARBITRATOR**

The Union grieves the imposition of 20, 30, and 25 demerits, respectively, as set out in the consolidated Joint Statement of Issue. Mr. Shawn Showkenik ("the grievor") was dismissed for the accumulation of demerits on September 24, 2013. The Union requests that all discipline be expunged from his record.

## Factual Background

The Company hired the grievor in 1990. At the time of the August 6, 2011 incidents, the grievor's discipline record stood at 15 demerit marks.

Since 2009, the grievor had been working as a gate clerk at the Brampton Intermodal Terminal ("BIT"). He had returned from a sick leave of absence on or about July 28, 2011.

Immediately after the incidents of August 6, 2011, the grievor went off on sick leave.

In April 2012, while the grievor was off on sick leave, Supervisor William Perry ("Supervisor Perry") discovered the grievor and his wife on Company property. The grievor was unwilling to answer a question put to him as to why he was there. Ultimately Senior Terminal Manager Dan Cater ("Manager Cater") intervened. He advised the grievor of his view that it was insubordinate to refuse to answer the question Supervisor Perry had put to him. A brief conversation ensued and the grievor and his wife left Company property.

In April 2013, while still on sick leave, the grievor emailed Ms. Lynda Seip, Administration Manager at the BIT. The email reads:

Good morning Lynda,

I would like to know if you can tell me Whom I must contact to resign from CN I would appreciate that.

I would need to know what our pension plan number is and what number to call the pension people.

Also whom at CN I will need to advise of me resigning. I cannot put up with the abuse I receive from the Gnome Dan Cater while I was sick and passed out at work. I have had enough and feel it is time to end my career.

Any help you can help me with I would appreciate

Have a Great Day  
Shawn Showkenik

The grievor chose not resign. He returned to work for a day on July 23, 2013. He then immediately took five weeks of vacation and returned to work on August 29, 2013. At that time the grievor was given three notices to appear for formal employee investigations pertaining to the three incidents that are the subject matter of this arbitration.

With respect to the discipline imposed for sleeping and conduct unbecoming on August 6, 2011, the record reveals the following facts.

The grievor commenced his shift at 00:01 hours. At approximately 07:10 hours, Supervisor Richard McNeil ("Supervisor McNeil") noticed the grievor sleeping. He asked Terminal Coordinator David Morse ("Coordinator Morse") to deal with the situation. Coordinator Morse approached the grievor's cubicle, leaned over the front partition of his desk and called the grievor's name several times. The grievor did not answer. The grievor's arms were crossed, his head was down with his hat pulled down low and his feet were up on the desk.

Coordinator Morse proceeded to walk around the cubicle, again calling the grievor's name. After calling the grievor's name for a second time, the grievor opened his eyes. Coordinator Morse told the grievor that it was unacceptable to be sleeping while on duty. The grievor responded that he was sorry and that it would not happen again. The grievor took his feet off the desk and resumed his work.

Approximately 20 minutes later, at 07:30 hours, Supervisor Perry left his office to speak with Coordinator Morse. Supervisor Perry saw the grievor sleeping in his chair. Supervisor Perry called Coordinator Morse over. He told Supervisor Perry that he had already spoken to the grievor earlier that morning about sleeping. Supervisor Perry woke the grievor up in Coordinator Morse's presence and called the grievor to into his office.

Once in the office, Supervisor Perry told the grievor that since he had talked to him earlier in the year about sleeping while on duty, this time he would be lined up for a formal statement. Supervisor Perry told the grievor that he was aware that he had been sleeping earlier that same morning. The grievor did not respond. The grievor then left the workplace. He drove himself home.

Approximately 15 minutes later, at 07:45 hours the grievor called Supervisor Perry and accused him of discriminating against him because he was a diabetic. The grievor told Supervisor Perry that he was to give him 72 hours notice for the formal statement because he was bringing his lawyer and diabetic nurse to the statement. Supervisor Perry denied that he was discriminating against the grievor and told him that any employee found sleeping on duty would be investigated. Supervisor Perry went on to tell the grievor that he would be given to 48 hours notice - not 72 hours - in accordance with the collective agreement. The grievor then said "make sure you mail it to me sweetheart" and hung up the phone.

At approximately 08:10 hours, Coordinator Morse retrieved the following voice message from the grievor;

Shawn Showkenik SRB 104110 booking off due to my disability of diabetes. Ah, tell Perry when he gets the balls to set me up an investigation my lawyer is going to have to love to come in and meet him. So you tell him to go ahead, I'm off on my disability and I'll make arrangements. Also tell him when he has the time to give me a call and tell him he can lose the attitude my lawyer will take it out of him. Thank you.

In the grievor's investigative statement, taken over two years later, the grievor denied sleeping. He said he was "passed out" from his medical conditions. He stated that he had no recollection of anything until Supervisor Perry was screaming at him at his desk. The grievor clarified that must have been "passed out" from his return from lunch at approximately 05:55 hours until Supervisor Perry was screaming at him at 07:35 hours. The grievor thought that it had taken him three to five minutes for him to "come to."

Once in Supervisor Perry's office, the grievor maintained that the "yelling and screaming" continued. The grievor asserted that he was subjected to verbal abuse. When asked to elaborate on how Supervisor Perry was verbally abusing him, the grievor stated: "per Bill 168 as no supervisor or employee has the right to yell or scream at any employee or supervisor at any time." When pushed to describe details the grievor responded that it was something about an investigation or sleeping on the job but that he was "pretty dazed at the time." The grievor named two people who he thought could corroborate that Supervisor Perry was abusive. No corroborative evidence of that kind was adduced in the course of the hearing. Coordinator Morse and Supervisor McNeil, who were both very near the alleged confrontation, denied any such conduct on Supervisor Perry's part.

The grievor acknowledged during his investigation that at no time on August 6, 2011, while at the workplace, did he raise his medical conditions with anyone.

The grievor asserted in his investigative statement, however, that when he had been found sleeping earlier in 2011 he disclosed to Supervisor Perry that he suffered from diabetes and cirrhosis of the liver. To corroborate this statement, the grievor produced an email from a co-worker written one month after his termination. The co-worker confirms that she had mentioned to Supervisor Perry “off the record” that the grievor had a liver issue. The co-worker explained she was not surprised that Supervisor Perry would have no recollection of her mentioning this, however.

With respect to the above referenced telephone conversation between Supervisor Perry and the grievor at 07:45 hours on August 6, 2011 and the voicemail left by the grievor shortly thereafter, the grievor identified the voice as his but was unable to recall anything about either communications because he was in medical distress.

Finally, concerning the email sent to Ms. Lynda Seip wherein the grievor refers to Manger Dan Cater, a man of small stature, as a “Gnome,” the grievor’s explanation was that he had likely typed in GEN SUP for general superintendent but that the spell check had replaced GEN SUP with “Gnome.”

In support of its position, the Union relies on a very brief letter from Dr. Husein dated August 29, 2014, which confirms that in July 2011 the grievor’s diabetes was not controlled.

Among other medical documents, I have before me an emergency record from the grievor's attendance at St. Mary's General Hospital the day following the August 6, 2011 incidents – on August 7, 2011 at 13:39 hours. The emergency record reveals that upon admission the grievor's chief complaint was a headache and dehydration. It confirms that the grievor suffers from cirrhosis and diabetes.

## **DECISION**

The Union argues that on August 6, 2011, when the grievor was caught “sleeping” that in fact he was in a nonresponsive state – what I take to be a diabetic coma. The Union submits that, because the grievor did not verbally respond to Supervisor Perry in his office when he told the grievor that he would be lined up for a formal statement, this corroborates the grievor's claim to have been in a “non-responsive” state due to his medical condition. According to the Union, the grievor's medical condition explains why he has no recollection of the conversation with Supervisor Perry or the voice mail he left for him.

There is no evidence before me to support the conclusions the Union would have me make.

The only conclusion that can be drawn from the totality of the record before me is that the grievor is not being truthful. The grievor is attempting to rely on a condition from which he suffers, namely diabetes, to support his untenable account of what transpired before he drove himself home the morning of August 6, 2011.



Multiple witnesses saw the grievor sleeping not once but twice as recounted above. After having been woken up for the second time, the grievor walked from his workspace to Supervisor Perry's office. The grievor himself agrees that he did not tell anyone that he was in distress or not feeling well. In such circumstances it was not incumbent on anyone to ask the grievor if there was some medical reason he was sleeping.

It is axiomatic that an employee must remain conscious and alert while at work. Clearly, the grievor failed to meet this basic expectation. Moreover, this was not the first time the grievor was discovered sleeping at work. The Company's assessment of 25 demerits against the grievor for sleeping was appropriate and warranted.

With respect to the comments the grievor made (of which he maintains he has no recollection) in his phone conversation with Supervisor Perry and the voice mail left shortly thereafter, I have Supervisor Perry's evidence and the audiotape of the voice message left for him shortly after the grievor left the workplace. In the voicemail message, the grievor does not sound like he is in a state of incoherence. To the contrary, he sounds lucid and coherent. The tone of the grievor's voice is deliberate, antagonistic and consistent with the sarcastic and belligerent nature of the recorded message. Supervisor Perry's testimony is consistent with the voicemail. The language chosen by the grievor in both circumstances was highly inappropriate, disrespectful on its face and deserving of a significant disciplinary sanction.

The grievor did not acknowledge the inappropriateness of his communications during the investigation. He abdicated any responsibility for his conduct by relying on a medical

condition, which has not been proven to be linked to the grievor's exhibited behaviour. The Company is correct when it submits that, if the grievor seeks to be exonerated of culpability for the inappropriate conduct, it is incumbent on him to provide medical evidence to support a causal link between the medical condition and the misconduct itself. It is hardly surprising that there is no such evidence before me.

A review of the grievor's disciplinary record reveals the imposition of discipline on two separate occasions for conduct unbecoming. I note that even during the investigative statement the grievor displayed an irreverent and disrespectful attitude towards Coordinator Morse when he asked him where he got his medical degree.

For the reasons stated above I do not accept the grievor's reliance on an alleged state of "incoherency" due to his medical condition to deny accountability for his comments. It was convenient that he claimed not to recall making them. I do not believe the grievor. He is responsible for his most obviously disrespectful and inappropriate communications with his Supervisor. In all the circumstances, I am not inclined to disturb the imposition of 30 demerits against the grievor for conduct unbecoming.

For the reasons set out above and on a review of the facts, I have come to the conclusion that it would not be appropriate to disturb the imposition of 20 demerits for the grievor's sleeping on-duty on August 6, 2011 or the 30 demerits which were assessed for his conduct unbecoming as reflected in the grievor's comments to Supervisor Perry that same morning. Those assessments of discipline are sufficient to justify the grievor's termination

under the Brown system of discipline. It is therefore unnecessary to address the Company's assessment of 20 demerits for the grievor's alleged inappropriate comments made about Manager Dan Cater.

I recognize that the grievor has some 24 years of service with the Company. Considering the totality of the grievor's record, however, with particular regard to whether the employment relationship has any potential for rehabilitation, my view is that the grievor's incredible use of an unwarranted "medical defense" to absolve him of misconduct of which I have found him to have been both responsible and aware, is deeply disturbing. It was an ill-advised attempt by the grievor to avoid the inevitable conclusion that he was indeed responsible for the two infractions committed both of which were deserving of discipline.

For the foregoing reasons, the grievor's dismissal for an accumulation of demerits is upheld.

October 30, 2014

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CHRISTINE SCHMIDT  
ARBITRATOR