

CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4346

Heard in Montreal, November 13, 2014

Concerning

CANADIAN PACIFIC RAILWAY

And

**TEAMSTERS CANADA RAIL CONFERENCE
MAINTENANCE OF WAY EMPLOYEES DIVISION**

DISPUTE:

Dismissal of Mr. Mike Pinsonneault.

STATEMENT OF ISSUE:

On September 17, 2013 the grievor, Mr. Mike Pinsonneault, was dismissed from Company service for “conduct unbecoming an employee of Canadian Pacific as evidenced by your repeated issuance of inappropriate, threatening and undesired text messages and voicemails to your Supervisor between August 10, 2013 and 20, 2013”. A grievance was filed.

The Union contends that the grievor, in his texts and messages, did not make any threats; Mitigating factors, including the death of the grievor’s daughter, existed. The Company has taken no steps to accommodate the disability arising from the grievor’s family status and situation; The discipline assessed the grievor was excessive and unwarranted in the circumstances.

The Union requests that the grievor be reinstated into Company service forthwith without loss of seniority and with full compensation for all wages lost as a result of this matter.

The Company denies the Union’s contentions and declines the Union’s request.

FOR THE UNION:
(SGD.) W. Brehl
President

FOR THE COMPANY:
(SGD.) M. Moran

There appeared on behalf of the Company:

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| M. Moran | – Labour Relations Officer, Calgary |
| K. Hutchings | – Assistant Roadmaster, Belleville |

There appeared on behalf of the Union:

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| W. Brehl | – President, Ottawa |
| D. Brown | – Counsel, Ottawa |
| R. Terry | – Vice President, Ottawa |

AWARD OF THE ARBITRATOR

This matter concerns the dismissal of the grievor for conduct unbecoming as evidenced by the repeated issuance of inappropriate, threatening, and undesirable text messages and voicemails to his supervisor (Kevin Hutchings) between August 10 to 20, 2013. The Union concedes that the communications initiated by the grievor to Mr. Hutchings were inappropriate and undesired, but the Union contends that the grievor did not make any threats. The Union further concedes that the grievor's misconduct deserves some discipline, but not termination.

The evidence is clear that the grievor sent Mr. Hutchings communications that were inappropriate and harassing. There is an issue as to whether any of the communications were threatening.

In total, the grievor left 11 voice messages for Mr. Hutchings between August 10 and 18, 2013. In addition, the grievor sent approximately 10 texts messages to Mr. Hutchings between August 11 and 20, 2013. However, it should be noted that Mr. Hutchings never returned the grievor's communications during this period of time. Mr. Hutchings indicated in his evidence that he was on vacation until August 18, 2013, and his boss advised him not to respond to the communications.

The one communication identified by the Company and Mr. Hutchings as being considered a threat, was a voicemail message left by the grievor for Mr. Hutchings on August 11, 2013 at 2:00 pm. The transcript of the message is as follows:

“Ignoring me are you I heard that Dustin already admitted to you that hes (sic) the one that reversed the switch and now your hanging me out to dry. Well I got your number. Bye.”

The Company and Mr. Hutchings also identified a particularly troubling and bizarre voice message left by the grievor on August 18, 2013 at 4:40 pm, where the grievor indicated as follows:

“...all I got to say is ahhh you got to get back to me cause my wife’s about to the point now where she’s going to call CP about you saying you’re going to bend her over in a text message as she has it so you might want to get back to me.”

The balance of the communications are generally related to requesting a call back from Mr. Hutchings to discuss an incident that occurred at work on August 9, 2013. The incident involved the grievor working in the capacity of an Extra Gang Forman on a Surfacing Crew. It is alleged that the grievor failed to ensure that a non-main track switch was restored to normal and failed to protect track equipment with a private lock. The grievor was assessed 25 demerits for this incident and removed from service for five days. The other employees involved in the incident were permitted to remain working. The grievor has grieved this discipline.

On two occasions the grievor uses colourful language in his communications, which Mr. Hutchings testified he had used himself before in the workplace. In his evidence, Mr. Hutchings referred to this type of language as “railroad language”. This evidence leads me to conclude that the use of such colourful language is acceptable behaviour, in the context of the grievor’s workplace and interaction with this supervisor.

In one text message sent August 19, 2013, the grievor apologizes to Mr. Hutchings and reaches out for assistance. In particular, the grievor stated as follows:

“Kevin I’m sorry you now (sic) I wouldn’t say anything against you I concenter (sic) us friends I no (sic) you can’t talk on company phone I really need your help I need my job please help thank you.”

After reviewing all of the communications, I am satisfied that the grievor is guilty of misconduct but I am not convinced on the balance of probabilities that the grievor intended to threaten Mr. Hutchings.

I appreciate how Mr. Hutchings and the Company might interpret the August 11, 2013 voice message as threatening. However, I find that a review of all the evidence leads me to agree with the Union that the voice message was not intended to be a threat. I say that because the grievor sent five text messages later that same day and none were what I would characterize as threatening except a reference to speaking with a Union Representative Wade Phillips. Telling a member of management that you spoke to a Union Representative is not threatening. Rather it is exercising your rights under the collective agreement.

Furthermore, after August 11, 2013 the grievor leaves a number of messages requesting that Mr. Hutchings contact him. None of those additional messages are threatening nor could they be interpreted as threatening.

I acknowledge that the August 18, 2013 voice message (referenced earlier in this award) was both troubling and bizarre. However, the grievor apologized the next day in a text message (also noted earlier in this award).

After considering all of the evidence and submissions of the parties, I find that the grievor engaged in misconduct but the misconduct was not as serious as alleged by the Company.

In terms of the appropriate penalty, there are several aggravating factors that count against the grievor.

In April 2009, the grievor was assessed forty demerits resulting in his discharge for sending inappropriate text and voicemail messages to supervisors. The grievor filed a grievance and the matter came before Arbitrator Picher. Arbitrator Picher reinstated the grievor in **CROA&DR 3937**. Arbitrator Picher made the following finding:

On the whole, the Arbitrator is satisfied that the bizarre and uncharacteristic conduct engaged in by Mr. Pinsonneault, which is entirely out of keeping with his history of employment, stems from an isolated period of unusual stress. I am not satisfied that these events confirm the total failure of an ongoing viable employment relationship, given the grievor's subsequent progress.

On the whole I am satisfied that this is an appropriate case for a reduction of penalty by reason of the mitigating factors presented, albeit the grievor's return to work should be on conditions fashioned to protect the employer's legitimate interests.

The grievance is therefore allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without loss of seniority and without compensation for any wages or benefits lost. The grievor's reinstatement shall be subject to the Company's option to require that he continue to undergo anger management therapy for such reasonable period as the employer and the Union may agree is appropriate, and failing their agreement, is determined by the

Arbitrator. Any failure by the grievor to accept or honour the conditions established may result in his termination.

It should be noted that the Company did not require the grievor to continue to undergo anger management therapy.

From the date of Arbitrator Picher's Award on September 20, 2010 until September 18, 2013 the grievor remained discipline free.

On September 13, 2013 the grievor was assessed twenty-five demerit marks for the incident that occurred on August 9, 2013 (referenced earlier in this award). As indicated earlier, this discipline was grieved and remains outstanding.

In addition, on September 17, 2013, the grievor was assessed 30 demerits for the "issuance of an inappropriate voicemail" to his General Manager on August 11, 2013. This discipline has also been grieved and remains outstanding.

It would be inappropriate for me to make any comments with respect to the validity of the grievances filed in respect of the two other incidents. However, it should be noted that these disciplines and the grievor's termination are all related to the incident that occurred on August 9, 2013. Furthermore, the communications that are at the heart of this matter make it clear that the grievor felt that he was unjustly disciplined for the August 9, 2013 incident.

In terms of mitigating factors, the grievor is a very long service employee, having begun working for the Company on March 18, 1985.

The Union brought to my attention a number of awards where more offensive language has been given less serious discipline, see for example **CROA&DR 4304**.

The grievor apologized in a text message to Mr. Hutchings on August 19, 2013. The grievor also apologized a second time during the investigation on September 12, 2013.

The grievor has sought help in coping with stressful situations and has attended anger management sessions with the John Howard Society of London and District.

Most significant is the fact that at the relevant time the grievor was under extreme stress dealing with his daughter being ill in the hospital. On September 12, 2013, during the investigation, the grievor admitted to the alleged misconduct, apologized and asked for compassion due to his personal circumstances. The personal circumstances referred to by the grievor was the stress that he was feeling due to his daughter's illness and ultimate passing away. It goes without saying that the loss of a child is one of the most devastating, unnatural and stressful situations a parent could ever face. I cannot imagine the pain and suffering the grievor must have been experiencing due to such a stressful situation.

I am satisfied that this is an appropriate case to reinstate the grievor in his employment. However, the grievor should understand that this may well be his very last chance to demonstrate that he can conduct himself in a proper manner.

Accordingly, for all the reasons indicated above, I am allowing the grievance in part. I direct that the grievor be reinstated into his employment forthwith, without loss of seniority but without compensation for any wages or benefits lost. The grievor's reinstatement shall be subject to him continuing to participate in anger management for such reasonable period as the Union and the Company agree is appropriate, and failing such agreement, as determined by me.

The grievor would also be wise to seek out additional assistance to cope with his anger, stress and grief (e.g. psychological therapy). However, I leave that decision to the grievor.

I remain seized to deal with any issue that might arise out of my Award.

November 20, 2014

JOHN L. STOUT
ARBITRATOR