

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

CASE NO. 4420

Heard in Montreal, October 16, 2015

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the dismissal of Locomotive Engineer A.J. (Tony) Maglio of Cranbrook, B.C.

UNION'S EXPARTE STATEMENT OF ISSUE:

On October 17, 2014 Engineer Maglio was informed by letter from the Company that he was dismissed from Company service for, "conduct unbecoming an employee of Canadian Pacific Railway, for your insubordinate actions as demonstrated by your repeated refusal to follow instructions of a Company Officer resulting in unnecessary train delay while working on train V67-01 at Skookumchuck on October 1st, 2014."

The Union position in this case is there was no culpable behaviour on the part of Engineer Maglio in this case and the Company has not met their burden of proof. Alternately, we contend the discipline in this case was unwarranted, unjustified and excessive in all of the circumstances.

The Union therefore requests an order from the Arbitrator removing the discipline imposed in this case from Engineer Maglio's record, that he be re-instated into his employment without loss of pensionable service and seniority and that he be 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.) G. Edwards
General Chairman

FOR THE COMPANY:
(SGD.)

There appeared on behalf of the Company:

- J. Bairaktaris – Director Labour Relations, Calgary
- B. Scudds – Assistant Director, Labour Relations, Toronto
- J. Huxtable – Assistant Superintendant, Fort Steele

And on behalf of the Union:

- K. Stuebing – Counsel, Caley Wray, Toronto
- G. Edwards – General Chairman, Calgary
- B. Church – Vice Local Chairperson, Fort Steele
- T. Maglio – Grievor, Fort Steele

AWARD OF THE ARBITRATOR

This arbitration concerns Locomotive Engineer Tony Maglio's ("the grievor") discharged on October 17, 2014. At the time of the grievor's discharge he had thirty-four years service with Canadian Pacific Railway ("the Company") and his disciplinary record stood at thirty demerits.

Approximately one year after the Company discharged the grievor, and notwithstanding its position at arbitration that the grievor's conduct warranted his dismissal, on October 7, 2015 the Company reinstated him.

The relevant facts as they relate to the allegation of insubordination resulting in a train delay are straightforward and not substantially in dispute.

On October 1, 2014, the grievor was assigned, together with Conductor Aasland ("Aasland") to work on a Way Freight assignment from Fort Steele B.C. to Golden B.C. The assignment requires switching work and set offs, etc. at customer locations along

the route, including at Skookumchuck pulp mill. There is a particularly heavy load of switching at Skookumchuck. Trainmaster Huxtable (“Huxtable”) was to assist with the switching there.

For many years prior to the incident in issue, the work performed with Huxtable on October 1, 2104 was performed with a trainman. At the time of the incident, the Company’s expectation for the completion of work to be performed at Skookumchuck from arrival to departure was 90 minutes. The time frame was extended to 120 minutes shortly after the incident. Also of note is that since October 2014, the Company has abolished the Weight Freight assignment and re-bulletined it with a trainman such that a manager is no longer regularly working with the crew.

Against this contextual backdrop, on October 1, 2014, after cars were lifted and pulled from the customer facility, the crew was to head to the main track and head north past the Torrent Road Crossing. Huxtable would protect the crossings on the way to the main track and this information was conveyed to the grievor and Aasland. The crew was to couple lifted cars with the train that was on the main track.

The Company's first concern about the grievor's behaviour was that he made an unplanned stop on the north leg of the Wye. According to the Company, that unplanned stop lasted no more than five minutes. When Huxtable asked the grievor to pull ahead clear of the north switch, he did so immediately.

Huxtable proceeded in his truck to the Skoomumchuck River crossing (or McNair crossing) to protect it while the crew coupled the lifted cars with the rest of the train on the main track. He instructed the grievor to back up to couple onto the train. The grievor did not immediately respond to Huxtable's direction as he had when told to pull ahead after the unplanned stop described above. Huxtable relayed the instruction again. The grievor told Huxtable that he would not move backwards until Aasland had completed the paperwork and until he knew the positioning of the dangerous goods on his train (which positioning he admitted during the investigation he already knew) and that he would not leave Skookumchuk until this was done.

Huxtable responded by telling the grievor that he was to immediately commence the backup movement. The grievor then threatened that he might invoke Part II of the *Canada Labour Code*, citing Huxtable's direction as unsafe (during the investigation the grievor acknowledged there was no safety issue in the circumstances). Huxtable then warned the grievor that if he did not comply he might be removed from service. The grievor's responded: "Nice try Jack, I'm not moving, the Conductor will be done in two minutes."

The grievor recounted the end of the exchange with Huxtable in the course of the investigation, as follows:

MH climbed onto the lead unit and told me I was going to be pulled out of service. He then walks back to stand beside his truck (parked close to the engineer's side window).

On the radio I asked, "When are you going to pull me out of service?"

MH replied, "After you put your train away,"

I leaned out of the window and shouted to him (the engine was noisy), "What about now?"

MH shouted up to me, "Don't tempt me, I'm an engineer you know, I can put the train away."

I said, "What's the difference? I get pulled out of service now; I get pulled out of service later."

He shouted back, "it would probably be better for you if you put the train away. Otherwise you can go sit over there and wait while I do it." He pointed to the section man's trailer on the West side of the main track.

I said, "Well this is quite the thing you're doing here." I didn't understand why MH was getting upset; I wanted to wait two minutes so Norman [the Conductor] and I were both ready to proceed safely as a team. Instead TH delayed us much longer.

MH pointed his right hand finger up at me and said, "I can say what I want and you'll do as I say!"

I said, don't point your finger at me!"

MH said "I can point my finger!"

I had not started to move yet. MH looked at his watch and then shook his head.

He then said to me, "you're going to bury yourself further!"

I chose to put the train away.

In the end, according to the Company, the delay was five minutes. According to the grievor it was approximately two.

Ultimately, the grievor was pulled out of service, though he was permitted to continue the remainder of his assignment.

It is apparent from a review of the grievor's statement that he wanted to have the requisite paperwork in order before his train was north of the Torrent crossing. The grievor felt he was being badgered to move the train, and that his Conductor was still

engaged in doing paperwork, rather than engaged in moving the train forward on the main track. In the circumstances the grievor felt justified in his decision not to make the coupling.

Decision

The Union takes the position that the grievor's conduct described above, which the Company asserts amounts to insubordination, was not culpable. That position is untenable.

First, contrary to the Union's submission, Huxtable was acting in a supervisory position to the grievor. It is Huxtable's position that determines his supervisory authority, not whether or not he was performing work that had been performed by, prior to October 1, 2014, and has since been restored to, a trainman. Secondly, the grievor made a decision to defy Huxtable's instructions when there was no safety issue - or any other legitimate reason – not to back up the train at the time Huxtable clearly and repeatedly asked him to do so. Further, I do not accept the Union's contention, or the grievor's for that matter, that he risked discipline if he had complied with Huxtable's direction. Finally, Aasland had sufficient time to complete the requisite paperwork prior to leaving Skookumchuck, and therefore the grievor's reliance on the completion of paperwork to justify the delay was not excusable.

What the record reflects is an unfortunate power struggle between a very long service locomotive engineer working with a manager with whom he resented working (as opposed to a trainman) and from whom he resented having to take direction. Huxtable was undoubtedly under pressure to get the train in and out of Skookumchuck within a tight time period, which in retrospect proved to be an unrealistic Company benchmark. The situation could have been de-fused had cooler heads prevailed.

In my view, the grievor's threat of invoking Part II of the *Canada Labour Code* escalated what was already an unnecessary dispute. Unfortunately, Huxtable did not de-escalate the situation, and in fact made the situation worse by threatening to remove the grievor from service. That was followed by the grievor's defiant and insolent "Nice try, Jack" response. Given how things then stood, Huxtable felt compelled to follow through on his threat rather than back down. Ironically Huxtable's decision led to a greater train delay than the unplanned stop at the north leg of the Wye (which was not itself an insubordinate act by the grievor) and the grievor's refusal to back the train up.

Unfortunately, the conflict has been permitted to percolate through the grievance procedure and to arbitration. The Union and the grievor have failed to acknowledge the grievor's culpability, and the Company has refused to consider a less harsh response than termination, which is clearly an excessive disciplinary reaction in all the circumstances of the case. The Company appears to have appreciated this to a certain extent, albeit late in the game, when it reinstated the grievor weeks before the

scheduled arbitration. The Union and the grievor have yet to demonstrate an understanding of the seriousness of the grievor's misconduct.

Having regard to all of the circumstances, it is unnecessary that I direct the grievor's reinstatement. I direct that the Company substitute the termination with twenty demerits to be placed on the grievor's record for conduct unbecoming as reflected in the Form 104 and to compensate him for all wages and benefits lost including any time lost for being held out of service.

October 28, 2015



**CHRISTINE SCHMIDT
ARBITRATOR**