

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4429**

Heard in Montreal, December 10, 2015

Concerning

CANADIAN PACIFIC RAILWAY

And

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

DISPUTE:

Dismissal of Mr. R. Tirelli.

UNION'S EXPARTE STATEMENT OF ISSUE:

On September 29, 2014, the grievor, Mr. Robert Tirelli, was dismissed by the Company for alleged inappropriate and unacceptable behaviour and language directed towards Company officers in his personal domain on September 2, 2014 and in the Roadmaster's office in St. Luc Yard on August 14, 2014. A grievance was filed.

The Union contends that: The grievor has more than thirty years' service with the Company and has never before been disciplined for an incident of this type; The Company is unable to meet its burden of proof that the grievor's actions were of sufficient severity to justify dismissal. Mitigating factors were not properly taken into account; the grievor is a man with average education whose mother tongue is neither English nor French. His actions were not intended to be disrespectful or racist; the dismissal of the grievor was unfair, unwarranted and excessive.

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

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

FOR THE UNION:
(SGD.) K. Deptuck
Assistant Trustee

FOR THE COMPANY:
(SGD.)

There appeared on behalf of the Company:

B. Scudds	– Assistant Director Labour Relations, Toronto
S. Smith	– Labour Relations Officer, Calgary
A. Blankson	– Roadmaster, Montreal
S. Alguire-Morin	– Structures, Montreal

And on behalf of the Union:

G. Doherty	– Union Representative, Brandon
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D. Brown
K. Deptuck
P. Gauthier
R. Tirelli

– Counsel, Ottawa
– Assistant Trustee, Ottawa
– Union Representative, Lachute
– Grievor, Montreal

AWARD OF THE ARBITRATOR

The issue before me is whether Mr. Roberto Tirelli's (the "grievor") conduct, as exhibited on August 14 and September 2, 2014, was such that his outright termination was justified.

At the time of the grievor's dismissal he had over thirty year's service. His disciplinary record was clean, however, he had once before been terminated from his employment with the Company. The grievor was dismissed in 2013 because he had filed multiple fraudulent expense claims. The Company ultimately agreed to substitute his dismissal with a suspension and returned the grievor to service without compensation.

At the time of the grievor's return to service in June 2014, a meeting was scheduled. At that meeting, it was determined that the grievor would be working as a Bridges and Structure ("B&S") flagman. Supervisor Paul Sauvé ("Sauvé") made it clear to the grievor that the Company would not tolerate any lack of respect exhibited by the grievor towards supervisors or fellow employees.

At the hearing in respect of this grievance, two witnesses testified on behalf of the Company: Assistant Roadmaster Blankson (“Blankson”), who was involved in the incident of August 14, 2014 and Supervisor Simon Alguire-Morin (“Alguire-Morin”), who was one of the two Supervisors involved in the September 2, 2014 incident. Both incidents are recounted below. Neither’s Blankson’s nor Alguire-Morin’s evidence at the hearing was challenged by the Union.

On August 11, 2014, the CP police arrested the grievor’s brother (“brother”), also a Company employee. The CP police was going to turn the brother over to the Sûreté du Québec. The brother had asked Sauv   to contact the grievor and let him know what was happening. Blankson was made aware that the police were investigating the brother. Blankson had been directed not to speak with anyone about the investigation then underway.

On August 11, 2014, when the grievor asked Blankson what had happened to his brother, Blankson gave him no information. Approximately sixteen hours elapsed before the brother resurfaced and during that time the grievor was upset as was his elderly father and his nephew. By the following day the grievor came to believe, in error, that Blankson had known about the brother’s whereabouts.

On August 14, 2014, after completing his tour of duty, the grievor attended at Blankson’s office. He says he was hurt and confused. The grievor wanted to “talk” to Blankson in his truck. Since Blankson refused that request, the grievor went to

Blankson's office. Two people other than Blankson were there at the time: Assistant Roadmaster Mathieu Gagné ("Gagné") and Operator Denis Kelly ("Kelly"). The grievor asked Kelly and Gagné to leave. Having carefully reviewed the evidence, I conclude that they did not have much of a choice. They immediately left the office. The grievor then closed the door.

Blankson demonstrated the grievor's behaviour towards him in his office. The grievor got in Blankson's face and poked him angrily in the chest. He told him that what he had done to his brother, he would regret. Blankson immediately took out his phone and called the police. He did so because he feared for his safety and that of his family. Blankson then called Sauv  and later attended at the local police station to report the incident.

The grievor said he went to see Blankson to ask him why he had not told him where his brother was when he had asked him on August 11, 2014. Blankson responded that he did not know which the grievor did not believe to be the case. The grievor denies poking Blankson in the chest although he admitted that his belly may have touched Blankson since he was a "big guy" and they were in close quarters. According to the grievor, Blankson just shrugged and turned his back to the grievor, so the grievor left.

The grievor was removed from service as a result of the incident.

On September 2, 2014, Alguire-Morin and Supervisor Paul Charbachi (“Charbachi”) attended at the grievor’s residence to deliver a notice to report for an investigation on September 3, 2014 concerning his conduct on August 14, 2014.¹ As soon as Charbachi handed the notice to the grievor, he ripped it up without reading it and threw the paper in the garbage bin. The grievor also suggested to the supervisors that there are some people who will support him and that he expected Kelly to be one such a person. The grievor was hopeful that Charbachi may be another.

The grievor went on to explain why he had been put out of service. Alguire-Morin recounted this part of the incident in the following unedited excerpt:

... and he said that the nigger and Sauvé knew where Joey was but said nothing. After he said CP is after him since a long time and the CP is trying to make him suffer. After he said that Mr. Kelly would be on his side when he went to the trailer to see the nigger. Roberto explained his version as follows: When I went to the trailer to the Hump to talk to the black, he did not touch the fucking nigger and he did not in any way yelled at any officer. Roberto went into the trailer and asked everyone to get out to talk to the nigger and then he walked towards Anthony until his belly touches the one of the nigger ... Then Anthony would have then turned and have gone further to call the police to press charges. Then Roberto explained to us that he had been accused of punching the nigger with his finger to the torso and then his belly would have touched Anthony’s belly.² Thereafter he began to talk about the code of ethic and that he was not treated equally like the other employees and management by naming examples: (Marc Legault, Normand Seguin, etc). Then he spoke about the Teamsters’ election approaching and that if he is elected Director Easter Region, he would go after anyone who is against him such as Denis Sauvé. Then he hit Paul on the shoulder and went towards his home and turned around and said to Paul: It’s a joke I hope you will not make a complaint.

¹ The Charbachi and Alguire-Morin memoranda are thorough, very detailed, and consistent.

² Charbachi counted that the grievor had referred to Blankson as “nigger” or “fucking nigger” 14 times so shocked he was at the grievor’s language.

At the hearing Alguire-Morin demonstrated how the grievor punched Charbachi with a closed fist such that he lost his balance.³ In his investigative statement, the grievor had denied that he punched Charbachi as recounted by both Charbachi and Alguire-Morin in their memoranda and as demonstrated by Alguire-Morin at the hearing. Instead the grievor said that he had hugged Charbachi goodbye, given him a kiss on the forehead, and put his hand on his shoulder and invited him into his house for coffee.⁴ The grievor said he could get ten signatures now to support his version of what transpired because he had “asked around.”

During the investigation the grievor admitted that he may have used the word “nigger” but not “fucking nigger” and that he did not use the language in an insulting or demeaning manner. He explained that he had not referred to Blankson by his name when he spoke with the supervisors on September 2, 2014, because he had always had trouble retaining names. The grievor also explained that he had been misunderstood about any plan to get back at certain people and that he meant that if he ever got the director position there would be no more favours but rather things would go strictly by the wage agreement.

³ Charbachi confirms this in his statement in addition to confirming the grievor’s plan to get his revenge against all people involved in the investigation, especially Denis Sauvé.

⁴ This is completely at odds with Charbachi and Alguire-Morin’s statements. They gave supplemental statements confirming the punch, Alguire-Morin mentioned that the invite for coffee was made after the grievor had ripped up the notice to appear for an investigation. Further both make mention of the fact that the grievor said that even if he was fired he would be back at work in five months.

Decision

The Union submits the Company's response to the incidents described above is excessive and that the Company has not taken into account all the relevant mitigating factors in assessing the imposition of discipline against the grievor. The Union points to the grievor's long service with the Company, his clean disciplinary record at the time of the incidents and the fact that the grievor's disciplinary record more generally discloses no discipline for conduct of the nature revealed by the circumstances here.

With respect to the incident with Blankson on August 14, 2014 the Union submits that since the grievor's history of discipline reveals no discipline for similar conduct there is no reason not to take the grievor's account of events at his word (see **CROA&DR 2847**).⁵ At most the Union says the physical contact between the grievor and Blackson was inadvertent and minor.

The Union argues that the grievor's behaviour is properly characterized as a "flare up" prompted by his anger over not being informed of his brother's whereabouts on August 11, 2014. The Union concedes that the grievor may have overreacted, but submits that his conduct was, to a certain extent, understandable. As such, it argues the Company's failure to share with the grievor his brother's whereabouts was a form of provocation, found in the jurisprudence to be a significant mitigating factor in circumstances of verbal aggression or physical violence. The Union directs me to a

⁵ In **CROA&DR 2847** Arbitrator Picher found both individuals' accounts of the incident to have been plausible and credible. I have not found that to be the case here.

number of **CROA&DR** decisions, which it says deal with situations similar to the one before me (see **SHP-136, CROA&DR 1701, 2584, 1688, 3569**).

The Union also emphasizes that the grievor did not make any racial or discriminatory comment to Blackson himself. The Union points out that neither Charbachi nor Alguire-Morin articulated any discomfort to the grievor with the admittedly racist reference to Blackburn on September 2, 2014.

The Union submits that had the grievor actually thought the term “nigger” was disrespectful or demeaning, he would have never referred to him in that way to his supervisors. In the “blue collar” railway workplace, the Union says that at times “ugly terms are (unfortunately) used.” In the circumstances, the Union urges me to infer that the grievor did not appreciate how inappropriate his conduct was. It suggests that a more appropriate response to this long-service, evidently upset employee would have been to require him to take some form of sensitivity training.

The Union directs me to **CROA&DR 2715**, where it says the applicable mitigating circumstances are very similar to those in this case. In **CROA&DR 2715** the Company assessed the grievor, a foreman of sixteen years service and thirty demerits on his record at the time of the incident, with forty demerits for making a verbal threat to another employee. The context was that during an exchange of tools, another employee deliberately or accidentally tapped or jostled the grievor’s hardhat. Perceiving the other employee’s actions as threatening, and in a heated tone the grievor responded: “The

only reason I don't fucking kill you right now is because I only have ten demerits to go and I want to keep my job." The grievor had a previously been disciplined for an altercation with another employee three years earlier.

Arbitrator Picher characterized the incident as a brief altercation transpiring between two employees in the heat of the moment – one where the grievor was angered by what he perceived as a threatening gesture. There had been a certain degree of provocation. In determining the appropriateness of the penalty imposed, Arbitrator Picher observed that the grievor had never before reacted violently towards another employee, and despite the reaction of the employee who was threatened and those who witnessed the threat, it was appropriate to reinstate the grievor without compensation subject to his acceptance of two conditions.⁶

In that same case Arbitrator Picher referred to the importance of employees being protected from threats or concerns for their safety in **CROA&DR 1701**:

Boards of Arbitration have long recognized that the work place is not a tea party, and that momentary flare-ups may occur between fellow employees, both on and off the job. When an altercation between employees takes place off the job, and is apparently not linked to anything that is work-related, arbitrators may question the imposition of discipline, particularly where the interests of the employer are not affected. On the other hand, where such conduct is job-related, and can be seen to impact negatively on the legitimate business interests of the employer, discipline may well be justified, depending on the circumstances of the particular incident. Plainly the threatening of a fellow employee in a way that threatens the

⁶ One of the conditions for reinstatement was that the grievor had to write an unconditional letter of apology to the employee to whom the threat had been made. The other condition was that the grievor was required to accept to be assessed for counselling in respect of anger control through the Company's EFA Program, or such other program the parties were agreed on. If deemed appropriate by the assessors of any such program, the grievor was to follow such a counselling program as may be prescribed, with quarterly reports to confirm his ongoing participation until such time as the agency or parties agree it was to be concluded.

peace of mind and well-being of that person in his job, and the physical acting out of such threats, is prejudicial to an employer's interests and will justify the imposition of serious disciplinary measures. (See, **Hitachi Sales Corp. of Canada Ltd.** (1981), 30 L.A.C. (2d) 1 (Frumkin); **City of Nanticoke** (1980), 29 L.A.C. (2d) 64 (Barton). **Kingsway Transports Ltd.** (1982), 4 L.A.C. (3d) 232 (Burkett); **Galco Food Products Ltd.** (1974), 7 L.A.C. (2d) 350 (Beatty); **Mattabi Mines Ltd.** (1973), 3 L.A.C. (2d) 344 (Abbott); **Liquid Carbonic Canada Ltd.** (1972), 24 L.A.C. 309 (Weiler); **Pedlar People Ltd.** (1972), 24 L.A.C. 277 (Hanrahan); **Canadian Food Products Sales Ltd.** (1966), 17 L.A.C. 137 (Hanrahan); **McCord Corp.** (1966), 17 L.A.C., 321 (Hanrahan); **Huron Steel Products Co. Ltd.** (1964), 15 L.A.C. 288 (Reville);).⁷

Every case must be determined on its own facts.

While there are some similarities between **CROA&DR 2715** and the one before me, and I appreciate that the grievor has significantly more years of service than the foreman in **CROA&DR 2715**, I cannot agree with the Union's submission that the defense of "provocation" can be relied on in this case.

By his own admission, two days elapsed between the time the grievor first formed the erroneous impression that Blankson had known about his brother's whereabouts and when he decided to go to the Blankson's office. This was not a heat of the moment reaction.

I appreciate that the grievor may be an emotional person. I also appreciate how upset the grievor was when he did not know of his brother's whereabouts and the

⁷ The foregoing remarks were written in the context of a case where the arbitrator found that the discharged employee had engaged in "... a sustained and long-standing vendetta" against another employee which culminated in a death threat coupled with a physical assault outside a drinking establishment. In that circumstance the Company's decision as to discharge was sustained.

impact this had on the grievor's father. However, on August 14, 2014, the grievor's decision to attend at Blankson's office was a deliberate one fuelled by his anger at Blankson stemming from erroneous knowledge imparted to him two days prior. He attended at Brankson's office with the fully informed intent to intimidate and to threaten him. In addition, Branskon was a supervisor, not a co-worker as was the case in **CROA&DR 2715**.

The grievor is a very tall, large and physically imposing man.

It would appear from a reading of **CROA&DR 2715** that the grievor in that matter did not deny his misconduct. He did not deny or seek to diminish the fact that he verbally threatened another employee in front of other employees in the heat of the moment. In the case before me, the grievor made sure he was alone with Blankson. The grievor then got in his face and poked him on the chest and threatened him. I do not believe the grievor's version of events. It is inconsistent with the totality of evidence before me, including Blankson's unchallenged evidence, recognized as most probable in the circumstances. Clearly, Blankson felt threatened otherwise he would not have called the police and Sauve. I have no difficulty accepting Blankson's version of events over that of the grievor.

In **CROA&DR 2715** there was a single incident that gave rise to the dismissal. In the matter before me, there was a second similar incident.

At the outset of the second incident on September 2, 2014, the grievor inappropriately and defiantly ripped up the notice Charbachi handed to him. That behaviour demonstrates the grievor's difficulty in accepting that he is subject to those above him in the workplace hierarchy.

I accept the evidence of Charbachi over that of the grievor that the grievor then invited the supervisors in for a coffee and that they, not surprisingly, declined.

The grievor does not deny that he may have referred to Blankson as a "nigger" though he denies referring to him as a "fucking nigger." He also denies that he punched Charbachi and in fact claims that he hugged, kissed and put his arm on his Charbachi's shoulder. That is patently absurd. I accept Charbachi's and Alguire-Morin's version over that of the grievor. I find that he assaulted Charbachi, a supervisor.

The Union's submission that the grievor did not appreciate that the term "nigger" was disrespectful or demeaning defies credulity. The Union suggests that if the grievor had known that the term was offensive he would not have used it. That too defies credulity as does his explanation that he did not refer to him by name because he has difficulty remembering names. In this day and age, no reasonably informed person can claim not to know that this is a highly offensive and racist term. It has no place in public discourse or in any workplace.

A thorough review of the grievor's accounts of both incidents as well as the written memoranda of other employees who provided evidence material to the case at hand, leaves no doubt in my mind that the grievor was dishonest during the course of the investigation, misrepresented the motives underlying his conduct in relation to both incidents and that he has no insight or understanding of his outrageous conduct.

Although the grievor expressed some remorse at the hearing, having regard to his pervasive lack of candour, I find the remorse expressed to be self-serving rather than genuine.

The grievor is a very long service employee. He has not before been disciplined for conduct similar to that set out above. He has been discharged before for dishonest behaviour engaged in for personal gain. When the Company agreed to substitute his dismissal with a suspension on March 8, 2014, Sauvé put the grievor on notice that he was to be respectful of his fellow employees and of supervisors and that conduct inconsistent with that expectation would not be tolerated. Presumably that notice was given to the grievor for a reason.

Within months of returning to work, the grievor behaved in the deeply disturbing manner described above. I have no confidence, even considering creative options available to me as conditional terms for reinstatement, such as those imposed by Arbitrator Picher in **CROA&DR 2715**, that they would have the necessary effect such that a substitution of penalty is appropriate.

I am persuaded that the legitimate interests of the Company in ensuring the peace of mind and well being of those to whom it owes a duty to provide a healthy work environment militate against the grievor's reinstatement. The grievor is a threat to that environment, and in fact he has demonstrated it by threatening a supervisor, assaulting another, and spewing intolerable racial epithets.

For the forgoing reasons, the grievance is dismissed.

December 21, 2015



**CHRISTINE SCHMIDT
ARBITRATOR**