

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4430**

Heard in Montreal, December 10, 2015

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the assessment of 45 demerits, 30 demerits and subsequent discharge for accumulation of demerits to Conductor Anna-Louise Blackmore.

UNION'S EXPARTE STATEMENT OF ISSUE:

The instant matter involves two separate assessments of discipline.

45 Demerits

Following an investigation, on July 12, 2014, the Company assessed Conductor Blackmore 45 demerits "For your insubordinate behavior resulting in delays to trains, in the presence of your peers, while employed as a Conductor on May 30th, 2014 at Fort Steele BC, a violation of CROR General Notice, CROR General Rule A (ix), (xi)."

The Union contends that the investigation was not conducted in a fair and impartial manner per the requirements of the Collective Agreement. For this reason, the Union contends that the discipline is null and void and ought to be removed in its entirety and Conductor Blackmore be made whole.

The Union further contends that there are no grounds for discipline in the circumstances. In the alternative, the penalty of 45 demerits is unjustified, excessive and unwarranted in all of the circumstances, including mitigating circumstances.

The Union requests that the discipline be removed entirely from Conductor Blackmore's record, and that Conductor Blackmore be made whole for any losses incurred as a result of this discipline. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company disagrees with the Union's contentions.

30 Demerits and Discharge

Following an investigation, on July 12, 2014, the Company assessed Conductor Blackmore 30 demerits "For conduct unbecoming as evidenced by you making unacceptable

comments and physical threats toward a company officer on June 2nd, 2014, a violation of CROR General Notice CROR General Rule A (ix), (xi) and Company Violence in the workplace policy and procedures.” She was subsequently dismissed for accumulation of demerits.

The Union contends that the investigation was not conducted in a fair and impartial manner per the requirements of the Collective Agreement. For this reason, the Union contends that the discipline is null and void and ought to be removed in its entirety and Conductor Blackmore be made whole.

The Union further contends that the Company has not met the burden of proof necessary to justify formal discipline in the circumstances. In the alternative, it is the Union’s position that the penalty of 30 demerits and subsequent termination is excessive and contrary to the arbitral principles of progressive discipline.

The Union requests that Ms. Blackmore be reinstated without loss of seniority and benefits, and that she be made whole for all lost earnings with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company disagrees and denies the Union’s request.

**FOR THE UNION:
(SGD.)**
GENERAL CHAIRMAN

**FOR THE COMPANY:
(SGD.)**

There appeared on behalf of the Company:

- | | |
|-----------|--|
| S. Smith | – Labour Relations Officer, Calgary |
| B. Scudds | – Assistant Director Labour Relations, Toronto |
| L. Kahl | – Assistant Trainmaster, Cranbrook |
| A. Tew | – Former Assistant Trainmaster, Fort Steele |

And on behalf of the Union:

- | | |
|--------------|--------------------------------|
| R. M. Church | – Counsel, Caley Wray, Toronto |
| D. Fulton | – General Chairman, Calgary |
| D. Edward | – Senior Vice General Chairman |
| B. Knight | – Local Chairman, Cranbrook |
| A. Blackmore | – Grievor, Cranbrook |

AWARD OF THE ARBITRATOR

This case concerns the dismissal of Conductor Anna Louise Blackmore (“the grievor”) on July 11, 2014. She was dismissed for an accumulation of demerits stemming from two incidents, which occurred on May 30, 2014, and June 2, 2014. Prior

to the first incident, the grievor's disciplinary record was clean. She had approximately nine years of service at the time of her dismissal.

In respect of both incidents, the Union takes the position that discipline was unwarranted, or in the alternative that it was excessive. It also takes the position that the investigations undertaken were not conducted in a fair and impartial manner.

At the hearing, two witnesses testified on behalf of the Company: then Assistant Trainmaster Amanda Tew ("Tew"), who was a witness to the first incident, and Assistant Trainmaster Lara Kahl, who was involved in both incidents. At the time of the incidents, grievor reported to Tew and Kahl. The grievor did not testify at the hearing.

May 30, 2014 - 45 Demerits for Insubordinate Behaviour

On May 30, 2014, the grievor was to report for duty at 09:10 hours. She arrived early.

Before commencing her tour of duty, the grievor had a brief interaction with Tew with other employees present. She asked Tew why she had "turned in" her colleagues, Carl Nimmet and Braeden Fairbairn, on a previous shift. Tew told the grievor that she was doing her job and that it was none of her concern. Tew confirmed that the interaction with the grievor was a "non-issue" as far as she was concerned. The Company, however, considers this interaction to have been "unacceptable."

At approximately 09:09 hours, in the process of reading through bulletins, Kahl asked the grievor if she preferred to print her own documents for the crew or whether the grievor would like Kahl to print them. The grievor's response was that she was not yet on duty until the expiry of one more minute and to ask her again when she was on duty. When Kahl asked again at 09:10 hours, the grievor said she would get the documents herself but that she was in no hurry. The grievor continued to read bulletins for a few minutes.

Kahl printed the documents even though the grievor said she would do it herself. The train the grievor was assigned to was running late and there was considerable pressure on Kahl (and others who occupy her position) to get the trains moving as fast as possible. Personnel such as Kahl and Tew occupying supervisory positions often assist in the crew changeover process to the extent that they can.

When Kahl went to get the documents from the printer, and while in close proximity to Brakeman Randy Murphy ("Murphy"), she overheard the grievor tell him that if he was not happy working for the Company, he should not quit but rather get fired. According to Kahl, the grievor went on to explain that "quitting gets you nothing, but getting fired the Company will owe you compensation, most likely hire you back with compensation and that you get a full payout of your pension."

The grievor denies the words attributed to her by Kahl. She says that she was merely commenting about it being better to get fired than to quit. In her initial description

of what transpired the grievor said in the course of her disciplinary interview that she and Murphy “had talked” without any further description of how Murphy had initiated the conversation. She went on to say that she made a comment about it being easier to get fired than to quit given the number of employees being fired by the Company. Later on in her statement she modified what she said was her response to Murphy’s comment: “I said that around here with the amount of people getting fired that don’t quit.”

Later, during the grievor’s investigative statement, the Union asked certain questions of Murphy. He said that it was he who had jokingly said to the grievor that it was better to get fired than to quit. When describing the interaction, Murphy provided no information about the grievor’s reaction to his comment. The Union then read Murphy the specific words attributed to the grievor by Kahl, and he denied that she had said those specific words. The Company asked Murphy no questions. It was not until the Company investigated Murphy for his comments, that he then confirmed the grievor’s version of how the conversation unfolded.

Tew confirmed in a memorandum that the grievor had made a comment to the effect that if Murphy was unhappy with the Company, he should get fired but not to quit, as it pays more. Tew stood by her memorandum at the hearing, which, though admittedly general in nature, was made within a half hour of the incident.

After Murphy had described his joking comment about it being better to be fired than to quit, he went on to confirm part of what the grievor had said in her description of

the morning's interactions: that prior to the crew's job briefing, Kahl had dropped a cell phone (used to contact customers while on duty), on the grievor's paperwork. According to Murphy, when the grievor asked Kahl if the phone was working Kahl did not answer and walked away. Both Murphy and the grievor say that the grievor then checked the cell phone. It came on for a brief period, gave a low battery signal and then died.

At approximately 19:21 hours the crew went into the job briefing room. After the job briefing, the two other members of the crew, Locomotive Engineer Armstrong and Murphy, departed for their locomotives, which, according to Kahl's records, was approximately at 09:35 hours. Within a few minutes (at most) prior to joining the crew, the grievor went to Kahl's office. According to both Kahl and Tew (who could only see a portion of the interaction between the grievor and Kahl), the grievor "tossed" the phone at Kahl and requested another phone. The grievor says that she did not toss the phone as alleged, but rather put the phone on the desk. In any event, both Kahl and the grievor agree that the grievor asked Kahl for a new phone.

According to Kahl, she told the grievor that she had no spare phone and that the crew would have to go without. The grievor then said that she needed a phone and that she would not go without one. The grievor acknowledges that she said she needed a phone but denies that she said that she would not go without one. Kahl's and the grievor's next verbal exchange is easier to reconcile. The grievor says Kahl told the

grievor that she had wasted enough time and to get the train moving.¹ Kahl's version is that she told the grievor to get on her train as she had already created enough delays.

The grievor then proceeded to her train, and the crew completed the required on-board briefing. At 09:39 hours the RTC was still waiting for a track release for another train. The grievor's train's "pull time" was 09:46 hours and its departure was 10:01 hours. The remainder of the tour was without incident.

Alleged Unfair and Impartial Investigation

The Union takes the position that the investigation on June 13, 17 and 18, 2014, into the incident described above was fatally flawed because of the investigating officers' frequent interjections throughout the investigation, the length of the investigation, as well as the Company's failure to follow-up on the grievor's request to file a harassment complaint stemming from RTC Bonnie's and Kahl's comments on the transcript disclosed as part of the investigation.

Though there were some interruptions by the investigating officer, and despite some questions being disallowed (many having regard to the questioning of Tew), I am not persuaded that the grievor or the Union was unable to explore the Company's

¹ In the transcription of the telephone conversation between RTC Bonnie and Kahl commencing at 19:39, Kahl sets out a portion of what had transpired: "I already yelled at her [the grievor] to get her ass out there." The transcript reveals that both the RTC and Kahl share some personal animosity towards the grievor. As a result of the comments made by the RTC and Kahl on the transcript, the grievor brought a harassment complaint against them.

evidence during the investigation. As for the 3-day length of the investigation, the questions posed by the Union and the grievor contributed to its length. Some were irrelevant. Though it is challenging to justify the length of this investigation considering the nature of the allegations, it pales by comparison to the 14-day investigation in **CROA&DR 4139**, which the arbitrator found to be excessive. Finally, the grievor's harassment complaint was made well after the decision to investigate the grievor's conduct. The content of the transcript, disclosed during the investigation and which led to the harassment complaint, is clearly relevant evidence to the Company's allegations. However, the investigation cannot be said to be flawed simply because the Company did not investigate the grievor's harassment complaint.

Having regard to all of the above, I find that the Company did not deny the grievor a fair and impartial investigation.

I turn to consider whether there was cause for discipline in the circumstances and if so, whether forty-five demerits was excessive.

The imposition of discipline in this case is not really because of an alleged train delay. As pointed out by the Union, the notice to appear for a formal investigation does not even mention a train delay. It had to do with the grievor's "work activities and interactions with Tew and Kahl on the day in question." Moreover, no other member of the grievor's crew was disciplined for a train delay. What the Company found most objectionable was the alleged phone toss and verbal exchange between the grievor and

Kahl, which the Company describes as insubordination on the part of the grievor. The interaction in Kahl's office and the grievor's general attitude is of concern to the Company.

What is apparent from a review of the investigation, including Kahl's testimony and the transcript, is that there was significant tension between Kahl and the grievor before her tour of duty commenced on May 30, 2014. The grievor's needlessly provocative comment to Kahl at the start of her tour, and the telephone transcript of the conversation between Kahl and RTC Bonnie at 09:39 hours, demonstrate this clearly. That is the factual backdrop leading to what was to become the "culminating incident" (the alleged phone toss and refusal to depart without a new phone) in Kahl's office.

Leaving aside the grievor's desire to question publicly Tew's approach to a personnel situation, which was none of the grievor's concern, the grievor responded in a provocative and dismissive manner to Kahl's offer to print the documents for the crew. The grievor continued in this vein by rejecting Kahl's offer to print the documents and telling Kahl she was in no hurry to do so. These comments reflect a contemptuous attitude by the grievor.

With respect to the grievor's interchange with Murphy, making a comment about benefiting from a termination rather than quitting is not insubordinate conduct. It may even be true in certain circumstances. However, it is an example of the grievor taking

an opportunity to create a certain discomfort among her coworkers, which she knew would be the effect.

Finally, with respect to the brief interaction in Kahl's office about the phone, I accept Kahl's and Tew's evidence that the grievor tossed the phone on Kahl's desk, despite the grievor's denial. She did so because she thought Kahl had previously ignored her inquiry about whether or not the cell phone was functioning. That, too, was provocative and contemptuous on the part of the grievor.

In all the circumstances, I find it more likely than not that the grievor did say that she would not leave without a new phone. In saying this, the grievor displayed contempt and defiance to Kahl's authority. That comment prompted Kahl's angry outburst to the grievor to get her train moving. Kahl's reaction is consistent with the grievor having threatened to delay the train's departure and the grievor's less than cooperative approach to the entire situation.

Having regard to all of the above, the Company's assessment of forty-five demerits would normally be considered excessive considering the relevant jurisprudence dealing with insubordination and insolence. The assessment of forty-five demerits places an individual within close proximity of discharge. Therefore, it should reflect very serious misconduct. Moreover, the grievor has never before been disciplined for similar conduct. In respect of this incident, I direct that the Company

substitute the forty-five demerits with ten demerits to be placed on the grievor's record and remove any reference to delays to trains on the applicable Form 104.

June 2, 2014 - 30 Demerits for Conduct Unbecoming

Within days of the incident of May 30, 2014, the grievor is alleged to have made a physical threat to Kahl. The alleged threat is the first interaction the grievor had with Kahl following the first incident described above.

At the beginning of the grievor's tour of duty, Locomotive Engineer Block ("Block") asked the grievor, in the presence of Kahl, when she was quitting her employment. The grievor is alleged by Kahl to have said the following: "Things have changed and I am going to end up getting fired because I am going to knock a certain ATM out who happens to be standing real close to me." The grievor is alleged by Kahl to have then walked towards the women's washroom while saying, "I have a real great swing too."

The grievor denies that she made these comments. She did not mention in her investigation statement that Block had asked her if she was quitting. Instead she recounted that she often jokes with Block about quitting and that she had previously mentioned to Block that she might quit her employment with the Company to support her husband's business. On June 2, 2014, the grievor says that she said to Block that

she might be “knocking out” the AMZ, the name of her husband’s business. The grievor did not recall saying to Block that “I have a real good swing too.” If she had made that comment, the grievor says she would have been referring to her husband, not to Kahl.

The parties agree that Brakeman Braeden Fairbairn (“Fairbairn”) was in close proximity to Block and the grievor during the conversation. At the outset of the investigation, the grievor requested that both Block and Fairbairn be produced as witnesses in the investigation. At the same time she produced two emails, one from Block and one from Fairbairn.

The email from Block dated June 8, 2014, reads as follows:

To all concerned;

The below statement is the truth in my best recollection of a conversation I had with Anna Blackmore the last time I spoke with her at work.

I saw Anna when she entered the "start work" area inside the four steel station June 1st or 2nd I'm not sure the date exactly. I know when I saw we smiled and said hello. We began a very “joking like” conversation just as we always have. It seems to lighten the stressful mood we generally face while we are at work. She and I tend to go off the cuff and pretend that we are quitting her job one day. Is not that we are actually going to quit or go work for another business. It's just "shock" humor and we don't take offense to our comments to each other because it makes us laugh and puts a giggle in our day.

I'm very surprised to hear that she is accused of threatening someone at work because during the course of our conversation I didn't hear that. It would've been funny. Our conversation may have lasted a minute or two. If a threat towards another employee happened, it didn't happen during our conversation and can't personally imagine someone doing that in front of many employees, especially in light of the possible outcomes that it could cause.

Fairbairn's email is dated June 17, 2014. He writes:

To whom it may concern

When I work the extra switcher with Anna Blackmore, we brought the Wayfreight to Fort Steele and changed off with the 67 crew. In the bullpen I was by the printer with Laura. I believe discussing our switch list for the second half of the day. At this point Anna was talking to another employee. I didn't hear their conversation, or hear any threatening comments directed towards Laura.

As well after my yard shift I went to the town hall meeting, where Adam Smith approached me asking some things that where (sic) said early that day. I cannot remember his exact words but he did say that Anna had said some threatening things towards Laura, and asked if I heard this while I was in the bullpen. I told him that I had not heard Anna say anything threatening, or offensive.

Ultimately the Company also chose to investigate Block in relation to his interaction with the grievor on June 2, 2014. It conducted that investigation on July 8, 2014. In his statement, Block confirmed that he had asked Kahl if she was quitting. He said that Kahl's version of what transpired as recorded in her memo did not happen, but provided no information about what the grievor's answer was to his question. He suggested that perhaps Kahl had misheard the conversation.

The Company did not follow-up with an interview of Fairbairn despite the grievor's request that he be interviewed. Fairburn does provide relevant information in his email of June 17, 2014. He says that he did not hear the conversation between Block and Kahl. The Union says that the email can only be construed as supporting the grievor's denial of the allegation made against her.

The Union submits that the Company failed to provide the grievor with a fair and impartial investigation as required by the collective agreement. It refers to the Letter of

Understanding (dated August 31, 1992 – “LOU”) on examining witnesses. The second last paragraph of the LOU says:

There may be instances where the employee or union may request that certain witnesses be called on behalf of the employee under investigation. Such request will not be denied unless it can be demonstrated that these people could not have witnessed the incident under investigation nor could they provide any pertinent evidence in this regard.

The Union also directs me to article 70.3 of the collective agreement, which states:

If the employee is involved with responsibility in a disciplinary offence, they shall be accorded the right on request for themselves or an accredited representative of the Union or both, to be present during the investigation of any witness whose evidence may have a bearing on the employee's responsibility, to offer rebuttal thereto and to receive a copy of the statement of such witness.

It is unclear to me how article 70.3 applies to Fairbairn in the circumstances of this case. Though the letter of understanding is clear, a careful review of Fairbairn's email provided to the Company indicates that he did not overhear the conversation at issue. He therefore was not in a position to give evidence about what she did or did not say.

As previous awards of this Office have noted (e.g. **CROA&DR 1858**), disciplinary investigations under the terms of the collective agreements such as those in Article 70 are not intended to elevate the investigation process to the formality of a full-blown civil trial or an arbitration. What is contemplated is an informal and expeditious process by which an opportunity is afforded to the employee to know the accusations against him

or her, the identity of his or her accusers, as well as the content of their evidence or statements, and to be given a fair opportunity to provide rebuttal evidence in his or her own defense.

For the reasons related above, I am satisfied that that standard has been met. Fairbairn's email indicates that he did not overhear the grievor's comments. The Company's failure to interview him, therefore, does nothing to advance its position in this matter and does nothing to harm the Union's or the grievor's position in this matter.

The allegation of a threat against a supervisor is a serious allegation, which falls to the Company to prove. In this case that determination must be based on an assessment of credibility.

I find that the grievor's account of what she said to Block defies credulity on its face. Block's email, unsatisfactory though it is in many respects, suggests strongly that he and the grievor were engaged in a light-hearted discussion about her quitting her employment. It is inconceivable, therefore, given the content of the conversation, that the grievor made an out-of-the-blue and nonsensical comment about her husband's business. Had she said something about her husband's business, I would expect to see some reference to that in Block's email. There is no such reference. In addition, there is an evasive quality to Block's denial that he overheard any threat made by the grievor. I do not put much weight on his denial.

In contrast, the grievor's alleged answer to Block's question (which was confirmed only by Block weeks after the grievor's statement was made) makes sense given Kahl's previous interaction with the grievor recounted above. In all likelihood, the grievor remained in a provocative mood after having been shouted at by Kahl a few days prior. Moreover, Kahl's reaction to the comments she heard the grievor utter on June 2, 2014, is consistent with that of a person who has been physically threatened. Kahl had in mind the possibility of obtaining a restraining order against the grievor. In these circumstances, I accept the clear and probable evidence of what Kahl says transpired on June 2, 2014, over that of the grievor and Block.

The threat of physical violence towards a supervisor has no place in the workplace. Any such threat must be taken seriously by the Company irrespective of whether the grievor actually has the intent of carrying out the threat made or not. If nothing else, the grievor was attempting to intimidate Kahl.

The grievor's comments to Kahl are fundamentally at odds with the Company's interests in creating a positive working environment and its obligation to provide a safe working environment for its employees. The grievor refuses to acknowledge any wrongdoing. She was not honest about what transpired during the investigation. In these circumstances, I can see no reason to reduce the penalty of thirty demerits imposed by the Company.

Having regard to all of the above, the grievance is allowed in part. The grievor is to be reinstated to employment with compensation for all wages and benefits lost and her disciplinary record will reflect a total of forty demerit points as a result of this decision.

December 21, 2015



**CHRISTINE SCHMIDT
ARBITRATOR**