

**CANADIAN RAILWAY OFFICE OF ARBITRATION**  
**& DISPUTE RESOLUTION**  
**CASE NO. 4512**

Heard in Calgary, November 9, 2016

Concerning

**CANADIAN PACIFIC RAILWAY COMPANY**

And

**TEAMSTERS CANADA RAIL CONFERENCE**

**DISPUTE:**

Appeal of the dismissal and subsequent reinstatement to reflect suspension of Conductor Veronique Delarosbel of Medicine Hat, AB.

**THE UNION'S EXPARTE STATEMENT OF ISSUE:**

Following an investigation Ms. Delarosbel was dismissed from Company service which was described as "For conduct unbecoming of an employee, not adhering to Policy 1300 Discrimination and Harassment, General Rules A (iii, iv, and ix), and General Notice while employed as a Conductor on 292-19 on July 19th, 2015 near crossing at mile 170.75 Brooks Subdivision."

The Company unilaterally reinstated Ms. Delarosbel to employment with the period of time from when she was held out of service until return to active service considered an unpaid suspension.

The Union contends the Company has failed to meet the burden of proof required to sustain formal discipline related to the allegations outlined above. The Union also contends Ms. Delarosbel's suspension is unjustified, unwarranted and excessive in all of the circumstances, including significant mitigating factors evident in this matter in addition to being discriminatory and contrary to the arbitral principles of progressive discipline.

The Union requests that the discipline be removed from Ms. Delarosbel's employment record without loss of seniority and benefits, and be made whole for all associated loss. 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.) D. Fulton**  
**General Chairperson**

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

There appeared on behalf of the Company:

C. Clark

– Assistant Director, Labour Relations, Okotoks

There appeared on behalf of the Union:

D. Ellickson

– Counsel, Caley Wray, Toronto

D. Fulton	– General Chair, Calgary
D. Edward	– Senior Vice General Chair, Calgary
B. Weisgerber	– Local Chair, Calgary
V. Delarosbel	– Grievor, Medicine Hat
J. Harris	– Local Chair, Port Coquitlam

### **AWARD OF THE ARBITRATOR**

The grievor is 24 and resides in Medicine Hat Alberta. She entered into service as a conductor with the Company on October 6, 2014.

On July 19, 2015 the grievor was the conductor on train 292–19 along with her fellow crew member, locomotive engineer Ken Lupul. They were operating in a straightaway service eastward from Alyth to Medicine Hat on the Brooks subdivision. After departing the OMTS at Ogden, and while approaching the first control public crossing, the crew initiated ringing of the engine bell at the whistle post. The crossing lights had been activated but the gates themselves had not yet come down.

As the train got closer to the crossing, the crew witnessed a red pickup truck proceeding eastward on Ogdendale Road towards CP headquarters. The red pickup truck then crossed directly in front of the movement, made a left-hand turn and then proceeded into the CP parking area. The crossing gates went down shortly after the pickup truck driver cleared the crossing. As the truck proceeded northward towards CP headquarters, parallel with the main line, the grievor extended her arm out of the open window of the locomotive and gave the driver of the red truck “the finger” (commonly understood in today’s society to be a “fuck you” gesture). The crew was later advised that the driver of the truck was a CP employee on his way to work.

A short time later, the crew received a radio call on channel 1, which broadcasts through to all other crews in the area, inquiring which of the two crew members had decided to give him “the finger”. Recognizing that the driver of the red truck was in fact a Rail Traffic Controller (“RTC”) employed by the Company, the grievor told the RTC that she had put up her hand to wave at the individual and the red truck. She declined to say anything further given that the conversation was being recorded and broadcast in the area. The grievor confirmed in an interview with the Trainmaster shortly after the incident that she had given “the finger” to the driver who had jumped the crossing.

The grievor was given a Notice to Appear for a formal investigation on July 20, 2015. She attended the interview on July 22, 2015 and stated that her intention was to “... *express her displeasure of the red truck running across in front of one of our trains*”. The grievor was terminated three weeks later on August 11, 2015. She was reinstated by the Company and returned to active service on April 12, 2016. The grievor had no discipline on her record prior to being terminated.

The Union noted that the grievor expressed regret for her actions at the outset of her statement. She acknowledged within her apology that she acted unprofessionally and viewed the incident as a learning experience.

The Company pointed out that the grievor’s finger gesture was made from her elevated position at the window of the locomotive in plain sight of not only the RTC but

also the general public. The arbitrator agrees with the Company that it has the right to expect that its employees will at all times demonstrate proper behaviour and protect the image of the Company by refraining from unwanted and disagreeable gestures such as the grievor displayed here. Of particular concern in this case is that running trades work independently and therefore must be trusted to protect the Company's reputation while performing their duties. In the arbitrator's view, gestures like the grievor displayed here, even if provoked by what the grievor viewed as a close call, is clearly unacceptable and deserving of discipline.

### **What of penalty?**

The arbitrator accepts that the grievor, an employee with just three months of service at the time of the incident, recognizes that her actions, spontaneous as they were, were completely out of line for someone in her position. There is, however, no pattern of misconduct here or other aggravating circumstances in my view which support the Company's initial response of termination for this type of one-off insult to a fellow employee who ran over the crossing when the bells were ringing.

I note in the cases provided by the Union where there has been an expletive (commonly "fuck off") used by one employee towards another-often an employee to a supervisor, typically attracts somewhere in the order of 10 to 30 demerits. See: **SHP 367; CROA&DR: 3260, 3030**. I see this case in a similar vein. Under the circumstances, and in order to drive home the point to a new employee like the grievor,

a 3 day suspension would have been an appropriate disciplinary response by the Company.

The grievor's record will therefore show that a 3 day suspension was substituted by order of this arbitration award for the penalty of termination, as set out in Company Form 104 on August 11, 2015. The grievor is to be compensated for all wages and benefits lost from the date of her termination to the date of her unilateral reinstatement on April 11, 2016, less the amount of wages and benefits for the period of her suspension.

In making this order, the Arbitrator is mindful that an offer of reinstatement was made to the grievor on January 14, 2016, but that offer included a time served suspension of 147 days. The Union declined the offer on the grievor's behalf. A suspension of close to five months is not a proportional response to this incident involving a new employee with a clean disciplinary record, nor is it consistent with the case law rulings of this Office.

The arbitrator will retain jurisdiction should any issues arise in the implementation of this award.

December 5, 2016



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JOHN MOREAU  
ARBITRATOR