

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

CASE NO. 4647

Heard in Montreal, July 11, 2018

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the dismissal of Conductor A. Lewis of Wynyard, SK.

JOINT STATEMENT OF ISSUE:

On April 5, 2017 at approximately 2:00pm, an external deliveryman arrived at CP Wynyard Yard office to deliver a package addressed to Trainmaster Mike Hankewich who was not in the office. The deliveryman approached Mr. Lewis and Mr. Clark asking them if they were able to sign for the package. According to Mr. Lewis, he responded, "I don't want to sign for it, it could be a bomb, it could be anything." Mr. Muir who overheard the comment then entered the booking room and informed the deliveryman that he would sign for the package. After receiving Mr. Muir's signature, the deliveryman left the building. Shortly thereafter, Mr. Lewis was questioned by Trainmaster Hankewich on what occurred in the yard office then continued on with his trip to Bredenbury. Once his tour of duty was complete at Bredenbury, he was informed by Trainmaster Hankewich that he was being held out of service pending an investigation.

On April 10, 2017 an investigation with Mr. Lewis was held. Following an investigation Mr. Lewis was dismissed from Company service which was described as "As evidenced by your having made an inappropriate comment with offensive racial connotations to an external delivery person on CP property on April 5, 2017; while employed as a Conductor in Wynyard, Saskatchewan. A violation of CP Policy 1300 - Discrimination & Harassment." The Company did not respond to the Union's grievances.

The Union contends the Company has failed to meet the burden of proof or establish culpability required to sustain formal discipline related to the allegations outlined above. In the alternative, the Union contends that Mr. Lewis' dismissal is unjustified, unwarranted and excessive in all of the circumstances, including significant mitigating factors evident in this matter. It is also the Union's contention that the penalty assessed is contrary to the arbitral principles of progressive discipline.

The Union requests that Mr. Lewis be reinstated without loss of seniority and benefits, and that he 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 maintains that it has met its burden of proof in establishing just cause for Mr. Lewis' dismissal, and therefore argues that this grievance be dismissed.

FOR THE UNION:

(SGD.) D. Fulton

General Chairman

FOR THE COMPANY:

(SGD.) C. Clark

Assistant Director, Labour Relations

There appeared on behalf of the Company:

C. Clark – Assistant Director, Labour Relations, Calgary

And on behalf of the Union:

K. Stuebing – Counsel, Caley Wray, Toronto
D. Fulton – General Chairman, Calgary
R. Finnsen – Vice General Chairman, Wynyard
W. Apsey – General Chairman, Smiths Falls
A. Lewis – Grievor, Wynyard

AWARD OF THE ARBITRATOR

Nature of case

1. On April 24, 2017, CP terminated conductor Adam Lewis for making what it called “an inappropriate comment with offensive racial connotations”. At the hearing, the TCRC did not dispute that Mr. Lewis had made an inappropriate remark but contested CP's evidence about its severity. The TCRC requested the arbitrator to reinstate Mr. Lewis with full compensation or, in the alternative, with a lesser penalty.

2. For the reasons which follow, the arbitrator concludes that CP had just cause to discipline Mr. Lewis for his comments. However, CP's evidence did not justify termination as the appropriate penalty. The arbitrator substitutes a suspension for the termination.

Facts

3. On April 5, 2017, Mr. Navjot Singh was delivering Fedex packages to the CP rail depot in Wynyard, Saskatchewan. Shortly after leaving the CP depot that day, he wrote an email to CP and others about his negative experience:

“...I went in cp rail depot to deliver package, two guys i first met inside they refuse to sign for the package. Then i went to a office (with a lot of computer systems) one of the guy sitting inside the office told he cannot sign the box because it might be carrying a bomb and he said he doesn't trust brown people delivering stuff. Is that kind of manners CP employees have?

...

... This time they went one step further saying that I might be carrying a bomb on the account of the colour of my skin. When he said that i was shocked to hear that, everyone in the room was laughing. After that john came from other room and signed for the box.” (sic)

4. On April 7, 2017, in accordance with its negotiated investigation process, CP sent investigation letters to four employees, including Mr. Lewis, and advised them of their right to have an accredited union representative accompany them. Mr. Lewis, who received a copy of Mr. Singh's email, in addition to other materials, admitted to an inappropriate statement, but denied commenting on Mr. Singh's skin colour (E-1; Company Brief; Tab 6):

Q13: Do you have anything you would like to rebut?

A13: Yes. Regarding the email, there was no mention at all by me or anyone in the room of skin colour.

There was no laughing by anyone in the room, or anyone in the hallway for that matter...

5. Mr. Lewis admitted he made the bomb comments attributed to him:

Q15: Please describe the progression of your assignment up to 1400 April 5, 2017

A15 ...I just responded, "I don't want to sign for it, it could be a bomb, it could be anything." His response was, "Why would I bring a bomb?" I reiterated saying, "I don't know what it is, I don't know what it is for, I don't want to sign for it. It is not addressed to me." He then proceeded out of the room and I continued looking at my switch list, making a plan to be ready...

6. Mr. Lewis did not dispute the inappropriateness of his comments and noted he owed Mr. Singh an apology:

Q42 Do you understand that when it comes to harassment that it is not the intent of the person making the comment but the perception of the person receiving the comment that contributes to something be as harassment. (sic)

Q42 (sic) Yes. I had no ill-will or intent to mistreat somebody. I do understand that Mr. Singh perceived it as a racial stereo type. It was in no way meant to offend him and given the opportunity I would happily apologize to him personally. It wasn't my intention whatsoever. I definitely apologize as that is not who I am as a person. I'd try to right that with him if given the chance.

7. CP similarly interviewed the three other employees who were present. Their evidence was generally consistent that they did not hear any mention of skin colour. Moreover, they noted there was shock, rather than laughing, in the room when Mr. Lewis made his comments.

8. CP did not follow up with Mr. Singh as part of its investigation but relied on the contents of his April 5, 2017 email.

Analysis and Decision

9. CP had the burden of proof in this discipline case. To meet that burden, CP needed to demonstrate why, on a balance of probabilities, its suggested version of the facts should be preferred. It is not enough simply to conclude that certain facts exist without explaining why. As noted recently in [AH664](#):

29. Ultimately, based on the record, the arbitrator can only discern an implicit disagreement on CN's part regarding Mr. Reid's explanation of his actions on June 26, 2017. In the face of these differing views, CN needed to demonstrate to the arbitrator why its position ought to be preferred.

10. This Office's expedited arbitration process is wholly dependent on the parties developing a full factual record. That requirement flows from their negotiated investigation process. The arbitrator then hears the parties' representations about the legal issues arising from those facts. The importance of the record explains in part how this Office (and the parties) can resolve 21 arbitration cases each month by scheduling 3 days of hearings with up to 7 one-hour cases assigned to each day.

11. A third-party complaint brings additional evidentiary complexity but can still be heard under this Office's expedited arbitration system: [CROA&DR 4587](#).

12. In this case, while CP interviewed the employees involved, no follow-up occurred with Mr. Singh. Mr. Singh's only evidence came from his original email complaint. This raises the issue of how the arbitrator should resolve conflicts in the evidence and related credibility issues.

13. CP urged the arbitrator to accept Mr. Singh's version as described in his email, despite the contrasting evidence from those witnesses it investigated (E-1; Company Brief; Paragraph 23). It further noted its important obligations regarding a safe and collaborative work environment:

27. The Company maintains it has a responsibility to ensure a safe and collaborative work environment for its employees, customers, and partners. Sarcastic comments and references to bombs are completely inappropriate, and under no circumstances are such quips tolerated in the workplace. The Grievor's comment towards Mr. Singh was completely inappropriate and was racially charged when he said to Mr. Singh that he would not sign the package delivered by Mr. Singh because it had a bomb.

14. There is no dispute that CP, like all employers, has significant responsibilities in the areas of discrimination and harassment. In this case, however, the arbitrator must consider that while some of the evidence was investigated; other evidence was not.

15. Since CP did not interview Mr. Singh, his April 5, 2017 email alleging a racial slur will constitute just one element in the overall record. While CP in its brief indicated that it accepted Mr. Singh's version of the incident (E-1; Company Brief; Paragraph 23), it also seemingly accepted that there was no laughing in the room at the time Mr. Lewis made his comment (E-1; Company Brief; Paragraph 34). CP did not explain how and why it chose to rely on irreconcilable evidence.

16. There is no dispute that Mr. Lewis made an extremely ill-considered remark to Mr. Singh when suggesting that he might be carrying a bomb. The witnesses who were interviewed confirmed the comment. Mr. Lewis did not deny making the comment.

17. It is more problematic given the conflicting evidence whether Mr. Lewis went further and also commented on the colour of Mr. Singh's skin.

18. The evidence does not permit the arbitrator to conclude that Mr. Lewis did utter the terrible things to which Mr. Singh made mention in his email. This is not a finding on Mr. Singh's recollection. Rather, it reflects the fact that an allegation differs from an investigation's evidence. CP did not follow up with Mr. Singh during the investigation. The arbitrator must accordingly decide this case based on the record.

19. CP has demonstrated that it had cause to discipline Mr. Lewis for his inappropriate comments and interactions with Mr. Singh. But CP did not demonstrate that that evidence supported terminating Mr. Lewis, even though he was a short service employee who did not have a discipline-free record. Those latter factors are, however, relevant for the suspension the arbitrator has decided to substitute.

Disposition

20. The arbitrator orders CP to substitute a time-served suspension for the termination and reinstate Mr. Lewis in his employment, without loss of seniority. In the

circumstances, including a review of Mr. Lewis' record, the arbitrator has not been persuaded to award any other compensation.

21. The arbitrator remains seized for any issues which arise out of this award.

July 19, 2018



GRAHAM J. CLARKE
ARBITRATOR