

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

CASE NO. 4761

Heard via Video Conferencing, September 9, 2020

Concerning

CANADIAN PACIFIC RAILWAY

And

UNITED STEEL WORKERS – LOCAL 1976

DISPUTE:

Dismissal of T. Fluet following her tour of duty on August 30, 2019.

JOINT STATEMENT OF ISSUE:

On September 6 2019, the Company conducted an investigation with Ms. Fluet in connection with her tour of duty on Friday August 30, 2019 and her alleged violation of policy 1300 and 4340 with mechanical support employee K. Dahn and production supervisor D. Walls.
Union Position

The Union takes the following position: The discipline assessed was excessive and unwarranted and request that the discipline be reduced. The Union believes and suggests that in this case, counselling or education is more appropriate than termination.

As full and final resolve, the Union requests that the dismissal be removed and that Ms. Fluet be paid all lost wages and benefits.

Company Position

It is the position of the Company that the discipline assessed was warranted in all of the circumstances. Culpability was established through a fair and impartial investigation where it was determined that the grievor acted in a manner towards a fellow employee which contravened Company Policy 1300 (Discrimination & Harassment in the Workplace) and 4340 (Violence in the Workplace).

FOR THE UNION:
(SGD.) N. Lapointe
Staff Representative

FOR THE COMPANY:
(SGD.) W. McMillan
Manager, Labour Relations

There appeared on behalf of the Company:

P. Sheemar – Manager Labour Relations, Calgary
D. McGrath – Manager Labour Relations, Calgary

And on behalf of the Union:

N. Lapointe – Staff Representative, Montreal
A. Daignault – Business Agent, Montreal
T. Fluet – Grievor, Winnipeg

AWARD OF THE ARBITRATOR

1. On September 30, 2019, the Grievor was dismissed from Company services via Form 104 (Company Ex. 1) for the following reasons:

...You have been dismissed from the Company services for the following reasons:

Conduct unbecoming as evidenced by the inappropriate comments you made towards a fellow employee on August 30, 2019.

Based on your previous disciplinary history, this incident also constitutes a culminating incident which warrants dismissal.

2. The facts are not in dispute and are largely captured in the Company's Brief at paras. 24-32, as follows:

On August 30, 2019, the Grievor was working as Storeperson in the Weston Shops in Winnipeg, MB. The Grievor's shift started at 08:00 and ended at 16:00.

At 8:00am, Mechanical Support employee Ken Dahn was instructed by Supervisor Rob Schirle to use forklift #635 due to a flat tire on his forklift. At the time, the Grievor was operating forklift #635.

The Grievor was not present by forklift #635 when Mr. Dahn was performing a forklift inspection. The Grievor then appeared prior to Mr. Dahn completing his inspection and stated to Mr. Dahn, "no that's my fucking forklift"

Mr. Dahn responded to the Grievor with his instructions from Supervisor Schirle, however the Grievor continued to insist, "that there are multiple forklifts at CP go find another one." The Grievor goes on to question Mr. Dahn's seniority and how long he has been there. Mr. Dahn expressed that was irrelevant and reiterated his instruction from Supervisor Schirle.

The Grievor did not allow Mr. Dahn to use forklift #635, therefore Mr. Dahn returned to Supervisor Schirle who then, at approximately 8:45am, instructed the Grievor to allow Mr. Dahn to use forklift #635.

The Grievor was subsequently tasked with conducting bearing counts. Supervisor Dan Walls approached the Grievor to begin

briefing her on the task when the Grievor stated, "Happy fucking Friday to me." (Emphasis added).

At approximately 9:00am, the Grievor and Supervisor Walls were in the Quonset discussing the identification of different types of bearings when Mr. Dahn entered the Quonset with the forklift and a load of bearings.

The Grievor stepped to the side, extended her arm out and gestured at Mr. Dahn with her middle finger (Emphasis added). She then stepped out further into the front of the path of the forklift and called out to Mr. Dahn "Princess" (Emphasis added). The Grievor stepped back towards Supervisor Walls and said, "I'm only joking with him".

As Mr. Dahn proceeded to move bearings to the Quonset, the Grievor continued to show him the finger, repeating, "are you happy princess" (Emphasis added) each time he entered the Quonset. Mr. Dahn continued to reiterate that he was simply following the orders of his Supervisor. There were no other interactions between the Grievor and Mr. Dahn on this day

2. I have no difficulty in concluding that the conduct of the Grievor breached the Company's policies and warranted discipline. Given my conclusion, below, the issue of whether or not it was a culminating incident is moot.

3. The only issue is the reasonableness of the penalty of dismissal.

4. The Company argues, quoting *Sheetmetal Workers International Association, Local 473. v. Bruce Power*, 2009 CanLII 31586, that the discipline imposed, considering the Grievor's past record, is well within the range of reasonable having regard to all of the circumstances and urges that I not change the penalty based on the fact that I might take a different view.

5. While I understand the position taken by the Company, I am also of the view that the application of a contextual approach to the imposition of the discipline of dismissal should be applied (see: *McKinley vs. BC Tel* 38 SCC 2001). Taken in context, I do not believe that the Grievor's conduct, warrants dismissal or that the employment relationship was destroyed thereby.

6. In the circumstances, I have concluded that the dismissal should be set aside and the Grievor given a last-chance opportunity to prove that she is capable of being a contributing employee in the Company's operation.

7. In arriving at this decision, I took into consideration the following:

- a) The Grievor has an abysmal record which is filled with several disciplines relative to conduct unbecoming. Although she said that she works hard and tries to keep her "head down", it is clear that she has an attitude which is reflected in her demeanour and disposition at the workplace;
- b) In fact, her discipline ascended to a level where, on February 12, 2018, the Grievor received a warning letter (Company Tab 3(c)) advising her that she is "*now at the last step of the Company's discipline in accountability process*". In my view she was given fair warning that changes in her conduct were necessary;
- c) However, being realistic, cognizance must also be taken of the fact that environment in which the Grievor worked is not the Junior Church Choir. The conduct and language she exhibited in the incident giving rise to her dismissal, was apparently not foreign to the majority of the members.

- d) In fact, it appears that as early as August 31, 2018 some of the conflicts which existed on the workplace floor were brought to the attention of the Company and it saw fit, according to the email from Mark Philppot of that date, to require an investigation.
- e) Finally, the Grievor is 52 years old and has worked with the Company since 2004. While the majority of her career was spent in Toronto, she transferred work when the Company centralized some of its work to Winnipeg in 2016. Thereafter she worked in the customer service centre until she was transferred into the Store Department in April 2018. Her voluntary transfer from Toronto to Winnipeg is not without significance, nor are her 16 years of service.

8. Nevertheless the Company's prior progressive discipline, and Grievor's record relative to "conduct unbecoming", makes it apparent that a lengthy suspension is warranted.

8. Accordingly, the grievance is allowed in part. The dismissal shall be set aside. The Grievor shall be reinstated without compensation and without loss of seniority.

9. In addition to, and as part of the above, the Grievor will be subject to the following terms and conditions:

- a. Prior to return to active service the Grievor will be required to successfully complete a screening interview with his local manager concerning her ongoing employment. The purpose of this interview will be to review the Company's ongoing performance expectations regarding the Grievor's return to work and to provide a full understanding and clarity regarding these expectations. If she so desires, an accredited representative may accompany the Grievor to this interview.

b. The Grievor shall attend and participate in such counselling or education as may be directed by the Company.

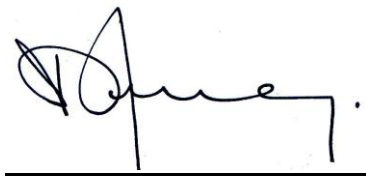
c. The Grievor will be reinstated at the last Step and, as such, her employment with the Company will be in jeopardy if she commits a future offense for which discipline is warranted within the next two (2) years.

d. This determination should be understood by the Grievor to be a last-chance opportunity to show her employer that she can work in a compliant and safe manner as required by her position.

10. While not a direction, I suggest that the Company consider transferring the Grievor into a position where the existing conflicts would have less of an impact on the Grievor.

11. I shall retain jurisdiction with respect to the application, interpretation and implementation of this award.

September 21, 2020

A handwritten signature in black ink, appearing to read "R. Hornung", written over a solid horizontal line.

**RICHARD I. HORNUNG, Q.C.
ARBITRATOR**