

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

CASE NO. 4791

Heard in Gatineau and via Zoom Video Conferencing, July 15, 2021

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the dismissal of Conductor D. Gaymer of Edmonton, AB.

THE UNION'S EX PARTE STATEMENT OF ISSUE:

Following an investigation, Mr. Gaymer was dismissed which was described as "Your conduct unbecoming toward a fellow employee on one or more occasions including but not limited to verbally threatening harm, making derogatory comments and making unwelcome comments. This is a violation of CP Policy 1300 - Discrimination and Harassment Policy and HS 4340 - Violence in the Workplace Policy." The Company did not respond to the Union's grievances.

Union's Position:

The Union contends that the investigation was not conducted in a fair and impartial manner under 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 Mr. Gaymer be made whole.

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. Gaymer's dismissal is unjustified, unwarranted, discriminatory, and excessive in all of the circumstances, including significant mitigating factors evident in this matter.

The Union submits the Company in failing to respond to the Union's grievances has violated the Collective Agreement.

The Union requests that Mr. Gaymer be reinstated without loss of seniority and benefits, and that he be made whole for all lost earnings with interest. Further, the Union seeks damages in amounts to be determined. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

Company Position:

The Company disagrees and denies the Union's request.

THE COMPANY'S EX PARTE STATEMENT OF ISSUE:

Following an investigation, Mr. Gaymer was dismissed from Company Service effective December 6, 2019 for the following reason: "*Your conduct unbecoming toward a fellow employee*

on one or more occasions including but not limited to verbally threatening harm, making derogatory comments and making unwelcome comments. This is a violation of CP Policy 1300 - Discrimination and Harassment Policy and HS 4340 - Violence in the Workplace Policy.”

Company Position:

The Company disagrees and denies the Union's request.

The Grievor's culpability was established through a fair and impartial investigation. The Grievor was properly dismissed for a violation of CP Policy 1300 – Discrimination and Harassment Policy and CP Policy HS 4340 – Violence in the Workplace Policy. Discipline was determined following a review of all pertinent factors, including those the Union describe as mitigating.

The claim that the Grievor was not afforded a fair and impartial investigation is unsupported by fact. The investigating officer transcribed the investigations to be understood by all parties. The Grievor and his Union Representative were given the opportunity to review all statements to ensure they were factually correct. Of note, the Grievor's Union Representative was present for Mr. Payot's statement and was given the opportunity to ask any questions and rebut any statements made. Further, the Grievor and his Union Representative were given another opportunity during the Grievor's investigation to voice any questions, concerns or rebuttals regarding Mr. Payot's statement. The Grievor was also given the opportunity to review his own statement which he initialed and signed.

The Company responded to the Union's grievances. Without prejudice to the foregoing, Article 40.04 is clear in stating that in the event “a decision on an appeal against discipline imposed is not rendered by the appropriate officer of the Company within the prescribed time limits, the grievance may be progressed to the next step of the grievance procedure.” As evidenced by the Union's referral to the next step through the grievance process as well as to arbitration, clearly the Union has progressed to the next step.

The Company reserves the right to object to any and all post-dismissal evidence and/or evidence which was not in the possession of the investigating officer at the time as any attempt to raise this evidence after the fact unfairly prejudices the Company.

The Company maintains the Union's request for damages is unnecessary, punitive and inappropriate in the circumstances.

Lastly, the Company maintains that the discipline assessed was just, appropriate and warranted in all the circumstances. Accordingly, the Company cannot see a reason to disturb the discipline assessed.

Union Position:

The Union has filed their own Ex Parte Statement of Issue.

FOR THE UNION:

(SGD.) D. Fulton

General Chairman

FOR THE COMPANY:

(SGD.) D. Guerin

Director, Labour Relations

There appeared on behalf of the Company:

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| D. McGrath | – Manager Labour Relations, Calgary |
| T. Gain | – Legal Counsel Litigation and Labour, Calgary |
| G. Gill | – Observer, Calgary |

And on behalf of the Union:

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|-------------|---------------------------------------|
| K. Stuebing | – Counsel, Caley Wray, Toronto |
| D. Fulton | – General Chairman, Calgary |
| D. Edward | – Vice General Chairman, Medicine Hat |
| R. Finnsen | – Vice General Chairman, Wynyard |
| C. Ferwin | – Local Chairman, Edmonton |
| D. Gaymer | – Grievor, Edmonton |

AWARD OF THE ARBITRATOR

1. The grievor was dismissed on December 6, 2019, for conduct unbecoming toward a fellow employee, notably for allegedly yelling, swearing, calling him names and threatening him, in violation of the Company's Discrimination and Harassment Policy HR 1300 (the Harassment Policy) and the Violence in the Workplace Policy HS 4340 (the Violence Policy). There is no dispute that the conduct at issue was work-related.

2. As a preliminary matter, the Union seeks to have the discipline rescinded on procedural grounds.

3. The Union submits that the investigation was not conducted in a fair and impartial manner, as the investigator did not report the grievor's answers adequately, put words in the grievor's mouth and did not disclose the audio recording of the conversation which led to the incident at issue. I reject the Union's position that the investigation was compromised in any way. First, the grievor signed the investigation notes, confirming their accuracy. Second, the transcript of the audio recording was provided by the Company and discussed during the investigation. The transcript properly reflects the content of the audio recording. There is no indication, contemporaneous to the grievor's statement, that the Union requested the audio recording to be played and was denied this by the Company. Moreover, the grievor suffered no harm from not having the audio recording played during the investigation. In the circumstances, I am satisfied that any fairness obligations were met.

4. The Union also submits that the Company did not respond to the grievance. That is not supported by the evidence, as the Company's grievance responses at Steps 1 and 2 of the grievance process were filed in evidence. In any event, the remedy to the Company's failure to respond to a grievance is not that the discipline be rescinded. Rather, by virtue of article 40.04 of the collective agreement, in the absence of a Company response within the prescribed time, the Union may progress the grievance to the next step, as it did in this case by referring it to arbitration. Article 40.04 reads, in part, as follows:

[...] Where a decision on an appeal against discipline imposed is not rendered by the appropriate officer of the Company within the prescribed time limits, the grievance may be progressed to the next step of the grievance procedure.

5. I now turn to the merits of the case. On October 3, 2019, the grievor was working as a conductor, with a trainman and a locomotive engineer. At the end of their trip, the crew's tie up location was erroneously recorded in the system as Clover Bar station, instead of South Edmonton. This error resulted in the trainman not showing as available for work on the spareboard at his Edmonton home terminal for the 2100 hours assignment that evening. The trainman contacted the Crew Management Centre (CMC) to have the error corrected, resulting in a fellow employee being put back on rest status and losing the opportunity to work the 2100 hours assignment. The fellow employee contacted the trainman, upset and looking for an explanation. The trainman explained the situation and attributed the tie up error to the grievor. The issue was reported on the unionized employees' chat platform on social media, which generated accusatory comments against the grievor, leading to the incident at issue.

6. The grievor called the trainman and verbally berated him for blaming him on social media and for interfering with other people's work assignments. The trainman's wife witnessed the 77-second call and recorded the end of it, generating a 31-second audio recording, which was filed as evidence. The transcript of the recording is as follows:

Conductor: I'll f*** tell you right now you f*** worm
 Trainman: Is that a threat Gaymer?
 Conductor: You f*** think you guys can do whatever the f*** you want and f*** guys out of money, watch out.
 Trainman: Ok, so I'll take that as a threat.
 Conductor: No, I'm not, don't take it as anything. I'm just f*** telling you right now, you want to keep f*** guys around and thinking it's f*** ok, watch out, you're a f*** piece of shit.
 Trainman: Ok.
 Conductor: I'm telling you right now.
 Trainman: Ok, bye.

7. After the call, the trainman texted the grievor, stating "You can't threaten people like that". He also mentioned that his wife had heard the conversation.

8. The next morning, the grievor left a voice message for the trainman and texted him the following:

Hey Jonathan,
 I just left you a message on your phone. I want to apologize for our phone conversation yesterday. I lost my temper and should not have said what I did. I'm sorry your wife had to hear that as well. Anyways I hope we can move past this. Once again, I'm sorry.

9. Later that day, the trainman reported the grievor's behaviour to HR and to his Superintendent who, in turn, contacted the Canadian Pacific Police Service (CPPS). The grievor was charged with uttering threats but those criminal charges were later dropped.

10. During the disciplinary investigation, other instances of inappropriate behaviour and comments by the grievor toward the trainman were reported, including the beginning of the October 3, 2019 phone conversation.

11. At the hearing, the Company indicated that the decision to terminate the grievor was solely based on the part of the October 3, 2019 conversation which was recorded and filed in evidence. Therefore, I have not given any consideration to statements made by the grievor before the recording started, nor to previous events involving the trainman.

12. The audio recording and the transcript of the October 3, 2019 conversation lead me to the clear conclusion that the grievor's conduct toward the trainman constitutes a violation of the Harassment Policy. Specifically, the grievor engaged in intimidation, verbal abuse, bullying, threats, unwelcomed remarks and name calling against the trainman, which are examples of "personal harassment" set out in the Harassment Policy. I note that the tone and profanity used by the grievor to deliver his message to the trainman were particularly egregious.

13. The Violence Policy, which prohibits workplace violence, defines it as follows:

Workplace violence constitutes any action, conduct, threat or gesture of a person towards an employee in the workplace that can reasonably be expected to cause harm, injury or illness to that employee.

14. While the threats formulated by the grievor against the trainman were not specific, I find that a reasonable person could interpret the repeated warning to "watch out" as a threat of harm or injury, especially considering the aggressive manner and tone in which

it was delivered. While the grievor denied that he was making a threat, when asked by the trainman during the conversation, the grievor's answer was not convincing nor reassuring, as he immediately reiterated his warning to watch out, in the same aggressive tone and manner. In the circumstances, I find that the grievor did contravene the Violence Policy.

15. The grievor knew, or should have known, that his conduct was inappropriate, as he had been trained on the Company's expectations regarding workplace conduct. His training record shows that he was successful in completing training on the Harassment Policy and the Violence Policy in 2012, 2015 and 2018. In any event, the grievor voluntarily acknowledged his unbecoming conduct and apologized to the trainman the day after. He also acknowledged his wrongdoing and expressed regret during the disciplinary investigation. Moreover, he sought counselling through the Employee Assistance Program (EAP) a couple of days after losing his temper, as he put it himself, with the intent of bettering himself and avoiding future incidents of this nature. I take these actions to mean that the grievor realized the inappropriateness and seriousness of his conduct.

16. In the circumstances, I find that the grievor's conduct, as reflected on the audio recording, is deserving of discipline.

17. Contrary to the Union's contention, the grievor's behaviour does not constitute acceptable industrial behaviour. While conflict will inevitably occur in the workplace on

occasion, the type of conduct in which the grievor engaged is not acceptable under today's workplace laws and standards.

18. The final question is whether dismissal was an excessive penalty in this case.

19. For the purposes of answering that question, it is relevant to consider that the grievor had a heavy discipline record in the two years prior to the dismissal, and a long discipline history. Also, the fact that the grievor indicated during the investigation that he was unsure about having been trained on the Harassment Policy and the Violence Policy is concerning, whether he genuinely did not remember taking the training or whether he was being uncooperative. These elements constitute aggravating factors.

20. On the other hand, there are also mitigating factors to be considered in favour of this thirty-two-year (32) service employee. The grievor left a voice message and texted the trainman the day after berating him over the phone, apologizing for his behaviour. He did so on his own initiative, before the trainman complained to HR and to the Superintendent, which suggests that the grievor was aware of the inappropriate nature of his conduct, had regrets, and was genuine in his effort to make amends. The grievor also sought counselling further to the incident. Moreover, during the investigation, he expressed that he was sorry and felt embarrassed about his behaviour. Also, I note that the vast majority of the grievor's discipline history relates to rules violations, as opposed to conduct unbecoming. The one incident of verbal confrontation and abusive language dates back to 2004, approximately fifteen (15) years prior to the current incident.

21. The nature of the grievor's actions, combined with his heavy discipline record, warrants severe discipline. However, I am satisfied that the mitigating factors in this case justify a substitution of penalty, short of dismissal. Therefore, I direct that the grievor be reinstated in his employment, without compensation or benefits, without loss of seniority, with all time lost to serve as a suspension for a "major offence", as defined under the Company's Employee Discipline & Accountability Process. The grievor shall stand at Step 3 of the Company's Progressive Discipline Steps.

22. The grievance is allowed in part.

23. I remain seized with respect to any and all disputes arising from this decision.

August 16, 2021



**JOHANNE CAVÉ
ARBITRATOR**