

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

CASE NO. 4853

Heard in Montreal, August 9, 2023

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The appeal of the assessment of 30 demerits resulting in an accumulation of 114 demerits and discharge from service for accumulation of demerits in excess of 60, to the personal record of Locomotive Engineer David Haraldson of Winnipeg, MB. for - *"your violation of the CN Code of business Conduct, the CN policy on Harassment Free Environment, Workplace Violence Prevention Policy, and your failure to comply with the CN Mask Policy while in International Falls Minnesota between February 16, 2019, and April 12, 2021."*

THE UNION'S EXPARTE STATEMENT OF ISSUE:

On April 14, 2021, Mr. Haraldson was removed from the working board without notification. While held out of service, the Company alleges to have attempted to serve Mr. Haraldson with a Notice to Appear to attend an investigation held on April 21st by registered mail. The Company further alleges that attempts were also made by registered mail to convene an investigation on April 26 and May 04, 2021, before finally successfully serving notice on May 7, 2021, for the aforementioned allegation.

On May 7, 2021, Mr. Haraldson received a Notice to Appear for a Formal Employee Statement. The notice required Mr. Haraldson to provide a statement regarding the following allegations – *"your alleged violation of the CN Code of Business Conduct, the CN policy on Harassment Free Environment, the Workplace Violence Prevention Policy, and your alleged failure to comply with the CN Mask Policy while in International Falls Minnesota between February 16, 2019, and April 12, 2021."*

Mr. Haraldson attended the investigation, which commenced on May 13, 2021, and was completed on June 08, 2021, where he answered all questions honestly and forthrightly. Mr. Haraldson denies the allegations in their entirety.

At the time of the investigation, Mr. Haraldson's record was clear of active discipline. Subsequently, Mr. Haraldson was required to attend multiple formal employee statements for which he received discipline, and as a result, Mr. Haraldson's record indicated a total of 114 demerits. On June 21, 2021, the Company issued a Form 780 assessing Mr. Haraldson the

ultimate penalty of a discharge from Company service for - "Accumulation of demerits". Mr. Haraldson received the notice on June 22, 2021.

Mr. Haraldson was investigated for an incident in 2019 at the Days Inn in International Falls, MN., the away-from-home accommodations. The Union's position is that the timeliness of the investigation, the evidence presented, and the use of hearsay evidence are a violation of Article 86.

Additionally, the Company investigated Mr. Haraldson regarding his interaction with an employee of the hotel on March 13 and 17th, 2021. It is the Union's position that the Company has not met the burden of proof to establish a violation of the Company's policy, they have not considered all of the evidence and that the discipline assessed is arbitrary, discriminatory and unwarranted.

Finally, the Company has alleged that Mr. Haraldson violated the Company's mask policy in the workplace. Once again, the Union's position is that the Company has failed to meet the burden of proof to establish culpability in this case.

The Union's position is that the Company has committed multiple violations of Article 86 and, in doing so, has disregarded Mr. Haraldson's right to a fair and impartial investigation. In the alternative, and without prejudice to the foregoing, it is the Union's position that the discipline assessed to Mr. Haraldson is discriminatory, unfair, unwarranted, and excessive in all the circumstances, that the discipline is not progressive, and that the Company has not considered all mitigating factors.

The Union requests that Mr. Haraldson be returned to active service without loss of seniority, wages or benefits for all time held out of service.

The Company disagrees with the Union's positions.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

Mr. Haraldson attended a formal investigation regarding the above incidents and was subsequently assessed 30 demerits. To note, the formal investigation commenced on May 31, 2021 and did not conclude until June 8, 2021 following several days of interruption initiated by the grievor.

The Company asserts that the incident which took place at the Days Inn, International Falls, MN, in 2019 took place as described by the hotel patrons and the incident illustrates a pattern of behavior of the Grievor which includes inappropriate behavior, deflection, attempts, to discredit others and failure to accept responsibility.

Further events in March 2021 which took place at the same location involving a hotel employee found the Grievor was in violation of CN's Mask Policy, CN's Policy on Harassment Free Environment, CN's Workplace Violence Prevention Policy and CN's Code of Business Conduct.

It is the Company's position that the investigation was conducted in a fair and impartial manner and the discipline assessed was warranted and merited.

The Union disagrees with the Company's position.

FOR THE UNION:
(SGD.) K.C. James
General Chairperson

FOR THE COMPANY:
(SGD.) L. Dodd (for) **D. Klein**
Senior VP Human Resources

There appeared on behalf of the Company:

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| L. Dodd | – Manager, Labour Relations, Winnipeg |
| M. Boyer | – Senior Manager, Labour Relations, Montreal |

And on behalf of the Union:

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| M. Church | – Counsel, Caley Wray, Toronto |
| K.C. James | – General Chairperson, Edmonton |
| T. Russett | – Vice General Chairperson, Edmonton |
| K. Ilchyna | – Local Chairperson Division 583, Winnipeg |
| R. Finnson | – Vice President, TCRC, Ottawa |
| D. Declercq | – Secretary, Winnipeg (via Zoom) |
| D. Haraldson | – Grievor, Winnipeg (via Zoom) |

AWARD OF THE ARBITRATOR

Background

1. Mr. Haraldson is a 59 year old Locomotive Engineer with some thirty-three (33) years of seniority.
2. He was given 30 Demerit Points, as a result of three incidents which occurred while he was on Crew Rest in International Falls and staying at the Days Inn. The Hotel is paid for by CN and hence CN Policies apply while CN crew are staying at the Hotel.

The Three Incidents

Company Submissions

Incident 1 - February 16, 2019

3. The Company notes that this initial incident was only investigated in 2021, as the Company only learned of the issue at that time when informed by the Hotel.
4. The incident concerned an interaction between parents of a hockey team staying at the Hotel and the grievor. The grievor called the Police twice to have them deal with a noise problem caused by the parents.
5. In addition, one of the parents came into the kitchen reserved for CN employees and refused to leave when asked to do so by the grievor. Subsequently, he raised his

voice to her and she left the kitchen. There is an issue whether profanity was used, which is contested.

6. One of the parents, Ms. Couture, wrote to CN concerning this last incident and stated that the hockey team would not be staying in the future at the Hotel if CN employees were present.

7. The Company submits that the grievor had an obligation to contact CN under its Code of Business Conduct with respect to the incident which led to the Police being called on two occasions. Instead, the grievor only contacted the Hotel manager, which the Company states is a clear violation of the Code.

Incident 2 - March 13, 2021

8. The Company states that it received a memo from one of the Hotel employees, Joe Freeman, complaining of close contact by the grievor which was unwanted. The grievor called him delusional and in need of an assessment. The Company states that this was not denied by the grievor at his investigation. Again, the grievor failed to report the matter to CN, as required by the Code of Conduct.

Incident 3 - March 17, 2021

9. The Company states there was a further interaction between Freeman and the grievor in which Freeman complains that he was once again provoking him. He further states that the grievor threatened his job by providing complaints about him from other CN employees. Three statements were provided which lends credence to the complaint of Freeman.

10. During this exchange, the grievor alleges that Freeman called him "buckwheat", which he interpreted to be a death threat. The grievor called the Police, who took no action. The Company states that the grievor spoke to the Hotel manager, but not to CN, as he was obliged to do for something as serious as a death threat.

11. The Company notes that these incidents resulted in the Hotel taking out a No Trespass Order against the grievor in 2021, which was renewed in 2023.
12. The Company submits that there is a long list of employees and guests at the Hotel who clearly have issues with the grievor, yet he refuses to accept any responsibility and instead deflects the blame back on others.
13. The Company further notes that the grievor failed to abide by the CN Mask Policy, as captured in the Hotel videos.
14. The Company submits that a 30 Demerit point penalty is in keeping with the behaviour of the grievor, his failure to inform CN according to the Code of Conduct and the relevant jurisprudence. (See **AH673C**, **CROA 3640**, **CROA 3922** and **CROA 4800** where arbitrators have upheld discipline where the grievor failed to admit wrongdoing or accept responsibility).

Union Submissions

15. Generally, the Union states that these complaints and a partial investigation demonstrate a pattern of “piling on” by CN, who clearly wish to get rid of the grievor.
16. It notes that the investigation failed to contact any other witness to the incidents, other than the grievor, who provided exculpatory comments.
17. It notes that many if not most of the complaints are based on hearsay at various levels and hence should be dismissed.
18. It notes that the complaints only arose in 2021, when the grievor made a complaint against certain Hotel employees. The grievor had stayed at the Hotel some 200 times between the initial incident in 2019 and the second and third incidents in 2021, without any problem.

19. The Union notes that the parent who entered the kitchen in 2019 is never identified and the person who made the complaint was not present at the incident. It notes that the investigator failed to contact other CN employees who were present in the kitchen with the grievor, who could have corroborated his statements.

20. The Union notes that the evidence concerning Freeman consists of two memos from Freeman (see Tabs 9 and 13 of the Company documents). Neither is signed or sworn. The grievor strongly contests this version of events and submits that the grievor's version should be preferred. It notes that other CN employees were not contacted by the investigator.

21. The Union notes that it only received the videos, on which the Company relies for evidence concerning the alleged mask violation, shortly before the hearing, despite repeated demands.

Decision

22. The Collective Agreement between the parties provides for a fair and impartial investigation before discipline can be imposed:

86.1 A locomotive engineer will not be disciplined or dismissed without having had a fair and impartial hearing and his responsibility established...

86.2 ...At the outset of the investigation the locomotive engineer will be provided with all evidence the Company will be relying upon, which may result in the issuing of discipline...

23. CROA jurisprudence has often considered whether a given investigation has been "fair and impartial". In **AH 673C**, cited at Tab 19 of the Company materials, Arbitrator Hornung notes:

In dealing with the objection at this stage, it is important to keep in mind the often quoted principles, set for in CROA 2073, that disciplinary investigations:

...are not intended to elevate the investigation process to the formality of a full blown civil trial or arbitration.

What is contemplated is an informal and expeditious process by which an opportunity is afforded to the employee to know the accusation against him, the identity of his accusers,

as well as a content of their evidence or statements, and to be given a fair opportunity to provide rebuttal evidence in his defence.

24. In **CROA 4800**, cited at Tab 22 of the Company materials, Arbitrator Flaherty noted the following, concerning the requirement for a fair and impartial investigation:

11. The relevant passages of the Collective Agreement are as follows:

71.1[...] At the outset of the investigation the locomotive engineer will be provided with all evidence the Company will be relying upon, which may result in the issuing of discipline. The Company will provide sufficient time for the locomotive engineer and his representative to review all of the evidence provided prior to the commencement of the investigation.

71.2 A locomotive engineer will not be disciplined or dismissed without having had a fair and impartial hearing and his or her responsibility is established [...]

12. The procedural fairness protections set out in provisions such as article 71 are a fundamental part of the CROA arbitration process. As part of the expedited arbitration format agreed to by parties, arbitrators rely on the results of employers' disciplinary investigations as primary evidence: CROA 4558. In these circumstances, the fairness of the investigation process is critical and predicated on full and appropriate disclosure to the Union.

25. As Arbitrator Picher noted, as long ago as the 1986 decision in **CROA 1588** (see Tab 8, Union materials): "It is clear from the language of article 86.1 that in the absence of a fair hearing discipline cannot stand".

26. At issue then, is whether the grievor got a fair hearing in the present matter.

27. With respect to the first incident, the context is critical. The investigation only occurred in May - June 2021, more than two years after the incident in February 2019.

28. The Company is not to blame for this delay-it was only informed of the incident by the Hotel in spring 2021.

29. The Union submits that this incident was only brought forward because the grievor had made a complaint against Hotel employees in 2021. This position has considerable weight, as the grievor had stayed at the Hotel some 200 times in the intervening two year period, without incident or complaint.

30. The passage of time necessarily makes the grievor's response much more difficult. His own recollection of events will be affected, as well as his ability to obtain contemporaneous statements from other witnesses.

31. The Company is correct, however, that the timing issue could have been avoided, had the grievor reported the incident to CN at the time, and not just to the Hotel manager and the police.

32. At the heart of the dispute between the parties concerning this first incident, is whether the grievor behaved inappropriately towards one of the hockey Moms, after she entered a kitchen area reserved for CN employees.

33. One of the other hockey parents, Ms. Couture, alleges that the grievor swore at the hockey Mom who had entered the CN kitchen without permission. It is noteworthy that Ms. Couture was not present at the incident and the hockey Mom never provides a statement, or is even identified by name. The grievor flatly denies during the investigation that he used inappropriate language with the hockey Mom.

34. It is clear that the statement from Ms. Couture was hearsay. The investigating officer did not contact her, or endeavor to get first hand evidence from the hockey Mom. Nor did he seek evidence from other CN employees present in the kitchen.

35. In the matter of SHP 712 (see Tab 25, Company materials), Arbitrator Richardson considered the material before an investigating officer and the ability to consider hearsay evidence, in the presence of similar collective agreement language:

[32] Rule 27.1 provides that "[e]xcept as otherwise provided herein, no employees shall be disciplined or discharged until they have had a fair and impartial investigation and their responsibility established."

[50] Having reviewed Rule 27.2 carefully I am not satisfied that a formal investigation under Rule 27.2 requires all evidence from witnesses to be in the form of formal statements. There is certainly nothing expressly to that effect in Rule 27.2. The requirement rather is that the employee being investigated must be provided "with a copy of all the *written evidence* as well as any oral evidence which has been recorded and which may have a bearing on their involvement" (emphasis added). "Evidence" is a word with a broad meaning. It can apply to oral or written statements, which in turn can include sworn or simply signed statements; and direct as well as indirect (that is, hearsay) testimony. Had the parties intended evidence to be gathered by way of formal statements they would have said so. They did not. They referred simply to written evidence, or oral evidence that had been recorded. Moreover, Rule 27.2 goes on to entitle the employee and his or her union representative, "upon request," to question witnesses-or to ask questions through the presiding officer. This entitlement implies a recognition by the parties that the initial "written evidence" could be in the form of statements-formal or informal, direct or indirect (hearsay)-that were collected by the investigator before the grievor was him- or herself interviewed (as was the case here).

[51]The only requirement under Rule 27.2 is that such evidence be either "written" or, if oral, that it had been recorded. The reason for such a requirement is clear. It is to ensure that the employee being investigated has the same information that the Company has and hence knows the "evidence" that has a bearing on the issue. It is to ensure that the employee knows the case he or she has to meet, and has a chance to either rebut, deny, add to or explain such evidence. That in turn ensures that the Company has *all* the evidence material to the issue *before* it makes its decision-which in turn is part of what it means to have a "fair" hearing.

[52] I was accordingly not satisfied that the absence of "formal" statements or interviews from the witnesses constituted a breach of the grievor's substantive right to "a fair and impartial investigation" under the Collective Agreement.

[56] The Union's objection to the Company's reliance on hearsay evidence (that is, the written statements of the complainant and the witnesses) cannot in the circumstances of this case be sustained. Arbitrators are not judges; arbitrations are not court proceedings. The law is clear that arbitrators are entitled to admit and consider hearsay evidence. It is true that arbitrators are often reluctant to place much weight on hearsay

evidence, particularly where it is *the only* evidence against a grievor who is alleged to have committed a serious disciplinary offence. But that is not to say that it can never be relied upon. The weight to be accorded hearsay evidence will vary from case to case. It will depend upon such factors as necessity, reliability (whether threshold or ultimate), as well as on the seriousness of the alleged offence. It will also depend on the grievor's own testimony in response to such evidence. So, for example, much more caution would be required on the part of an arbitrator where the grievor flatly denies the hearsay evidence that is offered against him or her than would be the case where the grievor admits, or qualifies or adds to, the hearsay evidence. In the latter case the hearsay serves as much as a prompt that elicits direct evidence (that of the grievor) as it does evidence that may be relied upon to establish a finding of fact.

36. The fact that the investigating officer did not verify the statement of Ms. Couture, or attempt to get a direct statement from the hockey Mom who was present, puts into doubt the fairness of the investigation.

37. Even if the investigating officer was entitled to consider the statement of Ms. Couture, I can give it little or no weight, in light of the obvious hearsay issue and the direct contradiction of her statement by the grievor.

38. With respect to the second and third incidents, the timing issue is not present, with both incidents happening in March 2021. However, some of the other difficulties remain. Mr. Freeman provided two statements, but was never questioned by the investigating officer.

39. In the questioning of the grievor, he consistently denies harassing Mr. Freeman (see Investigation Report, Q and A's 74-130, Tab 3 Union documents).

40. While the grievor was questioned, none of his other witnesses were contacted.

41. This is quite troubling, as two of the witness statements deal directly with J. Freeman. A. Fiola noted the following (see Tab 3 of the Union documents):

"I had a brief conversation with Mr. Freeman as to the severity and inappropriateness of his verbal actions! After this I noticed Mr. Freeman

being verbally abrupt with other co-workers, but they would tell Joe Freeman that he was out of line.

The last incident that I had with Joe Freeman was when I came in on March 18/21...I had heard from other employees that there was an incident with Dave Haroldson and Joe Freeman. I was curious as to what happened...Joe replied "I'm not saying a word and you can go fuck yourself"! I was shocked at this so I never said anything else...Mr. Freeman turned to me and said: "And if you lose any more weight you better lose that watch or I might as well fucking chop off your arm". The next trip Mr. Freeman was at the desk and he tried to shake my hand and apologize which at this time I was still offended so I didn't talk to him!...If there are any questions please call me or email."

42. Another CN employee, K. Slobodian, also forcefully wrote about the behavior of Mr. Freeman:

Hey kev,

On Saturday June 5th at around 23:45 I was sitting outside the days inn hotel having a cigarette after arriving from a trip when I had a very uncomfortable situation happen with the Joe the front desk clerk. Because I thought we were on "good terms" I asked joe what "buckwheat" meant. I asked him this because of what I had heard from his little run In with Dave haroldson. He replied with "I don't want to talk about it" I replied by saying no problem it's none of my business anyways. He walked back into the hotel, and I continued to smoke and sift through my phone. About a minute later he came back outside and asked aggressively. "what made you think you could ask me that question • I was a little surprised and just said I wasn't sure. He then continued to aggressively rant about how much he hates every single one of us, and how it's pathetic that some of us pretend to be friends with the staff at the hotel etc etc. As he kept talking he kept getting more angry and aggressive. I sat there uncomfortably and listened to this for 5 minutes not wanting to trigger something physical. He realized he wasn't getting a reaction from me so he went inside and I could hear him and don jonasson going back and forth. That went on for 5 minutes as well. After the exchange don came outside and sat outside across from me with a shocked look on his face. I knew the front desk office was right next to us and I knew the window was open and joe could hear us if we were speaking so I signalled to don not to say anything because joe was in the office. About 30 seconds later joe came back outside and asked if we were talking about him...I didn't say anything and don't remember what don said but Joe continued to aggressively scold us and egg us on. I'm not sure how long this went on for but at some point Corey feere was outside as well as the days inn driver Craig. I don't remember a lot about Joe's verbal rampage because I was Just In shock that someone was talking to me/us

that way, let alone somebody that CN does business with. After this whole altercation, myself, don, Corey and Craig were just standing there not even knowing what to say to each other. Craig the driver informed us that this is a regular occurrence with Joe and he's also treated the regular guests like this. He also told us that he physically witnessed Joe spit on Dave Haraldson. This did not surprise me at all after witnessing his behaviour first hand. I can honestly say as a grown man in all my years working at CN or anywhere else, I've never been spoken to or felt more threatened ever. I couldn't sleep thinking about I'm nervous writing this thinking about possible repercussions from Joe if he finds out. This guy should not be working anywhere let alone with the public. I'm really hoping CN looks into this. I feel sick to my stomach saying this but honestly if there's somebody that I would ever be afraid of going on a violent rampage, it's Joe hands down. In the meantime I think I will be throwing out my passport because it's definitely not safe to roll the dice with that loose cannon behind the front desk.

43. There is no doubt that there is a dispute between the grievor and Mr. Freeman. Each blames the other for the dispute. There is also a dispute between the grievor and the Hotel. Again, each blames the other for the dispute. The problem was serious enough that the Hotel took out a No Trespass Order against an employee of what was undoubtedly one of their most important customers.

44. However, the grievor is entitled to a fair and impartial investigation establishing his responsibility before any discipline may be imposed, based on the Collective Agreement and an unbroken line of CROA jurisprudence. There cannot be a conclusion about responsibility if the complaints are disputed, and neither the complainants nor the witnesses speaking in favour of the grievor are contacted by the investigating officer. If the investigation is not fair and impartial, it cannot legally establish the responsibility of the grievor.

45. I find that the investigation was not fair and impartial and therefore the discipline based on it cannot stand.

46. There was an allegation of a mask violation, based on screen shots taken from a hotel video. The video was not provided to the Union at the time of the investigation.

Information supplied by the Company after the current hearing, to which the Union has responded, indicates that the Company made the video available to a Union officer some two and half months after the investigation. Whether the video was actually obtained by the Union at that time, or only just prior to the hearing, remains in doubt. In any case, fundamental fairness and CROA jurisprudence require that all relevant information in the possession of the Company be provided to the Union, such that the Union can fully participate in the CROA mandated joint investigation. To do otherwise renders the process void. Even if the video had been provided in a timely manner, I am not convinced that the photos or video clearly demonstrate mask violations. In most of the photos, the Grievor appeared to be drinking, when unmasking is permitted.

47. There is also an allegation that the grievor failed to notify the Company about any of the three incidents mentioned above, in violation of the Code of Business Conduct (see Tab 7, Company documents). The grievor does not deny this, stating that he had informed the Hotel, as he was requested to do by the Hotel manager, and the police, when she failed to act (see Q and A's 37 and 50 of the Investigation). He contacted the police twice with respect to the 2019 hockey parents incident and once in 2021 with respect to Mr. Freeman's alleged death threats.

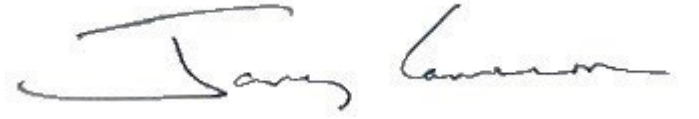
48. The Company clearly has an interest in being informed any time police are being called by its employees for incidents occurring while the employees are governed by CN policies. The grievor chose to do it alone, ignoring the obvious interest of the Company to be informed and to make a timely investigation as required. It is possible that the entire 2019 complaint could have been avoided, if the grievor had only reported the incident at the time.

49. While this allegation was not the central reason for the imposition of the penalty of 30 demerits, it is not denied by the grievor and is worthy of sanction. I find that a written reprimand is appropriate.

50. The grievance is therefore allowed, subject to a written reprimand for the failure to follow the Code of Business Conduct.

51. I retain jurisdiction with respect to implementation of this Award, together with respect to Remedy, should the parties not be able to resolve it between themselves.

September 18, 2023

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

**JAMES CAMERON
ARBITRATOR**