CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5017

Heard in Montreal, March 13, 2024

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE MAINTENANCE OF WAY EMPLOYEES DIVISION

DISPUTE:

Dismissal of Mr. C. Falcetta.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

On April 6, 2021 advised the grievor, Mr. Chris Falcetta, that he was dismissed for "*conduct unbecoming of an employee of Canadian Pacific and as evidenced by your being criminally charged with sexual assault, failure to comply with conditions, and assault*" and "*failure to fully participate in the investigative process*." A grievance objecting to the dismissal was filed on April 19, 2021 and was denied by the Company on June 2 2021.

The Union contends that:

1) The investigation in this case was unjustifiable. The grievor had not done anything that warranted the holding of an investigation. The grievor had not violated any Company operating rule or other policy. He was dismissal solely on the basis of being criminally charged for a matter that had nothing whatsoever to do with CP Rail or its operations (a domestic dispute);
2) The grievor cooperated fully with his investigation. He was disciplined for doing no more than exercising a right repeatedly confirmed by the CROA&DR, for example, in CROA 3917 where the Arbitrator found that he could not agree with the proposition that a "refusal to answer questions while criminal charges were pending can properly be characterized as insubordination justifying the termination of (the grievor's) employment."
3) The grievor's dismissal was improper and unwarranted.

The Union requests that:

The Company be ordered to reinstated the grievor into active service immediately without loss of seniority and with full compensation for all wages and benefits lost as a result of this matter.

The Company denies the Union's contentions and declines the Union's request.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) W. Phillips	**(SGD.)**
President	

There appeared on behalf of the Company:

F. Billings	– Assistant Director Labour Relations, Calgary
D. Zurbuchen	– Manager Labour Relations, Calgary
S. Scott	– Observer Labour Relations, Calgary

And on behalf of the Union:

W. Phillips	– President, MWED, Ottawa
M. Foster	– Director, Eastern Region, Ottawa

AWARD OF THE ARBITRATOR

Context

1. The grievor had some thirteen years of seniority with the Company when he was dismissed on April 6, 2021. He was dismissed for:

> "Conduct unbecoming of an employee of Canadian Pacific and as evidenced by your being criminally charged with sexual assault, failure to comply with conditions, and assault.
> Failure to fully participate in the investigative process." (See Tab 1, Company documents).

2. Ultimately, the grievor was found guilty of assault and multiple failures to comply with conditions. He served 134 days in pre-trial custody, for which he was granted credit for seven months of confinement. On July 6, 2023, he was given a twelve month probation order.

3. Issues

- **A.** Did the grievor fail to fully participate in the investigative process?
- **B.** Was dismissal appropriate when the grievor had been charged, but not convicted, of multiple crimes?
- **C.** Was discipline appropriate in the circumstances?
- **D.** Was dismissal appropriate in the circumstances, and if not, what lesser discipline is appropriate?

A. Did the grievor fail to fully participate in the investigative process?

Position of the Parties

4. The Company notes that the grievor refused to respond to multiple questions from the Investigating Officer, based on the advice of his criminal lawyer.

5. The Company notes that it did not assert insubordination, but the failure to respond meant that the events were not clarified.

6. It cites the decision of Arbitrator Kates in **CROA 3916**, in which he held that the Company was not obliged to wait for the conclusion of the criminal proceedings and could proceed in the face of the grievor's refusal to participate in the investigation:

> "… although the Company may have appeared imprudent in its refusal to accept the Trade Union's offer to await the outcome of the criminal trial before proceeding with the article 24 investigation it was under no obligation to do so. **Once the grievor refused to participate in the proceedings, the Company was thereby absolved of its responsibility under article 24.1 and was free to proceed on the basis of the information in its possession to impose an appropriate disciplinary sanction. The grievor simply proceeded at his peril in foregoing the opportunity to participate in the investigation in order to provide the Company with an explanation in answer to the theft allegation**. In sum, no evidence was adduced to substantiate the charge that the grievor's rights were at all compromised thereby warranting the vitiation of the discharge penalty. I do not accept the notion that the grievor's solicitor necessarily gave him sound advice in advising him not to participate in the investigation. Section 5 of the Canada Evidence Act is designed to afford the protection claimed by the grievor against self-incrimination and still allow a concurrent proceeding to go forward. Because the grievor's perceived rights were protected in any event I do not have to make any conclusive ruling on the relevance of the Canada Evidence Act." (Emphasis Added).

7. The Union argues that a refusal to answer questions during an employment investigation on the advice of criminal counsel cannot be considered insubordination and should not be held against the grievor (see **CROA 3916**).

<u>Analysis and decision</u>

8. In my view, a refusal to answer questions during an investigation on the advice of criminal counsel cannot constitute insubordination. The refusal, in and of itself, is essentially a neutral fact.

9. However, as Arbitrator Kates noted in **CROA 3916**, the employer may then proceed with the investigation and make decisions based on all of the facts, including the neutral fact of the refusal to answer.

10. I therefore do not agree that one of the grounds found in the Form 104, namely "Failure to fully participate in the investigative process" can be used by the Company to justify dismissal.

B. Was dismissal appropriate when the grievor had been charged, but not convicted, of multiple crimes?

Position of the Parties

11. The Union submits that the decision to dismiss was at the very least, premature, as the grievor had not been convicted of anything at the time of his dismissal, and would not be convicted for a further **2.5** years.

12. The Union argues that the Company has failed to show any compelling reason why the grievor could not have been suspended, pending a trial on the charges.

13. The Company argues that the charges were serious and the grievor refused to provide any explanation for the charges, based on the advice of his criminal counsel.

14. The Company submits that in light of the grievor's previous record, the serious nature of the charges, a refusal to provide any explanation and their clear duty to provide a safe working environment for all employees, dismissal was appropriate.

Analysis and decision

15. As Brown and Beatty have noted at 7.31, whether suspension is appropriate requires a balancing of interests between the employee interest in continued work and

the employer interest in protecting its reputation and the safety and security of its employees, customers and property:

> In assessing the propriety of suspending a person pending trial, arbitrators attempt to determine d to the employment relationship, and whether continued employment pending the resolution of charges would put the legitimate business concerns of the employer at risk, including its reputation, and the safety and security of its property, customers and employees. *In balancing these interests, arbitrators have insisted that, to establish that the continued presence of an employee poses a real threat to its legitimate concerns the employer bears an onus to show that it investigated the charge to the best of its ability, and that it took reasonable steps to ascertain whether the risk of continued employment could be mitigated by closer supervision or a transfer to another position*. …
> As in cases involving criminal convictions, to decide whether the legitimate interests of the employer would be prejudicially affected by the retention of the grievor pending the resolution of the criminal charges *will depend upon the nature of the offence, the work performed by the employee, and the nature of the employer's business*. On the basis of these factors, some (but by no means all) employees charged with a wide variety of significant offences, including possession and trafficking in drugs, sexual assault, arson, murder, theft and impaired driving, have persuaded arbitrators that their presence in the workplace did not so materially prejudice interests of the employer as to warrant a suspension until the criminal process had run its course.

16. Here, it is not clear whether suspension was ever considered by the employer. Given the findings for Issues 3 and 4, it is not necessary to decide whether a suspension was appropriate. In another case, however, a failure to consider a suspension could well be important.

C. Was discipline appropriate in the circumstances?

Position of the Parties

17. The Union submits that this was a wholly domestic matter, in which the Company and its reputation are unaffected. It submits that the criminal justice system is present to deal with the matter, and that the Company is not entitled to take further action against the grievor.

18. The Union argues that the grievor was a good employee, with no problems with fellow workers or his supervisors. His domestic issues are not impactful on the Company. It argues in the Statement of Issues that no investigation was even necessary.

19. The Company submits that the grievor was arrested while on duty in front of other employees. During the investigation, he identified a number of serious criminal charges:

> "There's a couple of them. Assault charge. And a failure to comply with a release order. Sexual assault, failure to comply with an undertaking, and another assault. That's all." (A 11, Tab 5, Union documents).

20. However, he did not elaborate on the circumstances on the advice of his criminal counsel (see Q and A's 18-19, Tab 5 and Q and A's 7-15, Tab 6 Company documents).

21. The Company noted that the grievor had previously been disciplined for conduct unbecoming and received a 30 day suspension:

> "your record has been assessed the following discipline as a result of your behavior unbecoming an employee of Canadian Pacific as evidenced by your May 30, 2013 inappropriate Facebook communication with an employee of a Company with which Canadian Pacific does business, resulting in a complaint being forwarded to Canadian Pacific:
>
> 1) 30 calendar day suspension without pay and benefits effective June 20, 2013
> 2) You will be prohibited from staying in or being in the Ignace Bunkhouse while the Complainant remains employed by the Company with which Canadian Pacific does business
> 3) During the 30 calendar day suspension, you are to complete the Promoting Respect at Canadian Pacific and the Discriminant and Harassment Awareness and Prevention modules of the Promoting Respect training available on Rail City" (Tab 3)

22. The Company argues that the grievor works in a largely unsupervised role, staying in bunkhouses and hotels, and interacts with members of the public. It notes that his demonstrated history of violent and unwanted interactions towards women is of genuine concern.

Analysis and Decision

23. I find that the Union argument that the matter was purely domestic and could not affect the Company's reputation must fail, on both factual and legal grounds. Given this finding, the Union's argument that an investigation was unnecessary, must also fail.

24. Factually, the grievor was arrested while on duty, in front of other employees. The grievor had involved his supervisor in the impending arrest, as evidenced by the report from Roadmaster Taddeo (see Tab 4b, Company documents).

25. Secondly, the Court transcripts clearly identify the grievor's employer (see Tab 6, p. 11, 16, Company documents).

26. Thirdly, the City of Thunder Bay is not large. The fact of the work-place arrest, subsequent incarceration and Court Hearing would be the subject of some discussion.

27. From a factual standpoint, it is not accurate to say that the matter was merely a "domestic dispute".

28. From a legal standpoint, the test is not that of proof of harm to the employer's reputation, but of risk of harm. This test was set out in Grand Erie District School Board and OSSTF, District 23, 271 LAC(4th) 162:

> "In assessing this aspect of the case, I consider it is necessary to consider:
>
> - **whether an employee's off-duty conduct creates risk of harm to the employer's reputation**
> - **the nature of the potential harm created by that risk**
> - **evidence of any actual harm**
> - **the potential for future harm; and**
> - the potential (and cost) of any steps that might ameliorate harm.
>
> **In other words, it is not enough to simply conclude that no harm has occurred. The evidence or lack of evidence of harm is but one factor in the assessment. It is necessary to consider all the factors, including the fact that the off-duty conduct created risk, or that harm might arise in the future**. In this case, it appears that

> damage to the Board's reputation has been minimal or non-existent but it is clear that a potential for harm was created through the Grievor's off-duty activities". (Emphasis added).

29. As Arbitrator Weatherill noted in **CROA 972** (see Tab 8, Company documents), the impact of criminal acts of employees on the Company's reputation is difficult to quantify, but nonetheless real:

> "The fact of such conduct (here indecent exposure) by an employee reflects adversely on an employer and indeed on all those associated with the person. This adverse reaction, however, is of an indirect, imprecise and emotional kind, and would be difficult to analyze or quantify."

30. In **CROA 4890** (see Tab 11, Union documents), I dealt with the dismissal of the grievor for "conduct unbecoming", based on a domestic assault. I concluded there that a domestic assault by one of its employees created at least a risk of harm to the Company's reputation:

> "There can be no doubt that domestic assault is viewed very seriously by both the Courts and members of the public. It is highly likely that the grievor's conduct would be the subject of discussion by inhabitants of the Town and surrounding area. The employer of the grievor would be known.
> There is clearly at least a risk that the reputation of the Company would be negatively impacted by the criminal conviction of one of its employees for domestic assault" (paras 28-29).

31. From a legal standpoint in this matter, I therefore conclude that there was at least a risk of harm to the Company's reputation and that the conduct was worthy of discipline.

D. Was dismissal appropriate in the circumstances, and if not, what lesser discipline is appropriate?

32. The factors to be considered on whether dismissal is an appropriate sanction are set out in the well-known decision of William Scott and Canadian food and Allied Workers Union, Local P-162, 1976 BCLRBD 98:

1. The previous good record of the grievor.
2. The long service of the grievor.

> 3. Whether or not the offence was an isolated incident in the employment history of the grievor.
> 4. Provocation.
> 5. Whether the offence was committed on the spur of the moment as a result of a momentary aberration, due to strong emotional impulses, or whether the offence was premeditated.
> 6. Whether the penalty imposed has created a special economic hardship for the grievor in the light of his particular circumstances.
> 7. Evidence that the company rules of conduct, either unwritten or posted, have not been uniformly enforced, thus constituting a form of discrimination.
> 8. Circumstances negativing intent, e.g. likelihood that the grievor misunderstood the nature or intent of an order given to him, and as a result disobeyed it.
> 9. The seriousness of the offence in terms of company policy and company obligations.
>
> Any other circumstances which the board should properly take into consideration, e.g., (a) failure of the grievor to apologize and settle the matter after being given an opportunity to do so; (b) where a grievor was discharged for improper driving of company equipment and the company, for the first time, issued rules governing the conduct of drivers after the discharge, this was held to be a mitigating circumstance; (c) failure of the company to permit the grievor to explain or deny the alleged offence.

33. Here, the grievor had thirteen years seniority with the Company, which is substantial but would not make him a long service employee.

34. The offence was not an isolated incident. The grievor had previously received a 30 day suspension for “conduct unbecoming”.

35. The offence was not a spur of the moment aberration, as it consisted of multiple criminal charges, for which he pleaded guilty, committed over a period of time.

36. The offence is clearly serious, as the grievor was given credit for 201 days of pre-trial incarceration and given a twelve month probation order. The grievor by his actions has clearly risked harming the reputation of his employer. Neither the public nor the Company can tolerate domestic violence.

37. In all the circumstances, I am not convinced that dismissal is warranted. The situation is not such that there must necessarily be a complete break down of trust between the employer and employee, as was the case in **CROA 1703, 1222, 2714** and **SHP 353**. I believe the employment relationship, although strained, has survived. However, some form of serious discipline is clearly warranted.

38. In **SHP 477**, the grievor was convicted of serious assault against his wife and child and served 30 months of incarceration. Arbitrator Picher nonetheless reinstated the grievor, on proof of rehabilitation, without compensation.

39. In **CROA 972**, Arbitrator Weatherill, found that a grievor convicted of indecent exposure, again on proof of rehabilitation, was entitled to reinstatement without compensation.

40. In Grand Erie School Board and OSSTF, District 23 2016 CarswellOnt 16600, Member White found a nine month suspension without compensation was appropriate for a teacher fired for smuggling cheese.

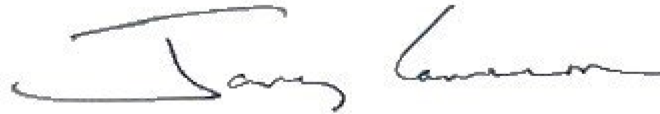
41. In **CROA 4890**, the grievor was dismissed for "conduct unbecoming", following a domestic assault. He had no previous discipline for "conduct unbecoming" and was never incarcerated. He was a short service employee with some three years of seniority. The dismissal of the grievor was overturned by this arbitrator and a three month suspension substituted.

42. In comparison to the grievor in **CROA 4890**, the grievor here has ten year's more seniority.

43. However, the incidents here were more serious than in **CROA 4890**, involving multiple infractions over a period of time with the judicial system finding the conduct sufficiently serious to have him serve 134 days of pre-trial detention. In addition, the grievor had a previous incident of "conduct unbecoming" on his record.

44. Applying all of the various positive and negative factors, I find that a suspension of five months is appropriate in the circumstances, to be served beginning with his period of incarceration. The grievor is to be reinstated without loss of seniority. After the period of his suspension, he is to be paid lost wages and benefits, less mitigation.

45. I retain jurisdiction with respect to the interpretation and implementation of this Award.



May 10, 2024

JAMES CAMERON
ARBITRATOR