

IN THE MATTER OF AN AD HOC ARBITRATION

BETWEEN

TEAMSTERS CANADA RAIL CONFERENCE (TCRC)

And

CANADIAN PACIFIC RAILWAY COMPANY (CP)

DISPUTE:

Appeal of the dismissal of Conductor Ian Lougheed of Kenora, ON.

JOINT STATEMENT OF ISSUE

Following an investigation Mr. Lougheed was dismissed for the following:

“Your conduct unbecoming toward a fellow employee on January 21, 2021 at Kenora Terminal, as evidenced by your use of threats, intimidation, profanity, and unwelcome remarks. This is a violation of the Company's Policies HR 1300 - Discrimination and Harassment Policy and HS 4340 - Violence in the Workplace.

Notwithstanding the above-mentioned incident warrants dismissal in and of itself, it is also a violation of your Offer of Reinstatement (Last Chance) Agreement signed October 4, 2019.”

The parties agree that CROA rules apply including item 14 of the Memorandum of Agreement Establishing the CROA&DR.

UNION POSITION

The Union contends that the investigation was not conducted in a fair and impartial manner under the requirements of the Collective Agreement Article 39.05:

- The investigating officer was biased, asking many unfair, self-incriminating, and speculative questions.
- Questions 17, 39, 40, 42, 46, 53, 55, 70, and 71 were inappropriate, unfair, self-incriminating, speculative, biased, and/or assumed culpability.

- The investigating officer entered new evidence at Question 25 that was not provided with the Notice of Investigation in violation of Article 39.01(4) of the Collective Agreement.
- The Company conducted a supplemental investigation that failed to meet the burden necessary to conduct a supplemental investigation. The investigating officer did not ask any questions related to the initial investigation and did not seek to clarify any of the information brought forward in the initial investigation. The supplemental investigation was utilized by the Company to enter Mr. Lougheed's Last Chance Agreement, dated October 3, 2019, into the record, and to ask Mr. Lougheed questions regarding this agreement.

The Union contends the Company has failed to meet the burden of proof required to sustain formal discipline regarding the allegations outlined above as follows:

- The record shows two vastly different recollections of the event.
- Despite no supporting evidence, the Company has chosen to accept Mr. Bennett's version of events over Mr. Lougheed's.
- There were no witnesses to the event.

The Union also contends the Company has failed to establish the abovementioned incident warranted dismissal, that Mr. Lougheed did not comply with any part of the "Offer of Reinstatement (Last Chance)" agreement, or that it constitutes a culminating incident worthy of discharge.

In the alternative and without prejudice, the Union submits Mr. Lougheed's dismissal is discriminatory, unjustified, unwarranted, arbitrary and excessive in all of the circumstances, including significant mitigating factors evident in this matter including:

- Mr. Lougheed had been the victim of harassment for two and a half years prior to the event.
- Mr. Lougheed brought his harassment complaints to management, who failed to properly investigate in violation of Company Policy HR1300, failing to ensure Mr. Lougheed was provided a working environment free from harassment.
- Although brought forward within the record, the investigating officer neglected to question TM Penner regarding the complaint.
- Mr. Lougheed, after suffering two and half years of harassment, was forced to attempt to ascertain who was responsible for the slanderous, derogatory, hurtful comments on his own after receiving no help from the Company.
- Mr. Lougheed admits that he was emotional and became agitated but maintains he never had any intention of resorting to violence.
- Mr. Lougheed only raised his voice to be heard from a distance of 50 yards.
- Mr. Lougheed was not aware Mr. Bennett was uncomfortable during their conversation.
- Mr. Lougheed was attempting to ascertain if Mr. Bennett was the source of the derogatory graffiti directed at Mr. Lougheed.
- Mr. Lougheed maintains he was the victim of harassment.

- Mr. Loughheed has remained sober since his reinstatement in 2019.

The Union requests that Mr. Loughheed be reinstated without loss of seniority and benefits, and that he be made whole for wages and benefits with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

COMPANY POSITION

Objection

The Company submits a preliminary objection related to the Union's allegation that the discipline was discriminatory. The Union failed to supply sufficient information in support of this allegation. The Grievance handling procedure requires sufficient information to be included in the grievance to be able to properly identify the issue and basis for an allegation. The lack of pertinent information rendered the Company unable to properly respond.

Position

The Company disagrees and denies the Union's request.

The Company maintains the grievor's culpability as outlined in the discipline letter was established following the fair and impartial investigation. Discipline was determined following a review of all pertinent factors, including those that Union describe as mitigating. The Company's position continues to be that the discipline assessed was just, appropriate and warranted in all the circumstances.

The Company maintains the investigation was fair and impartial and some of the questions raised by the Union, including question 70 and 71, specifically asked the Grievor whether the subject matter was covered to the grievor's satisfaction and whether all evidence considered relevant had been brought forth to his attention. The Company fails to see how such questions are in any way unfair. If anything, they are evidence to the contrary. Further, the Union did not object to any of these questions during the investigation statement. To object only during the grievance procedure unfairly prejudiced the Company.

Regarding the Grievor's Last Chance Agreement, the Company maintains the Grievor violated its terms. The Company maintains that raising the Last Chance during the supplemental statement provided the Grievor with an opportunity to provide testimony related to an item which stood on his record. The Company's position is supported by AH712.

The Company maintains the discipline was properly assessed under the Company Hybrid Discipline & Accountabilities Guidelines. Violations are clearly listed and, following the fair and impartial investigation into this matter that determined culpability for the violations list in the discipline letter, the grievor was assessed discipline in accordance with these Guidelines.

It is incumbent on the Union to provide detailed information on alleged lost wages, benefits, and interest. The Company cannot properly respond to this request when the Union is vague and unspecific on what constitutes "made whole."

The Union has further stated a desire to reserve the right to allege a violation of, refer to and/or rely upon any other provisions of the collective agreement and/or any applicable statutes, legislation, acts or policies. In accordance with the grievance procedure, the Company will be prepared to proceed only on the issues that have been properly advanced through the grievance procedure.

As an additional comment, failure to specifically reference any argument or to take exception to any statement presented as "fact" does not constitute acquiescence to the contents thereof. The Company rejects the Union's arguments, maintains no violation of the agreement has occurred, and not compensation or benefit is appropriate in the circumstances.

Based on the foregoing, the Company cannot see a reason to disturb the discipline assessed and requests the Arbitrator be drawn to the same conclusion.

FOR THE UNION:

FOR THE COMPANY:



Doug Edward - for

Dave Fulton
General Chairman
TCRC CTY West

Lauren McGinley
Assistant Director Labour Relations
Canadian Pacific Railway

March 31, 2023

Hearing: April 12, 2023 - By video conference

APEARING FOR THE UNION:

Ken Stuebing – Counsel, Caley Wray
Doug Edward – Sr. VGC CTY West
Jason Hnatiuk – VGC CTY West
Wayne Apsey, General Chairperson, CP-East
Jason Rousseau – LC Kenora
Ian Loughheed – Grievor

APEARING FOR THE COMPANY:

Allan Cake, Manager Labour Relations
Lauren McGinley, Assistant Director Labour Relations

AWARD OF THE ARBITRATOR

JURISDICTION

[1] This is an Ad Hoc Expedited Arbitration pursuant to the Grievance Reduction Initiative Agreement of May 30, 2018, and Letter of Agreement dated September 7, 2021, between the parties. The protocols entered into by the parties provided for submission of detailed briefs filed and exchanged in advance of the hearing. At the hearing, the parties reviewed the documentary evidence and made final argument. The parties have agreed that I have all the powers of an Arbitrator pursuant to Section 60 of the *Canada Labour Code*.

BACKGROUND

[2] The Grievor, Ian Lougheed, is 35 years of age. Mr. Lougheed commenced his employment with the Company on February 28, 2011, in Brandon, Manitoba. He transferred to Kenora on July 1, 2013.

[3] On January 20, 2021, at approximately 20:50, Locomotive Engineer Jason Bennett arrived at the Kenora Terminal on train 113-18. After going off duty, Mr. Bennett was headed outside to his truck when he was met by the Grievor outside the station when an incident took place. After the incident Mr. Bennett contacted his manager, Steven Briggs, and the Ontario Provincial Police.

[4] On January 20, 2021, at approximately 21:00, Superintendent Alex Lamb was advised by Trainmaster Briggs of the incident. Mr. Lamb, along with General Manager Pat Remillard, spoke with Mr. Bennett and the Grievor. Based on the initial information provided, both Mr. Bennett and the Grievor were removed from active service.

[5] On January 21, 2021, the Company obtained an initial incident report from the Grievor. In this report, the Grievor advised he had been dealing with a substance abuse disorder over the last 2.5 years and had turned his life around. He advised most of his coworkers were supportive, however he maintained that Jason Bennett had been harassing him by vandalizing company property and writing about him on Company walls. He stated that after 2.5 years of harassment at the hands of Jason Bennett, he was finally at his wits end chose to confront him.

[6] At the time of the incident, the Grievor had been working on a Last Chance Agreement. It required that he strictly comply with all Company policies, procedures and work practices. In that regard, Mr. Lougheed's employment with the Company was in jeopardy if he commits a future offence for which discipline is warranted and any future offense would be handled in accordance with the CP disciplinary process.

[7] On January 25, 2021, a statement was taken from Jason Bennett in connection with alleged harassment and threats of violence towards Jason Bennett by Ian Lougheed, as outlined in statements provided by him dated January 21, 2021.

[8] A statement was taken from the Grievor on January 26, 2021, in connection with alleged incidents of harassment and alleged threats of violence towards Jason Bennett by the Grievor as outlined in a complaint memo provided by Mr. Bennett dated January 21/2021.

[9] On February 9, 2021, a supplemental statement was taken from the Grievor. During this statement, the Grievor acknowledged the terms of his Last Chance Agreement.

[10] Following the investigation, the Company dismissed the Grievor on February 25, 2021, for the following reason:

Your conduct unbecoming toward a fellow employee on January 21, 2021 at Kenora Terminal, as evidenced by your use of threats, intimidation, profanity, and unwelcome remarks. This is a violation of the Company's Policies HR

1300 – Discrimination and Harassment Policy and HS 4340 – Violence in the Workplace.

Notwithstanding the above-mentioned incident warrants dismissal in and of itself, it is also a violation of your Offer of Reinstatement (Last Chance) Agreement signed October 4, 2019.

[11] The Grievor's work history and earlier issues are part of the background necessary to understand the incident of January 20, 2021. On July 28, 2018, Mr. Lougheed worked to, Ignace, ON. He decided to go to the tavern close by for dinner around 21:45. While there, he started drinking. Mr. Lougheed stated he drank until he blacked out and doesn't remember the following events at the bunkhouse at approximately 01:20 in the morning, where the Bunkhouse attendant, provided a statement about his drunkenness. At approximately 04:30, a fellow co-worker in the bunkhouse awoke to sounds in his room—room 205. He found the Grievor in his room, looking confused and urinating on the carpet and furniture.

[12] Following a formal investigation, Mr. Lougheed was dismissed from Company service. Mr. Lougheed was diagnosed with a substance abuse disorder. He underwent intensive rehabilitation treatment and successfully gained control over his addiction. He was reinstated by agreement of the parties in October 2019. The October 2019 agreement is framed in light of the Company's obligations to accommodate Mr. Lougheed's disability (addiction) to the point of undue hardship.

[13] It is not disputed that the Grievor has been successful in his ongoing efforts to maintain his sobriety from 2019 to the date of the incident.

ANALYSIS AND DECISION

[14] On January 25, 2021, a statement was taken from Jason Bennett in connection with alleged harassment and threats of violence towards him by the Grievor on January 20, 2021. The Company submits that Mr. Bennett testified he hadn't worked with the Grievor in the last 3 years, last time I worked with him it was cordial. He even let him drive because he wanted to practice. When asked about their working relationship, Mr. Bennett advised they'd had no issues in the past and in the year prior, the Grievor had ignored him even during trading offs.

[15] During his statement Mr. Bennett advised that the summer prior, an employee brought up a rumor that the Grievor wanted to beat him up. Mr. Bennett maintained his concern and that he did not feel safe. He was concerned that the Grievor knew where he lived and has a reputation as a hot head. Mr. Bennett denied all allegations that he had ever written, posted graffiti or vandalized CP property, in general or in reference to the Grievor.

[16] The Company maintains the Grievor's culpability was established as a result of the fair and impartial investigation and that dismissal was warranted in all the circumstances. During his statement, the Grievor confirmed having completed and understood training on the Company's Discrimination and Harassment Policy as well as the Violence in the Workplace Policy.

[17] The Company maintains Mr. Bennett and the Grievor's statements reveal they agreed upon the following:

- They had not worked together for many years;
- They had no issues in the past, but rather had gotten along;
- Nobody else was present the night of the confrontation;
- The Grievor went to the Kenora station for the sole purpose of confronting Mr. Bennett; and,
- The Grievor made remarks which were found to be threatening by Mr. Bennett.

[18] The Grievor claimed prior harassment, allegedly by Mr. Bennett, as the rationale for his actions. However, it says the investigation revealed the Grievor was in fact the aggressor in the

situation at hand and, moreover, he acknowledged going to Kenora station for the express purpose of confronting Mr. Bennett. He also acknowledged speaking loudly and saying “It better not be you” and that Mr. Bennett interpreted what he said as a threat of violence, because he was somewhat agitated at the moment.

[19] The Company maintains that on the undisputed facts alone, the Grievor’s actions threatened and intimidated Mr. Bennett sufficiently that he immediately contacted Trainmaster Briggs and the OPP and therefore, were in violation of the Discrimination and Harassment Policy. Further, based on Mr. Bennett’s testimony regarding the psychological harm caused by this confrontation, the Company maintains a violation of the Violence in the Workplace Policy was also made out.

[20] CP submitted that on a balance of probabilities, the Company found Mr. Bennett’s timely reporting of the incident to Trainmaster Briggs, confirmation of his report to Superintendent Lamb and General Manager Remillard, and reiterated testimony during his statement, as well as the Grievor’s confirmation of many facts to be persuasive and simply most probable in the circumstances.

[21] The Union maintains that shortly after Grievor’s return from the treatment program related to the 2018 incident and on an ongoing basis for 2.5 years, the Grievor was the subject of vicious and taunting harassment from his peers at Kenora terminal. This harassment took many forms, most prominently in the form of harmful graffiti in the workplace.

[22] It submits that Mr. Lougheed being the target of considerable harassment at Kenora terminal is undisputed. Both in direct messages with his Trainmaster, Jillian Penner, and at his subsequent formal statement. Mr. Lougheed spoke in depth about the constant harassment he faced from his peers and his desperation to escape this harassing environment for the sake of his health and continued sobriety. The Union submits that nowhere in the Company’s grievance correspondence or Statement of Issue does the Company assert that such harassment never took place. The Union maintains this is because it is self-evident that there was ongoing harassment of the Grievor on the record.

[23] The Union submits that the pressures on Mr. Lougheed for this 2.5 year period are indelible. For 2.5 years, employees at Kenora had taken to writing slurs about the Grievor on walls and in bathrooms on locomotives, including references to “Peein’ Lougheed.” The graffiti was rampant. It was at the Home Terminal, Away From Home Terminals and in locomotives. In addition to references to “Peein’ Lougheed,” there was widespread graffiti with the number “205.” 205 was the room number in the bunkhouse where the July 2018 urination event had occurred. Shortly after the July 2018 urination incident and before Mr. Lougheed was dismissed in January 2019, numerous items that could be changed to a “205” were changed. For example, the Union argues that even the number 2 on clocks would have 05 added to read 205. At one point, somebody wrote “205” on Mr. Lougheed’s personal backpack.

[24] The Union maintains that the graffiti commenced shortly after Mr. Lougheed returned from the recovery centre in September of 2019. Mr. Lougheed went to Kenora station to retrieve his personal belongings and found those belongings had been defaced with graffiti. The graffiti continued well after Mr. Lougheed was reinstated in December, 2019.

[25] The Union submitted that Trainmaster Jillian Penner reached out to the Union shortly after Mr. Lougheed’s reinstatement in December 2019, asking the Union to assist in getting these incidents to stop. For this same period of time, the Company took no meaningful steps to investigate this ongoing campaign of abusive treatment. Mr. Lougheed brought his harassment complaints to management on multiple occasions and sought many options for addressing and resolving the pressures he was facing.

[26] The Company objects to any mention by the Union that the Company condoned any of the alleged vandalism referencing Mr. Lougheed. However, it does acknowledge the exchange between the Grievor and Trainmaster Penner prior to the incident with Mr. Bennett on January 20, 2021. It submitted that Trainmaster Penner responded to the Grievor, stating in part:

It's not ok. I'm not saying we condone the behavior.

[27] CP argues that her statements make it evident that the Company does not condone any graffiti or other form of comments negatively referencing their employees. The Union suggests that the Company's decision not to investigate the graffiti while focusing on the actions of the Grievor was a failure to investigate harassment and discrimination within its workplace.

[28] After carefully reviewing all of the submissions, I find that the Grievor clearly engaged in inappropriate conduct on the night of January 20, 2021. He had used an on-line Company data base to determine Mr. Bennett's arrival time in Kenora that night and meet him on his arrival. He accused Mr. Bennett of writing graffiti on Company walls regarding his actions of drunkenness on July 28, 2018 at Ignace. The evidence clearly established that his actions warranted discipline. In order for the dismissal to be upheld, onus is on the Company to provide clear and cogent evidence to establish that the penalty of discharge is appropriate in all the circumstances.

[29] In assessing the appropriateness of dismissal, I must at first comment on some of the contradictions in the evidence, and on the quality of the investigation. Both Mr. Bennett and the Grievor provided written reports to the Company following the incident at the station. The reports presented two very different versions of events and that the decision in this case will turn on the assessment of credibility. Both Mr. Bennett and the Grievor were originally removed from service after consultation with Superintendent Alex Lamb and General Manager Pat Remillard

[30] I find Mr. Bennett's selective and self-serving evidence cannot be accepted as being reliable with respect to his lack of any knowledge of the graffiti against the Grievor. Mr. Bennet testified that he felt threatened by the Grievor on the night of the incident. He stated that he was never involved in writing any graffiti on Company property. He stated the he did not know anything about anyone writing graffiti about the Grievor. He stated that a fellow employee had told him the Grievor wanted to beat him up. While offering that another employee said the Grievor wanted to beat him up, he gave no reason why, when or by who this information was given to him. I find it questionable that he was told by another employee that the Grievor wanted to beat him up without being aware of the graffiti allegations in a terminal the size and location of Kenora.

[31] The Grievor reported and testified that his actions were driven by anxiety from the ongoing harassment. He testified that he was told by others that Mr. Bennett had written the graffiti.

[32] In my opinion, the Investigating Officer did not conduct an adequate investigation into Mr. Bennett's or the Grievor's report of the incident. While the Grievor and Mr. Bennett were both originally removed from service the resulting investigation found the Grievor as the single wrongdoer. I find the analysis of the incident is not consistent with the evidence. The investigation was fatally flawed as it failed to consider or investigate the Grievor's graffiti allegations. Instead, the Investigator became focused solely on the accusation against the Grievor raised by Mr. Bennett without questioning his evidence. There is no evidence that any effort was made by the investigating officer to address the harassment and graffiti allegations made by the Grievor.

[33] I find the evidence establishes that the offensive actions of the Grievor in confronting Mr. Bennett was an isolated incident in his employment history. I find that the Grievor showed commitment and dedication to his work while addressing his addiction. He did so in a workplace while faced with forms of incivility, disrespect and harassment. Nastiness resulted from what some may have thought of as humorous and anonymous graffiti. I find the Grievor's behaviour, while worthy of significant discipline, must be understood in this context. I find his behaviour was

improperly reasoned by him as defensive, to protect himself against elements of what he viewed as a hostile work environment.

[34] In my view, the Grievor was entitled to have the issues in his complaint to Trainmaster Penner considered in the investigation and the assessment of a disciplinary penalty. In this case, it appears that the Investigating Officer became focused solely on Mr. Bennett's complaints about the Grievor. In the end, the Investigator failed to properly investigate the allegations against the Grievor.

[35] I find the provocation faced by the Grievor was a significant mitigating factor as addressed in SHP 629, by Arbitrator Soronow stated the following:

Although what can be viewed as provocation on the part of Mr. May is certainly a mitigating factor, as Brown & Beatty, Fourth Edition, Section 7:4412 confirms, provocation can almost never completely exonerate an employee from wrongful conduct. The provocation is relevant, however, in determining the reasonableness of the penalty imposed.

In this instance, I conclude that the discipline imposed by the company was too severe. However, in making this determination, I wish to make it abundantly clear that Mr. T's use of profanity, which was directed at Mr. May in an angry tone, was a very serious infraction and highly at odds with harmonious management/employee relations. Such conduct, particularly when directed towards a supervisor, cannot be considered as acceptable and is justly the subject of discipline.

[36] Accordingly, I am prepared to exercise my discretion to reinstate the Grievor and to substitute a lesser penalty than discharge. The Union's grievance is therefore upheld in part. The Grievor is reinstated without compensation and without loss of seniority. The minimum contribution will be made to ensure his original pension entitlement. Upon reinstatement the Grievor may exercise his seniority on his seniority district.

[37] I remain seized of the implementation and interpretation of this award.

Dated at Niagara-on-the-Lake this 17th, day of July 2023

A handwritten signature in black ink, appearing to read "Tom Hodges", is enclosed in a thin black rectangular border.

Tom Hodges

Arbitrator