

CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4643

Heard in Edmonton, June 13, 2018

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The Union advance an appeal of the dismissal of Locomotive Engineer J. Baril of Calgary, Alberta.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Following an investigation, Engineer Baril was dismissed for the following reasons, Please be advised that you have been assessed a dismissal from Company effective January11, 2017 for the following reasons: For conduct unbecoming of an employee and insubordination.

The Union contends that the Company has not met its burden of proof to establish any culpable behavior in this case and therefore no discipline is warranted. The Union contends that Engineer Baril did not display any signs or actions that would fit the claim that he was insubordinate in anyway. Rather, Engineer Baril's concern during his tour of duty was in connection with the safe movement of his train, specifically, the application of Rule 103 while doubling his train together at Alyth terminal and nothing more.

The Union further contends that the investigation failed to establish that Engineer Baril's comments were directed at the Company Officer. The facts of the investigation established that the comments in question were directed to his Conductor while hanging up the telephone and in no way were they meant or directed at the Company Officer.

The Union contends the discipline imposed in this case was excessive, extreme and unwarranted. Regardless of the mitigating circumstances in this case and in case there was any unintended offence taken from his actions, Engineer Baril has submitted a written apology to the Company Officer involved and the Union further contends that this should be considered an appropriate response to the situation.

The Union requests that Engineer Baril be reinstated without loss of seniority and that he be made whole for all lost earnings and benefits with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company has denied the Union's request.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

On December 21, 2016 at approximately 1054, Engineer Baril contacted Trainmaster Brandon Dalke by telephone to inquire about his lifting instructions while working train 293-19. Mr. Dalke informed Mr. Baril of his instructions, after which Mr. Baril advised Mr. Dalke that he would be on the crossing. Mr. Dalke informed Mr. Baril that a crew bus would be there to assist Mr. Baril. Mr. Baril then ended the phone call by stating to Mr. Dalke, "you're a fucking ignorant cock."

Mr. Dalke later called the Brownhouse, but was informed by Mr. Baril's conductor, Mr. Contos that Mr. Baril was in the washroom. Mr. Baril later phoned Mr. Dalke during which he was informed by Mr. Dalke that he was out of service for having called Mr. Dalke a "fucking ignorant cock" at the end of their previous conversation. Mr. Baril informed Mr. Dalke that he called him a "fucking ignorant idiot" and not a "fucking ignorant cock." Mr. Dalke informed Mr. Baril that this comment was no better. Mr. Baril then stated that he would get the tapes pulled of the conversation pulled and would get Mr. Dalke fired, as Mr. Baril stated that he has a lot of power.

An investigation to discuss this incident with Mr. Baril occurred on December 28, 2016 at Alyth Brown House. Present at this investigation was Grant Duncan, Trainmaster; Vice Local Chairman TCRC 355 Local Engineers; Dale Adams; and Mr. Baril.

On January 11, 2017 Mr. Baril was dismissed for the following reasons: *Please be advised that you have been assessed a Dismissal from Company effective January 11, 2017 for the following reasons: For conduct unbecoming of an employee and insubordination.*

The penalty was mitigated when the Company reinstated the Grievor effective March 24, 2017, and substituted the dismissal with substituted the dismissal with a ninety-three (93) day suspension.

UNION'S POSITION:

The Union contends that the Company has not met its burden of proof to establish any culpable behavior in this case and therefore no discipline is warranted. The Union contends that Engineer Baril did not display any signs or actions that would fit the claim that he was insubordinate in anyway. Rather, Engineer Baril's concern during his tour of duty was in connection with the safe movement of his train, specifically, the application of Rule 103 while doubling his train together at Alyth terminal and nothing more.

The Union further contends that the investigation failed to establish that Engineer Baril's comments were directed at the Company Officer. The facts of the investigation established that the comments in question were directed to his Conductor while hanging up the telephone and in no way were they meant or directed at the Company Officer.

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The Union requests that Engineer Baril be reinstated without loss of seniority and that he be made whole for all lost earnings and benefits with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

COMPANY'S POSITION:

The Company maintains that the substituted suspension assessed to the Grievor was just and reasonable. The Company maintains that it has met its burden of proof in establishing through the investigation that the comments made by the Grievor to the Company Officer were insubordinate and unbecoming, and therefore yielded the substituted discipline. Furthermore,

the Company argues that while the Union contends that the Grievor has submitted an apology to the Company Officer, the Grievor's reinstatement was contingent upon this apology and therefore was not genuine as it was issued by the Grievor after ninety-three days had passed since the Grievor's dismissal.

Therefore, it is for these reasons that the Company argues that this grievance be dismissed.

FOR THE UNION:
(SGD.) G. Edwards
 General Chairperson

FOR THE COMPANY:
(SGD.) C. Clark
 Assistant Director, Labour Relations

There appeared on behalf of the Company:

A. Jansen	– Labour Relations Officer, Calgary
C. Clark	– Assistant Director, Labour Relations, Calgary
B. Dalke	– Trainmaster, Vancouver

There appeared on behalf of the Union:

D. Ellickson	– Counsel, Caley Wray, Toronto
G. Edwards	– General Chairperson, Revelstoke

AWARD OF THE ARBITRATOR

The Company's position is that its decision to reinstate the grievor on March 24, 2017 resulted in the grievor receiving an appropriate penalty for the offence. Initially the Company took the position that Mr. Baril's apology, plus his reinstatement, settled the matter. It did not. The Union, then and now, takes the position that it was unilaterally imposed, on an unacceptable last-chance basis, and involved a 93 day suspension. That, the Union says, was unjustified and even if some discipline was called for, grossly disproportionate.

There are two aspects to what is alleged. The grievor is said to have been insubordinate in questioning or not following the directions of his supervisor. He is said to have been disrespectful as a result of comments he made that were directed at, or at least about and overheard by, his supervisor.

The grievor is a 22 year employee with 12 of those years as a locomotive engineer. At the time of termination, such points the grievor had on his record, under the now discontinued Brown system, had been expunged by the passage of time. He had no discipline on his file at the point of termination. Further, he had no prior record of unbecoming conduct or insubordination.

The discussion between the grievor and Trainmaster Dalke provides significant context to the subsequent unprofessional statement. There is little dispute that, if the grievor did what he was told by Trainmaster Dalke, the 80 cars he was to lift from track NT13 could end up blocking a road crossing. That brings into consideration CRO Rule 103.1(d) which provides:

Except at those public crossings indicated in special instruction, no part of a movement may be allowed to stand on any part of a public crossing at grade, for a longer period than 5 minutes, when vehicular or pedestrian traffic requires passage. Switching operations at such crossing must not obstruct vehicular or pedestrian traffic for a longer period than 5 minutes at a time. When emergency vehicles require passage, employees must cooperate to quickly clear the involved crossings.

This rule is to protect the public interest. There is no evidence to dispute the grievor's assertion that Transport Canada inspectors have been stationed so that they can monitor compliance with this rule at the location in question. Similarly, there is nothing to contradict the grievor's assertion that, in the event of non-compliance, the individual locomotive engineer can be subjected to a fine, which is indicative of individual responsibility, and which is a consequence the Employer cannot control.

The concepts of managerial authority and insubordination have to be modified to fit situations where the employee is being directed to do something that is publicly prohibited, even if only arguably so provided that any difference is *bona fide*. It is a situation where the defence of “my boss told me to do it” is usually ineffective. The whole purpose behind individual liability is to add a layer of personal responsibility and therefore personal judgment onto operational choices that may affect the public interest.

Examining the exchange that took place prior to the disputed statement that gave rise to the grievor’s termination, I find the grievor’s questioning of his instructions was not unreasonable, and Mr. Dalke’s response not as responsive to the issue as Mr. Dalke was entitled to expect.

The grievor, in the investigation, took issue with the very limited statements over the blocking of the road issue, and offered much more detail about the exchange. He explained, at Q and A 13:

A13: On December 21, 2016 I was called for train 293-19 for 0940. At 09:50 I found out that we were lifting 80 cars from NT13 from Conductor Contos. I phoned terminal train master Brandon knowing that we were going to be blocking crossings longer than a five minute time span which does not follow the GOI rulings. I wanted to know what plans Brandon had to assist me with the crossings due to Transport Canada monitoring these crossing closely. I have questioned TTM’s about this previously, so I asked how long the lift was, Brandon said 5800 ft., I then replied “I’m going to be blocking crossing for more than 5 minutes.” I knew from experience that I would be blocking two crossings for an extended amount of time, so I asked Brandon who was going to take the responsibility for cutting the crossing. Brandon replied “We will get you out of here fast”. I said, “it won’t happen as I have to wait 5 mins as per GOI after tying on cars or wait for a 3 pound rise on the tail end and till I was calibrated to leave.” I knew that it would take longer than 5 minutes to charge my train as we were going to be 10,000 ft. long with one engine on the head end and a remote for power. Brandon’s response

to my concerns for rules compliance was “Yeah JP ...” Then I asked him again “who is going to be responsible as I’m not going to take a 50,000 dollar hit for this because you are perjuring your yard”. His reply was “Yeah JP ...” He was being dismissive and by saying that to me it seemed like he didn’t care that we would not be abiding rules of the GOI.

Trainmaster Shuttleworth’s statement read:

Engineer asked how many feet they were doubling up, protested about doubling up and having crossings blocked. Terminal replied there will be a bus to assist and speed things up. Engineer Baril protested again and then called Mr. Dalke F%^king ignorant cock. There was a second call made from the terminal back to Mr. Baril to inform him he was out of service, he (Mr. Baril) confirmed he called him a f&*king ignorant idiot not and ignorant cock.

Trainmaster Dalke’s statement read:

At 1054 engineer Baril called myself (Trainmaster Dalke) asking about his lifting instructions on 293-19, I advised him of the instructions and he advised me he would be on the crossing, I advised him that there would be a crew bus there to assist. Mr. Baril then said “you’re a fucking ignorant cock” then hung up.

I called the Brownhouse back his Conductor answered said Mr. Baril was in the washroom I requested for him to call me back.

Mr. Baril called me back. I stated he was out of service. He stated being out of service for following the GOI is bullshit. I stated he was out of service for the remarks at the end of our 1st conversation. Calling me “a fucking ignorant cock” at which time he corrected me saying he called me “a fucking ignorant idiot”. I stated that this was no better. At which time he stated he (Mr. Baril) would get the tapes pulled of this conversation and would get me fired too as he has a lot of power.

Conversation concluded with him requesting Superintendent Ruff’s number and me providing him with such.

Even when compared to Trainmaster Shuttleworth’s statement, Trainmaster Dalke’s statement omits important aspects of the discussion that provide significant

context. The grievor gave a much fuller account, set out above, as well as in his rebuttal to his supervisor's statements.

A7: Yes, I wish to refute the following from the memo from Brandon Dalke. When he says 10:54, the actual time was around 09:50. That he advised me that he would have a crew bus to assist me. He did not say that to me. He said "they will get me out of here fast". When he says Mr. Baril called me and "I stated he was out of service", he actually said that I was out of service pending investigation. When he stated I said "being out of service for following the GOI is bullshit". I actually said "for asking about rules". I did not call him an ignorant cock, I said arrogant bastard as I was hanging up the phone. This was not directed at Mr. Dalke, I was saying it to Peter Contos. Also where he says "at which time he corrected me saying he called me "a fucking ignorant idiot". I actually said "what an arrogant bastard". This was a remark said to conductor Contos not aimed or intended for Mr. Dalke. Also where Mr. Dalke says "at which time he stated he (Mr. Baril) would get the tapes pulled of this conversation and would get me fired too as he has a lot of power". I do not recall saying that.

Yes, I wish to refute the following from the memo from Christopher Shuttleworth. Where he says "Baril called up to the terminal trainmaster to get instructions, ask if they were doubling up". I actually asked how many feet were in NT13 as I was concerned about blocking crossings. Also where he says "Engineer asked how many feet they were doubling up, protested about doubling up and having crossings blocked". I actually was not protesting. Also where he says "Terminal replied there will be a bus to assist and speed things up". He actually said "we will get you out of here fast". Also where he states "Engineer Baril protested again". I was actually just seeking clarification. Where he says "there was a second call made from the terminal back to Mr. Baril to inform him he was out of service, he (Mr. Baril) confirmed he called him a f&*king ignorant idiot not and ignorant cock". That is not what I said at all. In my conversation with Peter as I was hanging up the phone I said to Peter "what a fucking arrogant bastard".

The investigating officer chose to inquire of Mr. Dalke and Mr. Shuttleworth over the difference, but the answer he records is of no help; that "they stand by their statements". Their statements simply did not address the questions the grievor was raising.

The grievor agrees that, after his telephone call with Mr. Dalke, in frustration, he made an unprofessional and derogatory statement. He says it was about Mr. Dalke, but directed to his co-worker Mr. Contos. They differed, in a later call and throughout the investigation, as what was said. The grievor says he said “fucking arrogant bastard”. Mr. Dalke and his co-worker Mr. Shuttleworth say he said “fucking ignorant cock”. My sense is that Mr. Dalke’s version is closer to what was actually said, but using a subsequent word that would complete a sentence not infrequently used in the vernacular. If so, it supports the view that what the grievor said occurred just as he was hanging up the phone.

Whatever was said, it was admittedly unprofessional and inappropriate no matter to whom it was said. I find the more probable view is that it was said to Mr. Contos and overheard, unintentionally but carelessly spoken.

The grievor accepted, right from the day in question, that what he said was unprofessional. He said, at Q and A 20:

A20: I understand that I’m not supposed to use profanity when speaking with employees and supervisors. I was frustrated with the situation at the time and let my emotions get the best of me. I won’t let this happen again. We work in an industrial environment and sometimes language and pressure on both parts can manifest itself in industrial language. I meant no disrespect towards TM Dalke.

Both parties refer me to the often quoted list of mitigating factors set out in the long accepted case of:

USWA Local 3257 v. Steel Equipment Co. (1964) 14 L.A.C. 356
(Reville)

The Union refers to the following factors:

- The grievor's previous good record;
- The grievor's long service;
- Whether or not the offence was an isolated incident in the grievor's employment history;
- Whether there was provocation; and
- Whether the offence was committed on the spur of the moment as a result of a momentary aberration; due to spontaneous emotional impulses; or whether the offence was premeditated.

I agree with the Union that each of these factors speak in favour of the grievor.

The Employer's comment on the "spur of the moment" factor is that:

"The grievor was dissatisfied with the information and the directive Mr. Dalke provided him and chose to dispute the directive he was given by lashing out at Mr. Dalke".

While that is mostly so, Mr. Dalke's attitude at the time relied too heavily on his perception of an affront to his managerial authority. He provided too little by way of an answer to the grievor's concerns. Describing the grievor's attitude as one of insolence and insubordination makes too much of the grievor's "subordinate status" and takes too little account of the joint nature of their responsibility for compliance with the rules in question.

Both parties provided authorities that deal with the use of profane language in the workplace in interpersonal dialog. I agree with Arbitrator Jamieson's observation that:

"profanity in the workplace, particularly when aimed at co-workers, must surely be high on the list of bad habits that must also be curtailed."

Parmalat Canada Inc. and CAW Local 462 (2005) 141 L.A.C. (4th) 377

That said, in my view the cases cited by the Employer do not support the proposition that termination for an employee with this grievor's record and length of service would be appropriate. Similarly, I find the Employer's reduction of the penalty to a three month suspension with reinstatement on a last chance basis is similarly unjustified.

The Employer refers to **CROA 3880** where an employee was reinstated without compensation. However, that grievor's penalty was only 30 points under the Brown system, and he had a record of absenteeism. It is not at all analogous nor is it supportive of the penalty in this case.

The Employer also refers to **CROA 4398**. The abuse directed at the supervisor there was direct and more elaborate than here. Arbitrator Silverman set aside a termination and substituted a 20 point penalty, saying "in this case, twenty demerit points was the appropriate response. As this was not a dischargeable offence given what occurred and the seniority of the grievor, he should be compensated for time held out of service". The Employer suggests this is distinguishable due to the ten years greater seniority and this grievor's 105 total career points, ignoring the fact all those

points had been worked off in this case. I do agree that the grievor's later threat of reprisal against Mr. Dalke is an aggravating factor.

The Union also cites cases involving the use of profane language in speaking disrespectfully to a supervisor. In **CROA 3108**, 20 demerits were reduced to a written reprimand. In **CROA 4398** a termination for extreme profanity was reduced to twenty demerits. Twenty demerits was also found appropriate in **CROA 3008**. In **CROA 3569** a 30 day suspension was reduced to 5 days in the face of a more direct verbal assault on a supervisor. **CROA 4294** resulted in a termination for insubordination followed by direct and offensive comments, which was set aside and replaced by 15 demerits.

I agree with the Union that the initial termination as well as the later reduced penalty were both extraordinarily harsh. The penalties are set aside and replaced with a 7 day suspension, for the insulting language, but not for a refusal to follow directions. The grievor is otherwise to be made whole, with interest. I remain seized of any remedial issues that cannot be resolved between the parties.

July 25, 2018



ANDREW C. L. SIMS
ARBITRATOR