

IN THE MATTER OF AN ARBITRATION

BETWEEN

CANADIAN NATIONAL RAILWAY COMPANY

("Company")

and

**INTERNATIONAL BROTHERHOOD OF ELECTRIC
WORKERS (SYSTEM COUNCIL NO. 11)**

("Union")

**Amit Arora Grievances
15 Demerit Points**

Arbitrator:

Richard I. Hornung, Q.C.

For the Union

Robert M. Church	Counsel
Steve Martin	Senior General Chairman
Lee Hooper	General Chairman
Gurpal Badesha	Regional Representative
Darrel Kleebaum	Local Representative
Amit Arora	Grievor

For the Company

Francois Daignault	Manager Labour Relations
Susan Blackmore	Senior Manager Labour Relations
Simon-Pierre Paquette	Director Dispute Resolution and Labour Standards
Adam Knorr	Supervisor S&C
Andrew Kich	Retired/Manager S&C

Hearing

May 23 - 24, 2019;
February 10, 2020
Calgary, Alberta

AWARD

I

1. The Grievor's history and circumstances are set out in paragraphs 1 - 5 of decision **AH 673(A)**.

II

Appeal of 15 Demerits Regarding Failing to Follow Instructions

2. On April 19, 2018 (Company Tab. 3) the Grievor was served with a Notice to attend an investigation:

...surrounding your alleged failure to follow the instructions of the supervisor at the S&C Shop in Surrey, BC on March 29, 2018:

- *Refusing to remove a camera pole from the Company truck;*
- *Refusing to leave Company property at the end of your shift;*
- *Refusing to turn over certain items belonging the Company (cell phone, passcard) before being escorted from the property*

3. The Investigation took place on May 8 & 9, 2018. On May 14, 2018, the Grievor was assessed 15 demerits for: *"Failing to follow the instructions of the supervisor at the SC Shop in Surrey, BC on March 29, 2018"*.
4. The Union contends that: *"there was no just cause for the discipline and maintains that Mr. Arora was denied the right to a fair and impartial investigation of this matter as outlined in Agreement 1.1"*.
5. There is a notable divergence between many aspects in the evidence of the Grievor and that adduced on behalf of the Company. In order to save a lengthy repetition and analysis of the same, the circumstances as I describe them below represent the facts as I have found them. Where there is a contradiction in the evidence, the findings of fact which I make represents my determination, after weighing all the evidence, relative to the credibility of the conflicting positions.

III

Refusing to Remove a Camera Pole from the Company Truck

6. The circumstances relative to this ground for discipline are strenuously disputed by the Grievor who, somewhat laterally in the discussions at the time, inferentially raised the broad issue of work place safety and explained his refusal to do the work on both a concern with his physical ability to remove the camera pole by himself and on a misunderstanding.
7. In light of the conclusions below – that the discipline imposed was warranted based on the final two grounds - it is unnecessary for me to delve into the morass of disputed evidence around whether the Grievor had an honestly held belief that it was unsafe safe for him to remove the camera by himself, as he was instructed to do, and whether that factor would absolve him from a determination of culpable conduct in the circumstances.

IV

Refusing to Leave Company Property at the End of Shift

8. Following the exchanges that occurred regarding the removal of the camera, Mr. Knorr accompanied the Grievor out to the truck to demonstrate how the camera could be removed by a single person and thus reinforce his directive that the work that he had requested the Grievor to do was a one-man job.
9. When Mr. Knorr completed that task it was approximately 15:45. Considering that the Grievor's shift had concluded, Mr. Knorr instructed him to leave the property.

10. When Mr. Knorr returned to the Communications Office at 16:00, he found the Grievor sitting at his desk. He asked the Grievor why he was still there. The Grievor appeared angry and told Mr. Knorr that he had been talking to Mr. Kich. In that the Grievor appeared to be agitated, Mr. Knorr left the office to avoid an escalation.
11. At 16:20, Mr. Knorr returned to the Office and found the Grievor still at his desk. He told the Grievor that he needed him to leave the premises. To which the Grievor sharply replied: “*You cannot tell me what to do.*” When Mr. Knorr repeated his instructions, the Grievor responded: “*Be quiet*” and “*Go away*”.
12. In his rebuttal statement the Grievor provides further details of his exchange with Mr. Knorr. He acknowledges that Mr. Knorr came up to him while he was typing his report and said: “*I want you to leave right now*”. The Grievor replied that he intended to finish his email and he could not do so with Mr. Knorr standing over his shoulder. At this point, Mr. Knorr himself was becoming frustrated and irritated.
13. The Grievor’s explanation for not following Mr. Knorr’s directive was that he was:
...typing an email as I felt compelled to inform the Company officers regarding ongoing harassment and bullying to our immediate managers and Union Chairman. I wanted to email the employer before I left about his ongoing treatment and behaviour...and it was fresh in my mind.
Mr. Knorr again demanded: “I want you to leave”. I responded that I heard it once and he did not have to repeat it multiple times and that as a fellow CN employee should not talk to me in that tone. He did not stop reiterating and that point he was angry and I felt intimidated so I dialed 911 and called RCMP to report Mr. Knorr’s behaviour.
14. In his evidence at the Investigation the Grievor states:
 Q.60 *Why did you call 911?*
 A.60 *There has been a past incident, it was reported in the harassment bullying complaint in 2016. Mr. Knorr has punched the lab wall in anger and stated "why has CN hired you." He seemed very upset that he might do something or punch me. So for my personal safety, I dialed 911.*
 Q.61 *Were any threats made to you concerning your personal safety?*

A.61 *His proximity was at an arms length and his facial expression were red in anger, so I felt and sensed danger and dialed 911.*

Q.62 *Were you immediately concerned for your personal safety right before you dialed 911?*

A.62 *Yes.*

Q.63 *If you were concerned for your immediate safety, why did you finish your email instead of immediately leaving the building as instructed?*

A.63 *I finished the email because Mr. Knorr had left the building at that point and I kept my calm and I was sitting on my desk with my hands on my computer.*

15. At the point that the Grievor dialed 911, Mr. Knorr left the office to call the CN Police.

16. When questioned about the circumstances which led to Mr. Knorr calling the CN Police, the Grievor explained:

Q.44 *Do you understand that you were required to leave company property immediately after being instructed to so by Mr. Knorr?*

A.44 *I was in the middle of doing my on-call tie-up in the service manger and I felt compelled to inform the Senior Management of Mr. Knorr's conduct.*

Q.45 *Mr. Knorr stated in his memorandum that after being told to leave the property on March 29, that you told him "You cannot tell me what to do", "Be quiet" and "Go away." How do you explain this conduct to your Supervisor?*

A.45. *Feeling devastated I came to my computer desk and was doing my on call tie-up in the service manager. Mr. Knorr came to the Shop and yelled — "Why are you still here?" directed towards me. This resonated with the time once previously where Mr. Knorr punched the wall in the Signals lab yelling — "Why did CN hire you?" and which I have brought to the Company's attention previously. This was when he was a fellow technician and before he became the Supervisor. I immediately replied to his question by informing Mr. Knorr that I was "just fixing my on-call tie up in the service manager." He did not acknowledge and he left the Shop area or so I thought and knowing I received 10 demerits, at that point I wanted to save my job and wanted to email to the management before I left about his ongoing concerning conduct and treatment towards me. Mr. Knorr did not leave and I am not sure how long Mr. Knorr was standing behind me and reading my email which was addressed to Mr. Lepp, Mr. Kich and Mr. Hooper. When he said — "I*

want you to leave right now". I turned around to see Mr. Knorr standing behind my back and I replied I will finish my email and then leaving. And I cannot finish my email while you're standing over my shoulder. I knew he has read my partial email so his face turned all red in anger and again demanded by stating — "I want you to leave". I was typing an email as I felt compelled to inform the company officers regarding ongoing harassment and bullying to our immediate managers and Union Chairman. I had previously provided few incidents to the CN Ombudsman that I have been through a lot and sought advice. I was typing an email and not sure what point Mr. Knorr came behind me and was reading my email. Mr. Knorr asked me to leave. I took a soft approach immediately responded — "let me finish my email and I cannot finish it with him standing over my shoulder. I wanted to email the employer before I left about his ongoing treatment and behavior as I wanted to protect my position and it was fresh in my mind. Mr. Knorr then again demanded - I want you to leave." I responded I heard it once and you do not have to repeat it multiple times and that I am also a CN employee just like himself and Mr. Knorr should not talk to me in that tone. He did not stop reiterating and at that point he was all angry and I felt intimidated so I dialed 911 and called RCMP to report Mr. Knorr's behavior.

17. I find the Grievor's answer to be both evasive and non-responsive. While he attempts to tie his conduct to a previous incident involving Mr. Knorr, that incident – as stated in an earlier application relative to the admissibility of the Grievor's surreptitious recordings – was unrelated and happened several years prior.
18. The evidence satisfies me that the Grievor - in response to a reasonable request by the Supervisor - told his Supervisor that: "*You cannot tell me what to do*", "*Be quiet*" and "*Go away.*"
19. Instead of acknowledging and accepting the reasonable directive from his Supervisor and acting on it as he was required to do, the Grievor chose to escalate the situation, dialed 911 and called the RCMP in an effort to deflect responsibility for the situation to Mr. Knorr.
20. The investigator then asked the Grievor a critical question (Q.46):

Q.46 Why did you not send your email from home instead of work thereby complying with the Company Officer's instructions to go home?

A.46 I don't know.

21. If the Grievor believed that the conduct of Mr. Knorr was grounds for a complaint or grievance, it was incumbent on him to, nevertheless, follow Mr. Knorr's reasonable directive, leave the premises and grieve later. Refusing to follow a Supervisor's reasonable request (especially since his shift had already ended); confronting his Supervisor with disrespectful comments; and, improperly involving the RCMP in a workplace dispute, were not justifiable options for the Grievor.
22. Accordingly, I conclude that the Grievor's conduct in refusing to leave Company property at the end of his shift, after being repeatedly told/requested to do so by his Supervisor, was culpable and deserving of discipline.

V

Refusing to Turn Over Certain Items Belonging to the Company Before Being Escorted from the Property

23. Following the Grievor's refusal to leave the work place as requested, Mr. Knorr decided to call the CN Police to assist in having him removed.
24. Accordingly, he left the Communications Office and (following a conversation with Mr. Kich) contacted the CN Police. The CN Police were unable to immediately access the building because of a crossing train. After walking across the pedestrian bridge, Mr. Knorr met them on the other side. When the train cleared the crossing, Mr. Knorr and Officer Witzell saw the Grievor parked at the crossing while speaking on his cell phone.
25. Officer Witzell and Mr. Knorr approached the Grievor. Mr. Knorr advised him that he had been taken out of service and asked him to surrender his CN property. Although the Grievor refused Mr. Knorr's request to surrender his phone (and continued to make calls on it), he subsequently handed the cell phone over to

Officer Witzell. While he turned over his cell phone to the CN Police, he did not turn over his passcard.

26. By this point, the Grievor had begun surreptitiously recording the conversations which occurred (he allowed in *viva voce* evidence that he had been surreptitiously recording all of his conversations, with everyone, since he was at university).
27. When it was made clear to him that it was essential for him to turn in his passcard before he could leave the premises, he initially advised that the passcard and keys were on his desk. Mr. Knorr retrieved the keys from the desk but could not locate the passcard. When he returned to the Grievor's car with that information, the Grievor told him that the card was in the top zipper pocket of his CN laptop bag, and that the laptop bag was on his desk where his keys had been found.
28. In his answer at Q.47, the Grievor states:

Constable Witzell mentioned I have been pulled out of service and demanded the company phone, Site keys and access card. I gave the phone to Mr. Witzell and advised that the keys and access card were on my desk.

... After searching my desk and laptop bag they said we did not find your access card. I again remembered and advised last I left it in my laptop bag. I then again called RCMP as CN Police blocked my car and while talking to RCMP advised CN Police to contact IT security as they should be able to disable the card and there was no reason to block me unnecessary.

29. Mr. Knorr then retrieved the laptop bag and handed it to the Grievor who was asked to locate the card by himself. He searched for it and could not locate it. On at least two occasions he suggested that Mr. Knorr, or someone at CN, had taken the card out of his bag. Finally, when he was unable to locate it, he suggested the card might be in his desk drawer. The card was not produced or located and Officer Witzell was required to have the card deactivated by the IT Department before the Grievor could leave the premises.

30. In his initial reporting letter (Ex. 3), Officer Witzell reported to Adam Knorr the following:

When I asked for the work keys and passcard for the building to be turned over he was first evasive as to where they were, but did say they were in his black tool bag.

Supervisor, Adam Knorr recovered the black tool bag and recovered the work keys. He brought the back to Amit's vehicle and was asked to find the passcard.

Mr. Arora could not find the passcard in bag. He mentioned that an employee let him in the building this morning. Then later mentioned that it may be on his desk, and further said that maybe another Employee or Supervisor had taken it.

31. At one point the Grievor's evasiveness regarding his passcard became intolerable for Officer Witzell and the following exchange took place:

Witzell: Where is your passcard?

Grievor: Should be on the desk or somewhere. In the drawer or somewhere.

Witzell: You're the one that took it out. Show us where you put it. Come on. Don't play games.

Grievor: No, I'm not playing games, I'm just saying, I just want to make sure...

32. The *Access Documents* (Company, Tab 6) produced by the Company disclose that the Grievor used his passcard to enter the premises at 11:15:13 on March 29, 2018.

33. Notwithstanding his statement to Mr. Witzell that another employee let him in that morning, it is apparent that the Grievor used the passcard himself. When asked which specific employee let him into the building (Q.53), he only then admitted that he got access himself.

34. In Q.54, the following exchange takes place:

Q.54. How did you access the SC building on the morning of March 29?

A.54 I don't remember as we showed up together. I don't know if I used my access card, or John's or Mike's. Everybody gets there at about the same time. I believe Mike left the door propped open when he saw me coming.

35. Having reviewed the evidence, including the tape recordings, I conclude that the Grievor's conduct relative to the production of his passcard was evasive, purposely uncooperative and obstructive. I do not accept his evidence that he did not know where the passcard was, particularly since he just used it that morning when he entered the premises.
36. I find, on a balance, that the Grievor's conduct and responses effectively amounted to a refusal to turn over his passcard before being escorted from the property. As noted by Officer Witzell, as soon as the CN Police arranged to cancel the passcard the Grievor left the premises.
37. It is pertinent to note that the Grievor's ultimate departure from the property exceeded an hour from the time that he left the building. His obstructiveness and refusal to disclose the location of his passcard, as well as his calls to the RCMP, all served to exacerbate and unnecessarily protract the situation.
38. In the circumstances, the Grievor's refusal to make his passcard available, and to accept the reasonable directives of both Mr. Knorr and the CN Police, serves as another breach of his employee obligations and constitutes culpable conduct.

Fair and Impartial hearing

39. The Union contended that the investigation breached the requirements of a fair and impartial investigation, rendering the 15 demerits void *ab initio*.
40. A helpful explanation of the operation and expectations inherent in the CROA investigative system is contained in the recent decision of Arbitrator Clarke in *TCRC v. CPR; AH 663* wherein he states:

35. Under CROA's expedited system of arbitration, the parties have agreed to use a formal investigation to identify the facts in discipline cases. The intent is to eliminate the fact-finding role arbitrators would otherwise perform in a regular arbitration. ...

...

37. In **CROA&DR 2073**, this Office noted the investigation was intended to be informal, but still had to be fair and impartial: ... disciplinary investigations under the terms of a collective agreement containing provisions such as those appearing in Article 34 are not intended to elevate the investigation process to the formality of a full-blown civil trial or an 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 the content of their evidence or statements, and to be given a fair opportunity to provide rebuttal evidence in his own defence**. Those requirements, coupled with the requirement that the investigating officer meet minimal standards of impartiality, Ad Hoc 6639 are the essential elements of the "fair and impartial hearing" to which the employee is entitled prior to the imposition of discipline.

(Emphasis added)

41. The Union asserts that the evidence of Mr. Knorr (having regard to an exchange of previous emails, Union Tab 12) was biased and the Company's reliance on it resulted in the Investigation being partial and unfair. I do not agree.
42. A review of the investigation leads me to conclude that it was fair and impartial. In addition to fully disclosing all the documentation the Company had in its possession, the Investigator ensured that the Grievor was given a full opportunity to provide any evidence he wished (including a detailed rebuttal consisting of four full, single-spaced pages), as well a full opportunity to examine the witnesses produced by the Company.
43. While there may have been some prior enmity between the Grievor and Mr. Knorr that, in itself, does not disqualify the evidence of Mr. Knorr nor does it equate with a conclusion of an overall biased investigation. It is the conduct of the investigation as a whole, rather than the witnesses called before the Investigator, which leads to the overall determination that an investigation lacked fairness or impartiality.
44. That said, I did not find that the evidence of Mr. Knorr disclosed bias or enmity toward the Grievor. The reactions that the Grievor provoked in Mr. Knorr and

Officer Witzell were understandable responses to an employee who was being unreasonably insubordinate.

45. There are no questions or issues which arose within the investigation that would lead me to conclude that the Investigator had taken an unfair or biased position. Every opportunity was given to the Grievor or his representative to respond to or question any of the evidence which was put forward. An opportunity of which they availed themselves.

46. In this vein it should be noted that at the outset of the investigation, the Union requested:

Full disclosure of all evidence, photographs, voice recordings, audio/video records, including any documentation whether paper or electronic, that has been utilized by, or is in the possession of the Company, in which may have a bearing in determining responsibility.

47. In his final answer (Q.81) the Grievor makes the following statement:

*At the very end, I would like to add **I retain the right to utilize any audio recordings of my interactions with my Supervisor Knorr, Manager Andy Kich, Constable Witzell, Coordinator Mike Debryun, and the RCMP constable who attended, and the transcripts obtained from the 911 dispatch and communications center for calls made by me to the Center.** For the record, the date of these interactions is March 29, 2018. These audio recordings can be used in pending dispute, arbitrations, tribunal, or legal proceedings that might arise from this investigation.*

(Emphasis added)

48. While the Grievor made an equivocal reference to the recorded conversations as above, the actual existence of those surreptitious recordings was not disclosed by the Grievor to Counsel – much less to the Company - until the end of the first day of the hearing in his matter.

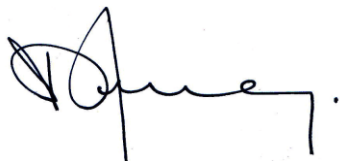
49. The Grievor's withholding of that information until then, represents a notable departure – by comparison - from the disclosure of information provided to him at the outset of the investigation, including:

...all relevant evidence ... related to his matter in the form of either written, audio, photographic, electronic and/or video format.

Decision

50. Without reference to the first ground, I conclude that the remaining two grounds for discipline have been proven on a balance of probabilities and that the Grievor's conduct was culpable and deserving of discipline.
51. Given, *inter alia*: the Grievor's refusal to follow a reasonable directive from his Supervisor to leave the premises; his disrespectful demeanor toward his Supervisor; his failure/refusal to leave the workplace and grieve later if necessary; his exacerbating conduct of calling the RCMP to the workplace when the CN Police were already at hand; his obstructiveness; and, his lack of cooperation in the face of a reasonable request from his Supervisor and the CN Police to relinquish his passcard, I am unable to find any circumstances which would mitigate the penalty in this case.
52. I conclude (after a review of the cases provided) that a disciplinary response of 15 demerits is justified and reasonable in the circumstances.
53. The grievance is accordingly dismissed.

Dated at Calgary, Alberta this 25th day of May, 2020.

A handwritten signature in black ink, appearing to read 'Richard I. Hornung', with a period at the end. The signature is written in a cursive style.

Richard I. Hornung, Q.C.
Arbitrator