

IN THE MATTER OF AN ARBITRATION UNDER THE *CANADA LABOUR CODE*, R.S.C. 1985, c. L-2

BETWEEN:

CANADIAN PACIFIC RAILWAY COMPANY

and

**TEAMSTERS CANADA RAIL CONFERENCE
(Maintenance of Way Employees Division)**

Grievance of 30 Day Suspension – J. Lavallee

Arbitrator: Cheryl Yingst Bartel

Date of Arbitration: October 24, 2022 (Held via Videoconference)

Date of Decision: November 9, 2022

The parties filed a Joint Statement of Issue which reads:

DISPUTE:

Suspension assessed to Mr. Jason Lavallee (Union file 12-2839; Company file 21492).

JOINT STATEMENT OF ISSUE:

On March 1, 2021, Mr. Jeff Thompson filed a written complaint to the Company's Employee Relations Department alleging harassment by the Grievor, Mr. Jason Lavallee, through text message.

On March 8, 2021 the Grievor, attended a statement in connection with "alleged incidents of Harassment and Violence in the Workplace (inappropriate texts) directed towards Jeff Thompson by you Jason Lavellee (Foreman), including texts from May 2019 and February 2021".

On March 23, 2021, the Grievor, was assessed a thirty (30) day suspension for:

Conduct unbecoming towards a fellow CP employee (Mr. Jeff Thompson) between May 2019 and February 2021 while employed as an Extra Gang foreman. A violation of CP Discrimination and Harassment Policy 1300.

CP is committed to our corporate values and providing and maintaining a work environment that supports the dignity of all individuals. The company will make every effort to ensure that no one at CPR is subjected to discrimination, harassment or sexual harassment. Such conduct is not acceptable at any level of the company.

As per your disclosure that you may have a substance abuse issue and that you have reached out to EFAP, you are hereby restricted from Foreman duties until confirmation is received that you are fit for work able to perform Safety Sensitive duties.

Your employment with the Company is in jeopardy if you commit another officer for which discipline is warranted. Please consult the "Hybrid Discipline & Accountability Guidelines" to learn how you can improve your discipline standing.

Summary of rules violated

Type Rule/Section Subsection(s) Description
POLICY CP POLICY 1300 DISCRIMINATION & HARASSM

The Union objected and a grievance was filed on April 5, 2021. The Company responded to the grievance on May 10, 2021.

The Union contends that:

1. The grievor, an employee with some 25 years of service, had never previously been disciplined for any matter of this kind. The grievor was completely honest during the investigation and expressed great remorse;

2. According to Mr. Thompson, he and the grievor had worked together for three years and had not had any issues;
3. The grievor was drunk when he sent the objectionable texts and didn't remember doing it. Mr.Thompson acknowledged that the grievor has a drinking problem;
4. The discipline assessed was far too harsh and unwarranted.

The Union requests that:

The Company be ordered to remove the suspension from the grievor's record and compensate him for all wages and other payments lost as a result.

Company Position:

1. The Company denies the Union's contentions and declines their requests.
2. There is no dispute between the parties that the Grievor did in fact send inappropriate texts to Mr.Thompson. The Company maintains that following a fair and impartial investigation, culpability was established for violation of CP's Discrimination and Harassment Policy 1300.
3. The Company has an obligation to provide and maintain a work environment free of discrimination and harassment and cannot condone behavior from any employee let alone one in a leadership position.
4. Given the circumstances, the Company maintains that the discipline assessed was appropriate and in no way excessive nor unwarranted.

FOR THE UNION (SGD):
 Wade Phillips
 President
 TCRC MWED

FOR THE COMPANY (SGD):
 Francine Billings
 Assistant Director, Labour Relations
 Canadian Pacific

Appearances:

TCRC

David Brown: Legal Counsel
 Wade Phillips: President, TCRC, MWED

CP

Francine Billings: Assistant Director, Labour Relations
 Poonam Sheemar: Manager, Labour Relations

AWARD OF THE ARBITRATOR

1. This Grievance concerns the 30 day suspension assessed against Extra Gang Foreman Jason Lavallee (the "Grievor") for incidents of alleged harassment and discrimination against a fellow employee (via text message). These incidents occurred in May of 2019 and February of 2021. There is no dispute between the parties that the conduct taken by the Grievor in

February of 2021 was inappropriate. The parties disagree about the nature of the comment made in May of 2019 and whether - when combined with the comments of February 21, 2021 - a pattern of harassing conduct emerges.

2. There are therefore two issues to be resolved:

- a. Whether the text message of May 2019 is part of a pattern of harassment and/or discrimination; and
- b. Whether the discipline of a 30 day suspension was reasonable in all the circumstances.

The Facts

3. At the time of the incidents, the Grievor had close to 25 years of service. The Grievor's last discipline prior to these incidents was in 2015. He has no previous discipline for harassment or discrimination.

4. An Investigation into the Grievor's conduct occurred in March of 2021. The facts are not in dispute. On May 15, 2019, the Grievor sent the following text message to Mr. Thompson:

You still awake

The boys were wondering way [sic] you do one rail [sic] at a time but them up and go on you should be 10 rails ahead maybe talk to us in the morning because we're tired of waiting for you. They want to change you out with criss

F[***] the spelling this auto correct why you don't set up rails pull them into place but them tight, never had this problem with Mike Morrison he had 10 stings set up got their just had to grind.

One string does not cut it were upset, might ask for a line change. Go take out we will take criss you can't figure out system out your on your phone too much

5. Mr. Thompson was bothered by this message and showed it to a co-worker. That co-worker approached the Grievor and told him of Mr. Thompson's reaction to this message. The Grievor was also able to determine from his own observation of Mr. Thompson's demeanor that this text comment had upset him. The Grievor approached Mr. Thompson and apologized that his comments hurt Mr. Thompson's feelings.

6. The Grievor and Mr. Thompson then worked together without incident until February 21, 2021, when Mr. Thompson awoke to 10 text messages from the Grievor, which stated:

Have fun on set up, you will lose weight
doing grinds.

Don't worry you can't look at the
men working now. You did it for 14
years now. Your [sic] the man get in done

Skip the work Jeff Thompson .85 a
shirt because I was a speed swing operator.
Why would I get out of my cab. For 15 years. I'm a diabetic.

Take care don't ever come by
me again. Stud

My shares just broke 900,000 your
self how are your shares doing I
almost got a million

Have fun hopefully people work
for you your a diebectic [sic] fat and have no skills
Good luck diabetic

Every one I ask they ask you got
Downsindrom [sic]. Just how you look is
That true

Just wondering who's going to work
For you

When you did f*** all for every one
For 15 years

7. Both the *Canada Labour Code*, R.S.C. 1985 C. L-2 and Policy 1300 of the Company prohibit discrimination and harassment in the workplace. Article 122 of the *Code* defines harassment and violence as:

Any action, conduct or comment, including of a sexual nature, that can reasonably be expected to cause offence, humiliation or other physical or psychological injury or illness to an employee, including any prescribed action, conduct or comment.

8. The Company's Policy 1300 is titled "Discrimination and Harassment Policy". It describes "Harassment" as: "any conduct based on any of the grounds listed above [prohibited grounds from the *Canadian Human Rights Act*] that offends or humiliates and is a type of discrimination". The grounds listed include physical disability - such as being a diabetic or suffering from Down Syndrome. Policy 1300 also defines "Personal Harassment" to be behaviour that is "inappropriate and offensive but is not related to the grounds listed [under the *Act*]" but is prohibited. That list includes "intimidation" "verbal abuse" "bullying" "unwelcome remarks" or "derogatory or degrading remarks".

Was there a Pattern of Harassing Conduct?

9. The February 2021 comments were intended to – and did – offend and humiliate the Grievor based on his personal attributes of weight, skill, intelligence, disability and perceived disability. I am led to the clear conclusion that those messages meet the definitions in both the *Canada Labour Code* for discriminatory conduct against Mr. Thompson on the basis of disability, and the definition of Personal Harassment in Company Policy 1300. The comments were unwelcome, derogatory and degrading. Discipline was warranted. The parties disagreed on the impact of the May 15, 2019 text message. The Union argued the May 2019 text was a "roughly stated" message from one employee to another, which meant the February 2021 comments were an isolated incident. The Union noted the Complaint of Mr. Thompson only related to the texts received in February 2021. The Company urged the May 2019 message should be considered as part of a pattern of conduct.

10. Considering the substance of the May 15, 2019 text, while I agree the February 2021 texts were more offensive and demeaning than that of May 15, 2019, I disagree with the Union that the May 2019 text contained only "rough" comments between colleagues and so were not part of a pattern of harassing conduct against Mr. Thompson. The May 15, 2019 text commented on the manner in which Mr. Thompson did – or did not – do his work, suggested his colleagues wanted to replace him with someone better and stated that the Grievor was unable to figure out the system of work, which demeaned his intelligence. I find the comments were disparaging of Mr. Thompson's abilities and were intended to be

offensive. I disagree the fact the workplace is not a “tea party” (**CROA 1701**) served to lessen the significance of comments which demean a colleague’s ability to do his job and his intelligence: **CROA 4791**.

11. The Union noted Mr. Thompson did not make any complaint about the May 2019 text at the time, which indicated it was not significant to him and should not be considered. The May 2019 text was sent 21 months prior to the February 2021 comments. Mr. Thompson provided the May 2019 message to the Investigator after the later comments, described it as evidence of “previous harassment” and showed it to a colleague at the time he received it in May of 2019. He was bothered by it to the point the Grievor recognized this and offered an apology. Harassment by its nature can be insidious. I find it is not unusual for an individual to live with harassing comments in the hope they are “one off”, but to look at an earlier remark in a different light – as part of a pattern of conduct - when another, more offensive incident occurs. I find that is what happened in this case.

12. I agree with the Company that the May 2019 and February 2021 messages together demonstrated a negative pattern of conduct by the Grievor against Mr. Thompson, which conduct escalated in the February 2021 texts. The Grievor knew – or should have known – his comments were disparaging, demeaning unwelcome, embarrassing, humiliating and offensive to Mr. Thompson. I find the texts of February 2021 were not a “one off” circumstance, and that discipline was warranted for a pattern of conduct. I find the Grievor knew disparaging comments were unwelcome to Mr. Thompson in May of 2019 yet made further comments of even greater offence towards him in February of 2021. I further note there were ten texts sent with multiple slurs in February of 2021 and that while they were sent in succession, this is not a situation where only one offensive comment was made.

Was the Discipline Reasonable?

13. The next question is whether the discipline assessed for the harassing conduct was reasonable or whether some other form of discipline should be substituted.

14. Harassment and discrimination in the workplace is recognized as serious and significant misconduct in CROA jurisprudence: **CROA 4800; CROA 4776 and 4777; CROA 4791**. There

is a continuum for harassing behaviour, which at an extreme end can include threats and criminal conduct. While Mr. Thompson indicated he had concerns for his safety because of the texts, I do not find the Company has established there were any threats made by the Grievor against Mr. Thompson.

15. The Union offered several authorities. In certain cases, inoffensive language was used, or the incident was an “isolated and momentary outburst” (**CROA 4439** at p. 4); a flare-up which was not too serious in nature: **CROA 4643** or involved disrespectful verbal language: **CROA 3392**. I do not find those cases analogous. Discipline must be contextual. In this case, there was not only angry and belligerent language and profanity, but also harassing comments based on personal characteristics, designed to embarrass, demean, humiliate and offend.

16. There were several factors argued in mitigation. The Union argued the Grievor had been having difficulties with Mr. Thompson’s work performance. I cannot accept this issue should act to mitigate the penalty. If the Grievor was having those difficulties, his role was to escalate that issue to management. It was not his responsibility to address that issue, even had he done so in a manner that was not demeaning. The Union also urged the Grievor’s substance abuse disorder should be considered a mitigating factor. The Company disagreed. There is no dispute that since this incident, the Grievor has been assessed as having a substance abuse disorder relating to alcohol. Having a substance abuse disorder which compels an individual to drink to excess does not act to excuse or minimize inappropriate behaviour which is then taken by that individual when drunk. While the Grievor indicated he had a lack of recall from alcohol when sending the texts, that lack of recall due to intoxication does not act to neutralize his responsibility. I agree with the Company that the Grievor’s substance abuse disorder is not a mitigating factor for his behaviour. The Grievor remains responsible for his behaviour when drunk.

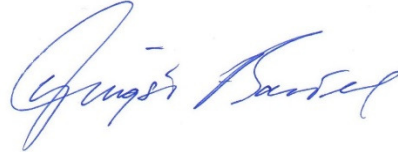
17. The Grievor has a long service record and has not received any discipline for the prior six years, which I accept are both significant mitigating factors. However, in this case, there are also aggravating factors for discipline, which serve to reduce the impact of these mitigating factors. Doubt has been cast on the sincerity of the Grievor’s level of remorse and his

understanding of his wrongdoing. While the Grievor indicated in the Investigation that he did not recall sending the February 2021 texts and felt “terrible” and embarrassed on seeing them the next morning, he did not then take any steps to apologize to Mr. Thompson. The Grievor’s level of understanding of what was inappropriate was lacking. He sent texts he was aware were demeaning – and for which he apologized – in May of 2019 and yet sent even more offensive texts in 2021. The Grievor also indicated in the Investigation that certain of his family members might not even find the comment offensive. This comment was an attempt to diminish the seriousness of his comments and minimize his responsibility. This impacts the Grievor’s understanding of his wrongdoing for his highly offensive comments. A further aggravating factor is the power dynamic between the Grievor and Mr. Thompson. The Grievor is Mr. Thompson’s foreman. Offensive comments made by a foreman which are stated to be shared by a crew are comments which the Grievor knew – or ought to have known – were not just personally disparaging and demeaning to Mr. Thompson, but also had the potential to isolate him from his work colleagues and create division.

18. Discipline must be proportional and contextual to be reasonable. The Union has urged an assessment in the range of 20 to 30 demerits is an appropriate level of discipline and sufficient to bring home to the Grievor the gravity of his actions. It urged that level is consistent with CROA jurisprudence. I cannot agree that this level of demerits is proportional to the significance of the misconduct in this case. I find a significant suspension was warranted to bring home to the Grievor that this type of conduct is unacceptable, as he did not have that awareness. In *Sheet Metal Workers’ International Association, Local 473 v. Bruce Power LP* 2009 CanLII 31586 (ON LRB), it was recognized that in assessing discipline, arbitrators must consider whether the penalty is “within the range of reason”. While I accept a 30 day suspension is a harsh penalty as having a substantial financial impact for this Grievor, I find the Company’s response to be within the range of reason, consistent with the seriousness of harassing behaviour in CROA jurisprudence, the principles of progressive discipline and the Company’s responsibility to maintain personal safety between colleagues in the workplace. This is therefore not an appropriate case to alter that penalty.

19. For the above reasons, I am unable to conclude that the Grievor's 30 day suspension was unreasonable as being excessive. The Grievance is dismissed.

SIGNED, DATED and ISSUED this 9th day of November, 2022 in Wheatland County, Alberta



Cheryl Yingst Bartel
Arbitrator