

**CANADIAN RAILWAY OFFICE OF ARBITRATION  
& DISPUTE RESOLUTION**

**CASE NO. 4650**

Heard in Edmonton, September 11, 2018 and  
November 26, 2018

Concerning

**CANADIAN NATIONAL RAILWAY COMPANY**

And

**UNITED STEELWORKERS – LOCAL 2004**

**DISPUTES:**

- A.** Mr. J. Hrycyk discharged for the following reason;” uttering threats of physical harm and harassment toward fellow employee C.T. in May and June 2017”.
  
- B.** Mr. M. Siebeneich discharged for the following reason; “For your conduct involving participating in threats of and harassment toward fellow employee C.T. during May and June 2017”.
  
- C.** Discharge of C. Hydamaka on July 5, 2017.

**THE JOINT STATEMENTS OF ISSUE:**

**A.** On July 5, 2017, the grievor was discharge for “uttering threats of physical harm and harassment toward fellow employee C. T. in May and June 2017.”

Only July 17, 2017 the Union filed a grievance regarding this matter in accordance with Articles 18.4, 18.5, 18.6 of Agreement 10.1 contending that the discharge is unwarranted.

The Union requests Mr. Hrycyk be reinstated to his former position without loss of seniority and made whole for all loss of wages and benefits.

The Company has declined the Union’s request to reinstate the grievor.

The parties have not been able to resolve this dispute to date.

**B.** On July 17, 2017 the Union filed a grievance regarding this matter in accordance with Articles 18.4, 18.5, 18.6 of Agreement 10.1 contending that the discharge is unwarranted.

The Union requests that Mr. Siebeneich be reinstated to his former position without loss of seniority and made whole for all loss of wages and benefits.

The Company has declined the Union’s request to reinstate the grievor.

The parties have not been able to resolve the dispute to date.

**C.** On July 5, 2017 the grievor was discharged “for your conduct involving and participating in threats of physical harm and harassment towards fellow employee C.T. during May and June 2017”.

On July 17, 2017 the Union filed a grievance regarding this matter in accordance with Articles 18.4, 18.5, 18.6 of Agreement 10.1 contending that the discharge is unwarranted.

The Union requests that Mr. Hydamaka be reinstated to his former position without loss of seniority and made whole for all loss wages and benefits.

The Company has declined the Union’s request to reinstate the grievor.

The Parties have not been able to resolve the dispute to date.

**FOR THE UNION:**

**(SGD.) M. Piché**

Staff Representative

**FOR THE COMPANY:**

**(SGD.) Mr. B. Laidlaw**

Manager, Labour Relations

There appeared on behalf of the Company:

- |              |  |
|--------------|--|
| C. Wendel    | – Counsel, Dentons, Edmonton                 |
| S. Blackmore | – Senior Manager, Labour Relations, Edmonton |
| N. Nielsen   | – Chief Engineering, Edmonton                |
| B. Strachan  | – Senior Manager Engineering, Edmonton       |

And on behalf of the Union:

- |               |  |
|---------------|--|
| K. Doctor     | – Counsel, Goldblatt Partners, Toronto |
| T. Lundblad   | – Staff Representative, Toronto        |
| G. Colli      | – Chief Steward, Winnipeg              |
| J. Hrycyk     | – Grievor, Martensville                |
| M. Siebeneich | – Grievor, Saskatoon                   |
| C. Hydamaka   | – Grievor, Saskatoon                   |

On behalf of Ms. Thomas

- H. M. Jensen  
C. Thomas

(November 26 2018 only)

- Counsel, Plaxton Jensen, Saskatoon  
Witness, Saskatoon

**AWARD OF THE ARBITRATOR**

These reasons incorporate three decisions arising from incidents in May and June, 2015. Four people worked on a railway track crew around Delisle, Saskatchewan; the three male grievors and Ms. Thomas. Their positions were:

Mr. Joel Hrycyk - Machine Operator

Mr. Christian Hydemaka - Track Foreman  
Mr. Michael Siebeneich - Assistant Track Foreman  
Ms. Carol Thomas - Track Maintenance Employee

The crew reported to Mr. David Nuss, Assistant Track Supervisor and Mr. Marcel Boehm, Track Supervisor. Investigations were conducted after Ms. Thomas complained about the conduct of her three male co-workers. This led to the termination of all three grievors, each “for your conduct involving participating in threats of and harassment toward fellow employee Carol Thomas during May and June 2017”.

The three were also charged criminally. Ms. Thomas went off work, obtained Workers' Compensation coverage, and remains off work. The relevance of those matters is addressed below.

### **Preliminary Issues**

Normally, these grievances would be heard separately, each on the basis of a joint statement of issue and their individual investigations. It was agreed that the three should be heard together, still recognizing circumstances unique to each grievor.

At the initial CROA hearing, the three grievors sought to provide additional evidence, arguing that the investigation had allowed them insufficient opportunity to advance full explanations. The Employer opposed this, but the request was granted. In each case, their evidence took issue with Ms. Thomas' written account of what had happened. Each presented the circumstances as being little more than innocent banter and joking.

At the hearing, unsuccessful efforts were made to contact the complainant. As the grievor's evidence went directly to the truth of what Ms. Thomas had raised, and beyond what was advanced during the individual investigations, it was appropriate, in fairness to the Employer and to Ms. Thomas, to allow her to be called in reply. She had not been questioned at the investigation stage and had been afforded no other opportunity to speak to her allegations or the additional evidence from the grievors. She also had an outstanding human rights complaint, with some risk of issue estoppel objections.

Ms. Thomas was reluctant to testify, given her treatment during these events, her health, and her apprehension over being in the same room as the grievors. Arrangements were later made to receive her evidence at an *ad hoc* hearing. She was separately represented by counsel, by agreement, she testified in the absence of the three grievors, although counsel heard her evidence and cross-examined.

### **Ms. Thomas' Complaint**

Ms. Thomas was the last person to join this crew. She had been away on medical leave from August 2016 until May 9, 2017. Ms. Thomas, apparently as a result of her leave and some earlier events, had been meeting with a counsellor through the Employee Assistance Program.

Soon after returning, Ms. Thomas found herself in a truck driven by Mr. Siebeneich. He was texting and using facebook while driving, and expressing anger at his job and his

co-workers. Ms. Thomas spoke to Mr. Nuss about this and hoped he might intervene without implicating her. Ms. Thomas believes Mr. Siebeneich learnt of this and that retaliation ensued. Later, she once again spoke to Mr. Nuss, again hoping he might be able to intervene. He passed her concerns on to Mr. Boehm who decided that he and Mr. Nuss should meet with the full crew. They did so in a less than orthodox manner. Despite the lack of any formal statements or interviews, and without arranging any Union representation, Mr. Boehm called a meeting at an old rock pit a couple of minutes away from D'Arcy, Saskatchewan.

What purport to be minutes of that meeting were taken by Mr. Nuss, but their accuracy is disputed. More significantly, the meeting was about Ms. Thomas' oral complaints and clearly had the potential to result in disciplinary action. CN and the Union have a contractual investigation process (see s. 18.2 of the agreement). This rock pit meeting bore no resemblance to a normal investigation. The grievors were not afforded any opportunity for Union representation. The Union objected to the use of any statements from the meeting. The Company agreed that it would proceed solely on the basis of the subsequent investigation and Ms. Thomas' written statement, and not rely upon this "rock pit meeting."

The rock pit meeting surprised and upset Ms. Thomas. She felt she had been put on the spot and that her concerns were being minimized. She took the next two days off work. She told her counsellor of concerns she had about her treatment following her

return to work. She was told to report the matters to management, or else the counsellor herself would feel obliged to do so.

On June 20, 2017, she emailed a complaint to Mr. Nuss. That complaint is set out almost in full because it became the primary basis for the Company's investigation. She was cross-examined on its contents on November 26<sup>th</sup>.

On my first day back at work, May 9<sup>th</sup>, I was riding with my co-worker Mike from Rosetown to Delisle. He was ranting and raving about absolutely everything. He was swearing and talking about how he hated CN and everyone on the Rosetown sub. He hated Marcel, Nuss, Joel and Christian. He said that he is being treated unfairly. He was on his phone constantly texting and on facebook. Because he was so agitated and angry I did not feel that I could tell him not to text and drive. I was too scared to say anything because I didn't know how he would react.

I reported the incident to Nuss and asked him not to say anything because I was afraid of the repercussions. I thought he could tell them not to text and drive without saying I told him.

After I spoke to Nuss, I was sitting on the back seat on the passenger side. Joel was in the front, on the driver's side. Christian was in the passenger side in the front. Mike was beside me sitting in the back on the driver's side. Joel turned to face me. There is a metal box between the driver's side and the passenger's side. He had his knife in his hand and was tapping the knife on the metal box and he called me a snitch. He told me snitches get stitches. I told him I wasn't a snitch and he kept repeating snitches get stitches. In the meantime Christian is in the front seat and he is saying the same thing and Mike is beside me and he is also saying snitches get stitches. They kept repeating it and I kept repeating whatever, whatever, whatever every time they said it. All three were talking all at once.

Between the first time I was threatened with the knife and the second time. I was told by Mike that he got into an argument with Joel. He was worried that he had to bid out because he told Joel to fuck off. He said that anyone Joel wanted out, he got out. I told him that Joel has been wanting me gone for a long time and he hasn't been able to get rid of me. I told him not to bid out if he didn't want to.

The second time we were all in the truck again and Joel was faced towards me again. I don't remember what brought it on but he was calling me a snitch again and that snitches get stitches. He had his knife in his hand but this time he wasn't tapping the metal box. When he said snitches get stitches I told him fuck off. Every time he said it I said fuck off and told him fuck you. He kept repeating it and I started saying whatever, whenever he said it.

The third time we were in the truck again and Joel was holding the knife in his right hand and he was flicking his wrist in the air. Joel asked me "What do snitches get?" I said "Whatever". He kept repeating "What do snitches get?" And I was expected to say stitches. I kept saying whatever.

Those are the three times the knife was brought out. In between those times, at any time, if they thought they were doing something that I was going to report or tell on them about, I was told that snitches get stitches. I was told snitches get stitches so many times that the incidents are mixed up together. It was almost a mantra. I don't remember the days or the times. During all 3 incidents, all three of them were telling me snitches get stitches. I did not feel like I was going to be stabbed at the time but the threat was for me to keep my mouth shut when I was working with them. I was not allowed to say anything to Nuss. At no time did I laugh or joke with them when they were telling me snitches get stitches. During this time I was also told multiple times that I should bid out. I was also told by Mike "you may as well kill yourself."

The last incident happened when we were working at Mile 28 on Thursday, June 8. I was told by Joel that he found an arrowhead. I didn't want to go but I went to go see anyway. I thought what if he really did find an arrowhead. I walked over and he had a sharp rock in his hand. He told me to bring my wrist over I laughed at him because I thought as if I was going to rush over and give him my wrist for him to slice. Mike was saying to make sure I cut lengthwise not across to do the job properly.

I was shocked and stunned. I felt like I couldn't say anything to complain. I felt intimidated, bullied, and threatened. I felt I had to remain silent in order to maintain a congenial workplace and maintain the status quo. A congenial workplace at my expense. At the expense of my feelings and my sense of self. I tried to be strong and show I was not upset. I pretended what they were doing did not bother me.

[Ms. Thomas then described speaking to her counsellor]

I spoke to Nuss on Thursday, June 15 in the morning when he came into the office. I told him that my counsellor told me to tell him about what I was going through. I told him that I have been threatened with a knife and told snitches get stitches, I was told to kill myself and urged to bid out. He called Marcel and told him. Marcel said for us to go to Darcy to meet him. When we got to Darcy we had a meeting with Marcel. Nuss, Joel, Christian, Mike and myself. We were all given the opportunity to speak.

Nuss was told to take notes of the meeting. The main things I remember from the meeting is Mike saying he was just joking. Joel repeating he is so angry he was shaking and saying Mike did not tell me to kill myself. Christian asking me what [why?] I did not say anything and saying I was joking and laughing with them. I felt further intimidated and felt I should not have said anything. I felt that they were justifying and minimizing their behavior. I felt the meeting accomplished nothing. I was told to go work with Nuss to cool down.

I talked to Nuss about how I was feeling. We talked about CN culture and the attitudes and behavior that is acceptable at CN but would not be elsewhere. The culture at CN is different. I was told that construction worker culture is like this everywhere. And I have accepted that CN is an organization that has a different culture.

I work in a workplace where it is acceptable to say cunt. Cunt has been normalized for me. It no longer upsets me when the term is used. Cunt is spoken when someone is angry about something, behavior is called cunt. I don't monitor what people say and how they speak. I don't complain when the term is used. Marcel tried to tell the guys no more "C" word around Carol but is still used.

I don't say anything when I am teased about Bruce. I don't say anything when someone is swearing and throwing tools around. That behavior has become acceptable to me. It no longer shocks me or bothers me. I have had to adapt my expectations of appropriate behavior in order to fit in. I have developed as big a potty mouth as the next person and have laughed at inappropriate jokes. The lines between what is appropriate and inappropriate have become blurred. I have remained silent about the harassment I have faced thinking it would change when Bruce retired. It has decreased significantly but still continues to a lesser extent. Realistically I don't know if CN can



provide a harassment free workplace. Managers yell, swear and freak out on each other during their phone meetings. This behavior is acceptable from the top down.

What upsets me is that Joel, Mike and Christian don't think what they did is wrong. The boys will be boys excuse is just not acceptable to me anymore. We are all adults in a workplace where we are all entitled to a safe, respectful harassment free workplace. I have lowered my boundaries so much and still that is not enough. What standard of behavior are we willing to live with?

This letter is detailed, thoughtful, and to a very large degree consistent with Ms. Thomas' testimony. It is not a complaint about a fear of imminent bodily harm. She says directly, and later confirmed in her evidence, that:

I did not feel directly like I was going to be stabbed at the time but the threat was for me to keep my mouth shut when I was working with them”.

That does not render such incidents irrelevant. It is not appropriate to parse her complaint down to a few anemic incidents of dubious accuracy that can be explained away as misunderstood humour. Rather, her complaint, read in its entirety, is what has become recognized as workplace bullying. This is sometimes called “mobbing”, where a group of employees pick upon, undermine, and demean a co-worker. The question is - were these three employees joking with her? Or rather, were they disrespectful of her in ways intended to make her feel excluded, intended to dehumanized her, and directed at making her work life experience unpleasant unless and until she conformed to group norms and their perceived hierarchy of authority?

## **Laws and Policies**

The Employer has a legal obligation to protect the health and safety of its employees. Section 124 of the *Canada Labour Code* requires that “every employer shall ensure that the health and safety at work of every person employed by the employer is protected. Part XX of the Occupational Health and Safety Regulation sets out more specific obligations. CN has established a policy on Harassment-Free Environment which provide in part:

Harassment, including harassment under the *Canadian Human Right Act*, is considered employee misconduct and is not tolerated. It is the responsibility of all employees to ensure that harassment does not occur.

... the Company will impose appropriate corrective measures, including disciplinary action up to and including dismissal, on any employee who has acted in a manner constituting harassment.

Under this Policy, harassment refers to behaviour or communication, whether written or verbal, which a reasonable person would consider to cause offence or humiliation or affect the dignity of an employee, employment candidate, customer or member of the general public and, in the context of employment, results in an intimidating, hostile or offensive atmosphere (“poisoned environment”).

Harassment can occur at or away from the workplace and during or outside working hours if individuals are in a work situation. While harassment typically takes the form of hostile or unwanted conduct that is repeated over time, a single serious incidence of such behaviour that has a lasting harmful effect may also constitute harassment.

A parallel policy sanctions workplace violence:

For purposes of this policy, “workplace violence” is defined as any action, conduct, threat or gesture of a person towards a CN employee in a workplace that can reasonably be expected to cause harm, injury or illness to the CN employee, excluding situations of justified self-defence.

All three grievors acknowledged knowing of, being trained in, and understanding these policies. While the allegations here are more of workplace bullying than a threat of violence, the comments of Arbitrator Monteith in SHP 710 are equally relevant here.

The Regulations set out the legal duty of federal employers to develop policies and programs for the protection of their employees against workplace violence, threats of violence, harassment and intimidation and to control the risks of such conduct. It is very important, therefore, to take into account in the process of weighing all the relevant factors, the policy goals of the legislation and the heightened awareness and expectation in society today that employers will take the appropriate steps to protect all their employees from violence or threats of violence and other improper behaviour in the workplace and to promote a safe working environment. This is not to say that the legislation mandates a zero tolerance policy. The Company's policy recognizes that incidents of violence in the workplace will be subject to discipline up to and including dismissal. The legislation does not restrict the discretion of an arbitrator to substitute a lesser penalty, where warranted. As I indicated, above, arbitrators have always treated workplace violence as serious misconduct. However, given the heightened public concern and the duties placed on employers by legislation, it is becoming increasingly clear that the tolerance of arbitrators in regards to violence or threats of violence is low and mitigation of the penalty of discharge will not be warranted absent compelling evidence, such as medical evidence, that supports a conclusion that the employee has rehabilitative potential and will not be a danger to the safety of others, if returned to work.

### **Objections to Evidence**

The Union objected to any weight being placed on the results of Ms. Thomas' subsequent successful claim for Workers' Compensation. The Union's position is that, while it does not deny Ms. Thomas was psychologically impacted by the way she was treated, it does not accept that this was caused by the grievors and by these incidents.

I felt it inappropriate for the factual evidence in this matter to be resolved in the absence of Ms. Thomas' testimony. I similarly take the view that it is inappropriate to draw conclusions from a WCB eligibility decision made in the absence of participation by either the grievors or the Union. I place no weight on that process or its findings.

The Union similarly objected to weight being placed on the results of the Criminal proceedings against the grievors. The grievors' conduct was referred to the CN Police Department in Saskatoon. As sworn police officers, their decisions to charge are no less significant because they work for CN. All three grievors were charged with offenses under s. 264.1 of the *Criminal Code* which refers to knowingly uttering threats to harm. In each case the charges were withdrawn. As described below, in Mr. Hydemaka's case this was following the grievor's agreement to enter into a peace bond under s. 810 of the *Criminal Code*. In the other two cases they were replaced by alternative measures under section 717 of the *Criminal Code*, which provides:

717(1) Alternative measures may be used to deal with a person alleged to have committed an offence only if it is not inconsistent with the protection of society and the following conditions are met:

...

(e) the person accepts responsibility for the act or omission that forms the basis of the offence that the person is alleged to have committed;

(f) there is, in the opinion of the Attorney General or the Attorney General's agent, sufficient evidence to proceed with the prosecution of the offence;

The Employer argues that, due to these preconditions, and the two grievors' voluntarily opting for alternative measures, they must have accepted responsibility for the threatening conduct with which they were charged. The Union argues that s. 717(3)

prevents the use of any such acceptance of responsibility in any subsequent civil proceeding:

(3) No admission, confession or statement accepting responsibility for a given act or omission made by a person alleged to have committed an offence as a condition of the person being dealt with by alternative measures is admissible in evidence against that person in any civil or criminal proceedings.

In **CROA 3377**, Arbitrator Picher said, and I agree:

It seems evident to the Arbitrator that an essential reason for the statutory inadmissibility of any such admission is to encourage the use of the alternative measures or diversion programs contemplated by Parliament within section 717 of the Criminal Code. Failing any such privilege or protection persons who might otherwise face liability in other civil or criminal proceedings might be obviously reluctant to take advantage of the diversion program. Obviously, therefore, it is incumbent upon tribunals such as boards of arbitration to respect the underlying purpose of the inadmissibility rule and the clear letter of that rule as expressed in section 717(3) of the Criminal Code of Canada.

I find the proffered evidence in respect to the two grievors inadmissible.

In Mr. Hydemaka's case he voluntarily entered into a s. 810 peace bond.

810(1) An information may be laid before a justice by or on behalf of any person who fears on reasonable grounds that another person

(a) will cause personal injury to him or her or to his or her spouse or common-law partner or child or will damage his or her property;

A peace bond itself is not necessarily an admission of the underlying facts.

In my opinion entering into a peace bond is not an admission that one has committed a crime nor does it constitute a conviction for a crime. A peace bond is prospective in operation. The party agreeing to be bound by it agrees that certain named persons have reasonable grounds for fears that he will cause personal injury to them. That is not

the same as an admission that a criminal act was committed. Thus, I do not think that Mr. Yhap should be precluded from asserting his innocence in the arbitration proceeding.

*Markham (Town) v. C.U.P.E. Local 905* (2001) 102 L.A.C. (4<sup>th</sup>) 236 (Bennett)

I accept, as Mr. Hydemaka says, that the costs of a trial weighed on his decision to enter into a peace bond.

I accept it is open for the Union to argue, and for to a board of arbitration to find on all of the evidence, a different set of circumstances than that which formed the basis of the recognizance order. An explanation by a respondent/grievor to the effect that he did not dispute facts in a peace bond proceeding because he could not afford the legal costs and did not want to risk getting a criminal record, cannot be completely dismissed out of hand without due consideration.

*Plasti-Fab and United Steelworkers (Hardy), Re* [2010] BCCAAA No 202, at para 46 (Sullivan)

However, I find some weight can be given to the statements made in Court on Mr. Hydemaka's behalf and I note, without feeling in any way bound by, the presiding judge's reaction. Part of the exchange in Court was recorded as follows (with phonetic names corrected).

The Grievor's lawyer said:  
he's recognizing that [Ms. Thomas] may have felt some fear that day for sure. ...

The particulars were stated on the record by the Crown as:  
... on May 9, 2017, Carol Thomas, the victim, she's an employee of the CN, and she was working with the – there were three co-accused, I guess you could call them. Mr. Hydamaka was one of them. – essentially, the victim, Ms. Thomas, saw Mr. Siebeneich texting while he was driving a company vehicle. She reported that to their supervisor who then cautioned Mr. Siebeneich. Some time after that, Carol Thomas was alone in a work vehicle with the three accused sitting in

the backseat. Mr. Hrycyk pulled out a knife, was waving it around, and tapped it on the center console advising Ms. Thomas that “snitches get stitches”. So Mr. Hydamaka was in the backseat of that vehicle. Ms. Thomas says that the – Mr. Hydamaka and Mr. Siebeneich essentially repeated that sentiment to her and, as a result, she did fear out of that incident.

There were continuing incidences with the other two accused after, but not with – not involving Mr. Hydamaka in any way. So it was just the incident in the truck that day that he was essentially a part of those three boys. I understand that the three of them are sort of in their early twenties, whereas Mr. Thomas is in her mid-forties. So she did not feel threatened in the circumstances.

Given the opportunity to add information, counsel for the Grievor said: ... Mr. Hydamaka has indicated that, although he’s uncertain as to the knife situation given – given his understanding of what occurred, he – he doesn’t deny that he had it out either. He also doesn’t deny the fact that he repeated the “snitches get stitches” thing, but he also indicated that it was tongue-in-cheek, the intention was. But he has acknowledged and we’ve had discussions that – that more than likely caused her some fear and he does have remorse for that.

The Grievor himself added:

I’d just like to say that I made a bad joke. I didn’t think that anything would happen out of it. I didn’t intend on anything happening out of it, but it did, and I’ve learned my lesson.

The Court noted that his conduct “was really dumb” and that it “doesn’t sound like a joke” and it was “not sure how you would have thought that she would think it was a joke”. The Court further commented that what the Grievor ought to have done was turn to Mr. Hrycyk holding the knife, and tell him to “stop being such an idiot, put it away and apologize.”

## **Context and Credibility**

All three grievors, in their statements and in their evidence, assert that the grievor took their various comments out of context, purporting to take seriously and literally, words said in jest. I accept that this is a situation where the overall context is important

and this can have a profound impact on the assessment of credibility. However, the Union's arguments also focused, unduly in my view, on the specific words written or spoken which itself distracts from the context in which they were spoken. A full contextual assessment cuts both ways.

This crew was largely unsupervised. Ms. Thomas was the lone female. Operating in a remote rural environment, they, of necessity, had to travel together in close quarters, usually with one of the grievors doing the driving. These are all important contextual issues as well.

There are significant differences between the witnesses' evidence. Credibility is in issue, something I have approached using the customary tests and cautions set out in cases such as:

*Faryna v. Chorney* [1952] 2 D.L.R. 354 (B.C.C.A.) at 357

*Canadian Forest Products Ltd. v. Unifor Local 446* [2018] CanLii 8167 (Sims)

This conflicting evidence can be subdivided into three main areas:

- Riding with Mr. Siebeneich on May 9<sup>th</sup>;
- The one or more knife and "snitches get stitches" incidents;
- The events at Mile 28;

There was also conflicting evidence about the rock pit incident, but given the preliminary issues described above, my doubts about the reliability of Mr. Nuss' note



taking, and the agreement not to rely on any statements, I take a very limited account of that meeting.

### **May 9<sup>th</sup> – Riding with Mr. Siebeneich**

Ms. Thomas' complaint letter describes her being subjected, as a passenger, to a pattern of driving which, if her description is true, was obviously both scary and dangerous. As the lone passenger on her first day back at work, she had no realistic ability to prevent this conduct. Ms. Thomas testified that Mr. Siebeneich's angry remarks were directed at the Company and other employees, not at her personally.

Ms. Thomas says all she reported to Mr. Nuss was her concerns over texting and driving. She says Mr. Nuss told her that Marcelle Boehm "probably talked to Mr. Hrycyk", although she does not know for sure. She does say however that someone had clearly told Mr. Hrycyk that she had been talking to Mr. Nuss, because Mr. Hrycyk told her he knew she had been talking to him. He did not say specifically it was over her complaining about his texting and driving but she says, convincingly, "that's the best logical conclusion".

In his investigation Mr. Siebeneich was asked if he had a conversation with Mr. Nuss regarding the use of cellphone while driving a Company vehicle and he replied that he did, and that Mr. Nuss told him it was a violation of Company policy. He answered that he did not speak to anyone about that conversation afterwards. In his testimony Mr. Siebeneich denied knowing that Ms. Thomas had complained about his cellphone use.

My conclusion is that Mr. Siebeneich in fact learnt about Ms. Thomas' complaint, that it was a valid concern, and that he knew or strongly suspected it was Ms. Thomas who had raised the issue.

### **Snitches get Stitches**

Ms. Thomas' says that what she perceived as threats were often accompanied by individual statements or a chorus of the phrase "snitches get stitches". The meaning of the phrase is self-evident, although it does not directly imply, and indeed as noted above Ms. Thomas did not take it as implying, she was actually being threatened with physical harm. Rather she took it to be a repeated warning from the three grievors individually and collectively, that she should never report them to management.

The grievors' evidence on the use of the phrase is inconsistent between them. Mr. Hydamaka agreed that Ms. Thomas' description in paragraph 3 of her complaint was accurate, and that they "possibly" repeated the phrase. Asked about specific incidents of repetition, Mr. Hydamaka replied "I do not recall those exact events" and "I do not recall that exact moment". Asked to explain the phrase he said:

It is a phrase I have heard in songs and around the railroad it is a term that is used to deter from snitching. However, in this context it was not used in that manner it was intended for humour.

In his testimony Mr. Hydamaka said that the three grievors had used the phrase, while just joking at work, anytime anyone did something they shouldn't. "Its just

something we joke around with.” He says they said it often, perhaps when Ms. Thomas was around, although he denied any recollection of it being said to her directly.

In Mr. Hrycyk’s investigation, he too confirmed that the phrase was used as described by Mr. Thomas in the third paragraph of her complaint. He says of the phrase: “In the right context it could mean punishment for someone who rats on you.” He says it is not accurate that it was used subsequently saying “it all happened on the same day”. Asked “how would a snitch get stitches?” he replied “probably a laceration”. He agreed that if the phrase was used while a knife was present a reasonable person might feel intimidated “... if the phrase was used in the right context yes.” By this he meant “if something is said in a joking manner it is not intended to cause harm”. Asked where the phrase came from within the crew he replied “I have just heard it on TV and from old railroaders.” Asked why his entire crew was using the phrase he replied “I don’t recall why it started, but it was all intended as a joke right from the beginning, before Carol came back from her absence.”

In his testimony Mr. Hrycyk said the three men used the phrase long before Ms. Thomas returned to work. While he agrees the phrase was used around Ms. Thomas he says it was never directed at her, only said when they did something wrong, like being late for work. He says the three of them never said it all together. He denies she ever offered any comment in reply although later conceded she might have said “fuck off” in response. He says he does not recall having his knife in his hand when the phrase was

used, he denies tapping it on the metal box and denies ever calling her a snitch. He says the alleged second incident with the knife never happened.

Mr. Siebeneich agreed that the words were used as alleged in the complaint but replied "...intended as a joke. It is an ongoing joke between me Joel and Christian that started before Carol came back to work". When asked if he could explain what the phrase meant he said "no". Question 17 to 19 address subsequent uses of the phrase:

17. Q. Mr. Siebeneich, again referring to the letter (evidence item #4), this time paragraph 4, Ms. Thomas describes a conversation that the two of you had. Is this accurate?

A. Yes, it was just out of frustration

18. Q. Mr. Siebeneich, in Ms. Thomas' letter (evidence item #4) she describes another day when all four of you were travelling and the phrase "snitches get stitches" was uttered by Mr. Hrycyk and she responded to him by saying "Fuck Off". Is that accurate?

A. Yes, she was laughing while she said it too

19. Q. Mr. Siebeneich, according to the letter of Ms. Thomas, this scenario happened on three occasions, would that be accurate?

A. Not that I remember but probably

In his testimony Mr. Siebeneich agreed he had used the phrase, but said it started before she arrived and was a joke with no harm intended. Contradicting his earlier statement he said he could not recall if it was ever said while Ms. Thomas was with them.

Even aside from Ms. Thomas' evidence I found the grievor's description of how this phrase was used, in each case, lacked credibility. They each gave the impression of

trying to explain away what happened. Their attempts to characterize its use as a joke were at best self-serving, after the fact, attempts at rationalization.

Ms. Thomas gave her evidence on the use of the phrase, its repetition, and the group chanting, in a clear manner. His ability to describe it in a fairly precise way contrasted dramatically with the inconsistent and disjointed evidence of the grievors. I find particularly that Ms. Thomas sought to restrain rather than exaggerate her evidence about what happened to her. From experience, she had learned that her best course of action was to try to accept what went on around her and to fit in where possible. While this is a sad commentary on her situation, it helped reinforce my conclusion that she was telling the truth without exaggeration. I accept the complainant's evidence about the repeated use of the phrase "snitches get stitches" by all three grievors, often directed at her, often in chorus, on the three occasions with the penknife used as a prop, and in an effort to intimidate not entertain.

### **The Arrowhead Incident at Mile 28**

In her evidence, Ms. Thomas described the Mile 28 incident. It was lunch time. Mr. Hrycyk was sitting down and called her over saying he had found an arrow head, which was in reality just a sharp rock. She says he wanted her to give him her wrist. Her evidence is that he actually said the words "bring your wrist here." Mr. Siebeneich was standing close by and said "should slit it lengthwise, not across, to do the job properly". Ms. Thomas concedes it was her assumption that Mr. Siebeneich's "lengthwise" comment was in relation to her, although Mr. Hrycyk was running to across his own wrist. Mr.

Hydemaka while there, was not directly involved. Ms. Thomas agrees that, at the time she laughed, not because she was having fun with them, but because it is what she felt she had to put up with; that they expected her to keep taking jokes at her expense so as to achieve a congenial workplace. It made her feel small; it was never enough and undermined her feelings of dignity and self-esteem.

After the event she went to see her therapist who asked how things were at work. She she said 80% better than the time when Bruce had been her foreman. Bruce, who resigned before her leave, had subjected her to earlier harassment. The therapist asked about the 20%, which led to her describe the events since she returned. She was told she had to report this to management. She did so, but felt Mr. Nuss was dismissive in that he kept asking what was the tone of voice, and asked whether they were serious. They talked about the culture at CN quite a bit but she felt he just wanted to categorize the events as joking around. The meeting at D'Arcy followed.

In Mr. Hrycyk's testimony he agrees that Ms. Thomas had been hoping to find an arrow head. He found a rock but it was not a real arrow head. He says he scratched it across his arm Mr. Siebeneich said to him, and not to Ms. Thomas, "you are supposed to go the other way". He recalls that she was three feet away from him when it happened. He says no one touched her or said she should kill herself.

Mr. Siebeneich's evidence about the Mile 28 incident is that Mr. Hrycyk found a rock that resembled an arrow head and showed him how sharp it was. Mr. Siebeneich says

he replied “lengthwise” and thinks that’s about all that happened. He agrees Ms. Thomas was there but says she was not part of the conversation. He says no one grabbed or touched her. He denies telling her, in any way, to kill herself.

Mr. Hydamaka says that while they were driving out to Mile 28, Ms. Thomas spoke of wanting to find an arrow head. Once there, they stopped for lunch. Mr. Hrycyk picked up a rock and jokingly said to Ms. Thomas “I found your arrow head”. He scratched his arm with it. Mr. Siebeneich made a comment “lengthwise not width wise”, to which Mr. Hydemaka says he made a comment about his grade 8 teacher saying something like that to him. That, he said, was the end of the conversation. He says Mr. Hrycyk was only talking to Mr. Siebeneich. He says no one touched Ms. Thomas and no one said anything about her killing herself.

My conclusion on the events at Mile 28 are mixed. Again, I find Ms. Thomas’ the more credible witness, but I believe she may have viewed what was actually said based on her cumulative experience of demeaning conduct from the grievors. I find that Mr. Hrycyk found a rock and, while he had no belief it was an arrow head, called Ms. Thomas over and said give or show me your wrist. There was no joke in that. I am not however convinced that the lengthwise not widthwise comment was directed at Ms. Thomas, although I can understand in the circumstances how she might have seen it that way. The actions were childish, totally insensitive, and disrespectful, but I am not persuaded they were quite as malicious as Ms. Thomas perceived them to be.

## **Just Cause**

I find that CN had just cause to discipline all three grievors; indeed I find it had a statutory obligation to take action as a result of this conduct, and its harassing and threatening impact upon Ms. Thomas.

This is not a situation amenable to any “boys will be boys” explanation. I suspect each grievor, individually, is capable of more maturity than they exhibited collectively. However, the fact they acted in concert and in a “mobbing way” adds substantially to the gravity of the offence. Ms. Thomas is correct in saying, in her complaint:

What upsets me is that Joel, Mike and Christian don't think what they did is wrong. The “boys will be boys” excuse is just not acceptable to me anymore. We are all adults in a workplace where we are all entitled to a safe, respectful harassment free workplace. I have lowered my boundaries so much and still that is not enough. What standard of behavior are we willing to live with?

Mr. Hydamaka was perhaps the least involved, but as foreman, he had the higher duty. He did nothing to intervene, instead participating in the “snitches get stitches” threats with the other two. I totally reject the “it was just a joke” rationalization. No one could point to anything even remotely funny or amusing in what took place, even for themselves never mind Ms. Thomas.



I similarly reject the arguments (or perhaps again more self-rationalization) for the grievors that she never told them to stop, instead, by laughing, or saying “whatever” or “fuck off” she actually led them on. Such arguments, in the circumstances, only serve to demonstrate a lack of maturity and self-awareness. In some of the grievor’s evidence, one could detect anger at Ms. Thomas’ unwillingness to shuck-off this deplorable conduct as a joke. Without it being said directly, there was a totally unjustified air in their evidence of “why should we restrain what we say just because she’s thin skinned”.

### **Penalty**

I have found that all three grievors, from the outset, and throughout the hearing, sought to minimize and explain away their bullying behaviour. The Employer argues that their failure to be frank about what occurred and to accept their wrongdoing compounds the offence. I agree. It refers to the comment of Arbitrator Springate:

The grievor’s misconduct was compounded by the fact he did not acknowledge that he had done anything wrong. This does not instill confidence that he would not repeat his conduct should he be reinstated and again became disappointed by work related events.

Metropolitan Hotel and H.E.R.E. Local 75 (2003) 124 L.A.C. (4<sup>th</sup>) 1 at para. 92

The Union recognizes that all three grievors lack long service, but argue that, at best, that is a neutral, not an aggravating factor. I agree. They refer to:

*Unifor Local 80-0 and CertainTeed Insulators Canada* (2015) 121 CLAS 233 (Tramayne)

*TNT Logistics North America Inc. v. USWA Local 9042* (2003) 118 L.A.C. (4<sup>th</sup>) 109 (Davie)

*Great Atlantic and Pacific Co. of Canada Co. and Retail Wholesale  
Canada Div. USWA Local 414 (1996) 43 CLAS 53 (Low)*

The Union also submits that, in more serious cases, employees have been spared the ultimate penalty of termination. It presented a variety of earlier CROA cases where it says much more serious conduct has resulted in a lesser discipline. See **CROA 3636, 3834, SHP 694, 3529, 2715, 4430, 3008 and 4398**. While these cases indeed involve an array of fairly deplorable behaviour, almost all the cases involve individuals rather than three people acting in concert. None involve the type of demeaning dehumanizing harassment involved here. None involved this level of isolation and vulnerability.

The Union suggests a lack of leadership from the top; pointing to Mr. Nuss and Mr. Boehm's failure to treat these matters seriously. Such evidence as I heard indeed suggested an inappropriate, luke-warm, approach to serious complaints. Mr. Nuss appears to have been anxious to categorize things as just joking. Such evidence as I received about the rock pit meeting causes concern. However, the lack of an appropriate managerial response, at this level, does not excuse this type of conduct.

**Matters specific to Mr. Hydamaka**

Mr. Hydamaka had three years and five months service with CN. As a track maintenance foreman he was responsible for leading and directing the other members of the crew. He had a clear record prior to this incident.

The Company argues that Mr. Hydamaka's response during the investigation shows that at that time he was unapologetic. He said:

A.36 I feel that going forward if Ms. Thomas is working with me if this issue is not resolved for all parties that I feel threatened by her allegations and will find it very difficult and uncomfortable working under those kind of conditions. (*emphasis added*)

### **Matters specific Mr. Hrycyk**

Mr. Hrycyk had three and a half years of service with CN at the point of discharge. He was a Permanent Machine Operator operating and servicing track work, equipment, and machinery, as well as performing track inspection as needed. Mr. Hrycyk had no prior discipline.

At the conclusion of Mr. Hrycyk's investigation he offered the following comment:

43. Q. Do you have anything further to add to this employee statement?

A. I have known Carol Thomas for 3 ½ years and at no time during this period have I ever intended to disrespect her or harm her in any way. In the past I had thought we had a good relationship as we have eaten and drank together after work. If I would have known that any of the things going on were bothering her I would have been the first person to step up and tell the guys to stop because I know of her past. I feel terrible that this has been going on and I feel that my character has been questioned and harassed to an extreme that my career at CN could end. I respect Carol as both a coworker and a person and I just hope that we can all move on and I can continue my career at CN. (*emphasis added*)

The Employer argues that his view that he was being harassed suggests a failure to accept responsibility and a lack of comprehension or remorse. This, it argues, exacerbates the offence.

In the criminal proceedings, after he was told that Ms. Thomas did not want to participate in a mediation, Mr. Hrycyk wrote a letter of apology. He gave this to the mediator but does not know if it was ever reviewed by Ms. Thomas. She says she did not receive or review it. I have considered it in arriving at my decision.

### **Matters specific to Mr. Siebeneich**

At the time of termination, Mr. Siebeneich had ten months service and was working as an Assistant Track Foreman. His only prior offence was 10 demerits for failure to follow a policy, which is unrelated.

At the time of the alternative measures proceeding, Mr. Siebeneich prepared a letter of apology which he gave to the mediator to give to Ms. Thomas. He does not know if she received it because she declined to participate. The Union seeks to rely upon this as evidence of a sincere apology. I have considered this letter in arriving at my decision.

### **Decision**

The grievances are each dismissed. There are few mitigating factors. None have a bank of long term service to draw upon, so length of service is neutral. The conduct is serious, contrary to law and expressed policies. It is the type of conduct that calls for a degree of deterrence. I find precious little acceptance or understanding by the grievors of the unacceptable nature of their behaviour. Further, in each case, I found their testimony to be disingenuous; rationalizations as to how what they were doing might be

perceived rather than truthful accounts of what in fact they were doing . Collectively that conduct amounted to harassing, bullying, and intimidating the grievor to keep her in line. The grievors lack of candor and insight, and their continued efforts to deny or minimize what happened persuades me that this is not a case where it would be just to reduce their discipline.

A handwritten signature in purple ink, appearing to read 'A. C. L. Sims', written in a cursive style.

January 30, 2019

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**ANDREW C. L. SIMS, Q.C.**  
**ARBITRATOR**