

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

CASE NO. 4655

Heard in Montreal, October 16, 2018

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the assessment of 30 demerits to Locomotive Engineer C. Serson of Sioux Lookout, ON., for conduct unbecoming towards a Company Officer on January 15, 2017.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

On January 15, 2017, Mr. Serson had reported for duty at Sioux Lookout for train M31842-15 and while waiting for his taxi to take him to his train, was involved in a discussion with Trainmaster Allan. Mr. Allen requested that Mr. Serson expedite his getting into the taxi, Mr. Allen prompted a discussion about a prior trip, and a decision was made by Mr. Allen that Mr. Serson was to be pulled from service for his conduct during the conversation.

Mr. Serson was not pulled from service and was allowed to complete his tour of duty to Armstrong as well as the return tour on M31751-15.

The Union contends that Mr. Allen's role in the conversation represents an attempt to provoke Mr. Serson into providing cause for the basis of the charge of conduct unbecoming.

The Union contends that the Company did not meet their burden of proof to assess discipline, and if it did, that the discipline is excessive.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

On January 15 2017, Mr. Serson reported for duty at Sioux Lookout for train M31842 15. While waiting for his taxi to arrive, an incident occurred with Trainmaster Christopher Allen. A heated discussion transpired, when Mr. Allen questioned Mr. Serson's about what occurred during his tour of duty on M302 on January 14 2018.

Further to this incident, the Company conducted an investigation into the matter on January 20th, 2017. As result of the findings, Mr. Serson was assessed disciplined conduct unbecoming of a CN employee, towards a company officer.

The Company find the discipline is not excessive nor has it failed to meet the burden of proof to assess discipline.

FOR THE UNION:
(SGD.) M. King (for) **K.C. James**
General Chairperson

FOR THE COMPANY:
(SGD.) S. Roch
Manager, Labour Relations

There appeared on behalf of the Company:

- S. Roch – Manager, Labour Relations, Montreal
- M. Boyer – Senior Manager, Labour Relations, Montreal
- S. Mumby – Assistant Superintendent Great Lakes North Division, Capreol
- J. El Shamey – Manager, Labour Relations, Montreal

And on behalf of the Union:

- M. Church – Counsel, Caley Wray, Toronto
- M. King – Senior Vice General Chairman, Edmonton
- K. C. James – General Chairman, Edmonton
- C. Serson – Grievor, Sioux Lookout

AWARD OF THE ARBITRATOR

The Grievor is fifty-five years old. He has been with the Company for thirty three years. During this time he amassed a grim disciplinary record (*Company Exhibit 2*).

Following an investigation on January 20, 2017, the Grievor was assessed discipline of 30 demerits for “... *conduct unbecoming towards a Company Officer on January 15, 2017.*”

On that day, the Grievor reported to the Sioux Look Out Booking Office prepared to run train X31841 15 to Armstrong, Ontario. When he first arrived, he left his bags in a taxi that was waiting to transport the crew to Staunton. He then went into the building to complete some administrative work. According to the Grievor, as he was leaving to take the taxi, the following occurred:

Q12: Mr. Serson, please describe in your own words, the circumstances leading up to the incident that occurred on January 15,

2017 in the Sioux Lookout booking office when on duty for train X31841-15.

A. I arrived at the yard office approx. 2055 where I approached AA taxi and asked the driver if he was there for us. He said yes and I put my bags in the back of the van. I then went in to check the lineups and CATS and talk to my Cndr re job briefing and such. I discovered that we were the Staunton meet train for the evening vs 111/101. At that time I realized that Marshall (Barnes) had left the building and just as I was getting out of the chair to go to the taxi, I was confronted by Trainmaster Allen with the question "hey, are you on duty". My response was yes, I am on duty. He then retorted with "why are you not in your cab?" This was approx. 2120 I made mention to Mr. Allen that 111/101 were still approx. 3.5 hours from Staunton. At that point, trainmaster Allen, in an aggressive tone, said, "oh and what about that train you put into emergency the other night?". My response was, "why are you bringing that up now, if you want to discuss it, I am sure there is going to be a formal investigation". His immediate response was "I am pulling you out of service" with his cell phone pulled out. I asked what for? His response was "you have a bad attitude". I proceeded outside, assuming that I had been pulled from service, I realized at that point that this was not in the best interests of either party and I went back inside the building to speak to Trainmaster Allen. I told Chris that this is not the best way to handle the situation and my intention is to take the train and headed to the taxi. Chris did not say anything to me at this point and I proceeded to get into the taxi and head to the east end to take my train.

During his interview, the Grievor also stated that Mr. Allen came across as confrontational, not using his normal tone of voice and, while not necessarily alleging that he was being harassed, stated that: *given Mr. Allen's tone and demeanor, he felt defensive. (Questions 18, 19 and 20).*

The Grievor's Supervisor, Christopher Allen, provided the following statement outlining his version of the events (*Company Ex. 5*):

Met Clifford Serson in the booking room at 2120 while he was on the computer looking at CATS. I asked him what time he was on duty and

he said "I am on duty" I asked him what he was doing as the Taxi was outside waiting and his Conductor was in it. I told him to let's get moving as he had been on duty for 5 min and his train was at the east end waiting. He stated that I was harassing him and that I should have better things to do as he was walking to grab his bag I asked what happened the other night on 302 as he put his train into Emergency and his response was "what is it any fucking business of yours". At that point I told him that he is being pulled from service and you do not speak to a Company Officer in that manner. He proceeded to say that he was being harassed and he had been working for CN for thirty plus years and has never been harassed like this in the past. I proceeded to walk to the front door where the Cab was and he followed me saying that he was not going to delay his train any further and was going to take it to Armstrong and by my pulling him from service would not resolve anything.

As pointed out in his statement, Mr. Allen allows that as the Grievor was walking out the door to grab his bag he questioned him on what happened "... *the other night on 302*" when he put his train into emergency and the Grievor responded: "*What is it any fucking business of yours?*". Oddly, although Mr. Allen purportedly pulled him from service then and there, the Grievor was not, in fact, taken out of service that day and finished his shift operating train X31841 15 as scheduled.

The Grievor repeatedly stated that he did not recall using that language alleged and, although he agreed that Mr. Allen had every right to ask the question, he said that he responded to Mr. Allen's question by saying: "*Why are you bringing that up now, if you want to discuss it, I am sure there's going to be a formal investigation*".

Both the Company and the Union argue that their respective takes on what happened between Mr. Allen and the Grievor should be preferred. The Company asserts that, considering the Grievor's previous record and similar conduct in the past, I

ought to accept Mr. Allen's version of the discussion. The Union says that the evidence of the Grievor ought to be preferred and that, in any event, given the absence of any witnesses to the exchange or any other corroborative evidence/circumstances, the Company has not met its burden of proving the conduct in question.

The burden of proof, on a balance of probabilities, lies with the Company in discipline matters (**CROA 4647**). The Company referred me to a number of cases in which Arbitrators found supportive circumstances or corroborating evidence to assist in choosing the Supervisor's version of events over that of the Grievor's. However, each case must be judged on its own merits and facts; and, for the most, the circumstances in the cases referred to me were more compelling and germane to their issues than those evinced here.

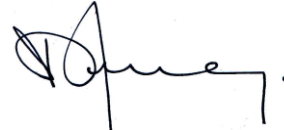
Although experience tells me that the tone and demeanor of both the Grievor and the Supervisor would likely have been more fitting for the shop floor than a tea party, I am unable to conclude, on a balance, that the Grievor spoke in the fashion it is alleged.

The effectiveness of the CROA system presupposes that a Joint Statement of Issue is filed so as to obviate the need to make factual determinations relative to the specific issues at play. In this case no JSI was filed; only *Ex Parte* positions. That said – as in the past - it nevertheless falls to me to attempt to arrive at a conclusion on the evidence adduced. However, in this case, given the disagreement on the facts – and/or the absence of a hearing which would allow me to properly assess the credibility

issues - I am unable to conclude, on a balance of probabilities, that the Company has met its burden of proof.

Accordingly, the grievance is allowed and the demerit points set aside.

December 5, 2018

A handwritten signature in black ink, appearing to read "R. Hornung", positioned above a horizontal line.

**RICHARD I. HORNUNG, Q. C.
ARBITRATOR**