

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

CASE NO. 4737

Heard in Montreal, May 29, 2020

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The appeal of the 20 day suspension of Conductor D. Neglia of Toronto, ON.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Following an investigation, on June 6, 2019, Conductor Neglia was disciplined as shown in his CP Form 104 as follows, "*Formal investigation was conducted on May 23, 2019 to develop all the facts and circumstance in connection with the referenced occurrence. At the conclusion of that investigation it was determined the investigation record as a whole contains substantial evidence proving you are in violation of: misconduct towards your supervisors. In consideration of the decision above, you are hereby assessed with a 20 day suspension*".

Union Position

Mr. Neglia was honest and forthcoming during the investigation. He offered his rebuttal to the allegations in support of his actions. In Q and A, he offered his regrets, Q19] Why do you feel that you can speak to a direct supervisor in this manner? A19] this was out of extreme frustration, I regret my behavior. Mr. Neglia expressed his remorse and simply put, had made a mistake from being hungry, wet, and frustrated. These mitigating circumstances need to be taken into account, especially his remorse afterward.

Mr. Neglia was working to the best of his abilities, being the most efficient employee he could have been by taking into account the makeup of Toronto Yard. He has 8 years of spare board experience working all assignments, and with this knowledge, he was expediting not only his movement but was assisting the expedited movement of other assignments. By working efficiently and safely, he allowed for the Havelock train and the Pound job train to meander thru the east end of the yard while also completing his assignment. Mr. Neglia and his crew worked in the rain, in the night, and over 8 hours during this tour of duty. He felt frustration when being advised late in his shift that he was being held for forced overtime and was in need of a second lunch and out of the rain.

Mr. Neglia is a hardworking, dedicated employee that made a simple error, once. He should not have faced 20 days without pay for a simple mistake.

The Company sent their response to the Step 2 grievance via email notification that it is accessible on GMS, therefore the Union is not in possession of the Company's position on the

matter and leaves the Union at a disadvantage. The delivery of the response, in the Union's view is in violation of the CBA Article 40, the Letter Re: Management of Grievances and the Scheduling of Cases at CROA as well as Arbitrator Weatherill's Award dated September 25, 2019 on the Establishment of a Grievance Management System

The Union requests that the discipline assessed to Mr. Neglia be removed and that he be made whole. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company disagrees

THE COMPANY'S STATEMENT OF ISSUE:

Following an investigation, on May 23, 2019 Mr. Neglia was issued a 20-day suspension as follows:

"Formal investigation was issued to you in connection with the occurrence outlined below:

In connection with: "the circumstances surround your tour of duty as a helper while working Assignment TT14-13 on May 13th, 2019. Specifically, your conduct toward your supervisors."

Formal investigation was conducted on May 23rd, 2019 to develop all the facts and circumstance in connection with the referenced occurrence. At the conclusion of that investigation it was determined the investigation record as a whole contains substantial evidence proving you are in violation of: Misconduct towards your supervisors. In consideration of the decision above, you are hereby assessed with a twenty (20) day suspension."

Company Position:

Preliminary Objection:

To begin with, the Company objects to the following reference in the Union's Ex Parte Statement:

"The Company sent their response to the Step 2 grievance via email notification that it is accessible on GMS, therefore the Union is not in possession of the Company's position on the matter and leaves the Union at a disadvantage. The delivery of the response, in the Union's view is in violation of the CBA Article 40, the Letter Re: Management of Grievances and the Scheduling of Cases at CROA as well as Arbitrator Weatherill's Award dated September 25, 2019 on the Establishment of a Grievance Management System"

The Union was provided with the ability to review the Grievance response. Despite their assertion to the contrary, the Union's lack of appreciation in the way the response is delivered to them, does not equate to a lack of response.

Further, as the Union is well aware, any attempt to bring this issue in front of the Arbitrator in the context of this grievance would be inappropriate, an expansion of the Union's position, and only serve to delay the proceedings. The rules of the CROA office of arbitration do not permit parties to raise disputes not first processed through the grievance procedure.

Notwithstanding the aforementioned, the Company disagrees and denies the Union's request.

The Grievor's culpability of misconduct towards supervisors was established through the fair and impartial investigation. Discipline was determined following a review of all pertinent factors including the Grievor's past discipline record and his service. Further, before discipline was assessed the Company duly considered all mitigating and aggravating factors.

The Union contends that the Grievor was being the most efficient employee he could be and was expediting the movement of other assignments in the Toronto yard. The Company cannot agree. Not following instructions of his supervisor in no way expedited train movement through the Toronto yard.

The Union submits that the Grievor was "honest and forthcoming" and have conceded his culpability, noting the Grievor "expressed his remorse." Of note, the Grievor's remorse for his conduct towards his supervisors does not negate the severity of the violation.

The Company's position continues to be that the discipline assessed was just, appropriate and warranted in all the circumstances. Accordingly, the Company cannot see a reason to disturb the discipline assessed.

Union Position

The Union has filed their own Ex Parte Statement of Issue.

FOR THE UNION:
(SGD.) W. Apsey
General Chairman

FOR THE COMPANY:
(SGD.) J. Shaw
Labour Relations Officer

There appeared on behalf of the Company:

D. McGrath	– Manager Labour Relations, Calgary
S. Oliver	– Manager Labour Relations, Calgary
J. Shaw	– Officer Labour Relations, Calgary

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
W. Apsey	– General Chairman, Smiths Falls

AWARD OF THE ARBITRATOR

The parties resolved the preliminary objection in advance of the hearing.

The grievor was called off the yard helper spare board on May 13, 2019 on assignment TT14-13 in the Toronto Yard, scheduled for 8 hours from 15:30 to 23:30. He was switching cars from the north and south yard at the east Toronto yard with Conductor Spiess. The weather was cold that evening for May (7 degrees) and raining. The grievor has eight years of service.

At about 21:30, the grievor and his crew were contacted by Trainmaster Adams to discuss an incoming train, Pound/Havelock, that was arriving in the yard and how to expedite that train through the yard. According to Trainmaster Adams he instructed the crew to begin to “pull up to A45 cars leaving them exposed first up in FT109” and he would follow up with further instructions later. According to Road Foreman Monk, who was training Trainmaster Adams, the crew did not make the cut as instructed and instead made the cut at a different point.

The grievor maintains that he held a job briefing with Trainmaster Adams and his yard foreman about where they would make the cut. The grievor indicated in his statement in that regard that they managed their assignment as follows: “...a *direct cut of 33 cars to bring over to the north side to switch. We switch part of our list and had all the A yard cars away when Mr. Adams came on the radio for an update*”. The Company denies that the grievor held a job briefing with Trainmaster Adams and his yard foreman prior to making the cut.

The grievor had not completed all the assigned work when Trainmaster Adams notified him that he would have to stay for overtime as there was no relief crew available to complete the assignment. Mr. Adams recalled that the grievor commented that he “*should get that crew situation fixed*”.

At 00:01, Trainmaster Adams contacted the crew and instructed them to pick up a switch list from the pulldown tower. The grievor, according to Road Foreman Monk's Memorandum of the incident responded as follows:

Conductor Neglia responded over the radio you can take it up whenever the hell you want, you know what I'll probably go for my second lunch before I take that to the rips, so I'll tell you when I'll get that list. At this point I told the crew just to put the B yards away and Conductor Neglia responded exactly we're the ones doing the work down here so let us do our job.

The grievor was also asked at his investigation about the switch list and the second lunch comment:

Q 15 According to Appendix D and Recording transmission #2 you told Mr.Spiess "we'll will grab it after Chris, let get this taken care of first" Is this correct?

A Yes, with the plan to get out of the way of the pound job.

Q 16 According to A appendix B – voice recordings #3:
Trainmaster Monk states "if you guys want to keep disobeying we will take it up here"

Your response back was "Pardon me?"

Trainmaster Monk – I said if you guys ah-want to keep making your decisions out there after we've given instructed you to do so will be taking it up.

Your response – take it up where ever the hell you want. You know what cuz ah I'll probably go for my second lunch before I take that through the rip. So I'll tell you when I'll get that list

Was this you speaking with Trainmaster Monk?

A That was me speaking I do have issue with Mr. Monk stating we continued disobeying cause at this point we were just trying to get out of the way of the pound crew and upon completing this list we were going to go for our second lunch.

Q 17: At any point did you or your foreman advise the tower about your plan to go for the second lunch when you completed the FT109 list?

A No we did not tell the tower till up to the point of my heat of the moment comment on the radio

The Company maintains that the grievor's use of profanities directed to his supervisor is unacceptable and warrants serious discipline. The grievor's behaviour, in the Company's view, is further aggravated by his refusal to follow the direct orders of his supervisors in reference to the movement assignment. The Company submits that the congestion with the other train crew had been cleared up and the grievor's crew were in a position to obtain the new switch list from the printer in the pulldown tower.

The Union submits that the record of the exchange between the grievor and his supervisors does not demonstrate any wilful misconduct, or a refusal to comply with directions. There is nothing in the grievor's comments which can be considered as outright insolent or insubordinate. The Union maintains that, at worst, the grievor's conduct amounts to no more than a momentary flare-up of frustration which was aggravated by the harsh and atypical weather conditions that evening.

Communication is important in every railway setting, particularly in an area like the Toronto yards where trains are coming and going at all hours of the day and night. It appears that the grievor did deviate from his original assignment but did so based on his own yard experience and the need to deal with the congestion resulting from the presence of the arrival of the Pound/Havelock crew. The grievor in my view was agitated for several reasons: the weather made it difficult to work outside that evening; he was unhappy about having to work overtime; he was being told how to do deal with the switching when he had already determined the best way to perform his assignment

in light of the congestion; and, he was not inclined to interrupt his assignment to pick up the switch list.

In my view, the grievor's earlier comments to his supervisor to "fix the crew situation" once advised he had to work overtime; and, later about his supervisor taking up his comment regarding the switch list "to where ever the hell you want"; and, then saying afterwards that he would be taking his lunch break first before picking up the list, all amount to insolent comments and unacceptable behaviour. These were not "heat of the moment" comments but rather part of a continuum of back-and-forth discussions that lasted through several exchanges.

I note the comments of Arbitrator Silverman in **CROA&DR 4398** where the grievor was disciplined for using profanity in the workplace and where 20 demerits was substituted for the discharge penalty:

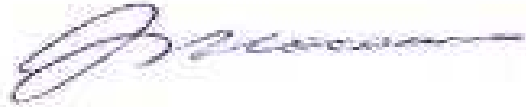
The grievor was clearly agitated and frustrated by issues that arose at the workplace, but his response was excessive and intemperate. It was not acceptable and clearly worthy of discipline. The grievor apologized in the investigation meeting with a clear acknowledgment that what he did was not acceptable. He said he was not directing his comments at the trainmaster.

The grievor was clearly out of line with his remarks to his supervisors. His behaviour cannot be excused because of the chilly and rainy working conditions; or the nature of his work assignment which included the need to deal with another movement; or having to work overtime. It was inappropriate, in particular, for the grievor to use defiant language to his supervisor about when he would pick up the switch list and when he would take his lunch break.

The grievor's work record contains discipline for attendance issues and safety rules violation, most recently in February 2018 for which he was assessed a 20-day suspension (10 days served and 10 days deferred). Bearing in mind his work record and considering his overall behaviour and comments to his supervisors, I do not find the 20-day suspension to be an inappropriate disciplinary response under the circumstances.

Accordingly, the grievance is dismissed.

June 11, 2020



JOHN M. MOREAU
ARBITRATOR