CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4800

Heard via Video Conference and in Ottawa, Ontario, January 11, 2022

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The discharge of Locomotive Engineer N. Medeiros for violation of CN's Policy on Harassment Free Environment and CN's Social Media Policy related to Facebook Messenger messages sent to a fellow employee on April 24-26, 2020.

JOINT STATEMENT OF ISSUE:

Between April 25th and 26th 2020, Mr. Medeiros (the Grievor) sent private messages to […], a fellow employee ("Coworker"), through Facebook Messenger. The Company was made aware via the Ombudsman's office that a complaint was brought forward by the Co-worker concerning those comments.

The Grievor was required to attend a formal investigation on May 17th 2020 for an alleged violation of CN's Policy on Harassment Free Environment and CN's Social Media Policy related to Facebook Messenger messages sent to a fellow employee on April 25-26, 2020. Subsequent to this investigation, the Grievor received formal notification of discharge effective May 26th 2020.

Union's Position

The Union contends that the Grievor did not violate CN's Social Media Policy as he did not make any social media posts to the public or to his personal Facebook profile. The communication made to the Co-worker were personal messages sent directly to the Co-worker through Facebook Messenger which is a private form of communication similar to a text or personal email.

The Union contends that the Grievor did not violate CN's Policy on Harassment Free Environment. The Grievor's communications to the Co-worker were his personal complaints that were made directly and solely to her regarding her application of the collective agreement. During

this communication, the Co-worker did not, at any time, inform the Grievor to stop the communication, or even indicate that it was upsetting her. If she had done so, the Grievor would have stopped the messaging.

The Union submits that the Grievor was cleared of a complaint made to the O.P.P. by the Co-worker for the same Facebook Messages.

The Union submits that some of the language used by the Grievor is language commonly used within the railway industry on a regular basis. In addition, other language used by the Grievor was in the form of Shakespearean language, the same form of talk he commonly used with his fellow employees.

The Union contends that, on a balance of probabilities, the Company did not meet the burden of proof.

In the alternative, the Union submits there are mitigating factors to consider in this instance. The Grievor was honest and forthright during the investigation, and is a long-service employee of thirty-six years. He is, and has always been, willing to provide the Co-worker a letter of apology for the misunderstanding of his intentions if she is willing to accept one.

The Union submits that the discipline is unwarranted, and in any event, excessive in all of the circumstances. The Union requests that the Grievor be reinstated into service and be made whole for all lost earnings, benefits, and pensionable service with interest.

In the alternative, the Union requests that the penalty be mitigated as the arbitrator sees fit.

Company's Position

The Company disagrees with the Union's position. The Company maintains that the Grievor's conduct was unacceptable and in violation of the CN Social Media Policy and Harassment Free Environment.

The Company maintains that the discipline assessed is warranted in all of the circumstances.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) P. Boucher	**(SGD.) S. Roch** (for) **J. Thompson**
General Chairperson	Vice President Western Region

There appeared on behalf of the Company:

S. Roch	– Manager, Labour Relations, Montreal
F. Daignault	– Senior Manager, Labour Relations, Montreal
A. Borges	– Manager, Labour Relations, Toronto
V. Carriero	– Manager Labour Relations, Edmonton
L. Dodd	– Manager, Labour Relations, Winnipeg

And on behalf of the Union:

K. Stubeing	– Counsel, Caley Wray, Toronto
P. Boucher	– General Chairperson, Belleville
M. Kernaghan	– Vice General Chairperson, Sarnia
P. Stewart	– Local Chairperson, Hornepayne
N. Medeiros	– Grievor, Hornepayne

AWARD OF THE ARBITRATOR

1. This grievance concerns the discharge of Locomotive Engineer Noah Medeiros for alleged violations of CN's Policy on Harassment Free Environment and CN's Social Media Policy related to Facebook Messenger messages sent to a fellow employee ("Coworker").

2. The grievance raises the following issues:

   i. Is the discipline void *ab initio* because the Employer failed to conduct a fair investigation?

   ii. Can the Grievor be disciplined for his off-duty conduct?

   iii. Does the Grievor's conduct in this case amount to harassment, violence and/or a violation of the Employer's Social Media Policy?

   iv. What, if any, discipline is reasonable in the circumstances?

The Facts

3. The facts are not in dispute. The Grievor used Facebook Messenger to send a series of approximately 24 messages to a female coworker. The Coworker filed a complaint with the Ombudsperson's office, who in turn advised the Employer and provided screenshots of the messages.

4. The Joint Statement of Issues indicates that the messages were sent on April 25 and 26, 2020. This appears to have been an oversight. The screenshots in evidence show that the Grievor actually messaged his Coworker over a period of three days, from April 24 to 26, 2020.

5. The messages between the Grievor and his Coworker reproduced below (errors included):

- April 24, 7:49 PM -

Mr. Medeiros:

Read a post: should it not be the directive of professionals such as the Chief Medical Office to respond to COVID 19 inquiries?

Coworker:

Not sure what yo are talking about Noah Sorry you If you have any questions for the Facebook Live you can email them to […]

Mr. Medeiros:

Stick to stealing “tv”s from our brothers and sisters at CN…We CN are not as stupid as you purport …..send email to the group “Band” to explain how and why thee would reduce the collective agreement to accommodate [Coworker Name]…..Your correspondence shall henceforth to all members……

Coworker:

I am sorry Noah I do not know what you are talking about

Mr. Medeiros:

Who does call the crew office with trickery to demand “T.V’s” as your friend, thy has heard many complaints about three. As I heard you are known for this malpractice behaviour …

Please learn our agreement. You are not the person I taught as a union member to adhere to the rules…..

Thank you [Coworker name]! No hatred here but as a collective we are of the same…God bless you!

Coworker: 👍

Mr. Medeiros:

Thank you..your emoji means shit to me….please send correspondence as to your behaviour ….the boys from hearst would appreciate a proper response.

- April 24, 8:48 PM -

Mr. Medeiros:

FYI: Other members of our unified union have not spoke to thy for over 15 years…as Thy will not accept the mis-adherence nor acceptance to any deviations or abrogations to the agreement… [middle finger emoji]

Kiss this [followed by five middle finger emojis]

Ttyl sister {Judas}

False pretence, its all bullshit, you are only fooling yourself and all those who do not know your true self, what a joke! you are such a fraud! In regard to CN you only look out for yourself, you and you only, stealing from all the brothers and sisters, the whole brotherhood knows how you are you are! You think anyone on CN voted for you? HAHA! Good thing you had the indians in your corner, with free taxi, or Willy would Currently be Mayor You expect the community to think you have their best intent at heart? SUCH BULLSHIT! [COWORKER NAME] ONLY THIKNS ABOUT HERSELF AND HERSELF
ONLY! You don't think people are seeing through your propaganda? Think again you selfshit bitch!
Raise thou sword unto my intelligence…..struck thy ….such falsehood …thou can not trick thy…as thy can not trick the brothers of Hearst…….
No comment….Hearst is listening…..
12 interludes are waiting……

- April 25, 11:32 PM -

Mr. Medeiros:
So fare you well…….
Upon a knife
The knife of age did struck Greg……It has struck thy as wel… age isupon your back….shall Andrew enjoy the aged [Coworker name] of shaggy skin???? A young queen of freshness is near….Wake up….wrinkled…..
Karma: old man greg; shall sit with you [Coworker name] …..fuck we are all old…look in the mirror……We both are ugly and got big fuckin heads….

- April 26, 12:00 AM -

Mr. Medeiros:
So fare you well…….
You are sick in the head……
Post: sent from thee to thee to be upon face book…..fuck…..you sickie in the head…
I have pics of you…dirty ones…a friend has sent me
Do you wish me to tell?//
I want a banana cream pie here…or I will show the pics……Craig:::::
I got the pics…mmmmm…not bad..
want a vision?

6. The Coworker blocked the Grievor sometime after 12am on April 26th and there are no further messages between them.

Analysis

Is the Discipline Void Ab Initio?

7. The Coworker initiated her complaint by emailing the Ombudsperson's office and providing a copy of the Grievor's messages. In the course of conducting its investigation, the Employer shared the messages with the Union, but it did not disclose the Coworker's email to the Ombudsperson. The Union received that email for the first time in the lead up to the arbitration, as part of the Employer's brief of documents.

8. The Coworker's email to the Ombudsperson outlines the steps she took in response to the Grievor's messages, including speaking to a lawyer and contacting police. It also includes comments about the Coworker's safety concerns and the Grievor's alleged history.

9. The Union submits that the Coworker's email is a keystone document and that the Employer's failure to disclose it at the outset of the investigation is a breach of article 71.1 of the Collective Agreement. According to the Union, because the Grievor was denied a fair investigation, the discipline imposed on him is void *ab initio.*

10. The Employer states that, in deciding to discharge the Grievor, it did not consider or rely on the Coworker's email. According to the Employer, the relevant representatives and decision-makers received the email from the Ombudsperson for the first time as they were preparing for this arbitration, long after the decision to discipline was made.

11. The relevant passages of the Collective Agreement are as follows:

> 71.1 […] At the outset of the investigation the locomotive engineer will be provided with all evidence the Company will be relying upon, which may result in the issuing of discipline. The Company will provide sufficient time for the locomotive engineer and his representative to review all of the evidence provided prior to the commencement of the investigation.
>
> 71.2 A locomotive engineer will not be disciplined or dismissed without having had a fair and impartial hearing and his or her responsibility is established […]

12. The procedural fairness protections set out in provisions such article 71 are a fundamental part of the CROA arbitration process. As part of the expedited arbitration format agreed to by parties, arbitrators rely on the results of employers' disciplinary investigations as primary evidence: **CROA 4558**. In these circumstances, the fairness of the investigation process is critical and predicated on full and appropriate disclosure to the Union.

13. That said, CROA jurisprudence recognizes that not every "minor non-disclosure" will undermine the fairness of the investigation or render the discipline void *ab initio*: **CROA 4558**. Violations are triggered where the Employer fails to disclose a "keystone document," which is referred to in the jurisprudence as a document that is fundamental to the issues in dispute: See **CROA 4558**, citing **CROA 3542**.

14. In this case, I cannot conclude that the Coworker's email to the Ombudsperson is a keystone document or that the Employer's failure to disclose it renders the discipline void *ab initio.*

15. First, there is no reference to the Coworker's email or its contents in the investigation interview or in the notice of discipline. There is no basis to conclude that human resources, the investigator, or the decision-making managers had access to or relied on the Coworker's email. This case is similar to **CROA 1858** (cited in **CROA 4558**), where the employer failed to disclose a document that was in the possession of CN Police. The arbitrator in that case concluded that fairness principles were not breached because the investigating officer did not have or rely upon the information in question.

16. Second, the Coworker's email is not fundamentally or significantly related to the issues in dispute. The steps the Coworker took in response to the messages are not relevant to the discipline imposed on the Grievor. There is no suggestion that these steps were considered by the Employer in rendering its decision.

17. I appreciate that the Grievor takes issue with the Coworker's description of his history or past events. In the circumstances of this case, however, I fail to see how these comments are related to the issues in dispute. Had the Employer given any consideration to his alleged history (as reported by the Coworker), it certainly would have been important for the Grievor to know and respond to that information. However, nothing in the evidence, including the investigation statement, suggests that the Employer considered or relied upon these allegations in any way.

18. The Union submits that documents in possession of the Ombudsperson are subject to disclosure obligations and should be treated as information held by the

employer: **CROA 4558**, at p. 20 – 21. I need not address this issue. Whether or not the Employer can be deemed to be in possession of the Coworker's email, I find that it was not a keystone document and it was not considered or relied upon by the Employer in imposing discipline.

19. For these reasons, there was no breach of article 71 of the Collective Agreement and no basis to void the discipline.

Is Discipline Appropriate for Off-Duty Conduct?

20. The Union submits that the Grievor's messages amount to off-duty conduct, which should not attract discipline from his Employer.

21. Both parties rely on the seminal case of *Millhaven Fibres Ltd. v. Oil, Chemical & Atomic Workers Int'l Union,* [1967] OLMAA No. 4 ("*Millhaven"*). Significantly, that matter also involved the off-duty harassment of fellow employees, albeit in a different context. In *Millhaven*, the grievor harassed and vandalized the property of two fellow employees because they had crossed the picket line during a lawful strike. The Ontario Labour Board held that the misconduct was "directly related" to the grievor's employment and that discipline was appropriate in the circumstances. It wrote (at para. 24):

> […] the Board therefore concludes that the offence of willful damage to fellow employees was directly related to the employment of the grievor and Messrs. McGreer and Pringle, at the Company's Plant, and it would result in an intolerable situation if one employee who threatens another employee and who actually does willful damage to other employees' property, cannot be disciplined because such threatening language and willful damage took place away from the Company premises.

22. In this case, the Grievor's messages have a clear connection to the workplace. According to the Union, the Grievor's purpose in communicating with his Coworker was to challenge her alleged manipulation of the line-up, which the Grievor perceived to be a breach of the Collective Agreement. The Grievor's messages are peppered with references to the Employer, the union, temporary vacancies, coworkers, and the Collective Agreement.

23. As I discuss in more detail below, the Grievor's misconduct in this case was very serious. The Grievor has not accepted responsibility or acknowledged any wrongdoing. In these circumstances, the Grievor's misconduct has implications in the workplace and creates risks, including in respect of the Employer's obligation to ensure a safe and harassment-free workplace.

24. Applying the principles set out in *Millhaven*, I find that the Grievor's off-duty conduct was properly the subject of workplace discipline.

Do the Grievor's Messages Constitute Harassment?

25. Article 112 of the *Canada Labour Code*, R.S.C., 1985, c. L-2 defines harassment and violence to mean:

> 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.

26. This language is reflected in the Employer's Harassment and Violence Policy, which 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. Includes harassment and violence based on prohibited grounds of discrimination such as: race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, veteran status, genetic characteristics, gender identity or expression, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.

27. I have no hesitation in concluding that the Grievor's messages fall squarely within these definitions. Clearly, his messages could reasonably be expected to cause offence, humiliation, or physical injury to his Coworker.

28. At the investigation, the Grievor provided implausible justifications for his comments. For example, the Grievor explained that his final series of messages was an attempt to lighten the mood with a "well-known internet joke," in which an individual offers "dirty pics" before sending a non-sexual image of a horse in mud. This is not borne out by the language the actual messages, in which the Grievor wrote "I have pics of you…dirty ones."

29. Similarly, the Grievor explained that his messages were not harassment or intimidation, but mostly Shakespearean references. Even accepting that the words "by the knife" are from a Shakespearean sonnet, they form part of a barrage of hostile messages directed at his Coworker. That they may be a literary reference does not take

away from the fact that the words were used in a manner that could reasonably be expected to cause offence, humiliation, or physical injury.

30. Based on the Grievor's own explanation, his use of the words "by the knife" is a remark about his Coworker's age and physical appearance. At a minimum, these comments are disparaging, unwelcome, and a violation of the Harassment Free Environment Policy. In my view, however, the Grievor's remarks are more serious than this. The words "fare thee well…" followed immediately by "by the knife" can reasonably be understood as a threat of physical violence.

31. The Union submits that, particularly given their longstanding personal relationship, the Grievor could not reasonably have known that his comments were unwelcome to his Coworker. The Union notes that, until she blocked him on April 26, the Coworker did not ask the Grievor to stop messaging her.

32. In my view, by the very nature of his comments, the Grievor should have known that they were unwelcome, offensive, and threatening. In any event, after her thumbs up emoji, the Coworker stopped responding to the Grievor's messages. Despite this, the Grievor continued to message the Coworker for more than 24 hours. The Coworker's silence in the face of a barrage of hostile messages was a further reasonable basis for the Grievor to understand that his comments were unwelcome.

33. Finally, the Union states that the messages must be considered in the context and reality of this workplace, where a certain degree of “shop talk” is expected. I make no comment about the appropriateness of “shop talk.” In this case, the Grievor’s comments extend well beyond the use of profanity or vulgarity. His messages were specifically about and directed at his Coworker, in a manner that he knew or reasonably ought to have known would cause offence. This is not “shop talk”; it is harassment and intimidation.

34. For these reasons, I find that the Grievor’s messages are in clear violation of the *Canada Labour Code* and the Employer’s Workplace Harassment Policy. It was appropriate for the Employer to impose discipline in the circumstances.

Discipline

35. The Grievor is a long-service employee. At the time of his discharge, he was fifty-two years old and had thirty-one years of service. He had no active demerit points. These are significant mitigating factors.

36. However, a number of aggravating factors are also present. The Grievor’s misconduct in this case is very serious. His messages were offensive and humiliating, and they could reasonably be interpreted as a threat of violence.

37. It is significant that the Grievor has not accepted responsibility or truly apologized for his behaviour. In exchange for a lesser penalty, he offered to apologize if his

comments were misconstrued. This is not a sincere apology, nor does it suggest that the Grievor has understood or accepted the seriousness of his misconduct.

38. Moreover, this was not a brief outburst in the heat of the moment, but rather a series of hostile messages that persisted over the course of three days. The Grievor's investigation interview took place on May 17, 2020, approximately two weeks after the messages were sent. Having had time to reflect on his conduct, the Grievor maintained that his messages were not inappropriate and he asserted a constitutional right to freedom of expression.

39. A number of attempts have been made to minimize the Grievor's misconduct. As noted, the Grievor offered implausible explanations for his comments. At the hearing, the Union described the Grievor's messages as "a conversation between friends." I reject this characterization. Even accepting that the Grievor and his Coworker had a longstanding personal and professional relationship, the Grievor's messages were highly one-sided and anything but friendly.

40. I have carefully considered these mitigating and aggravating factors. In particular, I note the Grievor's long service and the fact that he has no active discipline record. In these circumstances, dismissal would only be warranted in the clearest of cases.

41. In my view, this is a clear case. The seriousness of the Grievor's misconduct coupled with his ongoing failure to acknowledge wrongdoing or accept responsibility leads

me to conclude that discharge is reasonable. I am satisfied that the Grievor cannot be returned to the workplace in the circumstances.

42. In closing, I note that the Employer has also alleged a breach of its Social Media Policy. I have concluded that the Grievor's discharge is warranted because his conduct amounted to a serious breach of the Harassment Free Environment Policy. Given this finding, it is not necessary for me to determine whether his conduct was also in breach of the Social Media Policy.

43. For all of these reasons, the grievance is dismissed.

January 24, 2022

MICHELLE FLAHERTY

ARBITRATOR