CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4860

Heard in Edmonton, September 12, 2023

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The Company's discharge of Conductor P. Sine.

JOINT STATEMENT OF ISSUE:

On December 17, 2022, Conductor Sine was involved in a dispute which led to the grievor being assessed an outright discharge following a formal investigation into an alleged physical altercation that occurred on December 17, 2022.

Union's Position:

It is the Union's position, however not limited hereto, that the Company violated Article(s) 82, 84, 84.2(c) NOTE, 85, 85.5, Addendum(s) 123 and 124 of Collective Agreement 4.16 as well as Arbitral Jurisprudence, and their own Policy dealing with Workplace Harassment and Violence when the Company assessed Conductor Sine an outright discharge on January 18, 2023.

The Union additionally contends that the discipline ought to be declared *"void ab initio'* on the basis that the Company violated Article(s) 82 and the investigation was not held in a fair and impartial manner.

The Union views the Company's actions as contrary to their commitments under Article 85.5 of Collective Agreement 4.16, it cannot be said that the Company exercised its rights' reasonably.

The Union argues that the assessment of an outright discharge is excessive, unjustified, unwarranted, arbitrary, disproportionate, discriminatory and in bad faith. The Union further argues that the Company failed to adhere to the Brown System of Discipline as set out in Addendum 124 of the 4.16 Collective Agreement.

The Union seek to have Conductor Sine be reinstated and compensated for all lost wages, benefits and pension entitlement for the entire time he was discharged. Failing that the Union seeks to have the Grievor reinstated on terms the arbitrator deems appropriate.

The Union, as a result of the substantial violations, submit that a remedy in the application of Addendum 123 of Collective Agreement 4.16 is appropriate.

Company's Position:

The Company disagrees with the Unions position. The Company maintains that the grievor's conduct was unacceptable and in violation of CN's Code of Conduct and CN's Workplace Harassment and Violence Prevention Policy. Once the Company was made aware of

the incident action was taken in accordance with Article 82. The Company disagrees that a remedy under Addendum 123.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) J. Lennie	**(SGD.) A. Borges**
General Chairperson, CTY C	Labour Relations

There appeared on behalf of the Company:

A. Borges	– Manager Labour Relations, Toronto
F. Daignault	– Director Labour Relations, Montreal
S. Miller	– Manager, Workers Compensation, Edmonton

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
J. Lennie	– General Chairperson, CTY-C, Smiths Falls
E. Page	– Vice General Chairperson, CTY-C, Toronto
P. Boucher	– President, TCRC, Ottawa
R. Finnson	– Vice President, TCRC, Ottawa
P. Sine	– Grievor, via Zoom

AWARD OF THE ARBITRATOR

Summary

[1] This Grievance concerns the discharge of the Grievor for his involvement in a physical altercation with a junior co-worker, Mr. Storer. At the time of the incident, the Grievor was the victim's Foreman.

[2] For the reasons which follow, the Grievance is denied. The discharge is upheld.

Facts

[3] The facts in this case are straightforward. The Grievor is a short service employee of four years. He was employed as a conductor at the Toronto South Terminal at the time the incident at issue occurred.

[4] I am satisfied on review of all of the evidence that on December 17, 2022 the Grievor was working as a Foreman, on a shift with Mr. Storer, who was an employee who had been employed for two years. On that day, Mr. Storer was trying on belt packs and was having difficulty finding a belt pack that was operational. The Grievor was in the same room while he was doing so, as were several other employees. While Mr. Storer was trying his third beltpack, the Grievor said to him "Why don't you try a different box you fucking retard?"

[5] The Grievor noted in the Investigation that one of the statements of the employees "makes it sound more aggressive than I remember happening" and he also denied "dropping the F bomb". His evidence was he "tried to say to [Mr. Storer] jokingly "try a different box you retard" but that he was "in a bit of a bad mood and came off more aggressive that it was meant to be". I do not accept as sincere the Grievor's comment that he came off more aggressive than he intended. If his intention was not to be so aggressive, he had the opportunity to "walk that back" in the next exchange, described below. He did not do so.

[6] I prefer the evidence of Mr. Storer and the other eyewitnesses that the comment of Mr. Storer was made aggressively. I find the Grievor intended to intimidate and embarrass Mr. Storer. I also accept that this statement *did* embarrass Mr. Storer, having been said in front of other employees.

[7] Mr. Storer responded to the Grievor's comment – in what I accept was a joking manner by Mr. Storer – by saying "I did try different boxes actually, and next time you talk to me like that in front of people, I'll smash ya one".

[8] According to the Grievor, Mr. Storer's demeanour towards him when he said that comment seemed "serious", "and then that was when I grabbed him by his vest…." (as described below).

[9] This description of Mr. Storer's demeanour as "serious" was refuted by the witness statements, who described Mr. Storer's demeanour as joking. I accept Mr. Storer's response was said in a joking manner, and that this response further angered the Grievor, who then grabbed Mr. Storer under the chin, high on his vest and backed him into the wall. I find he told him words to the effect of "if you are going to smash me go ahead smash me and don't threaten me", and that he held onto his jacket in a threatening manner while repeating these words two or three times. I accept the altercation lasted for approximately one minute. I further find that two other employees were involved trying to break up the encounter by telling the Grievor to "break it up". I accept the Grievor then let Mr. Storer go and left the room.

[10] I find this action constituted a physical assault on Mr. Storer and was intimidating to him. I also accept that during the altercation, Mr. Storer did nothing to escalate the

encounter and demonstrated admirable restraint. I am satisfied he asked the Grievor to take his hands off him and to calm down all the while keeping his own hands down; that he told the Grievor he was just joking; and that he also said "what's your problem, man?" and tried to calm the Grievor down by telling him he was not trying to fight him.

[11] The shift proceeded. The Grievor said when he got to the engine he apologized to Mr. Storer and stated his conduct was unprofessional and they agreed to talk about it after the shift. Mr. Storer indicated in his statement that the Grievor apologized after the shift and the matter was resolved. No formal complaint was filed by Mr. Storer, although the Company found out about the incident.

[12] It must be recalled Mr. Storer was a subordinate employee to the Grievor.

[13] Once the Company found out about the incident, it held the Grievor out of service and launched its own Investigation. The Company then took two actions which are at issue: First, the General Superintendent interviewed the witnesses who observed the altercation. Second, it asked those witnesses to send in their statements via email of what occurred.

[14] Both Mr. Storer and the Grievor were also investigated for this altercation. The same Local Chairman of the Union was the representative for both Mr. Storer and the Grievor's Investigations. I am satisfied the Union therefore had notice under Article 82 that each of those Investigations was occurring.

[15] The Grievor's Investigation took place first. There was no objection lodged on the record of the Grievor's Investigation that he was not given notice or the opportunity to attend Mr. Storer's Investigation. At Q/A 37, he said he "wished him luck" with his Investigation.

[16] The email statements were placed before the Grievor in his Investigation, as was the statement of Mr. Storer. No objections were raised by the Union during the Investigation and no requests were made to ask questions of any of the authors of the witness statements during the Investigation. I am satisfied that had those requests been made, the Company could have accommodated that request – whether through a

Supplementary Investigation, or a short recess to determine if those witnesses were available.

[17] As explanation for his conduct, the Grievor indicated during his Investigation that he was in a “bad mood” and that he had come to work “a little grouchy”. He apologized to the Company and to Mr. Storer and agreed he did not comply with CROR General Rule A, CN’s Workplace Harassment and Violence Prevention Policy or with its Code of Business Conduct. He agreed he could have handled the situation differently and done a better job.

[18] Mr. Storer was disciplined with 10 demerits for saying to the Grievor that he would “smash ya”.

Arguments

[19] The Company urged it had cause to discharge the Grievor. It argued it has an obligation to keep its workforce safe and that bullying and violence are very serious forms of misconduct in the workplace. It urged this is recognized not only by its own policy, but by CROR and legislation which imposes obligations on the Company to ensure that workplace intimidation, harassment and/or violence do not occur. It noted the Grievor’s conduct created a toxic work environment and that he was expected to be a leader among his peers as a Foreman; that the Grievor’s actions supported a significant disciplinary response and that it was not required to proceed in a progressive manner through the Brown System when serious misconduct occurred. It urged that significant discipline was proportional and it pointed out this was not the Grievor’s first altercation with an employee.

[20] For its part, the Union argued the Company violated both its own Policy dealing with Workplace Harassment and Violence, as well as the collective agreement. It noted this incident was fully resolved as between the employees and the Company did not need to investigate the issue further. It argued the Investigation was not carried out in a fair and impartial manner, so the discipline should be *void ab initio.* It argued that Mr. Sine was not given the opportunity to “attend all of the witness statements that had a bearing on his responsibility” and more particularly the interviews of the eyewitnesses. It urged the Company should not have interviewed the witnesses without the Grievor and/or his representative being present. It did not make argument in its main submissions that the

Grievor was denied the opportunity to attend Mr. Storer's Investigation, although that argument was responded to by the Company.

[21] It also argued that discharge was an excessive response. It urged the incident can be distinguished from the facts in the jurisprudence relied on by the Company, as it did not cause any serious injuries; the Grievor was provoked by Mr. Sine's comment; the Grievor expressed sincere remorse and contrition and apologized several times to Mr. Sine and to the Company; he has expressed a desire to watch how he speaks to others, including his language, and to refrain from using words such as "retard"; and that Mr. Sine did not think it was a "big deal" and they have "moved on" and "forgiven" each other. It also argued there was discriminatory discipline as Mr. Sine only received 10 demerits for the incident. It further argued the Company failed to adhere to the Brown System of Discipline, as set out in Addendum 124 of Agreement 4.16.

Analysis and Decision

The Impact of Addendum 124

[22] Considering first Addendum 124, that document demonstrates the Company's commitment to adhere to the Brown System of Discipline during the life of the Agreement.

[23] The Brown System is a system of discipline involving demerits for misconduct, with discharge resulting when a certain threshold is reached, for "accumulation" of demerits. That discharge results regardless of whether the last incident on its own would justify that discipline. The Brown System has deep historic roots in this industry but is no longer the only progressive disciplinary system followed. It does not replace that discipline must be for "just cause".

[24] In its leading decision of *McKinley v. B.C. Tel*[1], the Supreme Court of Canada directed that discipline must be contextual and proportional to be "just". This principle of proportionality must also inform an arbitrator's assessment of the reasonableness of discipline under the second *Wm. Scott* question. To be proportional, significant and serious misconduct can attract significant and serious discipline, up to and including discharge.

[1] 2001 SCC 38

[25] While the Brown System is an example of the impact of the culminating incident doctrine (where one last issue can lead to significant discipline due to accumulation), I do not read Addendum 124 or its commitment to the Brown System as acting to displace the principle of proportionality, or the ability of an employer to "skip steps" in a progressive discipline model when serious misconduct occurs. I therefore cannot agree with the Union that either Addendum 124 or the Brown System prevents the Company from the outright discharge of an employee, in appropriate circumstances.

Was the Investigation Fair and Impartial?

[26] The Union has argued a breach of Article 82. The Union did not argue that it did not have notice of, or the opportunity to attend, Mr. Storer's Investigation. This was likely because - as the same local Chairperson was involved in both Investigations - the Union was aware both of those Investigations were going on and so had the required Notice contemplated by Article 82.

[27] Rather, the Union's argument was that Article 82 provided to it the right to attend at the taking of the *eyewitness* statements, by the General Superintendent, which was not given. This issue can be resolved by interpreting the wording of Article 82.

[28] The first sentence of Article 82.2(b) speaks to the "right to attend any company investigation, which may have a bearing on the employee's responsibilities". **CROA 3785** has established one employee has the right to attend the investigation of another employee. I cannot agree with the Company's argument that this right does not exist in the collective agreement. **CROA 3785** addressed the situation where a Grievor did not attend the Investigation of another employee, who was also investigated, nor was he provided with that individual's statement. The arbitrator held the discipline was void *ab initio.*

[29] However, **CROA 3785** was not a case where the Grievor was denied an opportunity to attend when eyewitnesses were being initially interviewed by the Company, who were not themselves being "investigated". That is a different issue.

[30] Article 82.2(b) speaks to the right of the Grievor or the Union to be present at an "Investigation", and not at an evidence-gathering stage. In my view, the witnesses in this

case were not being “investigated” which triggered Article 82; they were being interviewed to gather evidence for the Grievor’s Investigation.

[31] Second, the Grievor – and the Union – had the right to request during the Grievor’s “investigation” that they be given opportunity to interview any of the witnesses whose emails were filed into that investigation by the Company. That is the protection offered to the Union regarding witness statements. This right is outlined in the second sentence of Article 85.2(b): “The employee and/or their accredited representative shall have a right to ask any questions of any witness/employee *during such investigation* relating to the employee’s responsibilities” (emphasis added). I do not read this as a requirement that the Union must be present during the *initial* gathering of witness statements, but that those individuals are entitled to have those witnesses questioned *as part of the Grievor’s own Investigation.*

[32] Neither the Union nor the Grievor made a request to interview those witnesses, in this case. The Company was not given the ability to address that request had it been made – either through presenting those witnesses or arranging a Supplementary Investigation.

[33] Not having exercised that right during the Investigative stage, it cannot now be suggested by the Union that the Investigation was either unfair or impartial.

[34] I also cannot agree the Company was only limited to investigating acts of alleged physical assault and intimidation by the process in its Policy and only when a formal complaint is made.

[35] The Company is subject to broad legislative requirements to ensure its workplaces are safe. It was within its management rights to independently assess misconduct it became aware of, and take an appropriate respond to that misconduct. Without that ability, it could not meet its legislative obligations to keep its employees safe.

[36] Turning to the merits, in this case the Grievor physically placed hands on a subordinate employee, backed or “manhandled” him into a wall and intimidated him and taunted him – repeatedly – on his own admission.

[37] I am satisfied that grabbing the clothes of another individual while taunting him to "smash" you constitutes both intimidating conduct and physical assault. I find that cause for significant discipline was established by the Company in this case.

[38] Considering next the *Wm. Scott* factors, the nature of the misconduct is one of the factors to be considered when assessing if discipline was reasonable. The Union has urged that the misconduct was not "as serious" as that seen in certain of the jurisprudence in this industry, as it did not cause serious physical injury.

[39] I have some difficulty with that argument, as it assumes that there is some form of physical assault that would be more acceptable in the workplace as drawing a lesser form of discipline.

[40] Serious injury need not occur for an individual to be guilty of assault in the criminal context and it is not a prerequisite for a finding of civil assault in a workplace context either, which is determined on a lower standard of proof. Assault encompasses threatening gestures, as well as physical contact. I agree with the Company that this Office has found that issues of bullying, intimidation, harassment and violence in the workplace – which would include physical assault – are some of the most serious forms of misconduct. I am prepared to find that this is the case even where no physical injury resulted from the altercation, as it is the act of assaulting another employee that is significant and intimidating and unacceptable in a workplace, not just physically injuring a fellow employee.

[41] Neither can I agree that remorse is the defining factor in those cases where discharge has been upheld.

[42] In **CROA 4070**, Arbitrator Picher's comments were general that "physical aggression and the threat of physical aggression towards another employee is among the most serious forms of misconduct in any employment setting". Under this general statement, a "threat" of physical aggression need not be pared with actual aggression to be serious and significant misconduct.

[43] **CROA 3451** was decided almost twenty (20) years ago. In that case, Arbitrator Picher noted the changing experience of the latitude given in a workplace for threatening

comments. In doing so, he noted that an employer's obligation to protect its employees against "fear for their own safety…is now recognized as one of the highest obligations of an employer". Arbitrator Picher also noted it is "…no defence on the part of the individual who makes them to say, after the fact, that the threats uttered were not seriously intended" (at p. 2).

[44] Both threatening and carrying out threats of physical contact is serious misconduct which must attract significant discipline. In this case, the serious nature of the misconduct as physical assault and intimidation is an aggravating factor.

[45] Another *Wm. Scott* factor to explain or mitigate conduct is provocation. I have considered whether the Grievor was provoked, as argued by the Union. I find myself unable to agree that the Grievor's conduct can be explained or mitigated by provocation on the facts of this case. It must be recalled it was the Grievor's own comment to Mr. Storer that started this altercation, not Mr. Storer's comment to the Grievor. Further, the Grievor's initial comment – on its own – could be considered to be bullying, as it was an offensive and profane comment which was made by a Foreman to an employee on his crew in front of other employees, which questioned Mr. Storer's intellect and ability.

[46] I do not find the Grievor was provoked to violence by the joking comment of Mr. Storer that he would "smash ya". If the Grievor had responded in kind and was also disciplined for a comment instead of a physical assault, he could have raised provocation for *that* response, however he escalated the conflict considerably and well out of proportion to the original comment. I am satisfied the witness evidence confirmed the evidence of Mr. Storer that while Mr. Storer's comment was said in a joking manner, the Grievor's initial comment was not. He had an opportunity – which he did not take – to "walk back" what he initially said when Mr. Storer responded to his initial comment. He did not do so. Rather, he "doubled down" so to speak and escalated the encounter to physical violence. I do not find the Grievor was provoked.

[47] The Grievor had no reasonable explanation for his disproportional and violent physical response to Mr. Storer's comment. Being "in a bad mood" or "grouchy" does not either explain why the Grievor lost his temper and assaulted Mr. Storer, or provide comfort

to the Company that this type of serious misconduct, will not be repeated if the Grievor is reinstated.

[48] Concerning responsibility and accountability, I find the Grievor initially downplayed the aggressiveness of the encounter. I also do not find sincere his description that he did not "drop the F bomb". I am satisfied he did do so and he was not honest in that regard. However, the Grievor did ultimately take responsibility by agreeing he violated the various policies and CROR rules, and that he could have handled the situation differently. He also apologized to Mr. Storer. The Grievor is a short service employee so his length of service is not mitigating. The Grievor does not have a clean disciplinary record so his record is not mitigating.

[49] I recognize it is difficult for a grievor to accept that one incident can lead to discharge. I am sure if the Grievor had the day to live back, he would make very different choices. However, considering all of the evidence – and despite the able argument of the Union on behalf of the Grievor – the mitigating factors have not convinced me this is a case which should attract my discretion to interfere with the penalty imposed by the Company, for this serious and significant workplace misconduct by a Foreman towards a subordinate employee.

Conclusion

[50] The Grievance is denied. The discipline is upheld.

[51] I retain jurisdiction for any questions relating to the implementation of this Award and to correct any errors or omissions to give it the intended effect.

December 6, 2023

CHERYL YINGST BARTEL
ARBITRATOR