

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

CASE NO. 4890

Heard in Montreal, January 10, 2024

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

**TEAMSTERS CANADA RAIL CONFERENCE
MAINTENANCE OF WAY EMPLOYEES DIVISION**

DISPUTE:

Dismissal of Mr. T. Vandrunen.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

On August 28, 2020, the grievor, Mr. T. Vandrunen, was advised by the Company that he was dismissed from Company service for "conduct unbecoming an employee of Canadian Pacific as evidenced by (his) being criminally charged with assault, uttering threats, and the unsafe storage of a firearm." A grievance was filed on October 4, 2020 and was denied by the Company on November 6, 2020.

The Union contends that; The charges against the grievor were pending when he was dismissed on August 28, 2020. A basic legal principle is that individuals are presumed innocent until proven guilty; The incident that gave rise to the charges occurred on June 2 2020 and involved a matter that was purely domestic in nature. The grievor was found guilty of assault (against his wife) on October 6, 2020 and given twelve months' probation. The grievor was not found guilty of any gun infraction; The events of June 2 2020 were unrelated to his work performance or his general relations with supervisors and fellow employees. Those events in no way affected or impacted the Company and, as a consequence, it was wrong for the Company to dismiss him.

The Union requests that; The Company be ordered to reinstate the grievor into active service immediately without loss of seniority and with full compensation for all wages and benefits lost as a result of this matter.

The Company denies the Union's contentions and declines the Union's request.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

On August 28, 2020, the Grievor was served a Form 104 that stated the following:

"Please be advised that effective August 31, 2020 you have been DISMISSED

from Company Service for the following reason(s):

Please be advised that you have been dismissed for conduct unbecoming an employee of Canadian Pacific as evidenced by your being criminally charged with assault, uttering threats, and the unsafe storage of a firearm.”

A grievance was filed on October 4, 2020 and was denied by the Company on November 6, 2020.

The Union Position:

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

The Company Position:

Preliminary Objection:

The Union has inappropriately expanded the scope of their grievance. Absent from any grievance correspondence is any reference to the following:

- The incident that gave rise to the charges occurred on June 2 2020 and involved a matter that was purely domestic in nature. The grievor was found guilty of assault (against his wife) on October 6, 2020 and given twelve months’ probation. The grievor was not found guilty of any gun infraction;
- The events of June 2 2020 were unrelated to his work performance or his general relations with supervisors and fellow employees. Those events in no way affected or impacted the Company and, as a consequence, it was wrong for the Company to dismiss him.

The Union’s Step 2 Grievance limits the dispute to an argument of “innocent until proven guilty.”

The Union’s attempt to file new positions at the doorstep of Arbitration is contrary to the Memorandum of Agreement Establishing the CROA&DR, specifically Item 9.

These new positions cannot properly form part of the dispute and the Arbitrator’s decision must be limited to the disputes properly advanced through the grievance correspondence as outlined in CROA MOA Item 14.

The Company Position: The Company denies the Union’s contentions and declines the Union’s request.

Notwithstanding the Company’s objection to the Union’s expanded position, the record confirms that the Grievor’s actions during his arrest, made this a Company issue. In fact, the Royal Canadian Mounted Police (RCMP) even reached out to Canadian Pacific Police Services (CPPS) to report the arrest and express concern – domestic or otherwise – the Grievor’s behaviour and charges reflected badly upon the Company and had action not been taken would have caused reputational harm.

The Grievor admitted to being charged with assault, uttering threats, and unsafe storage of a firearm. These charges were serious in nature and not compatible with maintaining a positive employment relationship.

The Grievor’s culpability was established through the fair and impartial investigation. Discipline was determined following a review of all pertinent factors including the Grievor’s service and his past discipline record. Further, before discipline was assessed the Company

duly considered all mitigating and aggravating factors.

The Company's position continues to be that the dismissal assessed was just, appropriate, and warranted in all the circumstances. Accordingly, the Company cannot see a reason to disturb the discipline assessed and requests that the Arbitrator dismiss the Union's grievance in its entirety.

FOR THE UNION:
(SGD.) W. Phillips
President MWED

FOR THE COMPANY:
(SGD.) L. McGinley
Director, Employee Relations

There appeared on behalf of the Company:

S. Oliver – Manager, Labour Relations, Calgary
A. Harrison – Manager, Labour Relations, Calgary

And on behalf of the Union:

W. Phillips – President, MWED, Ottawa
T. Vandrunen – Grievor, *via Videoconferencing*

AWARD OF THE ARBITRATOR

Preliminary Objection

1. The Company raises a preliminary objection that the Union has inappropriately broadened the issues in its Ex Parte Statement. It notes that the Union's initial stance in the Step 2 grievance was to question the dismissal on the basis that the grievor had only admitted to being charged with certain offences, while not being convicted of anything. In the Ex Parte Statement, the Union raises the argument that the matter involved a domestic dispute which had no impact on the business of the Company. It points to the CROA Rules which prohibit new issues being raised at the last minute.

2. The Company relies on Rule 9 of the CROA Rules and cites **CROA 4263** and **4828**, as well as **SHP 634** and **AH 689**, for the reasoning behind and examples of objections being sustained concerning last minute arguments.

3. The Union responds to the objection by noting the distinction between issues and arguments and submits that the issue has always remained the same, namely the domestic dispute and the charges flowing from it. It submits that it is entitled to bring on additional arguments, as a grievance is not intended to be a brief.

4. The Union relies on AH 810, in which Arbitrator Clarke explored a similar objection between the same Parties and found in favour of the Union.

Analysis and Decision on Preliminary Objection

5. The CROA Rules at Rule 9 and 14 clearly limit the Parties from bringing up new issues at the last minute:

Rule 9

No dispute of the nature set forth in section (A) of clause 6 may be referred to arbitration until it has first been processed through the last step of the grievance procedure provided for in the applicable collective agreement. Failing final disposition under the said procedure, a request for arbitration may be made, but only in the manner and within the period provided for that purpose in the applicable collective agreement in effect from time to time, or if no such period is fixed in the applicable collective agreement in respect to disputes of the nature set forth in section (A) of clause 6, within the period of 60 days from the date decision was rendered in the last step of the grievance procedure.

No dispute of the nature set forth in section (B) of clause 6 may be referred to the Office of Arbitration until it has first been processed through such prior steps as are specified in the applicable collective agreement.

Rule 14

The decision of the arbitrator shall be limited to the disputes or questions contained in the joint statement submitted by the parties or in the separate statement or statements as the case may be, or, where the applicable collective agreement itself defines and restricts the issues, conditions or questions, which may be arbitrated, to such issues, conditions or questions. The Arbitrator's decision shall be rendered in writing, together with written reasons therefor, to the parties concerned within **45** calendar days following the conclusion of the hearing unless this time is extended with the concurrence of the parties to the dispute, or unless the applicable collective agreement specifically provides for a different period, in which case such different period shall prevail.

The decision of the arbitrator shall not in any case add to, subtract from, modify, rescind or disregard any provision of the applicable collective agreement.

6. The Rules are in place to avoid unwanted surprises on either side, and to ensure the fair and expeditious hearing of the arbitration.

7. At issue then is whether the Union arguments are novel and whether they infringe the CROA Rules. For the reasons that follow, I find no such infringement.

8. In **AH 810**, Arbitrator Clarke found that the distinction between arguments and issues is not always clear, but that the goal is to avoid prejudice caused by an expansion of issues:

42. CP suggested that the TCRC expanded the issues in this arbitration when it argued that CP had failed to follow its own obligations under the RPA. The arbitrator disagrees that any expansion took place.

43. First, CP alleged that the grievor had violated the RPA. That makes the RPA itself one of the issues in this arbitration. The TCRC remains fully entitled to review the RPA's language and argue that CP failed to follow its own obligations under that agreement.

44. Second, the JSI does not require the parties' arguments, only the facts and the issues [21]:

The joint statement of issue referred to in clause 7 hereof shall contain the facts of the dispute and reference to the specific provision or provisions of the collective agreement where it is alleged that the collective agreement had been misinterpreted or violated.

45. The TCRC regularly, as it has again done in this case [22], provides CP with its full position via the steps in the grievance procedure. If CP suggests it can rely on the RPA to support a just cause termination, then the TCRC can argue that the very same document prevents it from doing so.

46. Third, the difference between issues and arguments is not always clear. Railway arbitrators will prevent unfairness in situations where one party has expanded the issue and caused prejudice to the other. For example, an improper expansion may occur when a party raises a new issue that had not previously been candidly explored between the parties. This occurred in AH689 [23]".

9. The process followed here shows that the Company raised, investigated and relied upon the off duty conduct to terminate the grievor. The Step 2 Response (see Tab 2, Company Documents) notes the following:

“The Company maintains that the Grievor’s conduct was unacceptable and cannot be tolerated as an employee of Canadian Pacific. He has admitted to being charged with assault, uttering threats, and unsafe storage of a firearm. These are very serious in nature and not compatible with maintaining a positive employment relationship under the circumstances”.

10. The Investigation bore directly on the charges and the incident which gave rise to the charges and explores them in some depth (see Tab 11, Company Documents).

11. The grievor was dismissed, according to Form 104 (see Tab 1, Company Documents):

“For conduct unbecoming an employee of Canadian Pacific as evidenced by your being criminally charged with assault, uttering threats and unsafe storage of a fire(arm)”.

12. The Company submits that the arguments advanced by the Union in their Ex Parte Statement of Issue that the charges involved a purely domestic dispute and were unrelated to his work performance should not be considered.

13. However, it is clear that both Parties were dealing with the same issue, namely whether the dismissal of the grievor for off-duty conduct was justified. The conduct in both cases is the same; at issue is the characterization and impact of that conduct. There is no surprise or prejudice to the Company. These are merely additional arguments about an understood issue.

14. The preliminary objection is dismissed.

Merits of the Case

15. The Union advances three arguments as to why the dismissal of the grievor should be overturned:

- A.** The dismissal was premature as the grievor had only been charged, not convicted, at the time of his dismissal;
- B.** The charges were “purely domestic”;
- C.** The events “in no way affected or impacted the Company”.

16. In the event that these arguments are unsuccessful, I will still need to consider whether dismissal was appropriate in the circumstances.

A. The dismissal was premature as the grievor had only been charged, not convicted, at the time of his dismissal

17. The grievor was dismissed on August 28, 2020. He was only found guilty of assault and breach of an undertaking on October 6, 2020.

18. The Union advances a number of arguments why being charged should not presuppose guilt and that a suspension, rather than an immediate dismissal, is the usual course of action. In other circumstances, this argument might be compelling.

19. However, both Parties agree that I am entitled to consider facts arising after the dismissal, and in particular, that the grievor was found guilty of the two charges indicated.

20. In light of the subsequent conviction, this argument must fail.

B. The charges were “purely domestic”

21. The Union argues that the matter arose outside the workplace, and involved a domestic dispute between the grievor and his wife arising from the removal of their children by local authorities.

22. The Company argues that the matter was not “merely domestic”, as it involved a criminal assault. It highlights the fact that the matter was investigated by the RCMP, who reported multiple concerns about the grievor to Company Police. These concerns included self-harm at work and being under the effects of Methamphetamine while in the workplace recently (see Tab 11B, Company Documents).

23. I find that this argument must fail, based on the facts above. In addition to the dispute being found a criminal assault, the RCMP involved Company Police, based on workplace concerns. The Company was directly involved; the matter was not “purely domestic”.

C. The events “in no way affected or impacted the Company”

24. The Union argues that the dispute between the grievor and his wife was a domestic dispute which did not affect or impact the Company. It highlights the fact that it did not involve other Company employees or the workplace.

25. The Company argues that having an employee charged with and later convicted of a criminal assault does affect their reputation. It notes that the charges occurred almost at the same time as the renewal of a major contract with a nearby important customer (see Tab 15B, Company Documents).

26. The Company submits that the charges and conviction occurred in an extremely small town, with less than 100 inhabitants. It would be inevitable that the incident would be well known to all.

27. It further argues that the off-duty conduct of the grievor need not harm the business interests or reputation of the Company, as the risk of such an impact is sufficient.

28. I find the arguments of the Company to be more persuasive. There can be no doubt that domestic assault is viewed very seriously by both the Courts and members of the public. It is highly likely that the grievor's conduct would be the subject of discussion by inhabitants of the Town and surrounding area. The employer of the grievor would be known.

29. There is clearly at least a risk that the reputation of the Company would be negatively impacted by the criminal conviction of one of its employees for domestic assault. As found in Grand Erie District School Board and OSSTF, District 23, 271 LAC (4th) 162:

"In assessing this aspect of the case, I consider it is necessary to consider:

- **whether an employee's off-duty conduct creates risk of harm to the employer's reputation**
- **the nature of the potential harm created by that risk**
- **evidence of any actual harm**
- **the potential for future harm; and**
- the potential (and cost) of any steps that might ameliorate harm.

In other words, it is not enough to simply conclude that no harm has occurred. The evidence or lack of evidence of harm is but one factor in the assessment. It is necessary to consider all the factors, including the fact that the off-duty conduct created risk, or that harm might arise in the future. In this case, it

appears that damage to the Board's reputation has been minimal or non-existent but it is clear that a potential for harm was created through the Grievor's off-duty activities." (**Emphasis added**)

30. I find therefore that the off duty conduct of the grievor had at least the risk of harming the reputation of the Company and is worthy of discipline.

D. If Some Form of Discipline Was Warranted, Was Dismissal Excessive?

31. The oft-repeated test on whether the penalty was excessive is found in the William Scott matter:

In evaluating the immediate discharge of an individual employee, the arbitrator would take account of "the employee's length of service and any other factors respecting his employment record with the Company in deciding whether to sustain or interfere with the Company's action' (at p.117). The following is an oft-quoted, but still not exhaustive, canvass of the factors which may legitimately be considered:

- 1. The previous good record of the grievor.**
- 2. The long service of the grievor.**
3. Whether or not the offence was an isolated incident in the employment history of the grievor
4. Provocation.
5. Whether the offence was committed on the spur of the moment as a result of a momentary aberration, due to strong emotional impulses, or whether the offence was premeditated.
6. Whether the penalty imposed has created a special economic hardship for the grievor in the light of his particular circumstances.
7. Evidence that the company rules of conduct, either unwritten or posted, have not been uniformly enforced, thus constituting a form of discrimination.
8. Circumstances negating intent, e.g. likelihood that the grievor misunderstood the nature or intent of an order given to him, and as a result disobeyed it.
- 9. The seriousness of the offence in terms of company policy and company obligations.**
- 10. Any other circumstances which the board should properly take into consideration, e.g., (a) failure of the grievor**

to apologize and settle the matter after being given an opportunity to do so; (b) where a grievor was discharged for improper driving of company equipment and the company, for the first time, issued rules governing the conduct of drivers after the discharge, this was held to be a mitigating circumstances; (c) failure of the company to permit the grievor to explain or deny the alleged offence.

The board does not wish it to be understood that the above catalogue of circumstances which it believes the board should take into consideration in determining whether disciplinary action taken by the company should be mitigated and varied, is either exhaustive or conclusive. Every case must be determined on its own merits and every case is different, bringing to light in its evidence differing considerations which a board of arbitration must consider. **(Emphasis Added)**

32. Here, the Company highlights the grievor's short service of approximately 3 years. It relies on the seriousness of the charges, and the Company's obligations to provide a safe working environment. It submits that the grievor is a security risk to himself and others. It further pleads that the grievor was less than candid during the investigation and exhibited no remorse for his actions.

33. The Company submits that dismissal was appropriate and that I should not intervene.

34. The Union notes the grievor's clean discipline record and notes that the grievor was never incarcerated. It submits that this was a one-time event and that there is no "clear, cogent and compelling" evidence that his continued employment is impossible.

35. The Union further submits that other grievors, with much more serious issues of violence, have been reinstated (see SHP 477, Tab 7 Union Documents).

Analysis and Decision

37. When I consider the William Scott factors, I am not persuaded that the ultimate sanction of dismissal is appropriate in the circumstances.

38. I accept and give weight to the Company argument that the grievor was less than candid and showed little or no signs of remorse during the investigation.

39. However, while the grievor has only short service, his discipline record prior to the present matter was entirely clean.

40. Domestic violence cannot be condoned, but it would appear that he has met the conditions for a Conditional Discharge. As set out in the Probation Order:

“Effect of a Conditional Discharge

You have been conditionally discharged for the length of this probation order. No conviction is entered at this time. If you complete this probation order without getting any new offences, no conviction will be entered, the discharge will become absolute, and you may say that you have no record....”

41. Although the Parties were not able to confirm the status of the grievor’s file, no new offenses were alleged, and it would appear likely that the grievor has no criminal record.

42. The grievor testified that he had undergone Anger Management and other counselling and now lives in Ontario, where he and their child have support from family members.

43. I find that an appropriate penalty in all the circumstances would be a suspension without pay for three months. This recognizes the seriousness of the charges and the potential impact on the reputation of the Company, while permitting the grievor to demonstrate that he can be a valuable employee.

44. Accordingly, I order the grievor reinstated without loss of seniority together with compensation, after the suspension of three months.

45. I remain seized as to any issues of interpretation or application.

February 20, 2024

A handwritten signature in black ink, appearing to read "James Cameron", is written above a solid horizontal line.

**JAMES CAMERON
ARBITRATOR**