

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

**CASE NO. 5018**

Heard in Montreal, March 13, 2024

Concerning

**CANADIAN PACIFIC KANSAS CITY RAILWAY**

And

**TEAMSTERS CANADA RAIL CONFERENCE –  
MAINTENANCE OF WAY EMPLOYEE DIVISION**

**DISPUTE:**

Dismissal of Mr. B. Schile.

**JOINT STATEMENT OF ISSUE:**

On July 3, 2020, Mr. Schile was issued a Form 104 notifying him that he was dismissed from Company service for the following reason(s):

“For conduct unbecoming when employee engaged in a discussion about sitting in front of a Roadmaster's house with a gun, watched him go in and out of his house and made comments such as ‘if I was only 25 yards closer ...’

Summary of Rules Violated:

- Policy 1300 Discrimination and Harassment
- Code of Business Ethics
- Policy 4340 Violence in the Workplace”

The Union filed a grievance on August 20, 2020. The Company responded on September 23, 2020.

**The Union's Position:**

The grievor had no intention of hurting anyone. He never went to his former Roadmaster's residence and, in fact, did not know where he lived. Rather, he was merely relaying the contents of a dream that he'd once had. The Company is unable to satisfy its burden of proof that the grievor ever posed a real threat;

The Company was aware well before the events that gave rise to the grievor's dismissal that he was suffering with mental issues;

The Company violated its legal duty to accommodate. Furthermore, it violated section 17.1 of the collective agreement and, as detailed in the Step 2 grievance, section 15.1 as well.

The Union' requests that; the discipline assessed be removed from the grievor's record and that he be immediately reinstated into Company service without loss of seniority and with full compensation for all wage and benefits lost as a result of this matter.

The Company's Position:

The Company disagrees and denies the Union's request.

Following a medical leave of absence, the grievor was deemed medically fit and returned to work in a safety sensitive capacity on May 19, 2020. On that same day, the grievor made comments to his coworkers that he had had been outside of a Company Officer's home with a rifle watching him enter his residence and that if he had only been 25 yards closer implying that he would have used the weapon. Commentary such as this cannot be tolerated, nor will the Company allow employees to threaten the safety of one another in any circumstances.

After a fair and impartial investigation it was determined that the Grievor violated Policy 1300 Discrimination and Harassment for making threatening and serious unwelcome remarks, Policy 4340 for an action, conduct, threat or gesture of a person towards an employee in the work place that can reasonably be expected to cause harm, injury or illness to that employee, and the Code of Ethics in which all employees must ensure a work environment free of discrimination, harassment and violence. Additionally, the Code of Business Ethics states that such conduct will not be tolerated at any level.

As the Grievor was deemed medically fit to return to work and all the necessary steps were taken to ensure his proper reintegration to the workplace, the Company maintains that the Grievor was not discriminated against and his rights under the Canadian Human Rights Act were not violated. Should the Union pursue allegations of discrimination, they have the onus of proof, which has not been satisfied in the circumstances.

The Company maintains no violation of the Collective Agreement or the Canadian Human Rights Act has occurred.

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 the Arbitrator be drawn to the same conclusion.

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

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

There appeared on behalf of the Company:

F. Billings	– Assistant Director, Labour Relations, Calgary
D. Zurbuchen	– Manager Labour Relations, Calgary
S. Scott	– Observer, Labour Relations, Calgary
H. Inman	– Observer via Zoom, Calgary

And on behalf of the Union:

W. Phillips	– President, MWED, Ottawa
M. Foster	– Eastern Region, Director, Ottawa

## AWARD OF THE ARBITRATOR

### **Context**

1. This matter concerns the dismissal of a twelve year Track Maintainer employee with a clean discipline record. During this time he was off work on LTD or Medical Leaves of Absence for some three years. On his return to work after a one year leave, he is alleged to have told co-workers that he stalked a supervisor to his house while in possession of a firearm. The grievor contends that what he told his co-workers was identified as a dream that had taken place some three and a half years ago.

### **2. Issues**

- A.** What did the grievor say to his co-workers?
- B.** Did his statement breach the Discrimination and Harassment Policy, the Code of Business Ethics and the Violence in the Workplace Policy?
- C.** Did the Company meet its obligation to properly accommodate the grievor, prior to his dismissal?
- D.** What is the appropriate remedy?

### **A. What did the grievor say to his co-workers?**

#### Position of the Parties

3. The Company submits that a proper investigation established that the grievor had told co-workers that he had been outside of a Company Officer's home with a rifle, watched him enter his house and that if he had only been 25 yards closer.

4. The Company notes that this conclusion is based on the examination of the sworn statements and supplemental statements of Dillon Molyneux Tabs 7a and 7j, Philip Walther, Tabs 7b and 7i, Bryce Schile, Tabs 7h and 7l, Colton Howells, Tab 7k and the Memorandum of Thomas Banks, Tab 7b.

5. It argues that I should find the version of the co-workers to be more credible than that of the grievor, given motive, corroboration, discrepancies and admissions.

6. The Union acknowledges that the grievor should not have said what he did, but is adamant that what he said had been identified as a dream. The grievor never did what he said and does not even know where the Officer lives.

### Analysis and decision

7. This issue essentially comes down to a finding of credibility between the co-workers and the grievor. For the reasons that follow, I find the version of events set out by the co-workers worthy of greater credibility.

8. Firstly, it is uncontested that an exchange took place in the BTMF truck on May 19, 2020. Those primarily involved were Dillon Molyneux, Philip Walther and Bryce Schile. Colton Howells did not pay attention to their conversation at the time.

9. Secondly, while various matters differ (distance, existence and kind of firearm), most of the conversation is uncontested.

10. The central issue on which Molyneux and Walther differ from the grievor is whether he had stated that what he was recounting was a previous dream. The grievor consistently maintains throughout his statement and supplemental statement that he had indicated that he was recounting a dream, which had happened some time earlier. The co-workers are equally sure that no dream or nightmare was mentioned at the time.

11. To make a finding on credibility, multiple indicia may be examined.

12. The tone of the conversation was serious:

Phillip Walther Initial Statement

Q9 What was Bryce's tone when he stated that he sat out front of Darren's house with a gun?

Q9 It sounded serious. There was no joking manner about it, that's why Dillion asked him to repeat himself and then Bryce said it again. It wasn't any form of a joke, we didn't know what to reply to something like that. That's why we are here because I felt like he was serious when he said it.

13. The witnesses were shocked by the content of the conversation:

Dillon Molyneaux Initial Statement

Q15 What did you do after you heard this?

Q15 Bryce left the truck and Phil and I were shocked by it and discussed how inappropriate it was, it was a very scary thing to hear.

14. Both are categorical that a nightmare or dream was not mentioned: “I also never once heard Bryce say anything about this being a dream or nightmare” (Moyneux, Tab 7j, p. 3); “he did not say anything about a dream or nightmare that I heard” (Walther, Tab 7i, p. 2).

15. The exchange was troubling enough for Molyneux and Walther to have several conversations about it in the hours that followed, before reporting the exchange to management the next morning. It seems unlikely that a conversation about a dream would have engendered such a strong reaction on the part of the co-workers.

16. In terms of motivation to lie or distort, the circumstances militate in favour of the version of the co-workers to be true. The grievor is obviously interested in keeping his job and testifying that he had said that what he was relating was a dream would help him to do so. On the other hand, the co-workers have little or no incentive to lie, as they have nothing to gain. The Union advances the possibility that the co-workers had less seniority than the grievor, and getting rid of a more senior colleague would increase their personal job security. The Union advances absolutely no evidence that this is in fact the case. This argument is no more than speculation, in a situation where the consequences could be career ending. The possibility is flatly denied by both co-workers (see Tab 7l, Q and A8; Tab 7j, p.4). Moreover, Walther, far from looking for reasons to get rid of the grievor, would rather not be involved at all:

Q22 How did this whole situation make you feel?

A22 Like he put me in a tough spot and I'm a little upset about it. I can't not say anything. When it's something like that. I'm the foreman of the truck and I'm obligated to say something about it. I'm just upset that I have to deal with it.

17. In terms of accuracy of recollection, the testimony of the co-workers is very consistent between their initial and subsequent statements. The versions of Molyneux and Walther, while changing on minor issues such as the distance, are consistent on all of the more important issues. The grievor, however, changes his testimony about multiple matters. He initially denied having said that he knew meth heads who would kill someone for \$100, but later admitted that he had said it (see Tab 7I, p.4). He initially denied saying that he had a firearm with him in the exchange with his co-workers. He later changed his recollection to say: "I remember telling them that I drove to Darren's to shoot him in my dream but I don't remember the gun I shot him with and that's all I remember" (A 12, Tab 7I). I find the versions of the co-workers to be more consistent than that of the grievor.

18. The testimony of Molyneux and Walther is largely corroborative. While there are minor differences between them, both are consistent about there being no mention of a dream, the grievor having a weapon and stalking an Officer to his house.

19. For all of the above reasons, I find as a fact that the grievor did not mention at the time of the conversation with his co-workers that he was relating a dream. I find as a fact that he said he had stalked an Officer of the company to his house, while having a firearm. I find as a fact that he said something like: "If I was only 25 yards closer."

20. These findings in no way determine that the grievor in fact had done the things he related. However, he did say them.

**B. Did his statement breach the Discrimination and Harassment Policy, the Code of Business Ethics and the Violence in the Workplace Policy?**

Position of the Parties

21. The Company argues that the statement breached the three above Policies, as the comments were clearly threatening and caused harm to the workplace.

22. The Union focused on contestation of whether the comments had been described as a dream. However, both the Union and the grievor concede that the comments were inappropriate, even described as such.

### Analysis and decision

23. Policy 1300 Discrimination and Harassment sets out the following:

**Harassment** is any conduct based on any of the grounds listed above that offends or humiliates and is a type of discrimination.

**Personal harassment is behavior that is inappropriate and offensive but is not related to the grounds listed under the Canadian Human Rights Act. However, it is prohibited under this Policy as well as under CP's Code of Business Ethics and will not be tolerated.**

**Harassment may take many forms, including:**

- **Threats**
- **Intimidation**
- Verbal abuse
- Bullying
- **Unwelcome remarks**
- Name calling
- **Inuendo**
- Derogatory or degrading remarks regarding gender or sexual orientation
- **Offensive, inappropriate material**
- Hate literature
- Offensive jokes

Harassment is unacceptable not only during working hours and on Company premises, but also in work-related settings such as conferences, business trips and social events.

24. The remarks made clearly violate the Policy, as they would constitute at least threats, intimidation, unwelcome remarks and inuendo and personal harassment is established.

25. Procedure H and S 5340 Controlling Violence in the Workplace sets out the following:

**Harassment** would include **unwelcome** or **unwanted words** or **gestures that may cause an employee to become frightened, threatened or physically intimidated.** This could include, but not be

limited to, bullying and/or stalking, by an individual or by a group of persons.

**Threats are an expression of intent to injure or harm a person or to damage another's property. Threats may be expressed through physical displays, or any unwanted communication (i.e. e-mails) Threats may be expressed by one employee towards another employee or by any other person towards an employee.**

**Workplace Violence** is any action, conduct, threat or gesture of a person towards an employee in their work place that can reasonably be expected to cause harm, injury or illness to that employee.

26. There can be no doubt that the statement made by the grievor would constitute harassment, being both threatening and unwelcome. Such remarks would undoubtedly cause employees to be frightened and intimidated.

27. The Code of Business Ethics sets out the following:

**RESPECTFUL WORKPLACE & HUMAN RIGHTS**

**Employees must ensure a work environment free of discrimination, harassment and violence, in all forms, and where individuals are accorded equity in employment processes, procedures and practices based on merit and ability. CP and its employees will comply with applicable human rights legislation.**

CP is committed to providing and maintaining a work environment that promotes and protects fundamental human rights and supports the dignity of all individuals and will make every effort to ensure that no one at CP is subjected to discrimination, sexual or other forms of personal harassment or violence in the workplace. Such conduct will not be tolerated at any level.

(Emphasis added)

28. Making such remarks would constitute both personal harassment and violence towards another employee.

29. I find therefore that the Company has established that the comments made violate the above three Policies.



### **C. Did the Company meet its obligation to properly accommodate the grievor, prior to his dismissal?**

#### Position of the Parties

30. The Union submits that the grievor suffers from a mental health disability, to the knowledge of the Company. It submits that the Company had a duty to inquire whether this disability influenced the events of May 19, 2020, which was the grievor's first day back after a one year absence due to health issues.

31. The Company submits that the grievor was found fit to return to work by both his doctor and the Company. It notes that the grievor's doctor in the Functional Abilities Form had confirmed that there were no effects on cognition. It maintains that the grievor was not discriminated against and that his rights under the Canadian Human Rights Act were not violated.

#### Analysis and Decision

32. The Supreme Court of Canada has found that that there is both a substantive and procedural aspect of the duty to accommodate. As the Human Rights Tribunal of Ontario noted in John Betts v United Brotherhood of Carpenters and Joiners 2017 HRT0 886:

[104] The Supreme Court of Canada has accepted that the duty to accommodate has both a substantive and procedural component; see Meiorin above... In Lane v. ADGA Group..., the Tribunal held that a failure to meet the procedural dimensions of the duty to accommodate – the duty to inquire and assess – is a form of discrimination in itself because it denies the affected person the benefit of the prohibition against discrimination, and a proper search for accommodation...

33. Arbitrator Moreau found in Union of Northern Workers v The Government of the Northwest Territories 2019 Canlii 18391 that the employer may have a duty to inquire about workplace behaviour, when it suspects that the employee may have a disabling condition:

...the onus is normally on the employee to communicate the nature of their disability. But there is also an obligation on the employer, before taking any steps such as disciplinary action, to make inquiries if it

suspects that the employee may have a disabling condition which impacts on their workplace behaviour.

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I agree with the (BC Human Rights Tribunal's) analysis in Rezaei that context is fundamental to the analysis of whether the employer has a duty to inquire. A close look at the facts is therefore in order to determine whether further inquiries about the grievor's medical condition were in order here given the grievor's circumstances. (underlining added).

34. The duty to accommodate is an ongoing obligation and certainly applies to relapses, when dealing with substance disorder disabilities (see **CROA 4811**).

35. Here, the employer was aware of the grievor's many absences due to mental health:

April 18, 2020 to May 18, 2020	Unauthorized Leave of Absence
June 7, 2019 to April 17, 2020	Medical Leave of Absence
September 1, 2018 to May 9, 2019	Medical Leave of Absence
July 1, 2017 to September 11, 2017	Medical Leave of Absence
February 27, 2014 to February 22, 2015	Long Term Disability

36. The Company also knew that the grievor was just back to work after a year long absence.

37. Although the Company relies on the findings that the grievor was fit to return to work, it would not be surprising that a hypothetical return to work may be different from an actual return to work. The grievor may well have thought he was fit, but the reality triggered an unexpected reaction. Based on the evidence presented, the Company made no effort to explore whether the grievor's behaviour could be caused by or related to his mental health. Instead, they relied solely on the FAF from the grievor's doctor prior to his actual return to work, ignored any possibility of his mental health playing a role, and only pursued a disciplinary approach.

38. In my view, the Company had a duty to inquire further before determining discipline. As with a finding of impairment due to drugs or alcohol, an exploration of

whether an addiction is present must take place before the appropriate discipline can be assessed. Here, the Company does not know if the remarks made by the grievor were caused by or related to his mental health issues.

39. Accordingly, I find that the Company has not met its obligation to inquire before assessing discipline.

#### **D. What is the appropriate remedy?**

40. Given the finding about the failure of the Company to properly accommodate the grievor, his current dismissal cannot stand.

41. However, given the finding about the remarks made by the grievor and his violation of three Policies related to harassment and violence in the workplace, discipline is appropriate.

42. Accordingly, I find that the grievor should be reinstated, but without compensation.

43. The possibility of a return to work needs to be assessed in light of a thorough mental health assessment. The psychiatrist or psychologist should have access to the full employment file, the Manulife file, the Court file, together with this Award, in order to assess whether and to what extent the grievor's behaviour on May 19, 2020 was the result of a mental health condition and whether or not his current condition would permit a safe return to work.

44. Accordingly, I order the following:

- i. the grievor is reinstated without compensation;
- ii. the grievor is subject to a full mental health assessment, where the psychiatrist or psychologist has full access to mental health, Court and employment files, together with this decision;

- iii. the mental health expert is to make an assessment whether the grievor's mental health disorder contributed to the May 19, 2020 incident and whether his current mental health would permit a safe and secure return to work;
- iv. the Company would then make a decision whether accommodation is possible or would amount to undue hardship, in light of this decision and the mental health assessment;
- v. if the grievor is returned to work, he shall be subject to on-going mental health assessments for a period of two years, with the terms relating to the assessments to be agreed to between the Parties.

45. I retain jurisdiction with respect to any issues of interpretation or application of this Award.

June 4, 2024



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**JAMES CAMERON**  
**ARBITRATOR**