

**SHP 710**

IN THE MATTER OF AN ARBITRATION

BETWEEN

CANADIAN NATIONAL RAILWAY COMPANY

("COMPANY")

- AND -

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA  
(CAW – CANADA) LOCAL 100

("UNION")

IN THE MATTER OF THE GRIEVANCE OF STEPHEN DAY ALLEGING UNJUST DISMISSAL

BEFORE:       GEORGE S. MONTEITH, ARBITRATOR

APPEARANCES:

FOR THE EMPLOYER – Jennifer Darby – Labour Relations Associate  
                          Susan Blackmore – Senior Manager, Labour Relations and others

FOR THE UNION – Brian Stevens – National Representative  
                          Ken Hiatt – President, Local 100 and others

HEARING HELD ON JULY 31, 2013 AT TORONTO, ONTARIO

## AWARD

### NATURE OF THE DISPUTE

1. This is a discharge grievance. The Company discharged Stephen Day (“Grievor”) following a formal investigation by the issuance of a Form 780 (November 15, 2012) for “communication to fellow employees concerning threats of violence made towards a Company Officer”. The Company’s position is that it had just cause to discharge the grievor and there are no mitigating factors sufficient to warrant any interference with the penalty of discharge.

2. The Union’s position is that the Company failed to conduct a fair and impartial investigation rendering the discharge of the grievor void *ab initio*. Alternatively, the Union contends that the Company has not proved just cause exists to discharge the grievor and, in the further alternative, the penalty of discharge is excessive in all the circumstances. The Union seeks the grievor’s reinstatement with full redress.

3. The evidence relied upon by the Company to support the decision to discharge the grievor is contained in the documents in the Company’s Book of Evidence (Exhibit 3). No witnesses were called and both parties advised that they were content to have the dispute resolved on the basis of the documents, filed and their submissions in regards thereto. I have reviewed all the documents filed by the parties, particularly the witness statements summarized or referred to below that are central to the issues in this case.

### EVIDENCE

4. The grievor occupied the position of Rail Car Mechanic at the Company’s Belleville yard. The grievor is 61 years of age and at the time of his discharge had about 36 years of service with the Company with no active discipline on his record.

5. Pursuant to the provisions of the Collective Agreement, the grievor received a Notice to Appear (October 26, 2012) for an investigation in regards to his “alleged communication to Car Mechanic J. Bushell that you would undertake to carry out physical violence against Mechanical Supervisor Mr. Sameeh Saleem if he kept coming to the Belleville Terminal”.

6. The investigation of the grievor commenced following receipt of the memorandum of Mechanical Supervisor Sameeh Saleem (October 16, 2012) (“Saleem”) (Exhibit 3, Tab 1) to other supervisors concerning information he received by telephone from Car Mechanic William Miller (“Miller”) on October 14, 2012 respecting an apparent threat made by the grievor against him. Saleem states that Miller told him that Car Mechanic Joel Bushell (“Bushell”) told him (Miller) that the grievor was “not happy” with Saleem and “if he (Saleem) keeps coming here he will put a bullet in my head and for CN to send the next Supervisor from Toronto”. Saleem states that Miller “seemed distraught during this conversation and was not only concerned for my well-being but for his own safety as Steve has had a past of being mentally unstable.” Saleem also states that Miller agreed “it is technically heresy (sic) from Joel”.

7. Saleem’s memorandum also referred to “another instance” on September 29, 2012 at the Belleville yard. During a safety walk-about, Saleem states:

While talking to Steve he seemed uneasy or irritated and I asked him if was okay, if he had an issue. He stated that it was stupid for me to be babysitting them there. I stated it is my job to make sure my staff is working correctly and that these cars were high dwell and required more attention. He went on to state that people just need to leave us alone, always bothering us, going to put some bodies on the ground if they keep it up. This was not directed at Joel or me who were standing in the vicinity. I did not register the comment completely. However it was brought to my attention that Steve had tried to commit suicide before and had all his firearms taken away, but was now back in possession of his firearms/weapons.

8. The Company referred the matter to the CN Police Department. The parties advised that the matter was investigated by the police but no criminal charges were laid by the police against the grievor. The Company conducted its own internal investigation. The Company took statements first from Miller and then Bushell on October 30, 2012 and the grievor on October 31, 2012 (Exhibit 3, Tabs 4, 5, 6) concerning the allegations against the grievor.

9. Miller was provided with a copy of Saleem’s memorandum before his interview commenced. Miller provided the following answers to the questions asked of him:

14. Q. Mr. Miller, in a telephone conversation, initiated by you, according to Mechanical Supervisor Mr. Sameeh Saleem, on Sunday, October 14, 2012, Mr. Saleem states that you advised him that Car Mechanic Mr. J. Bushell told you that Car Mechanic Mr. Steve Day stated that he [Mr. Day] “was not happy with

Mechanical Supervisor Mr. Sameeh Saleem” and would “a bullet in his [Mr. Saleem’s] head” if kept coming to Belleville. Does the latter encapsulation of what you discussed with Mr. Saleem accurately capture what Mr. Bushell advised you of and what you communicated to Mechanical Supervisor Mr. Sameeh Saleem on Sunday October 14, 2012?

A. Yes and I also heard it first hand from Mr. Day.

15. Q. Mr. Miller, Mechanical Supervisor Mr. Sameeh Saleem suggests in his submission [Item #1] that during your conversation with him on October 14, 2012 you displayed concern for your personal well being and that of Mr. Saleem’s because of what Mr. Bushell had communicated to you regarding Mr. Day’s behavior? Was Mr. Saleem’s read and conclusions of how you felt with respect to his and your personal safety accurate?

A. Yes.

18. Q. Mr. Miller, aside from what you allege Mr. Bushell communicated to you regarding Mr. Day’s threats towards Mr. Saleem, have there been any other instances where Mr. Day has threatened other employees that has gone unreported?

A. No.

10. Bushell was provided with a copy of Saleem’s memorandum and the statement of Miller before his interview commenced. Bushell provided the following answers to the questions asked of him:

9. Q. Mr. Bushell, please refer to the submission by Mechanical Supervisor Mr. Sameeh Saleem [Item #3], specifically paragraph two [2] of the submission. In said submission Mr. Saleem states that on September 29, 2012, Mr. Day, in your presence (*sic*) and Mr. Saleem’s, stated that, “people need to leave us alone out here, always bothering us, going to put some bodies on the ground if they keep it up.” Mr. Bushell, do you recall being present when Mr. Day allegedly is said to have made that statement?

A. Yes. I was present. The three of us were talking, at which time Mr. Saleem said to Mr. Day you seem upset. Mr. Day’s response was no I am not upset but if I was upset there would be bodies laying all over.

12. Q. Mr. Bushell, at any time on or prior to October 14, 2012, did you tell Car Mechanic Mr. William Miller that Mr. Steve Day had expressed being unhappy with Mechanical Supervisor Sameeh Saleem and that if Mr. Saleem kept coming to Belleville he [Mr. Day] would “put a bullet in his [Mr. Saleem’s] head.”?

A. No to the terminology. I expressed to Bill Mr. Day's frustration with Supervisor Saleem and that he [Mr. Day] stated that he may as well as get a gun and lay him out in the parking lot.

13. Q. Mr. Bushell, approximately on what date did you have the conversation with Mr. Day where Mr. Day expressed frustration with Mr. Saleem and indicated that he "may as well as get a gun and lay him out in the parking lot"?

A. Around Wednesday October 3, 2012.

11. Miller and Bushell were also asked about the grievor's behaviour in the workplace. Miller indicated that, from his own personal experience, the grievor has behaved in a manner or made statements that caused him to be concerned for his personal safety and that of other employees (Exhibit 3, Tab 4, Q. 12). Bushell indicated that in his dealings with the grievor, he does not have a propensity or inclination for making physical and violent threats against other employees (Exhibit 3, Tab 4, and Q. 10). Both Miller and Bushell stated during their interviews (Q. 17 and 11, respectively) that they had never been threatened by the grievor.

12. The grievor was provided with a copy of Saleem's memorandum, and the statements of Miller and Bushell before his interview commenced. The grievor had union representation during the interview. The union's objection to the impartiality of the investigation of the grievor is based upon the failure of the Company to provide to the grievor and the union copies of any statements of Saleem, Miller, and Bushell taken by the CN police during its investigation prior to the interview of the grievor by the Company. The Company stated that it is not in possession of any police witness statements and agrees that it did not produce any statements of witnesses that may have been taken by the CN police prior to the interview of the grievor. The Company added that it did request copies of witness statements but the CN police had refused to produce to the Company any statements in its possession concerning the matter.

13. The grievor provided the following answers to the questions asked of him respecting the alleged threatening behaviour:

9. Q. Mr. Day, please refer to Mechanical Supervisor Mr. Sameeh Saleem's submission [Item #3], first paragraph. In it he states that Car Mechanic Mr. Miller

advised him [Mr. Saleem] that Car Mechanic Mr. Bushell advised Mr. Miller that you [Mr. Day] made a statement to the effect that you would put a bullet in Mr. Saleem's head, if Mr. Saleem kept coming to the Belleville Yard. Mr. Day did you, while in a conversation with Mr. Bushell, indicate or make a statement to the effect that you would put a bullet in Mr. Saleem's head if he kept coming to the Belleville Yard?

A. No I never said I would put a bullet in his head. I said out of turn to him, when asked if I was upset? I said, no I am not upset, but if I was upset there would be bodies laying around. No I did not mean that, I was speaking out of turn. I have tendency to speak before I think and I end up apologizing afterwards. Joel and Sameeh were there.

10. Q. Mr. Day, at any other time did you say to any other employee that you would put a bullet in Mr. Saleem's head if he kept coming to Belleville Yard.

A. No I never.

11. Q. Mr. Day, refer to the same submission. In the third paragraph of that submission, Mr. Saleem states while he and Mr. Bushell were in your vicinity, on September 29, 2012, you said you were "going to put some bodies on the ground if they keep it up". Mr. Day, does Mr. Saleem's allegation that you said you would "put some bodies on the ground if they keep it up" correctly reflect what you said on September 29, 2012 while in the vicinity of Mr. Saleem and Bushell?

A. Yes but I already explained what when on in that conversation.

12. Q. Mr. Day, what was the reason for making such a statement, while Mr. Saleem and Mr. Bushell were in your immediate vicinity, and what did you mean by and hope to accomplish by making that comment.

A. I didn't hope to accomplish anything. I didn't mean anything by it. I have a tendency to make comments before thinking. I have tendency to make negative comments because of all the changes that have gone on. I can't really speak for the other guys but I know they are upset too.

13. Q. Mr. Day, refer to question #14 of the statement taken from Car Mechanic Mr. W. Miller [Item #5]. In response to question # 14, Mr. Miller indicates that Mr. Bushell advised him [Mr. Miller] that you stated that you would put a bullet in Mr. Saleem's head. In response to that question, he also goes on to state that he personally heard you say you would put a bullet in Mr. Saleem's head. Did you make such a statement in the presence of or to Mr. Miller regarding what you would do Mr. Saleem?

A. I don't remember saying that to Mr. Miller.

14. Q. Mr. Day, is there anything you might have said to Mr. Miller or in his presence, that would lead him to conclude that you make such a threat against Mr. Saleem?

Objection on the basis that it is misdirected. It seeks a conclusion from Mr. Miller. He is not present. The question is unfair, please withdraw the question.

Objection duly noted and recorded.

Investigating Officer – the question will not be withdrawn.

A. No I did not.

15. Q. Mr. Day, refer to question #12 of the statement taken from Car Mechanic Mr. W. Miller. In response to that question, Mr. Miller indicates that your behavior and statements made by you have caused him to be concerned for his personal safety and that of other employees? Mr. Day have you made any general threats or behaved in a manner so as to give Mr. Miller concern for his personal safety and that of other employees?

A. No I have not. I don't remember saying anything that would make him come to that conclusion.

16. Q. Mr. Day, in your opinion, would statements such as threatening to put a bullet in someone's head or putting bodies on the ground be reason for someone to be concerned about their safety and that of other employees?

A. Depending on the situation, what was going on, and if there were other negative comments I might be concerned if I did not know the person.

17. Q. Mr. Day, refer to question #09 of the statement taken from Car Mechanic Mr. J. Bushell. In response to that question, Mr. Bushell states that on September 29, 2012 you responded to Mr. Saleem, when he asked if you were upset, by saying "no I am not upset, but if I was upset there would be bodies laying all over." Mr. Day did you make that or similar statement to Mechanical Supervisor Mr. Saleem on September 29, 2012, in the presence of Mr. Bushell, when asked by Mr. Saleem if you were upset?

A. Yes I made that statement and explained that in another answer.

18. Q. Mr. Day, refer to question #12 of the statement taken from Car Mechanic Mr. J. Bushell. In response to that question, Mr. Bushell attributes the following comment to you, "may as well get a gun and lay him [Mr. Saleem] out in the parking lot." Mr. Day does Mr. Bushell's response accurately reflect what you

said to him [Mr. Bushell] about what you would do to Mr. Saleem if he kept allegedly frustrating you?

A. No I don't ever recall saying that I would get a gun and lay him out in the parking lot. There is a lot of talk but I honestly do not remember saying that. Things get blown out of proportion.

19. Q. Mr. Day, do you understand that threats of physical violence against another person, whether there is intent or not to act on those threats, is not appropriate workplace behavior and will not be condoned?

A. Yes, I understand that it is not appropriate in the workplace to make comments or threats of violent behaviour.

22. Q. Mr. Day, do you have anything further to add to this employee statement?

A. Yes, I speak out of turn at times. I say things before I think, which I don't mean. I end apologizing because I don't mean the things that I have already said. Sometimes my workmates overreact to things I say. I would like to apologize to Sameeh and my fellow workers for any misunderstandings that resulted from comments I may have made. I never had any intentions of hurting Sameeh or any of my fellow workers. I have worked for 36 years and never had a fight with anybody and generally got along with everyone I worked with.

14. The Union filed a copy of the grievor's statement to a CN Police Officer (October 24, 2013) (Exhibit 4, Tab 8). The grievor was asked about an alleged threat made by the grievor towards Saleem on or about October 5, 2012. The grievor stated the following:

I was standing on the rear porch of the mechanical building after 12:00 p.m. I guess, Sameeh called me over to talk and asked me if I left the property and I said yes, I went to the credit union and I didn't think it mattered because it was my lunch hour. He said if there was an emergency, he wouldn't know where I was. I said I won't do it again. I'll ask you. He said to me you sound like you are upset and I said no I am not upset, if I was, I would just shoot somebody, which was a figure of speech. I have a tendency to speak or react before I think. I have always been that way but don't mean anything by it. There was no threat directed to him. It wasn't directed to anybody.

15. The grievor was also asked by the police officer if he owns any firearms and stated the following:

Yes I have hunted all my life, small game and stuff and have all my documents, F.A.C. which I can show you. I have no intentions of hurting anybody. It's my normal way of talking sometimes, but not meaning anything harmful. I



have had firearms all my life and have never hurt anybody and not about to start now.

16. The Company filed its Business Code of Conduct and its Workplace Violence Policy (Exhibit 3, Tab 12) made pursuant to the requirements of Part XX of the *Canada Occupational Health and Safety Regulations* dealing with violence prevention in the workplace. The policy was made effective November, 2012, although it was reviewed and discussed by the Company and Union members of the Policy Health and Safety Committee present at its meeting of September 5, 2012 (Exhibit 3, Tab 18). The policy, among other things, provides that the Company will not tolerate workplace violence (including threatening violence or physical harm) and will investigate and impose appropriate corrective measures, up to and including dismissal against any employee who has engaged in workplace violence.

#### DECISION

17. I have reviewed both the written and oral submissions of the parties and the cases filed by both parties in relation to the issues in this case. The first issue concerns the Union's contention that the dismissal of the grievor be declared void *ab initio* because the Company violated the substantive right of the grievor to a fair and impartial investigation by failing to place before the grievor the statements Saleem, Miller and Bushell gave to the CN police. The union argues that these statements ought to be treated as being in the possession of the Company and may have had a bearing on the matter. I am unable to accept the Union's position.

18. Rule 27.1 and Rule 27.2 as amended by Appendix III of Collective Agreement 12 deal with investigations. The relevant parts of the Rules read:

- 27.1 Except as otherwise provided herein, no employees shall be disciplined or discharged until they have had a fair and impartial investigation and their responsibility established. When an employee is held out of service pending such investigation, the investigation shall not be unduly delayed.
- 27.2 Copies of statements, stenographic reports and all other evidence taken shall, if requested, be furnished to the employee and, if present, to the authorized representative.

## APPENDIX III

### 27.2 FORMAL INVESTIGATION

At or prior to the commencement of the hearing, the employee (and the authorized representative if present) will be provided with a copy of all the written evidence as well as any oral evidence which has been recorded and which may have a bearing on their involvement. Sufficient time will be allowed the parties to peruse the evidence.

19. There is no dispute between the parties respecting the nature and purpose of the process contemplated by the Rules between the Company and the Union pertaining to formal investigations. In *SHP 371* at page 6, arbitrator M.G.Picher described the process in the following terms:

The right to a fair and impartial investigation implies that the employee be afforded the opportunity to respond to the statements or evidence in the possession of the Company, and be given the opportunity to make a full answer and explanation.

The process so contemplated is not a trial nor a hearing which must conform in all respects with judicial or quasi-judicial standards. It is, rather, an information gathering process fashioned, in accordance with the requirements of the collective agreement, to give the employee the opportunity to know the information gathered, and to add to that information before any decision is taken with respect to the assessment of discipline.

20. I agree with arbitrator Picher that the Company is obliged under the Rules before taking any decision respecting discipline to afford the employee the opportunity to answer or explain the allegations against him (her) by providing to the employee the evidence including documents or information in its possession that may have a bearing on the matter. The failure to do so in appropriate cases may render a dismissal void *ab initio* (see *CROA 4083*, M.G. Picher – concerning, in part, the withholding of video evidence in the Company’s possession and *SHP 700*, R. Germaine – concerning the failure of the Company to interview key witnesses).

21. In this case, there is no dispute that the Company did produce the documents and witness statements that it gathered during its internal investigation to the grievor and the Union before the commencement of his interview. The grievor had the opportunity to review the statements with his Union representative before the interview commenced. The Union does not dispute the Company’s statement that the police declined to produce to the Company any witness statements

it may have obtained during its investigation and the Company was not in possession of any police statements at the time of the grievor's interview (or it appears at anytime). Thus, it is clear that the Company in arriving at its decision to dismiss the grievor only relied upon the information or documents in its possession and produced to the grievor and the Union. Given the purpose of the investigation process under the Rules, the Company, in my view, is not required, in the absence of express language, to produce documents that are not its possession but in the possession of third parties or in this case, the CN police which, although part of the Company, is independent of the Company in respect of its law enforcement powers and mandate prescribed by statute. The Union's complaint in this case is, essentially, the same as the objection advanced in *CROA 1858*. The union in that case sought to have the grievor's discipline declared null and void because the Company failed to disclose to the grievor the CN police report relating to witness statements. Arbitrator M.G Picher at page 3 of the decision, in considering the requirements of an addendum that contained, essentially, identical language to Appendix III, Rule 27.2, rejected the union's objections and concluded that "no violation of the standards of Addendum 41 is disclosed in this regard". The same reasoning applies in this case. Accordingly, the Union's objection is dismissed.

22. The second issue concerns the merits of the grievance. There are two questions to be addressed. First, did the grievor engage in misconduct warranting discipline? Second, if so, is the penalty of discharge warranted in all the circumstances? Turning to the first question, it is long been recognized by arbitrators that violence in the workplace, including threatening physical harm or death against another employee is very serious workplace misconduct and just cause for discipline or discharge. As with all discipline cases, the employer bears the onus of establishing, on the balance of probabilities, that the employee, in fact, committed the alleged offence. In order to meet the balance of probabilities standard of proof, the employer is required to establish that the misconduct occurred with clear, cogent and convincing evidence. This is, particularly, the case where, as here, the allegations are very serious and egregious.

23. The union reviewed the evidence revealed by the documents filed by the parties. In summary, the Union contends that the evidence falls short of the standard required to prove that the grievor made a threat towards Saleem or anyone at anytime. The Union submits that the

evidence of Saleem and Miller against the grievor is mostly hearsay, or unreliable and ought to be given no weight. In particular, there is no reliable or direct evidence the grievor said he would put a bullet in Saleem's head. The Union also submits that Bushell's evidence ought to be viewed with great care because the questions asked of him did not seek to obtain information from Bushell but were prosecutorial in nature based upon the unreliable hearsay evidence of Saleem and Miller.

24. Turning to the evidence, it appears there are two instances where it is alleged the grievor communicated threats of violence against Company Officers. The first relates to Saleem's conversation with Miller on October 14, 2012 in which he reports what he was told by Miller about what Miller was told by Bushell respecting the grievor's threat to "put a bullet in my (Saleem's) head". I shall deal with Bushell's evidence below, but for now, it appears that this instance allegedly occurred on or about October 3, 2012. The second relates to Saleem's attendance at the Belleville Yard on September 29, 2012 when he heard the grievor say he was "going to put some bodies on the ground".

25. With respect to the occurrence of September 29, 2012, the evidence of Saleem, Bushell and the grievor is, essentially, the same and is not hearsay evidence. Bushell states in his interview with the Company (paragraph 10, Q. 9, above) that the grievor said "no I am not upset but if I was upset there would be bodies laying all over". The grievor admits in his interview with the Company saying that "if he was upset there would be bodies laying all over" and in his statement to the CN police he said "no I am not upset but if I was, I would just shoot somebody". The grievor's statements occurred during a conversation in which the grievor expressed some frustration or displeasure about the presence or need for a supervisor at the yard. Even though Saleem did not feel at the time that the grievor's statement was directed at him, the evidence is clear, nonetheless, that the grievor did make the statement threatening violence towards Company Officers on September 29, 2012.

26. The union's position respecting hearsay evidence and the probative value or weight to be given to the evidence of Saleem and Miller really concerns the alleged threat that occurred on or about October 3, 2012. The evidence of Saleem in that regard, clearly, is hearsay. I shall address Miller's evidence, below. The Company suggests that hearsay evidence is corroborative

evidence of the alleged threat against Saleem. I do not agree. Hearsay evidence in which a witness repeats what another has told him (her) about an event is not corroborative evidence of the event in the sense that it is not independent evidence that strengthens or confirms the truth of whether the event occurred or not. This is not to say that corroborative evidence, although no doubt helpful, is required in a civil case in order for the party bearing the onus to prove that an event occurred. Here, the Company also relies upon the occurrence on or about October 3, 2012 to justify the dismissal of the grievor. Accordingly, the Company must prove through a witness or witnesses with personal knowledge that the grievor communicated a threat of violence towards Saleem. The Company contends that there is direct evidence from Bushell and Miller against the grievor. I now turn to their evidence.

27. I am doubtful, on the evidence before me, that Miller actually heard “first hand” the grievor threaten to put a bullet in Saleem’s head or similar threatening language. Saleem’s memorandum makes it plain that Miller told him what Bushell had told him (Miller) about the grievor threatening to put a bullet in Saleem’s head. There is nothing in Saleem’s memorandum that suggests that Miller had any personal knowledge about this or any threat. Indeed, Saleem says Miller agreed with him that “it is technically heresy (*sic*) from Joel”. If Miller had personal knowledge, then why did he not tell Saleem instead of agreeing his knowledge is hearsay? In his interview, the content of Saleem’s memorandum was put to Miller (paragraph 9, Q.14) and he confirmed what Bushell told him and added “I also heard it first hand from Mr. Day”. It is not clear from reading Question 14 what Mr. Miller said he heard first hand from the grievor. Was it the part about the grievor not being happy with Saleem or the part about putting a bullet in his head or both? Given Saleem’s evidence, Miller’s response surely, was unexpected and ought to have prompted further questions. However, the investigating officer did not ask any follow-up questions to glean additional information or particulars or to clarify, for example, what he heard, where he heard it, when he heard it and who was present. Also, in Question 18 about other instances, Miller is asked “aside from what you allege Mr. Bushell told you” and he answers simply “no”. This casts doubt about whether Miller did, in fact, hear the alleged threat against Saleem because if had heard the threat, then it seems reasonable that the investigating officer would have referenced his previous answer or Miller would have corrected the investigating officer before answering the question. Further, Bushell was interviewed shortly after Miller and

was asked (paragraph 10, Q. 12 and 13) about whether he told Miller about the grievor's threat to put a bullet in Saleem's head. Bushell did not agree with the terminology and provided a different account of what he told Miller the grievor said to him (which I discuss, below). However, notwithstanding Miller's answer that he "also heard it first hand from Mr. Day", the investigating officer did not ask Bushell about Miller's interview answer. The fact that the investigating officer did not pursue Miller's interview answer with follow-up questions of Miller or Bushell suggests the investigating officer did not interpret (at least, at that time) Miller's answer to be that he actually heard the alleged threat or any threat. The investigating officer, however, did ask the grievor about Miller's statement that he "personally heard" the grievor say he would put a bullet in Saleem's head (paragraph 11, Q. 13) and he said "I don't remember saying that to Mr. Miller". However, in a follow-up question (Q. 14), the grievor, expressly, denied saying to Miller or in his presence anything that would have led him to conclude that he made a threat against Saleem. It may be that Miller has personal knowledge of a threat made by the grievor towards Saleem, but, upon review of all the evidence before me regarding Miller's state of knowledge, I am not satisfied that Miller, in fact, heard any threat against Saleem first hand from the grievor. Rather, my assessment of the evidence suggests that it is more likely than not that Miller's only knowledge of any threat comes through Bushell which he passed along to Saleem. As a result, Miller's evidence, like Saleem's, amounts to hearsay, and has no probative value in the determination of whether the grievor communicated a threat against Saleem on or about October 3, 2012 or at anytime.

28. This brings me to the evidence of Bushell concerning the occurrence on or about October 3, 2012. Bushell's evidence is the only direct evidence against the grievor. In his interview (paragraph 10, Q. 12 and 13), Bushell is asked if the grievor said he would "put a bullet in his [Saleem's] head" and Bushell answers: "No to the terminology. I expressed to Bill Mr. Day's frustration with Supervisor Saleem and that he [Mr. Day] stated he may as well as get a gun and lay him out in the parking lot". This evidence was put to the grievor (paragraph 11, Q. 18) and the grievor answers: "No I don't ever recall saying that I would get a gun and lay him out in the parking lot. There is a lot of talk but I honestly do not remember saying that. Things get blown out of proportion". Bushell's evidence does not confirm the exact threatening words ("put a bullet in his head") that the grievor was alleged to have uttered. Bushell's evidence is, however,

to the same effect and, if I accept Bushell's evidence, it would constitute clear, cogent and convincing evidence that the grievor uttered a threat of physical harm with a gun towards Saleem, a Company Officer, consistent with the reason for dismissal contained in the Form 780 and the Notice to Appear for an investigation interview, above.

29. The question, therefore, concerns the difficult task of assessing the evidence of Bushell and the grievor, made more so because I did not hear testimony from either of them and am left to determine the facts on the basis of the statements filed by the parties. The Union does not suggest that Bushell is not a credible witness, for example, because he harbours some personal animus towards the grievor or his account of what the grievor said to him is inconsistent with a prior statement. Instead, the Union argues his evidence is not reliable and seeks to call into question the probative value or weight to be given to Bushell's evidence on the basis that the investigating officer acted as a prosecutor by putting unfair suggestive questions to Bushell to elicit from Bushell confirmation of the hearsay evidence of Saleem and Miller.

30. I am not persuaded that the interview of Bushell was conducted in an unfair manner. The investigating officer quite properly asked him about whether he told Miller that the grievor said he would put a bullet in Saleem's head. There is nothing in the question suggestive of a particular answer; nor did the investigating officer engage in any cross-examination type follow-up questions that would suggest the investigation officer was trying to elicit or pressure Bushell into giving a particular answer. I observe that the Union raises the same point in its written submissions (Exhibit 4, paragraph 43) in respect of the way in which the grievor's interview was conducted but, somewhat inconsistently, relies upon his answers and argues the Company ignored the grievor's evidence or explanations. It is not how the investigating officer asked Bushell and the grievor questions in this case that determines whether their evidence is reliable or not; rather, the focus must be on what they answered.

31. After careful review of the evidence of Bushell, the grievor and the surrounding circumstances, and there being no reason to doubt the credibility or reliability of Bushell's evidence, I am satisfied that Bushell's account of what the grievor said is reliable and truthful. Unlike the grievor's clear denial (paragraph 11, Q. 9 and 10) about putting a bullet in Saleem's head, the grievor does not deny making the statement attributed to him by Bushell, above. The

grievor said he does not recall making the statement and adds that “[T]here is a lot of talk” and “[T]hings get blown out of proportion”. It seems implicit in these statements that the grievor, likely, does recall but is reluctant to admit the truthfulness of Bushell’s evidence. Instead, the grievor tries to put his words into an innocent context. Further, the reliability of Bushell’s account of what the grievor said (“get a gun and lay him out in the parking lot”) is strengthened because it is consistent with or similar to the statement the grievor gave to the CN police officer (“just shoot somebody”) and the statement he admits making (“bodies on the ground”), on September 29, 2012 in the presence of Bushell and Saleem. As a result, I have concluded that the grievor did, in fact, communicate to Bushell a threat of physical harm against Saleem on or about October 3, 2012.

32. In summary, I have concluded that the evidence supports a finding that the grievor did communicate threats of violence alleged by the Company on September 29, 2012 and October 3, 2012. I have no difficulty concluding that the grievor’s statements warrant discipline. The remaining question is the justness of the penalty of discharge.

#### PENALTY

33. The question of whether the penalty of discharge is just in all the circumstances involves the consideration of a number of factors. The Union contends that the penalty is unjust, given the grievor’s long service and the absence of a disciplinary record and further, seeks to mitigate the penalty of discharge by putting the grievor’s statements into an innocent context and suggests that the grievor did not at anytime pose any real or serious threat to harm Saleem or anyone. The Company however, submits that, notwithstanding the grievor’s long service and the absence of a disciplinary record, the seriousness of the offence warrants discharge and, further, there is no lawful excuse or defence that justifies any lesser penalty.

34. In this case, the seriousness of the offence is of paramount importance. The grievor made threats to kill or do physical harm towards Saleem and Company Officers with a gun out of some frustration or displeasure about how Saleem and other supervisors were managing the operations and him at the Belleville Yard. I start with a comment about progressive discipline. The absence of progressive discipline is not determinative in all cases and there are certainly many instances where arbitrators have not interfered with discharges involving serious misconduct, including



violence or threats of violence in the workplace, by long service employees with good records. For example, in *CROA 3451*, Arbitrator M.G. Picher upheld the dismissal of an employee with fifteen (15) years of service and no proven discipline on his record for uttering threats to shoot everyone at work. Also, *Ottawa (City) and Ottawa-Carlton Public Employees' Union (C.U.P.E., Local 503) (Lapierre) (Re)* 209 L.A.C. (4<sup>th</sup>) 335 (Devlin) is another example of an arbitrator upholding the discharge of a long service employee (twenty-two (22) years) with no discipline record for threatening to bring a gun to work and to target or shoot members of management.

35. The societal concern about violence or threats of violence in the workplace and the public's expectation that employers will provide safe workplaces has been heightened in recent years by a number of well publicized violent incidents. This expectation has recently become public policy at the federal level with the enactment of Part XX of the *Canada Occupational Health and Safety Regulations*. The Regulations set out the legal duty of federal employers to develop policies and programs for the protection of their employees against workplace violence, threats of violence, harassment and intimidation and to control the risks of such conduct. It is very important, therefore, to take into account in the process of weighing all the relevant factors, the policy goals of the legislation and the heightened awareness and expectation in society today that employers will take the appropriate steps to protect all their employees from violence or threats of violence and other improper behaviour in the workplace and to promote a safe working environment. This is not to say that the legislation mandates a zero tolerance policy. The Company's policy recognizes that incidents of violence in the workplace will be subject to discipline up to and including dismissal. The legislation does not restrict the discretion of an arbitrator to substitute a lesser penalty, where warranted. As I indicated, above, arbitrators have always treated workplace violence as serious misconduct. However, given the heightened public concern and the duties placed on employers by legislation, it is becoming increasingly clear that the tolerance of arbitrators in regards to violence or threats of violence is low and mitigation of the penalty of discharge will not be warranted absent compelling evidence, such as medical evidence, that supports a conclusion that the employee has rehabilitative potential and will not be a danger to the safety of others, if returned to work.

36. There is no compelling evidence before me that explains or diminishes the seriousness of the grievor's statements. The Union did not file any medical evidence and does not suggest that the grievor's conduct is in any way related to or explained by any medical condition. I also reject the Union's attempt to put the grievor's comments into an innocent context. With respect to Saleem's evidence, he provided a reasonable explanation of why he did not react immediately to the grievor's statement. I have no doubt the grievor's statement on September 29, 2012 coupled with the threat reported to him by Miller, which Bushell subsequently, in essence, confirmed would cause Saleem or any Company Officer or indeed, anyone to be concerned for their personal safety. I also reject the argument that the grievor posed no real threat because of his explanations in his interview and to the CN police to the effect that his statements were just a figure of speech or his normal way of talking; that he speaks out of turn without thinking and does not really mean what he says. These kind of after the fact self-serving or convenient explanations are not lawful excuses for uttering threats of violence in the workplace. *CROA* 3451, above, dealt with a similar situation where the grievor admitted making a statement threatening violence with a gun but put forth the explanation that it was "just a poor choice of words. Just a joke". Arbitrator Picher rejected the grievor's excuse and dismissed the grievance. I agree with the reasoning of arbitrator Picher at page 3 of the decision, below.

When, as in the case at hand, an employer is faced with an employee who threatens to kill other employees, and utters those words on more than one occasion, causing obvious disturbance to persons in the workplace, it must take the threat seriously and deal with it without delay. No employer has the luxury to wait out events to see whether the threatening words are coupled with an actual serious intent. Nor are employees or supervisors who suffer such threats to be left to worry and await the test of whether the employee demonstrates that he or she had a serious intent. There is, very simply, no room for such threats in any workplace. 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, absent compelling medical or psychiatric evidence in mitigation.

37. Apart from the grievor's long service and clean record, there are no other mitigating circumstances deserving of any weight in the determination of justness of the penalty. There is no suggestion that the grievor's statements were provoked by Saleem or another Company Officer. I do not consider his apology (paragraph 11, Q. 22) a sincere and unconditional expression of remorse. The grievor says he knows it is not appropriate to make threats of violence in the workplace (paragraph 11, Q. 19), yet he does not acknowledge any wrongdoing.

Rather, he downplays the seriousness of his statements and attempts to explain them all away as an innocent poor choice of words. I can only conclude that the grievor does not appear to understand fully the seriousness of his statements and the impact they must have had on Saleem's and other employees' sense of well-being and safety in the workplace. Given the serious and egregious nature of the misconduct, the absence of any compelling evidence explaining the grievor's conduct, the legal obligation of the Company to provide a safe workplace and the importance of deterrence to prevent any future incidents of this nature, I am not persuaded that the grievor's long service and good record alone are sufficient to warrant any interference with the penalty of discharge.

38. Accordingly, the grievance is dismissed.

DATED AT MARKHAM THIS 28<sup>th</sup> DAY OF AUGUST, 2013

A handwritten signature in blue ink, reading "George S. Markham".

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ARBITRATOR