IN THE MATTER OF AN ARBITRATION

BETWEEN:

PROGRESS RAIL/CANADIAN PACIFIC RAILWAY
(hereinafter referred to as the "Company")

AND:

CAW/TCA CANADA, LOCAL 101
(hereinafter referred to as the "Union")

ARBITRATOR: **Sidney G. Soronow**

APPEARANCES:

FOR THE COMPANY: **John H. Bate, Labour Relations Consultant**
Adrianne McCulloch, Manager, Human Resources
Al May, Operations Manager, Wheel Shop

FOR THE UNION: **Brian McDonagh, CAW National Representative**
Ken Hares, Vice-President, CAW Local 101
Derek Ternowetsky, Grievor

AWARD

At the commencement of the hearing, the parties agreed that the Arbitrator was properly appointed and had jurisdiction to hear and determine this matter. The grievance heard was the second of two grievances relating to the same individual which were both originally set to be heard by the Arbitrator on July 12th, 2007. As there was only sufficient time to hear the first grievance, the date of September 20th, 2007 was ultimately set to hear this grievance. At the commencement of the hearing, both parties provided the Arbitrator with comprehensive written submissions.

The grievance heard by the Arbitrator relates to the assessment of 30 demerits to Derek Ternowetsky for alleged inappropriate and unacceptable conduct as evidenced by his use of profanity directed toward a Supervisor on February 15th, 2006. The assessment of the 30 demerit marks caused him to be dismissed from the Company due to an accumulation of over 60 demerits under the Brown System of Discipline. Under the Brown System of Discipline, when an employee reaches 60 demerits, he or she is automatically subject to dismiss.

The Collective Agreement contemplates that the parties will submit to the Arbitrator a Joint Statement of Fact and Issue (the "Joint Statement"). The Joint Statement, in large measure, frames the difference or issue between the parties. In this instance, the Joint Statement reads as follows:

> *"**Dispute:*** *Discipline – Machinist Derek Ternowetsky's record being debited 30 demerits and subsequent dismissal on March 9, 2006.*
>
> ***Statement of Fact:***
> *According to the Company Discipline Form 104 issued March 9, 2006, Machinist Derek Ternowetsky's record was debited 30 demerits marks for:*
>
> > *"...your inappropriate and unacceptable conduct as evidenced by your use of profanity toward a supervisor on February 15, 2006, Winnipeg, Manitoba."*

Further, according to the Company Discipline Form 104 issued March 9, 2006, Machinist Derek Ternowetsky was dismissed from service for:

> *"...for accumulation of demerits marks in accordance with the Brown System of Discipline, Winnipeg, Manitoba."*

Statement of Issue:
It is the contention of the Union that:

- *the Company did not establish wrong doing on Machinist Derek Ternowetsky's behalf sufficient to give the Company cause to discipline him;*

- *Machinist Derek Ternowetsky was treated in an arbitrary, discriminatory and an excessive manner in regard to the 30 demerits debited against his record;*

- *The Union contents that the Company did not meet its responsibility to clear the snow and ice away from the entrances of the Shops thereby allowing an unsafe condition to develop. A violation of Rule 44 of the Collective Agreement and the Canada Labour Code Part II and its Rules and Regulations*

Therefore, with regard to the foregoing, it is the position of the Union that the discipline of 30 demerits debited against Machinist Derek Ternowetsky's record should be removed from this record and his dismissal rescinded.

It is further the Union's position that Machinist Derek Ternowetsky should be returned to duty forthwith without loss of seniority, with full redress for all lost wages, benefits and losses incurred as a result of his dismissal, including, but not limited to, interest on any moneys owing.

The Company denies the Union's contentions and claim."

The background to this dispute arises from the assessment of 30 demerits against Mr. Ternowetsky (hereinafter for convenience referred to as "Mr. T") for his conduct on February 15th, 2006. At the time of this discipline, Mr. T was a Machinist with the Company in Winnipeg, and worked in the wheel bearing room. As well, Mr. T was approximately 48 years of age and had accumulated approximately 26 years of service with the Company.

The conduct at issue relates to the use of profanity towards Mr. Alex May, one of Mr. T's

supervisors. The facts are, for the most part, not in dispute. There is an underground pedestrian tunnel in the Progress Rail Weston Shops facility yard. This tunnel provides a means of safe passage to employees to enable them to enter or exit the property from the west side. Apparently, the tunnel is equipped with a lockable gate. The gate is locked when the facility is not in operation to prohibit members of the public from entering the property. In the absence of the tunnel, employees would need to walk around the terminal to enter the facility from the east side. The walk to the east side is a significant distance, and would be particularly difficult to make during inclement weather.

On February 15th, 2006, the temperature was extremely cold with a wind chill in excess of -30 degrees Celsius at times. Therefore, use of the tunnel for ingress and egress to the facility would have been commonplace among employees. On that day, Mr. T had arrived at the tunnel entrance prior to the start of his shift and discovered that the lockable gate would not open. He apparently entered the pass code provided to employees, but the gate remained closed. In order to gain access to the workplace, Mr. T traversed the long outdoor route to get to the east side of the property in order to enter the Weston Shops facility.

Shortly after entering the workplace, Mr. T approached Mr. Alex May, a supervisor, to inform him that the gate to the pedestrian tunnel was not working and that it was therefore necessary for him to walk around the property in the cold in order to enter the building. According to the Company, Mr. T spoke to Mr. May in a heated manner and used extremely profane language that was both inappropriate and unacceptable. Although the Union admits that Mr. T did use obscenities when addressing Mr. May, it argues that his response was justified given the circumstance of having to walk around the property in the frigid temperatures. Furthermore, the Union argues that Mr. May's initial response to being told that the pedestrian gate was not working was provocative.

SUBMISSIONS & EVIDENCE

As this is a discipline case, the Company presented its submission first. As part of its written submission, the Company indicated that Mr. T had been disciplined on ten (10) separate occasions during the course of his career for an accumulated total of 170 demerits, later reduced to 145 through grievance resolutions, and that his discipline record stood at 40 demerit marks prior to the incident giving rise to this arbitration. The Company further indicated that of those ten (10) incidents of discipline, six (6) incidents for a total of 155 demerits marks between the years 1992 and 2005 were for inappropriate, insubordinate, aggressive or threatening displays of behaviour. Specifically, paragraph 6 of the written submission of the Company reads as follows:

> "*6. Of those 10 incidents of discipline, Mr. Ternowetsky has been disciplined on six (6) different occasions for a total of 155 demerits, later reduced to 130 through grievance resolutions, for inappropriate, insubordinate, aggressive or threatening displays of behaviour, as follows;*
>
> *(a) On July 7, 1992 Mr. Ternowetsky was assessed 40 demerits, (later reduced to 25 demerits by-way of joint resolution) for using a pry bar to hit lockers, machinery and subsequently throwing the pry bar toward wheel sets in the middle of the shop in an area where there were some 40 employees present;*
>
> *(b) On March 16th, 2000, Mr. Ternowetsky was assessed 40 demerits for damaging Company property for using a sledgehammer to smash a door window and batter the door knob and lock off of a shop exit door;*
>
> *(c) On May 3rd, 2002, Mr. Ternowetsky was assessed 25 demerits for leaving a safety meeting prior to it[s] conclusion and refusing a directive to return to the meeting;*

(d) On February 1, 2005, Mr. Ternowetsky was assessed 10 demerits for a verbal altercation with another employee;

(e) On February 4, 2005, Mr. Ternowetsky was assessed 20 demerits (later combined with item d above in a joint grievance resolution meeting for a total of 20 demerits for both incidents) for insubordination toward a Company Officer by way of comments he had provided in a formal investigation pertaining to the February 1st, 2005 incident;

(f) On July 25th, 2005, Mr. Ternowetsky was assessed 20 demerits for inappropriate behaviour by ramming a walkie forklift into wooden pallets causing damage."

The Union raised an objection, which was vigourously argued, that the Company is not at liberty to include greater detail of the alleged incidents than what is included in the Employee Discipline Record which is attached at Tab 2 of the submission of the Company. There was no question or dispute that the griever had a prior disciplinary record, but the Union argued that the Company is attempting to paint Mr. T as a violent and aggressive person without tendering evidence to that effect. This same objection was raised by the Union at the last arbitration hearing before the Arbitrator. As this is an entirely separate proceeding, however, I will address the Union's objection again.

On the one hand, the Union argued that if the Company is at liberty to give this character of background information, then it is open to the Union to provide its own narrative of the surrounding events to each discipline referred to by the Company. On the other hand, the Union argued that it was completely inappropriate for the Company to provide its own narrative and that the Arbitrator should not take any such narrative into account. In short, the Union's second argument is that the inclusion of anything more than the bare bone details disclosed in the Employee Discipline Record would not be in accordance with the principles of natural justice.

In response, the Company argued that the misconduct detailed in paragraph 6 of its submission was the same misconduct that was the subject of the earlier discipline and that it's inclusion of the details would not in any way violate natural justice. Furthermore, the Company argued that the reason it provided the narrative was to validate that the griever had some historical background of intentional misconduct and that such background was taken into account when assessing the quantum of discipline with respect to this incident involving the use of profanity towards a supervisor.

Indeed, a review of the Employee Discipline Record does disclose far less detail of the conduct which was the subject of prior discipline. At the hearing, I advised the parties that the details of the previous record, as provided by the Company in paragraph 6 of its written submission, will not be given any weight and that I will rely on what is disclosed in the official Employee Discipline Record. I do wish to note, however, that with respect to the discipline referenced in subparagraph 6(c) of the Company's submission, additional detail was subsequently brought to the attention of the Arbitrator by way of official Company documents from the investigation of the incident which gave rise to that discipline. The documentary evidence provided by the Company will be canvassed later in this Award.

As the Union continued to express concern about the validity of the inclusion by the Company of a detailed narrative of prior incidents, I deferred a formal ruling on its objection at that time. During the previous arbitration involving Mr. T, the Union had stated that there was case law in support of this very same argument. As a result, the Arbitrator afforded the Union an opportunity to provide such case law. No case law in respect of this issue was ever provided in connection with the previous hearing nor was any provided as part of this hearing.

In any event, the point is moot, as I accord no weight to that detailed narrative in paragraph 6 of the Company's submission. Instead, I have relied on the official Employee Discipline

Record which does disclose some incidents of inappropriate conduct and difficulties with anger over a long period of time, but in my view, does not demonstrate any significant pattern of aggressive, inappropriate or insubordinate behaviour.

As part of its written submission, the Company also indicated that any maintenance required of the gate or tunnel area is the responsibility of Canadian Pacific Railway ("CP Rail") maintenance staff and is not the responsibility of Progress Rail. As I understand it, Progress Rail has a business arrangement with CP Rail, but that the Weston Shops have remained the property of CP Rail. According to the Union, Progress Rail controls the building and has a responsibility to ensure that the gate is functioning property and that it should not matter what agreement, if any, the Company has with CP Rail.

It was argued by the Union that the Company should have to produce documentation which proves that it does not have responsibility for the gate if it is to make such claims. I therefore indicated to the parties that if necessary, the issue of responsibility for the gate will be revisited and the Company may be required to provide evidence to confirm whether CP Rail is in fact responsible for the operation and maintenance of the gate.

As part of its submission, the Company confirmed that it had conducted a formal investigation into why the gate was not functioning properly on the day in question. Pursuant to that investigation, it was apparently determined that someone had disabled the switch to the gate, rendering it inoperative. No indication of who may have been the person responsible for disabling the gate was provided.

Upon hearing that the Company had determined the cause of the gate malfunction to be human interference, the Union immediate voiced an objection. Specifically, the Union expressed concern and frustration because the Company had apparently not informed the Union about the results of its investigation prior to the arbitration hearing. Part of the

Union's prepared written submission had been that the gate was inoperative due to a build-up of snow and ice. The Union had further argued as part of its written submission that by allowing such a build-up of snow and ice, the Company was in violation of the Canada Labour Code for failing to protect its workers from the extreme cold on the day in question. According to the Union, at the very least the Company should have ensured that the Union knew about the findings of its internal investigation at the time the Joint Statement was prepared. At that time, it would have been clear to the Company that part of the Union's argument related to the build-up of ice and snow which rendered the gate inoperative.

For its part, the Company presented no evidence to suggest that it had in fact informed the Union as to the results of its internal investigation with respect to the gate. As the Company's failure to inform the Union of its findings would not, in the Arbitrator's view, affect the outcome of this case, the objection of the Union was overruled. That being said, however, I do believe that the Company should have disclosed the results of its internal investigation at a much earlier date, and I highly suggest that in the future, the Company make such disclosures well in advance of arbitration hearing dates.

The central issue of this case relates to the use of profanity by Mr. T towards Mr. Aleksander May on February 15th, 2006. Shortly after entering the workplace on the day in question, Mr. T approached Mr. Alex May, a supervisor, to inform him that the gate to the pedestrian tunnel was not working and that it was therefore necessary to walk around in the cold in order to enter the building. According to the Company's submission, Mr. T Mr. said to Mr. May in a heated manner that *"your fucking gate at the tunnel is not working"* and that when Mr. May responded that it was not *"his gate"*, Mr. T further stated *"fuck you, asshole"*.

There is some reasonable question as to whether Mr. T uttered the first statement that *"your fucking gate at the tunnel is not working"*. According to the initial e-mail account of

the incident sent at 3:51 PM on February 15, 2006 to Adrianne McCulloch from Aleksander May (Tab 4 of the Company's submission), Mr. May stated as follows:

> *"At Approx 15:25K on Wednesday February 15/06, Mr. Ternowetsky came to my office door and said my pedestrian gate was not working. I told him that it was not my gate and then he proceeded to say the following "Fuck You, asshole".*
>
> *I contacted Mr. Moorhouse at CP and informed him of the gate situation."*

However, there is a second e-mail at Tab 4 of the Company's submission from a Mr. Lloyd Hornsby to Aleksander May. In his e-mail, Mr. Hornsby's states as follows:,

> *"At approximately 3:25 P.M., February 15, 2006, I, Lloyd Hornsby witnessed following in A. May's office: Derek walked in and stated in heated manner that "your fucking fate at the tunnel isn't working". Alek stated that it wasn't his gate. Derek then said: "Fuck you, asshole" and strode away."*

In the Arbitrator's view, it is not necessary to canvass whether anything turns on whether Mr. T used profanity in his first statement to Mr. May about the gate not functioning properly. That is because when the inconsistency was canvassed at the hearing, the counsel for the Company acknowledged that Mr. T would not have been disciplined by the Company if he had only used profanity in his first statement to Mr. May as alleged.

It is worth noting at this time, however, that there is no dispute as to whether Mr. T said to Mr. May *"fuck you, asshole"*. That is admitted by the Union as part of its Step Two Grievance.

A second inconsistency relates to Mr. May's initial response to being informed by Mr. T that the gate was not working. According to the Union, Mr. May replied that *"it is not my problem"*. According to the Company, Mr. May replied that "it is not my gate." It is the

position of the Union that the response of Mr. May was provocative and meant to elicit an angry reply from Mr. T. In a letter to the Company from Mr. Glenn White, CAW Local 101 Regional Vice-President, Mr. White goes so far as to suggest that Mr. May deliberately antagonized Mr. T with his reply, knowing that Mr. T has a problem with anger management. The Union further argued that Mr. May demonstrated a total lack of concern for the welfare of Mr. T and other employees at the Weston Shops by not taking a greater interest in the gate malfunction.

For its part, the Company argued that Mr. May was just responding factually in that any maintenance of the gate or tunnel area is allegedly the responsibility of CP Rail maintenance staff and not Progress Rail staff. The Company takes the position that the statement of Mr. May was not provocative whatsoever, nor was it intended to be so. In any event, whether anything turns on this inconsistency will also be the subject of further comment later in this Award.

In its submission, the Company placed particular emphasis on the written statement given by Mr. T on February 23rd, 2006 in respect of the incident of February 15th, 2006, a copy of which is included at Tab 3 of the Company's written submission. The statement was taken by Ms. Adrianne McCulloch, Manager of Human Resources for Progress Rail. The following is a reproduction of the substantive parts of that statement:

> "***Q1:*** *Have you been properly notified as to the subject matter of this investigation?*
> ***A1:*** *Yes*
>
> ***Q2:*** *Rule 28.2 requires that an accredited representative of your Organization be present at this investigation. Would you please name him?*
> ***A2:*** *Sonny Amposta*

Before we begin, I would like to present the following documentation:

Document A: Email from Alek May dated February 15, 2006
Document B: Email from Lloyd Hornsby dated February 15, 2006
Document C: Collective Agreement No. 101 - Rule 43 Human Rights

Please take some time to review the documentation with your representative.

Q3: *Have you and your accredited representative had sufficient time to review the documentation?*
A3: *Yes*

Q4: *Do you have any documentation you wish to present at this time?*
A4: *Yes – Document D (2 pages)*

Q5: *Please state your name, occupation, and service with the company.*
A5: *Derek Ternowetsky. Machinist 26 years*

Q6: *Please explain the circumstances that led up to the incident with Mr. May on February 15, 2006*
A6: *Document D –*

Q7: *In their statements, Mr. May and Mr. Hornsby both claim that you used obscene language when advising Mr. May that the gate in the tunnel was not working. Did you use obscene language during this conversation?*
A7: *I advised Mr. May in a way that is common in the shop.*

Q8: *Is it common practice for employees to swear at their supervisors?*
A8: *Is it common practice for supervisors to swear at an employee.*

Note: Mr. Ternowetsky was asked to reply to the question, but wanted to leave his response as shown.

Q9: *During the incident on Feb 15, 2006 did Mr. May swear at you during his reply to your concern about the gate?*
A9: *No*

Q10: *Do you have an explanation as to why you lost your temper and swore using obscene language to Mr. May?*

A10: *Refer to Document D.*

Q11: *Can you please explain why your behaviour has not changed despite numerous explicit directions that your verbal comments are inappropriate.*
A11: *Can you explain why Company officers here can't act more like human beings. In addition is it normal for supervisors to be so uncaring. Also a safety concern.*

Q12: *Are you aware of the Collective Agreement No. 101 Rule 43 Human Rights?*
A12: *Yes*

Q13: *Do you understand that the Company and Union are opposed to any form of harassment in the workplace?*
A13: *Yes*

Q14: *Are you aware that it is the responsibility of everyone to report any form of harassment in the workplace to the Company or the Union?*
A14: *Yes*

Q:15 *Have you taken the Human Rights Awareness course?*
A13: *I don't remember*

Q16: *Do you have anything you wish to add to this statement?*
A16: *Seems to be common knowledge that some supervisors here have used foul language on my fellow workers. Its just that people lose there cool once in a while both management and workers.*

A17: *Are you satisfied in the manner in which this investigation Has been conducted? (Note: if the reply is no, please have the employee explain reason)*
A17: *Yes"*

Document D (as referred to in the above statement) is a document signed by Mr. T and provided to the Company by him. It is dated February 22, 2006, the same date as his statement was taken by the Company. Document D reads as follows:

"When I realized the gate would not open and given the current weather conditions (-27 degrees Celsius with a windchill of -41), my first reaction was

to go home. But out of concern for my fellow workers (who also depend on using the tunnel), I decided to walk all the way around.

I felt that if I got to work early enough and report what happened, maybe they could fix it and people coming to and leaving work would not have to walk around.

When I brought it to Alec May's attention his response was "It's not my problem..." Though my reply may be deemed by some as inappropriate, it was a knee-jerk reaction to Alec May's lack of concern.

I firmly believe that my concern for the safety to be true and just.

Furthermore, I believe that Alec May's lack of concern for safety to be a contributing factor for the high rate of accidents in the Wheel Shop."

Before reviewing the submissions and evidence further, I wish to address a side issue which was raised by the Union with respect to the statement of Mr. T taken by the Company on February 23, 2006 as set out above. During the hearing, the Union took the position that because the Company did not take issue with Mr. T's answer to question number 8, his answer becomes fact. Specifically, the following question and answer were given:

*"**Q8:** Is it common practice for employees to swear at their supervisors?*

***A8:** Is it common practice for supervisors to swear at an employee."*

According to the Union, it should be considered by the Arbitrator as fact that supervisors at Progress Rail do swear at employees because the Company did not challenge the answer given by Mr. T. Although the Arbitrator expressed skepticism and doubt as to the validity of the argument being advanced by the Union, the Union suggested that there was case law to support its position. As a result, the Arbitrator allowed the Union a period of seven days to submit case law to support the proposition that statements made in an investigation statement become fact if not challenged.

Subsequent to the hearing, the Union did in fact provide a number of arbitration cases heard by the Canadian Office of Arbitration (C.R.O.A.). They are as follows:

1. *Canadian Pacific Limited and United Transportation Union (C.R.O.A. 743);*

2. *Canadian Pacific Express Ltd. and Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (C.R.O.A. 769);*

3. *Canadian Pacific Limited and Transportation Communications Union (C.R.O.A. 2721);*

4. *Canadian Pacific Limited and Brotherhood of Maintenance of Way Employees (C.R.O.A. 1420);*

5. *Canadian Pacific Railway Company and Canadian Council of Railway operating Unions (C.R.O.A. 3167);*

6. *Canadian Pacific Limited and Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (C.R.O.A. 1538);*

7. *Canadian National Railway Company and Brotherhood of Locomotive Engineers (C.R.O.A. 2280);*

8. *Canadian Pacific Railway and Canadian Council of Railway Operating Unions (C.R.O.A. 2957); and*

9. *Canadian National Railway Company and Canadian Council of Railway Operating Unions (C.R.O.A. 3061);*

I have carefully reviewed each of the cases provided by the Union and find that none of the cases support the proposition being advanced. Furthermore, I am not aware of any other case law which would support the argument being advanced by the Union. I must therefore reject the Union's argument on this issue.

According to the Company, it is not simply that Mr. Ternowetsky used obscene language in his discussion with Mr. May that it finds so problematic. The Company acknowledged

that it would be frustrating for anyone to be use the outdoor route to enter the Weston Shops, particularly in such cold weather conditions. The Company argues, however, that it was the tone of voice and the that fact the words were directed toward a Company officer in presence of another Company officer, namely Mr. Lloyd Hornsby, that made his conduct so serious. The Company also argued that instead of walking around outside, Mr. T could have gone to the convenience store which is near the entrance to the tunnel and called over to the shop. According to the Company, employees knew to do this when confronted with problems with the gate.

As part of its submission, the Company presented the altercation with Mr. May as yet another example of aggressive, inappropriate and insubordinate behaviour exhibited by Mr. T, similar to behaviour for which he has been disciplined in the past. According to the Company, Mr. T *"believes that he can say what he wants, he believes that his responses to situations or circumstances are justified in his own mind and he makes no attempts to control his outbursts."* It is the Company's position that the type of behaviour exhibited by Mr. T cannot be tolerated and that it is justly the subject of discipline.

The Company freely acknowledged that the quantum of discipline assessed with respect to the incident of February 15th, 2006 would not have been as much but for the prior incidents of aggressive, inappropriate and insubordinate behaviour exhibited by Mr. T. In paragraph 23 of its written submission, the Company provided a brief narrative of an earlier incident involving Mr. T which was the subject of discipline. The discipline was also related to insubordinate conduct. According to the Company:

> *"23. During a formal investigation of January 14th, 2005 where he was being questioned in respect to inappropriate behaviour directed toward another employee, he introduced a letter drafted by himself at the conclusion of the investigation in reaction toward Mr. May who had overheard and provided a memorandum pertaining to Mr.*

> *Ternowetsky's comments directed toward another employee. In that letter he concluded by stating, "Lastly, I'd like to give Mr. May a little advice. Go get drunk. Go get very drunk. Perhaps all that alcohol will kill that bug up your ass".*

In response to Mr. T's letter, the Company conducted a follow-up investigation on February 3rd, 2005. The following is an excerpt from the statement given by Mr. T pursuant to that follow-up investigation:

> "***Q11:*** *In the context of this Document that you submitted during the investigation of January 14th, you made the following statement; "Lastly, I'd like to give Mr. May a little advice. Go get drunk. Go get very drunk. Perhaps all that alcohol will kill the bug up your ass." Please explain what you meant by the comments made in the letter in regard to Mr. May.*
> ***A11:*** *Because he perpetuated the investigation and obviously he had something he wanted to get me on.*
>
> ***Q13:*** *Please explain what those comments you made in respect to Mr. May have to do with the subject matter of the investigation of January 14th, 2005?*
> ***A13:*** *He initiated the last statement.*
>
> ***Q14:*** *Do you understand that the comments you have made in respect to Mr. May could be viewed as a form of insubordination?*
> ***A14:*** *Not really.*
>
> ***Q15****: Please explain why you do not see this as insubordination?*
> ***A15:*** *Because I was asked my comment. Freedom of speech. I have a right to say what I like. And if they don't like it its too bad. I can say it."*

Part of the argument of the Union is that the conduct of Mr. T in directing profanity towards Mr. May is not tantamount to insubordination as the Company alleges. It argued that the use of swearing is common in the workplace and that it is an accepted practice. No evidence was called, however, to confirm whether this allegation is true and the Company was certainly not prepared to admit that it tolerates or condones the use of profanity in the

workplace.

The Union made the further argument that the use of profane language by Mr. T was understandable given the provocation by Mr. May and an apparent lack of concern on his part for the gate malfunction. According to the Union, this was nothing more than a somewhat heightened discussion with respect to the responsibility of the Company towards the safety of its employees and a momentary flare-up on the part of Mr. T to the situation.

It is the further argument of the Union that Mr. T's conduct was not tantamount to insubordination because he did not challenge the authority of Mr. May and did not diminish Mr. May's authority in the eyes of another person. As part of its submission, the Union referred the Arbitrator to Brown & Beatty, Fourth Edition, Section 7:3660, which reads as follows:

> "*7.3660 Insolent and defiant behaviour*
>
> *Conduct that is threatening, insolent or contemptuous of management may be found to be insubordinate, even if there is no explicit refusal to comply with a directive, where such behaviour involves a resistance to or defiance of the employer's authority. If, however, an obscene or abusive outburst is the result of a momentary flare-up of temper, and does not challenge the employer's authority, the imposition of disciplinary sanctions would not be justified. Similarly, it seems generally accepted that, by itself, profanity in the workplace is not grounds for discipline. In determining whether the quality of the grievor's remarks can be characterized as insolent and defiant, regard may be had to the nature of the business, and the common language and mode of expression utilized and tolerated in the plant. Assuming that the behaviour or language at issue is not particularly disruptive, insulting or contemptuous of management, only minor disciplinary sanctions would be warranted. On the other hand, if the language is accompanied by a refusal to obey instructions, threats or an assault on a supervisor, more severe disciplinary sanctions, including discharge may be justified. As a general principle, it has been suggested that discharge may be appropriate where it can be said that the employee's conduct, viewed in its totality is "sufficiently*

> *contemptuous of authority as to justify the conclusion that the ongoing employment relationship ... should be terminated.* (Emphasis added)
>
> *In addition to considering the common idiom of the business and the intention of the griever, arbitrators also look to see whether there was any provocation by the employer, the context in which the remarks were made, whether the griever was acting in her capacity as a union representative, and the grievor's prior work history."*

Although the Union admits that Mr. T responded in a way that may be considered inappropriate if considered in isolation, it argued that it was the response by Mr. May to being informed about the functionality of the gate and his apparent lack of concern which angered Mr. T. According to the Union, Mr. May's comments were provocative and the response by Mr. T was justified under the circumstances. To help bolster its argument, the Union referred the Arbitrator again to Brown & Beatty Fourth Edition. This time, the section referenced was Section 7:4412 reads as follows:

> "*7:4412 Provocation*
>
> *Where an employee is able to prove that his or her behaviour was, at least in part, induced by acts of provocation or entrapment on the part of a member of management (or indeed others), that fact may be relied upon to mitigate the penalty imposed. Whether provocation should count as a mitigating factor typically arises in cases involving confrontation, such as insubordination, fighting and strikes. Although provocation is a factor arbitrators have considered in many cases, it can almost never completely exonerate an employee. Moreover, its force as a mitigating factor will be attenuated if the griever had an opportunity to extricate himself or herself from the situation or where he or she responded in a disproportionate way."*

Lastly, the Union referred to Arbitrator to Brown & Beatty Fourth Edition, Section 7:4410 to support its argument that where the Company bears some of the responsibility for the situation which gave rise to the confrontation, that should be considered as a mitigating factor with respect to the discipline imposed. That section reads, in part, as follows:

"*7:4410 Employer Conduct*

It is a long standing assumption of arbitration law that, in reviewing the reasonableness of a disciplinary penalty, arbitrators cannot avoid judging the employer as well as the employee. ... So too if it can be established that the employer bore some of the responsibility for the employee's situation because, for example, it acted illegally or provocatively ..."

No formal viva voce evidence was given during this hearing from any witnesses. Instead, the parties relied on their submissions and subsequently submitted case law.

III. DECISION

One troubling aspect of this case is the fact that the Union chose not to call the griever to testify. In fact, no witnesses were formally called to testify by either party. The Arbitrator does recognize that in many railway cases, even those with disputed facts, no evidence is called. That being said, however, it would have been helpful for the Arbitrator to hear what the griever had to say about why he reacted the way he did to Mr. May.

During its submission, the Company argued that Mr. T had other choices than to walk around to the east side of the property in order to enter the facility. According to the Company, Mr. T could have gone to the nearby convenience store to alert one of the supervisors about the gate. This would have eliminated the need for Mr. T to walk around the east side in the frigid temperature, and may have resulted in a less heated discussion with Mr. May or no discussion at all. While the Company's argument does have validity, I cannot find that it was unreasonable for Mr. T to walk around the property in order to start his shift in a timely manner and to alert Mr. May about the problem with the gate. Likewise, I cannot find that it was unreasonable for Mr. T to be frustrated by the situation. It was extremely cold outside and he walked a significant distance outside due to the problem with

the gate.

As I indicated earlier in this Award, there is a factual dispute as to whether Mr. May's initial response to Mr. T was *"it's not my gate"* or whether he said *"it's not my problem"* after being advised by Mr. T that the pedestrian gate to the tunnel was not working. According to the Union, Mr. May said to Mr. T that "it's not my problem". It is the position of the Union this would have been extremely provocative under the circumstances and significantly contributed to Mr. T's angry response of "fuck you, asshole." Furthermore, the Union argued that Mr. May intended to antagonize Mr. T, knowing that he has a problem with anger management. According to the Company, Mr. May said "it's not my gate", and that this is simply a factual statement in that the Company claims that the responsibility for the operation and maintenance of the gate lies with CP Rail and not with Progress Rail.

I had indicated to the parties during the course of the hearing that if necessary, the issue of responsibility for the maintenance and operation of the gate may need to be revisited, and if necessary, the Company may need to provide some evidence to prove that it is CP Rail's responsibility. In the Arbitrator's view, however, whether the gate is the responsibility of CP Rail or the Company has no material bearing on this case. Mr. T worked for Progress Rail at the Weston Shops and may not have had any knowledge of the arrangements between CP Rail and Progress Rail with respect to the operation and maintenance of the property. His concern was to be able to enter the workplace through the pedestrian tunnel and gate. This was frustrated by the fact that the gate was not functioning on the day in question, a day which was extremely cold by all reasonable accounts. Mr. T had a legitimate right to expect that his concerns would be taken seriously and acted upon quickly by his employer.

Regardless of which version of Mr. May's reply was actually said, in the Arbitrator's view, either could have been considered to be provocative by a reasonable person under the

circumstances, even though it may not have been Mr. May's intention to be provocative and no evidence was presented to suggest that Mr. May deliberately meant to antagonize Mr. T. That being said, however, Mr. T's response to the perceived provocation was inappropriate, unacceptable and insubordinate.

Although no evidence was tendered to substantiate the Union's argument that the use of obscene and/or vulgar language by workers in the Weston Shops is accepted practice, I have no doubt that some level of vulgarity in terms of language is used and perhaps tolerated in the workplace. As the arbitration board stated in *Rolland Inc.* (1983), 12 L.A.C. (3d) 391 (MacDowell):

> *"What is apparent from a perusal of these cases is that the use of profanity in the work place is not, in itself, grounds for discipline. A factory floor is not a Sunday school. The reality of the work place is that vulgar language and pithy epithets are often an ordinary part of everyday conversation. It is not the words themselves but the tone and intention of the user which determine whether profanity should be considered abusive or offensive".*

In the Arbitrator's view, what was said by Mr. T goes far beyond what can be considered acceptable conduct. It was not said in the course of casual shop conversation, but was said in a heated manner out of frustration and most probably anger.

During the hearing, the Union argued that supervisors routinely swear at their employees, presumably as some sort of justification for Mr. T's conduct. No evidence was ever tendered, however, to support this argument. As well, Mr. T acknowledged in his written statement taken on February 23rd, 2006 that Mr. May had not sworn at him during the incident in question. Therefore, the Arbitrator is unable to accept the argument that supervisors routinely swear at their subordinates.

As part of its submission, the Company placed great emphasis on the written statement given by Mr. T on February 23rd, 2006 with respect to the incident which is the subject of this hearing. The written statement is a series of questions asked by the Company and Mr. T's responses thereto. Some of his responses to questions referenced only a "Document D". This is a document which Mr. T provided to the Company as a means of explaining (and presumably exonerating) his conduct. The written statement given by Mr. T and Document D were reproduced earlier in this Award.

It is clear from Mr. T's responses to the questions asked and from reviewing Document D that he believes his responses were not inconsistent with the type of language used in the workplace by both supervisors and their subordinates. It is also clear that Mr. T realizes that his reply to Mr. May might be seen as inappropriate, but feels that it was simply a knee-jerk reaction to what he viewed as Mr. May's lack of concern for the situation with the gate.

The Company passionately argued that Mr. T's conduct is not an isolated incident, but is rather part of a pattern of inappropriate and unacceptable conduct. In furtherance of that argument, the Company provided a brief narrative of conduct which was the subject of an investigation and subsequent discipline in 2005. The investigation and discipline related to comments made by Mr. T in a letter to the Company dated January 14th, 2005. The letter was provided by Mr. T as part of another investigation of him by the Company for alleged inappropriate behaviour towards another employee. The end of that letter reads as follows:

> *"Lastly, I'd like to give Mr. May a little advice. Go get drunk. Go get very drunk. Perhaps all that alcohol will kill that bug up your ass."*

As part of the investigation into the January 14th, 2005 letter, the Company had taken a written statement from Mr. T, excepts of which are reprinted earlier in this Award. In that written statement, Mr. T was asked whether he understood that his comments in respect of Mr. May could be viewed as a form of insubordination and he replied in the negative. Mr.

T was then asked why he does not see this as insubordination and he replied as follows:

> *"Because I was asked my comment. Freedom of speech. I have a right to what I like. And if they don't like it its too bad. I can say it."*

In the Arbitrator's view, the closing comments make by Mr. T in his letter of January 14th, 2005 appear to be both highly inappropriate and insubordinate. Mr. May is a supervisor and the comments made are contemptuous of him. This was not a sudden outburst resulting from a momentary flare-up. Mr. T had time to craft a letter to the Company and deliberately chose to make disparaging comments about Mr. May. Furthermore, it is clear from Mr. T's comments that he does believe that he can say what he pleases as the Company alleges. He appears to believe that the concept of freedom of speech allows him to comment in any way he sees fit.

Notwithstanding the Arbitrator's comments as aforesaid, Mr. T was already disciplined for this prior conduct. At this stage, the relevancy of the prior conduct is simply to determine whether it supports the Company's argument that there is a pattern of aggressive, inappropriate and insubordinate behaviour on the part of Mr. T, the culmination of which is the incident of February 15th, 2006, and whether the Company was therefore justified in imposing 30 demerits for the conduct at issue.

Under the Brown System of Discipline, an employer is entitled to consider the past conduct of an employee in determining the appropriate level of discipline. This is part of the concept of progressive discipline. Furthermore, as Arbitrator Picher states in his decision in an arbitration between *Canadian Pacific Railway Company and National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW -Canada)* (SHP – 480):

> *"The preponderant jurisprudence in Canadian labour arbitration recognizes*

that where an employer determines that the conduct of an employee merits discipline, it may treat that conduct as a culminating incident which, in light of the employee's prior discipline, justifies the termination of his employment."

Although the Company did not expressly state that it treated the incident of February 15th, 2006 as a culminating incident, its arguments were clearly meant to leave that impression. In this instance, the Company acknowledged that the quantum of discipline would have been excessive if it were not for past incidents involving Mr. T's difficulty in controlling his anger.

In the Arbitrator's view, the conduct of February 15th, 2006, while unacceptable, highly inappropriate and insubordinate, has not been proven to be part of some pattern of aggressive, inappropriate and insubordinate behaviour as the Company argues. Mr. T has been disciplined on a few previous occasions for conduct involving anger management, but these prior disciplines span a number of years.

As well, the only other discipline for insubordination relates to Mr. T's letter of January 14th, 2005. Unlike the contemptuous remarks made by Mr. T in that letter, his angry tone and comments regarding the gate were partly the result of what might have been seen as provocation by Mr. May and likely made without much thought or deliberation. Mr. May's comments likely could have been viewed as provocative by any reasonable person, let alone someone like Mr. T who the Union acknowledges has problems with anger management.

One of the cases provided to the Arbitrator by the Company as part of its submission is an arbitration between *BC Rail Ltd. and United Transportation Union, Locals Nos. 1778 and 1923* (AH 547) (Arbitrator John Kinzie). At first blush, it appears that the facts of that case are quite similar to the case at bar. Upon closer examination, however, it is clear that there are important differences. In the *BC Rail* case, the employer terminated the grievor after

25 years of employment with the company. An except from the dismissal letter reads as follows:

> *"...you are being dismissed for your demonstrated unacceptable and insubordinate conduct during your exchange with the Crew Supervisor on September 10, 2001 when you used profane and abusive language when you were advised that your allotted annual vacation could not be changed as you had requested. Your abusive conduct has been continuing and repeated despite the Company's efforts to modify and correct your behaviour using the progressive approach to discipline."*

The culminating incident in the *BC Rail* case occurred when the grievor, Rudy O'Quinn, called his crew supervisor, Bob Smith, a "fuckin' asshole". The profane outburst happened immediately upon the grievor being advised by Mr. Smith that his annual vacation days could not be modified as requested. According to Arbitrator Kinzie, there was no provocation whatsoever by Mr. Smith. He was simply advising Mr. O'Quinn of the facts.

This was not the first time in which Mr. O'Quinn had been disciplined for insubordination. There appeared to be many incidents over the years where Mr. O'Quinn had failed to follow directions from supervisors and displayed contempt for authority. One such example occurred on July 19, 2001 when the grievor refused to eat and be relieved in the manner scheduled. Instead, he chose to eat in the location he wanted which resulted in the delay of a train. In it worth noting that many of the past instances of discipline involving Mr. O'Quinn related to conduct which delayed trains. In any event, in speaking to the radio traffic controller about the foregoing situation on July 19, 2001, Mr. O'Quinn made the following comments: *"If you want to fuck around you can god damn well do it but I'm not gonna tolerate it."* Again, there was no evidence of provocation prior to Mr. O'Quinn's inappropriate and abusive response.

In the end, Arbitrator Kinzie determined that the incident involving Mr. O'Quinn's use of profane and abusive language towards his supervisor, when considered in light of his past record of discipline, gave BC Rail just cause to dismiss him and therefore the grievance was dismissed.

There is no question in the Arbitrator's mind that the conduct of Mr. T is worthy of discipline. That being said, however, his discipline record is not as extensive as the grievor in the *BC Rail* case nor are the instances of insubordination as serious or as frequent. As well, I have determined that there may have been some element of (unintended) provocation on the part of Mr. May which likely contributed to Mr. T's angry and profane response.

Although what can be viewed as provocation on the part of Mr. May is certainly a mitigating factor, as Brown & Beatty, Fourth Edition, Section 7:4412 confirms, provocation can almost never completely exonerate an employee from wrongful conduct. The provocation is relevant, however, in determining the reasonableness of the penalty imposed.

In this instance, I conclude that the discipline imposed by the company was too severe. However, in making this determination, I wish to make it abundantly clear that Mr. T's use of profanity, which was directed at Mr. May in an angry tone, was a very serious infraction and highly at odds with harmonious management/employee relations. Such conduct, particularly when directed towards a supervisor, cannot be considered as acceptable and is justly the subject of discipline.

The grievance is therefore allowed in part, with an order that the discipline imposed be reduced from 30 demerits to 25 demerits.

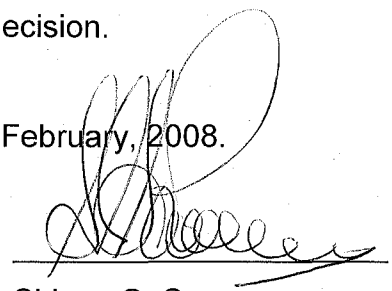
In reducing the discipline, it is appropriate to make it entirely clear to Mr. T that he must guard against such untoward conduct in the future. If there is future behaviour of this

nature, given the past history and the content of this Award, it is likely that Mr. T's long employment with Progress Rail would be in serious jeopardy. Hopefully this stern admonition will have a sufficient impact on Mr. T that he will resolve to conduct himself in a more respectful fashion in his dealings with supervisors.

I reserve jurisdiction to deal with the question of any compensation, should the parties be unable to agree.

I would like to express my sincere appreciation and thanks to both parties for their skill, competence and clarity in presenting their respective positions and arguments, all of which were of great assistance to me in making my decision.

Dated at Winnipeg, Manitoba this 14th day of February, 2008.



Sidney G. Soronow
Sole Arbitrator