

BETWEEN:

PROGRESS RAIL
(hereinafter referred to as the "Company")

- and -

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

AWARD

ARBITRATOR: Sidney G. Soronow

APPEARANCES:

**FOR THE COMPANY: John H. Bate, Labour Relations Consultant
Adrianne McCulloch, Manager, Human Resources**

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

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. This grievance was the third of three grievances relating to the same individual.

At the commencement of the hearing, both parties provided the Arbitrator with comprehensive written submissions.

The grievance relates to the assessment by the Company of 40 demerits to the record of Bruce McLaren ("McLaren"), in respect of events which occurred on March 27, 2006. Both the Company and the Union have adopted and accepted the Brown System of discipline. Pursuant to the Brown System of discipline, the accumulation of demerits exceeding 60 demerits, results in termination. Consequently, by letter dated April 12, 2006, McLaren was dismissed from Company service due to the accumulation of demerit marks.

The Collective Agreement contemplates that the parties will submit to the Arbitrator a Joint Statement of Fact and Issue (the "Joint Statement"). In this instance, unlike the earlier arbitrations involving McLaren, the parties did agree to a Joint Statement.

It is appropriate, at this juncture to recite in its entirety, the text of the Form 104 issued to McLaren, dated April 12, 2006, which referenced the demerits. The text reads as follows:

"Please be informed that you have been assessed with forty (40) demerit marks for your unacceptable conduct as evidenced by your making physical threats towards a supervisor on March 27, 2006, Winnipeg, Manitoba."

Under the same date, another Form 104 was issued to McLaren, the text of which reads as follows:

"Please be informed that you have dismissed from company service for the accumulation of demerit marks in accordance with the Brown System of Discipline, Winnipeg, Manitoba."

At the time of the discipline of the 40 demerits, McLaren was a rail car mechanic at the Progress Rail facility in Winnipeg, Manitoba. McLaren had accumulated service of 27 years, firstly with Canadian Pacific Railway and secondly with Progress Rail.

This Arbitrator had issued two prior decisions relating to McLaren. One of those decisions related to discipline of March 14, 2005 and involved 30 demerits. By the earlier decision, the discipline was reduced to 20 demerits. McLaren's discipline record had been debited with 25 demerits for events which occurred on September 12, 2005. By this Arbitrator's earlier decision, the 25 demerits was reduced to 20 demerits. For convenience, these two earlier grievance arbitrations are sometimes referred to herein respectively as the "First Grievance Arbitration" and the "Second Grievance Arbitration".

It should be noted that McLaren had other disciplinary proceedings in February 1980, August 1984 and March 1998. However, by the time of the discipline of March 14, 2005, McLaren's discipline record stood at zero.

In respect of the First Grievance Arbitration and the Second Grievance Arbitration a preliminary objection had been raised by the Company. That objection was based on the doctrine of laches and it was the Company's contention that those two grievances were not arbitrable, or alternatively that by reason of the Union's delay, there should be an impact on (or a bar to) relief to the grievor, in the event of success by the Union. It was indicated, in relation to this grievance, that although there was no claim that the grievance was not arbitrable, a similar concern was expressed on the subject of relief.

In its submission, the Company brought forward certain facts related to events which it alleged occurred on March 20, 2006 and on March 24, 2006. In both instances, a supervisor, Peter Kowalyk ("Kowalyk") had identified that McLaren was in the lunch

room prior to completion of his assigned shift. On March 20, 2006 such event related to 20 minutes and on March 24, 2006 it related to 30 minutes. In each instance, Kowalyk advised McLaren that his shift was not over and required McLaren to return to his job site.

These events formed part of the matters canvassed during a formal investigation interview conducted by the Company with McLaren. The investigation also related to an issue of threats towards a Supervisor (a matter hereinafter referred to).

Based on the formal investigation, it appears clear that McLaren was, in fact, in the lunch room well prior to completing his shift. It would have been open to the Company to have imposed discipline in respect of the conduct of Mr. McLaren and his absence from his work area. However, the Company appears to have chosen not to have included that conduct as part of the disciplinary sanction. As such conduct was not part of the disciplinary sanction, it is unnecessary for me to comment more fully on such conduct or the degree to which such conduct might have given rise to sustainable discipline.

The focus of the discipline related to the events of March 27, 2006. On that day, Kowalyk spoke to employees at a shift meeting. Kowalyk reminded employees of their obligation to work the required hours and not to quit work any more than 5 minutes before the shift ends.

It is the Company's position, that following the shift meeting, McLaren approached Kowalyk and stated "you feel good picking on a sick man". McLaren subsequently requested a meeting with Kowalyk and his local CAW Union representative, Rick Broszeit ("Broszeit").

In response to this request, Kowalyk arranged a meeting to be attended by McLaren, Broszeit and Adrienne McCulloch ("McCulloch"), the manager of human resources.

It is alleged by the Company, that Kowalyk informed McLaren of the meeting arrangement, whereupon McLaren became upset and stated to Kowalyk:

"I will kill you, I don't care where you are I will fucking kill you. As long as you live in Winnipeg I will find you and kill you."

It is alleged by the Company that Kowalyk attempted to have McLaren repeat the threat but that McLaren stated:

"there are no witnesses it is only me and you."

It is the position of the Company, that Kowalyk was concerned and felt a threat to his personal safety, having regard to the anger displayed by McLaren and the words spoken. The foregoing events were communicated by Kowalyk to McCulloch, which lead to McLaren being held out of service pending scheduling of an investigation.

In light of the contact between McLaren and Kowalyk above referred to, Canadian Pacific Police were called upon. Apparently, a report was filed by the Canadian Pacific Police requesting a Crown opinion pertaining to the laying of charges. The evidence did not disclose that any charges were ultimately laid.

The events of March 20, March 24 and March 27, 2006 became the subject of a memo from Kowalyk to McCulloch, Owen Jones and Hans Thrien. This memo reads as follows:

"Monday, March 20/06 at 1540 I entered into the west end lunch room and found Bruce McLaren having a coffee and talking to the 16k shift. I informed Bruce that he was not finished his shift and should not be having coffee at this time. He said Okay. On Friday March 24/06 at 15:30 I entered into the lunchroom and again found Bruce having a coffee. I again reminded him that his shift was not over and for him to return to his job site. He replied that he did a lot of work and I took his mate away

without telling him. Bruce was given the assignment to replace rollers. This is a one person job and does not require a mate.

On Monday morning I reminded all the staff of their obligation to work the required hours and not quit before 15:55. After the meeting Bruce approached me and said, "You feel good picking on a sick man". I replied to Bruce "you cannot quit at 3:30. He then went on about the man I pulled and never let him know. He then said his arm is sore and he wants someone to drive him to the doctor tomorrow. I asked why, which he replied because of the accident. I could see he was mad about something so I left for the east end. Later I assigned Bruce to clean a corridor in the east end. He then again approached me and asked to meet with Rick Broszeit and myself. I replied that I will not meet with him but will refer him to Adrienne. I talked with Adrienne to arrange for the meeting. Adrienne confirmed she would see him immediately.

I found Bruce and let him know I arranged for him to meet with Adrienne and Rick. While walking back down the aisle Bruce said, "I will kill you, I don't care where you are I will fucking kill you. As long as you live in Winnipeg I will find you and kill you. I said to Bruce what are you saying, he said there are no witnesses it is only me and you. There was real tension and anger in Bruce's voice which I never witnessed before. This made me very concerned and I immediately phoned Adrienne to let her know that now Bruce had threatened to kill me. Bruce heard me talking to Adrienne and shouted it's not true I am not threatening him. Bruce continued down the aisle to meet with Adrienne and Rick."

As may be expected, during the formal investigation interview, McLaren was questioned on the events of March 27, 2006. It is particularly worthwhile to review the question and answers to question 30, 35, 36, 37, 38, 39 and 40 which are as follows:

"Q30 Following the meeting did you approach Peter and say words to the effect: "you feel good picking on a sick man"?"

A30 I did not say that. I said "maybe the next time you take my mate away from me you will let me know." I had received a sliver in my arm on March 20th, and I saw my doctor on the 21st because the First Aid attendant did not get it out and it was becoming infected. I told Peter during this conversation that my arm was still sore and I needed to go to the doctor on Tuesday the 28th. Peter responded to go on my own time. I told him I would have gone on the week end, but my doctor is only there on Tuesdays from 1:00 p.m. to 5:00 p.m. Peter followed me to my work site and was upset with me about my two recent accidents. Following this conversation I went to find John Murray. I went to John's office and he was not there, so I called him on his cell phone and he answered. I told him I was having trouble with Peter and he said he was going to call Owen Jones.

Q35 Document A indicates that on March 27, 2006 Peter Kowalyk approached you to tell you a meeting had been arranged with your union rep and the HR Manager. While walking back down the aisle you said to Peter "I will kill you, I don't care where you are I will fucking kill you. As long as you live in Winnipeg I will find you and kill you." Did you say words like this to Peter?

A35 No I did not.

Q36 Why would Peter say this if it was not true?

A36 Because he is a very good liar.

Q 37 Document A indicates that when Peter asked you what you were saying you said "there are no witnesses it is only me and you. Did you say these words?

A37 No, what I said to Peter was that since my accident you have been punishing me.

Q38 Why would Peter say this if it was not true?

A38 I don't know, Peter does not seem to have respect for me.

Q39 Document A also indicates that during the conversation referenced in Q30 there was a real tension and anger in your voice that he had never witnessed before. Were you upset about something?

A39 I was upset about Peter not letting me go to the doctor. He told me to go on my own time.

Q40 Document A indicates that following the conversation referenced in Q35 Peter became concerned and immediately called HR Manager Adrienne McCulloch to let her know you had threatened him and you overheard the conversation. If you did not say those words why would Peter Kowalyk make this call and say you did?

A40 I don't know why Peter made the call.

The Company takes the position that threats of physical harm directed to someone in the workplace must be taken seriously and cannot be tolerated. According to the Company, they view threats towards a Supervisor as even more serious as they challenge authority. The Company further argues that Kowalyk believed the threats were real, particularly given the observation that McLaren was tense and angry at the time of the threats. The Company further relies on the fact that in their view McLaren has exhibited unacceptable and threatening behaviour in the workplace in the past and point to discipline in March 1998 and March 2005. Furthermore, the Company takes the

position that McLaren was warned in respect of his accumulation of demerits through consultation and was aware of the consequences if he were to further display unacceptable behaviour, and as such, had sufficient warning that his employment was in jeopardy.

As will be referred to later in this Award, there was an attempt on the part of the Union to provide some form of mitigation on the basis that McLaren was suffering from some sort of brain injury. To that end, various types of medical reports were tendered. The Company addressed this issue by contemplating the possibility that the Union would use the medical information to describe McLaren's conduct as non-culpable or excusable. The Company takes the position that in advancing an argument based on the medical material, the Union is not denying that the adverse behaviour occurred, but rather simply trying to mitigate the behaviour so as to reduce or void the discipline.

The Company recognized that McLaren had sustained an injury as a result of an accident at the Ogden Shops in Calgary in October of 2000. However, the Company's position is that they had never received any medical documentation that McLaren suffers from an ongoing brain injury in consequence of that accident which could result in uncontrollable anger, inappropriate conduct or result in McLaren making threats of physical harm to anyone. The Company poses the question of why if there is an ongoing brain injury as a result of a workplace accident, there would not be an open Workers Compensation claim.

The Union's position as set out in the Joint Statement, raised a question as to whether Progress Rail was in violation of the Human Rights Act on the basis of not providing McLaren with an accommodation due to a disability. In response, the Company indicated that they were not aware of a disability, but rather aware only of certain physical restrictions, which restrictions were taken into account in McLaren's normally assigned duties.

For its part, the Union suggests concerns about Kowalyk engaging in tactics of fear and intimidation in his approach to employees. They point to a letter of concern sent to the Company by email in September 2005. This email was issued by John Murray the recording secretary of the CAW Local. The email was addressed to various individuals at Progress Rail, including R. Wolsey, the General Manager and McCulloch. The text of the email reads as follows:

" A matter of concern has come the union's attention that needs to be discussed and corrected. It involves the treatment of new hires by Peter Kowalyk in the Component Shop.

It has come to our attention that tactics used by Mr Kowalyk are counter productive to both the companies and the new hires best interests. His style of management by fear and intimidation is unnecessary and far outdated.

We believe that Progress Rail interests would be best served by trying to build a good relationship with its new employees, not intimidate them to the point were they do not look forward to coming to work.

A supervisor should assist and guide the new employee in their early days with the company. Also supply them with appropriate training to effectively complete their assignments.

What has been taking place is far from building good company, employee relations.

Threatening with dismissal, harassing employees on a daily basis are but a few examples of what has been taking place.

These individuals are highly motivated and eager to please, we ask that they be given a fair opportunity to complete their first 90 days in a supportive atmosphere not the destructive one created by Mr Kowalyk.

We would like to schedule a meeting with the 2 grievance chairs as well as the 16k union rep (Larry Ladarney) at your earliest convenience."

It should be noted that no meeting occurred in consequence of this email. In any event, having regard to the Union's concerns about Kowalyk, the Union takes the position that it is entirely possible that Kowalyk lied in his memo about what occurred on the morning of March 27, 2006. Furthermore, the Union takes the position that it is entirely plausible that Kowalyk conspired to put McLaren in the position of being over 60 demerits and therefore subject to dismissal.

The Union points to the fact that the onus is on the Company to prove its case and that the Company "must develop a balance of probabilities greater than that of the Grievor."

The Union recognized the potential that the Arbitrator might accept Kowalyk's version of events. Accordingly, the Union cited an excerpt from Brown & Beatty, 4th Edition, Section 7:3660 which includes the following:

"Conduct that is threatening, 1 insolent or contemptuous 2 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. 3 Similarly, it seems generally accepted that, by itself profanity in the workplace is not grounds for discipline. 4 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"

The Union also focused on the issue of mitigation, that is factors that the Arbitrator should take into account, if the determination is made to accept the Company's version of events. In that regard, the Union cites Brown & Beatty, 4th Edition, Section 7:4400.

Additionally, the Union relied on the medical related material to suggest that McLaren was having difficulty with his mental state and suggested the McLaren was in fact disabled.

In arriving at a decision on this matter, I have carefully reviewed all of the case law and the various quotations from Brown & Beatty as presented, whether they are specifically referred to in this Award or not.

Upon careful review of all of the material before me I am satisfied, on more than a balance of probabilities, that on March 27, 2006 McLaren did say to Kowalyk the exact words or a close facsimile of the words, namely:

"I will kill you, I don't care where you are I will fucking kill you. As long as you live in Winnipeg I will find you and kill you."

This conclusion is reached, inter alia, on the basis that this allegation is in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in the place and in these conditions. It is noteworthy, that there had been two occasions, namely on March 20 and March 24, 2006, for Kowalyk to confront McLaren on the issue of leaving his work station, far earlier than the completion of the shift. This was followed by a meeting in the staff room where Kowalyk reminded employees of their obligation to work the required hours. This obviously would have struck a raw nerve with McLaren.

This was followed by a request by McLaren for a meeting with his Union representative, which meeting, according to McLaren was in relation to the fact that Kowalyk was not providing time off for McLaren to see a doctor. McLaren acknowledged that he was upset about this.

When the meeting was confirmed to McLaren, it was obvious that the meeting did not involve Kowalyk but rather was to be with the Human Resources Manager. It is logical to believe that for McLaren this would be a further point of agitation. It was at this point that the threatening words were spoken by McLaren.

Kowalyk's actions are consistent with an individual who was concerned by both McLaren's demeanour and his words. The circumstance was promptly reported verbally by Kowalyk to McCulloch and was then reflected, in some detail, in an email to both the General Manager and the Manager of Human Resources. Additionally, Canadian Pacific Police were called upon.

Not unexpectedly, McLaren denied saying the words in question. When asked why Kowalyk would have reported the offending words, McLaren's only response was to suggest that Kowalyk "is a very good liar".

In summary, it is far more believable and credible that McLaren made the threatening statements as reported by Kowalyk, then that he did not make such statements. There is no adequate evidence to support (or from which a conclusion could be drawn) that Kowalyk was simply lying.

As noted earlier, there was an attempt by the Union to impugn Kowalyk's integrity by reference to an email sent by the CAW Local in September 2005. However, a review of that email indicates that the complaint related solely to allegations concerning the treatment of new hires by Kowalyk. The email contains no details. That aside, as noted, the complaint is directed towards treatment of new hires, and does not reference treatment of long term staff. As such, I do not find this email persuasive nor does it supply any material support to the notion that Kowalyk was lying.

At the end of the day, having considered all the surrounding circumstances an Arbitrator is obliged to make findings of fact. In this instance, having considered the totality of

material (as indicated earlier) I am satisfied that McLaren did use the threatening words alleged.

Earlier in this Award, there is reference to a quotation from Brown & Beatty referred to the Arbitrator by the Union. However following the quotation above cited, Brown & Beatty continues as follows:

"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."

In this instance there were serious threats of harm and death contained in the language used by McLaren towards his supervisor Kowalyk.

As noted earlier, the Union has suggested that even if the Company's version of events is accepted by the Arbitrator, the Union believes there is much reason to mitigate this matter. The Arbitrator has given close consideration to the mitigation factors cited by the Union. It should be firstly noted, of course, that it is incumbent on the employee to prove the existence of any of these mitigating factors.

While mitigating factors should be considered, the factors referred to by the Union will not make a material difference in the disposition of this matter. So for example, one of the mitigating factors referred to in the quotation from Section 7:4400 of Brown & Beatty is whether the offense was committed on the spur of the moment or as a result of a momentary aberration due to strong emotional impulses or whether the offense was premeditated. The Arbitrator does not consider that the offence was premeditated, in the sense that it was a planned course of action by McLaren. However, threats of the character made by McLaren can not, and should not be taken lightly. In fact it is difficult

to conceive of any threat that is more serious and disconcerting than a threat to the life of a fellow employee, let alone a supervisor.

This leaves to be considered the effect of the medical related reports. Some of those reports deal with the physical aspects of the injury suffered by McLaren in 2000 when a lining bar snapped up and hit McLaren in the jaw and face. It appears that over time his physical condition improved. The most recent medical information was a report by Dr. Daniel Globerman a psychiatrist who provided a psychiatric report as requested by the Occupational Health Physician of Canadian Pacific Railway. This report is dated March 29, 2005 and therefore predates the events giving rise to the 40 demerits and the consequent discharge.

I note the following on Page 4 of Dr. Globerman's report:

"Mr. McLaren admitted to experiencing occasional nocturnal panic attacks, indicating that he has experienced similar episodes since the age of 9. I was unable to elicit any other symptoms suggestive of a specific anxiety disorder. There were no symptoms suggestive of psychosis evident.

Mr. McLaren reported that he was in generally good physical health, aside from chronic neck pain, with it being noted that he had a prior diagnosis of myofascial pain previously treated by Dr. Dubo with trigger point injections."

Later in his report, Dr. Globerman notes as follows:

"Clinically Mr. McLaren is presenting with a history consistent with a diagnosis of a Major Depressive Episode, which currently appears to be in partial remission. Mr. McLaren has a past history of a head injury with subjective and objective (as per Dr. Hawryluk's report) concentration and memory deficits. Clinically Mr. McLaren is presenting in a considerably improved fashion than that described in Dr. Hawryluk's report, with this

perhaps being reflective of the improvement in Mr. McLaren's mood subsequent to appropriate treatment with anti-depressant medications."

Towards the latter part of his report, Dr. Globerman comments as follows:

"Mr. McLaren does have a number of vulnerabilities which may have contributed to him responding in an angry manner to his supervisor, with these including his prior head injury and residual depressive symptoms. Mr. McLaren's capacity to cope with stress would be diminished as a result of these two conditions, with Mr. McLaren being more vulnerable to react in an angry or impulsive fashion with provocation. Ongoing abstinence from alcohol is strongly encouraged as intoxication with alcohol is strongly associated with increasing an individual's risk of violence, particularly in an individual with a prior head injury."

It is worthy to note Dr. Globerman's reference to abstinence from alcohol. Indeed, evidence from an earlier arbitration made it clear that McLaren, while abstaining at one time, had again commenced the consumption of alcohol. Of course, at the time of the imposition of the 40 demerits and the consequent termination of employment, it does not appear that the Company was aware of the contents of Dr. Globerman's report.

As a result of earlier decisions of this Arbitrator, and the reduction of demerits arising therefrom, McLaren's record would stand at 40 demerits. As such, even if the 40 demerits imposed for the events of March 27, 2006 were reduced to 21 demerits, the termination from employment would be justified based on the Brown System of Discipline. The medical reports do not sufficiently alter or mitigate the seriousness of the threats made by McLaren, so as to justify a reduction of 20 or more demerits. Having closely considered all of the material before me, there is simply no logical basis that the Arbitrator can find to reduce the discipline by 20 or more demerits. As such, it is inevitable that McLaren will be an employee with an accumulation of more than 60

demerits and therefore subject to termination pursuant to the Brown System of Discipline.

Having regard to the foregoing, the grievance in respect of the demerits and consequent termination from employment is dismissed. While the result is an unfortunate one for McLaren, I am satisfied that it is the inevitable result of McLaren's own conduct. In view of the disposition of this case, it is unnecessary to comment further on the Company's argument concerning the doctrine of laches or the effect it may have on relief.

As is historically the case in arbitrations between these parties, both the Company and the Union have presented their cases with great skill and cited case law that each considered relevant. The clarity of these presentations has assisted the Arbitrator in making the decision.

Dated at Winnipeg, Manitoba this 17th day of June, 2009.



SIDNEY G. SORONOW,
Sole Arbitrator