

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4440**

Heard in Toronto, January 14, 2016,

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the dismissal of Conductor Stephanie Katelnikoff of Calgary, AB.

UNION'S EXPARTE STATEMENT OF ISSUE:

On January 23, 2015, following an investigation, Ms. Katelnikoff was dismissed from Company service for "Please be advised that you have been DISMISSED from Company Service during your probationary period for the following violations; Prairie Region Alberta Summary Bulletin: Reporting of All Injuries, GOI section 11 Item 7.2 Protecting the Accident Scene, CROR Rule 106, CROR General Rule A: (ii), (iii) and (vi) while employed as a Conductor on December 26, 2014."

UNION POSITION

The Union asserts that the investigation was not conducted in a fair and impartial manner per the requirements of the Collective Agreement. For this reason, the Union contends that the discipline is null and void and ought to be removed in its entirety and as a result, Ms. Katelnikoff be made whole.

The Union maintains that the Company has not met the burden of proof necessary to justify formal discipline in the circumstances. Alternatively, it is the Union's position that the penalty of termination is arbitrary, discriminatory, excessive and contrary to the arbitral principles of progressive discipline.

The Union contends that the discipline action taken against Ms. Katelnikoff is unjustified, unwarranted and excessive in all circumstances, including significant mitigating factors evidenced in this matter. The Union requests that the discipline be removed in its entirety and that Ms. Katelnikoff be made whole for all associated loss.

In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company disagrees and denies the Union's request.

FOR THE UNION:
(SGD.) D. Fulton
General Chairperson

FOR THE COMPANY:
(SGD.)

There appeared on behalf of the Company:

J. Bairaktaris – Director, Labour Relations, Calgary

There appeared on behalf of the Union:

K. Stuebing – Counsel, Caley Wray, Toronto
 D. Fulton – General Chairman, Calgary
 D. Edward – Senior Vice General Chair, Calgary
 R. Finnon – Vice General Chair, Wynyard
 R. Hackl – Vice President, Saskatoon
 S. Katelnikoff – Grievor, Calgary

AWARD OF THE ARBITRATOR

The Grievor was hired on July 28, 2014, as a Conductor and dismissed on January 23, 2015. Ms. Katelnikoff qualified as a Conductor at the Calgary Division on December 18, 2014. She had less than six (6) months of service at the time of her dismissal.

The Employer claims that on December 26, 2014, the Grievor failed to report an on-duty injury as required by the December 1, 2014 Summary Bulletin that provides:

Reporting of Injuries/Operating Officers:
 All personal injuries and accidents must be reported immediately to the on-duty Supervisor or applicable RTC, in order to ensure proper handling. Employees seeking medical attention as a result of an injury/accident must notify the immediate supervisor or Company Officer prior to seeing a doctor, except in the case of emergency.

The Company sustains that the Grievor should have informed the RTC or the on-duty Supervisor at the derailment site of her discomfort. The Company maintains that the Grievor failed to advise immediately Trainmaster Tomlenovich that she had been in the dust for an hour and that even after three (3) hours away from it that she still suffered

from the inhalation irritation. Finally, the Employer maintains that she failed to notify her immediate supervisor prior to seeking medical attention for dust inhalation.

The evidence establishes that on December 26, 2014, at approximately 1:00 am or 2:00 am, the train on which the Grievor was assigned derailed at West Switch Banff. Subsequent investigation into the matter determined that the cause of the derailment was a broken track. The bridge over which the locomotive was traveling was destroyed, and fifteen (15) derailed cars fell in a crumpled pile of twisted metal in the waterway. One of the derailed, damaged cars was carrying fly ash and in the investigation report it is stated that this product is hazardous when released into the environment and that the conductor was not aware of these properties:

According to the Material Safety Data Sheet (MSDS) for the Boundary Dam Fly Ash (CAS #68131-74-8), the released material was a coal combustion by-product from the Boundary Dam Power Station in Estevan, Saskatchewan. This product is used as an ingredient in the production of concrete. Its hazardous characteristics when released into the environment include high pH when wet, ability to smother sediment biota, and the presence of trace elements, including metals. This product is toxic by inhalation, and can cause skin and eye irritation. The conductor was not aware of these properties when inspecting the train.

The evidence also shows that the Grievor did feel some discomfort within a few minutes of her inspection of the train between 1:00 am or 2:00 am. On her way to the Brownhouse, the Grievor began to feel increasing discomfort in her lungs and decided to seek medical attention around 8:00 am and advised Mr. Tomlenovich at 8:51 am. Shortly after, Mr. Tomlenovich responded and advised the Grievor that there was fly ash in one of the cars and that if she did not feel better, she should go the hospital, which she did.

The evidence establishes that the Grievor kept the Employer informed of all further medical consultations.

In summary, concerning this last reproach the evidence shows that the Grievor did advise the Company of her discomfort six hours after its first sign. The evidence also reveals that the Grievor was quite nervous and shaken by the scope of the derailment and consulted an EFA Referral Agent a few days later, on December 29.

The Company also states that the Grievor contacted a representative of the media and gave information (her role in the derailment) in violation of GIO Section Item 7.2.

Concerning this matter, the evidence establishes that the Grievor did contact the news photographer to get a copy of the pictures he took and he gave her telephone number to the author of the article who later contacted her. She then requested advice on December 29 and the same day, Mr. Tomlenovich informed the Grievor that she could not speak to the media regarding the incident. She complied with his instructions. Moreover, on that day, Mr. Tomlenovich informed the Grievor for the first time that she had to fill out various reports, including an on-duty injury report.

On the other hand, the evidence reveals disturbing actions or interventions initiated by Assistant Superintendent, Mr. Inglis, who was involved in the administration (follow up) of the Grievor's medical condition following the incident of December 26, 2014. Firstly, Mr. Inglis contacted the EFA Referral Agent that the Grievor had consulted for

post-incident counselling and gave inaccurate information. He also shared his reading of the incident and therefore tried to discredit the Grievor as reported by the EFA Referral

Agent:

Afterward I received a call from the Jason Inglis who explained that the incident happened at night and that it was less likely that it would be traumatic to the employee from where she was seated, she could not have seen a lot. He informed me that the employee has sought the Doctor's help twice already and that after the first Dr. visit she was fine, the next day she went to a different Dr. who prescribed her 5 days off. I explained to Jason that when the employee called explaining that she was experiencing symptoms of critical incident stress and requested a debriefing I had to offer it as per policy.

Also, on January 5 2015, when Mr. Inglis was informed that Ms. Katelnikoff was cleared for safety critical duties with restrictions prescribed for a period of two to three weeks, he informed Company Health Services as follows:

This employee has had a previous issue, an alleged tunnel fumes incident which was not justified and later revealed that it was an allergic reaction to dairy at the Field bunkhouse. I have attached the email that Corey Wolak had received as well as the response to Guido. We will be taking an investigation right away to determine the facts of this matter.

In an email, Mr. Wolak reported that the Grievor "explained that the trip to the Hospital did not have anything to do with the incident [that occurred on August 17, 2004] in the tunnel, it was a severe allergic reaction to dairy". Again, the evidence reveals that Mr. Inglis tries to discredit the Grievor while she was honest at all times. Those harmful interventions initiated by a Company Officer are even more disturbing since he should have provided assistance to the Grievor following her on-duty injury.

Lastly, Mr. Inglis' grounds for termination are clearly discriminatory and when added to the previous interventions it reveals that he acted in bad faith. Following the investigation that he requested, he wrote in the dismissal recommendation:

Conductor Stephanie Katelnikoff has only been with CP since July 28th 2014. Ms. Katelnikoff has been involved in several previous incidents, two of which were prior to her qualifying as a Conductor, one of them she claimed inhalation from locomotive fumes, when it in fact turned out to be an allergic reaction to dairy while at the Field bunkhouse. Ms. Katelnikoff has also been involved in an harassment case with another employee which employee relations has since dealt with. Ms. Katelnikoff was also been involved in a derailment, where she lined a switch underneath a car while switching, resulting in a one 91-car derailment in Alyth yard.

The evidence reveals that the Grievor's sexual harassment complaint was justified and the employee was disciplined accordingly.

The standard of review in the case of a probationary employee is well defined:

It is common ground that the standard of proof required to establish just cause for the termination of a probationary employee is substantially lighter than for a permanent employee. The determination of "suitability" obviously leaves room for a substantial discretion on the part of the employer in deciding whether an employee should gain permanent employment status. By the same token, however, under the instant collective agreement that discretion is not unreviewable. That is plain from the language of article 58.1 of the collective agreement, which expressly permits an appeal against the dismissal of a probationary employee. While the parties addressed argument to the appropriate standard of review in such cases, it is not necessary to exhaustively recount or resolve that debate for the purposes of the instant case. It is sufficient to say that, at a minimum, the Company's decision to terminate a probationary employee must not be arbitrary, discriminatory or in bad faith. It must be exercised for a valid business purpose, having regard to the requirements of the job and the performance of the individual in question.¹

¹ CROA&DR 1568.

In this instant case, the Arbitrator concludes that the evidence reveals that Ms. Katelnikoff acted in compliance with the spirit and intention of the provision of the Summary Bulletin (reporting of all on-duty injuries), which is to keep the Company informed of his or her medical condition as soon as possible (or immediately). She exercised reasonable efforts in this regard. She did advise the Employer when the symptoms were getting worse, namely six hours after the appearance of the first symptoms. Such delay is reasonable given the fact that the symptoms came up while she was involved in a stressful context (major derailment), especially for a Conductor who had just completed her training. The Company should have also taken into account that the Grievor was not aware of the content of one of the derailed cars and therefore could not establish any relationship between her symptoms and its content (fly ash). However, as discussed previously, the evidence establishes that the Grievor was targeted and therefore was not given fair treatment.

Concerning the second blame, the evidence shows that the Grievor did not give any information to a journalist. On the contrary, when the Grievor was invited to give an interview, she sought advice and complied with the instructions. The Arbitrator also finds that calling a photographer to obtain copy of pictures of the incident does not constitute a violation of GOI Section 11. In acting in this way, she did not divulge any information. Under those circumstances, the Company's interpretation of the Grievor's actions appears unreasonable.

Overall, the Arbitrator finds that the grounds cited for Ms. Katelnikoff's dismissal are factually inaccurate and unfounded. Furthermore, those allegations appear to be a camouflage of the Company's actual reasons that are discriminatory and in bad faith.

Even if the Company did not per se dismiss the Grievor on those discriminatory grounds (allergies and a sexual harassment complaint), the written dismissal recommendation drafted by Mr. Inglis speaks for itself. He did take those incidents into consideration and in doing so, his recommendation is in part discriminatory. He was part of the dismissal decision and the evidence shows clearly that from the first day of the incident that occurred on December 26, 2014, Mr. Inglis influenced significantly the process of the Grievor's on-duty injury claim as well as the investigation. All through both processes (on-duty injury claim and disciplinary) he did not act fairly and in the circumstances, the summary discharge of Ms. Katelnikoff was arbitrary and conducted in bad faith.

For the foregoing reasons the grievance must be allowed. The Grievor shall be reinstated into employment with compensation for wages and benefits lost. I retain jurisdiction in the event of any dispute between the parties respecting the interpretation of the implementation of this Award.

February 17, 2016



MAUREEN FLYNN
ARBITRATOR