

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

CASE NO. 4685

Heard in Calgary, May 16, 2019

Concerning

BOMBARDIER TRANSPORTATION CANADA INC.

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

By letter dated November 22, 2017 employee T. Butler was informed that “This letter is in reference to an investigation held on November 2, 2017 regarding your alleged insubordination during your tour of duty on October 27, 2017. The investigation revealed that you were in fact insubordinate toward a company office on October 27, 2017. As a result of this non-compliance, the following will be assessed against your personal record: Suspension without pay for five (5) working days to be served on October 27th, 30th, 31st, November 1st and November 2nd 2017.

JOINT STATEMENT OF ISSUE:

By letter dated December 18, 2017, the Union filed a Step 2 grievance and the Company declined the Step 2 grievance by letter dated January 23, 2018.

By letter dated March 9, 2018, as well as a subsequent Step 3 grievance meeting with the Company on May 2, 2018, the Union appealed the Company’s action at Step 3 of the grievance procedure on the basis that the discipline assessed against Ms Butler to be excessive and that it failed to take into account significant mitigating factors.

The Union has further asserted that the Company’s actions in removing the grievor from service were in response to the grievor filing a formal complaint of harassment. While the Company identified the need for corrective action for the manager involved in the October 27, 2017 incident by letter dated April 27, 2018, there remains no evidence demonstrating such corrective action has taken place.

Further, the Union requested that the discipline be removed from the grievor's record, with redress of any loss of wages or benefits

By letter dated June 13, 2018, the Company responded at Step 3 declining the Union's appeal.

FOR THE UNION:

(SGD.) G. Vaughan
General Chairperson

FOR THE COMPANY:

(SGD.) A. Ignas
Manager, Human Resources

There appeared on behalf of the Company:

- D. McDonald – Counsel, Norton Rose Fullbright, Toronto
- A. Ignas – Manager, Human Resources, Toronto
- R. Doan – Manager Train Operations, Toronto
- B. Crashely – Supervisor Train Operations, Bombardier

And on behalf of the Union:

- M. Church – Counsel, Caley Wray, Toronto
- G. Vaughan – General Chairperson, Toronto
- S. Borg – Vice General Chairperson, Toronto
- T. Butler – Grievor, Toronto

AWARD OF THE ARBITRATOR

The grievor works as a commuter train operator at the Go Train Willowbrook facility in Etobicoke Ontario. She was hired on April 7, 2014.

The grievor was on the Company' Spare Board on Friday, October 27, 2017. In the early afternoon, she entered the office of Michelle Robinson, Manager, Contracts and Administration to inquire about a payroll issue. At about that time, the grievor had discovered that she had not been paid some \$400 that she felt she was entitled to receive for hours worked. The grievor, in that regard, asked Ms. Robinson to look into the OMS records, which she understood would provide her with the necessary information to verify her hours worked.

Ms. Robinson was dealing with an operational issue concerning the crew schedule for the upcoming weekend at the time. Ms. Robinson advised the grievor that she could not address her payroll concern at that time and requested that she submit her concern to the centralized payroll email address. A few days earlier, on October 23, 2017, an email was sent to all employees which stated as follows:

To: All Bombardier Employees
Subject: Payroll Concerns-Email address
Notice # TO-IN-17-155

Please be advised that there is now an email address that you can forward any payroll concerns to:

BombardierPayrollConcerns@gmail.com

If you have an issue with your pay that you would like to bring to our attention, please forward your concern to the email address above.

A paper copy of your concern is no longer necessary

After discussions with Ms. Robinson, the grievor agreed to send the email. She left Ms. Robinson's office and went into the dispatch office. As she stated in her incident statement of October 27, 2017:

I left Michelle's office and I walked right into the dispatch office where the door was open. I went to the dispatch office to see if maybe someone in there could help me figure out my payroll concern. As I didn't like the fact of sending off an email to the payroll concern email address not knowing if I was putting in the right payroll concern. I didn't and still don't have a clear understanding of what is showing in my OMS vs what is on my paycheck.

The grievor was discussing her payroll issue with a dispatcher in the dispatch office, Ms. Lisa Ouwendyk, when Ms. Robinson walked in.

According to the grievor's account of the incident dated October 27, 2017, Ms. Robinson interrupted her conversation with the dispatcher and said in a rude voice "*I just*

told you to put in a payroll concern” to which the grievor indicated in reply that “... Yes, I just wanted to make sure what I was putting in was correct”. A back and forth conversation ensued, according to the grievor, with the grievor stating near the end of the conversation: “I feel like you are attacking me and shouldn’t be talking to me like this. All I am trying to do is figure out my payroll. You told me you were busy so I came here to find out if dispatch can help me”. At that point, the grievor indicates in her incident statement that Ms. Robinson “Raised her voice, and in a rude and unprofessional manner said ‘get out’ and pointed to the door”.

According to Ms. Robinson’s file memo of the incident, which is also dated October 27, 2017, she told the grievor in the dispatch office that Ms. Lisa Ouwendyk did not have time to address the payroll concern because of the same weekend scheduling issue and repeated to the grievor that she should send her payroll concern to the payroll email address. The following exchange then took place, according to Ms. Robinson’s memo:

Grievor: Lisa has a mouth of her own, and if Lisa doesn’t have time, then Lisa can tell me she does not have time.

I said to Lisa: “Lisa doesn’t have time.”

Grievor: “then Lisa can speak for herself, you can’t speak for her”

Ms. Robinson replied: “Yes I can, I am her Manager and she needs to deal with an operational issue right now, and you need to leave”.

Grievor: “you can’t speak to me like that, I have every right to be in here, and I want to speak with a Manager”.

According to Ms. Robinson, the grievor continued to refuse to leave the dispatch office but finally did so with the following parting words to Ms. Robinson:

Grievor: "Fine, I will submit it to the email...not that I will hear anything back for a year".

There were management witnesses present who overheard the above exchange between the grievor and Ms. Robinson. Three witness statements were obtained by the Company and were included in the Company's brief to the arbitrator. All three essentially corroborate Ms. Robinson's version of events in the dispatch office.

The grievor said she was very upset when she left the dispatch office. She went to her car in order to regain her composure and calm down.

The grievor, about ten minutes later, then went into the office of the Supervisor, Train Operations ("STO"). She closed the door behind her and spoke to two individuals. The grievor indicated to them that she wished to make a complaint about a manager. One of the individuals, according to the grievor, mentioned two names to her in the Human Resources office.

There was a knock on the door at that point from Ms. Robinson who was able to observe the grievor in the STO office. The grievor was told by Ms. Robinson that she was being relieved from her assignment that afternoon and would be contacted once further investigative steps were complete.

The grievor concluded her incident statement of October 27, 2017 as follows:

“I, Tasha Butler, would like for this to serve as an official complaint against Michelle Robinson as I feel like based on her actions and tone of voice that she was not treating me ‘fairly, ethically respectfully and with dignity’ [referenced from Operation Employee Handbook]. I feel like Michelle has bullied me and harassed me. As an employee, you’re entitled to, and are expected to preserve a positive harmonious and professional work environment.”

The grievor attended an investigative meeting on November 2, 2017 regarding the events of October 27, 2017. According to the Company, the grievor did not deny the general chronology of events although she disputed the exact words that were said between herself and Ms. Robinson. The grievor was subsequently suspended without pay for five days for insubordination.

The grievor filed a complaint with the Ministry of Labour regarding her allegations of harassment against Ms. Robinson. On March 8, 2018 a representative of the Ministry of Labour attended the Company’s premises to conduct a field visit in response to the grievor’s complaint. The Company, at the direction of the Ministry of Labour, informed the grievor on April 30, 2018 in writing of the results of their internal investigation into the grievor’s complaint. The letter reads as follows:

April 30, 2019
Dear Ms. Tasha Butler,

This is [the] letter to report the findings of the investigation conducted regarding your formal complaint of alleged workplace harassment.

On November 23, 2018 you met with Human Resources (HR) to discuss your formal complaint of alleged workplace harassment towards Mrs. Michelle Robinson. HR subsequently met with Mrs. Robinson to receive her account of the events. After obtaining the two

accounts in reviewing the information provided, the Company has determined that both parties share responsibility for the incident.

As discussed during the meeting on February 7, 2018 the Company is committed to upholding a workplace which is free from workplace harassment and violence. The Company outlined its expectations and committed to you that there would never be a recurrence. As corrective action, Mrs. Robinson will complete an E-learning retraining course on Respect in the Workplace and you will act respectfully moving forward.

Should you have any questions or concerns please do not hesitate to contact me.

Sincerely,

Morgan MacKay
Manager, Human Resources
Bombardier Transportation, Services

The Company notes that an employee will be found to have been insubordinate where he or she disobeys a clear order given by a person in authority. See *Dare Food Ltd. v. BCT, Local 264* (1999) 77 Lac (4th) 409 (Weatherhill). Ms. Robinson, the grievor's manager, ordered that she submit her payroll concerns to the centralized payroll email address. The grievor not only disobeyed that order but also refused to leave the dispatch office when told to do so. The grievor also disobeyed several other related orders and generally created a disturbance in the office on October 27, 2017. The grievor's payroll concern was not an emergency and she had received clear instructions to follow up her concerns by email. The Company had just cause to discipline the grievor. Disciplinary action should not be interfered with unless it is outside the "ballpark" of what is fair, which is not the case here. See *Natrel Inc. v. Teamsters, Local 647* (2005) 136 LAC (4th) 284 at para 63 and *Roland Inc v CPU, Local 310* (1983) 12 LAC (3d) 391 (MacDowell).

The Union submits that the Company relies upon the statements of the managers who were present during the incidents of October 27, 2010. The Union submits the statements are incomplete and disputes their fairness. No statements were taken from the unionized employees who were present during the four separate meetings that occurred in the Company offices. The Union also notes that the Company determined that both employees shared responsibility for the incident in question and yet it was the only grievor who suffered a suspension. The Company's only response to Ms. Robinson, who was investigated long after the grievor was disciplined, was to require that she take an online E-learning retraining course. The cases in this area are clear that no penalty can be justified if such penalty is unevenly applied when considering other employees' degree of culpability. See **CROA 905** and **CROA 3581**. In the end, the Union submits there is no doubt that Ms. Robinson shares some of the blame for the grievor's reaction to her comments.

There is no dispute in the arbitrator's view that the grievor inquired with Ms. Robinson about her payroll issue and that Ms. Robinson told the grievor in her office that she was busy addressing an operational matter concerning the weekend crew schedule. Ms. Robinson also reminded the grievor on October 27, 2017 of the email notice of October 23, 2017 that all payroll concerns could be addressed online. The October 23, 2017 notice to all the Company employees explicitly states that all payroll concerns should be sent to the listed email address.

The grievor was well aware of the new protocol for verifying pay issues through the email system. Instead of going online to fill out her payroll inquiry, as she indicated she would do while she was in Ms. Robinson's office, she chose instead to go to the dispatch office to see if the dispatch office personnel would assist her by showing her the Company's OMS records. That discussion ended, once again, with the grievor leaving the office with the assurance to Ms. Robinson and the others who were present that she would "...fill out the payroll concern and hear back a year later." The fact that the grievor made the same request to the dispatch office personnel for the OMS records after being told to use the email system by Ms. Robinson -and agreeing to do so- was insubordinate behaviour deserving of discipline. The next issue is whether the five-day suspension was an appropriate disciplinary response.

The HR Manager for the Company wrote to the grievor on April 30, 2019 indicating that the results of the investigation into the grievor's complaint of harassment against Ms. Robinson was that neither individual was solely to blame for the incident. The findings of the Company are an important mitigating factor in reviewing the appropriateness of the discipline. Although this is not a case where "like conduct should attract like discipline" (See **CROA 3581**), the grievor should not on the other hand shoulder the entire responsibility for the incident given the unequivocal findings of the Company's own HR department that "both parties share responsibility for the conduct". There remains blameworthy conduct on the part of the grievor who refused to accept the direction of Ms. Robinson to use the email system for payroll concerns as all employees

had been directed to do in a Company-wide email sent out just four days before the incident.

Under the circumstances, and particularly given the shared blame for the incident, I find that the grievor should have been suspended for her tour of duty on the day of the incident but no more. Accordingly, the five-day suspension shall be substituted with a one-day suspension. The grievor shall be reimbursed for the difference in lost wages and benefits. I will retain jurisdiction should any issues arise in the implementation of this award.

May 28, 2019



JOHN M. MOREAU, Q.C.

ARBITRATOR