# CANADIAN RAILWAY OFFICE OF ARBITRATION

# CASE NO. 2622

Heard in Calgary, Wednesday, 10 May 1995

concerning

## CANADIAN NATIONAL RAILWAY COMPANY

and

## CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS (BROTHERHOOD OF LOCOMOTIVE ENGINEERS)

## EX PARTE

**DISPUTE:**

Appeal the discharge of Locomotive Engineer N.W. McInnes, Edmonton, Alberta.

**COUNCIL'S STATEMENT OF ISSUE:**

On July 29, 1993, Company Human Resources Officers interviewed N.W. McInnes with respect to an incident of sexual harassment against a Ms. T. Shroud, which had allegedly occurred on the Company's premises on July 4, 1993. The Company's investigation of this alleged incident lasted approximately two weeks, at the expiry of which the Company concluded that there was insufficient evidence to substantiate the allegations made against N.W. McInnes. The Company subsequently re-opened the investigation of the alleged incident in June 1994. On June 23, 1994, the Company's investigating officers questioned McInnes with respect to incidents which had previously been dealt with by the Company. At the completion of this interview, the Company concluded that McInnes was guilty of sexual harassment, and discharged him effective July 13, 1994.

It is the Brotherhood's position that the Company did not have sufficiently cogent evidence to support a finding that McInnes had been guilty of sexual harassment. It is also the Brotherhood's submission that it was improper for the Company to submit McInnes to two separate investigations with respect to the same alleged incident of sexual harassment in the absence of any new factual evidence which would justify re-opening an otherwise completed investigation. The Brotherhood submits that, by relying upon the sexual harassment charges disposed of by the Company in 1988, McInnes has been disciplined twice of the same offence.

Therefore, the Brotherhood requests that McInnes be reinstated with his full seniority and compensated for all lost wages and benefits including punitive/aggravated damages.

The Company disagrees with the Brotherhood's contentions and has declined the Brotherhood's request.

**FOR THE COUNCIL:**

**(SGD.) WAYNE A. WRIGHT**
**GENERAL CHAIRMAN**

There appeared on behalf of the Company:

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| M. King | – Counsel, Edmonton |
| B. Laidlaw | – Labour Relations Officer, Edmonton |
| R. Reny | – Labour Relations Officer, Edmonton |
| A. Wagner | – Alberta District Transportation |
| T. Shroud | – Witness |

And on behalf of the Council:

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| J. Shields | – Counsel, Ottawa |
| M. W. Simpson | – Vice-General Chairman, Saskatoon |
| D. Shewchuk | – Vice-General Chairman, Saskatoon |
| N. W. McInnes | – Grievor |

## AWARD OF THE ARBITRATOR

This grievance concerns the discharge of Locomotive Engineer N.W. McInnes for sexual harassment. The Company asserts that the grievor engaged in a touching of a sexual nature of a female employee, Ms. Tracy Lee Stroud, on July 4, 1993 while the employee was engaged in the course of her duties as a train movement clerk in the Calder Machine Room, while Mr. McInnes was temporarily promoted to a supervisor's positon at that location. The Council asserts that the conduct alleged has not been proved, and that the Company failed to follow appropriate procedures in its dealings with the grievor concerning the allegations against him.

Both Ms. Stroud and Locomotive Engineer McInnes testified under oath at the hearing. Ms. Stroud relates that on July 4, 1993 she was at her work station, standing before her computer terminal, engaged in a degree of banter with some running trades employees who were standing on the other side of a nearby counter, at a time she estimates to have been shortly before the lunch period. She relates that some of the employees, who were males, were teasing her about the jeans that she was wearing. According to her evidence they had a super-imposed cloth on the side of the thigh which was full of holes. As she described the jeans, they were designed that way, with the blue dungaree material showing under the holes in the super-imposed fabric. She relates that that some of the running trades employees were teasing her about how much she might have paid for jeans with holes in them.

According to Ms. Stroud's evidence, while this banter was ongoing, Mr. McInnes proceeded from his office into the area of her work station. She states that he approached her from behind and placed his hand inside her thigh, stroking it up and down once, saying "Nice jeans!". According to her evidence he then left immediately, saying nothing more. It is common ground that Ms. Stroud did not say anything at the time, and that she did not make any complaint to a supervisor during the course of that working day. She relates that she was extremely troubled by what happened, and spoke with her mother about it that evening. Ms. Stroud relates that shortly thereafter she spoke to the shop timekeeper who, it appears, expressed sympathy for her feelings of discomfort arising from the incident. During the course of the same week Ms. Stroud wrote a letter describing the incident which she left on the desk of her supervisor, Mr. Gerry Dodge. Subsequently, the matter was further investigated by the then superintendent for the Edmonton terminals, Mr. A.J. Wagner. The complainant estimates her conversation with Mr. Wagner to have taken been perhaps a week or more after the incident. Mr. Wagner's evidence is that Ms. Stroud came to him and presented her letter of complaint to him in person on July 26.

Mr. Wagner, in the company of Human Resources Officer R.J. Clarke, met with the grievor on July 29 to obtain his version of the incident. Mr. Wagner relates that the grievor denied touching the complainant in the manner stated. He apparently confirmed that there had been some teasing of her about the jeans that she was wearing. According to Mr. Wagner, Mr. McInnes admitted that he might have touched the outside of the complainant's thigh, poking his finger through one of the designer holes in the jeans, while saying something to the effect that he would not pay the kind of money she had paid for those jeans.

It is common ground that Mr. McInnes was disciplined for sexual harassment arising out of previous incidents in 1988. According to Mr. Wagner's evidence that fact was known to Mr. Clarke at the time of their interview of Mr. McInnes. He states that Mr. Clarke questioned Mr. McInnes as to whether he had not been involved in a sexual harassment complaint in the past. According to Mr. Wagner's evidence Mr. McInnes then said that he had, and went on to state that the charges against him were then "unsubstantiated".

Following the interview Mr. Wagner spoke again with Ms. Stroud to attempt to identify the employees who might have witnessed the incident. It is common ground that his interview of those persons did not provide any witness who could corroborate Ms. Stroud's account of what transpired. Unfortunately, however, it appears that Mr. Wagner was very general in his questions to the employees concerned, and that he merely asked them whether they had seen anything which in their opinion might have constituted sexual harassment. By his own account, he did not ask them specifically whether they saw Mr. McInnes approach or in any way touch Ms. Stroud. For obvious reasons, therefore, the absence of corroborating testimony from other employees who may have been present is of limited weight for the purposes of assessing credibility in the case at hand. Moreover, it appears that the employees in

question were to some extent occupied with documentation at the counter where they were situated, some fifteen or so feet away, and may simply not have been watching. Unfortunately, the indirect method of interrogation used by Mr. Wagner brought forth little useful information, and the issue of fact must be determined on the basis of the credibility of the two principal participants in the incident.

Based on the fact, in his opinion, that there was no corroboration of the incident as described by the complainant by other employees, Mr. Wagner came to the view that he could not then proceed with a disciplinary investigation of the grievor or take any further action. It appears that Mr. McInnes was then advised that no record of the incident would be placed on his personal file, based on the information available. It appears that the Company's decision caused Ms. Stroud to file a grievance against the Company through her own bargaining agent, the CAW. Still later, in May of 1994, she filed complaints of sexual harassment against both the grievor and the Company with the **Canadian Human Rights Commission**. On June 14, 1994 the grievor received the following letter from Mr. Wagner:

> The complaint of sexual harassment against you filed by Ms. T. Stroud has been elevated to the Canadian Human Rights Commission. Upon reviewing the file, information which was not available at that time has come to light, therefore a formal employee statement is required.
>
> Please arrange to report the office of the Superintendent, Edmonton Terminals at Calder at 1000 MDT, Thursday, 23 June 1994 for the purpose of providing an employee statement in connection with the alleged sexual harassment directed towards Ms. T. Stroud by yourself on 04 July 1993 and, information supplied by yourself in the investigation that followed.
>
> If you desire an accredited representative present, please arrange.

Mr. Wagner relates that the decision to re-open the investigation in respect of the alleged sexual harassment complaint made by Ms. Stroud came about because of information which he obtained in April of 1994 in conversations with Mr. B.T. Anderson, his supervisor, and Ms. Sue McConville of the Company's Industrial Relations Department. They then provided him with the file pertaining to the events of 1988, and the grievor's previous discipline for sexual harassment, and asked him to review it. Mr. Wagner states that there were discrepancies between what he found in that file and the representation of what had transpired which had previously been given to him by the grievor at the time of the initial investigation of the July 4, 1993 incident. Mr. Wagner relates that on the strength of what he found in the file, he took the view that the credibility of Mr. McInnes was at issue, based on his earlier statement to himself and to Mr. Clarke, during the course of the investigation of Ms. Stroud's complaint, that the charges of sexual harassment made against him in 1988 were "unsubstantiated". As a result, the disciplinary investigation of Mr. McInnes was duly conducted on June 23, 1994. Following that investigation the grievor received notice of his discharge, effective July 13, 1994, for the sexual harassment incident of July 4, 1993.

Mr. McInnes gives a substantially different account of the incident of July 4, 1994. He states that when he approached the employee's work area he noticed that her jeans had holes in the thighs, as well as in the knees and seat. According to his evidence he commented to her on the holes in her jeans and the fact that they were tight. He states that when she indicated that she had paid $70.00 for them he commented that he would not give her 70 cents for them, and that she shouldn't be wearing them to work. According to Mr. McInnes, his precise words were that she should go home and change.

Mr. McInnes denies that he later told Mr. Wagner and Mr. Clarke that he might have touched the grievor on the outside of her thigh, by placing his finger in one of the holes of the exterior fabric. He states that he might have said that the holes were "big enough to put your finger through". Further, in his testimony in chief he stated that during the course of his interview with Mr. Wagner and Mr. Clarke he did advise them that he had been disciplined in 1988 and had been placed on probation for a year, as a result of a previous sexual harassment charge.

Counsel for the Council submits that the grievor was not properly dealt with, arguing that the Company effectively re-opened the investigation in May of 1994 without any additional evidence in fact coming to light. He submits that the Company's initial decision to do nothing about the incident was the appropriate response, absent any corroboration of Ms. Stroud's complaint by other employees who may have been nearby at the time. According to Counsel, the Company's action in re-opening the matter was prompted by the Canadian Human Rights Act complaint and the related investigation then being conducted by the Canadian Human Rights Commission, rather than by the merits of the incident itself. He submits that the holding of the investigative hearing after such a substantial delay is

tantamount to investigating the employee twice for the same offence, and prejudiced his ability to deal with the facts and present a defence. Further, as to the merits of the complaint, counsel stresses that an allegation as serious as sexual harassment requires clear and compelling evidence. Stressing the absence of any eye witness testimony to support the account of events given by Ms. Stroud, Counsel submits that the Company has failed to discharge the burden of proof in the case at hand.

Counsel for the Company submits that there was no unjustified delay in the case at hand. He notes that the decision to re-open the investigation was made by Mr. Wagner in light of the information which he received in April of 1994, and in particular his discovery of the discipline assessed against Mr. McInnes arising out of incidents in 1988. Counsel submits that the grievor's credibility then, for the first time, came to be questioned, that it was not inappropriate for the Company's officers to proceed to a disciplinary investigation. He submits that, on the whole, the evidence of the complainant, Ms. Stroud, is to be preferred to that of Mr. McInnes, and that the Company's action was justified in the circumstances.

The Arbitrator does not dispute the assertion of the Council with respect to the standard of evidence to be applied in a case of this kind. The seriousness of a charge of sexual harassment has been thoroughly discussed in prior awards of this Office, as has the commensurate standard of proof necessary to sustain so serious a finding. (**CROA 1791**, reported as **Re CNR Co. and CBRT&GW** (1988) 1 L.A.C. (4th) 183 (M.G. Picher)) It remains, however, that a party can adduce clear and convincing evidence through the credible oral testimony of a witness, particularly where the evidence of another witness lacks credibility in matters of material importance. Inevitably, the case at hand turns upon a determination of credibility as between Ms. Stroud and Mr. McInnes, and depends to some degree on the credibility of Mr. Wagner.

Firstly, the Arbitrator is satisfied that Mr. Wagner gave his evidence in a careful and considered fashion, and that his evidence in relation to the statements made to him by Mr. McInnes during the course of the initial investigation of Ms. Stroud's complaint are credible and accurate. Upon a review of the totality of the evidence, including the transcript of the disciplinary investigation held by the Company on June 23, 1994, I am satisfied that in fact Mr. McInnes was not forthcoming during the course of the interview conducted by Mr. Wagner and Mr. Clarke in July of 1993, particularly as concerns his prior discipline for sexual harassment in 1988. I am satisfied, on the balance of probabilities, that when he was questioned as to whether there had been a prior incident he simply replied that there were charges which in fact were unsubstantiated. I cannot find, on the evidence before me, that the testimony of Mr. McInnes before the Arbitrator, to the effect that he had confirmed to Mr. Wagner that in fact he had been disciplined for sexual harassment in 1988 and had been placed on probation for a year can be believed. It should be noted that Mr. Wagner was not involved in the 1988 incident and had no independent knowledge of it. Although it appears that Mr. Clarke might have been in a position to have some knowledge of the the events of 1988, there is no evidence to confirm that he was aware of the discipline which finally issued against Mr. McInnes who held a management position at the time. In the result, I am satisfied that the grievor did intentionally down play, if not misrepresent, the extent of his prior disciplinary record for alleged sexual harassment stemming from 1988. Further, as he apparently held a position of trainmaster at the time, it is not clear to what extent the treatment of his case at that time would have been documented or made the subject of general knowledge.

When close regard is had to the testimony of Mr. McInnes at the arbitration hearing, there is further cause for concern about the credibility of his evidence. Although Mr. Wagner testified that the grievor admitted to him and to Mr. Clarke that he might have touched the outside of the complainant's thigh, by putting a finger through one of the designer holes in the exterior fabric, Mr. McInnes testified at the arbitration that he never made any such concession, and that he did not engage in any such touching. According to his testimony he may, at most, have indicated to the two Company officers that the holes in the thigh of the jeans were big enough to put one's finger through. Again, as I prefer the credibility of Mr. Wagner, and find this aspect of Mr. McInnes' evidence to be less than persuasive.

What of the credibility of Ms. Stroud? Firstly, there is nothing in the record to suggest any motive or basis upon which the complainant would fabricate so serious an allegation against Mr. McInnes. It seems to be common ground that their previous contact was relatively limited, and that there had been no negative incident or discord between them. The evidence further discloses that Ms. Stroud acted relatively promptly in bringing the incident to the attention, firstly of another employee and soon thereafter, of her supervisors. Her account of what transpired has not changed from the initial letter of complaint which she provided to Mr. Wagner in July of 1993. By Ms. Stroud's own written account, the incident occurred extremely quickly, in what would appear to have been the space of a second or

two. There is, in the circumstances, reason to doubt that persons who were otherwise occupied in the same vicinity would necessarily have seen what occurred or heard the remark which Ms. Stroud attributes to Mr. McInnes.

It is clear that the complainant felt extreme concern about this incident from the outset. In recalling it during her evidence she was in tears. Moreover, in her initial letter of complaint she stated, in part, "After this incident, I feel uncomfortable being around this individual & have genuine fears concerning any future encounters." Ms. Stroud reconfirmed those feelings during the course of her testimony.

Regrettably, the Arbitrator is compelled to conclude, on the balance of probabilities, that the evidence in the case at hand does sustain the finding that Mr. McInnes engaged in touching of a sexual nature which would clearly constitute sexual harassment, as alleged by Ms. Stroud. Nor can I find that the re-opening of this matter by the Company in April or May of 1994 was improper or in any way deprived the grievor of his rights. Even if it is assumed, for the purposes of this discussion, that the Human Rights complaint filed by Ms. Stroud caused the Company's officers to look more closely into the question, and prompted Mr. Anderson and Ms. McConville to obtain the record of the 1988 incident and bring it to Mr. Wagner's attention, that would not diminish the import of what was disclosed to Mr. Wagner. For the reasons related above, I am satisfied that he then first learned that in fact Mr. McInnes had been clearly disciplined for sexual harassment in 1988. That, of course, could not be treated as evidence going to the truth of Ms. Stroud's allegation. It could, however, fairly be seen by Mr. Wagner as evidence that Mr. McInnes had sought to deceive him during the course of their interview in July of 1993, when he told him that the charges against him in 1988 were unsubstantiated. In my opinion, Mr. Wagner was entitled to conclude in April or May of 1994 that Mr. McInnes had not been honest and forthcoming, and that the incident should be formally investigated in light of concerns about his credibility. In these circumstances the Arbitrator cannot find that the grievor was subjected to double jeopardy, or that the Company did not have a reasonable basis to re-open the matter, as it did in May of 1994 when Mr. McInnes was summoned to a formal investigation.

The next issue to be considered is the appropriate measure of discipline. In considering that question it is pertinent to give weight to the grievor's prior record. While the sexual touching of another employee can never be condoned, it is arguable that the severity of the action may be tempered if it can be shown to have been an isolated and uncharacteristic gesture by an employee of previous good service and good character. Where, however, an employee has previously been disciplined for sexual harassment of other employees, as is the case with Mr. McInnes who, according to the record, sexually harassed two female employees at Calder in 1988, very different concerns arise. Notwithstanding that Mr. McInnes was found to have engaged in sexual harassment, and was placed on probation by the Company for the period of one year, he did, as found above, engage in a deliberate act of touching which was plainly outside the bounds of permissible conduct, and which was deeply disturbing to the victim. In these circumstances the Arbitrator can find no basis to reverse the decision of the Company to discharge Mr. McInnes.

For the foregoing reasons the grievance must be dismissed.

May 18, 1995

**(signed) MICHEL G. PICHER**
**ARBITRATOR**