

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2985

Heard in Montreal, Wednesday, 13 October 1998

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

**NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND
GENERAL WORKERS UNION OF CANADA (CAW-CANADA)**

DISPUTE:

The assessment of discipline to Mr. W. Kopton, Customer Support Representative, of Winnipeg

JOINT STATEMENT OF ISSUE:

On February 10, 1998 the grievor, Mr. Wolf Kopton, was assessed forty (40) demerits for alleged harassment of fellow employees at the Winnipeg Customer Support Centre. The alleged harassment was said to have taken place "during the last three months of 1997." The assessment of demerits led to his dismissal.

It is the Union's position that the assessment of demerits is unwarranted for the following reasons: 1.) The Company failed to hold proper investigations in connection with the alleged irregularities, and showed a bias in its approach with the intent of convicting the grievor. 2.) The Company was not forthright in sharing all of its investigative findings with the Union; and, 3.) The Company has failed in its burden to show that the grievor is guilty of any of the charges against him. It is further the Union's position that even if the charges could be proved the penalty is exceedingly harsh and unjustified.

The Union requests reinstatement with full compensation for all wages and benefits lost.

The Company denies the Union's request.

FOR THE UNION:

(SGD.) D. OLSHEWSKI
NATIONAL REPRESENTATIVE

FOR THE COMPANY:

(SGD.) J. B. DIXON
FOR: ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

M. G. Sherrard	– Counsel, Montreal
B. Laidlaw	– HR/LR Associate, LeVerendrye District, Winnipeg
J. Dixon	– Business Partner, Pacific District, Vancouver
A. E. Heft	– Manager, Labour Relations, Toronto
K. Markoff	– Senior Manager, Operations, CSC, Winnipeg
A. Parke-Teillet	– HR/LR Associate, CSC, Winnipeg
K. Watson	– Counsel, Montreal

And on behalf of the Union:

D. Olszewski	– National Representative, Winnipeg
R. Johnston	– President, Council 4000
V. Perinot	– Witness
W. Kopton	– Grievor

AWARD OF THE ARBITRATOR

The grievor is a thirty-seven year old customer service representative employed in the Company's national Customer Service Centre (CSC), in Winnipeg. Mr. Kopton had fifteen years of service prior to his discharge on February 10, 1998 following the assessment of forty demerits for the alleged harassment of other employees by the grievor. The Union submits that there is no evidence of improper conduct on the part of the grievor which would warrant discipline or discharge, and seeks his reinstatement with full benefits and compensation.

The record discloses that the Company received complaints respecting the alleged harassment of two employees, Ms. Deidre Murphy and Ms. Joanne Bonneville, both employed as Customer Service Representatives in the CSC. It appears that Ms. Murphy complained of a series of events, which if true, are obviously disturbing. According to the account which she provided to Company investigator Basil Laidlaw, following referral by her local union chair Ms. Linda Nowell, certain of her stored clothing had been defaced with markers and "white-out", her terminal was logged of while she was on a break, her telephone head-set was cut from the cord, the cover of a library book in her possession was torn off, a personal photograph was defaced, the words "You're history ugly bitch" were scrawled into the dust on her car in the Company parking lot and, finally, a bag containing human feces was placed on her desk, accompanied by an obscene note.

Understandably, the allegations related by Ms. Murphy triggered an extensive investigation on the part of the Company. It appears that Mr. Laidlaw interviewed a substantial number of employees with respect to whether they were aware of harassment taking place at work. It should be stressed that the harassment being investigated was not alleged to be in the nature of sexual harassment, but rather harassment through verbal bullying, confrontation and insults. Through the investigation process Mr. Laidlaw obtained a number of statements from employees, some of which resulted in narrative accounts written by himself, and others, as in the case of Ms. Murphy, signed by the employee interviewed.

According to an interview with Ms. Bonneville conducted by Supervisors Ken Carroll and Kathy Markoff, she disclosed "off the record" that she was resigning from her employment because she could no longer tolerate the stress of the job. It also appears that she stated, in part, to Ms. Markoff that she could no longer bear to be near the grievor. She also made it clear that she would not cooperate in any investigation, and indicated that the reason for her quitting her job was "... because I am finding the shift work difficult."

Unfortunately, Ms. Bonneville was not called as a witness, neither in the disciplinary investigation of Mr. Kopton nor before the Arbitrator. Evidence concerning the treatment of Ms. Bonneville is indirectly reflected in a written report of an interview conducted with employee Vivian Bissette prepared by Mr. Laidlaw. It appears that she related to Mr. Laidlaw that she witnessed a confrontation between the grievor and Ms. Bonneville who was replacing employee Michelle Brown on the Ontario desk. It would appear that when Ms. Bonneville transferred an incoming call to the grievor's desk when he was on his lunch break, the customer became upset. When the grievor confronted Ms. Bonneville with the incident, according to Ms. Bissette's account as recorded by Mr. Laidlaw, a heated confrontation took place. He relates Ms. Bissette's account, in part, in the following terms:

Joanne is a meek little employee, she passed on the call and he (Wolf) got upset. I heard Wolf shouting at Joanne, she shouted back. Wanted to go under my desk. I mentioned to Dianne the need to work as a team, morale was terrible, to me it's not a team. The noise is in Wolf's pod there's only 2 in there. I'm not scared of Wolf he's never done me any harm, never felt threatened myself or seen anyone harassed to that degree ... I was sensitive to Joanne's meekness.

Further, Mr. Laidlaw was advised by Equity Manager (Montreal) Bob Nantel that his daughter-in-law, Ms. Bonneville, was being harassed in the workplace by both the grievor and by company service representative Josh Borowski. It also appears that at or about the same time Mr. Laidlaw was advised that Performance Consultant Paul Vandal had received an anonymous letter stating, in part, that a female employee was being harassed by Mr. Kopton and Mr. Borowski.

Mr. Kopton denies having harassed Ms. Bonneville. According to his account of the confrontation described by Ms. Bissette, while he may have spoken loudly and was clearly disturbed by her earlier handling of the call to him, he did not behave improperly. According to his evidence, the workplace is relatively stressful and it is not unusual for employees to communicate directly and forcefully with each other when errors or incorrect procedures are detected.

Employee Vanessa Perinot testified at the arbitration hearing in support of the grievor's account of his encounter with Ms. Bonneville. She indicates that the conflict arose out of a GTW call which Ms. Bonneville apparently mishandled. She states that Mr. Kopton proceeded to Ms. Bonneville's work station in an apparent attempt to ascertain how the call been misdirected. She states that he was rational and calm in his communication with her, and that she lost her temper, and eventually left in tears. It may be noted that Ms. Bonneville's anger at the grievor is reflected in the statement of Ms. Bisette, as related by Mr. Laidlaw, that Ms. Bonneville ultimately responded to Mr. Kopton "... fuck off or you fucking jerk or asshole ... something like that".

The record adduced in evidence by the Company includes a series of statements by Ms. Murphy, dated January 20, 1998, as well as certain notes which she had made to herself on e-mail. She relates an incident of December 11, 1997 in which Mr. Kopton accused her of having her phone on forward. It appears that during the course of the same day there were at least two other occasions on which Mr. Kopton accused Ms. Murphy of not doing her job, and forwarding her calls to voice mail.

According to Ms. Murphy's written statement, on December 12, 1997 she returned from her break to find the grievor and employee Gerry Larkman at her work station. The grievor told her that she had left her phone "live" and that customers were complaining. She denied that that was so. According to her account when she checked the phone it was in fact "live", but according to her account a headset which was not her own was plugged into it. She states that she became angry at both employees and stated "Don't think I don't see what's going on. I've been keeping notes".

Ms. Murphy further relates that on September 16, 1997 she witnessed a strong verbal exchange between the grievor and employee Russ Sawatzky. According to her account, although she is not sure which of the employees might have said it, there was an invitation to "step outside", which caused her to feel "uncomfortable and shaken".

She further relates an incident of December 19, 1997 when she overheard the grievor remark to someone else, "At least I'm not like Deidre, who puts her phone on forward." It appears that the statement was made to employee Gerry Larkman who, according to Ms. Murphy's account, responded "... or accuse people of tampering with her phone."

Under the heading "Miscellaneous" Ms. Murphy further reports that she once heard Mr. Kopton leave what she interpreted to be an abusive message on the answering machine of a person who played in the same hockey league as the grievor, who had apparently loaned his services to another team. Ms. Murphy states, in part "... Wolf had a threatening tone and I did not believe it to be a jest."

Further, in a report dated January 21, 1998 about his discussions with Deidre Murphy Mr. Laidlaw writes, concerning the incidents of gross anonymous vandalism directed towards Ms. Murphy:

I asked her again if she could link anyone specifically to any of the incidents, and if she had any opinion as to who from the group would be capable of doing such things. Again she said she could only link Wolf & Gerry to some specific incidents with the phones, but that they would be capable of doing these things. However she doesn't know them well enough, only what she sees on the surface. She then clarified it by saying that Wolf would be capable, he's been more vocal and "in your face" than anyone else in the group.

Unfortunately, as with Ms. Bonneville, Ms. Murphy was not called to testify at the arbitration hearing. Further, it appears that at the level of the Company's own investigation reliance was placed entirely on her written statements and the accounts of her interviews recorded by Mr. Laidlaw. Again, the grievor, who attended the hearing, denies that he deliberately or systematically harassed Ms. Murphy. According to his account, supported in part by the testimony of Ms. Perinot at the arbitration hearing, Ms. Murphy was a sub-standard employee who did not field her share of incoming calls, and whose performance made life difficult for those working around her. Both Mr. Kopton and Ms. Perinot testified that on the occasion of the December 12th incident, when the grievor and Ms. Larkman were found checking Ms. Murphy's phone, the phone was in fact left on forward. Ms. Perinot relates that she was there, and herself observed Ms. Murphy's telephone. According to her account Ms. Murphy had devised a "run-around system" whereby her calls were forwarded to a telephone number which she did not recognize.

Upon a close review of the entirety of the material presented, the Arbitrator has grave concerns about the nature of the case presented by the Company. In this matter the Company bears the burden of proof. It must establish, on the balance of probabilities, that the grievor engaged in a degree of deliberate harassment and bullying of other employees so as to justify the assessment of forty demerits and his ultimate termination from employment.

Remarkably, however, there is no direct testimony whatsoever adduced from either of the victims of the grievor's alleged harassment. On the opposite side of the ledger, both Mr. Kopton and fellow employee Vanessa Perinot testified at the arbitration hearing, and were subject to cross-examination. As this Office has previously noted, in matters of conflicting credibility, particularly having regard to serious allegations, direct evidence is generally to be preferred to hearsay. (See, e.g., **CROA 938, 1133, 1241, 2419, 2667, 2689, 2813.**)

In the instant case virtually all of the evidence advanced by the Company is hearsay, principally in the form of narrative accounts related in the written reports of Mr. Laidlaw based on his conversations with a number of employees and reports he received from supervisors. While it may be that an industrial enterprise must, of necessity, make decisions and take courses of action based on such second hand reports, a quasi-judicial tribunal charged with making determinations as to serious allegations against individuals cannot, particularly when the only direct evidence before it is to the contrary. Within a certain framework the Company's perspective is understandable. Mr. Kopton is a relatively rough-hewn individual who is neither soft spoken nor given to diplomatic turns of phrase. It further appears that on prior occasions he has been disciplined for abuse, both written and spoken, of a customer and another employee. While those considerations can have a legitimate bearing on determining the appropriate penalty to be assessed against him, they bear little probative weight for the purposes of deciding whether he did or did not engage in the conduct alleged against him. This is not, in any event, a hearing in which the Company seeks to prove its case on the basis of similar fact evidence.

For reasons which should seem obvious, reliance upon third party interviews for the determination of important individual or company rights is a less than optimal method of fact finding, particularly where the accuser or witness is not available to be questioned by the employee or his or her union representative in the course of the disciplinary investigation. It is obviously difficult for a union to meet a case so presented, and the result may be the tendering of contradictory written statements at arbitration. For example, to counter the interview of Ms. Bonneville by Mr. Laidlaw, the Union files a written report of Regional Bargaining Representative Rick Doherty, who also interviewed Ms. Bonneville. According to Mr. Doherty, Ms. Bonneville indicated that there was only one incident with the grievor, and that she felt equally that she had been harassed by another employee, whom she declined to name. She further elaborated, according to Mr. Doherty, that her reason for leaving the workplace was that "... the Company could not or would not offer her better hours of work or work in a different department which she had asked for ... She thought that for the quality of life for herself she did not want to continue to working shift work and odd hours." Which hearsay document is the Arbitrator to believe, and absent Ms. Bonneville as a witness subject to cross-examination, how is anything to be meaningfully assessed with respect to the single incident involving the grievor and Ms. Bonneville, relied upon substantially by the Company to sustain Mr. Kopton's discharge? It is also questionable whether, in any event, a single confrontation can fairly be termed "harassment". According to one dictionary definition "harassment" means "... to annoy persistently"(Webster's Ninth New Collegiate Dictionary, 1986).

Similar concerns as to the quality of evidence arise with respect to the allegations concerning Ms. Murphy. There appears to be little doubt that Ms. Murphy was a less than exemplary employee. According to the grievor's account Customer Support Unit Manager Dianne Borowski periodically took him out for coffee to discuss a number of issues, including the performance of Ms. Murphy, whom Mr. Kopton was informally charged with overseeing. In that context it is less than clear that it was out of place for Mr. Kopton to take issue with inappropriate work practices engaged in by Ms. Murphy. Nor does it appear that his criticisms of her came as any surprise to the Company at the time of the disciplinary investigation, as they were reasonably well known to Ms. Borowski.

Of equal concern is the apparent innuendo, contained in the reports of Mr. Laidlaw, which, notwithstanding the official position of the Company taken at the hearing, would tend to associate Mr. Kopton with the heinous acts of vandalism directed towards Ms. Murphy. It should be stressed that there is not a jot of evidence to sustain any such connection, and indeed it appears that on the occasion of one of the more serious incidents Mr. Kopton may not have been at work.

Given that Ms. Murphy was viewed by employees other than Mr. Kopton as being a problem in the workplace, a situation apparently known to Supervisor Borowski, it is difficult to understand the assessment of forty demerits and the grievor's discharge for what at the highest appears to be a single confrontation with Ms. Bonneville, and some three or four encounters between Ms. Murphy and Mr. Kopton, some of which involve Mr. Kopton making remarks to others and not to Ms. Murphy herself. Even if the Arbitrator accepted the evidence as establishing the allegations of Ms. Murphy in respect of the incidents of December 11, 12, 16 and 19, 1997, as well as the "miscellaneous" incident, involving the telephone message to a hockey player, the facts would fall well short of

justifying the assessment of discipline at the level assessed by the Company. For the reasons related, however, I cannot accept that those incidents disputed in the direct testimony of Mr. Kopton are proved as related in the hearsay documentation tendered.

In the result, the grievance must be allowed. The evidence presented by the Company fails to establish, on the balance of probabilities, that the grievor harassed employees Joanne Bonneville and Deidre Murphy in a manner that justifies the assessment of any discipline. The Arbitrator directs that the grievor be reinstated into his employment, without loss of seniority and with compensation for all wages and benefits lost.

November 2, 1998

(signed) MICHEL G. PICHER
ARBITRATOR