# CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

# CASE NO. 3465

Heard in Montreal, Tuesday, 11 January 2005

concerning

## CANADIAN NATIONAL RAILWAY COMPANY

and

## UNITED TRANSPORTATION UNION

## EX PARTE

**DISPUTE:**

Harassment and intimidation of Mr. P. Croteau, jointly and severally, by Company Officers Ms. K. Stewart and Mr. T. Cowieson, this in violation of CN's Human Rights Policy, the Canadian Human Rights Act, Privacy Act, the Canada Labour Code and the Canadian Charter of Rights and Freedoms.

**UNION'S STATEMENT OF ISSUE:**

The Union submits that beginning on or about September 2003, the Company (Ms. K. Stewart and Mr. T. Cowieson) did continually harass and intimidate Mr. Croteau and Mr. Croteau's family as a result of Mr. Croteau's personal illness and work related injuries.

The Union filed a grievance to the Company on September 28, 2004. The Company has not responded to the grievance. The Union submits the situation has not been resolved. The situation remains intolerable for Mr. Croteau and his family.

It is the Union's position that the Company, by way of its officers (Ms. K. Stewart and Mr. T. Cowieson) did jointly and severally violate CN's Human Rights Policy, the Canadian Human Rights Act, the Privacy Act, the Canada Labour Code and the Canadian Charter of Rights and Freedoms and implied rights with respect to the collective agreement 4.16.

The Union requests that the Company find that Ms. Stewart and Mr. Cowieson, jointly and severally, did improperly and illegally harass and intimidate Mr. Croteau and Mr. Croteau's family.

In finding a violation, the Union requests that the Company direct Ms. Stewart and Mr. Cowieson to cease and desist from harassing and intimidating Mr. Croteau and Mr. Croteau's family. That the Company provide a written apology to both Mr. Croteau and Mr. Croteau's family for such improper and illegal harassment and intimidation. In addition, to compensate Mr. Croteau all loss wages resulting from his absence from work due to such improper and illegal harassment and intimidation.

In addition, the Union submits that the actions of Ms. Stewart and Mr. Cowieson, jointly and severally, were extremely egregiousness. In consideration of this unacceptable behaviour the Union additionally requests that the Company provide Mr. Croteau and his family equitable compensation, as deemed appropriate in the circumstances, for such improper and illegal harassment and intimidation.

On December 6, 2004, the Company wrote the Union advising that the Company will be raising a preliminary objection regarding the arbitrability of the Union's grievance.

On December 6, 2004, the Company wrote CROA&DR (copied to the Union) advising that should the Union progress an *ex parte* statement of issue with respect to the Union's grievance it would have a preliminary objection

regarding arbitrability. The reasons for the preliminary objection provided stated "Complaint vs. Grievance – No article in Agreement 4.16".

On December 7, 2004, the Union wrote the Company advising that it would be proceeding to file to arbitration by way of an *ex parte* statement of issue. The Union referenced the Company's intent to raise its preliminary objection. The Union advised the Company, *inter alia*, that it would request that the Arbitrator address all matters in dispute, including the substantive issue raised by the Union with respect to the grievance submitted.

The Union submits that all matters with respect to the Union's "Policy Grievance" are now properly before the Arbitrator for resolution.

**FOR THE UNION:**

**(SGD.) R. A. BEATTY**
**GENERAL CHAIRPERSON**

There appeared on behalf of the Company:

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| J. Coleman | – Counsel, Montreal |
| J. P. Krawec | – Manager, Labour Relations, Toronto |
| B. J. Hogan | – Manager, Labour Relations, Toronto |
| S. Grou | – Manager, Labour Relations, Montreal |
| D. Gagné | – Manager, Labour Relations, Toronto |
| M. Becker | – Director, Labour Relations, CN North America, Chicago |

And on behalf of the Union:

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| M. Church | – Counsel, Toronto |
| R. A. Beatty | – General Chairperson, Sault Ste. Marie |
| J. Robbins | – Vice-General Chairperson, Sarnia |
| G. Anderson | – Vice-General Chairperson, London |
| W. G. Scarrow | – Vice-Local Chairperson, Sarnia |
| R. LeBel | – General Chairperson, Quebec City |
| B. R. Boechler | – General Chairperson, Edmonton |
| R. A. Hackl | – Vice-General Chairperson, Edmonton |
| J. W. Armstrong | – Vice-President, UTU-Canada, Edmonton |

## PRELIMINARY AWARD OF THE ARBITRATOR

The Company makes a preliminary objection that the grievance, which alleges harassment, is not arbitrable. It submits that the grievance form, as well as the *ex parte* statement of issue, are not in compliance with the requirements of the collective agreement and of the Memorandum of Agreement establishing this Office. Specifically, the Company submits that no article of the collective agreement is cited as having been violated. In these circumstances it submits that the grievance should be dismissed. The Union relies on recent decisions of the Supreme Court of Canada, as well as the provisions of the **Canada Labour Code**, to argue that the Arbitrator does have jurisdiction in these circumstances to deal with alleged violations of the **Canadian Human Rights Act**, the **Privacy Act** and the **Canada Labour Code**. It submits that the grievor was harassed, contrary to the **Canadian Human Rights Act** in his treatment at the hands of two supervisors by reason of his illness or injury, a status protected under the **Act** and in respect of which a board of arbitration has jurisdiction.

The facts surrounding the grievance are not in dispute. Mr. Croteau is employed as a yard helper in Sarnia, Ontario, having been hired in 1992 and having worked in various job classifications in more than one bargaining unit, including as trackman, labourer, operator, helper and brakeman in and out of a number of terminals.

On or about July 27, 2004 the grievor filed a seventeen page complaint alleging an extensive series of acts which he submits were harassment by two named supervisors during the period between September of 2003 and July 8, 2004. The complaint was filed through the Union's Legislative Board Chairperson, Mr. Glenn King under the procedures of the Human Rights Harassment Policy adopted by the Company in 2003. Having received responses from the two supervisors in August and September of 2004 the Company sought to schedule a meeting concerning the complaint, but was advised that Mr. King would not be available until October of 2004. In the interim, the instant grievance was filed by the Union on September 28, 2004.

It appears that the Company's Human Resources Manager, Ms. Suzanne Fusco, made extensive efforts to schedule the meeting to pursue the complaint under the Company's harassment policy procedures. An offer to meet Mr. King on several proposed dates in November received no response. When Ms. Fusco advised Mr. King of possible dates in December he answered that the grievor was off work due to illness and would not be available until further notice. In response Ms. Fusco indicated that the matter would be held in abeyance pending Mr. Croteau's availability to participate in the process. Having heard nothing further, the Company's Senior Manager of Human Resources, Mr. Terry Gallagher, communicated to Mr. King in the following terms by letter dated December 20, 2004:

> In an effort to expedite the review of Mr. Croteau's claims and to complete our investigation in a timely manner, we are amendable to any reasonable accommodation you or Mr. Croteau wish to suggest that would bring about a discussion of his concerns, and issues, and hopefully bring closure to the situation.

It would appear that nothing has happened since that communication, and that the processing and possible resolution of the grievor's complaint under the Human Rights Harassment Policy is still pending.

The grievance letter filed by the Union on September 28, 2004 took the form of a letter addressed to the Company's Senior Vice-President for Eastern Canada from the Union's General Chairperson. That letter alleges, among other things, that in November of 2003 a supervisor "badgered" the grievor to disclose the details of a personal medical condition which had occasioned his absence. In December of 2003 the grievor was made the subject of a disciplinary investigation concerning his attendance at work in the period commencing in September of 2003, resulting in a written reprimand. In January of 2004, when he sustained an injury at work, the grievor alleges that the same supervisor became hostile and angry towards him when he submitted his "injury on duty" form. The grievance alleges that he was then subjected to questioning by the supervisor for some five hours and was released after being at work for a total of thirteen hours. The grievance further alleges that in March of 2004 the grievor sustained a knee injury while at work and, upon filing the necessary documentation, was again confronted with an angry and aggressive response from his supervisor. The grievance alleges that the supervisor asserted that the injury sustained by Mr. Croteau were unacceptable and that she would put an end to it. Subsequently the grievor was declared by his physician to be unfit for duty from March 10 to March 29, during which time the Company placed him under surveillance by a private investigator.

A further disciplinary investigation ensued during which the Company presented the resulting video taped evidence of the activities of the grievor and his family, apparently agreeing that they did not disclose any impropriety. The complaint relates that no discipline has issued pursuant to the investigation, albeit that it remains open under an extension of time limits granted by the Union. In the interim, Mr. Croteau complained to another supervisor to the effect that he was being targeted and that the activities of the private investigator were improper, alleging animosity aimed at him. The complaint relates that the grievor is presently under the care of a physician for "severe traumatic stress" apparently caused by the grievor's belief that a company supervisor is bent on ending his employment with the Company. By way of remedy, the grievance seeks an apology to the grievor and his family, assurances that he will not be disciplined and compensation for all earnings lost. The Union also seeks "equitable compensation" for Mr. Croteau and his family for the alleged harassment and intimidation.

The Company submits that to the extent that the grievance and subsequent *ex parte* statement of issue do not identify any article of the collective agreement allegedly violated, the grievance is not arbitrable. In that regard the Company argues, in part, the language of clause 10 of memorandum of agreement establishing the CROA&DR which reads as follows:

> **10.** The joint statement of issue referred to in clause 7 hereof shall contain the facts of the dispute and reference to the specific provision or provisions of the collective agreement where it is alleged that the collective agreement had been misinterpreted or violated. In the event that the parties cannot agree upon such joint statement either or each upon forty-eight (48) hours notice in writing to the other may apply to the Office of Arbitration for permission to submit a separate statement and proceed to a hearing. The scheduled arbitrator shall have the sole authority to grant or refuse such application.

Counsel for the Union submits that recent decisions of the Supreme Court of Canada make it clear that by reason of the provisions of the **Canada Labour Code** the protective provisions of employment related statutes are to be implied as terms contained within the collective agreement and can, of themselves, be the basis for an

arbitrable grievance through the grievance and arbitration process of the collective agreement. In support of that position he cites three decisions of the Supreme Court of Canada: **Re Weber v. Ontario Hydro** [1995] 2 S.C.R., 929; **Re New Brunswick v. O'Leary**, [1995] 2 S.C.R., 967; **Re Parry Sound (District) Social Services Administration Board v. O.P.S.E.U. Local 324**, [2003] S.C.C. 42. The Union further relies on the recent decision of Arbitrator Owen Shime in **Toronto Transit Commission and Amalgamated Transit Union**, an as yet unreported award dated October 6, 2004.

The Company's harassment policy, found within a document entitled "*Human Rights Policy – Harassment Free Environment*", defines harassment, in part, in the following terms:

> Harassment includes any conduct, comment, gesture or contact which is likely to cause offence or humiliation to any employee, employment candidate, client or member of the general public. It is an unacceptable behaviour which denies individuals their dignity and respect. Such behaviour threatens to adversely affect the work performance or the employment relationship of the individual and creates an intimidating, hostile or offensive work environment.

The policy also contains the following mission statement:

> The Company will act promptly to investigate, resolve and remedy cases of harassment brought to its attention, whether they are made informally or formally. The Company undertakes to act on all complaints to ensure they are resolved quickly, confidentially and fairly. Accordingly, the Company will impose sanctions on any employee, regardless of position, where harassment is evident up to and including dismissal. Investigation and discipline involving unionized employees will be consistent with the procedures of the applicable collective agreements.

The issue in these proceedings is whether this Office, or any board of arbitration, can seize jurisdiction of a grievance which cites violations of work related statutes, and makes no reference to any article of the collective agreement as being allegedly violated. Intrinsic to the analysis of the issue are the provisions of section 60.1(a.1) and 60.1(b) of the **Canada Labour Code** which provide as follows:

> **60. (1)** – An arbitrator or arbitration board has
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> …
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> **(a.1)** the power to interpret, apply and give relief in accordance with a statute relating to employment matters, whether or not there is conflict between the statue and the collective agreement;
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> …
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> **(b)** power to determine any question as to whether a matter referred to the arbitrator or arbitration board is arbitrable.

At one time the conventional wisdom was that a statutory provision such as that in section 60.1 of the **Canada Labour Code**, and analogous provisions of provincial labour relations statutes governing arbitration, applied only to allow a board of arbitration to disregard the provisions of a collective agreement which conflict with a public statute and to effectively enforce the higher standard of the statute itself. That approach flows largely from the decision of the Supreme Court of Canada in **McLeod v. Egan** [1975] 1 S.C.R. 517, a decision which predates the amendment of the various labour codes in Canada granting to arbitrators the power to interpret and apply employment related statutes. In that case the Court ruled that an arbitrator cannot, in effect, interpret an open ended management rights clause so as to allow employees to be scheduled for hours in excess of the limit mandated by the **Employment Standards Act**, S.O. 1968, c.35. To borrow from the language of old estoppel law, the generally accepted view was that provisions such as section 60.1(a.1) of the **Canada Labour Code** were intended as a shield, and not as a sword. In other words, they could be used to protect employees against what would otherwise be the application of illegal or abusive provisions of a collective agreement which are contrary to the standards of a public statute. In such cases, however, the jurisdiction of the board of arbitration was generally thought to be grounded in the impugned provision of the collective agreement.

The recent decision of the Supreme Court of Canada in **Parry Sound**, however, represents a substantial evolution of the concept originating in **McLeod v. Egan**, and arguably interprets provisions such as section 60.1(a.1) of the **Code** as a sword which can be unsheathed to independently ground a grievance, regardless of the express terms, or the silence, of a collective agreement, in the matter of the rights and obligations being enforced. In

**Parry Sound** the majority of the Supreme Court of Canada found that a board of arbitration could take jurisdiction of a grievance of a probationary employee who had been discharged. Although the collective agreement expressly provided that a probationary employee could be discharged at the discretion of the employer without recourse to arbitration, the Court sustained the decision of Arbitrator Paula Knopf to find that the arbitrator could, through the grievance and arbitration provisions of the collective agreement, enforce the protections afforded to the grievor under the **Ontario Human Rights Code**, in light of her allegation that she had been discharged by reason of having taken pregnancy leave. At p. 173, Iacobucci J. stated the following conclusion on behalf of the majority of the Court:

> … it is my conclusion that the Board was correct to conclude that the substantive rights and obligations of the *Human Rights Code* are incorporated into each collective agreement over which the Board has jurisdiction. Under a collective agreement, the broad rights of an employer to manage the enterprise and direct the work force are subject not only to the express provisions of the collective agreement, but also to statutory provisions of the *Human Rights Code* and other employment-related statutes.

It is clear that the Court consciously moved the fundamental principle underlying **McLeod v. Egan** to a much broader application. In dealing with the analysis of **McLeod v. Egan**, and disagreeing with the dissenting opinion of Major and Lebel JJ., the majority wrote as follows at pp 175-77

> Major J. states that this case [*Mcleod v. Egan*] stands for the proposition that a union and employer are restricted from making an agreement contrary to law. This rule, he states, is no more than a modern application of a long-standing rule that courts will not enforce contracts that are illegal or against public policy. This may be true, but I believe it important to consider carefully what it was that made the collective agreement in *McLeod* objectionable. In *Mcleod*, the collective agreement did not expressly state that the employer was authorized to require overtime beyond 48 hours a week. It did, however, contain a broad management rights clause that recognized the employer's right to control all operations and working forces, including the right to discipline employees and to schedule operations. The collective agreement was objectionable because the powers it extended to the employer were sufficiently broad to include the power to violate its employees' rights under s. 11(2) of the *ESA*, 1968.
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> As a practical matter, this means that substantive rights and obligations of employment related statutes are implicit in each collective agreement over which an arbitrator has jurisdiction. A collective agreement might extend to an employer a broad right to manage the enterprise as it sees fit, but this right is circumscribed by the employee's statutory rights. The absence of an express provision that prohibits the violation of a particular statutory right is insufficient to conclude that a violation of that right does not constitute a violation of the collective agreement. Rather, human rights and other employment-related statutes establish a floor beneath which an employer and union cannot contract.
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> As a result, the substantive rights and obligations of the parties to a collective agreement cannot be determined solely by reference to the mutual intentions of the contracting parties as expressed in that agreement. Under *McLeod*, there are certain terms and conditions that are implicit in the agreement, irrespective of the mutual intentions of the contracting parties. More specifically, a collective agreement cannot be used to reserve the right of an employer to manage operations and direct the work force otherwise than in accordance with its employees' statutory rights, either expressly or by failing to stipulate constraints on what some arbitrators regard as management's inherent right to manage the enterprise as it sees fit. The statutory rights of employees constitute a bundle of rights to which the parties can add but from which they cannot derogate.
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> In some sense, *McLeod* is inconsistent with the traditional view that a collective agreement is a private contract between equal parties, and that the parties to the agreement are free to determine what does or does not constitute an arbitrable difference. But this willingness to consider factors other than the parties' expressed intention is consistent with the fact that collective agreement bargaining and grievance arbitration has both a private and public function. The collective agreement is a private contract, but a contract that serves a public function: the peaceful resolution of labour disputes. See for example Professor P. Weiler, "The Remedial Authority of the Labour Arbitrator: Revised Judicial Version" (1974), 52 *Can. Bar Rev.* 29, at p. 31. This dual purpose is reflected in the fact that the content of a collective agreement is, in part, fixed by external statutes.

> Section 48(1) of the *LRA*, for example, dictates that every collective agreement must provide for final and binding settlement by arbitration of all differences arising under a collective agreement. Section 64.5(1) of the *ESA* provides that the Act is enforceable against an employer as if it was part of the collective agreement. In each collective agreement, certain procedural requirements and substantive rights and obligations are mandatory. In *McLeod*, the Court determined that these include the obligation of an employer to exercise its management rights in accordance with the statutory rights of its employees.

In the result, at p. 188 the Court stated the following conclusion:

> For the foregoing reasons, the Board was correct to conclude that the substantive rights and obligations of the *Human Rights Code* are incorporated into each collective agreement over which an arbitrator has jurisdiction. Because of this interpretation, an alleged violation of the *Human Rights Code* constitutes an alleged violation of the collective agreement, and falls squarely within the Board's finding that the subject matter of Ms. O'Brien's grievance is arbitrable. The Board's finding that the discriminatory discharge of a probationary employee is arbitrable is not patently unreasonable.

To the sure, the approach taken by the majority in **Parry Sound** has provoked some discussion, not unlike prior concerns expressed over the Court's "inferential" finding of sweeping arbitral jurisdiction in **Weber** and **O'Leary**. Lebel and Major JJ. expressed their dissent, in part, in the following terms in **Parry Sound**, at pp. 202-203:

> Iacobucci J.'s reasons state that the legislature must have intended that s. 48(12)(j) grant arbitrators jurisdiction over claims based on statutory protections. But I believe that this provision, coming as it does at the end of a long list of uncontroversial arbitrator's powers (the power to administer oaths, the power to accept oral or written evidence, etc.), does no more than confirm the rule from *McLeod*. Arbitrators may not enforce any contract that violates public policy by "contracting around" the protections of statute. To read into this innocuous provision the extraordinary power to take jurisdiction of any claim based on statute, despite the plain wishes of the parties to the contract, is a subversion of the legislative intent. If the legislature wished to thus expand the power of arbitrators, it surely would have signalled its intent more clearly.
>
> It is not for the court but rather the legislature to decide that particular statutory protections are so important that they must be injected into every collective agreement. Iacobucci J.'s rather expansive holding stands upon an extension of a 30-year-old case and an inexplicable notion of public policy. It does not respect the intention of the parties and the legislature, and is inconsistent with the court leaving to the legislature the duty of implementing what I take to be new policy.

(See also M.G. Picher, "Defining the Scope of Arbitration: The Impact of Weber – An Arbitrator's Perspective", (1999-2000) Vol. I *Labour Arbitration Yearbook 99*. )

Whatever the merits of the academic debate, a board of arbitration, including this Office, is compelled to take the law as it finds it. It would appear, therefore, that a grievance alleging little more than the violation of a work related statute is properly arbitrable within the jurisdiction of a board of arbitration. That seems to be the lesson reflected in the award of Arbitrator Shime in **Toronto Transit Commission and Amalgamated Transit Union**, dated October 6, 2004. In that case Arbitrator Shime found that the collective agreement before him contained no express provision prohibiting the abuse or harassment of employees by supervisors. He found that the Company and a named supervisor did engage in the improper harassment of the grievor to the extent of inflicting upon the employee a condition of stress related anxiety for which he required medial attention. Arbitrator Shime found the conduct of the Company to be in violation of its obligation to maintain a safe and healthy workplace as required by the **Occupational Health and Safety Act of Ontario** R.S.O. 1990 c. O-1. Following **Weber** and **O'Leary**. He concluded that he had jurisdiction to deal with the grievance. He also found that the employer was constrained by the standard of reasonableness in the application of the management rights clause of the collective agreement. The extensive reasons of Arbitrator Shime contain the following conclusion:

> Having regard to the foregoing, it is my view, that there are a number of alternate grounds for rejecting the Commission's objection to jurisdiction. First, and at the very least, if management is not required to exercise its responsibilities reasonably, it must not abuse its authority and act in a manner that constitutes abuse or harassment of employees. Following **O'Leary**, even absent an express provision referring to managerial abuse or harassment, and apart from the management

> rights provision, I determine it is an implied term of the collective agreement that he work of a supervisor must be exercised in a non-abusive, non-harassing manner.

Having reviewed the provisions of the **Occupational Health and Safety Act**, Arbitrator Shime reasoned as follows:

> In my view the *Occupational Health and Safety Act*, being a matter of public policy, requires the Commission to exercise its managerial functions in accordance with the legislation and particularly Section 27(2)(1) of the Act, which requires a supervisor to take "every reasonable precaution … for the protection of a worker." In effect, a supervisor's managerial authority is circumscribed by operation of the legislation. Accordingly, I determine when a supervisor exercises his/her authority under the collective agreement, it is an implied term that the supervisor do so in a manner that is consistent with the legislation.

In the result, in the **Toronto Transit** award Arbitrator Shime found violations of the implicit terms of the collective agreement and directed the compensation of the grievor by the restoration of his sick leave credits and the topping up of his sick pay. Additionally, he ordered the payment of $25,000 in general damages against the supervisor and the Company, jointly and severally. Finally, he directed the employer to ensure a harassment free workplace, including the institution of an anti-abuse and an anti-harassment training program for all management, coupled with a direction that the grievor be allowed to work free of the presence of the offending manager.

How do all of the foregoing principles apply to the case at hand? In my view there can be little doubt but that the grievance must be found to be arbitrable. Firstly, the letter of the Union's General Chairperson specifically invokes three work-related statutes with relatively clear specificity as to how it is alleged they were violated. By any reasonable reading the letter would indicate that in the Union's view the Company's managers sought to violate the grievor's rights of privacy by attempting to have him disclose the nature of a personal illness. The Union's allegations, obviously as yet unproved, also extend to asserting that the Company resorted to disciplinary procedures to effectively discourage the grievor from making claims in relation to work-related injuries in a manner that would amount to discrimination on the basis of an illness or disability. Moreover, if it were necessary to find reference to any collective agreement provisions within the text of the Union's letter, reference to the disciplinary investigations, procedures which are extensively provided for under the terms of the collective agreement, would be sufficient. At a minimum, the letter of the General Chairperson effectively states that the Company misapplied and abused the disciplinary investigation procedure which is found within the collective agreement. In the result, therefore, and having regard to the authorities reviewed above, the Arbitrator is satisfied that there is an arbitrable case stated in the grievance document provided to the Company by the Union, and that this Office therefore has jurisdiction to hear the matter.

The Union's *ex parte* statement of dispute also raises the **Canadian Charter of Rights and Freedoms**, an issue not argued in its brief. This award makes no comment on whether that is an improper expansion of the grievance or whether the **Charter** could apply, in any event, to the actions of a non-governmental employer.

Notwithstanding the foregoing finding of arbitrability, there is a further consideration. One of the very reasons for the granting of wider jurisdiction to boards of arbitration under section 60.1(a.1) of the **Canada Labour Code** to interpret and apply work related statutes is to prevent a multiplicity of proceedings. Prior to the advent of these provisions it was too common for parties to find themselves before two or more tribunals with respect to a single cause of action. For example, a given alleged infraction of a collective agreement might also have been properly characterized as a violation of employment standards legislation and a human rights code, resulting in simultaneous complaints being made to several tribunals. Part of the rationale for provisions such as section 60.1(a.1) of the **Code** is to provide the expediency of single forum resolution of multi-facetted complaints based on a single set of facts. Being conscious of these provisions, tribunals have attempted to avoid the multiplicity of proceedings. That, for example, is reflected in the current practice of human rights commissions to defer the processing of complaints when it is apparent that the complaint before the commission is fully capable of being remedied under the grievance and arbitration provisions of a collective agreement.

In the instant case, by his own choice, the grievor filed a complaint under the Company's harassment policy, a policy fashioned in consultation with the Canadian Human Rights Commission and, the Arbitrator is advised, ultimately approved by the Commission. The grievor's complaint under that process is in fact being carried by the Union. While it was suggested by counsel for the Union that it was a different branch of the Union, being the legislative branch, which is responsible for that complaint, in the Arbitrator's view it can only be concluded that the same bargaining agent is proceeding on the grievor's behalf, under the procedures of the Company's harassment

policy. In my view it would be counter-productive to compel the Company to proceed simultaneously in both the arbitration forum and the internal complaint process. It appears to me that the matter can be dealt with in a manner which does not prejudice the interests of either party if the instant grievance is, for the reasons related above, declared to be arbitrable but placed in abeyance for scheduling on the merits, pending the resolution of the harassment policy complaint process, whether through a decision of the Company, a settlement or the withdrawal of the grievor's complaint under that process.

For the foregoing reasons the Arbitrator is compelled to reject the preliminary objection as to arbitrability registered by the Company. I am nevertheless satisfied that the hearing of the grievance would be premature so long as the harassment complaint process under the Company's policy remains ongoing. The General Secretary of the CROA&DR is therefore directed to keep this matter in abeyance pending further direction by the parties concerning the status of the harassment policy complaint filed by the grievor and being presently handled by his bargaining agent.

January 17, 2005 **(signed) MICHEL G. PICHER**
**ARBITRATOR**

## AWARD OF THE ARBITRATOR

In the award herein dated January 7, 2005, the Arbitrator rejected the Company's initial preliminary objection to the arbitrability of this matter. The Arbitrator did, however, direct that the grievance be kept in abeyance pending the exhaustion of the grievor's parallel complaint made under the Company's harassment policy. The record discloses that in fact the harassment policy process was exhausted on or about March 11, 2005, at which time the Company issued a report indicating that no finding of harassment could be made.

The Union nevertheless did nothing to bring the matter back before this Office until a referral to arbitration was finally made on March 20, 2008. The Company now argues that the matter should be dismissed by reason of an application of the doctrine of *laches*, given the Union's excessive delay of more than three years before bringing this matter back on for hearing.

On behalf of the grievor the Union argues that, apparently at the grievor's instance, it was decided not to bring the grievance back on for hearing pending resolution of separate complaints made before the Privacy Commissioner of Canada by Mr. Croteau. Those complaints, which apparently relate to a number of actions, including surveillance of the grievor and his family, resulted in a finding supportive of the grievor's complaint made by the Privacy Commissioner in an undated letter apparently received on November 29, 2007. That letter advises the Company's officer that "following the investigation into the complaint, I have concluded that the matter is well founded. We will be pursuing the matter in accordance with our authorities under the *Act*." The letter also advises that the grievor can proceed before the Federal Court of Canada for a hearing in respect of matters complained about or dealt with within the Commissioner's report. It would appear that some four months after that notification the Union then referred this matter again to arbitration.

The events which are the subject of this grievance occurred between September of 2003 and July of 2004. Persons instrumental to this file on the Company's side have in fact left the Company's employment, although one was made available at the hearing for the purposes of giving evidence, if necessary. The Company also stresses that the passage of four to five years from the time of certain of the events complained of makes it extremely difficult for the Company to marshal evidence and present a defence to the complaint at this time.

Upon a careful review of the facts the Arbitrator is compelled to agree. Firstly, there is no basis upon which this Office can sustain the suggestion that the grievor had a legitimate interest in awaiting the outcome of his complaint before the Privacy Commissioner before resuming his harassment grievance in this Office. As is clear from the original award, issued on January 17, 2005, the grievance was placed in abeyance not for any general purpose, but specifically to allow the exhaustion of the Company's internal harassment policy procedure. As indicated above, that procedure was fully exhausted within some two months following the award. Nevertheless, the grievor and his Union made no attempt to return to this Office to deal with the merits of the grievance, allowing a period of three years to pass before attempting to revive it. In the Arbitrator's view it is not insignificant that, apart from the prejudice of evidence gathering which the grievor's delay has brought to bear against the Company, the Union also continues to seek full wage and benefit compensation for the grievor for virtually the entire period of the three year delay.

Grievance arbitration under the **Canada Labour Code** is conceived as an informal and expeditious manner of resolving disputes without excessive formality and delay. It is in that context that the phrase "labour relations delayed is labour relations denied" has evolved. In the Arbitrator's view it was entirely reasonable for the Company to conclude, if not one year after the exhaustion of its internal harassment procedures, then certainly two and three years after that event, that the grievor and his Union had effectively abandoned this grievance. For this Office to conclude otherwise would be tantamount to condoning procedural abuse in a manner plainly not contemplated within the time limits found within the collective agreement and within the memorandum of agreement which has established this Office.

Mr. Croteau knew, or reasonably should have known, that it was his obligation to return to the pursuit of his grievance before this Office at the exhaustion of the Company's internal process, or within a reasonable period of that time. His failure to do so, and his ongoing claim for an ever growing period of compensation for wages and benefits works plainly to the prejudice of the Company in a manner which should not be countenanced.

For these reasons the Arbitrator must agree with the Company that by reason of the operation of the doctrine of *laches*, and an unreasonable period of delay for which no compelling justification has been shown, Mr. Croteau's grievance must be deemed to have been abandoned. On that basis his grievance must be dismissed.

July 14, 2008 **(signed) MICHEL G. PICHER**
**ARBITRATOR**

**SUMMARY – CROA&DR 3465**

Croteau, P. – claim harassment – Arbitrator discusses jurisdiction to deal with grievances alleging violation of **Canada Labour Code** and/or **Canadian Human Rights Act** only, i.e. no violation of collective agreement – grievance arbitrable but premature – ALLOWED – undue delay in proceeding to second hearing – doctrine laches – grievance abandoned – GRIEVANCE DISMISSED

**KEYWORDS – CROA&DR 3465**

CNR – UTU January 2005 claim harassment arbitrability **Canada Labour Code Canadian Human Rights Act** allowed delay progressing grievance untimely dismissed