CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3465

Heard in Montreal, Tuesday, 8 July 2008

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

On Tuesday, 8 July 2008, there appeared on behalf of the Company:

J. Cavé	– Counsel, Montreal
D. VanCauwenbergh	– Director, Labour Relations, Edmonton
R. A. Bowden	– Manager, Labour Relations, Toronto
B. Hogan	– Manager, Labour Relations, Toronto
J. Krawec	– Manager, Labour Relations (Ret'd)

And on behalf of the Union:

M. Church	– Counsel, Toronto
G. Ethier	– General Chairperson, Sault Ste Marie
G. Bates	– Vice-President, Canadian Legislative Director, Ottawa
G. Gower	– Vice-General Chairperson,
M. Serieska	– Legislative Representative, Niagara Falls
J. Lennie	– Local Representative, Niagara Falls
S. Pommet	– Local Chairperson, Montreal
E. Page	– Local Chairperson, Toronto
P. Croteau	– Grievor

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