

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

CASE NO. 3488

Heard in Montreal, Thursday 12 May 2005

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

DISPUTE:

The alleged harassment and intimidation of Mr. Gilles Pelletier by the Company in violation of the collective agreement, CN's Human Rights Policy, the *Canadian Human Rights Act* and the *Canada Labour Code*.

JOINT STATEMENT OF ISSUE:

Throughout late 2002 until the late fall of 2003, the Union contends that Mr. Gilles Pelletier was harassed and intimidated by the Company (principally by Company Supervisor Mr. J.T. Burke) resulting in him being forced to take sick leave until December 2004.

The details of the alleged harassment and intimidated were initially set out by Mr. Pelletier in a letter dated October 29, 2003. The Union contends that these particulars were further substantiated by additional letters including, but not limited to, letters dated May 26, July 8, August 16 and November 11, 2004. Moreover, in a series of meetings between the parties, Mr. Pelletier explained his recollection of the facts and his position to the Company.

The Union filed a grievance on behalf of the grievor dated August 16, 2004 which was supplemented by a letter dated November 11, 2004. The Union took the position that the Company was responsible for all lost wages and benefits by the grievor during the period referred to above as a result of the intimidation and harassment by a Company official.

The Union contends that the Company violated the collective agreement, CN's Human Rights Policy, the *Canadian Human Rights Act* and the *Canada Labour Code* as set out above. The Union seeks a declaration from the Arbitrator to these effects [sic]. The Union seeks an order that the Company cease and desist from said intimidation and harassment. The Union also seeks an order that the grievor be reimbursed for all lost wages and benefits throughout the period referred to above. The Union seeks a written apology to the grievor. Finally, the Union seeks an order for additional damages (general and punitive) to the grievor on account of the Company's actions in this case.

The Company denies having harassed or intimidated Mr. Pelletier. The Company's position is that the issue relating to the alleged harassment complaint was resolved in a meeting in Edmundston, N.B. on October 29, 2004 between Mr. Pelletier, Mr. LeBel, Supervisor Ted Burke and Human Resources Manager Michel Lamarche.

The Company denies any responsibility over lost time. The Company disputes any liability or responsibility to pay any damages for lost wages or benefits or for any additional general or punitive damages.

The Company therefore rejects the Union's appeal.

FOR THE UNION:

(SGD.) R. LEBEL
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) D. GAGNÉ
FOR: SENIOR VICE-PRESIDENT

There appeared on behalf of the Company:

D. Gagné	– Manager, Labour Relations, Montreal
M. Lamarche	– Manager, Human Resources
D. S. Fisher	– Director, Labour Relations, Montreal
E. J. Burke	– Trainmaster

And on behalf of the Union:

M.A. Church	– Counsel, Toronto
R. LeBel	– General Chairman, Quebec
J.C. Levesque	– Local Chairman, Edmundston
G. D. Pelletier	– Grievor

The hearing was adjourned by the Arbitrator.

On Tuesday, 14 June 2005, there appeared on behalf of the Company:

D. Gagné	– Manager, Labour Relations, Montreal
D. VanCauwenbergh	– Sr. Manager, Labour Relations, Toronto
E. J. Burke	– Trainmaster
M. Lamarche	– Manager, Human Resources
C. O'Neill	– Manager, Human Resources

And on behalf of the Union:

M.A. Church	– Counsel, Toronto
J.C. Levesque	– Local Chairman, Edmundston
R. A. Beatty	– General Chairman, Sault Ste. Marie
B. Boechler	– General Chairman, Edmonton
C. Petitpas	– Witness
P. Bridgeo	– Witness
G. D. Pelletier	– Grievor

AWARD OF THE ARBITRATOR

The Union alleges that the management style adopted by Operations Supervisor Ted Burke of Edmundston constitutes harassment of the grievor to an extent which caused him to suffer a medical leave of absence for stress and clinical depression. As reflected in the Joint Statement of Issue, the principal allegation is that throughout late 2002 until the late fall of 2003 Mr. Pelletier suffered harassment and intimidation by Mr. Burke, resulting in his being forced to take sick leave. Following a suspension issued to the grievor on September 2, 2003, for a period of fourteen days, Mr. Pelletier sought professional medical help through the Company's EFAP program. After five sessions with a counsellor, and following an incident which involved a verbal confrontation between Mr. Burke and Mr. Pelletier on or about October 9, 2003, which caused the grievor to dissolve in tears, he eventually sought more substantial medical assistance. On November 14, 2003 the grievor booked sick, staying off work for the fourteen following months. Among the submissions of the Union is a claim for compensation for the difference between the wages which the grievor would have earned during that period and the sick leave and disability benefits which were provided to him, a claim said to be in excess of \$50,000.00. The Union also seeks an award of aggravated and punitive damages.

The Company raises a number of issues. Firstly, it submits that the grievor's claim of harassment was effectively settled at a meeting between the parties on October

29, 2004, subject only to the grievor proceeding with his claim for his loss of wages. Secondly, the Company objects to the Arbitrator hearing evidence and disposing of allegations contained in a letter dated April 26, 2005, prepared by Mr. Pelletier, a document which catalogues allegations of further harassment between January 10 and April 26, 2005. The Company submits that the particulars within that document were never provided to the Company before the arbitration hearing and that the allegations contained within it are, in any event, outside the scope of the of the joint statement of issue executed by the parties.

The Arbitrator cannot sustain the position of the Company with respect to the alleged settlement of the dispute. There is no jointly signed document placed in evidence to indicate that the parties agreed to settle the claims of Mr. Pelletier, in whole or in part. At best, it appears that the meeting of October 29, 2004 was held in anticipation of the grievor returning to work following his medical leave of absence, in an effort to smooth the relationship between himself and his supervisor, something which was apparently done to some degree. As previously noted in this Office, in the context of collective bargaining it is most common for grievances to be settled by a memorandum of agreement jointly signed by the parties, or possibly an exchange of letters. There is no such documentation in the case at hand, beyond a unilateral description of the meeting of October 29, 2004 in a letter dated November 15, 2004 and signed by the Company Supervisor, Derrick Colasimone. In these circumstances the Arbitrator is satisfied that there was no settlement that would prevent the hearing and disposition of those issues contained within the joint statement of issue.

With respect to the second objection, however, the Arbitrator is satisfied that the Company is correct. The jurisdiction of the Arbitrator under of the memorandum of agreement establishing the Canadian Railway Office of Arbitration & Dispute Resolution expressly limits the Arbitrator's jurisdiction to those matters contained within a joint statement of issue. As is clear from the text of that document in the case at hand, the alleged acts of harassment contained within the letter of April 26, 2005 prepared by the grievor fall entirely outside the issues identified within the joint statement of issue and cannot be properly said to fall within the jurisdiction of this Office in respect of the grievance at hand. Alternatively, if I am incorrect in that conclusion, I am also satisfied that the material before me would not, in any event, establish that the Union has proved, on the balance of probabilities, that the grievor was the victim of harassment by his supervisor to the point of a causal connection between Mr. Burke's actions and the medical leave of absence taken by Mr. Pelletier for clinical depression.

For the purposes of the case at hand it is perhaps appropriate to adopt the definition of harassment contained in the Company's own policy, found within its code of business conduct. That document contains, in part, the following definition:

Harassment is defined as unwelcome conduct, comments, gestures or contact that causes offence or humiliation to any employee, employment candidate, customer or member of the general public. It is unacceptable behaviour, which denies people their dignity and respect.

Although the Arbitrator has not been referred to any provision of the collective agreement, nor of the **Canadian Human Rights Act**, which specifically deals with harassment which would not constitute discrimination under the protected areas identified within the **Canadian Human Rights Act** (e.g. race, religion, gender, age, etc.) it does not appear disputed that harassment in the sense of the continuous undue humiliation of an employee would be an abuse of the rights of management under the collective agreement and would, to that extent, constitute a violation of the collective agreement. Nor does it appear disputed that harassment of such a degree as to cause physical or psychiatric consequences such as clinical depression would obviously violate the health and safety obligations of an employer. (See **Toronto Transit Commission and Amalgamated Transit Union**, a decision of Arbitrator Owen B. Shime dated October 6, 2004.)

At the outset it should be stressed that an allegation of harassment made against an employer is an extremely serious charge. Just as serious wrongdoing alleged against an employee may demand a high standard of proof, to the level of clear and convincing evidence, the same may be true when a union alleges harassment on the part of an employer or of a supervisor representing the employer.

Having reviewed the extensive evidence tabled in the case at hand, the Arbitrator is compelled to the ultimate conclusion that the Union has not discharged its burden of proof in this case.

Central to the Union's claim is its allegation, as stated within its brief, that "Mr. Pelletier developed Major Depression and disabling stress as a result of harassment by his supervisor." Upon a careful review of the evidence tendered by the Union, the causal connection between the actions of Mr. Burke and the grievor's fourteen month absence for clinical depression is not established. In my view the best evidence of the grievor's condition is that of his specialist psychiatrist, Dr. Pierre Celestin Nguimfack Mbodie. In an opinion letter dated September 27, 2004, the grievor's psychiatrist gives an extensive analysis of his condition. He expressly finds that the grievor's depressive trouble and his relationship problem with his supervisor are concomitant but not causally related. His report states in part, in translation: "The favourable clinical evolution of his major depressive trouble at the time Mr. Pelletier Gilles says that he was in disagreement with his supervisor, supported by his union, confirms my doubt with respect to a possible causality element ...". Dr. Mbodie's note also contains the following statement: "His relationship conflict with his supervisor does not, in my opinion, require a psychiatric expertise, rather an approach to solve his internal problems at work."

The evidence also indicates that the grievor had a prior history of treatment for anxiety and depression, sometimes triggered by family problems. According to his family physician, the first episode of that type was experienced in 1989. The record further discloses that in 1996 the grievor experienced a stress-related absence from work for which he was under the care of Doctor Denis Pelletier of Edmundston. The

report of Dr. Pelletier, dated September 19, 1996, contains the following, as translated by the Arbitrator:

Mr. Pelletier came back on a follow-up appointment on August 29, 1996, having previously been seen on August 7, 1996 (the date upon which his incapacity began). At that moment the patient presented with a pronounced difficulty of adaptation with problems of concentration. Also certain mood control problems were noted. He demonstrated impatience and frustration. **This seemed to be triggered by a certain insecurity related to his employment.**

As the record indicates, at that time the grievor was prescribed medication and psychotherapy.

[emphasis added]

The medical reports before the Arbitrator also indicate that depression in him was at times triggered by family stressors. His family physician reports, in part, having prescribed him medication in May of 2003 when, "he had just suffered an important family stress ...".

On the whole, for the reasons touched upon above, the Arbitrator cannot find that the Union has established that the medical leave of absence taken by Mr. Pelletier was caused by harassment at the hands of his supervisor. In light of the medical reports reviewed above, there is no responsible basis upon which an arbitrator can conclude that "but for" the actions of Mr. Burke the grievor would not have suffered stress and clinical depression resulting in his absence from work for a period of fourteen months.

However, can it be said that there was, nevertheless, harassment on the part of Mr. Burke, even though it might not have triggered the grievor's illness? In the

Arbitrator's view, subject to some important qualifications, that question must also be answered in the negative. As well demonstrated in the case put forward by the Company, on each and every occasion that the grievor was dealt with by Mr. Burke, whether through a simple conversation concerning his performance or the investigation of an error which resulted in some measure of discipline, there was an action or omission by Mr. Pelletier which warranted discussion or investigation by the supervisor responsible for his performance. Indeed, the evidence reflects that a number of incidents resulted in justified discipline which was not grieved by Mr. Pelletier. It would appear that in some respects Mr. Pelletier's view of his victimization by Mr. Burke is almost entirely subjective. For example, in the letter of April 26, 2005, he relates an incident which arose on January 25, 2005. It is not disputed that on that occasion the grievor and his crew mates disregarded an instruction from Mr. Burke and took their layover at Fredericton rather than at Perth-Andover, as directed. Mr. Pelletier relates that following the incident, when he returned to work on January 31, he had concerns.

He writes:

I reluctantly went to work that day, fearing some kind of reprisal from Mr. Burke. What was he going to say or do re Fredericton? The first thing that day, Mr. Burke with a serious tone asks me to step in his office. I was actually shaking when I walked in his office.

Sure enough, again he hands me a notice to appear for another investigation to explain the reason for going to Fredericton instead of Perth-Andover. Now walking out of his office, I was shaken. I just don't know what to do about this harassment.

With respect, the Arbitrator has substantial difficulty with the foregoing. The grievor knew, or reasonably should have known, that he had violated a clear directive by failing to lay over at Perth-Andover, as instructed. On what rational basis can a

reasonable employee conclude that being made the subject of an investigation over that incident by the supervisor responsible for proper operations is harassment?

The Arbitrator has little doubt as to the sincerity of feeling experienced by Mr. Pelletier. I accept that he has felt fear of Mr. Burke and, as he further states in his letter of April 16, 2005, "... my stomach was in a knot and I am becoming increasingly nervous when I see him." But these elements of themselves do not establish abuse or harassment.

What the whole of the evidence discloses is that if the grievor has experienced stress in the face of Mr. Burke, that situation is in large part due to his own unusual vulnerability, as evidenced in the medical certificates filed before the Arbitrator. It is not, however, clear that the grievor's reactions, and in particular his subjective feelings about being harassed, are necessarily those that would be felt or experienced by an average or reasonable employee in the same circumstance.

The Arbitrator agrees with the submissions of the Union, which would indicate that Mr. Burke is not known for diplomacy, and that at times his manner of expression, tone of voice and overall hard-driving management style can be sarcastic, condescending and disturbing to employees. Indeed, it appears that in the case of another employee, Mr. Conrad Petitpas, the employee developed a fear of Mr. Burke which was interfering with his ability to work safely. According to the testimony of Mr.

Petitpas, however, that problem was resolved after he and Mr. Burke had a heart to heart conversation, following which there was no further difficulty and he was at all times treated politely by Mr. Burke. The evidence would suggest, at a minimum, that while the conduct of Mr. Burke may not have constituted harassment as that term would apply to an average or reasonable employee, and that it certainly did not cause any clinical depression suffered by Mr. Pelletier, Mr. Burke's management style nevertheless does bear examination and possible adjustment to ensure that he consistently brings an appropriate level of respect and politeness to his treatment of all employees.

In the result, the Arbitrator is compelled to conclude that the Union has not established, on the balance of probabilities and through clear and cogent evidence, that the grievor was the subject of harassment by Supervisor Burke, or that Supervisor Burke was causally responsible for the grievor's medical leave of absence for clinical depression. For these reasons the grievance must be dismissed.

June 20, 2005

(signed) MICHEL G. PICHER
ARBITRATOR