

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

CASE NO. 3529

Heard in Calgary, Tuesday, 8 November 2005

concerning

CANADIAN PACIFIC RAILWAY

and

TEAMSTERS CANADA RAIL CONFERENCE

EX PARTE

DISPUTE:

Appeal of 40 demerits assessed to Mr. Greg Tymshychyn of Winnipeg for inappropriate conduct towards a fellow employee; a violation of the Company's Discrimination and Harassment (including sexual harassment) Policy and Procedure (Canada), February 9, 2004.

UNION'S STATEMENT OF ISSUE:

On April 27, 2004, Mr. Tymshychyn was investigated in connection with allegations made by an employee in a formal investigation. Mr. Tymshychyn admitted he raised the shirt of a fellow employee to view her tattoo. Mr. Tymshychyn was issued 40 demerits on account he violated Section 8 (harassment) of the above noted policy.

The Union's position is that Mr. Tymshychyn acted spontaneously and without forethought. He lifted the back of his fellow employee's t-shirt to observe what was an already partially exposed tattoo on her lower back. He expressed his deep regrets and apologized later. Previous to that incident Mr. Tymshychyn had never had any problems working with or relating to his female co-workers or supervisors.

The Union submits the discipline is unwarranted in these circumstances. At the very least the quantum is excessive. The Union further submits that the grievor was treated in a discriminatory manner having regard to considerably less discipline awarded to another employee also found guilty of harassing the same female employee. Moreover, the discipline was not issued until months after the incident (during which there was no repetition of such by the grievor). Finally, the grievor had not received any training as to this type of conduct.

The Company believes that spontaneity cannot be regarded as an excuse for sexual harassment, particularly involving an employee in a position of authority versus a female trainee. The Company does not believe the grievor apologized. The Company believes the grievor received sensitivity training and training on harassment and violence in the workplace. The Company also believes that the two instances of harassment referred to above, warranted differing disciplinary assessments and that its response was not discriminatory.

Finally the Company does not believe that there are any grounds to mitigate the discipline in these circumstances. Therefore the grievances ought to be dismissed.

The Union seeks mitigation of the penalty on such terms as the Arbitrator deems appropriate.

FOR THE UNION:

(SGD.) D. FINNISON
GENERAL CHAIRMAN

There appeared on behalf of the Company:

- D. Cooke – Manager, Labour Relations, Calgary
- J. McPherson – Labour Relations Officer, Calgary
- W. Stekman – Road Manager, Winnipeg
- S. Baker – Manager, Yard Operations, Winnipeg
- S. Cavanaugh – Service Area Manager, Winnipeg

And on behalf of the Union:

- D. Ellickson – Counsel, Toronto
- D. Finnison – General Chairperson, Calgary
- D. Able – General Chairperson, Calgary
- D. Olson – Vice-General Chairperson, Calgary
- A. Singer – Vice-General Chairperson, Cranbrook
- M. Parker – Local Chairperson, Winnipeg
- R. A. Hackl – Vice-General Chairperson, CN Lines West, Edmonton
- G. Tymshchyn – Grievor

AWARD OF THE ARBITRATOR

The grievor was assessed forty demerits for inappropriate conduct towards a fellow employee which the Company characterizes as sexual harassment. The evidence confirms that the incident in question transpired in the yard office lunch room.

The complaining female employee relates that as she was seated at the table she stood

up to lean across the table. It appears that the gesture exposed a tattoo on the lower part of her back. The grievor then raised her shirt up, which caused her to turn and confront him. She states that she told him to "Cut it out" and that she was "embarrassed and very shocked that it had occurred."

The grievor does not deny lifting the shirt of his female co-worker in what he describes as an effort to better see the intricacies of her tattoo. The Union's submission is that the event was innocuous, and did not constitute sexual harassment. In the Union's submission no discipline should have resulted.

The Arbitrator disagrees. For an employee of one sex to lift or partially remove the clothing of an employee of the opposite sex is not an innocuous gesture. The Arbitrator finds no merit in the argument of the Union to the effect that the complaining female employee, who it appears was subsequently terminated for reasons of absenteeism, is not to be believed with respect to the degree of offence which she took. The record discloses that she had also been the victim of graffiti in the workplace as well as of uninvited verbal harassment of a sexual nature by another employee, who was also disciplined, apparently at the measure of twenty demerits. The Company maintains that the treatment of the other employee is to be distinguished in that his offence was verbal rather than physical and that, unlike the grievor, he was not in a position of power over the complaining female employee. The record indicates that Mr. Tymshychyn was responsible for training and evaluating the young lady whose shirt he lifted. The Arbitrator accepts that submission.

There is, moreover, no evidence that the grievor ever apologized to his trainee directly. His expression of regret, in relatively equivocal terms, was confined to an answer he gave to the Company during his disciplinary investigation.

Having regard to the whole of the circumstances, the Arbitrator is satisfied that the assessment of forty demerits was appropriate in the circumstances and should not be disturbed. The grievance is therefore dismissed.

November 14, 2005

(signed) MICHEL G. PICHER
ARBITRATOR