

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

CASE NO. 3958

Heard in Montreal, Wednesday, 15 December 2010

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

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

DISPUTE:

The assessment of discharge to Employee M for conduct unbecoming on February 9, 2010 and the continuous and unrelenting harassment of fellow employee K.

JOINT STATEMENT OF ISSUE:

On February 9, 2010 the grievor was present for a pre-shift meeting at the Concord Automotive Garage. While the assignment of work was being discussed the grievor made offensive and derogatory comments towards two fellow employees. The remarks and the behaviour of the grievor were in direct violation of Company Anti-Harassment policy and, further, the actions were contrary to the *Canadian Human Rights Act*.

The Union contends that the discharge of the grievor was excessive, arbitrary and discriminatory in nature.

The Company disagrees with the Union's grievance.

FOR THE UNION:

FOR THE COMPANY:

(SGD.) R. FITZGERALD
NATIONAL REPRESENTATIVE

(SGD.) S. PRUDAMES

There appeared on behalf of the Company:

S. Prudames	– Labour Relations Officer, Toronto
S. Grou	– Sr. Manager, Labour Relations, Montreal
M. Carter	– Sr. Mechanical Officer, Toronto
T. Sudeyko	– Fleet Management Officer, Toronto

There appeared on behalf of the Union:

R. Fitzgerald	– National Representative, Toronto
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J. Almdal
R. M.

– Regional Representative, Toronto
– Grievor

AWARD OF THE ARBITRATOR

K, who is employed at the Company's Maintenance Garage at Concord, Ontario is black. He is also gay. Sadly, the material before the Arbitrator confirms that for a long period of time in the workplace he was made the subject of abusive racism and sexism at the hands of employee M. The tension between K and M appears to have boiled over during the course of a morning briefing on February 9, 2010. As the pre-shift meeting ended the lead hand distributed work assignments. When he assigned employee K to work with employee A, M said, within the hearing of the other assembled employees "Kissing cousins make-up; you wearing the skirt and A the pants". The statement was plainly aimed at K and the reference was entirely based on his sexual orientation as a gay person.

Grievor M was then removed from the workplace and taken to the office of Garage Supervisor Terry Sudeyko. Mr. Sudeyko then asked the grievor if he was aware of the Company's harassment policy, a copy of which was shown to him, asking him if he understood it. When the grievor replied "Somewhat" he then showed him a copy of the Company's code of conduct. Asking again whether M understood it he responded "somewhat, to not really". The grievor was then told by Mr. Sudeyko that he was

removed from service and should leave the premises. His response to the supervisor was: "We joke around all the time."

The evidence before the Arbitrator reveals a disturbing pattern of conduct which the grievor may have considered to be a joke, but which K, and indeed a number of other employees in the workplace, saw as profoundly offensive. The evidence confirms that on various occasions, repeatedly, M made reference to K as a "homo", "big lips" and a "monkey". He made repeated comments such as suggesting that Africans have sex with monkeys and chimpanzees, and that Africans were the reason for the spread of AIDS. During lunchroom conversation M would point to an article in the newspaper concerning blacks involved in crime, pointing it out to K and stating that his "brothers" were at it again. On at least two occasions he made unfounded allusions in the workplace to K having stolen money from other employees.

The record confirms that M utilized a rope during certain parts of his work. In fact he fashioned the rope into a hangman's noose which he displayed by hanging it on his toolbox. The unchallenged evidence before me is that on at least one occasion M said to K that the hangman's noose was for ".. black people who get out of line."

Extraordinarily, the facts in the case at hand are adduced not only through the complaint of K. They are also fully supported in written statements provided by nine separate employees.

I am satisfied on the evidence before me that the conduct engaged in by M extended over a substantial period of time. It is suggested that on occasion M was spoken to by supervisors and relented from making homophobic or racist remarks. However, after a short time the same conduct would reassert itself and the workplace was once again made extremely unpleasant for K.

There can be no doubt but that the grievor's conduct repeatedly violated the Company's own "Human Rights Policy – Harassment-Free Environment" which expressly prohibits both sexist and racial/ethnic harassment. Quite apart from that policy, M's conduct was plainly well outside the bounds of the standards of proper conduct in any civil workplace. Such conduct has been dealt with in clear and unequivocal terms in the awards of this Office, as for example **CROA 1791** and **CROA 2951**. Both of those cases sustained the discharge of employees who engaged in sexual harassment.

It is suggested that the material before the Arbitrator does not in fact confirm that M was ever spoken to by a supervisor with respect to his conduct. The grievor's disciplinary investigation includes his statement that he was never spoken to. In my view, even accepting the truth of that fact, the grievor clearly crossed a line any employee should respect. The evidence of extreme racism and homophobia, repeatedly visited upon K by M, confirms that the grievor effectively created a poisoned workplace in which life was made extremely unpleasant for a number of employees, not the least being K himself. I am satisfied that at all times, quite apart from any supervisory

remarks, the grievor knew or reasonably should have known that his statements were abusive and offensive toward K. Indeed, I am compelled to the regrettable conclusion that they were intended to be so. Nor do I find the grievor's belated statement of regret to be persuasive as to his possible rehabilitation. With respect to the importance of avoiding racist and sexist comments, employee M does not get it. In all of the circumstances I cannot see on what basis the grievor can be returned to the workplace, given what has occurred.

For all of the foregoing reasons the grievance is dismissed.

December 22, 2010

(signed) MICHEL G. PICHER
ARBITRATOR