

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

CASE NO. 4020

Heard in Edmonton, Alberta, Thursday, 16 June 2011

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

**NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL
WORKERS UNION OF CANADA – COUNCIL 4000**

DISPUTE:

The 14-day suspension assessed by the Company against Ms. L. Tomashewsky for the alleged harassment of a fellow employee.

JOINT STATEMENT OF ISSUE:

The Union contends that the Company failed to adhere to its own policy entitled “Human Rights Policy – Harassment Free Environment”. By disregarding its own policy and the steps that are to be taken as outlined within this policy, the Company deprived Ms. Tomashewsky of a fair and reasonable opportunity to properly defend herself against the alleged accusations of harassment. Furthermore, the Union contends that the quantum of discipline assessed Ms. Tomashewsky was arbitrary, excessive and severe given the mitigating circumstances in this case. The Union requests that Ms. Tomashewsky be compensated for all lost wages and benefits during the period of her suspension.

The Company maintains that the investigation procedures in the instant case were consistent with Company policy and the assessment of discipline was appropriate in that the Company imposes sanctions where harassment is evident, whether it is viewed as intentional or unintentional. For these reasons the Company has declined the grievance.

FOR THE UNION:

(SGD.) R. SHORE

FOR: PRESIDENT

FOR THE COMPANY:

(SGD.) R. CAMPBELL

MANAGER, LABOUR RELATIONS

There appeared on behalf of the Company:

R. Campbell	– Manager, Labour Relations, Winnipeg
P. Payne	– Manager, Labour Relations, Edmonton
D. Fuller	– Supervisor, TRS, Edmonton

There appeared on behalf of the Union:

B. Kennedy	– President, Edmonton
R. Shore	– Regional Representative, Vancouver
S. Scott	– Control Clerk, Edmonton
L. Tomashewsky	– Grievor

AWARD OF THE ARBITRATOR

The Company alleges that Edmonton Servo Centre Control Clerk Lana Tomashewsky engaged in conduct which amounted to harassment of a fellow employee. The Company alleges that she was joined in that conduct by fellow Control Clerk Sara Scott. Following an investigation the grievor was assessed a fourteen day suspension while Ms. Scott received a twenty-eight day suspension for the harassment of their fellow employee.

The employee alleging harassment is Edmonton Control Clerk Trinity Zuk. Ms. Zuk recounts in her complaint an incident which occurred at approximately 7:20 a.m. on January 4, 2010. Her complaint reads, in part:

I was working the West Desk when Lorna came in. I asked her if she was training on this desk and she said that yes it was her first day. I then stated that Jim would be in soon but that I would begin to show her what I would normally give on a turnover for the desk. I also stated that I did not expect her to remember anything and that if I was gone by the time Jim got in he would have no problems on figuring out what was going on, but that I would like her to get a taste of what a turnover would look like and began to give her the turnover. In the middle of me talking to Lorna, Sara and Lana asked if she would like to go for a cigarette. Lorna stated that she would not she would actually like to stay and wait for Jim to get in and listen to me. At this point Lana stated while I was talking to Lorna that I should actually be leaving Jim notes instead of telling Lorna, and Sara added that it is stupid of me to be giving a turnover to someone new as it is very overwhelming. At this point in time I turned to them and told them to mind their own business and that I am fully aware that this would be overwhelming and that I did not expect Lorna to be accepting to the turn over but to only get a taste of what it would be like. Then I stated to Lana that I do not need her tell me what to do as Jim has never had a problem with my turnovers and is very capable of what I leave him to be able to continue on with day to day activities and that I never leave him notes and it is none of her business and I asked them both to just leave me alone. They began to walk away as I became very visibly upset. ...

The “Lorna” mentioned in the above account is Train Movement Clerk Lorna Lorentz. She obviously witnessed the exchange among the three employees and saw Ms. Zuk break down in tears as Ms. Scott and Ms. Tomashewsky left the workplace for a cigarette break. The statement of Ms. Lorenz, taken on January 12, 2010 as part of the Company’s disciplinary investigation, contains the following:

On Monday 04 January 2010 I arrived for day shift training with Jim Nashman on the West Desk, we were to relieve Trinity. Upon my arrival, Trinity said to me “I don’t expect you to be able to remember all this but I just want to show you what a turnover on this desk is like” I replied “sure, go ahead I will try to remember it”. Sara Came over from the inbound desk to talk to Lana, who was on the north line desk. Lana said “Trinity is giving Lorna a turnover on her first day”. Sara replied “Why would she do that”. Lana said “I don’t know” Sara then said to me, “hey buddy do you want to go for a smoke.?” I replied, “no thanks I am fine” Then Sara said to Lana, “How stupid is that, this is her first day” Lana said “ya well, she is stupid or its stupid – (I’m not sure exactly which it was). She should just leave a note for Jim this is Lorna’s first day.”

Trinity turned around and said “I am just showing her what a turnover from this desk is like – its none of your business so stay out of it”. At that point either Lana or Sara said “well that’s just stupid, just leave a note”. There were more mumblings after that. Sara was being very loud with all the conversations. I wasn’t really paying attention to them at that point about specifically what they were saying.

Trinity was visibly upset and I told her to just ignore them and don’t worry about it. Lana and Sara left after that. Trinity was crying and I said “don’t let them bother you”. She said “you don’t know what I have gone through for the last few weeks I can’t take it anymore. I am ready to just give my notice. I am done with this”. ...

...

Sara left immediately and called Liz Barwell who works out at Scotford, to tell her she had made Trinity cry. I know this because shortly after I received a text from Liz asking what went on as Sara told her she had just made Trinity cry. I didn’t answer Liz back then and went back to work. At this point both Lana and Sara had left.

[sic]

Confirmation that Ms. Zuk was reduced to tears is also revealed in the employee statement of Train Movement Clerk Tracy Stroud, also taken on January 12, 2010. Ms.

Stroud relates that in a conversation with Ms. Scott shortly afterwards outside the east door of the building she commented to Ms. Scott: "I thought you were pretty rude in there."

Part of the account of the situation in the workplace given by Ms. Zuk, which the Arbitrator accepts, is that she has generally been treated in a less than friendly manner by both Ms. Scott and Ms. Tomashewsky. According to her account they exclude her from lunch and smoke breaks. The Company's representative notes that Ms. Scott's statement includes the admission on her part that she and Ms. Tomashewsky frequently engage in "in-jokes" which only the two of them could understand, although they did so within the earshot of others, creating an exclusionary atmosphere which is of itself denigrating of a co-worker.

In fairness, it should also be noted that Ms. Zuk is, as characterized by the Company's representative, a person of delicate personality, "... who reacts emotionally to comments and actions more so than the average person." It may well be that her nature has caused some employees to distance themselves from her. That nature, however, does not give licence to engage in insulting or harassing conduct.

The central issue of fact in the case at hand is whether there were insulting remarks directed at or about Ms. Zuk within the presence of others, as alleged, near the end of the shift on January 4, 2010. Having closely reviewed the evidence I am satisfied that there was. I find the evidence of Ms. Zuk, corroborated entirely by the statement of

Lorna Lorentz and partially by Train Movement Clerk Tracy Stroud, to be credible and consistent.

While Ms. Tomashewsky claims that she was entirely unaware that she did or said anything that could have offended Ms. Zuk, there is material in the record that clearly contradicts that assertion. When it was suggested to her during the course of her statement, taken on January 13, 2010, that she should have stopped what was a course of conduct causing obvious hardship to a fellow employee she responded: "It was not obvious hardship from my perspective, I did not see any harassment." She then went on to say: "She was upset as I was leaving. I had no indication prior to her being upset." Still later in her statement she says: "I don't think it's appropriate to upset people and I wasn't upsetting anyone that I am aware of. ... I don't see anything wrong with the conversation that we had."

However, by Ms. Tomashewsky's own account, she subsequently wrote a Facebook message to Ms. Zuk. That message included the following: "I hope you're okay, hope I didn't cause any waves. ... I really am free to talk, anytime, ... and I will also have an adult chat with Sara."

I find it hard to reconcile the grievor's electronic message to Ms. Zuk with her repeated statements during the course of her disciplinary investigation that she saw nothing improper or harassing in the incident related above.

The evidence of Ms. Scott is equally of concern. During the early portion of her investigatory statement when asked why she had caused hardship to a fellow employee she responded: "Prior to getting my notice to appear for this statement I was not aware that this had caused any distress specifically, nor did Ms. Zuk state at any time that anything that had been said was unwanted."

That statement is simply impossible to reconcile with a statement made subsequently during Ms. Scott's investigation. In answer to a later question she states: "When I got home I called Elizabeth Barwell. She asked how my evening had gone. I told her about the end of the evening and that apparently I had made Trinity cry." I am compelled to conclude that Ms. Scott attempted to create the impression that she was entirely unaware that her comments might have offended Ms. Zuk until such time as a disciplinary investigation ensued. Her later comment, however, with respect to her conversation with Ms. Barwell as well as the clear and in my view credible statements of Ms. Lorentz and also Ms. Stroud, who confronted Ms. Scott shortly after the incident, confirm that Ms. Scott not understanding the impact of her having accused Ms. Zuk of being stupid is simply not credible. I am compelled to conclude that Ms. Scott's words to Ms. Zuk were deliberately and consciously malicious and that she was fully aware of their impact. Her suggestion, at the investigation, that the grievor's upset was news to her raises substantial issues as to her overall credibility.

Having reviewed the evidence, on the whole I am satisfied that the grievor, Ms. Tomashewsky, did address language towards Ms. Zuk in the workplace which was

insulting and caused distress to her. That is confirmed, in substantial part, by the fact that Ms. Tomashewsky later attempted to extend an electronic olive branch to Ms. Zuk and undertook to have “an adult chat” with Ms. Scott. I am compelled, however, to agree with the Company that the minimal attempt by Ms. Tomashewsky to communicate with the offended employee is a mitigating factor, and that overall her conduct was less grievous than that of Ms. Scott.

Considering that this appears to be a first offence for disciplinary purposes, however, I feel that a fourteen day suspension is somewhat excessive. The grievance is therefore allowed, in part, with the grievor’s suspension to be reduced to seven days, with compensation for the difference in wages and benefits lost.

June 21, 2011

(signed) MICHEL G. PICHER
ARBITRATOR