

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4166**

Heard in Montreal, Thursday, 13 December 2012

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

**THE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION
AND GENERAL WORKERS' UNION OF CANADA (CAW-CANADA)**

DISPUTE:

Discharge of F. Tulipano for alleged conduct unbecoming, namely inappropriate behaviour on April 15, 2011 and continuous harassment of a fellow employee in violation of CN's Human Rights policy and code of business conduct.

JOINT STATEMENT OF ISSUE:

The grievor was investigated on June 30, 2011, for alleged conduct unbecoming, namely inappropriate behaviour on April 15, 2011 and continuous harassment of a fellow employee in violation of CN's Human Rights policy and code of business conduct. He was subsequently discharged effective June 14, 2011.

The Union contends that there are mitigating and extenuating circumstances that must be considered and that discharge was excessive and unwarranted.

The Union requested reinstatement and full compensation.

The Company disagrees with the Union and has declined the grievance.

**FOR THE UNION:
(SGD.) R. FITZGERALD
NATIONAL STAFF REPRESENTATIVE**

**FOR THE COMPANY:
(SGD.) R. BATEMAN
DIRECTOR, LABOUR RELATIONS**

There appeared on behalf of the Company:

R. Bateman	– Director Labour Relations, Toronto
R. Helmle	– Regional Manager CMC, Toronto
K. Smolyne	– Senior Manager Occupational Health Services, Montreal

There appeared on behalf of the Union:

R. Fitzgerald	– National Representative, Toronto
J. White	– Regional Representative, Toronto
F. Tulipano	– Grievor

AWARD OF THE ARBITRATOR

The record before the Arbitrator confirms that on at least two occasions the grievor engaged in both physical and verbal sexual harassment of fellow employee [...]. The account of events given by Ms. [...], and confirmed by another employee who was a witness, establishes that on April 15, 2011 the grievor stood in front of her while she was eating and stated that he intended to stand there and watch her eat. As he continued to watch, and she indicated that she would report him, he apparently walked away. Shortly thereafter, he returned, put his hands on her shoulders and leaned over her as she was taking a bite of her pita sandwich. He placed his face against hers and made a biting gesture. When another employee commented that the pita had teeth marks and saliva, the grievor commented that would not matter to him, as he would like to exchange saliva with Ms. [...] anytime. When she commented to him that his words were inappropriate he laughed and responded, in part: "...anytime, I am game."

A second incident occurred on April 28th, 2011. When the grievor was in the course of speaking with another employee about her marriage and she wondered out loud why her husband wanted to marry her, the grievor volunteered that he would marry her simply "...for the fact of not having to make trips to his bathroom for a date night with his right hand, because that gets old fast."

A third incident which occurred on April 30th, 2011 involves evidence of harassment, albeit not sexual harassment. On that occasion it appears that the grievor became frustrated by a supervisor's telephone which was ringing constantly. He

disconnected the telephone cord from the wall. When Ms. [...] commented that the phone had not been bothering her, he responded that it was bothering him and asked whether she "...had a problem, Missy ?" Ms. [...] reports having felt some fear for her own safety on that occasion. She felt a similar sentiment on another occasion the same day, when the grievor yelled at her because she had advised a supervisor that the grievor had abandoned his desk and the work was piling up. She describes his verbal outburst towards her as "threatening, demeaning and embarrassing."

Following a disciplinary investigation, the Company terminated the grievor's services for a conduct unbecoming and sexual harassments of a fellow employee. The grievor, during the course of his disciplinary statement, denied any recollection of the alleged acts of sexual harassment of which he was accused by Ms. [...]. In mitigation of his conduct, the Union advances evidence to the effect that he has been under medical care for an ongoing condition of stress, by reason of which he has been required to take a number of medications. A report from his family physician suggests that the grievor was "...at significant risk of psychiatric decompensation due to the stressful nature of his work...".

With respect, I find myself having some difficulty correlating the grievor's medical condition with all of the facts alleged against him. It goes without saying that being under medical care and using prescription drugs would not give anyone a license to make sexually explicit remarks to another employee in the workplace or to make physical contact with them in a way that is clearly unwelcome. The awards of this office

are categorical with respect to condemning deliberate sexual harassment of an employee (e.g. **CROA 1791, 2751**).

Upon a review of the facts in the instant case, I can see little reason to substitute a penalty short of discharge. Firstly, the grievor has not admitted any wrongdoing, and continues to deny any memory of the sexually suggestive statements he made towards his co-worker. I am not prepared to conclude, on the balance of probabilities, that he is being fully honest in that regard. Nor do I consider that the medical opinion filed in evidence is such as to explain or excuse the degree of sexual harassment in which he engaged in his remarks and gestures towards Ms. [...]. There can be little doubt but that the grievor's actions had a profound effect on her, to the point that she needed to be removed from the workplace for a period of time, such as to no longer be in contact with the grievor.

I am compelled to the reluctant conclusion that the grievor deliberately and repeatedly engaged in sexual harassment of a fellow employee. He did so without excuse and, it appears, without any recognition as to the seriousness of his own conduct. For all of these reasons the grievance must be dismissed.

December 17, 2012

(signed) MICHEL G. PICHER
ARBITRATOR