

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

**CASE NO. 4521**

Heard in Montreal, December 14, 2016

Concerning

**CANADIAN PACIFIC RAILWAY COMPANY**

And

**TEAMSTERS CANADA RAIL CONFERENCE**

**DISPUTE:**

Appeal of the harassment of Conductor M. Tilford.

**THE UNION'S EXPARTE STATEMENT OF ISSUE:**

Since at least the beginning of 2016, the Union contends that Mr. Mark Tilford was harassed and intimidated by Trainmasters employed by the Company at Montreal Terminal (principally by Company Trainmaster Mr. McRobbie) resulting in him being forced to take sick leave in May 2016.

The details of the alleged harassment and intimidation were set out in the Union's May 27, 2016 grievance letter. Moreover, in a series of emails, meetings and telephone conversations between the parties, Mr. Tilford explained his experiences and position to the Company.

The Union contends that the Company violated the collective agreement, CP's Discrimination and Harassment Policy 1300, the *Canadian Human Rights Act* and the *Canada Labour Code* in respect of the harassing and bullying conduct of the Company's Trainmasters. The Union seeks a declaration from the Arbitrator to these effects. 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 and a direction that Mr. McRobbie be restricted from interaction with Mr. Tilford. Finally, the Union seeks an order for additional damages (mental distress and punitive) to the Grievor on account of the Company's actions in this case.

The Company disagrees and denies the Union's request.

**FOR THE UNION:**  
**(SGD.) W. Apsey**  
GENERAL CHAIRMAN

**FOR THE COMPANY:**  
**(SGD.)**

There appeared on behalf of the Company:

- D. Pezzaniti – Manager, Labour Relations, Calgary
- D. Guerin – Senior Director, Labour Relations, Calgary
- R. McRobbie – Trainmaster, St. Luc
- N. Pattyn – Superintendent, Montreal

And on behalf of the Union:

- K. Stuebing – Counsel, Caley Wray, Toronto
- W. Apsey – General Chairman, Smiths Falls
- D. Lemoyne – Vice Local Chair, Smiths Falls
- M. Tilford – Grievor, Smiths Falls

## **AWARD OF THE ARBITRATOR**

### **Nature of the Case**

1. At the hearing, the TCRC alleged that CP had both harassed and failed to accommodate Conductor Mark Tilford. The TCRC contested CP's harassment investigation.
2. CP argued that the incidents of alleged harassment were not substantiated and that Mr. Tilford had never requested accommodation.
3. For the following reasons, the arbitrator concludes that there was effectively no investigation into Mr. Tilford's harassment allegations. The arbitrator further concludes the allegations regarding accommodation are premature. The record discloses no efforts in the tripartite process to discuss accommodation.
4. The arbitrator has accepted the TCRC's request to bifurcate the hearing. The parties will have an opportunity to argue the appropriate remedy at a future CROA session.

**Preliminary Issue**

5. CP objected to certain evidence the TCRC included in its brief. The TCRC has filed two other grievances on behalf of Mr. Tilford contesting separate 14-day and a 30-day suspensions. Those matters remain pending in the CROA process and were not included in this case. CP argued the arbitrator had no jurisdiction to consider those matters.

6. The TCRC argued that the arbitrator, within the context of a harassment grievance, could note, for example, that in one of the grievances CP interviewed Mr. Tilford, but not the train's engineer. That finding in the TCRC's view did not require the arbitrator to decide the merits of that grievance.

7. CP countered it was not prepared to deal with the context surrounding a grievance with which the arbitrator was not seized.

8. The arbitrator expressed to the parties some concern with potentially impacting two pending grievances which another CROA arbitrator might hear. Similarly, a Joint Statement of Issue, or an Ex Parte Statement, circumscribes the matters the arbitrator can decide: [CROA&DR 3488](#).

9. After a short break, the TCRC advised that Mr. Tilford's two grievances would not form part of this harassment grievance.

**Facts**

10. Mr. Tilford's May 27, 2016 grievance refers to specific incidents which occurred in the Winter and Spring of 2016 (Union Submissions; Exhibit 1; Tab 22). He had earlier filed a more general harassment complaint on May 10, 2016 which CP investigated (Union Submissions; Exhibit 1; Tab 4). The record also contained evidence about Mr. Tilford's medical issues and different assignments he performed. Mr. Tilford earned less income performing this other work.

11. Some of the specific incidents Mr. Tilford related included:

- A Train Master accused Mr. Tilford of leaving his keys in a switch. Despite Mr. Tilford indicating they were not his, he was accused of having 2 sets of keys. The keys belonged to another Train Master.

- A Train Master accused Mr. Tilford of not wearing proper footwear. Another Train Master confirmed Mr. Tilford's footwear was in fact approved.

- Mr. Tilford described being belittled by a Train Master's comment about relining a switch.

- A Train Master accused Mr. Tilford of failing to ride the footboard and protecting a hump crossing. After the engineer confirmed Mr. Tilford had been riding the footboard, the person making the allegation backed down. He nonetheless gave Mr. Tilford a warning.

12. CP investigated Mr. Tilford's allegations. The TCRC took issue with the fairness of that investigation and alleged that the investigator effectively dismissed most of the allegations without investigating.

**Analysis and Decision**

13. Legislation requires CP to be vigilant when it comes to safety (Company Submission; Exhibit 3; Tab 6). CP managers conduct e-tests to verify employees'

attention to safety matters. This verification helps protect not just CP employees, but the Canadian public as trains move across the country.

14. However, just because legislation mandates these checks, it does not follow that they could not be used to harass or otherwise unfairly target certain employees: [CROA&DR 4248](#).

15. On the evidence, the TCRC did not convince the arbitrator that the number of e-tests Mr. Tilford underwent demonstrated a misuse of such tests. The e-test frequency comparison with other employees such as Mr. Apsey, who also works extensively for the TCRC, did not satisfy the arbitrator that CP unfairly targeted Mr. Tilford.

16. CP's Policy 1300 prohibits "personal harassment" which it defines as "behaviour that is inappropriate and offensive but is not related to the grounds listed under the Canadian Human Rights Act". The policy obliges CP to investigate harassment complaints.

17. An obligation to investigate does not mean an outside investigator must always conduct harassment investigations. Indeed, using a third party investigator does not guarantee they will have an open, as opposed to closed, mind: [Shoan v. Canada \(Attorney General\), 2016 FC 1003](#).

18. Mr. Tilford's allegations as described above merited a fair investigation under Policy 1300. CP failed to provide one.

19. CP's investigation produced little evidence. The investigator's May 25, 2016 report was a mere two pages (Union Submissions, Exhibit 1, Tab 13).

20. No formal transcribed interviews were taken, despite this practice in other areas being essential to the CROA regime. There was no evidence from the Train Masters about what occurred or the context. The evidence which does exist in the record shows the TCRC's Mr. Apsey raised concerns directly with the investigator about the process being followed. The TCRC produced notes from Ms. LeMoyne about what had transpired on the initial call between Mr. Tilford and the investigator.

21. That evidence suggested the investigator immediately dismissed most of Mr. Tilford's allegations. The limited evidence before the arbitrator shows that the investigator, who the parties advised was an internal CP employee, had already arrived at certain conclusions about most of Mr. Tilford's allegations prior to speaking with him.

22. The investigator had apparently accessed material to support her conclusions, but she never shared this material with Mr. Tilford. She had also spoken to other witnesses, including the Train Masters, but did not disclose their testimony to Mr. Tilford.

23. Mr. Tilford was evidently in the best position to comment on the evidence on which an investigator may rely when arriving at his/her conclusions.

24. The arbitrator concludes that no real investigation took place into Mr. Tilford's allegations. A by-product of this failure is that, unlike in most CROA cases where evidence from an investigation constitutes an essential part of the record, here there is virtually nothing. These cases are highly fact sensitive. The regular arbitration cases the TCRC submitted, which were hundreds of paragraphs in length, show the importance of evidence in alleged harassment situations. A lack of evidence evidently poses challenges for CROA arbitrations which are scheduled for 1 hour.

25. CP's failure to investigate Mr. Tilford's harassment complaint entitles him to remedial relief.

26. The TCRC did not convince the arbitrator that a failure to accommodate had occurred. The record is almost entirely silent on this issue. The TCRC's Ex Parte Statement does not refer to accommodation. Neither did Mr. Tilford's grievance. The only mention the arbitrator could find about this issue was in the TCRC's submissions filed at the hearing.

27. The arbitrator emphasizes that the duty to accommodate is a continuing duty and the current finding does not impact any future position Mr. Tilford decides to take. The duty to accommodate in a unionized environment is a tripartite process. The arbitrator

found no evidence that anyone raised the issue of accommodation. For reasons the record does not disclose, this situation differs significantly from the usual communications in which these parties engage for accommodation matters: [CROA&DR 4503](#).

28. The arbitrator remains seized to deal with the parties' positions regarding an appropriate remedy for Mr. Tilford.

January 27, 2017

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**GRAHAM J. CLARKE**  
**ARBITRATOR**