

CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4752

Heard in Montreal with Video Conferencing, July 15, 2020

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the Company failing to follow Policy 1300, Discrimination and Harassment when employees were harassed and intimidated by a Company Manager while at work.

THE UNION EXPARTE STATEMENT OF ISSUE:

The details of the alleged harassment and intimidation were set out in the Union's September 10, 2018 and December 7, 2018 grievance letters.

The Company requested two TLE's before responding to the Union on March 22, 2019 and declined the Union's Step 3 grievance.

The matter has not been dealt with.

Union's Position:

The parties had discussions on the issue at hand and what it would take to resolve. The Union was very clear that there could only be one result, that the Company conduct a thorough and proper investigation. It is clear this was never done. For instance, one employee was never contacted by the Manager who was supposed to be conducting the investigation therefore, how any conclusion could have been determined is beyond the Union. What was determined by the improper investigation, and the Company's responses to the various Steps of the grievance procedure is that they do not care, nor intend to follow their own policies let alone the protective rights afforded to the employees, when the complaint is against a Manager. The Company simply wanted this to go away. Why would the Company not ensure the process, having been incorrectly done the first time, ensure that even with the amount of time that had passed, the wrong process would be corrected by having an independent investigation performed by a third party to which all parties would be governed by their findings. Instead, to respond in the manner the Company has on March 22nd speaks volumes to where CP stands on the rights of its employees, and the order of importance harassment, discrimination have. It is obviously very low, given the fact that these grievances were filed and declined.

The Company's Senior Vice-President of Operations East, Mr. Tony Marquis, was appalled that a harassment complaint had reached the third step of the appeal process without his knowledge or that HRBP not involved. He further suggested, if necessary, arrange to have external investigators as required.

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 discriminating conduct of the Company's Manager. The Union seeks a declaration from the Arbitrator to these effects. The Union also seeks an order that the Grievors be provided a worry-free atmosphere as no employee should have to face what these three did on the day in question and now have to continually look over their shoulder.

In addition, the Union seeks an order for punitive damages and mental distress damages in respect of the unnecessary tactics that have taken place to the Grievors on account of the Company's actions in this case.

Company's Position:

The Company has concluded its investigation into the matter and considers it closed and therefore disagrees and denies the Union's request.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

The details of the alleged harassment and intimidation were set out in the Union's e-mail to the Company on August 13, 2018.

Company's Position:

The Company disagrees and denies the Union's request.

The Company maintains that no violation of the Collective Agreement has occurred.

The burden of proof that a violation of Policy 1300, *the Canadian Human Rights Act* or the *Canada Labour Code* has not been met. Further, this matter was not filed under Policy 1300 nor under the *Canadian Human Rights Act* nor the *Canada Labour Code*.

The Company maintains the Union provides no rationale as to why the Grievors would be entitled to damages. Damages are reserved for conduct, which is found to be harsh, vindictive, reprehensible and malicious, as well as extreme in its nature, as established in the notable *Honda v. Keays* Supreme Court of Canada decision. The Union failed to allege such action on behalf of the Company throughout the grievance process; as such, the Company maintains the request for damages is without merit.

Accordingly, the Company disagrees and denies the grievance in its entirety.

FOR THE UNION:

(SGD.) W. Apsey -and- J. Campbell

General Chairperson

FOR THE COMPANY:

(SGD.) F. Billings

Manager, Labour Relations

There appeared on behalf of the Company:

D. Zurbuchen – Manager Labour Relations, Calgary
F. Billings – Manager Labour Relations, Calgary

And on behalf of the Union:

A. Stevens – Counsel, Caley Wray, Toronto
W. Apsey – General Chairperson, CTY E, Smiths Falls
J. Campbell – General Chairperson, LE E, Peterborough
B. Foster – Grievor, Toronto
R. Miscavish – Grievor, Toronto
A. Smith – Grievor, Toronto

AWARD OF THE ARBITRATOR

1. After carefully reviewing the submissions, materials, and jurisprudence before me, I find that the evidence fails to establish a *prima facie* case of discrimination or harassment. For the following reasons, the grievance is dismissed. This decision will only deal with the relevant arguments that were proffered in arriving at my findings.

2. On August 7, 2018, Assistant Superintendent Mr. B gave a ride to the crew, comprised of three employees. This was the crew's first encounter with Mr. B. The employees allege that while driving to their destination, Mr. B engaged in foul language and gossip about the former Assistant Superintendent. According to the crew members, Mr. B stated he got the promotion because his predecessor was "*unable to handle the job.*" The crew also claims Mr. B referred to his predecessor as "*a fucking asshole.*" The Union forwarded the allegations to management and voiced its concerns.

3. The Company spoke to two of the crew members and obtained Mr. B's response to the allegations made against him. Mr. B denies the conversation occurred as portrayed by the employees and asserts he has the utmost respect for every individual working for the Company. The Union filed the grievance. It contends the Company's handling of the complaint was insufficient and violates Company Policy 1300 dealing with discrimination and harassment.

4. I find that the Union has not met its evidentiary burden to prove *prima facie* discrimination or harassment. There is no evidence to substantiate that the three

employees were subject to any kind of harassment or discrimination by Mr. B. Assuming I accept the employees' versions of events, and Mr. B uttered the disparaging comments reported by the crew, those comments were not directed at them. Rather, they were directed at his former colleague, who was not present. Such foul language would certainly qualify as unprofessional behaviour but does not constitute harassment or discrimination against the members of the crew under the circumstances.

5. Although I understand that the crew felt bothered and uncomfortable to witness such unacceptable behaviour from management, this does not meet the threshold of evidence required to support a *prima facie* case of discrimination or harassment. I have no evidence before me that Mr. B continued in his unprofessional behaviour beyond this one occasion. Had he done so, that may have created the "poisoned work environment" the Union is referring to. In any event, Mr. B has left the organization.

6. Dealing now with the Company's duty to investigate, the Union argues that the Company has failed to conduct a proper investigation and adequately notify the Union or crew of its outcome. In its grievance response, the Company simply stated, "the matter has been dealt with."

7. Although the investigation was not perfect, I am satisfied the Company has fulfilled its duty to investigate. Additional interviews with one of the complainants with proper notification to the Union would not have led to a different outcome given the lack of evidence to substantiate a claim of harassment or discrimination.

8. Nevertheless, despite the finding that the complaint was unfounded, the behaviour reported by the crew does not strike me to be acceptable in the workplace. The Company has a duty to promote a healthy work environment. It is unfortunate that the Company did not communicate the results to the parties concerned. Had the Company been transparent about its investigation and its conclusion, this case may not have been referred to arbitration.

9. For these reasons, the grievance is denied.

August 7, 2020



AMAL GARZOUZI
ARBITRATOR