CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4847

Heard in Montreal, July 13, 2023

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The discrimination and harassing behaviour towards Mr. N. Lashley by the Company in violation of Policy 1300, the Collective Agreement and all applicable laws.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Starting on November 19, 2019 Mr. Lashley sent an email to Human Resources Manager (HRM) Kevin Kinsella, Melissa Shellnutt (Employment Specialist), GM Brad McDaniel, Shelly McInnis (Managing Director Human Resources), titled "Racial bias/discrimination against STM Aaron Twomey". In this email he recounted events from October 11, 2019 and onwards. HRM Kevin Kinsella emailed Mr. Lashley on December 16, 2019 looking to have another face to face meeting. Email exchanges as well as the in-depth information surrounding Mr. Lashley's discrimination/harassment against him are in possession of the parties. Union Local files Step 2 appeal which the Company declines on August 10, 2020 maintaining that the Company followed their Policy 1300 and found no that there was no discrimination or harassment towards Mr. Lashley.

Union's Position:

For all the reasons and submissions set forth in the Union's grievances, which are herein adopted, the Union contends as below.

The initial fact that the Company has neglected to respond to the Step 3 grievance shows that this is of little concern to them. The lack of response speaks volumes as this is indicative of how Mr. Lashley's workplace has been for him, a workplace where he felt singled out, unsafe, and unheard. This behaviour towards him has caused Mr. Lashley to move out of the Toronto Terminal and now works out of the Smiths Falls Terminal where his exposure to those at Toronto will now be limited to the odd adhoc trip to Toronto. Mr. Lashley still feels with the move that he will face retribution as he continues with his career at CP. To have to uproot your family account of this Company behaviour is no more than disgusting.

The Union contends that Mr. Neil Lashley has faced discrimination/harassment in violation of CP Policy 1300 (Discrimination and Harassment), Policy 1500 (Employment Equity), Canadian Human Rights Act, Employment Equity Act and the Collective Agreement.

The Union further believes that any so called addressing of Mr. Lashley's complaint appears to be no more then the Company self-serving a result for the sake of a result. We have seen throughout the World that this type of behavior MUST change but words are only words unless proper action takes place. Mr. Lashley knew by bringing this forward that he could face further retribution (of course the Company will always deny same) but he did the right thing. Unfortunately, those who were to handle came up with the same conclusion we have seen in previous times that no one within Management did anything wrong. We rely on the results of employee Mark Tilford where CP concluded nothing wrong when they didn't even perform a proper process. We saw where 3 Toronto employees brought forward issues and again the result was that Management did nothing wrong. LR will rely on the recent Award that the Arbitrator agreed that the Company did in fact follow the process, that was all she ruled on. It is no wonder that employees will not bring forward acts of aggression, discrimination, harassment, intimidation by CP Management, as the results of the so called "investigation" will remain consistent.

The Union as provided in the earlier grievance with the communication of facts that Mr. Lashley provided show that Mr. Lashley absolutely faced discriminatory acts by the Company. In his final communication to CP HRM Kinsella, Mr. Lashley provides his disappointment in how things have been handled and the so-called results and further states, "However, I'm not surprised. It is what it is."

The Union further believes that account of Mr. Lashley lodging his complaint he then faced undue scrutiny and excessive discipline assessed to him for 3 different incidents. It is abundantly clear the Company will now build a "progressive discipline file" on Mr. Lashley so when the dismissal finally arrives down the road they can stand up and say oh no Arbitrator, we followed our discipline policy and progressively disciplined Mr. Lashley which has nothing to do with his complaint.

The Company without a doubt has failed Mr. Lashley and his family, has failed what Policy 1300, 1500 stand for. There is no doubt that Mr. Lashley has faced under CHRA discriminatory behaviour towards him. The Union also contends the Articles and Preamble of the Consolidated Collective Agreement have been violated as provided within our grievances.

Mr. Lashley has moved his family to another Terminal to hopefully escape the discrimination he faced in Toronto; he has sought help from EFAP and Mental Health counselling in order to deal with this.

There is doubt to Mr. Lashley or the Union that evidence provided that, Mr. Lashley has faced discrimination while at work and through the Company's excessive discipline of this employee. There is no doubt that Mr. Lashley has felt emotionally and psychologically assaulted, account of the actions of the Company.

We have seen in recent months System Bulletins put out by CEO and President Keith Creel and Executive Vice President Mark Redd about Equality, instilling CP Values and Foundations, Diversity and Race Equality, again words are words unless you back up what you preach without further having an employee having to feel as Mr. Lashley has and continues.

As provided by CEO/President Keith Creel;

"Every single one of you will shape our future and define where we go next. Through respect and understanding, we can learn from each other and be far better together. We can continue to build a company where all people are valued and respected, and have equal opportunities to succeed."

We await the change.

Mr. Lashley has suffered discrimination in the work place, harassment and bullying/retribution tactics to the point that have left him and his family in the position of when will be the next time, where will we have to move again to evade this type of behaviour, or does Mr. Lashley have to leave his job to satisfy CP Management.

As important as this grievance is, the Company did not respond to the Union's Step 3 grievance.

As per the facts and positions provided in the Union's grievances the Union seeks a declaration that the Company has discriminated and harassed Mr. Neil Lashley and is ordered to stop its violations of CP Policy 1300, CP Policy 1500, the Ontario Human Rights Code, the *Canadian Human Rights Act*, the Employee Equity Act, and the CCA..

The Union seeks an order for general damages of $10,000, aggravated damages of $25,000, punitive damages of $25,000, and breach of the employment contract by CP of $10,000 all to be awarded to Mr. Lashley.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

On November 19, 2019, Mr. Lashley sent an email to Human Resources Manager (HRM) Kevin Kinsella, Melissa Shellnutt (Employment Specialist), GM Brad McDaniel, Shelly McInnis (Managing Director Human Resources), titled "Racial bias/discrimination against STM Aaron Twomey." In this email, he recounted his version of events occurring between October 11-16, 2019.

Following the email, Mr. Kinsella and the employee met and discussed the Grievor's allegations. Their correspondence will be available in the Company's Book of Documents. The employee remained unsatisfied following Mr. Kinsella's efforts.

The Union Local filed a Step 2 appeal on June 11, 2020. The Company declined the Grievance on August 10, 2020. A Step 3 grievance was then filed by the Union on August 20, 2020.

Union Position:

The Union has filed their own Ex Parte Statement of Issues.

Company's Position:

The Company disagrees and denies the Union's request.

To begin with, under the provisions of the Collective Agreement, the Step Two grievance correspondence was untimely. As per Article 40.04: *Any grievance not progressed by the Union within the prescribed time limits shall be considered invalid and shall not be subject to further appeal.*

Notwithstanding the aforementioned, the Union's contention that the Grievor's concerns were not taken seriously, or properly reviewed, is without merit. The Company investigated the matter and it was concluded that there were no findings of discriminating or harassing behaviour.

In consideration of the Union's allegations regarding discipline assessed to the Grievor, these assessments are the subject of other grievances. Reference to them within the context of this arbitration is inappropriate and an attempt to duplicate proceedings. The Union cannot have multiple opportunities to arbitrate the same issue.

In regards to the Union's allegations regarding the grievance correspondence, as per the grievance procedure the remedy for a failure to respond is escalation to the next step. This has occurred and the Company's position has been provided.

The Union has provided no rationale as to why the Grievor 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. The Union has failed to provide evidence that the Company has acted in such a manner. As such, the Company maintains the request for damages is without merit.

There has been no violation of the Collective Agreement, Company Policy, Ontario Human Rights Code, Canadian Human Rights Act, or the Employment Equity Act. The Union has not met the burden of proof to substantiate these allegations and a declaration supporting the Union's position would not be appropriate.

The Company requests the Arbitrator be drawn to the same conclusion as the Company and decline this grievance in its entirety.

FOR THE UNION:
(SGD.) W. Apsey
General Chair CTY-E

FOR THE COMPANY:
(SGD.) L. McGinley
Director Labour Relations

There appeared on behalf of the Company:

J. Bairaktaris	– Director, Labour Relations, Calgary
L. McGinley	– Director, Labour Relations, Calgary

And on behalf of the Union:

R. Church	– Counsel, Caley Wray, Toronto
W. Apsey	– General Chairperson, CTY-E, Smiths Falls
B. Baxter	– Vice General Chairperson, CTY-E, Toronto
P. Boucher	– President. TCRC, Ottawa
N. Lashley	– Grievor CTY-E, Smiths Falls

AWARD OF THE ARBITRATOR

Preliminary Objection

1. The Company objects that the Step 2 grievance was filed in an untimely manner and invokes article 40.04 of the Collective Agreement:

> Any grievance not progressed by the Union within the prescribed time limits shall be considered invalid and shall not be subject to further appeal.

2. It notes that the final exchanges between the grievor and the Company occurred in February 2020, with the grievance having to be filed at the latest in April 2020. The grievance was actually filed on June 11, 2020, some two months late.

3. The Company further argues that I should not exercise my discretion under the Canada Labour Code to relieve the Union from late filing, as it would suffer actual prejudice, as two of the key Company witnesses, STM A. Twomey and Superintendent D. Hunter, are no longer with the company.

4. The Union argues that the delay is not lengthy, and that the Company has waived it's right to object by responding in their Step 2 grievance response and deciding not to respond at Step 3. It argues further that the Company has not suffered any prejudice, and in the circumstances, I should exercise my discretion under the Canada Labour Code.

Decision on the Preliminary Objection

5. The Union argues that the Company has waived its right to object to timeliness issues based on its failure to raise the issue during the grievance process. The issue was raised for the first time in the Company's Ex Parte Statement of Issues (undated, but filed after the Union Ex Parte Statement of Issues dated April 27, 2023). The Union cites Brown and Beatty, Canadian Labour Arbitration 5th Edition, s 2:63:

> The concept of "waiver" connotes a party not insisting on some right, or giving up some advantage. However, to be operative, waiver will generally require both knowledge of and an intention to forego the exercise of such a right. In its application, waiver is a doctrine that parallels the one utilized by the civil courts known as "taking a fresh step",[2] and holds that by failing to make a timely objection and "by treating the grievance on its merits in the presence of a clear procedural defect, the party waives the defect".[3]That is, by not objecting to a failure to comply with mandatory time-limits until the grievance comes on for hearing, the party who should have raised the matter earlier will be held to have waived non-compliance, and any objection to arbitrability will not be sustained.[4] This has been held to be so even though there was a timely objection as to arbitrability but not one that related to the failure to meet time-limits.[5] Where, however, the objection to untimeliness is made at the earliest opportunity, even if it is not made in writing, it will preclude a finding that the irregularity was waived.[6]

6. Here, the Company has waited some three years after the close of the grievance process to raise a timeliness issue for the first time, in a CROA procedural step immediately prior to arbitration. I view this as a "failure to make a timely objection" and find that the Company has waived the late filing.

7. If I had not found a waiver by the Company, I would have exercised my discretion to extend time lines under the Canada Labour Code, which provides as follows:

> 60 (1.1) The arbitrator or arbitration board may extend the time for taking any step in the grievance process or arbitration procedure set out in a collective agreement, even after the expiration of the time, if the arbitrator or arbitration board is *satisfied that there are reasonable grounds for the extension and that the other party would not be unduly prejudiced by the extension*. (Italics added)

8. The jurisprudence has interpreted the provision on multiple occasions and provides criteria to be examined and weighed in deciding to exercise discretion to relieve against late filing:

> Vancouver Airport Authority v. Public Service Alliance of Canada,
> As set out at page 621 of the Annotated Canada Labour Code, Ronald M. Snyder (2012), the factors applicable to determining whether reasonable grounds exist to extend a time limit include: the nature of the grievance; whether the delay occurred in launching the grievance or at some later stage; whether the grievor was responsible for the delay; the reasons for the delay; the length of the delay; and whether the employer could reasonably have assumed that the grievance had been abandoned. A similar list is found at page 397 of Laidlaw Transit, citing Re Greater Niagara General Hospital and O.N.A.(1981), 1 LAC (3d) 1 (Schiff).

9. I exercise my discretion because the period in question is relatively short, some two months. The Company would not be prejudiced by the two-month delay, in and of itself. There is no indication that the Company believed the grievance to have been abandoned. There is no doubt that Mr. Lashley would be prejudiced if the grievance is not allowed to proceed.

10. The Union has not provided any clear reason for the failure to file on time. I do note that Mr. Lashley was in the process of moving to Smith's Falls from Toronto at the time.

11. I do not believe the Company suffers actual prejudice by the fact that two of its witnesses are no longer are employed by them. The Company is entitled to rely on the investigation conducted by Mr. Kinsella, when both witnesses were employed by the Company. Under the CROA process, the parties do their own investigation, and it is rare, and only by exception, that witnesses are called to testify. No witnesses were called here.

12. Thus, whether considered under the lens of "waiver" or the exercise of discretion under the Canada Labour Code, the grievance may proceed.

Prima Facie Case

13. Mr. Lashley alleges that he has been treated differently than his white colleagues, for identical actions.

14. To meet the necessary burden of proof, Mr. Lashley must establish a prima facie case of discrimination. To do so, he must prove the following, as set out by the Supreme Court of Canada in Stewart v. Elk Valley 2017 1 SCR 609:

> [23] To make a claim for discrimination under the Act, the employee must establish a prima facie case of discrimination. If this is established, the onus then shifts to the employer to show that it accommodated the employee to the point of undue hardship. [24] To make a case of prima facie discrimination, "complainants are required to show that they have a characteristic protected from discrimination under the [Human Rights Code, R.S.B.C. 1996, c. 210]; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact": Moore, at para. 33. Discrimination can take many forms, including "'indirect' discrimination", where otherwise neutral policies may have an adverse effect on certain groups: Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center), 2015 SCC 39, [2015] 2 S.C.R. 789, at para. 32. Discriminatory intent on behalf of an employer is not required to demonstrate prima facie discrimination: Bombardier, at para. 40.

15. Here, Mr. Lashley has established that he was counselled by Ms. Twomey for sitting on a log for some ten minutes, while his colleague was finishing a task. He has further established that his white colleagues have sat on the same log in the following days, without any comment or counselling by management. It would therefore appear that Mr. Lashley has met the first two tests set out by the Supreme Court of Canada. He is a black man and has received counselling from management, which would be an adverse impact on his employment.

16. At issue is the third test: whether his race was a factor in the adverse impact. Mr. Lashley has established that Ms. Twomey was working in the tower on the days his colleagues also sat on the same log. He has not established, however, that his colleagues were <u>seen</u> by Ms. Twomey. In Mr. Kinsella's December 13, 2019 notes at

Tab 2 of the Company Exhibits, he asks Ms. Twomey that question directly, and she denies having seen them:

> "Aaron
> …Have you seen anyone else sitting-No".

17. In his December 16, 2019 notes of his meeting with Mr. Lashley, he continues:

> "Aaron would like to set the record straight with Neil if open…You were not "singled out". You just happened to be the person there at that moment".

18. In the circumstances, it does not appear unreasonable for management to counsel Mr. Lashley. In fact, he does not object to the counselling per se, but rather the alleged differential treatment he received compared to his white colleagues. Unfortunately for his claim, he does not meet his burden of proof to prove this differential treatment.

19. Consequently, Mr. Lashley has not made out a prima facie case of discrimination and the grievance, to this extent, fails.

The Right to a Proper Investigation

20. The jurisprudence is clear that there is an independent right to a proper investigation of an allegation of discrimination. As set out in Murchie v JB's Mongolian Grill, 2006 HRTO 33 at para 165:

> Human rights jurisprudence has established that an employer is under a duty to take reasonable steps to address allegations of discrimination in the workplace, and a failure to do so will itself result in liability under the Code…

21. It would make the protection under s.5(1) to a discrimination-free work environment a hollow one if an employer could sit idly when a complaint of discrimination was made and not have to investigate it. If that were so, how could it determine if a discriminatory act occurred or a poisoned work environment existed? The duty to investigate is a "means" by which the employer ensures that it is achieving the Code-mandate "ends" of operating in a discrimination-free environment and providing its employees with a safe work environment.

22. The Company has a broad and detailed Discrimination and Harassment Policy, Policy #1300. It provides a Policy Statement which notes:

> Human rights violations and acts of discrimination, harassment or sexual harassment are unacceptable, are to be investigated, or, where appropriate, resolved through an alternate dispute resolution mechanism.

23. The Complaint/Dispute Resolution Procedure of the Policy notes:

> Resolution of complaints as quickly as possible and at the lowest possible level of the organization is preferred…..<u>However, if the complainant prefers to have the complaint dealt with at a higher level of management, or by Employee Relations, they may lodge the complaint directly with any of these groups….</u>
>
> <u>Where a complaint is being investigated, the person conducting the investigation will interview the complainant, the alleged offender and any witnesses, review pertinent files and documentation and conduct a complete investigation to establish the facts</u>…
>
> <u>The investigation will be conducted as quickly as possible and the results communicated to the parties concerned. The investigation results and notification to the parties must be documented</u>.

24. In **CROA 4521**, Arbitrator Clarke found that Policy 1300 required a fair investigation of a harassment complaint. In my view, a fair and complete investigation of a complaint of discrimination is equally required, both by Policy #1300 and by human rights law.

Arguments of the Parties

25. The Company argues that this was an informal complaint, which was properly investigated by Mr. Kinsella. It argues that the two primary Company actors, Ms. Twomey and Superintendent Hunter were contacted by him. It argues that the other possible witnesses were not present at the time of the incident.

26. The Union argues that this was a formal complaint, with a detailed email addressed to Employee Relations. The Complaint notes multiple witnesses, none of whom were interviewed by Mr. Kinsella. It pleads that the Superintendent was not interviewed by him.

It notes that only the grievor and Ms. Twomey were interviewed and no proper report was ever done to conclude the investigation. It pleads that the situation here is worse than the situation in CROA 4521, in which Arbitrator Clarke found that an improper investigation had been done.

Was a Proper Investigation Conducted?

27. In my view, this was a formal complaint, under the terms of the Company policy. The Policy clearly permits a complaint to be escalated beyond local management, as was done here. The detailed complaint was addressed to amongst others, Employee Relations.

28. The grievor's witnesses were never contacted to ascertain whether they had information showing that Ms. Twomey was in fact aware of other people sitting on the log. Instead, it appears that there was a single question put to Ms. Twomey, where her monosyllabic answer was accepted by Mr. Kinsella. There is no evidence of any effort to probe further or to challenge her testimony in any way. When identified witnesses are never questioned, it can hardly be said that there has been a "complete investigation", as called for by the Policy.

29. It is not clear whether the new Superintendent, Mr. Hunter, was interviewed by Mr. Kinsella. There may be an inference that this was done, as Mr. Kinsella's notes refer to "communication with senior management". However, Mr. Hunter was clearly a key witness and there are no detailed notes of the content of an interview with him by Mr. Kinsella, as there are with Ms. Twomey. The Policy would require that he be interviewed and the complainant should not be left uncertain whether this in fact took place.

30. No final report detailing the investigation and conclusions was ever provided, contrary to the Policy.

31. Viewed as a whole, this process does not amount to a proper investigation.

Damages

32. It is possible or even likely that a proper investigation would have led to the same conclusion, that there was no prima facie case of discrimination. There is some evidence from Ms. Twomey that she had not seen other people sitting on the same log as Mr. Lashley. However, there is also some possibility that if the identified witnesses had been interviewed, that a finding of differential treatment could have been made.

33. Mr. Lashley has lost at the very least an opportunity to make his case, had the Company performed a proper investigation. He is also left with the sense that his complaint was not treated sufficiently seriously.

34. I find that these losses, for which the Company is responsible, warrant at least some damages.

35. In all the circumstances, I find that an award of $2500 is appropriate.

36. I remain seized of this matter, should there be any difficulties of implementation.

August 8, 2023

JAMES CAMERON
ARBITRATOR