

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

CASE NO. 5073

Heard in Calgary, September 10, 2024

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Policy Grievance on behalf of CN Conductors, Trainpersons and Yard employees of Western Canada and specifically Conductor You– Ju Choi of Edmonton AB regarding the actions of Trainmaster Dallas Ogilvie on February 8, 2022, in alleged contravention of CN's Workplace Harassment and Violence Prevention Policy, CN's Code of Business Conduct and Article 152 of Agreement 4.3.

JOINT STATEMENT OF ISSUE:

On February 8, 2022, Conductor You Ju Choi (the Grievor) worked the 601 Road Switcher assignment in Scotford. At the end of her shift, Trainmaster Dallas Ogilvie allegedly detained the crew for more than an hour to address the fact that they had given notice that they would require rest in accordance with Article 35 of Agreement 4.3. The Grievor felt intimidated and humiliated by Trainmaster Ogilvie's behaviour during this interaction.

UNION'S POSITION:

The Union's position is that the actions of Supervisor Ogilvie were harassing, threatening, and intimidating and caused the Grievor humiliation and loss of dignity for exercising her collective right under Agreement 4.3. It is the Union's position that even after the Grievor asked Trainmaster Ogilvie to stop harassing her, Trainmaster Ogilvie continued his intimidation by acting in a hostile and offensive manner. The Union's position is that the Company failed to exercise its rights reasonably and ensure a harassment free workplace, contrary to the Company's Workplace Harassment and Violence Prevention Policy, the Company's Code of Business Conduct and Article 152 of Agreement 4.3.

The Union requests a finding that the Company was in violation of Article 152. Additionally, due to the blatant and indefensible actions of Trainmaster Dallas Ogilvie, the Union requests that an appropriate remedy be awarded to address the humiliation and loss of dignity the Grievor suffered as a result.

The Company has not responded to the Grievance.

COMPANY'S POSITION:

The Company disagrees with the Union's assertions. Mr. Ogilvie's conduct towards them was a managerial right when he questioned the Grievor on what transpired during the tour of duty and why the crew was unable to perform their assigned duties within their schedule. Further, the Company disagrees with the allegations as there was no harassment complaint filed under the Company's Workplace Harassment and Violence Prevention Policy, and because there has been no supporting evidence provided by the Union from the crew members on the assertions brought forward by the Grievor. Lastly, the Company disagrees that any monetary compensation is warranted in the matter.

For the Union:**(SGD.) R. S. Donegan**

General Chairperson

For the Company:**(SGD.) R. K. Singh** (for) **J. Girard**

Chief Human Resources Officer

There appeared on behalf of the Company:

R. Singh – Manager, Labour Relations, Vancouver
A. Borges – Manager, Labour Relations, Toronto

And on behalf of the Union:

K. Stuebing – Counsel, Caley Wray, Toronto
R. S. Donegan – General Chairperson, CTY– W, Saskatoon
J. Thorbjornsen – Vice General Chairperson, CTY– W, Saskatoon
Y. J. Choi – Grievor, Edmonton

AWARD OF THE ARBITRATOR**Background, Issue & Summary**

- [1] This Grievance alleges that Trainmaster Dallas Ogilvie harassed, intimidated and threatened Assistant Conductor You– Ju Choi on February 8, 2022, during three interactions which occurred when Ms. Choi and her crew were performing Road Switcher assignment 601 in Scotford yard. That crew included Ms. Choi (as brakeman; Assistant Conductor), Ms. Vrabel (as Conductor) and Locomotive Engineer Perry. Collectively, the three individuals will be referred to as the "Crew". The Crew was subject to Agreement 4.3, governing Prairie and Mountain Regions.
- [2] All Crew members provided detailed written statements. Ms. Choi's statement was written on February 14, 2022 (6 days after the incident); Ms. Vrabel's statement was written on February 9, 2022 (the next day after the incident); Engineer Perry also prepared a statement, which was undated. While his gender is not made clear in the evidence, in this Award, the reference will be to "he".

- [3] This Grievance is unusual, as the Trainmaster was not interviewed by the Company upon receiving this Grievance. Nor was any investigation undertaken by the Company upon the Grievance being filed in March of 2022, to determine the evidence of the Crew members as to what occurred that day. The crew of 602 likewise was not interviewed to address Ms. Choi's comment Mr. Ogilvie was overheard by the Grievor yelling at that crew, which frightened Ms. Choi regarding her own upcoming interaction with Mr. Ogilvie.
- [4] Therefore, the only evidence filed in this Grievance and before this Arbitrator comes from the Crew members. That evidence is undisputed.
- [5] There are two issues between these parties:
- a. Does the conduct as described in the evidence rise to the level of harassing, intimidating and threatening behaviour, which breached the Collective Agreement; the Company's own policy; and offended legislation requiring the Company to provide a safe workplace for these Crew members? and
 - b. If so, what is the appropriate remedy?
- [6] For the reasons which follow, the Grievance is allowed. Certain of Mr. Ogilvie's conduct towards the Crew on February 8, 2022 constituted behaviour that was threatening, intimidating and harassing. The Company further failed in its independent obligation to investigate the allegations and to ensure the continuing safety of its employees, once it received the Grievance in March of 2022.
- [7] A remedy under Article 121.10 is warranted, the amount of which is remitted to the parties, for their further discussion.

Facts

- [8] I am satisfied that on February 8, 2022, the Crew was working in Scotford yard. On that day, the Crew had several interactions with Mr. Ogilvie. A Grievance was filed on March 23, 2022, the month following the alleged incidents, and was forwarded to Mr. J. Thompson, VP of Operations, Western Region. In that Grievance, certain facts and allegations were set out, including that Mr. Ogilvie had acted in a manner which was intimidating, threatening and harassing to Ms. Choi.

- [9] The following is a summary of the only evidence filed:
- a. On February 8, 2022, the Crew was working the 601 assignment February 8, 2022 in Scotford yard;
 - b. At the start of their tour of duty, they advised Mr. Ogilvie they would not work past their 10th hour. This limitation was repeated on several occasions on that day.
 - c. The Crew ended up working over 11 hours on that day.
 - d. On that day, when the Crew was in for lunch, they were approached by Mr. Ogilvie with new lists and he explained to them what he would like done that afternoon, while they were having their lunch break. Ms. Vrabel explained she had been off almost two years on maternity leave and this was her first day back a work, so this explanation took some time.
 - e. The Crew finished eating and then had a job briefing for their afternoon's work, before returning to their Train.
 - f. During the afternoon, the Yardmaster changed certain of the work which Mr. Ogilvie had assigned, without his knowledge;
 - g. At 16:40, Ms. Vrabel reminded the Yardmaster of the time, as only 20 minutes were left in the 10th hour and the Train would need to be tied down. She asked about the plans for a recrew, and how the Yardmaster wanted the Crew to proceed, given the time constraints.
 - h. According to all of the Crew members, Mr. Ogilvie then "immediately" came on the radio after this question was asked.
 - i. In Ms. Vrabel's words Mr. Ogilvie "sternly" repeated the Crew was to toss the last list She described this interchange as Mr. Ogilvie asking why the Crew was not done the work, and being told that certain work had not yet been done as the Yardmaster had changed the work.
 - j. Ms. Choi description was that Mr. Ogilvie "jumps on the radio arguing with us that he made adjustments to our switching plans so that we can finish our work. He sounds angry and berates us about why we didn't switch around ...on our list and we inform him that we were instructed to perform the move in the south yard as per the Scotford Yardmaster". Ms. Choi described that Mr. Ogilvie continued to "berate" the crew about keeping him informed.
 - k. Ms. Choi indicated to Mr. Ogilvie that the Crew would be "expecting...to be in the shack by our ten", which referred to the 10 hours of duty.

- i. She then described Mr. Ogilvie as “furiously telling us that we will all be getting taxis is we are this tired that we can’t work past ten”.
- m. Ms. Vrabel apologized for “upsetting” Mr. Ogilvie, and explained she was trying to “find a way to get this done that works for both of us, but I would not be working past my 10th hour”.
- n. Ms. Vrabel described Mr. Ogilvie at this point as “clearly frustrated” with the Crew as they did not finish the work and noted that he made the comment that “if you’re too tired to move the train I will get you all a cab”.
- o. Ms. Choi comments that Mr. Ogilvie “furiously” told the crew that “we will all be getting taxis if we are this tired that we can’t work past ten”.
- p. The LE does not reference Mr. Ogilvie’s tone in his statement. He agrees with the other two Crew that Mr. Ogilvie said that if the Crew were too tired to operate the train, then they were too tired to drive home and he would get them a cab, and that he asked the Crew if they wanted him to call a taxi and the LE said “no”.
- q. The LE felt this statement by Mr. Ogilvie regarding getting a cab was “intimidation to get the Conductor to work over 10 hrs”.
- r. Ms. Choi was on the tail and she walked back to the office, while the other two Crew waited for Mr. Ogilvie to pick them up, which occurred approximately 30 minutes later.
- s. When Ms. Choi went back to the shack, she described that she “hid” in the bathroom as she could “hear Dallas yelling very clearly through the door in the booking in room to 602 (who started at 1700) and I catch him saying “don’t list to [her], forget everything she tells you” regarding the progress the 601 had made.
- t. Ms. Choi described she was “confused as to why he sounds so angry about the simple topic about where the shots were and where our train is”.
- u. She also stated that that she didn’t “...leave the bathroom until I hear his footsteps go back upstairs because I am scared of what kind of verbal abuse I am about to endure”.
- v. When Ms. Choi came downstairs, she described that Mr. Ogilvie saw her and asked to speak with her in private and that he asked 602 to go outside to wait for him in the truck.
- w. She stated in her statement that she “wish that 602 had stuck around because once again I am scared because Dallas seems angry”.
- x. Mr. Choi therefore describes being “scared” of Mr. Ogilvie at two different points in her statement.

- y. Mr. Ogilvie had printed out the locomotive information and told Ms. Choi her lunch hour was excessive, being an hour and 20 minutes.
- z. It is not clear why Mr. Ogilvie chose to initially discuss the issue of the length of the lunch hour only with Ms. Choi at this point, instead of waiting for the entire Crew, given that he then had a similar conversation with the entire Crew once they were back, as noted below.
 - aa. Ms. Choi reminded Mr. Ogilvie that he came to talk to the crew over lunch, taking up some time, and they also had to have a job briefing before returning to work.
 - bb. Ms. Choi also told Mr. Ogilvie it was not appropriate for him to target the crew for long lunches and that she felt the lunch was clearly not excessive and that this was “more of an intimidation tactic to get us to feel bad about not working past our ten hours”.
 - cc. Ms. Choi described Mr. Ogilvie as “then belittl[ing]” her, by saying “we’re going in circles” and “you’re just repeating yourself” and that he refused to acknowledge her statements.
 - dd. Ms. Choi also stated that Mr. Ogilvie “keeps talking about how he could be giving us NTA’s (Notice to Appear) and coach and counsel [sic] letters if he wanted us to be punished” and that he also gave her his supervisor’s number
 - ee. Ms. Choi told Mr. Ogilvie she would be talking to the Union.
 - ff. In her statement, she also tells him that “I am getting stressed out by him so can he please stop talking and leave. I am feeling so attacked and flustered so I walk outside to where 602 is”.
 - gg. The rest of the Crew is then brought in to talk to Mr. Ogilvie regarding the length of their lunch.
 - hh. During that conversation, Ms. Choi told Mr. Ogilvie it was not appropriate for him to “get mad at us and threaten to send us all home in taxis so that we cannot drive our vehicles home if we don’t do as he wants”. She also told him the lunch was not excessive, and that he was targeting the Crew “because of our refusal to work past our ten.”
 - ii. She described Mr. Ogilvie “kept belittling me again by saying that I’m just repeating myself”.
 - jj. Ms. Choi states that Mr. Ogilvie kept commenting that he could “bring an NTA to continue this conversation” which she stated “feels like a threat to get me to agree with him”.

- kk. Ms. Vrabel also referred to this conversation with the Crew at the end of the day. She stated that Mr. Ogilvie immediately told the Crew he wanted to speak with the whole Crew and that he placed a sheet of paper on the table with the locomotive download. She indicated he said there would be “no repercussion, no written warnings no action taken etc but that he wanted us “to be cognitive of our time taken for lunch”. She indicated there was “back and forth” between Mr. Ogilvie and Ms. Choi, and that Ms. Choi told Mr. Ogilvie she was of the opinion this was harassment. Ms. Vrabel stated that Mr. Ogilvie was not going to “see it any other way”, even when she pointed out he came to talk to them during lunch.
- ll. Ms. Vrabel also noted that Mr. Ogilvie admitted he had not pulled anyone else’s time for lunch, for that day.
- mm. Ms. Vrabel indicated the meeting “did not end on a very positive note” and in her opinion, “I do feel as though it was harassment” and that Mr. Ogilvie’s attitude “appeared to be in retaliation of us not wanting to finish our lists and work past our 10th hour. In her statement, she noted that she did not get off work until 11 hours and 10 minutes that day.
- nn. The LE’s statement was that Mr. Ogilvie told the Crew that lunch was too long, and he stated Ms. Choi and Mr. Ogilvie had a “heated disagreement about the situation”. He again described that the conversation between those two took several minutes and was “heated”. He also noted that Ms. Choi mentioned to Mr. Ogilvie several times that “this was harassment”. He also asked Mr. Ogilvie if any other crews had their lunch checked that day. Mr. Ogilvie’s answer was eventually “no” but was described as him as a “convoluted” answer initially.
- oo. The LE stated that one of the times Ms. Choi indicated it was harassment, Mr. Ogilvie “offered to make this formal and bring us in for an official statement. I believe this was an intimidating tactic from [Mr. Ogilvie] ...would almost certainly mean some type of discipline”.
- pp. The LE also commented that “In my opinion, as soon as You – Ju mentioned she felt harassed by [Mr. Ogilvie] he should have backed off and not keep pressing his point of view. If someone thinks something is harassment, you don’t fix the situation by arguing the situation”.
- qq. The LE indicated he did not personally feel harassed, “however that doesn’t mean You – Ju wasn’t harassed. I believe she felt [Mr. Ogilvie’s] behaviour was harassment and told him that multiple times.

- rr. The LE noted that in 11 years working at Scotford, he has never had his lunch duration questioned or challenged for working 10 hours, and that he did not believe the two things were a coincidence.
- ss. None of the Crew were subject to any discipline as a result of their actions on February 8, 2022.

Relevant Policy and Collective Agreement Provisions

Agreement 4.3

Article 47 Meals – Road Service

47.1 Train service employees in road switcher.....will have the opportunity of having a meal at a reasonable hour by previously advising the Train Dispatcher, or, when not under the jurisdiction of a Train Dispatcher, the proper supervisor.

47.2 Trains will not be delayed nor train operations disrupted solely as a result of stopping the train to eat. Employees will report for work suitably prepared for a tour of duty recognizing that the opportunity to take a meal will be governed by the practicality of train operations.

Article 121.10

When it is agreed between the Company and the General Chairperson of the Union that the reasonable intent of application of the Collective Agreement has been violated an agreed to remedy shall apply. The precise agreed to remedy, when applicable, will be agreed upon between the Company and the General Chairperson on a case-by-case basis. Cases will be considered if and only if the negotiated Collective Agreements do not provide for an existing penalty. In the event an agreement cannot be reached between the Company and the General Chairperson as to the reasonable intent of application of the Collective Agreement and/or the necessary remedy to be applied the matter may within 60 calendar days be referred to an Arbitrator as outlined in the Collective Agreements.

NOTE: A remedy is a deterrent against Collective Agreement violations. The intent is that the Collective Agreement and the provisions as contained therein are reasonable

and practicable and provide operating flexibility. An agreed to remedy is intended to ensure the continued correct application of the Collective Agreement

Article 152 Workplace Environment

Management agrees it must exercise its rights reasonably. Management maintains it ensures a harassment free workplace environment. An employee alleging harassment and intimidation by management may submit a grievance to the General Chairperson to be progressed by the General Chairperson at his or her discretion. An employee subject to this agreement may, without prejudice, elect to submit a complaint under CN's Harassment Free Environment Policy.

CN Policy on Harassment– Free Environment

Objective

1. It is CN policy to ensure that all employees are treated fairly and equitably in a harassment– free environment

...

3. Introduction

Harassment can endanger person well– being, job performance, productivity and safety. Every employee is entitled to a work environment free from harassment...

4. Policy

CN is committed to providing a safe and respectful work environment for all staff and customers. Harassment, including harassment under the *Canadian Human Rights Act* is considered employee misconduct and is not tolerated. It is the responsibility of all employees to ensure that harassment does not occur.

The Company will act promptly to investigate, resolve and remedy, in a fair and confidential manner, allegations of harassment brought to its attention, whether they are made informally or formally. Where applicable, the Company will act in accordance with the provisions of any applicable collective agreement. as further set out in this Policy, the Company will impose appropriate corrective measures, including disciplinary action up to an including dismissal, on any employee who has acted in a manner constituting harassment.

5. What is covered under this policy?

Under this Policy, harassment refers to behaviour or communication, whether written or verbal, which a reasonable person would consider to cause offence or humiliation or affect the dignity of an employee, employment candidate, customer or member of the general public and, in the context of employment, results in an intimidating, hostile or offensive atmosphere (“poisoned environment”).

Harassment can occur at or away from the workplace and during or outside working hours if individuals are in a work situation. While harassment typically takes the form of hostile or unwanted conduct that is repeated over time, a single serious incidence of such behaviour that has a lasting harmful effect may also constitute harassment. This policy includes harassment as described and defined in the *Canadian Human Rights Act*, namely harassment based on the following prohibited grounds of discrimination: race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.

6. Complaint Procedure

...

6.2 Management’s Responsibility

Management will respond promptly to complaints and to situations with potential for complaint.

When a complaint is received or harassment is observed, management will follow these steps:

- Review the allegations and where necessary, consult with a Human Resources representative.
- Notify the person identified as a harasser that a complaint has been made.
- Individually interview both the complainant and the alleged harasser as soon as possible if a unionized employee is cited in the complaint, the investigation will be carried out in compliance with the applicable collective agreement.
- Interview witnesses identified by employees involved or likely to have been present.
- Document the situation accurately.
- Render a decision on the complaint as promptly as possible and advise the parties of the resulting action.

- Ensure that all information concerning the case, including the names of the complainant and alleged harasser, is kept confidential subject to any disclosure which may be required as part of the investigation or disciplinary process.
- If it is determined that the allegation is not founded, nothing will be recorded on the personal file of either the complainant or the alleged harasser.
- Any employee who violated CN's policy on harassment in the workplace will be subject to corrective measures, including disciplinary action up to and including dismissal. The level of discipline will be assessed on a case-by-case basis, taking into account the circumstances of the harassment and any impact to the business or reputation of the Company which may result from the harassment.

Employees are encouraged to first use all avenues of recourse within CN. When an employee is not satisfied with the actions taken by management, his or her union or Human Resources, a complaint may be lodged directly with the Canadian Human Rights Commission.

Arguments

[10] The Union argued Mr. Ogilvie violated the Company's "Policy on Harassment– Free Environment" (the "Policy"), in place at the time of the incidents. It argued his conduct resulted in offence, humiliation, affected the dignity of Ms. Choi and resulted in an intimidating, hostile or offensive atmosphere, under the Company's own definition of harassment in its Policy. It focused on several incidents relating to Mr. Ogilvie on that day, being particular radio conversations regarding work performed and calling a taxi and threatening disciplinary investigations for a "long lunch", which it argued "stepped well over the line of what can be considered reasonable or appropriate"¹. It urged that Mr. Ogilvie had no basis to question this Crew on why the lunch hour was 1 hour and 20 minutes, or in threatening discipline as there was no breach of the Agreement.

[11] The Union also argued it was evident Mr. Ogilvie's harassment was because of the Crew members' insistence on "exercising their collective agreement right to end the workday after 10 hours on duty". It noted there was no discipline or investigation for the "long lunch" and in fact the lunch period for road crews is not limited in the Collective Agreement:

¹ At para. 61.

Article 47. It also pointed out Mr. Ogilvie ignored his own part in extending that crew's lunch break and was unwilling to understand the Job Briefing would have also extended the lunch break. It also noted the Grievor had the right to pursue her Complaint through the Grievance procedure, and was not limited to filing a Complaint under the Company's Policy.

- [12] While the Union recognized Mr. Ogilvie had a responsibility to address reasonable concerns, it urged that must be done in a respectful, non– harassing manner. In this case, it argued Mr. Ogilvie engaged in “threats, bullying, humiliation and personal attacks”². It further argued this was more than a momentary flare– up. It argued Mr. Ogilvie “singled out” Ms. Choi and set a different standard for her than others. It noted he did not initially talk individually to any of the other Crew than Ms. Choi regarding the alleged “long lunch”, even though he was the individual who drove the other two Crew members back from the Train at the end of day. Unlike with Ms. Choi, he only engaged in “small talk” with those Crew members at that point, while he sat Ms. Choi down and berated her individually for the “long lunch”, as well as with her other Crew.
- [13] The Union also focused on Mr. Ogilvie's comments regarding ordering a taxi for the crew if they were “that tired” and his intimidation tactic of threats to follow a disciplinary route when the Crew had not breached the Agreement. It also noted his “yelling” at the crew of 602 not to listen to what Ms. Choi had to say about work performed was overheard by Ms. Choi and reasonably caused her to be frightened and to hide in the bathroom. It also pointed out that Mr. Ogilvie did not stop his conversation with Ms. Choi when on multiple occasions she indicated that she felt harassed by him, in the presence of the other Crew members.
- [14] The Union also noted the Company's failure to take any action to investigate the issue, which was a blatant and indefensible breach of not just the Collective Agreement, but its own Policy and that a monetary remedy was warranted. It argued that Mr. Ogilvie had been trained on – and was well aware – of all of his obligations.

² At para. 64.

- [15] It requested for remedy that the amount be returned to the parties for their discussion under Article 121.10.
- [16] The Company argued there was no violation of its Police or of the Collective Agreement. It argued that Mr. Ogilvie's had exercised his management rights reasonable and his conduct did not constitute harassment. It argued the test for harassment – which is whether a reasonable person of similar experience would consider certain actions to be vexatious or harmful³ – was not met.
- [17] It as the Company's position that in contacting the Crew, Mr. Ogilvie was appropriately "following up with the crew" as to why their work was not done⁴, and that he "informed" the Crew in that conversation that he had modified their switching plans so they could do so, within the time frame. The Company argued that Mr. Ogilvie was appropriately exercising his managerial rights with this radio contact, which was to determine why their assigned tasks had not been performed and further that it was understandable that if a crew did not complete their assigned work, a manager would be "frustrated".
- [18] The Company argued that for Ms. Choi to assert this frustration was harassment was unreasonable. It argued he "in his own right tried to work with the crew and offer them an alternative solution to expedite their tasks, which is what a manager should do"⁵.
- [19] It further argued Mr. Ogilvie was within his management rights and acted reasonably when he questioned the Crew regarding their "long lunch", and that he spoke to Ms. Choi to attempt to get further details from Ms. Choi individually, to obtain further facts and to avoid similar situations from recurring. It argued "He simply spoke with the Grievor to better understand why the crew was not able to perform their tasks"⁶.
- [20] The Company argued Mr. Ogilvie was not intimidating the crew regarding calling a taxis. It argued he told the crew that if they are tired to complete their tour, they must be tired to drive their vehicles home and that he can "arrange to have them taxied home"⁷. It

³ At para. 42.

⁴ At para. 7.

⁵ At para. 19.

⁶ At para.24.

⁷ At para. 7.

pointed out that when the Crew reported for work at 0700 they informed Mr. Ogilvie they would “require rest” as per Article 35 of the Agreement.

- [21] It also argued Ms. Choi erroneously perceived from Mr. Ogilvie’s conversation she would incur verbal abuse from him. It also noted that Mr. Ogilvie telling Ms. Choi they are “going in circles” and “repeating herself” is not belittling her; and that he appropriately questioned them regarding their “long lunch”.
- [22] The Company disputed that Mr. Ogilvie was threatening the Crew with discipline and noted that he provided his supervisor’s information to Ms. Choi if she wanted to contact him.
- [23] It also pointed out the Union did not provide any of the supporting statements of the Crew to the Company when it filed its grievance, and that there are inconsistencies in the accounts of the Crew members, including contradictions by Engineer Perry, who described Mr. Ogilvie as “concerned” when he got on the radio, and who indicated he did not personally feel harassed.
- [24] The Company pointed out the Grievor had not filed any Complaint under its harassment policy, and was well aware of the process to do so through her training, and that she had the option of having this pursued through an investigation. However, it also acknowledged Ms. Choi was not required to use the Company’s Complaint process.

Analysis & Decision

- [25] Grievances alleging harassment are always dependant on the evidence. Whether harassment has occurred is judged based on an objective standard of what a reasonable person would perceive to be harassing, intimidating, bullying, offensive, or threatening behaviour, and what creates an offensive workplace environment.
- [26] It is a wholistic determination, based on a consideration of all of the facts, placed in the context of the entire interactions which occur over a particular period. Jurisprudence is of limited help, as no two fact situations will ever be the same.

- [27] In *Ontario Public Services Employees Union*⁸, relied on by the Company, it was noted the question to be answered in cases of harassment is “whether the alleged words or actions of the manager were outside the bounds of reasonable conduct within the work environment in which they occurred”. The test itself is not controversial and is easy to articulate. The question in this case – as in most cases of this type – is what is “reasonable” behaviour on the part of the alleged perpetrator; and what are “reasonable” perceptions by the alleged victim(s). It is well– settled in the jurisprudence that “safety” in a workplace includes psychological safety; which would include protection from verbal abuse or threatening and intimidating words or behaviour.
- [28] On these facts, I am satisfied that the test for harassment has been met.
- [29] It must be emphasized at this early point that the Company did not file any evidence. Representatives at a hearing are not themselves entitled to provide evidence. The only evidence filed in this case comes from the Crew members, and the training records filed by the Company demonstrating the types of training Mr. Ogilvie had received.
- [30] Several arguments of the Company can be briefly dispatched.
- [31] First – and most importantly – it is not the case that investigations are only required if a Complaint is made under the Policy process, as argued by the Company. The obligation was on the Company to investigate all incidents of alleged harassment of which it became aware – by whatever means, as part of its obligation to maintain a harassment– free workplace. The obligation to maintain a safe workplace arises not just from the Agreement in Article 152, but also legislatively through both human rights statutes and occupational health and safety legislation.
- [32] Article 152 recognizes the Grievor’s right to proceed through the Grievance process. She did not by that choice relieve the Company of its obligation to investigate any allegations of harassment of which it became aware – by whatever means.
- [33] Second, while the Company sought to imply motivations and imply explanations for why Mr. Ogilvie acted as he did – and then made assertions about the reasonableness of its

⁸ 2021 CanLII 127098 (ON GSB)

assumptions – Company representatives cannot give evidence at a hearing. In this case, there is no evidence filed of Mr. Ogilvie’s motivations or of his explanations for his actions.

[34] There is no evidence, for example, that Mr. Ogilvie spoke with Ms. Choi alone initially to “gather more facts”, as alleged by the Company, which it argued was reasonable for him to do.

[35] Mr. Ogilvie was not questioned as to his tone, mood, motivations, conduct or explanations. Neither was the crew of 602 interviewed to refute the Grievor’s allegation that Mr. Ogilvie was yelling to them about her, which caused her to hide in the bathroom in fear. The evidence of Mr. Ogilvie’s motivations – or his explanations – is simply lacking.

[36] The Company is therefore left with the evidence of the Crew members.

[37] Third, while the Company spent some time to prove the training of Mr. Ogilvie, that evidence is not persuasive for how Mr. Ogilvie actually chose to *act* on February 8, 2022. How a person is trained does not equate to how a person acts.

[38] Turning to the balance of the arguments, I cannot agree Mr. Ogilvie did not use any disrespectful comments or engage in any threatening behaviour toward this Crew on February 8, 2022, as argued by the Company.

The Radio Conversation

[39] Dealing first with the radio conversation, I cannot agree with the Company that it was reasonable for a manager to become “frustrated” with a Crew that has not completed their work, when there is no evidence that manager took the time to consider the Crew’s explanation for why that work was not completed, including that their work had been changed that afternoon by the Yardmaster. That reasonable explanation should have impacted Mr. Ogilvie’s level of “frustration” and caused him to control his emotions. It did not. A manager acting reasonably would have taken that information in; discussed that issue with the Yardmaster and gotten back to the crew. That did not occur. That very reasonable information as to why this crew did not finish their work had no impact on Mr. Ogilvie’s behaviour, his emotional state, or even cause him to pause, according to the

only evidence that was filed. I agree with the Union that Mr. Ogilvie had no interest in reasonable explanations in that conversation.

- [40] I am satisfied that the Union's assertion that Mr. Ogilvie lost control of his emotions during this initial part of the conversation is correct, based on the evidence that was filed. I am drawn to agree with the Union that his tone and attitude regarding the Crew's failure to finish their work was connected to their request to only work a 10 hour day.
- [41] That loss of emotional control, however, is not the only allegation arising from the radio conversation. In that same conversation, Mr. Ogilvie made the "taxi" comment.
- [42] I cannot agree with the Company's characterization that Mr. Ogilvie reasonably offered to call a taxi for the Crew "since they were tired". That characterization does not accord with the only evidence offered regarding that conversation.
- [43] The Crew members all agreed that Mr. Ogilvie's comments regarding getting them a taxi home if they were tired was not an "offer" but rather was an intimidation tactic challenging their need for rest. From a careful review of the evidence, I agree that is the most reasonable characterization of the conversation each Crew member described.
- [44] Mr. Ogilvie was attempting by this comment to not only intimidate this Crew, but to minimize their need for rest. His comment ignored that an individual can be too tired to bring the amount of attention required to operate a multi-ton train in a highly safety sensitive industry, and yet be able to drive a passenger car home. The two are completely unrelated. Mr. Ogilvie's comment made a mockery of that difference and in doing so, he inappropriately minimized the highly safety sensitive industry of the railroad.
- [45] This was a comment that I am satisfied was offensive to the Crew – and reasonably so – as it also minimized the important issue of rest in this industry. I am satisfied that the Crew's offence at Mr. Ogilvie's tone, attitude and comments as being tactics of intimidation was a reasonable conclusion for them to draw. Mr. Ogilvie's inability to listen to what was being told to him and his flippant and unnecessary comment minimizing the crew's ability to drive their own personal cars was intended to intimidate and created an offensive work environment for the Crew. It was harassment.

[46] I am therefore satisfied the Union's first incidents of harassment arising from the radio conversation has been established on the evidence.

The "Long Lunch" Conversations

[47] The "long lunch" is another incident, which is in two parts.

[48] In the first part, Mr. Ogilvie inexplicably chooses to talk to the Grievor alone, even though she is not the only Crew member who had a "long lunch". The Union has alleged Mr. Ogilvie "singled out" the Grievor. The second part of the conversation occurred when the two other Crew joined them.

[49] It must be recalled that Mr. Ogilvie sent the 602 crew out to the truck so he could talk to the Grievor alone, before the other Crew members were back. As there is no evidence from Mr. Ogilvie, it was not explained why he chose to speak to Ms. Choi alone regarding the long lunch, prior to the entire Crew joining them.

[50] What is in the evidence is that he chose not to have a similar conversation with the other Crew members when he drove them back, even though those Crew members also had a long lunch. With those individuals, he instead chose to engage in small talk.

[51] The evidence before me – undisputed by the Company – is that Mr. Ogilvie was "yelling" at the crew of 602 prior to speaking with Ms. Choi, alone. I have no reason to distrust this evidence, or to question the fact Mr. Ogilvie was yelling or that this conduct would be frightening to Ms. Choi – or to any employee. The Company did not bring evidence from crew 602 to refute Ms. Choi's account.

[52] The evidence was Ms. Choi was so frightened by this yelling and behaviour that she hid in the bathroom so as not to encounter him. I have been given no reason to distrust either this evidence or this response and I consider it to be reasonable. Further, gender differences are relevant when determining what is threatening conduct. A male may not perceive something as threatening that a female would.

[53] In this case, it would be reasonable for either gender to find "yelling" by a supervisor to be threatening. I agree with the Union that it is not material if the yelling was not directed to Ms. Choi; a supervisor "yelling" in a workplace – at any employee – creates a

threatening and offensive environment for all other employees who hear that interaction. That conduct reasonably coloured Ms. Choi's next interaction with that Supervisor, that occurred very close in time to that "yelling".

- [54] I have no difficulty in finding that Mr. Ogilvie's conduct of "yelling" in the workplace at crew 602, and telling them to disregard what the Grievor said, to have created an offensive and harassing environment for Ms. Choi. It is conduct which meets the test of harassment relied upon by the Company, as it is "outside the bounds of reasonable conduct within the work environment in which they occurred".
- [55] After what she had just overheard, it was then reasonable for Ms. Choi not to feel safe meeting with Mr. Ogilvie, without the 602 crew there.
- [56] I further agree with the Union that Mr. Ogilvie should not have "singled out" Ms. Choi for her own private conversation, given that she was not the only Crew member who had a long lunch.
- [57] To insist on a private conversation with the Grievor about a Crew issue, right after he yelled at the 602 crew about Ms. Choi and that they should disregard her, reasonably left Ms. Choi feeling vulnerable, frightened and scared of Mr. Ogilvie, which made her workplace unsafe for her.
- [58] That leads to the second "long lunch" conversation.
- [59] While I agree with the Company that individuals who disagree in a conversation are not necessarily harassing each other; and that it is not necessarily belittling for a manager to tell an employee they are going "in circles", the entirety of the exchange must be put in the context of what went before.
- [60] When it is reviewed in that context, I am satisfied Mr. Ogilvie had already created an offensive and intimidating environment for Ms. Choi at the time this second "long lunch" conversation occurred, and that this was in breach of the Company's obligations to maintain a safe workplace. I also have no difficulty determining that Mr. Ogilvie was well aware that Ms. Choi felt his conduct towards her, during this second conversation, was harassing. The evidence was he was repeatedly told that fact by her.

- [61] He also had to have been well aware he was inexplicably keeping the Crew well after the 10 hour rest on that day, frustrating their attempt to end their day by that point, given their earlier conversations and the time as noted by the Conductor in her evidence. She indicated the Crew was not off until after the 11th hour.
- [62] Mr. Ogilvie's conduct unreasonably discounted his own involvement in the length of that lunch break, as well as the legitimate job briefing that had to occur as a result of his direction, which would have impacted when the locomotive moved.
- [63] As with the radio conversation, that information likewise did not change Mr. Ogilvie's responses.
- [64] At the very least, Mr. Ogilvie should have stopped the conversation for that day when he became aware Ms. Choi found it to be harassing, and perhaps revisited the issue with a higher level management in the room, on another day. To continue the conversation in the 11th hour, when the crew had already given a 10 hr rest notice and after a female employee had told him she felt his conduct was harassing was confounding, intimidating to that Crew and extremely ill- advised.
- [65] I am satisfied a reasonable person would consider that type of behaviour, in that circumstance, with that context of what went before, to be harassment.
- [66] While the Company alleged there were inconsistencies in the Crew members accounts which impact the Grievor's credibility, upon careful review of all of the evidence, I cannot agree there are more differences than would be expected when three different individuals – of different genders – hear the same conversations. In my view, the similarities between the accounts are more pronounced than any differences.
- [67] For example, all Crew members agreed that Ms. Choi advised Mr. Ogilvie on numerous occasions during their conversation after work that she considered his behaviour towards her to be harassing. All three also agree that this did not have an impact on Mr. Ogilvie, and that he did not stop at that point.
- [68] As the LE pointed out in his statement, when someone tells you they perceive what you are doing as being harassing for them, you should stop there and not try to "argue" your way out of it.

[69] I would agree that is good advice.

Threats of Discipline

[70] That leaves the alleged threats regarding discipline.

[71] All Crew members agreed that Mr. Ogilvie's comments about giving them NTA's (Notices to Appear) for an investigation was likewise an intimidation tactic to try to get them to agree with his point of view. That is the evidence that is filed. The Union has pointed out there is not even a requirement for a road crew to have a one hour lunch hour: Article 47.

[72] I can find no cause for discipline of this Crew, on these facts. Threatening discipline when none is warranted on the facts is an intimidation tactic, which is harassment.

[73] That does not completely resolve this dispute, however.

[74] While the Union did not provide the statements as part of the Grievance procedure, the Company would have seen those statements if it had investigated these alleged incidents. Further, even though no statements were provided, the Grievance submitted to Mr. Thompson was detailed and notes that Ms. Choi felt frightened of Mr. Ogilvie; that she felt harassed; that Mr. Ogilvie "threatened" them with bringing the crew in for an investigation; and that all crew members agreed his actions were "clearly meant to intimidate them and threaten repercussions for only working 10 hours on the day in question. As earlier noted, I have no evidence of Mr. Ogilvie's part in this altercation.

[75] I am satisfied the Company was therefore made aware of the serious allegations of harassing, threatening and intimidating behaviour as early as one month after they occurred. While the Company pointed out the Complaint was not filed under its Policy, Article 152 of the Collective Agreement recognizes it is not required to be.

[76] There was no explanation offered by the representatives at the hearing as to why this matter was not properly investigated. It should be pointed out that it was not suggested the Company's representatives at the hearing table were involved in this failure.

[77] I am satisfied that in this case, management did not ensure a safe workplace. The actions of Mr. Ogilvie were intimidation and harassment and were in breach of Article 152.

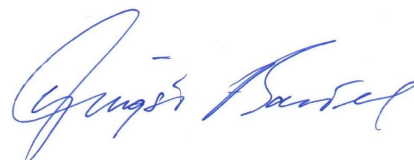
- [78] Secondly, the Company has breached its obligation to act reasonably and to ensure a harassment-free workplace when it chose not to investigate the allegations or take any steps to interview the individuals involved or determine what should be done if harassment was found, to ensure a safe workplace.
- [79] This lack of action was unreasonable. To know of an allegation of harassment and not to take any action is conduct which must attract censure.
- [80] Given the facts, this is an appropriate case for an award of monetary damages, both as that censure, and also to deter any viewpoint that an investigation is optional and only required if a Complaint is filed under the Policy.

Conclusion

- [81] The Grievance is allowed.
- [82] The parties are directed to enter into negotiations within the next 60 days to determine the appropriate amount of monetary damages for both the harassment and the Company's breach of the Collective Agreement in failing to investigate Ms. Choi's Complaint, as contemplated by Article 121.
- [83] Should the parties be unable to agree, I reserve jurisdiction to address that issue before a CROA session at which I preside.
- [84] The Office is directed to schedule that remedy hearing on an expedited basis.

I also reserve jurisdiction to correct any errors, and address any omissions, to give this Award its intended effect.

October 25, 2024



**CHERYL YINGST BARTEL
ARBITRATOR**