CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5073 - S

Heard in Edmonton, March 12, 2025

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The amount of monetary damages to be paid to the Grievor in CROA case 5073.

JOINT STATEMENT OF ISSUE:

In CROA award no. 5073 the Arbitrator directed the parties to negotiate the appropriate amount of monetary damages for harassment and the Company's breach of the Collective Agreement in failing to investigate the Grievor's complaints. The Arbitrator reserved jurisdiction in the case that the parties should be unable to agree.

Following negotiations, the parties remain unable to agree on an appropriate remedy.

The Union's position is that the Grievor should be compensated $10,000 for pain and suffering due to harassment from Company supervisors, as well as an additional $10,000 in special compensation for the Company's failure to conduct an investigation or provide a safe working environment as required by legislation, Company policy, and Collective Agreement provisions.

The Company's position is that it did not maliciously nor with intent fail to respond to the Grievor's complaint. Following CROA Award 5073, the Company has implemented a process to ensure that complaints submitted via the grievance process regarding alleged harassment are reviewed in accordance with CN's Workplace Harassment and Violence Prevention Policy as well as the Canada Labour Code Regulations on Workplace Harassment and Violence Prevention.

The Company disputes the Union's request for excessive damages to be awarded for failing to investigate as per Article 152. As per the available jurisprudence, for a single incident where similar conduct was not repeated over time, it has attracted damages of up to $3,000.

For the Union:
(SGD.) R. Donegan
General Chairperson

For the Company:
(SGD.) J. Girard
Senior Vice President, Human Resources

There appeared on behalf of the Company:

R. Singh – Senior Manager Labour Relations, Edmonton
C. Baron – Manager Labour Relations, Edmonton

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
J. Thorbjornsen	– Vice General Chairperson, Saskatoon
M. Anderson	– Vice General Chairperson, Edmonton

AWARD OF THE ARBITRATOR

Background & Summary

[1] This Grievance involves an assessment of the remedy for this Arbitrator's determination in **CROA 5073.** That Award outlined the multiple actions of Mr. Ogilvie that resulted in intimidation and harassment of the Grievor and also found that the Company should be "censured" and "deterred" for its failure to investigate the allegations, which it became aware of one month after they occurred. A monetary remedy was found appropriate for both findings.

[2] The parties were directed to discuss the amount of that remedy, as contemplated by Article 121.10. I retained jurisdiction over remedy if they were unable to agree, which is what has now occurred.

[3] The Union's position was that the Grievor should be compensated $10,000 for her pain and suffering due to the harassment experienced by the Company's supervisor, as well as an additional $10,000 in "special compensation" for the Company's failure to conduct an investigation "*or provide a safe working environment as required by legislation, Company policy, and Collective Agreement provisions*". It noted these amounts were 50% less than the maximum amounts that can be awarded by the Canadian Human Rights Tribunal for "*pain and suffering*", and "*special compensation*". It argued the actions of Mr. Ogilvie frightened Ms. Choi to the point she felt the need to hide

in the bathroom and that she suffered "*significant humiliation and loss of dignity*" (letter from the Union dated November 14, 2024)

[4] The Company's initial position was an offer of $2,000 "*for each ruling*", made on January 2, 2025. That amount was raised to $3,000 as noted in the JSI. The Company maintained there was "extremely limited jurisprudence" on the appropriate level of damages for this type of incident. It also relied on jurisprudence from Human Rights tribunals. It also pointed out it has already addressed its failings in the investigation process, internally. It argued that a damage award of $3,000 was appropriate, considering this was a) a limited interaction; b) the conduct was not repeated over several occasions or a lengthy period of time; c) there was no evidence of long term or permanent consequences as a result of the harassment; and d) the Grievor did not suffer any loss of wages or compensation.

[5] Both parties relied on some of the same jurisprudence, to support their positions.

[6] For the reasons that follow, I am satisfied that damages of $7,000 payable to the Grievor for harassment; and $7,500, payable to the Union, for the Company's failure to investigate, is a just and reasonable remedy for this misconduct.

Analysis & Decision

[7] It is by now trite law that an Arbitrator enjoys broad remedial jurisdiction under the *Canada Labour Code,* where the Collective Agreement does not outline a particular remedy for an offence. A close look at what was ordered in **CROA 5073** is necessary to determine what a damage Award was meant to address, and the appropriate level of damages required to meet that goal.

[8] In **CROA 5073**, the following findings were made (at paras 77 to 80):

> 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.

[9] As noted in that excerpt, the damages in this case have a two-fold purpose of a) providing damages for the harassment experienced by the Grievor; and b) a damage award to "censure" the Company and "*deter any viewpoint that an investigation is optional and only required if a Complaint is filed under the Policy*" (at para. 80), as contemplated by Article 121.10.

[10] There is no remedy outlined in Collective Agreement 4.3 for breaches of that Article, so one must be crafted.

[11] Regarding deterrence for breaches of the Agreement, the parties have negotiated Article 121.10. That Article states:

> 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 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.
>
> (emphasis added).

[12] I agree with the Union that my discretion to determine an appropriate level of damages can be guided by the parties' own agreement in Article 121.10. As noted in **CROA 5073**, the "*deterrent*" impact referred to in that Article is also applicable to this case, although this is not a case where the parties initially "*agreed*" a violation of the Collective Agreement had occurred.

[13] Both parties noted there was a paucity of jurisprudence from this Office on the issues raised by the remedial issue. Both relied on decisions from human rights tribunals.

[14] The difficulty with that reliance is that – in this case – it was not found that the harassment against this Grievor resulted from a protected human rights ground, such as sex, race or disability. While it was noted in the Award that there may be a gender difference to how males and females perceive harassing behaviour, that is not the same as finding that the harassment occurred on the basis of a protected ground, resulting in discrimination on the basis of that ground.

[15] For example, in *Walsh v. Mobil Oil Canada* 2013 ABCA 238, relied upon by the Union, it was noted by the Court of Appeal that there was discrimination against the plaintiff "*on the basis of her gender*" over several years. In *Canada Post Corp. v. CUPW (Ward Grievance)* 2021 CanLII 152033, also relied on by Union, the allegations involved a failure to accommodate his disability. Likewise, in *PPWC Local 1 v. Mercer Celgar Ltd.* 2023 CanLII 88235, which also involved allegations based on disability and family status.

ADGA Group Consultants Inc. v. Lane et al. 2008 CanLII 39605 also involved discrimination based on disability.

[16] That does not mean a damage award cannot be made, but it does mean that human rights jurisprudence is less helpful in determining that amount, and that the focus is not on “pain and suffering” or “special compensation” damages.

[17] It also means that the Union’s characterization that damages were appropriately awarded for both “pain and suffering” and “special compensation”, cannot be sustained, given this is not a case which attracts human rights damages, but one which attracts damages for a breach of Article 152.

[18] The most relevant authority from those filed was *SCIU, Local 2 v. Strata Corporation NW1378* 2024 CanLII 124396. In that case, the distinction between harassment which arose as a breach of a collective agreement and “*because of one or more prohibited grounds of discrimination*” was noted. In that case – as in this case - there was both harassment in breach of the Collective Agreement and a failure to investigate. At para. 26, of *SCIU*, the Arbitrator found

> … *there is no discrimination based on a prohibited ground. Ms. Anderson was not harassed because of a prohibited ground of discrimination. She was harassed at work by a person in a position of authority in an attempt to have her not report to the police an incident in which he participated and to have her change her perspective as a witness that he acted inappropriately and was the aggressor* (at para. 26).

[19] However, the Arbitrator in that case accepted that the ***impact*** on the person was relevant to *both* harassment contrary to a collective agreement and also when it involved a prohibited ground of discrimination.

[20] The Arbitrator in *SCIU* found that an award of $27,500 was appropriate to address both the harassment and the breach of the collective agreement. While there was not a fulsome examination of the underlying incidents in that case, I am satisfied that case involved a situation which was more extreme than that faced by this Grievor in *SCIU*, as in that case, the employer had cast the *harasser* as the victim, and stated the grievor was a "*flawed person, exaggerating and embellishing the impact of what happened; and deflecting the cause of the diagnosed impact to past events in her life*".

[21] The Company is not guilty of that behaviour in this case. There was no suggestion made by the Company that the Grievor was in any manner at fault for Mr. Ogilvie's misconduct.

[22] Like in *SCIU,* above, what was found in **CROA 5073** was that a breach of Article 152 had occurred. By that Article, the Company was to maintain a "*harassment free workplace environment*". The Company's obligations to maintain such an environment necessarily include obligations to properly *investigate* allegations of harassment and intimidation of which it becomes aware. It is difficult to maintain a harassment free environment without properly conducting those investigations. These investigative obligations arise not just from Article 152, but from the Company's legislative obligations to maintain a safe workplace.

[23] As noted in **CROA 5073**, "safety" is both physical and psychological. The Grievor became fearful of Mr. Ogilvie when she heard him yelling at the crew of 602 to disregard what she had told them. In this case, the Grievor hid in the bathroom in fear. She also told Mr. Ogilvie how his conduct was being perceived, and asked him to stop. He did not.

[24] I am further satisfied that Mr. Ogilvie's actions reasonably humiliated the Grievor. I determined in **CROA 5073** that the Grievor's concern was a reasonable response and that her workplace was rendered "*unsafe*" by the actions of Mr. Ogilvie. It is true that the actions of Mr. Ogilvie were not a pattern of conduct carried out over months or years, but only occurred on one day. That is also a relevant factor for consideration.

[25] Those are all relevant findings for determining the appropriate damages award for this harassment.

[26] As noted by the Union, damages to "censure" must be significant enough to deter violations of the same type in the future. It should be noted the Company maintained in this supplemental case that it had addressed the failings that led to this situation, and I have no reason to doubt that is the case. However, that does not lead to a finding that damages are therefore inappropriate, on these facts. The Company's representatives had no explanation for why the Company failed to investigate this issue, noting only that the allegations arose during the Grievance procedure instead of through a process set up to administer its policy. That did not explain why individuals who assess grievances at the Company did not see the serious allegations and/or arrange for an Investigation to immediately occur.

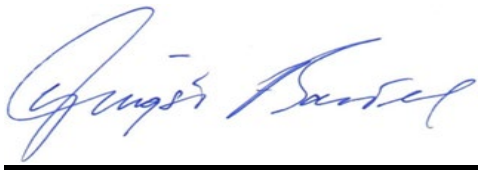
[27] That is a failing which is not related to "how" the claim came in. As noted in the above excerpt from **CROA 5073**, the Company failed in its obligation to appropriately investigate the actions its employee Mr. Ogilvie which the Grievor alleged had occurred on February 8, 2022. Those allegations included serious allegations of harassment and intimidation. **CROA 5073** found those allegations were established, on the evidence.

[28] Turning to an appropriate amount, as was noted to the Company's representative at the hearing, the Company's offer of $2,000 was a *de minimis* offer. That level of damage award does not serve either to "*censure*" or "*deter*" the Company, let alone provide damages for the harassment which occurred.

[29] Upon review of all of the facts and circumstances, and applying the reasoning from the recent decision in *SCIU,* I am satisfied that the following damage awards would represent a just and reasonable remedy:

a. $7,000 to be paid to the Grievor for the harassment by Mr. Ogilvie; and
b. $7,500 for the Company's failure to properly investigate the allegations in breach of Article 152, to be paid to the Union.

I retain jurisdiction to address any questions related to the implementation of this Award; to address any remaining issues relating to remedy; to correct any errors and to address any omissions to give this Award the intended force and effect.



May 15, 2025

CHERYL YINGST BARTEL
ARBITRATOR