CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5074

Heard in Calgary, September 10, 2024

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Policy and Remedy Grievance on behalf of all conductors in western Canada specifically, Conductor T. Carter of Edmonton, AB for alleged failure to comply with Article 152 of Agreement 4.3.

JOINT STATEMENT OF ISSUE:

On March 9, 2019, Conductor Carter (the Grievor) was called for service. Upon reporting for duty and obtaining all the required documentation, the Grievor was made aware of a fatality on the Edson sub. The Grievor attempted to continue his work but allegedly started to feel nauseous and suffered from flashbacks to his own fatality event where his movement struck a 14-year-old girl.

The Grievor's Engineer ended up invoking part II of the Canada Labour Code as he deemed the Grievor unfit to continue. He subsequently met with General Manager Austin McConnell, who allegedly berated and belittled him and insinuated that the Grievor was not fit to be a conductor.

Union's Position:

It is the Union's position that the Company violated Article 152 during the meeting with the Grievor in an egregious disregard of the Company's commitment to exercise its rights reasonably and to maintain a harassment free workplace.

Union requests a declaration that the Company harassed the Grievor and acted in an unreasonable manner contrary to Article 152 of the 4.3 Collective Agreement. The Union requests the Company provide formal education to its front-line managers on how to properly conduct themselves and treat all employees with the level of respect and dignity required in the workplace. The Union requests an appropriate remedy be applied in accordance with Article 121.10 of Agreement 4.3.

The Company has not responded to the Grievance.

Company's Position:

The Company recognises that if such comments were made by General Manager McConnell (who is no longer employed by CN), they were unwarranted and are not a representation of the core values and culture of the Company. The Company views safety as the number one priority and works hard to ensure that the employees are coming to a safe and healthy workplace.

The Company's position is that since the date of this alleged incident, it has taken significant measures and continues to do so by educating its management, supervisors and employees on a harassment-free workplace and to always treat everyone with respect and dignity. The Company offers mandatory training to all employees and follows proper process when dealing with any concerns brought forward by employees for alleged violation of its policies and procedures, including but not limited to CN Business Code of Conduct, Harassment and Violence Prevention Policy.

The Company is committed to creating a safe work culture for its employees and submits that the measures it has taken ever since should be the appropriate resolution for this matter under Article 121.10.

For the Union:	**For the Company:**
(SGD.) R. S. Donegan	**(SGD.) R. K. Singh** (for) **J. Girard**
General Chairperson	**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
T. Carter	– Grievor, Edmonton

AWARD OF THE ARBITRATOR

Introduction, Issue & Summary

1. The Grievance has alleged that on March 9, 2020, the Company harassed the Grievor and acted in an unreasonable manner, contrary to Article 152 of Agreement 4.3. The Union requested as a remedy under Article 121.10.

2. The parties disagree on what occurred on March 9, 2020. The issues between the parties are:

    a. What was said on March 9, 2020?; and

    b. Was the Company in breach of Article 152 as the result of the actions of Mr. McConnell, General Manager?

3. For the reasons which follow, the Grievance is allowed.

Facts

4. I am satisfied of the following facts.

5. The Grievor began his employment with the Company in March of 2013. At the time of this incident, he had seven years of service.

6. In December of 2017, the Grievor's movement struck and killed a 14 year old girl on the tracks. The Grievor was significantly affected by this incident and described in his statement that with the events of March 9, 2020, (described below), he suffered flashbacks to the young girl's body going under the engine, and seeing her body parts on the ballast. While graphic, that level of details is important to place the events of March 9, 2020 in context.

7. At the hearing, it was not disputed that it is unfortunately not an unusual event for individuals to commit suicide by Train.

8. On March 9, 2020 the Grievor was called for service as a Conductor. Upon reporting for duty, the Grievor was made aware of a fatality on the Edson subdivision, where an individual who was on the tracks was struck and killed.

9. As the Grievor was a close friend with one of the crew, he called that individual to offer his support and had a brief conversation with her. He described her as "pretty broke up" about the incident.

10. Shortly after, the Grievor began to suffer acute nausea while walking to his train. Once he entrained, he realized he would not be able to continue his work. He suffered from flashbacks to the December 2017 fatality, as described above. The Grievor called his immediate supervisor to indicate he would assemble the train, but would not be fit to

continue the trip after that point. He also told the Locomotive Engineer ("LE") working with the Grievor that he would not be fit to continue.

11. The LE also determined independently that it would be unsafe for the Grievor to continue in his current condition and he reported the situation as dangerous, invoking the right to refuse unsafe work under Part II of the Canada Labour Code.

12. The Grievor walked back to the booking room and telephoned his supervisor to ask what the next step would be. He was told another supervisor, Mr. Walid Abdelaal, would come talk with him.

13. At this point, the Grievor described himself as being "in panic mode", sweating and shaking and "trying to calm down".

14. Mr. Abdelaal took the Grievor to the office of the General Manager Mr. McConnell. In the room was Mr. McConnell, Mr. Abdelaal and a lady who was not introduced to the Grievor. That individual was identified at the hearing as Katie Kennedy, Business Manager.

15. The Grievor prepared a statement on March 10, 2020 regarding what occurred in that meeting. He was the only one do to so.

16. The Grievor described his demeanour at this point as "my mind is racing and envisioning every worst outcome". Mr. McConnell's summary email to occupational health services (described below) would agree with that self-assessment, as he described the Grievor as "visibly shaking, pale and sweating profusely".

17. It is at this point that the evidence significantly diverges. As such, a credibility determination will be necessary. While that is a difficult task in this expedited process - when only documentary evidence is filed by the parties - it is what is required to resolve this Grievance.

18. In his statement, the Grievor described that Mr. McConnell introduced himself and asked how long he had been with CN. The Grievor then described Mr. McConnell as saying "well you've been around awhile, you know what goes on". Mr. McConnell then asked the Grievor what happened and the Grievor told him "I was having a panic attack that I suspected on be [sic] triggered by that mornings events". The Grievor stated Mr.

McConnell then said that “we kill people all the time” and “so what you’re telling me is that you’re unfit to be a Conductor”.

19. The Grievor stated he did not know what to say at that point. He described that Mr. McConnell then said “how can I know that this isn’t going to happen tomorrow?”

20. At this point, the Grievor stated he told Mr. McConnell he wanted union representation, as he was feeling unable to “formulate a decent sentence let alone explain my situation”. He was told by Mr. McConnell “that this wasn’t a union matter and asked what I needed. I told him this meeting was over if I didn’t have a rep. I walked out”.

21. The Grievor left the meeting at that point and called Mr. Anderson and explained what happened. He described that he did go back into the room after that call, and apologized for walking out. He described that when he returned, Mr. McConnell’s demeanour “had done a “…full 180. We started over and he gave me a number to call Gwyneth from OHS”.

22. This is a reference to Ms. Gwenyth Capeness, in Occupational Health Services.

23. I am satisfied a “full 180” means Mr. McConnell’s attitude towards him – as relayed by the Grievor – had undergone a complete change.

24. A Grievance was filed by the Union on May 4, 2020, resulting from Mr. McConnell’s alleged comments prior to the Grievor leaving the meeting room, after requesting union representation. It alleged the Company acted extremely inappropriately and that the Union was concerned with the Company’s lack of understanding and sympathy regarding the Grievor’s post-traumatic stress to the fatality. It alleged the insensitive nature and verbal abuse of GM McConnell constituted workplace harassment and a form of intimidation, in violation of section 239 of the Canada Labour Code and a breach of Article 152. It requested a remedy under Article 121.0 of Agreement 4.3.

25. Mr. McConnell sent a detailed email to Gwenyth Capeness, in Occupational Health Services at 5:42 p.m. on the day of this incident, detailing what had occurred. That email referred to an earlier call between the two that day.

26. Mr. McConnell’s evidence in this summary was that he was told an employee was going home unfit because employees had been talking about a fatality and the employee was having a panic attack. He requested that employee be brought in to his office to

"understand what the circumstances were that surrounded his decision to go home and not complete his tour of duty."

27. He then described the physical condition of the Grievor, which was noted above and is consistent with the Grievor's evidence of his physical distress.

28. Mr. McConnell then states he told the Grievor he was

> …worried about his safety and that although he was removing himself from services, I wanted a medical review done so that I was confident that if something like this happens again, he has the tools to deal with it without endangering his own life or those that are working around him. The employee was so disturbed by the conversation, he said he wanted his union rep and when I informed him that this wasn't an investigation that I was simply trying to determine what help he needed (and therefore does not need a union rep) he got up from my desk and left the building. At that point, I asked Walid to speak to his Engineer to determine what had caused this. While Walid was speaking to the Engineer, the conductor returned and asked Walid if he could apologize to me.
>
> After coming in my office the second time, the employee was still sweating, but some color had returned to his fact and he was talking more clearly. He apologized and started to explain about a previous incident, and was getting choked up. At this point I stopped him and told him that I didn't need to understand the backstory, I just needed him to get the help that he needed so that he could do his job safety [sic]. I told him that I have the responsibility to provide a safe work environment to him and 700 other CN people as well as the public and that I agreed with his assessment that he was unfit for duty. I told him that he needed to contact you and provided him your number. I told him that you would ensure that he gets the help he needs and would be a part of the process that would ensure he can do his job safely.
> To be clear, since the employee has removed himself from service and has made it clear that he is not fit to work, I'm asking that he be medically cleared before returning to work.
> …
> **I would like to be kept apprised of his status. <u>I do not want him to be paid for this time period of review,</u>** I would like to be notified when he is [sic] been cleared and **<u>is allowed back</u>** on the property and finally, **I would like to know what our CBA and legal obligations are for an employee that exhibits this behavior so that I can manage my response should this happen again. I apologize for the long email, <u>I'm just unfamiliar with the process</u>**.[1]
>
> Mr. Thompson, FYI, this is the situation that resulted after the incident on the Edson Sub, that slowed our recovery while the new crew was called.

[1] Emphasis Added.

29. The email of Mr. McConnell neither denied nor agreed the specific comments of the Grievor were made, given it was a summary email to Occupational Health Services and not a statement. No statement was ever requested by Mr. McConnell. Neither Mr. Abdelaal nor Ms. Kennedy were asked to provide any statements when this conversation was fresh in their minds. The first questioning of these two witnesses by the Company took place in September of 2024, with a question of whether or not Mr. McConnell made the alleged comments. Ms. Kelly could not recall the conversation. Mr. Abdelaal gave a one line answer that Mr. McConnell did not make the alleged statements.

30. The Grievor was placed on short term disability for his physical illness. He was off work from March 10, 2020 to May 15, 2020, after which he returned to work and has continued in his employment.

Relevant Provisions

Agreement 4.3

> 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
>
> 152.1 Management agrees it must exercise its rights reasonably. Management maintains it ensures a harassment free workplace environment. An employee challenging harassment and intimidation by management may submit a grievance to the General Chairperson o 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.

> 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….

Arguments

31. The Union argued that the Grievor suffered harassment and humiliation as a result of this encounter, in breach of Article 152, which attracted a remedy under Article 121.1. It pointed out Arbitrators have accepted that a single incident, including verbal abuse, can constitute harassment, relying on arbitral jurisprudence, and that a finding of "intention" is not required. It argued Mr. McConnell's conduct demonstrated a "fundamental lack of understanding and sympathy regarding the post traumatic stress of killing another human being while in the Company's service". It further argued that Mr. McConnel's "barrage went beyond mere lack of sympathy to actively subject the Grievor "vexatious attacks, questions, demands and other unpleasantness"; that his comments went "far beyond what was necessary to determine what happened"; and that Mr. McConnel "launched an attack on the Grievor's competencies and abilities". It argued not only were the comments unwelcome, but they were demeaning. The Union argued this form of intimidation constitutes harassment. It pointed out that there are no statements but the Grievor's as to what occurred that day, given that the Company did not conduct any Investigation upon receiving the Grievor's allegations of harassment.

32. The Union pointed out that Article 152 allows a Complainant to file a Grievance rather than follow the Company's internal complaint procedure. It noted the Company had not

provided any evidence of any corrective measures to ensure that employees are free from intimidation in the future.

33. The Union also argued that the tort of intentional infliction of emotional suffering had occurred in this case as the conduct was “extreme and outrageous” and that Mr. McConnell’s actions caused actual harm in the flare up of the Grievor’s panic attacks, PTSD and anxiety disorder. It argued he was entitled to fair and reasonable compensation.

34. Alternatively, it argued for damages under Article 121.1 of Agreement 4.3.

35. The Company relied on the lack of recall by the two witnesses to the conversation, as refuting the Grievor’s version; that this evidence is persuasive; and that it supports the Company’s position that Mr. McConnell did not make the comments alleged by the Grievor. It argued the actions of the GM to obtain OHS help for the Grievor were valuable to him, to get him the help which he required. It also argued Mr. McConnell’s commitment to a safe work environment was evident from his email. It argued the Grievor interpreted comments as offensive which were not, as in **CROA 4309**. It also pointed out that had Mr. McConnell said the comments as alleged, it is unusual that the Grievor would have returned to his office.

36. The Company argued d the Grievor was not in a ‘right frame of mind’ on March 9, 2020 and that his conversations with his friend – and not the Company’s actions – were what had triggered his PTSD that day It argued the Company was committing to providing a safe workplace environment and that no monetary remedy was warranted. It pointed out that all managers undergo mandatory training when they are hired, and some further training is completed annually, including a Critical Incident Response Program to assist front-line management with how to relieve employees in cases of fatalities, and the proper procedure for such situations. It argued Mr. McConnell had undergone extensive training courses. It argued it was committed to educating not just its front-line managers, but also divisional leadership on its core safety and cultural values. It also argued the HR and LR teams support and counsel the management team to ensure proper procedures are followed.

37. As the Company maintained Mr. McConnell did not make the statements as alleged, it argued no monetary damages were warranted.

Rebuttals

38. In rebuttal, the Union disagreed with the Company's position that the story was fabricated by the Grievor and noted the Company had declined to answer the Union's grievance for the past four years. It argued the Grievor's recollection was committed to paper the day after the events occurred and raised this with the Union. Those concerns were brought to the Company in a timely manner. It argued issues with Mr. McConnell's email, including his questioning of the Grievor during a panic attack. It points out the emails from the other witnesses were only solicited right before the hearing, four years later and that it appears that neither witness was approached after the Grievance was filed. The questions to the witnesses are narrow and no statements are requested. It points out Ms. Kennedy has no recollection and Mr. Abdelaal fails to give an account of what he witnessed. It argued his one line response is not probative. It distinguished **CROA 4309** where the Grievor's account shifted after the manager's denials, while in this case Mr. McConnell was not asked to provide a statement.

39. For its part, the Company argued that the Grievor's condition was clearly occurring prior to his meeting with Mr. McConnell and that Mr. McConnell was not the "triggering event" as argued by the Union. It relied on Mr. McConnell's email to OHS that Mr. McConnell was worried about the Grievor's safety and noticed the Grievor was not in "good shape". It pointed out the Grievor was in a better state of mind when he returned to the meeting and apologized It argued no harassing comments have been established as made by Mr. McConnell. It also argued the Union did not make its allegations through the appropriate channels for investigation. It pointed out it was not provided the Grievor's written account until a few days before the arbitration. It also argued there was no numerous events of harassment and the Union's jurisprudence is distinguishable. It argued Mr. McConnell followed the correct approach to get the Grievor the help he needed. It also argued the Company has been very transparent with its educational efforts. It argued the Union's

reliance on the tort of mental distress is flawed as there was no evidence of intentional infliction of emotional suffering. It argued there was no harassment in this case.

Analysis and Decision

40. I agree with the Union that the jurisprudence does not require a "pattern" of conduct, but that single incidents can be harassing and intimidating. As noted in *Toronto Transit Commission v. A.T.U.*[2] "[e]ven a single act, which has a harmful effect, may also constitute harassment".

41. Harassment is a broad concept. As noted in that same authority, it can capture "…words, gestures and actions which tend to annoy, harm, abuse, torment, pester, persecute, bother and embarrass another person, as well as subjecting someone to vexatious attacks, questions, demands or other unpleasantness".

42. It is also well-accepted that it is not only physical effects that are relevant, but also the psychological impact of harassing behaviour.

43. As defined in the Company's own policy states, intimidating and harassing behaviour is that "which a reasonable person would consider to cause offence or humiliation or affect the dignity of an employee".

44. Whether harassment is established will always be a question of fact, so jurisprudence is of limited use. All of the facts must be considered in making this determination, as it must be a contextual determination. It is dependant, for example, on the power dynamics between two individuals. If a supervisor makes comments to an employee, that could reasonably be perceived as more impactful and damaging than if those same comments were made by a fellow employee.

45. The first issue to be resolved in this case is what was said in the meeting of March 9, 2020.

[2] 2004 Carswell ONT 5165

Were the Alleged Comments Made in the Meeting of March 9, 2020?

46. While the Company focused on the evidence of the other two witnesses in the room as contradicting the Grievor's evidence, I cannot agree either witness has provided persuasive and probative evidence of what was – or was not- said that day.

47. Neither witness was asked to provide a statement after the Grievance was received in May of 2020, when their memories would be fresh. When questioned in September of 2024, Ms. Kelly on her own admission did not recall the meeting and did not provide any statement of her own recollection of the conversation. Mr. Abdelaal gave a one line answer to a pointed question, instead of a statement as to what was – or was not- said that day.

48. I therefore do not find the evidence from either witness to be persuasive, or to impugn the credibility of the Grievor.

49. Neither was Mr. McConnell asked to prepare his own statement. The Company argued it was not given the Grievor's statement until the hearing, however the Grievance that was filed in 2020 outlined the specific allegations against Mr. McConnell, providing to the Company notice that it would have to defend against those accusations at this hearing. While Mr. McConnell was no longer at the Company in 2024, there was no evidence he was not still working at the Company in 2020, when the Grievance was received, to explain why he did not provide a statement to refute these allegations.

50. Therefore, the fact the Company did not have the Grievor's statement did not prevent Mr. McConnell from giving a statement disputing the comments the Grievor had alleged.

51. While the Company noted the Complainant did not file a Complaint under its Policy, Article 152 that is not required. That Article specifically states that such a complaint can be filed through the Grievance process. The Company would have an obligation to investigate allegations of harassment no matter the process under which its officials become aware of the allegations. It is not an onerous expectation that any management individuals or executives who receive allegations of harassment would forward those allegations to the appropriate department within the Company for processing and investigation.

52. The evidence of the Company as to what occurred consists of a summary email written to Occupational Health Services for a different purpose. There is no statement denying that he said what was alleged by the Grievor.

53. I agree with the Union that Mr. McConnell's email is not equivalent to a statement or that denial. Giving a summary to a health services employee is not giving a statement that he denies making the alleged comments. The only *statement* regarding what occurred during the meeting between Mr. McConnell and the Grievor at issue comes from the Grievor.

54. For the reasons which follow, while I am satisfied that - after the Grievor came back into the room - Mr. McConnell had "done a 180"; showed concern for the Grievor's health and suggested he contact the Company's health department, I do not find this occurred before the Grievor left the room. I find credible that prior to the Grievor leaving the room, Mr. McConnell's attitude was significantly different.

55. I find the Grievor's evidence to be persuasive. I find all the comments occurred as stated by the Grievor. This is not just an acceptance of the Grievor's statement of what occurred that day, but results from a consideration of the probabilities of what occurred, given several troubling aspects of Mr. McConnell's summary email. As Mr. McConnell was never asked to provide a statement before he left the Company, the Company is left with the shortcomings presented by his email.

56. Considering first the Grievor's evidence, the Grievor's statement was made the next day, when his memory was fresh. It provides considerable detail, especially considering Mr. McConnell was struggling with a panic attack. The Grievor recalled very specific details of the meeting; who attended and even where they were sitting that day. I was not given any reason to distrust his specific evidence. I also find the Grievor's evidence of Mr. McConnell's statements consistent with his feeling in that meeting that he needed union representation, and his leaving the meeting when that was not allowed. Had Mr. McConnell only been inquiring after his health as noted in the summary email, the Grievor would have had no reason to feel uncomfortable to the point of requesting union representation.

57. There are also several comments of significant concern made by Mr. McConnell, which demonstrate an inappropriate, unsympathetic and legally unsupportable attitude towards

the Grievor and his illness, and which support the probabilities the Grievor's evidence is credible.

58. Mr. McConnell's insensitive and inappropriate attitude toward the Grievor is first evident in why he called the Grievor into his office in the first place. He stated: "I requested the employee be brought in my office *to understand what the circumstances were that surrounded his decision to go home and not complete his tour of duty*".

59. This is a confusing statement. The Grievor did not just "decide" not to complete his tour of duty. Rather, he became physically ill.

60. If Mr. McConnell had any questions surrounding the Grievor's decision he was physically unfit then he should have followed the processes to make those inquiries, which may have included the Grievor at some point substantiating his illness.

61. Even if that were not the case, once he saw the Grievor he should have understood the Grievor was physically ill, as he specifically notes the Grievor's physical distress, even in his summary email to Occupational Health Services.

62. Further, if both an employee and the LE he is working with determine he is unsafe to be at work, it is not for Mr. McConnell to bring the Grievor into his office and discuss it or seek to understand it or – in this case – berate the Grievor for it.

63. Even without the medical information filed by the Union, it is not difficult to understand the Grievor could have had a very negative physical reaction to hearing of a death on the tracks, given his particular earlier experience. However, that was not experience that Mr. McConnell was interested in.

64. Mr. McConnell states in his email that he is "not interested in the backstory" of why the Grievor had his reaction. This is also a confusing statement. That "backstory" should have been the first question he asked the Grievor in the morning, if he was truly interested in understanding the Grievor's reaction and obtaining him the help he required.

65. That Mr. McConnell did not believe that experience would be relevant and did not want to understand it – when the Grievor tried to explain - is itself telling.

66. Of the greatest concern, however, are McConnell's comments at the end of his email, which are bolded, above.

67. The comment by Mr. McConnell that he wanted to ensure the Grievor was ”not paid while off awaiting clearance” demonstrated a blatant and discriminatory attitude towards the Grievor on the basis of his physical disability. It is an attitude which is confounding, confusing, and also legally unsupportable. In fact, that attitude has not been legally supportable for more than thirty (30) years, when the law around discrimination on the basis of disability developed. For an employee at the General Manager level – with the training Mr. McConnell had been given – to not have that understand was deeply disturbing. In fact, this Arbitrator had to read that comment multiple times to ensure the word “not” was actually included in that sentence. That Mr. McConnell wanted to deny the Grievance payment while he was awaiting medical clearance was consistent with the negative attitude and lack of understanding which he expressed in the Grievor’s account of his meeting with him.

68. It is not a great leap from this type of attitude to the Grievor’s detailed recitation of what he was asked by Mr. McConnell, and his reasonable decision he needed union representation in the face of such comments.

69. Upon review and consideration of all of the evidence, I am satisfied that the probabilities are that - in Mr. McConnell’s thinking - the Grievor was having an unreasonable reaction to the fatality; that he brought him in to berate him about being overly sensitive to that event; that he insensitively and inappropriately questioned this six year employee about his ability to do his job given his physical disability, without any desire to understand the Grievor’s particular background or experiences, and that his email demonstrated a discriminatory attitude against the Grievor by requesting the Grievor not be paid while waiting for medical clearance, if he was off for a physical disability.

70. While it is an unfortunate reality that deaths by suicide impact this industry, I am in agreement with the Union that these insensitive and inappropriate questions were asked of the Grievor in an attempt to intimidate him; to belittle him; to humiliate him for his reaction; and to berate him for not being able to perform his job despite that death. I am further satisfied they created a humiliating and demeaning work environment for the Grievor; and one which was not psychologically safe on that day.

71. Further, that Mr. McConnell's comments were made in a situation where it should have been obvious to Mr. McConnell that the Grievor was particularly vulnerable, given that he was pale, sweating, shaking and in obvious physical distress, increases the significance of that insensitivity.

72. I am further satisfied that the Company is in breach of its obligations to create a safe workplace under Article 152 when it failed – without explanation – to take any efforts to investigate the Grievor's serious allegations of harassment and intimidation.

Other Arguments

73. I am not convinced that there has been a tortious intentional infliction of emotional distress, as argued by the Union. The evidence to establish that tort has not been filed, even on the Union's own test. No evidence of "actual harm" was evident, beyond the Grievor's issues caused by the fatality on the track.

74. The Union has also sought education of front line management. The Company noted that Mr. McConnell had left the employ of the Company, and that it recognized that if it were found that Mr. McConnell made those comments it is well aware they were insensitive and inappropriate. It argued it had detailed education of its front-line staff, and provided evidence of those efforts.

75. That Mr. McConnell did not comply with that training in this case, is evident on the evidence. The Company cannot force compliance by its employees of its training, although it is responsible – in the end – for their actions.

76. While I am therefore not prepared to direct further education - given the Company's evidence of its ongoing efforts - I do agree with the Union that this is an appropriate case which must attract a financial remedy under Article 121. 10. The parties should have the opportunity to discuss the amount of that remedy, as contemplated by that Article.

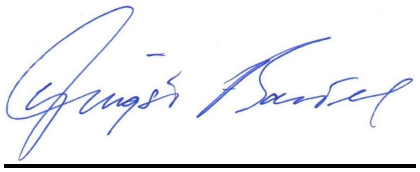
Conclusion

77. Given this finding, a declaration will issue that the Company has breached Article 152 of Agreement 4.3 and created an unsafe workplace for the Grievor by the actions of Mr. McConnell on March 9, 2020.

78. I am satisfied that a remedy under Article 121.10 of Agreement 4.3 is appropriate on the facts of this case.

79. The same direction as given in paragraphs 82-84 of **CROA 5073** – and the same reservation of jurisdiction regarding remedy – are hereby adopted in this Award.

Also as in **CROA 5073**, I reserve jurisdiction not just to impose a remedy should the parties be unable to agree, but also to correct any errors and address any omissions, to give this Award its intended effect.



October 28, 2024

CHERYL YINGST BARTEL
ARBITRATOR