CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5074 - 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 5074.

JOINT STATEMENT OF ISSUE:

In CROA award no. 5074 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 5074, 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, CTY-W, Saskatoon
M. Anderson	– Vice General Chairperson, Edmonton

AWARD OF THE ARBITRATOR

Background, Issue & Summary

[1] This Award addresses the remedy for the findings in **CROA 5074**.

[2] In **CROA 5074**, it was determined that the Company's General Manager, Mr. McConnell "*demonstrated a blatant and discriminatory attitude towards the Grievor on the basis of physical disability*" which was "*deeply disturbing*" given his level of leadership within the Company (at para. 67). It was found that Mr. McConnell attempted to intimidate, belittle and humiliate the Grievor for what he perceived was an "*oversensitivity*" by the Grievor to hearing of a traumatic event of a suicide on the track that day. It is significant that the Grievor himself had previously been part of a crew involved in such an incident. Mr. McConnell also "*berate*[d] *him for not being able to perform his job despite that death. I am further satisfied he created a humiliating and demeaning work environment for the Grievor; and one which was not psychologically safe on that day*" (at para. 70). It was also found that given these 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", that "increases the significance of that insensitivity*" (at para. 71). The Grievor was so upset by this treatment that he left the meeting when he was denied Union representation, but was advised by his Union representative to return and apologize for leaving. The Grievor was ultimately

off work on short-term disability for two months. As in **CROA 5073**, it was found in this case that the Company failed to investigate the allegations, in breach of Article 152. The Company was found to have breached *"…its obligations to create a safe workplace under Article 152 when it failed – without explanation – to make any efforts to investigate the Grievor's serious allegations of harassment and intimidation*" (at para. 72). It was determined that a "*financial remedy under Article 121.10*" was appropriate, and the parties were directed to have discussions as contemplated by that Article (at para. 76).

[3] I reserved jurisdiction to adjudicate a remedy should the parties be unable to agree, which is what has occurred.

[4] The issue between the parties is the proper amount of damages.

[5] The Union pointed out the Grievor's situation was unique and that there was no jurisdiction directly on point. It pointed out that whether or not Mr. McConnell has been moved on to another employer, no apology has ever been offered to the Grievor. It argued the remedy had to be "*meaningful*" to avoid a "*licence to violate*". It argued that such remedies under Article 121.10 were to "deter" violations of the Collective Agreement. It sought $20,000 for pain and suffering damages and special compensation ($10,000 under each head), citing awards of the Canadian Human Rights Tribunal as applicable. It relied on this Arbitrator's broad remedial jurisdiction, and various human rights jurisprudence, to support its remedy. It also distinguished the jurisprudence of the Company in its Reply.

[6] For its part, the Company pointed out that Mr. McConnell is no longer employed with the Company. It pointed out that there was no maliciousness or intent established in his misconduct. It too noted the limited jurisprudence on a similar incident, from this Office.

It argued that the factors to be considered included whether this was a prolonged event or a one-time event; and the impact on the individual. It pointed out this was a limited interaction; the conduct was not repeated over several occasions or of lengthy duration; there was no evidence the Grievor suffered long term or permanent consequences as a result of the harassment; and he suffered no wage loss. The Company argued this involved a single comment. It pointed out that Mr. McConnell did act appropriately after the Grievor returned to the office, and referred the Grievor to the Company's OH&S department. It argued that "*special compensation*" for failure to investigate was not appropriate, as the Company did not maliciously or with intent fail to investigate. It argued it was unaware of the allegations and that its failure to investigate was an oversight. It also maintained it had changed its practices to ensure timely investigations would occur. The Company maintained that $3,000 was a reasonable financial remedy on these facts and the jurisprudence.

Analysis & Decision

[7] An Arbitrator has a broad jurisdiction to craft an appropriate remedy where one is not set out in the Collective Agreement.

[8] Under Article 152 of Agreement 4.3, the Company is required to maintain a "harassment-free environment", which would include an environment free from discrimination, intimidation and belittling comments. As was noted in **CROA 5073** - also heard at this session - a failure to investigate is also a breach of Article 152. Without investigating allegations of harassment, the Company has breached its obligation to maintain that type of environment. In this case, the Company also breached the Grievor's

protected human rights, as the belittling which occurred of the Grievor was based on his physical and emotional responses to this trauma.

[9] There is no remedy stipulated in Article 152, for its breach.

[10] The parties have, however, agreed on 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).

[11] **CROA 5074** directed that a remedy under this Article was appropriately awarded (at para. 76 and 78).

[12] In determining the appropriate amount of damages for these various breaches, precedents are of limited value, given these cases are fact-driven.

[13] As a starting point, it is important to recall that this industry is subject to *federal* human rights legislation, and not to provincial legislation. The impact of that difference will become apparent, in this analysis.

[14] The Union relied on the Alberta Court of Appeal's comments in *Walsh v. Mobil Oil Canada* 2013 ABCA 238. That case involved address an issue of provincial jurisdiction. That was also a decision on remedy.

[15] The general comments made by the Court in that case are instructive, however some background is necessary to place the Court's comments into context. In that case, the failure to investigate was that of the human rights tribunal and not the employer. The complainant suffered gender discrimination by the employer and was "*underpaid, under recognized and overly criticized as a result of gender bias, both personal and institutional*" (at para. 4).

[16] She filed a complaint with the Alberta Human Rights Tribunal, who failed to investigate her complaint for three years, without a legitimate excuse for what the Court of Appeal described as the Tribunal's "*tardiness*", all while the complainant's situation "*continued and worsened*" (at para. 5).

[17] The Tribunal dismissed the first complaint. On the day that decision was issued, the employer wrongfully terminated her employment.

[18] The Complainant developed a stress disorder and was unable to work. To complicate matters, she also suffered a motor vehicle accident.

[19] A second human rights complaint was filed after her termination. That complaint was also dismissed, and no connection was found between that complaint and the termination. It also took the Tribunal more than 10 years to reach that conclusion.

[20] The Tribunal's finding was appealed. The Court overturned the Tribunal's decision on all counts.

[21] That decision was unanimously affirmed by the Court of Appeal in a 2008 decision. The Court found the treatment of the complainant to be "*callous and appalling*" (at para. 9). The matter was remitted back to the Tribunal to determine the appropriate remedy.

[22] On that assessment, the hearing officer awarded $35,000 in "general damages" and significant damages for lost income, with the total damages totaling more than $600,000. Her decision was upheld by a chambers justice and that decision was then appealed to the Court of Appeal, resulting in *Walsh*.

[23] There were several issues considered by the Court of Appeal, including the measure of lost income to retirement. In considering damages for lost income, the Court stated the following, on which the Union relied:

> Human rights legislation must be accorded a broad and purposive interpretation having regard to its fundamental purpose: to recognize and affirm that all persons are equal in dignity and rights and to protect against and compensate for discrimination. In addition to compensating victims of discrimination, the remedial authority under human rights legislation serves another important societal goal: to prevent future discrimination by acting as both a deterrent and an education tool.
>
> Damage awards that do not provide for appropriate compensation can minimize the serious nature of the discrimination, undermine the mandate and principles that are the foundation of human rights legislation, and further marginalize a complainant. Inadequate awards can have the unintended but very real effect of perpetuating aspects of discriminatory conduct.
>
> Human rights tribunals recognize that both pecuniary and non-pecuniary, or general, damages can and should be awarded in appropriate cases.

[24] The Court then went on to discuss principles for the award of *pecuniary* damages.

[25] In discussing the award for "general damages" – which are *non-pecuniary* damages (and the type of damages at issue in this case for "*pain and suffering*"), the Court stated the following:

> In Alberta there is no statutory limit on the amount of damages available for mental distress, injury and loss of dignity flowing from discriminatory conduct. Broadly speaking, the measure of damages for mental distress requires consideration of the effect the discrimination had upon the complainant and whether the discrimination was engage in wilfully and recklessly (at para. 59, emphasis added).

[26] It must be noted that under the *Canadian Human Rights Act,* RSC 1985, c. H-6 (the *"Act"*), which governs the railroads, there ***are*** such statutory limits or "caps" placed on damage awards for "*pain and suffering*" as well as caps on "*special compensation*" damages. Section 53(2)(e) imposes a cap of $20,000 for such damages. The "*special compensation*" damages would be those noted in *Walsh* that address wilful and/or reckless misconduct: Section 52(3) provides for those types of damages "…*if the member or panel finds that the person is engaging or had engaged in the discriminatory practice wilfully or recklessly*" (emphasis added). That amount is also capped at $20,000.

[27] That means that - by federal legislative decree - the worst case of "*pain and suffering"* or the worst case of "*willful or reckless*" misconduct under federal jurisdiction would only attract $20,000 in damages, under each head, or $40,000 total possible damages under those categories.

[28] This "limit" sets the boundary of damages that can be considered as reasonable, under this legislation. That means that decisions from *other* provincial jurisdictions which do not have such caps on the appropriate damage awards are not as relevant as they may on first blush appear, as they do not have similar "boundaries" placed around the damages award.

[29] The Union has claimed 50% of this "boundary" amount, under each head, for this case.

[30] The Court in *Walsh* also stated the following, which is instructive for this process:

> Historically, awards for general damages in the human rights context have been low, arguably nominal. Despite the absence of a cap on awards for mental distress in Alberta's legislation, Alberta's human right tribunals have sometimes used caps established in other provinces to set awards. There have been few awards in Alberta in excess of $10,000. As Ms. Bryant noted, however, this capping practice is not part of the governing statutory framework in this province (at para. 61).

[31] In *Walsh,* the nature of the conduct was gender discrimination, which went on for many *years*. The Company maintained it had cause throughout the litigation, which was also relevant. The conduct contributed to the complainant suffering a stress disorder, which rendered her unable to continue employment. In *Walsh,* the Complainant was awarded $10,000 in general damages for her first complaint, and $25,000 for her second complaint. That was in 2013 dollars.

[32] The Court of Appeal upheld that general damages award:

> Having regard to the standard of review, we cannot say Ms. Bryant's decision is unreasonable…*this is an egregious case both in terms of the wilfulness of Mobil's conduct, the duration of that conduct, the damaging impact on the appellant, and the untenable position that Mobil maintained throughout the litigation that the appellant was terminated for cause. The record is replete with evidence of the negative impact Mobil's conduct had on the appellant's self respect and confidence.* Both awards are on the low end of what we would consider appropriate in the circumstances, but the standard of review does not permit our interference (at para. 64, emphasis added).

[33] The Court in *Walsh* discussed a finding in Ontario, which noted that how prolonged or serious the misconduct was, and the complainant's particular experience in response to the discrimination were both relevant factors: If a complainant experienced "*particular emotional difficulties as a result, this will likely increase the amount of the award*" (at para. 59-61).

[34] I am satisfied that the category of factors that are relevant in determining damage awards are not “closed”. While there are various factors discussed in the jurisprudence - including the nature of the misconduct; the length of the misconduct; the number of incidents at issue; and the impact on the individual. In this case - I am prepared to consider that the fact that the offender was the Company’s General Manager, a position of significant leadership, is also relevant in considering an appropriate damages award. In that position, he was to provide leadership to ensure the Company’s policies were respected.

[35] Also relevant to an award in this case is the Grievor’s obvious vulnerability when he was belittled by Mr. McConnell and when Mr. McConnell suggested to him that – given his reaction - he could not perform his job. However, it is also true that this situation was a one-time event. There was no suggestion in this case that the Company’s actions were prolonged or part of a pattern of behaviour towards this Grievor; neither did the Company act to terminate the Grievor or maintain an untenable position throughout the litigation.

[36] Neither was the impact on the Grievor as significant as that in *Walsh*. While the Grievor was off for two months on disability, I am not satisfied on the evidence that Mr. McConnell’s treatment impacted that result. The Grievor was *already* in the throes of a negative physical and emotional reaction when he spoke with Mr. McConnell, including experiencing “flashbacks” of what he himself had experienced, when he talked to his friend who also experienced a “suicide on track” that day. This reaction had happened *prior to* the Grievor speaking with Mr. McConnell. The Grievor – and his LE – had already determined it was unsafe for him to continue to work. There was no evidence that Mr.

McConnell's actions caused that issue, as in *Walsh,* where it was the employer's misconduct which led to the Grievor's significant reaction.

[37] There ***was*** evidence that Mr. McConnell's comments did further upset the Grievor, as when his request for union representation was denied, he left the room. He came back into the room on the advice of his Union.

[38] Turning to the request for damages for "*special compensation*", the Company defended against those damages by arguing that Mr. McConnell had recently been transferred from the U.S. and was unfamiliar with Canadian law. However, there was no evidence on which a finding of Mr. McConnell's motivations could be based, as he wasn't interviewed. The Company was unable to establish ***why*** he acted as he did, or why he did *not* want the Grievor to even receive payment while his issue was being reviewed by the Company's disability department. Given the Company's explanation of the training received by Mr. McConnell, the Company was unable to explain why that training was not followed. Any comments on *why* he acted as he did – without any evidence – are speculative.

[39] It is also the case that the email sent by Mr. McConnell to the Company's disability department (discussed in **CROA 5074**) was sent ***after*** his "*180 degree turnaround*" in attitude toward the Grievor, after the Grievor left the room. Therefore, despite his change in attitude towards the Grievor himself, Mr. McConnell still did not want the Grievor to receive proper compensation for his disability, at the time he wrote this email, after this interaction. This was despite the training he had received regarding the Company's policies. McConnell failed to understand or apply the Company's policies relating to creating a harassment and discrimination-free workplace, or the impact of not doing so.

[40] At a minimum, for a General Manager level employee, this disregard of his training would be considered to be reckless misconduct and I am prepared to draw that conclusion from the evidence of the Grievor.

[41] Neither did the Company have an explanation for why a proper investigation was not conducted against the General Manager when the Grievance alleging harassment by the General Manager was received.

[42] In Reply, it argued it was "*following the process as outlined in its Policy*" and that "*had the Company been made aware of the allegations of the Grievor at the time of the incident, it would have acted promptly to address the same*" (p. 1). The difficulty with this position is that awareness does not just result if the claim is brought forward under the Policy. Awareness also comes through the Grievance process. The Company ***was*** made aware of the allegations when the Grievance was filed. That the information came in with a Grievance rather than under the policy process did not mean the Company was not "aware" of what had occurred. That failure to conduct an investigation was a breach of Article 152 of the Collective Agreement.

[43] Like in **CROA 5073-S**, the Company argued it has made a *"…prompt change in its process to address such allegations and ensure they are investigated without delay*". While that is laudable, it had that same obligation at the time the Grievance was filed.

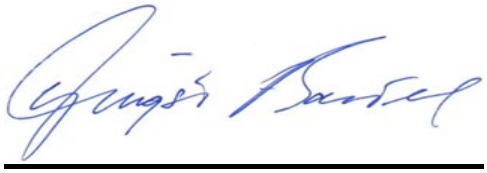
[44] While the conduct was not prolonged in this case, Mr. McConnell did not simply make one "*off the cuff*" comment. The Grievor was brought into Mr. McConnell's office and berated and humiliated for his oversensitivity and his "panic attack" type reaction to the suicide which occurred on the track. Mr. McConnell was uninterested in the Grievor's background – which he should have been – as the Grievor's background was *significant*

given his own earlier involvement as part of a crew which struck an individual committing "suicide by train" in 2017. That would perhaps have gone some way to helping Mr. McConnell understand his reaction. The Grievor's ability to continue his job as a Conductor – which he had performed for seven years – was also called into question by Mr. McConnell's comments. Mr. McConnell had no basis on which to insinuate the Grievor was unable to perform his job obligations because of his reaction to this trauma, and the Grievor returned to those obligations after his short-term disability period. Further, compounding this misconduct was the effort taken by Mr. McConnell with the Company's disability department, to try to prevent the Grievor from being paid while his claim was being reviewed.

[45] Reviewing all of the facts and circumstances; the legislation and the jurisprudence, I am satisfied that damages for human rights breaches – while historically low – are not at the low level as those which were offered by the Company. That said, I cannot agree with the Union that the situation in this case would properly attract an award of 50% of the worst case – or $10,000 - under each legislative head., for the "human rights" portion of damages. Considering all of the facts and circumstances, I am satisfied that the following damage awards represent a just and reasonable remedy:

a. $8,000 for breach of the Grievor's human rights, for "*pain and suffering*", to be paid to the Grievor;
b. $5,000 as "*Special Compensation*" for Mr. McConnell's wilful and reckless breach of the Grievor's human rights given his training in the Company's policies and his position as senior leadership; also, to be paid to the Grievor; and
c. $7,500 for the Company's breach of Article 152 in failing to investigate the allegations, 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