CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5076

Heard in Calgary, September 11, 2024

Concerning

VIA RAIL CANADA INC.

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the dismissal of Mr. Boyd (or the "Employee") for violation of VIA Rail's Workplace Violence and Harassment Prevention Policy.

JOINT STATEMENT OF ISSUE:

Two separate complaints were made against the Employee alleging harassment, bullying as well as engaging in discriminatory behavior.

The Union contends that the unsubstantiated complaints against the Employee do not warrant dismissal. What little evidence is presented was "Third Party" in nature. In addition, the Corporation relied heavily on the report from an outside mediator who convened meetings with both parties. The reports were inconclusive since the Employee was not in attendance owing to his being wrongfully terminated prior to the convening of the meetings. The Union further contends that there appears to be different levels of discipline as one of the complainants was observed defacing a Corporate 'Anti-Bullying' poster and received not even a disciplinary letter. The Union has requested that Mr. Boyd be reinstated and be made whole for all lost benefits and wages.

It is the contention of the Corporation that it duly investigated complaints made by a colleague of the Employee under the *Workplace Harassment and Violence Prevention Policy* as is required under the *Canada Labour Code* and the *Work Place Harassment and Violence Prevention Regulations*. The Corporation, as is its prerogative, assigned the investigation of the complaint to a neutral third-party investigator to ensure a thorough and independent investigation. The third-party investigator interviewed the complainant (known as the Principal Party) as well as several witnesses and emitted two reports, which concluded that the Employee's behaviour constituted harassment and discriminatory conduct. The Corporation wholly disagrees with the Union's contention that the Employee's failure to participate in the investigation renders it either unsubstantiated or inconclusive.

Indeed, the Employee was provided numerous occasions in which to participate in the investigation by the third-party investigation and chose not to. The Corporation has a duty to conduct and conclude its investigation per its own policy and also the *Work Place Harassment and Violence Prevention Regulations*. Further, the Corporation contends that it extended the investigation upon the Employee's return to work and conducted both an investigation and supplemental investigation in which the Employee was provided an opportunity to give this version of events, prior to concluding

on his file. The Corporation asserts that the Employee engaged in multiple instances of harassment and discriminatory behaviour such that a termination of employment was reasonable in the circumstances. As such, the Corporation denied the Union's grievance request.

For the Union:	**For the Company:**
(SGD.) P. Hope	**(SGD.) R. Coles**
General Chairperson	Senior Advisor, Employee Relations

There appeared on behalf of the Company:

C. Trudeau	- Counsel, Fasken Martineau DuMoulin, Montreal
C. Gauthier-Daigneault	- Business Partner, Human Resources, Montreal

And on behalf of the Union:

K. Stuebing	- Counsel, Caley Wray, Toronto
P. Hope	- General Chairperson, Burlington
D. Dunn	- Senior Vice General Chairperson, Brantford
J. Boyd	- Grievor, Georgetown

AWARD OF THE ARBITRATOR

Analysis and Decision

Background Facts and Summary

[1] This Grievance was filed against the Grievor's discharge on August 18, 2023 for contravention of the Company's Workplace Violence and Harassment Policy (the "Policy") during two different time periods and against two different individuals. Allegations were made regarding behaviour towards Mr. K. and Mr. D. The allegations against Mr. K. were for behaviour which occurred in October of 2021. The allegations of the behaviour against Mr. D. were for behaviour which occurred on October 21, 2021.

[2] The Company became aware of the allegations in November of 2021.

[3] The Company hired an external third-party consultant - who was a lawyer - to conduct an investigation into these complaints . It is not clear from the evidence when that investigator was hired, however the first investigation interview was done on February 1, 2022. The investigation took place between February 1, 2022 and April of 2022, with two reports issued on May 9, 2022.

[4] It is relevant the Grievor was terminated for failure to demonstrate his vaccination status against Covid19, in January of 2022.

[5] Due to an Arbitrator's "test case" Award issued in March of 2023, the Grievor was reinstated in June of 2023. When he was reinstated, the Company

[6] There are several issues between the parties:

a. Whether the Company's delay in investigation of these complaints was unreasonable;
b. Whether the Company has met its burden of proof that harassment against Mr. K. occurred; and
c. If so, whether termination was a just and reasonable response to the behaviour; and
d. Whether termination for Mr. D's complaint constituted double jeopardy, as the Grievor had already been disciplined for that behaviour.

[7] For the reasons which follow, the Grievance is dismissed. The Company properly investigated the complaints, given the unique circumstances. The Company has met its burden of proof to establish that the Grievor harassed Mr. K., and that termination was a just and reasonable response to that conduct, given both the aggravating and mitigating factors.

[8] It is not necessary to consider the issues surrounding Mr. D's complaint of October 29, 2021. Even if it were the case that "double jeopardy" had occurred - as argued by the Union - the decision to terminate could be properly grounded in the Grievor's prior behaviour against Mr. K. alone, including his actions in referring to Mr. K. as "the terrorist".

Decision

[9] The Company argued that the allegations against the Grievor were established; that they constituted harassment; and that termination was a just and appropriate action to take, in these circumstances. It argued the Grievor could not now take issue with the third-party Investigator's findings, given he chose not to participate. It argued his statement should not be considered by this Office, given that choice. It also pointed out the Grievor does not expressly deny having made threats or acting in an intimidating manner; and does not deny his racist remarks of calling Mr. K. "the terrorist".

[10] The Union argued the Grievor's decision to not participate in the third-party investigation was reasonable; that the Grievor's tone and choice of words reflected the reality of the workplace; that the Grievor provided a detailed response to the allegations which should be preferred; and that outright termination was an excessive response given that information. It also argued the Company was not able to meet its burden of proof. It argued the onus is on the employer regarding establishing facts, and that a credibility assessment should favour the Grievor. It also argued the Company failed to appropriately account for mitigating factors.

[11] The Union also noted that the Grievor was issued two penalties for the incidents of October 29, 2021, which constituted double jeopardy.

[12] Even assuming- without deciding - that the Union were correct that disciplining the Grievor again for misconduct against Mr. D. was "double jeopardy" and could not be used to later support the existence of a pattern of behaviour, the Company's decision in this case to terminate the Grievor's employment for other serious misconduct against Mr. K. - including threatening and intimidating him and calling him "the terrorist" - was justified.

[13] As with most harassment disputes, this dispute is "evidence heavy". No witness evidence was given; the only evidence was written.

[14] Whether harassment occurred is a question of fact. Given the expedited nature of this process, that evidence will not be outlined in great detail. Suffice it to say Mr. K. alleged issues with work direction given by the Grievor to him whereby the Grievor insisted Mr. K. perform the bulk of the work on multiple runs; that the Grievor threatened and acted in an intimidating manner towards him, including telling him to "shut up"; threats of having him "fired" and going back to "flipping pizzas"; and threats of telling management Mr. K. had acted in violation of "numerous policies" when he had not. The Union also alleged the Grievor's behaviour in slowing calling the on-duty manager on his phone in front of Mr. K. was meant to intimidate Mr. K. It was also alleged the Grievor made threatening, intimidating and racist comments in 2018 and 2019 and also more recently about Mr. K. - who is of East Indian/South Asian background - by developing the nickname for the Grievor of "the terrorist" and referring to him by this nickname when talking to other employees.

[15] The Company wisely chose to investigate these serious allegations through a third-party investigator, given their seriousness.

[16] I am satisfied this external Investigator attempted on many occasions to contact the Grievor to obtain his version of the alleged interactions as part of that Investigation, including contact by registered letter. I am also satisfied the Grievor chose not to participate in the third-party investigation. It must be noted the Grievor made this choice, even though the Union was filing a Grievance against his dismissal for failure to attest his vaccination status, and he hoped to obtain his job back.

[17] The investigator ultimately made a determination that "I am satisfied [the Grievor] has been given sufficient opportunities to participate in the investigation and has chosen not to do so".[1]

[18] In his reports of May 9, 2022, the Investigator found the allegations against the Grievor to be substantiated. The Investigator found that the Grievor's actions in deliberately dialing the on-duty manager slowly was intended to intimidate Mr. K. He found the Grievor's conduct to constitute workplace harassment, given the "repeated threats to the [Mr. K's] job, and threats to report him for unspecified policy variations, and that these actions, when taken as a whole, "can reasonably be expected to cause offence, humiliation and/or psychological injury"[2]. He found no basis for any contravention of workplace policies by Mr. K.

[19] In a second Report, also issued on the same day, the Investigator found the allegation that the Grievor called Mr. K. "the terrorist" in discussions with other colleagues to also be substantiated and to constitute behaviour based on race, which would reasonably be perceived as offensive to an individual of Mr. K.'s nationality. While the Union argued the evidence regarding "the terrorist" nickname was "third party" evidence - as Mr. K. had never heard the Grievor use that term directly towards him - the individuals who had heard the Grievor used the nickname "the terrorist" were interviewed as part of the third-party investigation into the Complaints. There was therefore direct evidence from

[1] Complaint Investigation Report, p. 1
[2] Report, p. 5.

witnesses, before the Investigator, that the Grievor gave the Grievor the nickname “the terrorist”.

[20] Once the Grievor was reinstated, it was reasonable for the Company to investigate the Grievor under the terms of the Collective Agreement. On June 26, 2023, shortly before his first day back at work on his reinstatement after the March 3, 2023 Award, the Grievor received a Notice to Appear at a formal investigation surrounding alleged violation of the Company’s “Workplace Violence and Harassment Prevention Policy” (the “Policy”) and the *Canadian Human Rights Act.* As a result, while the Grievor was reinstated to active service effective June 28, 2023, he was not allowed back into the workforce given that there were two allegations of harassment made against him, prior to his termination.

[21] With the Notice to Appear, the Grievor was provided with a Company of the Complaint Investigation Report, dated May 9, 2022.

[22] The Grievor was also asked to provide a formal employee statement regarding these alleged violations and to report for an investigation on July 4, 2023. The Grievor prepared a detailed statement, which was provided to the Company at that Investigation. The Grievor’s explanations for not taking the opportunity to participate in the third-party investigation were included in his statement. He said:

> I was terminated and no longer an employee of Via Rail. I felt that Mr. Gottheil [the third-party investigator] has no knowledge of my working agreement. I was also fight [sic] battle with Via HR and AON (company holding my pension funds) to release my funds as I have no income at this time. As a fired employee there was no obligation provided to me to entertain these alleged accusations.

[23] He also gave extensive detail regarding Mr. K’s conduct towards him, as further noted below.

[24] In the Company’s Investigation, the Grievor also stated the complaints against him were hearsay, and that the third-party investigator “only received their version of events” which “painted me in a negative light” (Q/A 28).

[25] While the Company has argued this Office should disregard the Grievor’s statement, given that he chose not to participate in the third-party investigation, it is not necessary to make that determination to resolve this Grievance.

[26] Even considering the Grievor's statement, the termination is appropriately upheld.

[27] I have carefully reviewed the Grievor's detailed explanations for the allegations, which included his right to direct the work of the Complainants as the engineer in-charge under the Collective Agreement; that Mr. K had been rude and unprofessional towards him; that it was his practice to have junior engineers print out the TGBO's which were wrong and was a serious issue; and that he had seen Mr. K. using his cellphone in the cab. The Grievor did not dispute he called Mr. K. "the terrorist". In response to that allegation, his response was to point out that he had been called "Ramp boyd" over the radio and the Complainants had spoken disparagingly about him to others; that Mr. K. was found writing the Grievor's name across a across an anti-bullying poster; and that he had donated some money to him. He described his relationship with Mr. K. had deteriorated because he had taken extra work Mr. K. wanted. He also argued the comments were only "hearsay".

[28] The first determination that must be made is whether the conduct alleged has occurred. If so, *Wm. Scott* requires an assessment of various factors to determine if the discipline assessed was appropriate.

[29] The Company's Policy describes harassing behaviour as

> …any action, conduct or comment, including of a sexual nature, that can reasonably be expected to cause offence, humiliation or other physical or psychological injury or illness to an employee, including any prescribed action, conduct or comment.

[30] As noted in **CROA 5074**, also heard in the November CROA Session, harassment is a broad concept. As noted in *Toronto Transit Commission v A.T.U.*[3], 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". As noted in **CROA 5074**, psychological as well as physical impacts are caught by that definition. The objective standard of a "reasonable person" is applied to determine whether those words and conduct meet the definition of harassment. If an individual is aware of a particular

[3] 2004 CarswellOnt 5165.

sensitivity of an alleged victim, that would also be relevant to determining if harassment has occurred.

[31] The Grievor's responses are not in fact responsive to the allegations against him; rather they are rationalizations for his actions. His evidence is not that the misconduct did not occur, but that it was a reasonable response to the actions of others.

[32] While Mr. K. is not completely innocent given his actions against the Grievor, at issue in the Investigation was the Grievor's actions *towards Mr. K*.

[33] Neither do I find credible the Grievor's reasoning for not participating in the Investigation, at a time point when the incidents would have been fresh in his memory. The reasons of the Grievor on this point are confusing.

[34] It is not up to the Grievor to approve the Company's choice of an investigator. Neither is it clear why a lawyer such as the third-party investigator would not be able to understand the collective agreement. The Grievor also failed to explain how dealing with HR or AON on his pension issues prevented his involvement in participating in the investigation. It does not lie with the Grievor to now suggest the Investigator's report was only based on allegations of others and "hearsay", when he himself chose not to give his version. That he chose not to participate does not invalidate the Investigator's findings, given that he was given ample opportunity to do so.

[35] While the Union expressed concern with the time which had passed before the investigation, there are at least two responses to this concern.

[36] First, the Grievor *was* given the opportunity to participate in an investigation closer in time to when the events occurred and chose not to provide his story when it was fresh in his own memory. He chose not to take that opportunity. Given that reality, it is difficult to determine any prejudice towards the Grievor from any delay, when he demonstrated by his own later statement that he had no interest in giving his version of events in an investigation done shortly after the events occurred and the incidents were fresh.

[37] Second, it was not unreasonable that the Company would need some time after receiving the allegations, to determine that a third party investigation was warranted; to retain an investigator to conduct that investigation; and to allow that investigation to then

take its course. It must be recalled this was all done while the Grievor's employment had been terminated and was no longer in the workplace. Despite that reality, the Company investigated the Grievor's alleged misconduct.

[38] However, as the Grievor had already been terminated; and during his period of termination had demonstrated he did not want to be part of that process and was "not required to respond to those allegations", it was not unreasonable for the Company not to investigate the allegations under its own internal process until it was determined the Grievor would be coming back to work. If the Arbitrator's decision had been that the termination was warranted, there would be no need for the Company to address the Grievor's conduct directly with the Grievor through an investigation, as he would no longer be in the workplace.

[39] While the Grievor had explanations for his conduct, given in his workplace investigation in July of 2023; and while he denied referring to sending Mr. K. back to "flip pizzas" as he stated he did not know of Mr. K's previous employment, I do not find the Grievor's evidence to be credible. I am satisfied the lengthy explanations of the Grievor are sometimes confusing; often off-topic; and are ultimately unconvincing. Where his evidence conflicts with that of Mr. K (such as whether he said he would send Mr. K. back to "flipping pizzas"), I prefer the evidence of Mr. K. as being consistent with the probabilities of what occurred, given the totality of the evidence.

[40] The Grievor does not in fact deny the serious accusation of calling Mr. K. 'the terrorist' to other employees. Rather he rationalized doing so, by what he alleged he himself was called by Mr. K. ("Ramp Boyd"), which he stated did not bother him.

[41] I cannot agree the two statements are "equitable". One is racist and one is not. Neither did the Grievor make any complaint regarding this label, if in fact it occurred. This is one of several attempts by the Grievor to deflect his own behaviour and avoid taking responsibility for his own actions, by referring to what Mr. K. did to *him*, instead of taking responsibility for what he did *to Mr. K.*

[42] Like the Investigator, on considering the entirety of the evidence, I have no difficulty in concluding that the Grievor's conduct towards Mr. K. was harassing and that it was reasonably foreseeable that the Grievor calling Mr. K. "the terrorist" to other colleagues

in the workplace would cause Mr. K. psychological harm, including humiliation. The Investigator's assessment of whether the conduct occurred is legally sound and supportable and I am in agreement with his conclusion. I do not find the Grievor's rationalizations to have lessened the impact of that behaviour.

[43] I am therefore satisfied the allegations are substantiated and that harassment has occurred by the Grievor as against Mr. K, including calling Mr. K. "the terrorist" and acting in a manner intimidated to intimidate the Grievor, including baseless threats of getting him "fired".

[44] Given that finding, the next question is whether termination was a just and reasonable response for that misconduct, given all of the mitigating and aggravating factors. On the circumstances of this case, I am satisfied that it was. First, even if the Union is correct and the Company cannot rely on the October 29, 2021 incident, the Grievor's conduct towards Mr. K. in and of itself demonstrates harassing, offensive and racist behaviour. His behaviour towards Mr. K in the engine cab was threatening and intimidating and was intended to be so. It was conduct that was repeated on multiple runs. The Grievor's conduct in calling an individual the terrorist" - in and of itself - is serious, as it is highly offensive racist, and discriminatory conduct.

[45] That type of label is significant misconduct in *any* workplace. That conduct would be harassment of the highest order. While the Union has argued the Grievor's "choice of words and tone" "reflect the reality of the workplace", the decision on which it relies for this proposition is almost 40 years old (1983). The tolerance for racist and derogatory language is not the same in 2024 as it was in 1983.

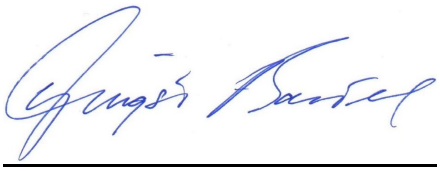
[46] Neither is this a case where the tone and intention of derogatory language was not abusive or offensive. Calling someone "the terrorist" is clearly offensive and clearly racist. Mr. K. found the conduct offensive as well. There is no workplace where racist comments or labels would be acceptable. This incident is distinguishable from **CROA 4258** where the Grievor was just "less than diplomatic". That would not be an accurate characterization of the Grievor's behaviour. Calling someone "the terrorist" is not just conduct which is "less than diplomatic"; it is conduct which is racist and offensive.

[47] Of considerable concern on the facts of this case is the lack of insight demonstrated by the Grievor. He failed to take any responsibility for his actions against Mr. K., and did not demonstrate any insight or remorse. The Grievor's attempt to equate the label of the "terrorist" with being called "ramp Boyd" is only one example of this lack of insight. His attempts to rationalize that behaviour were disturbing.

[48] Whether an individual shows remorse and accountability is an important *Wm. Scott* factor to assess in addressing whether termination is an appropriate response. This is especially the case where harassment has been found to have occurred. In such cases - when there is no recognition of the serious nature of the misconduct and no insight into how it was inappropriate - the Company has very little assurances that the behaviour will change if the Grievor is reinstated. Neither does the Arbitrator. That lack of insight does not attract an Arbitrator's discretion to interfere with a just and reasonable penalty. This is the case even if that individual is of long service and/or has a good disciplinary record. Those two mitigating factors are not sufficient to outweigh the serious aggravating factors which are present in this case.

[49] The Grievance is dismissed.

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



November 5, 2024

CHERYL YINGST BARTEL

ARBITRATOR