

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2751

Heard in Montreal, Wednesday, 12 June 1996

concerning

CANADIAN PACIFIC LIMITED

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Dismissal of Mr. M. Parker (2-549).

EX PARTE STATEMENT OF ISSUE

On December 6, 1995, the grievor was dismissed from Company service for "conduct incompatible" with his employment as evidenced by his alleged "repeated sexual harassment of fellow employees".

The Union contends that: **1.)** No sexual harassment, in fact or in law, ever occurred; **2.)** The discipline assessed was unwarranted and excessive in the circumstances.

The Union requests that the grievor be reinstated forthwith without loss of seniority and with full compensation for all losses incurred as a result of this matter.

The Company denies the Union's contentions and declines the Union's request.

FOR THE BROTHERHOOD:

(SGD.) J. J. KRUK

SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

R. M. Andrews	– Labour Relations Officer, Vancouver
G. D. Wilson	– Counsel, Montreal
D. T. Cooke	– Manager, Labour Relations, Montreal
D. W. Gauld	– Assistant Track Maintenance Supervisor, Kenora
M. R. Bye	– Rail Lubricator Maintainers' Helper, Kenora
J. E. MacPherson	– Track Maintenance Specialist, Engineer Services, Vancouver
B. M. O'Rourke	– District Manager, Engineer Services, Vancouver
R. W. Jones	– Track Maintenance Supervisor, Kenora
K. E. Archibald	– Grade I Maintainer, Kenora
F. W. White	– Trackman, Kenora

And on behalf of the Brotherhood:

P. Davidson	– Counsel, Ottawa
D. W. Brown	– Sr. Counsel, Ottawa
J. J. Kruk	– System Federation General Chairman, Ottawa
D. B. McCracken	– Federation General Chairman, Ottawa
R. Heinrichs	– General Chairman, Prairie Region

G. Beauregard	– General Chairman, Atlantic Region
R. Tirelli	– Assistant Legislative Director, Quebec
M. Parker	– Grievor

AWARD OF THE ARBITRATOR

This arbitration concerns the discharge of Track Maintenance Foreman Mark Parker for the sexual harassment of his fellow employees at Kenora by falsely accusing them of being in a homosexual relationship. Mr. Parker, age thirty-nine at the time of his dismissal, commenced working for the Company on March 29, 1983. At the time of his discharge he held the rank of Local Chairman in the Brotherhood and was a track maintenance foreman.

The investigation leading to the discharge of Mr. Parker was triggered by a report first made to Deputy Roadmaster Bruce Gauld by Lubricator Maintainers' Helper Mike Bye. The first complaint made by Mr. Bye is reflected in a memorandum prepared by Mr. Gauld following Mr. Bye's report to him. That memorandum reads, in part, as follows:

On or about September 6, 1995, Mike Bye approached me in confidence and said he has something very private, and embarrassing, that he had to talk to me about. Mike said that I wasn't going to like what he was going to tell me, but he could not live and work with this problem any longer. I assured Mike that he could tell me anything he wanted and I would help him in any way I possibly could.

Mike then began to tell me about the harassment that Mark Parker had put forth to Mike and what he had been living, working with, and trying to deal with on his own.

Mike told me that Parker was accusing him (Mike) of being gay, and that his comments and accusations were being said seriously, not jokingly. Parker was saying things to Mike about Mike and I being lovers. Parker accused Mike Bye of sleeping with me and having sex with me. Parker would ask Mike whenever Mike was going over to the Roadmaster's office if he was going to get his belly lined and to be careful not to hit his head while he was under Jones' desk. Parker made comments like he wondered who was the woman, Mike or Bruce. ...

Mike told me that Parker was starting to make sexual gestures toward him (Mike) at different times by Parker grabbing himself in the crotch when Mike was facing him or walking towards him. Mike said he turned down Parker's comments and told Parker to fuck off and grow up.

On several occasions Mike told Parker in no uncertain terms to stop this harassment. Parker would only tell Mike to shut up and go tell his girlfriend, Brucy, and to be careful to his head on the bottom of the desk. Mike told me of times when Parker would walk by him, call him a fag and then grab himself between the legs, (by the genitals; is the wording Mike used).

The complaint of Mr. Bye, and the report of Deputy Roadmaster Gauld, led to an extensive investigation by the Company of the conduct of Mr. Parker in respect of a number of fellow employees, with statements being taken from six individuals, including the grievor, between September 26 and November 8, 1995.

The record indicates that Mr. Parker thinks of himself as a strong and dedicated local union leader. As the Brotherhood's Local Chairman he demonstrated an aggressive antagonism to any employee he perceived as being unduly friendly or accommodating towards members of management. Unfortunately his style of response was to label employees whom he perceived as too friendly to supervisors as being in a homosexual relationship with the supervisor in question. As the record discloses, in some cases his attacks on targeted employees went beyond the normal teasing of a favoured employee as a "brown noser", or other such joking references that are common in many workplaces.

Mr. Bye relates in his testimony that he felt he was the victim of antagonism on the part of Mr. Parker for a period of some two years. The problem started, according to Mr. Bye, when his position as lubricator maintainer helper and that of Lubricator Maintainer Bob Todd were not abolished pursuant to the Company's reorganization of track maintenance forces undertaken in 1993. Mr. Parker did not conceal his own opinion that he felt that senior employees affected by the article 8 notice of job abolishments should have the right to displace Mr. Bye and Mr. Todd. Because

of the seniority structure under the collective agreement, however, that could not be done. The following passage taken from the statement given by Mr. Bye during the course of the Company's investigation gives some indication of the tension between himself and Mr. Parker over the issue of job abolishments:

Previous to the reorganization, the section forces were given the notice of a job reorganization that would take effect in the late summer. I'm not sure of the original date that this was to take effect, but it had to be moved to September 7. I work as a Lubricator Helper under shop agreement and a different seniority classification than that of the section forces. The lubricators weren't to be affected by the reorganization. When Mark Parker realized that our jobs weren't affected and at the time, I only had about 7 years seniority, he started threatening my job. Parker wanted to make it clear that I would be out of work after the reorganization. He told me that the more senior sectionmen would be able to bump me out of my position. And also, because I didn't have enough service with the railway, I wouldn't be entitled to Employment Security. When I checked the wage agreement under article 8, it read that, if an employee was to be affected by an article 8, and they couldn't hold a position in their own seniority classification, they could move into a vacant position within the same department but a different seniority classification. My position as a Lubricator Helper wasn't vacant. When I tried to show Parker he replied, "I know the wage agreement. You don't know what you're talking about." Parker kept threatening me, saying that I was going to be out of work, and also misleading other sectionmen, saying that they could bump me out of work. This went on for about a month or so, and I decided to call Ottawa to talk to someone higher up in the union. I talked with Ken Deptuck, and explained my situation. He explained to me that I wouldn't be able to be bumped, because my position wasn't vacant, and I was in a different seniority classification. I asked him if he would talk to Parker about these threats and the misleading of other sectionmen, and he said he would have a talk with Parker about it.

It was about a week or so later, Bob Todd and myself were working on the Keewatin Sub and we saw Mark Parker and his crew at Ingolf. I asked him if Ken Deptuck had talked with him and he replied "Yes, he had." I said "Now do you believe that you can't take my job away." and he didn't reply. I asked him if he realized that he was wrong and if he was going to quit hassling me. His reply was "It's not over yet."

Not long after this confrontation, Mr. Parker began a pattern of referring to Mr. Bye as the homosexual lover of Deputy Roadmaster Bruce Gauld. Mr. Dye's statement, which the Arbitrator accepts as truthful, contains, in part, the following account:

I've worked for CP Rail for nine and one half years, and never had a problem with anyone until Mark Parker. I worked from Kenora through to Thunder Bay, and lived in Thunder Bay from November 1987 to March of 1989, when I moved back to Kenora. When I got back to Kenora I got to know new people, as well as the old friends.

I've known Bruce Gauld for about 10 years now, and when he became a supervisor I never thought anything about the fact that I was in the union and he was a supervisor, that all of a sudden I should stop talking to him. I don't see anything wrong with knowing a supervisor. It seems that over the last couple of years, Mark Parker has developed a real attitude towards supervisors of any kind. Also, it seems that, if anyone is friends with a supervisor, they're no good for anything as well.

I can't remember all the times and dates Parker said things to me when I would walk into the Maintenance of Way shop or when I would go over to the Roadmaster's office. It got to the point where I just hated to have to come to work or to walk past Parker when I went into the shop, because I never knew what he was going to say. It started off with things like "Where's your sidekick." When I asked who he was talking about, he replied "Bruce. You guys are always together. You should know where he is." It continued with things like "Where's your lover." Things like "Are you going to get your belly lined", when I would go over to the office. Also, he would say "Watch you don't hit your head on the desk when you're under it." I tried ignoring him and avoiding Parker. I would try to get into the shop before he got there. If he happened to be in the front of the shop, I would go around to the back door. I didn't want any problems at work or

confrontations. I figured if I didn't have anything to do with him and avoided him, things would be alright.

There can be little doubt that the verbal attacks of Mr. Parker had a substantial impact on Mr. Bye. He felt stressed, embarrassed and demeaned in the eyes of his fellow employees, as Mr. Parker's insults and accusations were repeated openly in front of others. The following is related from Mr. Bye's statement during the course of the Company's investigation.

Like I said before, it got to the point where I tried to do all I could to avoid Parker, because of his comments and harassment. He also has referred to me and Bruce as being husband and wife. He said, "I wonder which one of them is the woman, which one rides on top." One time I came out of the office, and he said, "Hey, you forgot to wipe your chin." These sort of comments would go on and on, usually repeating the same things. I've tried dealing with these comments on my own because I was embarrassed by some of the things he said and couldn't talk to anyone about it. I did talk with Bruce Gauld once in a while about some of the things Parker would say and he mainly calmed me down and said "Take it from where it comes." When Parker was in his group and I would walk by, I would feel very uncomfortable, wondering what he was saying about me after I left. I may not have expressed all the comments that Parker has said, because I've tried in the past to forget a lot of what he's said. I shouldn't have to defend my personal life, or who I associate with to anyone. Just because I won't follow Mark Parker around, and like the time I refused to go with him to his camp, it now feels like he gets pleasure in degrading me in front of others.

In defence of Mr. Parker, the Brotherhood advances the argument that it was normal for Mr. Parker to refer to a number of employees in disparaging terms that suggested homosexuality, and that other employees knew, or reasonably should have known, that his comments were being made in a joking or teasing way. There is some evidence to support that theory. The evidence establishes that he made allusions to Lubricator Maintainer Todd being a "brown noser" to the roadmaster. When Trackman Faron White had a social drink during off hours with a supervisor, upon learning of it Mr. Parker addressed the supervisor with the question "Where's your little blow boy? ... I mean Faron, your little blow boy." On another occasion, when Leading Track Maintainer Reinhard Sommerfeld was temporarily promoted to a supervisory position, in Mr. Sommerfeld's words:

He calls me "Bruce's bum buddy" and asks me who I had to "blow" to get the job, both Bruce and Ron? ... This abuse has been going on for years, ever since I've known him.

Based on the pattern of what it characterizes as Mr. Parker's "teasing" other employees, the Brotherhood's Counsel submits that the charge of sexual harassment is not made out. He also submits, stressing that Mr. Bye and Mr. Gauld are generally known as heterosexuals with families of their own, that what transpired cannot fairly be characterized as sexual harassment. The same argument is reflected, in part, in the following answer given by Mr. Parker during the course of the Company's disciplinary investigation:

My understanding of sexual harassment in this case would be if I did harass a known homosexual and kept on doing it after I knew, then I would say I'm guilty, or if I approached anyone of these guys personally, and asked for sexual favours, then I would be guilty. But not to take a bunch of words and use them without telling anyone that you are offended by such words and misuse them as a weapon then I do not find myself guilty of these accusations.

The Brotherhood submits that, to its knowledge, there has never been a decision by a Canadian court or tribunal making a finding of sexual harassment involving heterosexual males only. It argues, in fact, that as a matter of law sexual harassment between such persons is not possible. In support of its position it refers the Arbitrator to a definition of sexual harassment appearing in a decision of the Supreme Court of Canada, issued in 1989 in **Janzen v. Platy Enterprises Inc.** 89 C.L.L.C. 17,011. That case involved physical touching, sexual advances and verbal abuse against two female waitresses by another employee, coupled with indifference on the part of the manager of the restaurant where these events occurred. The Brotherhood draws to the Arbitrator's attention the following comments by Dickson, C.J.:

I am of the view that sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to job related consequences for the victims of the harassment. It is ... as has been widely accepted by other

adjudicators and academic commentators, an abuse of power. When sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power. Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being.

In the Arbitrator's view, while the above passage represents an accepted definition of certain conduct which constitutes sexual harassment, it must be understood as part of a judgment rendered in the common law tradition, responding to the facts of the particular case then before the Court. It must be interpreted in its context. Passages from the judgment which suggest that sexual harassment, commonly understood, may involve sexual demands or other practices which affects conditions of employment or employment opportunities based on "a characteristic related to gender" should not be taken as intended to be exhaustive or definitive of sexual harassment for all purposes. While physical touching and the making of sexual demands may be the crudest form of sexual harassment, giving rise to the earliest complaints and court or tribunal decisions, experience has shown that the concept of sexual harassment can be much broader. Innuendo by words or gestures, unwelcome staring, sexually abusive jokes or other language, the unwelcome displaying of pornography and the writing of graffiti on workplace walls which singles out or demeans individual employees are all now generally recognized as forms of sexual harassment, even though they may not involve an abuse of power or the making of sexual demands by the member of one sex upon a member of the other sex. It is important, I think, to recognize that the categories of sexual harassment, like the categories of negligence, are never closed.

The Brotherhood alludes to the definition of sexual harassment found in section 247.1 of the **Canada Labour Code**. It provides as follows:

247.1 DEFINITION OF "SEXUAL HARASSMENT"

In this Division, "sexual harassment" means any conduct, comment, gesture or contact of a sexual nature

- (a) that is likely to cause offence or humiliation to any employee; or
- (b) that might, on reasonable grounds, be perceived by that employee as placing a condition of a sexual nature on employment or on any opportunity for training or promotion.

This grievance does not, of course, involve a criminal prosecution, or an application of the **Code** by this Tribunal. However, in the Arbitrator's view, even if the above definition is taken as a touchstone to the meaning of sexual harassment, it is more than sufficiently broad to capture the conduct which is the subject of this dispute. Upon a thorough review of the evidence, as noted below, there is evidence which, if accepted, could establish, on the balance of probabilities, that Mr. Parker did engage in conduct, comments, and gestures which were of a sexual nature and which were likely, and indeed were intended, to cause offence and humiliation to other employees.

The central issue in this case is whether the grievor engaged in teasing, without malicious or serious intent, as suggested by Counsel for the Brotherhood, or whether his words and actions did amount to a knowing course of conduct calculated to undermine the reputations and peace of mind of other employees, and most particularly of Mr. Bye and Mr. Gauld. In approaching that issue, a distinction must be made between the casual teasing and "brown noser" comments made by Mr. Parker on the one hand, which would not, in my opinion, amount to sexual harassment and, on the other hand, the consistent campaign of insult and defamation allegedly levelled against Mr. Bye and Mr. Gauld, in an effort to portray them as being in an actual homosexual relationship.

While it is true that allowance should be made for workplace norms and "shop talk", it is instructive to consider the impression created in the minds of other employees by the conduct of Mr. Parker. The evidence contains statements by a number of employees indicating their impression that the allegations of homosexuality being made against Mr. Bye and Mr. Gauld were intended as statements of fact to be believed. For example, Rail Lubricator Maintainer R.W. Todd made the following comment during the course of his statement to the Company:

On many occasions, Parker has said about Bruce Gauld and Mike Bye, my Helper, that they are sleeping together and that they are lovers. There was more but I can't remember just how he put it. He seems to be really serious about what he is saying. He says they are having an affair. If he sees

me and not Mike right away, he often says things like “Where’s Mike. Where’s your Helper. What’s he doing. Is he off with Bruce somewhere. Is Mike off getting his belly lined again.” The way he says some of these things, he is very direct. Other things, he insinuates. ...

Trackman Faron White relates the following:

When it comes to sexual slander, he did things to more than just Pat and I. He also did it to Bruce Gauld, Mike Bye, Ron Jones and Bob Todd. Parker makes accusations that Bruce and Mike are practicing homosexuals. I heard him make comments at the shop such as

“Look at those fags go.”

“There goes your girlfriend”, directed to Mike Bye in cases where Bruce was walking by,

“There goes Bruce’s girlfriend.” when Mike is walking by.

“Bum chums.”

“Butt pirates.”

One time, not long ago, when I walked in the shop lunchroom, Parker and Mike Bye were having a disagreement. Mike was asking “Why the hell are you ratting on everyone? Some union man you are?” Parker said “Fuck you, asshole. Go cry to Brucy.” Parker started walking away and said “You fag.” directed at Mike. After this, Mike left. Mark went into the lunchroom. As Mike walked by the window, Parker said with a full room of guys, “Look at that little faggot go. Go and see your little girlfriend Brucy.” and say how much Mike and Bob were assholes, and cut them down for several minutes. Not one person said anything. He called Mike a “Loser, fag, go see your girlfriend.”

...

On several occasions, when Mike walked by, and sometimes Mike won’t hear him, but he will say, “There goes Brucy’s blow boy.”

Parker says Bruce and Mike are lovers.

...

Mark Parker makes a point of trying to convince everyone that Bruce and Mike are gay, and are sleeping together. Parker said once in the shop “I wonder who swallows, Mike or Bruce.”

The evidence of Mr. Todd tends to confirm that the efforts of Mr. Parker to characterize Mr. Bye and Mr. Gauld as homosexual lovers succeeded in creating that impression in the minds of some employees. Mr. Todd describes one occasion when persons other than the grievor were making reference to the homosexual relationship between Mr. Bye and Mr. Gauld, prompting Mr. Todd to say: “Come on fellas. How stupid can you be?” It is significant, I think, that Mr. Parker’s smear campaign against these two employees had reached the point where other employees were apparently willing to believe the allegations of homosexuality being made.

Nor can there be any doubt that the campaign of harassment engaged in by Mr. Parker had a profound effect on Mr. Bye. From his testimony at the arbitration hearing it is clear that he suffered greatly, to the point where he dreaded coming to work knowing that he would be in contact with Mr. Parker, and sought to avoid him at all costs. Mr. Gauld also testified. Although he was not fully aware of the allegations of homosexuality being made against him by Mr. Parker until he was informed by Mr. Bye, he was clearly shaken and profoundly offended by Mr. Parker’s conduct. The impact on these two individuals is serious, to the point where Mr. Bye testified that he would not be willing to work again with Mr. Parker, even if it meant quitting his job.

As the prior decisions of this Office have recognized, sexual harassment of employees is among the most serious forms of workplace misconduct, meriting commensurately serious discipline. In **CROA 1791** (*Re CNR and CBRT&GW* (1988) 1 L.A.C. (4th) 183), a case involving the physical assault of two female employees by a male employee, the following comments were made:

There can be little doubt that sexual assault is, *prima facie*, grounds for discharge (see, e.g., **St. Joseph's Health Centre v. Canadian Union of Public Employees, Local 1144**, an unreported award of Arbitrator R.J. Roberts, dated November 23, 1983, sustaining the discharge of a male employee for attempting fondle the breast of a female employee and to kiss her). It is the most fundamental right of any employee, whether male or female, to work without fear of assault, whether sexual, physical or otherwise. The maintenance of that condition is among the first obligations of an employer and responsibilities of an employee. A sustained course of conduct that violates that condition and instills fear, humiliation or resentment among victimized employees will, absent the most extraordinary mitigating circumstances, justify the removal of the offending employee from the workplace by the termination of his or her employment.

There appears to be little doubt that Mr. Parker did not view himself as a harasser, much less a sexual harasser. During the course of his statement to the Company he stressed that he was not aware that anyone was offended by his words or conduct and that he was merely engaging in normal "shop talk". However, the evidence of other employees calls that assertion into question. A number of them, including Mr. Bye, Mr. Todd, Mr. Sommerfeld and Mr. Gauld all had occasion to make it clear to Mr. Parker that his allusions to homosexuality between employees and supervisors, whether casual or serious, were unfair and unwanted. Unfortunately, those objections made no impression on Mr. Parker. In this regard the comments of Arbitrator Blasina in **Re Royal Towers Hotel Inc. and Hotel, Restaurant and Culinary Employees and Bartenders Union, Local 40** (1992) 32 L.A.C. (4th) 264, at p. 278 are apposite as regards the understanding Mr. Parker reasonably should have had of his actions:

So, I do not accept the generalization that sexual harassment has been condoned because I do not accept that our society has condoned harassment of and injury to another person. I recognize notwithstanding that such misconduct will still occur but I would reject the notion that somehow this is a mitigating circumstance. Particularly, one does not need to be told that you do not torment and demean another person and do so repeatedly such that you make them miserable and make them hate coming to work. That applies to any harassment – sexual or not. Quite simply, any person with a modicum of goodwill and respect for his fellow man, would know better. Any person need only ask himself how he would like it if he or his wife, daughter or sister, or other loved one had to work under such conditions.

The motives underlying Mr. Parker's conduct are fairly evident. He held a degree of authority both as a track maintenance foreman and as the Brotherhood's local chairman. In the latter capacity he took an aggressive stance against what he perceived as undue fraternization or friendliness between bargaining unit employees and supervisors. Although it is his right to hold that view, unfortunately, as the evidence discloses, on the balance of probabilities, he crossed the line of acceptable human decency in his efforts to enforce it, particularly as regards his unrelenting campaign against Mr. Bye and Mr. Gauld.

It is of little consequence whether he was prompted in his actions by Mr. Bye's survival of the track forces reorganization, when more senior employees were laid off, or what he perceived as the excessive friendship between the two men. The critical fact is that he carried on a systematic campaign of verbal harassment against Mr. Bye and Mr. Gauld, sometimes in the presence of Mr. Bye, sometimes not, the effect of which was to raise a suspicion of homosexuality between the two men which, as appears from the evidence, took hold in the minds of a number of other employees and which, ultimately, became profoundly disturbing to both Mr. Bye and Mr. Gauld. Quite apart from the unfortunate homophobia inherent in Mr. Parker's attitude, the record discloses, beyond dispute, that his actions had a devastating effect on the persons he targeted. Moreover, to the extent that the morality of the shop is relevant, it should be noted that rarely, in this Arbitrator's experience, have so many bargaining unit employees so willingly given evidence against a fellow employee and union officer in a discharge case.

Regrettably, after much consideration, the Arbitrator cannot find mitigating factors which would suggest a workable substitution of a lesser penalty in this case. Because of the seniority structure of the bargaining unit, the Arbitrator cannot direct that the grievor be reinstated to work in some other location. The grievor cannot, in other words, be separated from those he has so profoundly offended, including at least one employee who has indicated that he would quit his job rather than work again with Mr. Parker. Unfortunately, Mr. Parker, who is not a long term employee, has so poisoned the atmosphere of his own workplace as to make his reinstatement impossible.

In the result, the Arbitrator is satisfied that the grievor did engage in sexual harassment, particularly as against Mr. Bye and Mr. Gauld, by comments and gestures of a sexual nature calculated to cause humiliation to them. He did so knowingly, deliberately and to such a degree as to justify the termination of his services.

For all of the foregoing reasons the grievance must be dismissed.

Dated at Montreal, June 28, 1996

(original signed by) MICHEL G. PICHER
ARBITRATOR