

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2758

Heard in Montreal, Wednesday, 10 July 1996

concerning

CANADIAN PACIFIC LIMITED

and

TRANSPORTATION COMMUNICATIONS UNION

EX PARTE

DISPUTE - UNION:

The debiting of the record of Walter Pasveer with 40 demerits and his dismissal for accumulation of demerits for "smoking in the calling bureau after having been given direct instructions not to do so by a company officer and your unacceptable verbal and sexual harassment of a fellow employee on May 8, 1995."

DISPUTE - COMPANY:

The assessment of 40 demerit marks to Mr. W. Pasveer for smoking in the Calling Bureau after having been given direct instructions not to do so by a Company Officer and his unacceptable verbal and sexual harassment of a fellow employee on May 8, 1995.

UNION'S STATEMENT OF ISSUE:

On May 8, 1995, Mr. Pasveer was the subject of a complain by a fellow employee. The investigation revealed that some unacceptable remarks of a sexual nature were made concerning Mrs. G. Lorenz, however, it was not established that Mr. Pasveer made the remarks. After being warned about smoking at work, in the course of the shift, Mr. Pasveer inadvertently lit a cigarette, and quickly extinguished it when he realized what he had done.

The Union progressed a grievance, claiming that the facts established at the investigation did not warrant discipline, and, in any event, if they did warrant discipline, that the discipline was excessive. The Union requested that Mr. Pasveer's record be cleared of demerits, that he be restored to his employment, and be compensated for all lost wages and benefits.

COMPANY'S STATEMENT OF ISSUE:

On June 2, 1995, an investigation commenced with respect to Mr. W. Pasveer's tour of duty on Monday, May 8, 1995, and events which transpired involving himself, Ginger Lorenz, Keith Miller and Bill Dunbar, culminating in Ginger Lorenz booking off. Of particular focus in the investigation were allegations that Mr. Pasveer had been smoking in the Calling Bureau and a complaint of sexual harassment which had been put forth against him. The investigation was completed on August 5, 1995.

Based on the evidence and facts adduced in the investigation, Mr. Pasveer's discipline record was assessed 40 demerit marks for smoking in the Calling Bureau after having been given direct instructions not to do so by a Company officer, and his unacceptable verbal and sexual harassment of a fellow employee on May 8, 1995.

As a result of this assessment, Mr. Pasveer had accumulated a total of 80 demerit marks and, as a result, he was dismissed from Company service for the accumulation of demerit marks under the Brown System of discipline.

The Union progressed a grievance alleging that none of the charges against Mr. Pasveer could be substantiated and requested that the demerits assessed be removed, with the result that he be reinstated into his employment with compensation for all lost wages and benefits.

The Company has denied the Union's grievance.

FOR THE UNION:

(SGD.) P. J. CONLON

ASSISTANT DIVISIONAL VICE-PRESIDENT

FOR THE COMPANY:

(SGD.) C. GRAHAM

FOR: DISTRICT GENERAL MANAGER, PRAIRIE

There appeared on behalf of the Company:

C. Graham	– Labour Relations Officer, Montreal
R. Weir	– Manager, Yard Operations, Calgary
G. L. Lorenz	– Witness

And on behalf of the Union:

P. J. Conlon	– Assistant Division Vice-President, Toronto
R. Pagé	– Executive Vice-President, Montreal
V. Dey	– Local Chairman, Calgary - Witness
W. Pasveer	– Grievor

AWARD OF THE ARBITRATOR

This matter involves two allegations against Crew Calling Clerk W. Pasveer. The first is that he disobeyed a general rule, as well as a specific direction from a supervisor, not to smoke in the Calling Bureau. The second is that he engaged in verbal and sexual harassment of fellow female employee G.L. Lorenz.

During the course of its presentation the Union objected, in part, to the style of investigation conducted by the Company's officer, a road foreman/trainmaster. Having fully reviewed the record of the investigation the Arbitrator can readily appreciate that concern. Article 27.1 of the collective agreement constrains the Company to conduct "a fair and impartial investigation" prior to the assessment of discipline against any employee. The record discloses, unfortunately, that during the course of asking questions of a newly hired probationary employee, who was a witness to certain events, the investigating officer pointedly reminded him of the vulnerability of his job security as a probationary employee, and the adverse consequences which might flow if the Company formed the opinion that improper answers had been provided by him. In the Arbitrator's view such "reminders" and questions which are in the style of an aggressive cross-examination with leading and suggestive questions risk undermining the credibility of such an investigation. However, I am satisfied, on the whole, that in the instant case the standard of fairness and impartiality was not violated. Indeed, the Union's own statement of fact and dispute does not specifically allege that it was. Quite apart from the issue of fairness and impartiality, however, Company officers conducting investigations should be aware that overzealous forms of questioning, however well motivated, can risk placing a taint on the credibility of the answers obtained.

With respect to the merits of the dispute the Arbitrator cannot find, on the balance of probabilities, that the Company has established that the grievor engaged in sexual harassment of a fellow employee on May 8, 1995. It would appear that the grievor was involved, at one point during the day, in a conversation with another employee, concerning the "sunshine girl" whose picture appeared in a local newspaper. While it seems that comments made during that conversation could, of themselves, be qualified as sexual harassment in the broadest sense, the evidence does not establish that the grievor was the person who spoke the words which offended the female employee. By her own account, which the Arbitrator judges to be credible, she could not identify which of the two employees, who were at some distance, made the offensive comments. In the result, the Arbitrator cannot find that the allegation of sexual harassment is made out.

It is clear, however, that the grievor did violate the prohibition against smoking, and that he did so in a deliberate and blatant fashion. The evidence discloses that when another employee in the Calling Bureau began to smoke, Calling Clerk G. Lorenz, who learned that day that she was pregnant, asked him to put out his cigarette. As he was doing so the grievor then protested that the employee should continue to smoke, indicting that he himself felt free to

do so. The evidence further discloses that that incident caused Ms. Lorenz to call Assistant General Yardmaster Tague, requesting that he speak to the two employees about their smoking, which he immediately did. Not long afterwards, however, the grievor did light a cigarette, which prompted Ms. Lorenz to book off work. The evidence further discloses that before she left the issue of smoking in the Calling Bureau led to what I am satisfied has been accurately characterized as a "shouting match" between Mr. Pasveer and Ms. Lorenz. While that exchange did not involve any sexual harassment, it plainly did involve verbal harassment on the part of Mr. Pasveer aimed at Ms. Lorenz, including comments to the effect that she was junior to him, that she was "nothing" and that he was in a position to adversely affect her husband, a running trades employee. In the result the Arbitrator is satisfied that the allegations of verbal harassment and a violation of the directives against smoking are established.

There are, however, a number of mitigating factors to be considered in respect of this grievance. Firstly, it is apparent on the face of the evidence that the Company was lax in the enforcement of the prohibition against smoking, both in the Calling Bureau and in the lunchroom within the same building. It appears that supervisors themselves were occasionally seen to be offenders against the no smoking rule, creating an atmosphere of uneven and dubious enforcement. While that circumstance does not justify the grievor's refusal to abide by the rule, and to respect the wishes of Ms. Lorenz, it must be taken into account in considering the appropriateness of a disciplinary penalty.

A second and still more compelling factor is the medical and emotional condition of the grievor at the time in question. Medical documentation placed in evidence confirms that the grievor was under medical care at the time for a condition of anxiety and depression, caused in part by the break-up of his marriage, his own personal bankruptcy and the death of his sister. The grievor's difficulty with anxiety and stress, for which he was being treated with prescription medications, is confirmed in a medical report of his physician, Dr. F. Byam, dated September 29, 1995. It also confirms that the grievor was suffering from migraine headaches secondary to a chronic inflammatory bowel disease.

Does the evidence confirm that the grievor's conduct on May 8, 1995 was deserving of the assessment of forty demerits? I think not. While his abusive conduct towards Ms. Lorenz is deserving of a serious degree of discipline, and the evidence also discloses a knowing violation on his part of the no smoking rule, the mitigating factors considered above are significant, and support the conclusion that a substitution of penalty is not inappropriate. In light of the decision recorded in **CROA 2757**, dealing with a separate incident, the grievor's disciplinary record at the time of his termination should, in the Arbitrator's opinion, have stood at twenty demerits. In my view the assessment of a further twenty demerits for the events of May 8, 1995, coupled with an extensive suspension, followed by a reinstatement on specific conditions, should serve as an appropriate form of rehabilitative message to the grievor. Needless to say, if he should fail to realize on the rehabilitative opportunity being afforded, any future incidents of aggressive or disrespectful behaviour towards other employees or supervisors will result in the most serious of consequences.

For the foregoing reasons the grievance is allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment, without loss of seniority and without compensation for wages and benefits lost, with his disciplinary record to stand at forty demerits. Mr. Pasveer's reinstatement is further conditioned on his willingness to undertake, for a period of not less than two years, anger and stress control counselling to be made available through the Company's Employee and Family Assistance Program, or by such other means as may be agreed between the parties.

July 12, 1996

(signed) MICHEL G. PICHER
ARBITRATOR