

AH 696

IN THE MATTER OF AN ARBITRATION

BETWEEN: VIA RAIL CANADA INC.

AND UNIFOR NATIONAL COUNCIL 4000

AND IN THE MATTER OF THE GRIEVANCE OF A. NIZSCHE-MacFADYEN

ARBITRATOR: J.F.W. Weatherill

A hearing in this matter was held at Montreal, November 25, 2019.

B. Kennedy, for the union.

A. Baril, for the employer.

AWARD

In this grievance the grievor, a Senior Station Attendant with ten and one-half years' seniority and whose discipline record stood at five demerits, protests her discharge, effective June 28, 2018, for violation of "the Workplace Violence and Harassment Prevention Policy as Alleged". The "allegation" would appear to be that set out in the company's Notice of Investigation, which alleged "Violation of the Workplace Violence and Harassment Policy and Theft", and while some questions at the investigation, and also at the preceding independent investigation, were related to potential theft, that head of discipline was not put forward at the hearing and in any event is not established by the material before me. The substantial ground for discharge was the alleged workplace violence and harassment.

The matter was raised on January 19, 2018, when a fellow employee ("the complainant"), a Station Attendant of some two years' seniority who, with the grievor, was one of two employees regularly working at the Truro station, filed a complaint with the company alleging that she was subject to "possible violence and harassment in the workplace" by the grievor. The company then held a fact-finding enquiry in accordance with their policy. It was determined that it could not be said that the allegations plainly and obviously did not indicate workplace violence or harassment. It was necessary then to investigate the matter further. The company engaged an independent and qualified third-party investigator. The investigator's report was issued on June 21, 2018. Its principal conclusions were that several allegations made by the complainant were founded, and that the grievor's conduct constituted workplace violence and harassment.

The grievor was then called to an investigation which was held on June 22, 2018. This was the “fair and impartial” investigation called for by article 24 of the collective agreement. The grievor attended with her union representative and, while objection was taken to some of the questions asked, she did reply to the questions, and indicated at the end that she was satisfied that the investigation was conducted in a fair and impartial manner, although the union representative reserved her right to comment thereon during the grievance procedure, should there be one. At the hearing of this matter the union raised certain objections both with respect to the independent investigation and the company’s article 24 investigation. These objections related principally to the hearsay nature, or the leading nature, of some of the questions or statements made at these investigations. Neither of these investigations should be considered as being of a trial-like nature, as many CROA cases have held. A reviewing officer, or an eventual arbitrator, can distinguish between answers whose substance was suggested by the question and those, as in cross-examination, designed to provoke a substantial answer or denial. Hearsay occurs when a witness testifies as to what someone else told him or her. Again, its value is usually easily assessed, and such evidence is not necessarily inadmissible. Both the investigations may properly be considered in the instant case.

Following the company’s investigation, the grievor was put on unpaid leave pending a decision as to what action to take. Given the nature of the allegations and their substantial acceptance by the independent investigator, putting the grievor on leave was not, I think, improper. I do not consider, however, that depriving her of pay for time she would otherwise have worked and during a period when the

company was presumably considering what action to take, was justified, although it is not clear that that is a question before me.

On June 28, 2018, the grievor was discharged for violation of the Workplace and Harassment Policy (as noted above, there is no mention of theft).

Also on June 28, the grievor filed a formal complaint of harassment with the company. This complaint included reference to an incident which had occurred in 2016 when the grievor made an allegation of sexual harassment against a member of management. At that time, the grievor was assessed 40 demerits, apparently on unrelated grounds. Following investigation, however, it was determined that the grievor's allegation had been founded; the 40 demerits were removed from her record, and it would appear that the offending member of management was disciplined and is no longer employed with the company. I do not take that incident as bearing on the truth or falsity of the allegations against the grievor in the present case. The same may be said of a complaint made against the grievor by another employee in 2016. That complaint apparently alleged what the independent investigator referred to as "similar facts". The complaint was investigated, but there was no finding of any culpability on the grievor's part. I do not consider that that earlier complaint should be given any weight in the instant case.

The allegation that the grievor violated the company's policy is a very general one and does not set out any particulars as to what gestures, actions or words may have been involved, or in what context or contexts they may have been made. The independent investigator, however, set out a number of incidents, or series of

incidents, apparently revealed in her examination of the complainant. In several, but not all of these cases, she found that the grievor had acted in the way alleged, and concluded this amounted to a violation of the company's policy. To a large extent, the evidence in respect of each allegation is that of witnesses who repeat what the complainant told them (often inadmissible hearsay) or, more reliably, text messages between the complainant and the grievor. The investigator's conclusions are generally said to be "based on the credibility given to each party", a matter on which I am at a disadvantage to judge, given that neither party was subject to examination or cross-examination before me.

All agree that charges of this sort are of a very serious nature, and if acts of violence or harassment have occurred then discipline should follow, the nature and extent of which should depend on the nature and extent of the violence or harassment and all of the relevant circumstances. Difficulties of proof must not be overlooked – a false or mistaken accusation must not lead to the unjust condemnation or discipline of an innocent person.

From all of the material before me, including the statements of the complainant and the grievor, as well as exhibits set out in the independent investigator's report (on which the employer appears to have substantially relied), it can be concluded – on the balance of probabilities – that the grievor did in fact ask the complainant to lie for her to cover her absence from the station at certain times when a train was due. This was improper behaviour and would call for discipline, but the question of whether or not it was harassment of the complainant is another matter. The complainant, of course, did not like such a request, although she made

no immediate complaint about it. (She eventually asked the grievor to stop such requests). That the grievor repeated such requests with the intention of placing the complainant in a difficult position would be very difficult to prove, although in my view a reasonable person would know or ought to know that such a request, particularly if made frequently, would be a cause of considerable stress, to say the least.

The allegation that the grievor was constantly criticizing the company, said to indicate that she was trying to poison the grievor's mind against it may, I think, more naturally be characterized, as the union put it, as "workplace productivity or job related issues causing employee or workplace conflict". The same may be said of the grievor's frequent lateness or absences during work hours, or of her failure always to appear in uniform. These offences, for which discipline could be imposed, do not necessarily, or even probably, suggest harassment of the complainant, much as they may have annoyed her.

It remains, however, that the grievor did seek to take advantage of her seniority and slightly higher rank over the complainant. She was, in effect, "in charge" or a "lead hand" but was not the complainant's supervisor and certainly not the Station Manager. Her behaviour toward the complainant in this respect, while not violent, did, I find, amount to harassment within the meaning of the company's policy.

A form of corroboration that the grievor was indeed harassing the complainant occurred following the grievor's dismissal, when a member of management was

alone with the complainant at the station, giving instructions. Her testimony is that the grievor telephoned the station and, in effect, threatened or tried to intimidate the complainant. I consider that testimony reliable, and it is quite inconsistent with the grievor's denials, as it is consistent with the theory of the grievor's abusive harassment of the complainant.

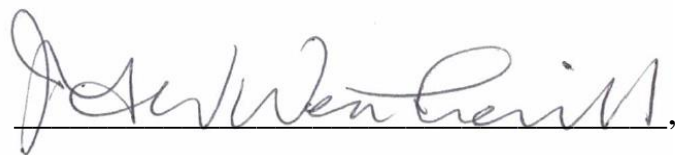
It was alleged that the grievor harassed the complainant by an unfair distribution of the workload, particularly the handling of baggage. The grievor had at one point injured her back, and it appears for a certain time was under certain restrictions respecting heavy lifting. These restrictions were eventually lifted, and while the grievor was prescribed physiotherapy, she did not attend the sessions. While the grievor, as lead hand, might be justified in assigning a larger portion of the baggage handling duties to her junior colleague than to herself, the bulk of the material before me does indicate that the grievor abused her authority in this regard, and it may be concluded that this amounted to harassment. The same may be said for the grievor's frequent reference to missing items with the insinuation, if not the outright accusation, that the complainant was responsible – with no sufficient justification for such a charge.

For all of the foregoing reasons, I conclude, with the independent investigator, that the grievor did abuse such authority as she had over the complainant, and that she was guilty of harassment in violation of the company's policy. There was, I find, just cause for the imposition of discipline. A number of the allegations, however, have not been established, and are really cases of run-of-the-mill workplace banter or of misunderstanding. The grievor's discipline record stood at five demerits. In

my view, the assessment of forty demerits – a severe penalty under the Brown system, and one which should alert an employee to the possibility of loss of her job – would be at the extreme end of the range of reasonable disciplinary responses to the situation. It may be noted that the complainant herself had not followed the company’s policy in that she failed promptly to report any of her complaints either to her lead hand or to anyone in management. As well, as the independent investigator noted, the company failed to act diligently, to remain alert and to act promptly following the earlier complaint against the grievor, even although that complaint was not shown to be well-founded.

Apart from the union request for full relief and compensation, the matter of remedy was not the subject of any substantial submissions at the hearing of this matter, although it is clear from the company’s brief that it considered a future employment relationship to be untenable. Accordingly, while I consider the grievor is entitled to some significant relief, not excluding reinstatement, make no award in that respect at this time, remitting the matter to the parties for consideration and negotiation, while retaining jurisdiction to receive submissions and determine that matter, in order to complete the award. Dates will be set shortly for the making of submissions if the parties cannot resolve the matter promptly.

DATED AT OTTAWA, this 20th day of December 2019,

A handwritten signature in cursive script, appearing to read "D. W. Kerrill", written over a horizontal line.

Arbitrator.