CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1791

Heard at Montreal, Tuesday, 14 June 1988

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

DISPUTE - COMPANY:

Appeal of the discharge of Mr. E. Morgan, Toronto, for conduct unbecoming an employee while employed in the Crew Management Centre.

DISPUTE - BROTHERHOOD:

Appeal of the discharge of Mr. E. Morgan, Toronto, for alleged conduct unbecoming an employee while employed in the Crew Management Centre.

COMPANY'S STATEMENT OF ISSUE:

On October 16 and 17, 1987, the Company received written complaints from two female employees concerning the behaviour of Mr. E. Morgan.

An investigation into the facts surrounding these complaints was conducted. During this investigation, the Company determined that the grievor had engaged in both physical and verbal sexual harassment against the two female employees.

As a result of the investigations on October 22, 1987, Mr. E. Morgan was discharged.

The Brotherhood has grieved the dismissal on the grounds that the incidents did not take place, rather the grievor is the victim of a conspiracy. Further that there is a lack of evidence to support the charges. The Brotherhood requests the grievor be reinstated to his position and fully compensated for all lost wages, including interest, overtime and benefits.

The Company disagrees with the Brotherhood's contention and has declined the appeal of discharge.

BROTHERHOOD'S STATEMENT OF ISSUE:

Mr. Morgan was discharged by CN Rail on October 22nd, 1987. The Company alleged that Mr. Morgan had, earlier in October, sexually harassed two female employees who were co-workers with Mr. Morgan in the Crew Management Centre.

The Brotherhood has grieved the dismissal on the grounds that no behaviour that could be construed as sexual harassment occurred as alleged.

The Brotherhood requests that the grievor be reinstated to his position in the Crew Management Centre and be made whole for all losses, including interest, overtime and benefits.

FOR THE BROTHERHOOD: **FOR THE COMPANY:**

(SGD.) TOM MCGRATH **(SGD.) W. W. WILSON**
NATIONAL VICE-PRESIDENT **FOR: ASSISTANT VICE-PRESIDENT LABOUR RELATIONS**

There appeared on behalf of the Company:

J. Luciani	– Counsel
W. W. Wilson	– Director, Labour Relations, Montreal
G. Wheatley	– Manager, Labour Relations, Montreal
M. M. Boyle	– Labour Relations Officer, Montreal
S. F. McConville	– Labour Relations Officer, Montreal
B. Boucher	– Transportation Officer, Operations Toronto
B. Hogan	– Manager, Crew Management Centre, Toronto
M. Cachia	– Supervisor, Crew Management Centre Toronto
R. Hafeez	– Supervisor, Crew Management Centre Toronto
S. P. Burt	– Witness
L. A. Peldiak	– Witness

And on behalf of the Brotherhood:

M. Lynk	– Counsel, Executive Assistant, CBRT&GW
T. N. Stol	– Regional Vice-President, Toronto
R. Storness-Bliss	– Regional Vice-President, Vancouver
R. Gee	– Staff Representative
G. Johnston	– Witness
B. Fitzgerald	– Witness
S. Baker	– Witness
R. Jones	– Witness
C. Roach	– Observer
E. Morgan	– Grievor

On Monday, 11 July 1988:

There appeared on behalf of the Company:

J. Luciani	– Counsel
M. M. Boyle	– Labour Relations Officer, Montreal
S. F. McConville	– Labour Relations Officer, Montreal
B. Boucher	– Transportation Officer, Operations Toronto
B. Hogan	– Manager, Crew Management Centre, Toronto
M. Cachia	– Supervisor, Crew Management Centre Toronto
R. Hafeez	– Supervisor, Crew Management Centre Toronto
S. P. Burt	– Witness
L. A. Peldiak	– Witness
J. Powell	– Witness
B. Sims	– Witness

And on behalf of the Brotherhood:

M. Lynk	– Counsel, Executive Assistant, CBRT&GW
T. N. Stol	– Regional Vice-President, Toronto
R. Gee	– Staff Representative, Toronto
G. Johnston	– Witness
B. Fitzgerald	– Witness
S. Baker	– Witness
R. Jones	– Witness
C. Roach	– Observer
E. Morgan	– Grievor

AWARD OF THE ARBITRATOR

Mr. Edwin Morgan grieves his discharge by the Company for alleged acts of sexual harassment. Mr. Morgan, who is married and is 36 years old, was employed as a crew dispatcher in the Crew Management Centre located in Union Station in Toronto. He has some 13 years' seniority, having first entered the service of the Company on February 5, 1974. The Union asserts that the allegations of sexual harassment made against Mr. Morgan are without foundation, and it seeks his reinstatement with full wages and benefits. The Company maintains that the grievor's conduct in respect of two female co-workers, from within the same bargaining unit, constitutes serious sexual harassment. It submits that the discharge of the grievor was appropriate in the circumstances.

I

THE EVIDENCE

The complaint of sexual harassment made against Mr. Morgan was brought by two young and relatively new employees, Ms. Susan Burt and Ms. Lisa Peldiak. The evidence establishes that Ms. Burt's brother, Stephen Burt, is employed within the Crew Management Centre. At his suggestion, both Ms. Burt and Ms. Peldiak applied successfully for job openings in the Company's crew dispatching centre at Union Station. Both commenced employment in July of 1987. It is common ground that historically the Crew Management Centre has been predominantly staffed by male dispatchers. The Centre, which operates on a three shift, 24-hour-a-day basis, is responsible for assembling and notifying train crews from among available running trades employees, in accordance with Company policy and the rights of the employees established within their respective collective agreements.

The Crew Management Centre is a relatively small open office containing some ten desks, each of which is equipped with a telephone and a computer and video display terminal. Each desk corresponds to a certain railroading area, such as Belleville or Hornepayne. Using the information available through the computer the crew dispatcher contacts available crew members to assemble teams of employees responsible for the operation of trains within a designated geographic area. It is common ground that this can, at times, be a hectic and intense experience, particularly when employees take issue with the order of their assignment and the dispatcher's interpretation of their right to be called to work in a particular circumstance. There seems little doubt that the telephone conversations between dispatchers and running trades crew members within the Crew Management Office are frequently loud and, on occasion, coloured with fairly graphic swear words.

The evidence establishes that both Ms. Burt and Ms. Peldiak were, in part, trained by Mr. Morgan in the procedures of crew dispatching. Both Ms. Peldiak and Ms. Burt testified that Mr. Morgan was extremely competent at his job, was helpful in their initial orientation to the work of the Crew Management Centre and, as the weeks passed, always remained available to help them out whenever they needed assistance with any problem with which they were not familiar.

Ms. Burt, who was 19 years old at the time, testified that she was first subject to physical harassment by Mr. Morgan on October 10, 1987. Her evidence establishes that she had been a friend of Ms. Peldiak for approximately a year, both having worked in a clothing retail store prior to their employment at CN. On the night of October 10th, while working at her video display terminal, she developed a stiffness in her neck. She asked Ms. Peldiak to give her a massage, which the latter proceeded to do. According to Ms. Burt, Mr. Morgan shortly came up behind the two employees stating: "Girls shouldn't be doing this, it looks funny." According to the evidence of Ms. Burt, corroborated by that of Ms. Peldiak, Mr. Morgan proceeded to take over massaging Ms. Burt's neck and shoulders, causing Ms. Peldiak to move away. Ms. Burt testified that after massaging her neck and shoulders he tried to reach down towards her breasts. According to Ms. Burt when she pulled forward he then reached under her arms, causing her to pull away again, stating "Eddie, don't". According to Ms. Burt Mr. Morgan simply laughed and went back to his desk. She testified that other employees observed what occurred, including employee Grant Johnston.

The second incident involving Ms. Burt occurred on October 13, 1987. According to Ms. Burt, on that occasion, she was busy on the telephone with a crew member when Mr. Morgan approached her from behind and began to massage her neck and shoulders once again. As she was speaking, he moved his hands forward towards her breasts and when she pulled away he again tried to put his hands under her arms. Ms. Burt again told Mr. Morgan not to do it. Ms. Burt testified that once more Mr. Morgan laughed at her reaction.

According to Ms. Burt the effect of these advances by Mr. Morgan were devastating to her. She testified that Mr. Morgan's actions, and the result of her reporting what had transpired, impacted greatly on her life. She relates that she was eventually forced to quit her job and has had to see a counsellor because of the emotional problems which resulted. The process of complaint, investigation and their aftermath are reviewed in greater detail below.

Ms. Peldiak gave evidence corroborating the account of Ms. Burt respecting the massage incidents both on October 10 and 13. Ms. Peldiak's evidence also relates further incidents of sexual harassment directed at herself. According to Ms. Peldiak's evidence, Mr. Morgan became physical with her almost from the beginning of her training. She states that he would lean very close to her to explain things and gradually became more and more familiar. Ms. Peldiak relates that she first became uncomfortable when, not long into her employment relationship, Mr. Morgan began patting her behind and making sexually suggestive verbal comments. She states that on one occasion when she came into work looking tired, he asked what she had been doing and, specifically, whether she had been up all night with her boyfriend, saying "He must have worn you out." Ms. Peldiak relates that the grievor also made comments about the attractiveness of her legs and, on more than one occasion, made half joking references about wanting to marry her.

Ms. Peldiak asserts that the verbal communication from Mr. Morgan gradually got worse. She testified that when he began to make statements to the effect that he would buy her nice presents if she was good and repeatedly stated, in the presence of other employees, that he wanted to marry her, she became acutely embarrassed and did not know how to handle the situation. Ms. Peldiak stated in her testimony "I'd laugh at him when he talked of marrying ... he obviously was married. When he started talking about my body it got uncomfortable. To hide my embarrassment, I'd laugh it off ... I was embarrassed and uncomfortable."

The most serious allegation made by Ms. Peldiak concerns an incident which she describes as having occurred on the afternoon of October 3, 1987. On that day she was assigned to the afternoon shift, in charge of the Belleville desk. Early in the shift she proceeded to the kitchen, a small, enclosed area adjacent to the crew dispatching office, where she made herself a cup of coffee. According to her evidence she was alone in the room until Mr. Morgan entered. She states that she offered him coffee and they exchanged a few words about the shift. According to Ms. Peldiak while she was standing at the table stirring her coffee Mr. Morgan said "I know what you want", a comment he had made to her on earlier occasions. He then came up behind her and, reaching around her, put both of his hands on her breasts and pulled her against him, rubbing his penis against her behind. Ms. Peldiak testifies that she immediately pushed Mr. Morgan away from her. Feeling what she described as a combination of astonishment and revulsion, she left the room and proceeded directly to her work station. She relates that shortly thereafter Mr. Morgan followed her to her desk where he stated "If I was good I'd get some nice Christmas presents." Ms. Peldiak's evidence is that she did not discuss Mr. Morgan's assault on her in the kitchen with anyone, principally out of a sense of personal shame for what had happened. Although she and Ms. Burt frequently travelled to work together, and she had observed the two massaging incidents involving Mr. Morgan and Ms. Burt, both employees confirmed in their evidence that neither spoke to the other at any time about the stress and discomfort that each was feeling with respect to the verbal and physical overtures of Mr. Morgan.

It appears that Mr. Morgan's actions in respect of the two female employees were revealed only as a result of an incident at the home of Ms. Burt on the evening of October 15, 1987. According to her account, she was so troubled by the stress that she felt as a result of Mr. Morgan's actions at the office, that that evening while at home with her boyfriend she became upset and began crying. When her father came home and demanded to know what the problem was, she related the two massaging incidents of October 10th and 13th involving Mr. Morgan. Her father advised her that she should first contact the Union. Following his advice she then called William Hutchens, a grievance officer with the Union and informed him what was happening with Mr. Morgan at the office. According to Ms. Burt, however, her father also notified her brother Stephen Burt. It appears that Mr. Burt, in turn, contacted Crew Manager Barry Hogan. Mr. Hogan telephoned Ms. Burt, and being advised of the general nature of her complaint, arranged for both Ms. Burt and Ms. Peldiak to meet with him at his office on October 16, 1987.

It was only in the course of that meeting that Ms. Peldiak disclosed the incident which had taken place in the kitchen on October 3rd. Both Ms. Burt and Ms. Peldiak then informed the Company of the verbal overtures by Mr. Morgan and of the two massaging incidents involving Ms. Burt. As a result of an ensuing investigation, the Company accepted the accounts of these events related by the two female employees and Mr. Morgan was discharged

The grievor's discharge was by no means the end of difficulties for Ms. Burt and Ms. Peldiak. While Mr. Morgan's denials of any wrongdoing were not accepted by management, they received almost universal acceptance

among the other employees in the Crew Management Centre. The other employees, many of whom had known Mr. Morgan for years, refused to support Ms. Burt and Ms. Peldiak or, it would appear, even to take a neutral position. In the result, both Ms. Burt and Ms. Peldiak found themselves ostracized by their fellow employees.

The aftermath of the complaint against Mr. Morgan was particularly devastating for Ms. Burt. She related that a male employee approached her and said that she did not know what she was doing and that she did not appreciate how serious her accusation was. According to her evidence she retorted by asking him whether he understood how serious it was. She further relates that a female employee told her that Mr. Morgan didn't mean to hurt anyone. Her response to the female employee was "He can do what he wants to you not to me; it's my body!" Ms. Burt relates that people in the office ignored her, talked behind her back and would point at her. She felt enormous pressure, as a result of which she moved to a day job, which meant a downgrade to a clerical position, and worked only one further day as a dispatcher. The clerical position was, however, in the same office, and she continued to feel peer pressure against her. According to her evidence, she could no longer handle working in the office, and so booked sick and finally resigned from Canadian National. In her words, "I didn't know what else to do."

Ms. Burt testified to her feeling of enormous personal injustice and outrage. In her view she has become, in effect, a double victim, firstly of Mr. Morgan's alleged harassment and secondly of the condemnation of her peers and subsequent loss of employment. Her evidence, which was given partly in tears, relates that she had to seek emotional counselling and was forced to find alternative employment as a receptionist/secretary for an insurance adjuster, a job which pays substantially less than the position she held with Canadian National.

Ms. Peldiak has fared little better. In her evidence she relates that she was reproached and ignored by other employees, both male and female. She describes the stress which she felt in the workplace as greatly aggravated by the fact that her detailed written statement of complaint concerning the incident in the kitchen was circulated generally within the workplace, a fact which she blames on the Union. Ms. Peldiak relates that she feels humiliated and embarrassed by that development. She also expresses bitter resentment at an article relating the discharge of Mr. Morgan which appeared in the Toronto Star on April 17, 1988. The article, which generally relates the facts of the case from Mr. Morgan's perspective and reflects his characterization that he was victimized by the lies of two female employees, further aggravated the position of Ms. Peldiak in the eyes of other employees. While it is not clear from the evidence when it occurred, it is not disputed that at some point Ms. Peldiak ceased working in the Crew Management Centre and, at the time of the hearing, she was on an extended sick leave due to the stress which she has experienced.

While the evidence of both Ms. Peldiak and Ms. Burt contains reference to sexual innuendo in the words addressed to them by Mr. Morgan, it would appear undisputed that other male members of the staff of the Crew Management Centre also engaged in a degree of sexual familiarity in the words which they spoke to the two female employees, from time to time. Ms. Burt testified that she received a number of comments of a sexual nature from dispatcher Fitzroy Morrissey and Supervisors Michael Cachia and William Kravecas. She relates that Mr. Morrissey made repeated references to the attractiveness of her breasts, that Mr. Cachia "joked" repeatedly about how he likes her legs and how sexy she is. She further relates that on one occasion Mr. Kravecas, responding to her comment during a telephone consultation to forget about the problem and "... have a sleep on me", responded by saying "Boy, would I like to!"

The material respecting verbal abuse of Ms. Peldiak by other members of the staff appears to be more limited. During her testimony at the arbitration hearing she did not relate any specific incident. During the course of the Company's investigation, Ms. Peldiak stated that she and Ms. Burt did have occasion to discuss "... what was happening to us, like why are we getting all these remarks from people. It wasn't right and it bothered us a lot ...". The statement of another employee made during the Company's investigation gives further substance to this observation by Ms. Peldiak. Under questioning by the Company's officer, Mr. Grant Johnston related that on one occasion Mr. Morrissey made a comment to the effect that he would like to take both Ms. Burt and Ms. Peldiak to a beach "... where the girls can get a tan all over ...".

Mr. Johnston was called as a witness by the Union at the arbitration hearing. He was named by both Ms. Burt and Ms. Peldiak as a fellow employee who had witnessed both verbal abuse on the part of Mr. Morgan as well as his attempts to touch Ms. Burt's breasts while massaging her neck at her work station. Mr. Johnston testified that he did observe Mr. Morgan massaging Ms. Burt on both October 10th and October 13th. According to his evidence, on both occasions it was an innocent gesture and, while he had an unobstructed view, he did not see any attempt by Mr. Morgan to touch her breasts. According to Mr. Johnston there was nothing unusual in Mr. Morgan's behaviour, and

he described his fellow worker as a tactile person who had, on occasion, given him a back rub while on the job as well. While Mr. Johnston related that it did not trouble him when Mr. Morgan touched him in that way, he conceded that during one incident, when Ms. Burt was speaking to an employee on the telephone and Mr. Morgan massaged her from behind, in his opinion, she did look uncomfortable.

During the course of his statement to the Company's investigating officer, Mr. Johnston confirmed that, on at least one occasion, he overheard Mr. Morgan asking Ms. Peldiak to marry him. He characterized Mr. Morgan's words as intended in a joking manner and not offensive. Mr. Johnston also confirmed during his evidence at the hearing that on at least one occasion he witnessed what he considered to be serious verbal abuse of a sexual nature of Ms. Peldiak by Supervisor Cachia. He testified that Mr. Cachia emerged from his office and made a number of statements to Ms. Peldiak which Mr. Johnston found offensive. Mr. Johnston relates: "Lisa was on the Hornepayne desk. Mike came out of his office to make comments to her. I could see she was uncomfortable ... it started with her legs and went from there." According to Mr. Johnston's evidence, afterwards he spoke privately with Mr. Cachia, telling him that his actions were highly improper and could land him in trouble.

Mr. Morgan denies any wrongdoing whatever. During the course of the Company's investigation Mr. Morgan denied that he ever sexually harassed Ms. Burt or Ms. Peldiak either physically or verbally. He specifically denied any recollection of massaging Ms. Burt's back and attempting to touch her breasts, sexually assaulting Ms. Peldiak in the kitchen, patting Ms. Peldiak on the behind, or asking Ms. Peldiak jokingly or otherwise to marry him. During a second investigation, when specifically confronted with the statements of Mr. Johnston that he had witnessed Mr. Morgan massaging Ms. Burt's neck and had overheard his overtures of marriage to Ms. Peldiak, Mr. Morgan stated: "No, I have no recollection of this."

At the arbitration hearing Mr. Morgan's recollection was markedly different. He testified that the work in the Crew Management Centre can be very stressful, sometimes giving rise to crude language. According to his evidence he sometimes touches or massages the shoulders of other employees to raise their spirits, and that verbal banter is also not uncommon. During the course of his testimony, Mr. Morgan recalled that on October 10th he was working the afternoon shift while Ms. Burt was assigned to the Northern desk. He relates that she had a problem finding a brakeman for a crew and asked for his help. Mr. Morgan states that he approached her and while he was helping her to find a crew member, he put his hand on her shoulder. He categorically denies that he attempted to touch her breasts or that she said anything like "Eddy, don't!" He also states that on October 13th, during the midnight shift, he was on the Northern desk while Ms. Burt was on the "tail end". According to his evidence while she was on the telephone he approached to ask if she wanted a coffee, and Ms. Burt replied that she would like toast and milk. He recalls that he then put his hand on her shoulder adding that she did not say anything by way of objection.

Under examination in chief by counsel for the Union, when Mr. Morgan was asked whether he had asked Ms. Peldiak to marry him he answered "No and Yes". According to his evidence, on one occasion he was making a general comment about marriage intended as a joke, stating that men are foolish in their eagerness to get married. According to his testimony, by way of illustration, he jokingly fell on his knees in front of Ms. Peldiak who happened to be present saying "Marry me!" as a comical illustration of what he meant. Mr. Morgan stated that his comment was not intended to be addressed to anyone in particular.

Under cross examination by counsel for the Company, Mr. Morgan was asked why his recollection of these events was so much better at the arbitration than it apparently had been during the course of the Company's investigation. Mr. Morgan responded that in the wake of the allegations against him, under the pressure of the investigation, "I ... was affected emotionally ... I was completely out of my senses".

Following Mr. Morgan's testimony the Company called reply evidence. Mr. Barry Hogan, Manager of the Crew Management Centre in Toronto testified that he served Mr. Morgan with the Form 780 advising him of his discharge. On that occasion, which took place at the grievor's home, according to Mr. Hogan, Mr. Morgan registered surprise and stated that although he had massaged Ms. Burt's shoulders, he had not attempted to touch her breasts, and that nothing else had happened. During the course of Mr. Hogan's earlier evidence, given during the Company's case in chief, he also related that when, through the course of the Company's investigation, he became aware of the allegations against Mr. Morrissey, Mr. Cachia and Mr. Kravecas respecting verbal abuse of the two female employees, he met separately with each of them in his office, reprimanding them verbally for their misconduct and warning them that such activities would not be tolerated in the future.

During the course of the hearing evidence was directed, chiefly through questions put to various witnesses by counsel for the Union, going to the suggestion of a conspiracy on the part of Ms. Burt and Ms. Peldiak to falsely accuse Mr. Morgan of sexual harassment. The conspiracy theory, which first appeared in a gratuitous statement of opinion on the part of employee Grant Johnston during the course of the Company's investigation, is that personal animosity between Mr. Morgan and Stephen Burt, Ms. Burt's brother who was a member of the bargaining unit but was employed as a crew supervisor at the time of these events, is at the root of the allegedly false accusations levelled at Mr. Morgan.

The evidence confirms beyond dispute that on a number of occasions Mr. Morgan and Mr. Burt engaged in mutually abusive verbal exchanges on work related disagreements and that their relationship is not marked by an excess of cordiality. While questions were put to Ms. Peldiak suggesting that she and Mr. Burt were in a romantic relationship, this was categorically denied by Ms. Peldiak. She acknowledges that she knew Mr. Burt and that they had met socially on one or two occasions. According to her evidence, which is substantially unchallenged by evidence of any substance called by the Union, she has never had any romantic involvement with Stephen Burt. During the course of the Company's earlier investigation when the suggestion of such an involvement was raised and the alleged conspiracy was put to her she asserted, again without rebuttal by the Union, that her limited contact with Mr. Burt had been casual only and that he was in fact living with a female companion. Both Ms. Peldiak and Ms. Burt denied forcefully, and with some indignation, the suggestion, first expressed by Mr. Johnston, that the two female employees were manipulated by Mr. Burt in a concealed attempt by him to secure Mr. Morgan's discharge.

II

ARGUMENT

Counsel for the Company submits that the evidence discloses a clear case of both verbal and physical sexual harassment directed at Ms. Burt and Ms. Peldiak by the grievor. She stresses that the events which they experienced have left deep scars upon them, as one has been forced to resign and the other has had consistent difficulty returning to the workplace. Counsel stresses what she characterizes as the "selective memory" of Mr. Morgan at various times during the investigation and the arbitration with respect to the incidents alleged. In this regard she points to the discrepancy between Mr. Morgan's failure to recall anything during the course of the Company's investigation and his apparently clear recall of a number of incidents at the arbitration hearing. She further points to the evidence of Mr. Hogan confirming Mr. Morgan's admission that he had massaged Ms. Burt's shoulders at the time that Mr. Hogan delivered the Company's notice of termination to Mr. Morgan at his home, notwithstanding his earlier denials.

By contrast she characterizes the testimony of Ms. Peldiak and Ms. Burt, substantiated at least in part by Mr. Johnston, as being clear, consistent and credible in all material respects. She notes that there are no inconsistencies between the statements of Ms. Peldiak and Ms. Burt from the time that they first voiced verbal complaints to their supervisor, through the various stages of the Company's formal investigation and throughout their respective examination in chief and cross examination at the arbitration hearing. She submits that in all respects their testimony is to be preferred to that of Mr. Morgan and that the Arbitrator must conclude, on the balance of probabilities, that both of the female employees concerned were seriously victimized by verbal and physical abuse of a sexual nature at the hands of the grievor. On this basis she submits that the Company had ample cause to terminate his employment.

Counsel for the Union advances a twofold argument. Firstly he submits that the Arbitrator should accept the evidence of Mr. Morgan denying the allegations of sexual harassment. In the alternative, should the evidence disclose some degree of wrongdoing by the grievor, counsel argues that a number of factors should be brought to bear in mitigation, and that his discharge would be excessive in the circumstances.

Counsel for the Union relies on what he characterizes as evidence of the general atmosphere within the workplace. He notes that the work of crew dispatchers is generally agreed to be stressful, and that coarse language is not uncommon within the Crew Management Centre. He further notes the evidence of a number of witnesses confirming that Mr. Morgan is generally inclined to strong verbal expression and is a comparatively tactile individual readily inclined to touch other employees, including male employees such as Mr. Johnston.

With respect to the allegations of Mr. Morgan's attempts to touch Ms. Burt's breasts both on October 10 and October 13, counsel for the Union submits that the Arbitrator should give weight to the evidence of Mr. Johnston to

the effect that he saw no attempt to touch Ms. Burt in a sexual way. With respect to the allegation that Mr. Morgan asked Ms. Peldiak to marry him, counsel maintains that Mr. Morgan's words must be seen in their context, and that they were intended in a lighthearted and inoffensive way. Lastly, with respect to the kitchen incident and the alleged physical assault of Ms. Peldiak on October 3, counsel stresses that there is no eyewitness testimony to corroborate Ms. Peldiak's account of that accusation, that it is categorically denied by Mr. Morgan. He submits that in this respect the evidence of the Company is simply insufficient to discharge the burden of proof which is upon it. He argues that the conduct alleged would appear to be clearly inconsistent with what he characterizes as Mr. Morgan's good character as an employee of long-standing who commands the unqualified respect of his fellow workers. Stressing that sexual assault is a grave accusation, the proof of which should require clear and cogent evidence, counsel for the Union asks the Arbitrator to conclude that the alleged assault upon Ms. Peldiak, and indeed all of the allegations of attempts at physical familiarity made against Mr. Morgan, are simply not proved on the evidence.

In the alternative, counsel for the Union argues that if it is found that Mr. Morgan did engage in some degree of unacceptable behaviour amounting to sexual harassment, a number of mitigating factors should reduce the disciplinary outcome to a penalty less serious than his discharge. In this regard counsel points to his good prior disciplinary record over a period of 13 years of service, the undisputed evidence that Mr. Morgan was an able worker liked by his employees and that he is the principal means of support of his family. Counsel also argues that the evidence of verbal harassment of a sexual nature aimed at both Ms. Burt and Ms. Peldiak by at least one other employee and two members of supervision must weigh heavily in Mr. Morgan's favour on the issue of mitigation. Noting that no formal discipline of any kind was registered against Mr. Morrissey, Mr. Cachia or Mr. Kravecas beyond a verbal reprimand, counsel for the Union submits that the discharge of Mr. Morgan would be inequitable in the circumstances.

III

PRINCIPLES AND AUTHORITIES

While discharge for any reason can give rise to hardship and human suffering, as this case sadly illustrates, accusations of sexual harassment are among the most devastating in their consequences for the employee accused, for the accusers and for employees and management alike who can be drawn into an intense and divisive process of acrimony and side-taking. A case of alleged sexual harassment is fraught with difficulty for Company and Union alike. Management, on the one hand, must take the greatest care to avoid false accusations that may wrong an employee of previous good service, cost that employee his or her job security and tarnish an individual's reputation not only within, but also outside the workplace. When, as in this case, the accused and accusers are co-members of a single bargaining unit, the trade union is cast in the invidious position of generally espousing principles which deplore sexual harassment while at the same time vigorously defending an accused employee who proclaims innocence and is entitled to fair representation by his union in the pursuit of his grievance against discharge. Such disputes are fought with little joy.

On one matter, however, no one is in disagreement. Throughout the hearing, both in evidence and in argument, witnesses and counsel alike were unanimous in the conviction that the sexual harassment of one employee by another constitutes an intolerable aberration of conduct which can have no place in the contemporary work setting. While sexual harassment has only come to relative prominence in recent years, its historic existence in male dominated workplaces has been well documented and has, in recent times, been the subject of vigorous attack both through legislation and through the private efforts of employers, trade unions and interest groups associated with the feminist movement. In Canada the seminal writings of authors Constance Backhouse and Leah Cohen in the 1970s contributed greatly to the raising of public consciousness about sexual harassment, primarily directed towards females in the workplace (*See Backhouse and Cohen,* ***The Secret Oppression: Sexual Harassment of Working Women*** *(Toronto, 1978)*).

Canadian jurisprudence on sexual harassment began with a landmark decision of a Board of Inquiry under the **Ontario Human Rights Code** in 1980 in what has become known as the **Cherie Bell case** (Ont. 1980), 1 C.H.R.R. D/155 (Shime). In hearing the complaints of two female employees alleging that they had been sexually harassed by the owner of the restaurant where they were employed, Adjudicator Shime ruled that sexual harassment constitutes sexual discrimination prohibited by the **Ontario Human Rights Code**. Subsequently, in 1981, the **Ontario Human Rights Code** was specifically amended to incorporate a prohibition against sexual harassment in the workplace

(*Human Rights Code, S.O. 1981, c.53*). In 1983, Parliament amended the **Canadian Human Rights Act** by adding a direct prohibition of sexual harassment (***Canadian Human Rights Act**, 1976-77, c.33, s.13.1 & 13.2 (reenacted in 1980-81- 82-83, c.143 s.7)*). More recently, the Government of Canada has further prohibited sexual harassment under the **Canada Labour Code, Part III**, R.S.C. 1970, L-1, ss.61.7, 61.8, 61.9 (en. 1983-84 c.39 s.12). The terms of those provisions are as follows:

> **61.7** 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.
>
> **61.8** Every employee is entitled to employment free of sexual harassment.
>
> **61.9** Every employer shall make every reasonable effort to ensure that no employee is subjected to sexual harassment.

The leading Canadian legal text on the subject of sexual harassment is the thorough study of Professor A. P. Aggarwal, **Sexual Harassment in the Workplace** (Toronto, 1987). In commenting on the definition of sexual harassment appearing in the Canada Labour Code, Professor Aggarwal at p.8, makes the following distinctions with respect to sexual harassment:

> These identified descriptions of "sexual harassment" appear to indicate that such behaviour can be divided into two categories: sexual coercion and sexual annoyance. Sexual coercion is sexual harassment that results in some direct consequence to the worker's employment status or some gain or loss of tangible job benefits. Sexual harassment of this coercive kind can be said to involve an employment "nexus". The classic case of sexual harassment falls in this "nexus" category: a supervisor, using his power over salary, promotion and employment itself, attempts to coerce a subordinate to grant sexual favours. If the worker accedes to the supervisor's request, tangible job benefits follow; if the worker refuses, job benefits are denied.
>
> Sexual annoyance, the second type of sexual harassment, is sexually related conduct that is hostile, intimidating or offensive to the employee but nonetheless has no direct link to any tangible job benefit or harm. Rather, this annoying conduct creates a bothersome work environment and effectively makes the worker's willingness to endure that environment a term or condition of employment.
>
> This second category contains two subgroups. Sometimes an employee is subjected to persistent requests for sexual favours and persistently refuses. Although that refusal does not cause any loss in job benefits, the very persistence of the demands creates an offensive work environment, which the employee should not be compelled to endure. The second subgroup encompasses all other conduct of a sexual nature that demeans or humiliates the person addressed and in that way also creates an offensive work environment. This includes sexual taunts, lewd or provocative comments and gestures, and sexually offensive physical contact.

As this case amply demonstrates, great emotional stress and human hardship can result from an allegation of sexual harassment. The grievor has experienced extreme personal anxiety and has suffered both in the loss of his employment and damage to his reputation and his family life. The two complainants, one of whom has had to seek professional counselling, have been ostracized by their co-workers, have been the victims of adverse media attention and have been effectively driven from their jobs, one having resigned and the other forced to take a medical leave of absence. The employer and the Union are both faced with a bitter and divisive controversy that has tainted the workplace and undermined morale. The Company, which to this point has lost the services of three valued employees, stands accused of supporting false accusations that have destroyed the life of an innocent man. The Union, on the other hand, bound as it is to fully protect the rights of a discharged employee, is bitterly accused by the female complainants of having forsaken their right to be free of sexual harassment by turning its defence of the grievor into an attack on themselves. The costs, both emotional and economic, have been high to all concerned.

These observations are not, however, to suggest that well-founded complaints of sexual harassment should not be made by the victims of such misconduct and that they should not be vigorously pursued by Company and Union alike. It now appears beyond serious discussion that the victimization of female employees by sexual harassment, described by the authorities as the historic legacy of a male dominated working world, has been as hidden as it has been widespread. One American authority estimates that some forty percent of women working in the United States have experienced some form of work related sexual harassment and have, for the most part, "suffered alone and in silence". (*See Meyer, Bechtold, Oestreich and Collins, **Sexual Harassment** (New York, 1981)*). A review of the generally accepted literature supports the conclusion that as difficult as it may be to initiate and pursue an emotionally volatile complaint of sexual harassment against an employee, the alternative of passive acquiescence by victims or wilful blindness by companies and unions will, in the long run, exact a far heavier toll of personal suffering.

IV

DECISION

I turn to consider the findings of fact to be made on the evidence. In so doing I accept the argument of counsel for the Union that the seriousness of the charge against Mr. Morgan requires a commensurate standard of clear and cogent evidence. The issue in this instance becomes one of credibility. If the evidence of Mr. Morgan is accepted, he has done nothing wrong, and in particular has neither verbally nor physically harassed either Ms. Burt or Ms. Peldiak. Should their evidence be preferred, however, the Arbitrator must conclude that the grievor did engage in a course of sexual harassment, both verbal and physical, over a sustained period in October of 1987.

It is well established that the demeanour of witnesses, the quality of their evidence in respect of the care and candour with which it is given, and the overall consistency of their account of factual events may all be looked to as a means of assessing their credibility. In the instant case the Arbitrator must conclude that the credibility of Mr. Morgan's evidence is considerably less compelling than that of either Ms. Burt or Ms. Peldiak. The two female complainants gave evidence at the hearing that did not vary from examination-in-chief through cross-examination and, indeed, which was in all material respects identical to the factual accounts which they made both in their initial complaints to the Company and during the course of the subsequent Company investigation. When they were unsure of a particular fact they readily admitted it. Nor did they seek to attack Mr. Morgan indiscriminately or in any general sense with respect to his character. Both described Mr. Morgan as a friend in the workplace who was among the best crew dispatchers, always willing to help with any work related problem they might have. They did not attempt to single out Mr. Morgan insofar as the issue of verbal harassment is concerned, freely describing the verbal improprieties of other males in the workplace, including two supervisors.

The Arbitrator was also impressed with their overall demeanor in the witness box. Both Ms. Peldiak and Ms. Burt gave their evidence in a careful, measured way, with understated tone of intense personal feeling for the humiliation and frustration they have suffered. Only in the case of Ms. Burt did emotion briefly prevail, when she broke into tears while recalling what she described as the mixed sense of embarrassment, fear and outrage that she felt when Mr. Morgan's attempts at physical familiarity were repeated, precipitating her breakdown in tears at home on October 15, 1987. In the Arbitrator's view that aspect of Ms. Burt's evidence does not undermine her credibility. If anything, it supports her account of the very intense emotion she felt at the time.

Counsel for the Union seeks to rely, in part, on the fact that neither Ms. Burt nor Ms. Peldiak raised any immediate hue and cry when they were first subjected to physical advances by Mr. Morgan, and that when words of a sexual nature were openly addressed to them in the office, they simply laughed rather than raise any objection. In the Arbitrator's view reliance on this evidence should be considered with great care. The reactions of women to sexual harassment have been well studied in the authorities cited above. In the Arbitrator's view it is neither implausible nor unlikely that the first reaction of some women to overt sexual harassment might be silence. Silence can be the natural consequence of a woman's fear of embarrassment at the thought of publicizing an unpleasant and humiliating experience. It can also be motivated by a natural fear of reprisal and the possibility of charges of lying for ulterior motives or having provoked the male employee by conduct that invited sexual advances.

Similarly, great care should be taken before characterizing a female's laughter in the face of overt sexual comments or teasing as acceptance or encouragement of such conduct. For men and women alike, laughter can be a

ready shield for a number of emotions, and a handy means of dealing with embarrassing or awkward situations. The Arbitrator accepts the evidence of Ms. Peldiak and Ms. Burt that when they laughed in response to the sexual comments which Mr. Morgan and others directed at them, they did so largely because, as relatively junior employees who were in a distinct sexual minority in the crewing office, they didn't know what else to do.

By contrast to the evidence of the two female complainants, the accounts which Mr. Morgan has given with respect to the alleged incidents are marked by substantial inconsistency. During the initial investigation by the Company Mr. Morgan denied having made any verbal or physical advances of a sexual nature towards either Ms. Burt or Ms. Peldiak. He denied massaging Ms. Burt's back on any occasion, or attempting to touch her breasts. He denied asking Ms. Peldiak to marry him, and saying "I know what you want" on October 3, 1987 while physically assaulting Ms. Peldiak in the kitchen. He also denied ever patting Ms. Peldiak's behind or any other verbal or physical contact in respect of either of the female complainants that could be construed as sexual harassment. As noted, however, during the arbitration hearing, after Mr. Johnston had made a statement confirming that he had observed Mr. Morgan massaging Ms. Burt, Mr. Morgan had a different account to relate. He then purported to remember both incidents in some detail, relating how he had simply put his hands on Ms. Burt's shoulders, once while helping her to locate a crew member and another time while asking whether he could pick her up a snack. He was also able to recall a single incident in which he maintains Ms. Peldiak might have misinterpreted his statement "Marry me!" which he says was meant as a joke and was addressed to no one in particular.

The suggestion that the conflicting accounts of these events given by the female complainants is the product of a conspiracy is unsupported by any direct evidence whatever. The evidence does not establish any relationship of substance between Ms. Peldiak and Mr. Stephen Burt. While it does appear that Mr. Burt and Mr. Morgan exchanged harsh words on occasion, the evidence discloses beyond controversy that Mr. Morgan consistently used harsh words with anyone in the workplace with whom he might have a disagreement, something which appeared to be a matter of personal style which no one took very seriously. In the entirety of an extensive record the Arbitrator finds it impossible to locate a conspiracy of any kind, save in the mind of Mr. Johnston.

In comparing the evidence of the female complainants and that of Mr. Morgan it is, in the Arbitrator's view, important to weigh the corroborative testimony of independent witnesses. Firstly, it is significant, that Mr. Johnston's first statement to the Company did corroborate the account of Ms. Burt, at least to the extent of confirming that, contrary to his initial denials, Mr. Morgan did massage her shoulders on two occasions. The evidence of Mr. Hogan establishes that Mr. Morgan in fact admitted doing so when the manager of the Crew Management Centre attended at his home to serve him with the Form 780 notifying him of his termination.

The discrepancies between Mr. Morgan's answers during the course of the Company's investigation and his very different account of events rendered at the arbitration are obviously problematic. How can these be explained? While the arbitrator appreciates that the stress of the accusations made against him by Ms. Peldiak and Ms. Burt may have been considerable, it is, in my view, unlikely that the difficulty of his circumstances would have prevented him from having any recall whatever of these events. In the Arbitrator's view, having regard to Mr. Morgan's general demeanour as a witness, and after a careful review of the entirety of the evidence, it is more probable that the posture which he adopted during the Company's investigation was deliberately defensive, as was the contrasting position of detailed recall which he advanced at the arbitration hearing. In these circumstances the Arbitrator is compelled to prefer the evidence of Ms. Burt and Ms. Peldiak, and cannot accept the denials and alternative characterization of the events of October 1987 advanced by Mr. Morgan. I must conclude as a matter of fact that he did, on two occasions, attempt to touch the breasts of Ms. Burt while massaging her neck and shoulders, and that he did approach Ms. Peldiak from behind in the office kitchen on October 3, 1987, grabbing both of her breasts and rubbing his penis against her behind while making a lewd comment to the effect that he knew what she wanted. I also accept the evidence of Ms. Peldiak that Mr. Morgan had, on a number of occasions, patted her behind and engaged in occasional verbal sexual innuendos, including imprecations of marriage and the suggestion of gifts.

I turn to consider the appropriate measure of discipline in the circumstances. The seriousness of acts of sexual harassment, and in particular of unwanted physical touching, can scarcely be understated. In a thoughtful article by Ms. Mairin Rankin in its own periodical publication, "**Canadian Transport**", in February 1981 the Union, in an article entitled "**Unions Declare War on Sexual Harassment**", accurately summarized the seriousness of sexual harassment. That article, at p.11, makes the following observations:

> Dangers to health can exist in any workplace, from asbestos dust in mines to cathode ray tubes in offices. These problems are widely publicized through the media, and unions wage a constant battle for improved working conditions and higher health and safety standards.
>
> However, there still remains a major threat to health in the work place that is rarely publicized, and it is the major on-the-job health hazard for women.
>
> At least once in their lives, 70 to 90% of working women will be affected by it, yet it remains the least discussed problem.
>
> That occupational hazard is sexual harassment.
>
> Sexual harassment is, in effect, a social disease, borne of traditional sex roles that established males as the sexual aggressors in our society, while passivity has been the female's role …
>
> Sexual harassment is an expression of power, and can be defined as any sexual advance that threatens a worker's job or well-being.
>
> It can be expressed in a variety of ways, including unnecessary patting or touching, suggestive remarks or verbal abuse, leering, demands for sexual favours and physical assault – all of which may or may not be directly accompanied by threats to the victim's job or career.
>
> Sexual harassment means being treated as a sex object, not a worker. It means being judged on physical attributes instead of skills and qualifications when seeking a job or raise.
>
> It is not harmless, nor is it fun, and can have serious effects on the victim's working and personal life.
>
> Victims of such harassment suffer tension, anger, fear and frustration, often manifested by headaches, ulcers and other nervous disorders.
>
> The psychological and physical effects of harassment can affect a victim's performance at work to the point where the employer may begin to question her abilities, and even fire her without seeking the true cause of her deteriorating performance …
>
> Quitting - or risking dismissal - for reporting harassment is often a step women cannot afford to take because of their already vulnerable position in the labour force.
>
> Even so, fully 48% of the victims of sexual harassment lose their jobs. They are either fired or forced to quit by the intolerable working conditions. When a victim complains, men often close ranks behind the harasser, and other women, fearful for their own jobs, may prefer not to get involved.
>
> Despite the fact that harassers are often "repeaters", it is still the victim who suffers. It is extremely rare for a harasser to be fired or transferred, even though the organization may be sympathetic. They usually have more of an investment in the harasser, as he is generally in a higher position than the victim.
>
> Rather than being seen as a victim of unwelcome abuse, the woman is often assumed to have been willing or to have encouraged the advances.
>
> She is made to feel that she could stop the harassment if she really wanted to, or she is accused of over-reacting or being vindictive.
>
> If the harassment is clearly documented, the harasser will often be excused on the ground that it was "an isolated incident."
>
> Sexual harassment is extremely difficult for a woman to combat alone, and must be fought against collectively …

In the Arbitrator's view the foregoing passages represent a generally accepted view, among trade unions and employers alike, of the importance of eliminating sexual harassment from the work place. As applied to the unfortunate realities of the instant case, and particularly to the employment fortunes of Ms. Peldiak and Ms. Burt, the

words of the Union's own article have a chillingly prophetic ring. Unfortunately, less prophetic is the representation made to Company employee's in the sexual harassment policy promulgated by the Company. The final statement of that document is as follows:

> Employees who make legitimate complaints of sexual harassment will not have their careers affected in any way as a consequence of their complaints. In fact, they will be assisting the Company in providing a healthy working environment.

Boards of Arbitration have generally recognized the gravity of sexual misconduct in the work place. Acts of overt indecency have readily been found to justify discharge, although the jurisprudence in this area is still relatively underdeveloped. In a recent decision this Office sustained the discharge of an employee who deliberately exposed himself to a female employee who was a member of a track maintenance crew working in a remote location. (*See **CROA 1658***.) In **Re Indusmin Ltd. and United Cement, Lime and Gypsum Workers International Union, Local 488**, (1978) 20 L.A.C. (2d) 87 (M. Picher) a Board of Arbitration had occasion to review the discipline of two consenting employees who engaged in a sexual act in the workplace. At p.91 the Board made the following observation:

> A sexual act ... can risk disturbing other employees, if only as an offense to their personal sensibilities, and can likewise risk offending persons with whom the employer does business. To the extent that it is perceived by other employees at being tolerated by management, it can pose a threat to the very authority of the employer.
>
> The offence may be viewed as more serious still in a workplace where an employer has sought by affirmative hiring practices to achieve a more sexually integrated work force. When an employer has taken the initiative and responsibility to introduce a member or members of one sex, be they male or female, to a work pool that has traditionally been the exclusive preserve of the opposite sex, there is a commensurate responsibility on the employees of both sexes to refrain, at work, from conduct that will discredit or hinder that valuable initiative.

The foregoing comments are particularly appropriate in the instant case. It is common ground that the Crew Management Centre has traditionally been male dominated. The employment, in the summer of 1987, of Ms. Burt and Ms. Peldiak was a step in the direction of altering the gender imbalance in that particular part of the Company's operations. This was plainly consistent with the employer's obligation to implement affirmative action programs pursuant to a direct order made by a tribunal under the **Canadian Human Rights Act,** R.S.C. 1976-77, c.33. The decision of the Tribunal in **Action Travail des Femmes v. Canadian National** (1984) 5 C.H.R.R. d/396 affirmed by the Supreme Court of Canada, eradicated any lingering doubt about the obligation of the Company to recruit females into employment in what had been traditionally been male positions. (*See, generally, Davis and Neudorfer "**Affirmative Action in the Workplace**" (1988) 2 National Labour Review 18 at pp. 21-24*.)

If the dictates of the public law place upon the Company an obligation to redress an historic gender imbalance within its working forces by means of affirmative action, it would appear undisputable that vigilance with respect to the deterrence of sexual harassment in traditionally male-dominated places of work must be an intrinsic part of such a program. Employer and union alike bear an obligation to sensitize employees to the need for gender equality and dignity in the work place. In those increasingly exceptional circumstances where employees are either unable or unwilling to adhere to a suitable standard of respect for peers of the opposite sex the Company may have no alternative but to revert to disciplinary sanctions. Indeed, it would appear that a failure to take steps against sexual harassment in the work place may leave an employer under the **Canadian Human Rights Act** liable for the transgressions of its employees in the course of their employment. (*See **Robichaud v. the Queen**, a decision of the Supreme Court of Canada reported at 87 C.L.L.C. p.17, 025*.)

As serious as the issue of sexual harassment may be, failure to observe appropriate norms of conduct should not necessarily trigger the automatic discharge of the offending employee. Sexual harassment, like any disciplinary infraction, must be assessed having regard to the facts of the specific case, including all mitigating factors, with due regard to the general standards of conduct tolerated within the work place, the length of service of the employee who is disciplined and the quality of his or her prior record. (*See, e.g., **Re Canada Cement Lefarge Ltd. and Energy and Chemical Workers Union, Local 219**, (1986) 24 L.A.C. (3d) 202 (Emrich)*.)

Some arbitrators have expressed reluctance to ground a finding of sexual harassment solely on verbal references to sexuality, particularly where they take place in a conversational setting and are repeated over time without apparent objection by the employee who later claims to be offended. In **Re Canadian Union of Public Employees and Office and Professional Employees International Union, Local 591**, 1982, 4 L.A.C. (3d) 385 (Swinton) a Board of Arbitration concluded that conversations between a male and female employee, extending over a substantial number of years, with occasional references to sex and sexual conduct did not, standing alone, substantiate a charge of sexual harassment. At p.401 the Board reasoned, in part, as follows:

> ... Surely, employees can discuss issues with a sexual connotation, whether rape laws or the problems of single parents, without risking a charge of sexual harassment because a male holds a view which a woman workers perceives as sexist. A standard of reasonableness is required in reviewing the verbal conduct, both as to the offensiveness and whether it creates a harassing and negative condition of work. ...
>
> Furthermore, if a woman finds comments distasteful, even though such comments are within the realm of tolerable or acceptable comments to many, she should make this known to her co-worker. Communication of discomfort may well end the discussion by the other employee.

This theme was also touched on in the earlier decision of Chairperson Shime in the landmark **Cherie Bell Case** (*(Ont. 1980), 1 C.H.R.R. d/155*). Discussing the problem of verbal sexual harassment in the context of the employee – supervisor relationship at d/156 Adjudicator Shime comments:

> The prohibition of such conduct is not without its dangers. One must be cautious that the law not inhibit normal social contact between management and employees or normal discussion between management and employees. It is not abnormal, nor should it be prohibited, activity for a supervisor to become socially involved with an employee. An invitation to dinner is not an invitation to a complaint. The danger or the evil that is to be avoided is coerced or compelled social contact where the employee's refusal to participate may result in the loss of employee benefits. ...
>
> Again, The Code ought not to be seen or perceived as prohibiting free speech. If sex cannot be discussed between supervisor and employee neither can other values such as race, colour, or creed, which are contained in The Code, be discussed.

In the instant case there is much evidence going to the use of crude language and frequent joking references to sex within the workplace generally. In the Arbitrator's view it is unnecessary to dwell at great length on this aspect of the case. As noted above, I am satisfied that Mr. Morgan did make unwelcome comments of a sexual nature to both Ms. Burt and Ms. Peldiak, but that his conduct in that regard was not substantially different from that of employee Morrissey and Supervisors Cachia and Kravecas. Indeed, the evidence of Mr. Johnston confirms that the language which he overheard one of supervisors use, including his very pointed sexual references expressed to one of the female complainants, offended him to the point that he privately rebuked his own supervisor for this excessive conduct.

The evidence discloses that all three of the members of the staff of the Crew Management Centre who also engaged in verbal familiarities of a sexual nature with the complainants were reprimanded by the Company for their actions. There is, however, a sharp distinction between the actions of Mr. Morgan, which in the case of Ms. Peldiak amount to overt molestation, and those of the three others. The actions of the three staff members other than Mr. Morgan who addressed what may arguably be construed as a form of verbal sexual harassment to the two female employees are plainly reprehensible. There is nothing, however, in the actions of these individuals which could in any way be construed as giving a licence to Mr. Morgan, or any other employee or supervisor, to engage in a sustained pattern of touching, bum patting, massaging and ultimately engaging in at least one act of sexual molestation.

The Arbitrator is not unaware of the length of Mr. Morgan's service nor of his undisputed quality as an employee. Nor should the findings of fact in this award be construed as a condemnation of Mr. Morgan's overall character. The fact remains, however, that with respect to the complaints filed by Ms. Burt and Ms. Peldiak, the evidence does sustain a conclusion that on a number of occasions Mr. Morgan crossed the line of acceptable

behaviour in a most serious way, and in a way that caused personal offense and hardship to the two ladies in question.

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.

In all cases where discharge is at issue consideration must be given to the alternative of a lesser penalty. If there are indications within the evidence that rehabilitation can be achieved without resort to discharge, and that the reinstatement of the offending employee will not be unduly disruptive to the workplace, that alternative may well commend itself. Regrettably, that is not so in the instant case. Mr. Morgan admits to no wrongdoing, notwithstanding the considerable evidence against him. He has offered no apology for his conduct. He has, for the reasons canvassed above, been less than candid both with the Company and with the Arbitrator. In all of the circumstances I can see no basis on which to conclude that the Company did not have just cause to terminate the grievor's employment.

Before leaving this matter, one further comment should be made. While the Arbitrator is without jurisdiction to order any direct form of redress for the two female complainants, the full justice of this case would not be served without acknowledging the great loss they have suffered. If the statement of principle appearing in the Company's document on sexual harassment to the effect that employees who make legitimate complaints of sexual harassment will not have their careers affected is to have any substance, it would appear to the Arbitrator appropriate for the Company to consider closely what might be done to restore both Ms. Peldiak and Ms. Burt to positions of gainful employment comparable to those which they enjoyed prior to making the complaint that ultimately gave rise to this grievance. It is hoped that this matter will be the subject of discussion between the Company and the Brotherhood.

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

16 September 1988

(signed) MICHEL G. PICHER
ARBITRATOR