CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3128

Heard in Montreal, Wednesday, 12 July 2000

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS (UNITED TRANSPORTATION UNION)

DISPUTE:

Discipline assessed Mr. M.L. Douglas of Coquitlam for his actions at an off-property Union meeting.

JOINT STATEMENT OF ISSUE:

During the course of a Union meeting, Mr. Douglas made remarks to co-members of the Union executive regarding fellow employee "L". "L" advanced a complaint against Mr. Douglas under the Company's Discrimination and Harassment Policy. As a result, the incident was investigated and the Company concluded that Mr. Douglas had violated the Policy and discipline was assessed accordingly.

The Council contends that nothing disclosed in the investigation of the complaint is actionable by the Company. The Council feels that the evidence produced in the investigation does not establish the culpability of Mr. Douglas to the extent of the jurisdiction of the Company, as the incident was not work-related. As such, the Council contends that the Company has no jurisdiction to discipline the grievor in this instance and has asked that the discipline be expunged from his record.

The Company's position is that it properly investigated the matter and properly issued discipline which was appropriate and warranted. Accordingly, the Company has declined the Council's request to remove the discipline assessed.

FOR THE COUNCIL:	FOR THE COMPANY:
(SGD.) L. O. SCHILLACI	**(SGD.) C. M. GRAHAM**
GENERAL CHAIRPERSON	**FOR: GENERAL MANAGER, FIELD OPERATIONS,**

There appeared on behalf of the Company:

C. M. Graham	– Labour Relations Officer, Calgary
M. E. Keiran	– Director, Labour Relations, Calgary
K. Giddings	– Employee Relations Specialist, Calgary

And on behalf of the Council:

L. O. Schillaci	– General Chairman, Calgary
M. L. Douglas	– Grievor

AWARD OF THE ARBITRATOR

The evidence discloses that a fellow employee, to be referred to as "L", filed a sexual harassment complaint with the Company's Director of Employee Relations on or about April 15, 1997. It appears that at the time of the complaint a number of incidents had distressed "L", including alleged misconduct by Mr. Douglas during a Company training course, during the conduct of union business, through letters sent to her and the use of e-mail messages. It is important to stress that none of those incidents or allegations is before the Arbitrator for the purposes of the instant grievance. The grievance at hand concerns a caution registered against Mr. Douglas' record for "inappropriate and unacceptable behaviour as evidenced by your having made a comment at an off-property union meeting which offended a fellow employee, at Coquitlam B.C."

The facts concerning the incident which caused the initial complaint being made by "L", and the investigation of the Company which resulted in the caution, are not disputed. It appears that at the conclusion of a union meeting, held in the Legion Hall in Coquitlam, Mr. Douglas made an extremely tasteless remark to another male employee, effectively asking what it was like having sexual relations with "L". It appears that a similar comment was made to another male employee shortly afterwards in the adjacent bar. "L" was not present at the time, but learned of the comments some time later. As both of the men who were so crudely addressed by Mr. Douglas are married, "L" felt deeply offended in her reputation and was understandably upset at what she considered to be untrue and grossly improper comments made by Mr. Douglas.

As a preliminary matter the Council submits that anything said within the context of a union meeting cannot form the basis for discipline against an employee by the Company. The Arbitrator cannot agree. Clearly, threats of physical violence by one employee against another, for work related reasons, uttered within a union meeting may well have a significant job connectedness which raises the legitimate business interests of the employer. Such conduct, whenever it occurs, can therefore become the subject of an investigation and appropriate discipline. I know of no principle in Canadian law or arbitral jurisprudence which would hold that illegal threats or other actions which are work related and which occur within the confines of a union meeting have some form of immunity. Needless to say, in such matters each case must be closely considered upon its own facts.

What are the facts in the case at hand? As emerged at the arbitration hearing, it appears that the grievor's ill-considered remarks were not addressed to "L", nor were they uttered in her presence. Mr. Douglas testified that he did not in fact believe that "L" would learn of what he said to the two individuals in question. Unfortunately she did, and she suffered considerable personal distress as a result.

The evidence further discloses, however, that at a subsequent union meeting, on January 31, 1997, when "L" apparently raised the issue openly, upon learning that she had become aware of what he had said, Mr. Douglas immediately apologized to her, and she accepted his apology. In that context the Arbitrator has some difficulty seeing that the totality of the events justified the assessment of any form of discipline against the grievor by the Company.

This Office has previously had occasion to observe that sexual harassment can include the spreading of malicious rumours of sexual innuendo against one employee by another (**CROA 2751**). The devastating effect of such attacks is obvious, and they should be taken no less seriously than threats of physical harm or an actual assault. Standing alone, therefore, comments communicated to employees for the purpose of destroying another employee's reputation by accusations of sexual impropriety may well qualify as sexual harassment (see **AH 457 (Canadian National Railway Company and National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)** an unreported award of M.G. Picher dated April 3, 1998). I am satisfied that Mr. Douglas' conduct at the union meeting in question would, standing alone, constitute a form of sexual harassment.

The real issue, however, is whether his actions ultimately merited discipline by the Company. As appears from the record before the Arbitrator the union hall incident, which apparently resulted in an open apology to "L" by Mr. Douglas at a union meeting on January 31, 1997, formed part of a list of complaints made considerably later by "L" to the Company, in her formal complaint of April 15, 1997. The Company's investigation reveals that as far back as 1995 "L" had concerns that Mr. Douglas had spread rumours about her alleged sexual involvement with other employees who were members of the local union's executive. Her complaint therefore included that period of time, as well as the statements which Mr. Douglas admits to having made in the Legion Hall, and an extensive sequence of other later events, including exchanges of letters and e-mails, eventually culminating in "L" deciding to transfer to work at another location.

It may well be that the Company could have made a substantial case against Mr. Douglas for either sexual harassment or personal abuse and harassment of "L" over a substantial period of time. For reasons which it best appreciates, however, it chose to assess the disciplinary caution against him solely on the basis of his comment at the union meeting. As noted above, it is important to stress that shortly after that comment was made Mr. Douglas openly apologized to "L". The uncontradicted evidence before the Arbitrator is that she accepted his apology in the presence of others. In the Arbitrator's view, whatever else may be found in the Company's investigation file, the union hall incident, standing alone, does not disclose just cause for discipline of Mr. Douglas by the Company. By his own actions, as reflected in his public apology to "L" at the union meeting of January 31, 1997, Mr. Douglas made it clear that he realized the error of what he had done and apologized for it. The fact that he may have previously or subsequently misconducted himself towards "L" cannot have any bearing on the merits of discipline for his actions at the union meeting, the sole incident which the Company chose to focus on for the purposes of the caution addressed to Mr. Douglas.

For the foregoing reasons the grievance must be allowed. The Arbitrator directs that the caution assessed against Mr. Douglas be removed from his record forthwith.

July 14, 2000

(signed) MICHEL G. PICHER
ARBITRATOR