

IN THE MATTER OF AN ARBITRATION

BETWEEN:

CANADIAN PACIFIC RAILWAY COMPANY

(the "Company")

-and-

TEAMSTERS CANADA RAIL CONFERENCE

(the "Union")

**Grievance of AB Claiming Breach of Privacy,
Harassment and Discrimination**

SOLE ARBITRATOR: John Stout

APPEARANCES:

For the Company:

Brian Scudds, Assistant Director Labour Relations
Tony Marquis, Senior Vice-President Eastern Region

For the Union:

Michael Church, Caley Wray
Bruce Hiller, General Chairperson (Conductors East)
Ed Mogue, Vice General Chairperson (Conductors East)
AB, Grievor

HEARING HELD IN TORONTO, ONTARIO ON MARCH 29, 2016

AWARD

1. This matter concerns a grievance filed by the Union on November 4, 2015 on behalf of AB (the “grievor”) seeking remedies for the Company’s breach of the grievor’s privacy rights, harassment and discrimination.
2. At the hearing on March 29, 2016, the Union requested that I only refer to the grievor by two letters “AB”. The Union’s request was based on protecting the grievor’s privacy rights in relation to a disability, which was the subject of two earlier arbitration awards decided by Arbitrator Christine Schmidt, **CROA 4297** and **Supplementary 4297**.
3. The Company did not oppose the Union’s request to provide the grievor with anonymity. The Company conceded that it was appropriate in these circumstances to grant the grievor anonymity and refer to him by the letters AB. At the same time, the Company requested that the Trainmaster involved in this matter also be granted anonymity. The Company indicated that they wished to protect the Trainmaster’s “reputation”. The Union opposed the Company’s request to grant the Trainmaster anonymity.
4. The normal practice of labour arbitrators is to identify the parties, the grievor and all witnesses by their names. However, it is not unusual for arbitrators to grant anonymity to a grievor, party or a witness in certain rare situations. The recognized rare situations include cases involving personal, private and extremely confidential information such as medical records.
5. Redacting the name or granting anonymity of a grievor, party or witness is within the discretion of the arbitrator based on the specific facts of any given case after carefully considering the positions of the parties¹.

¹ See *Sunrise Poultry Processors Limited v. UFCW Local 1518*, 2013 CanLII 70673 (Lanyon) affirmed 2015 BCCA 354

6. In this situation, the parties have agreed that it is appropriate to grant the grievor anonymity. I agree with the parties that granting the grievor anonymity is appropriate in this case. The only issue in dispute is whether the Trainmaster ought to be granted similar anonymity.

7. In my view, the Company has not demonstrated any specific circumstances that would distinguish the Trainmaster from any other witness in a similar situation. The facts of this matter are not generally in dispute, although the parties are at odds as to how I should interpret what occurred and the consequences that should follow. There is no private or personal information associated with the Trainmaster being disclosed in this award. Accordingly, after carefully considering the positions of the parties, I see no reason why I should grant the Trainmaster anonymity.

8. The nature of the dispute is summarized in an *ex parte* statement filed by the Union which provides as follows.

Conductor AB is a long-term employee with the Company, qualified in working as both a conductor and locomotive engineer. Conductor AB has an excellent record of service with the Company. Conductor AB has an acknowledged medical disability.

The issue of Conductor AB's disability has been dealt with in CROA 4297 and Supplementary 4297. The Union will refer to and relies upon the evidence, submissions and decisions in regard to the aforementioned awards. Conductor AB has been and continues to be an active union representative.

Train Master Terry Lee was found to have made certain statements to Conductor AB in CROA Supplementary 4297. The evidence of Trainmaster Lee in CROA Supplementary 4297 was not accepted by the Arbitrator.

At the conclusion of CROA 4297, the Arbitrator allowed the Union's grievance and position. As a result of CROA Supplementary 4297, the Arbitrator ordered that the restrictions imposed on "Conductor AB be lifted forthwith". Conductor AB thereafter commenced performing his regular duties for the Company without restriction.

On October 29, 2015, Conductor AB was ordered for Train 118. After reporting for duty at the station, Trainmaster Lee advised Conductor AB that he was disappointed

with the result of the arbitration process referred to above. Conductor AB thereafter left the company of Trainmaster Lee.

Subsequent to the above, Trainmaster Lee publically told a number of Conductor AB's colleagues, specific details and diagnosis relating to Conductor AB's private medical condition. Trainmaster Lee was aware of such having attended the above arbitration hearings.

Conductor AB was traumatized by the above events. He thereafter approached Trainmaster Lee to ask him why he divulged his personal medical information to his peers. Trainmaster Lee replied that he thought it was all public knowledge. In fact, it was not.

As a result of the above, Conductor AB was emotionally and psychologically devastated. He also found that Trainmaster Lee's actions were harassing and discriminatory. He felt that Trainmaster Lee had destroyed his working relationship with his co-workers.

Conductor AB could no longer work at the above-noted point and asked to be booked off.

There is no dispute that Trainmaster Lee had indeed divulged Conductor AB's private medical to his colleagues without any justification. Conductor AB thereafter sought medical assistance and was away from work for an authorized medical leave.

Conductor AB has suffered harassment and discrimination from the Company as a result of his disabilities since 2012. He was restricted from work without cause. The Union and the Company join issue as to whether or not Conductor AB ought to receive additional compensation from the time he was restricted from working his full conductor or locomotive engineer duties.

The Union filed a grievance on behalf of Conductor AB on November 4, 2015. The Union relies on the entirety of the grievance. In addition to the above points, the Union sought an order for punitive and mental distress damages. The Union alleged that the Company had violated its own discrimination and harassment policy 1300, the Collective Agreement, the *Canada Human Rights Act*, and *Personal Information Protection and Electronic Documents Act*, the *Canada Labour Code* and Conductor AB's privacy rights.

On December 30, 2015, the Company replied to the Union's grievance. The Company advised that Trainmaster Lee was extremely remorseful when the incident happened and noted that he did apologize to Conductor AB as soon as he realized the mistake he had made. The Company acknowledged that there had been error in judgment by Trainmaster Lee and that he understood the mistake he had made and accepted responsibility for it. The Company also advised that he regretted that the incident happened. Finally, the Company advised that it considered the issue closed.

The Company did not otherwise or allow or offer any suggestions as to the remedies proposed by the Union. Accordingly, the Union advised the Company that it wishes to proceed to arbitration with this matter.

The Union requests a finding from the Arbitrator that the Company violated Conductor AB's rights as set out above. The Union requests that the arbitrator award Conductor AB significant damages for said violations as well as punitive and mental distress damages, and no loss of earnings. The Union requests that the Company be ordered to cease and desist from such violations in the future. In the alternative and without prejudice to the above, the Union requests that the penalty against the Company be awarded as the arbitrator sees fit.

The Company disagrees and denies the Union's request.

9. As indicated above, the facts in this matter are generally not in dispute. The Company has conceded that on October 29, 2015 Trainmaster Lee disclosed private medical information relating to the grievor. The dispute relates to what, if any, remedies should be granted to address the disclosure.

10. The grievor is a qualified conductor and locomotive engineer. There is no dispute that the grievor has an excellent record of service with the Company over the past eighteen (18) years. The grievor has never had an accident or incident of any nature. Furthermore, the grievor has never received any discipline.

11. The grievor is married and has five (5) children.

12. There is also no dispute that the grievor suffers from a medical disability that relates to his vision. Arbitrator Schmidt addresses issues arising from the Grievor's disability in **CROA 4297** and **Supplementary 4297**. On April 1, 2014, Arbitrator Schmidt released **CROA 4297**. I rely on Arbitrator Schmidt's findings in **CROA 4297** but I shall not repeat all of her findings in this award.

13. In **CROA 4297** the issue in dispute arose with respect to the grievor's ability to perform his duties and the Company's restricting the grievor from performing certain duties, which significantly impacted his ability to earn wages. Arbitrator Schmidt found

that the Company had not met its ongoing duty to accommodate the grievor's disability. Arbitrator Schmidt directed the parties to reconvene and schedule a preliminary two week field assessment.

14. On January 19, 2015, a supplementary hearing was held before Arbitrator Schmidt to address issues arising from her April 1, 2014 award. One of the issues arising from the April 1, 2014 award was whether the grievor incorrectly called a signal during an assessment that was conducted by Trainmaster Lee.²

15. On February 3, 2015, Arbitrator Schmidt issued **CROA Supplementary 4297**. Once again, I rely on the findings of Arbitrator Schmidt, but I shall not repeat all of her findings except to the extent that I feel it necessary for completeness of this award.

16. Significantly, Arbitrator Schmidt found that Trainmaster Lee told the grievor, in relation to the grievor's abilities to perform his job as a conductor, that "the Company saw him as a liability and that no one would sign off on him". Arbitrator Schmidt went on to find that at the very least, the Company's interpretation of the grievor's assessment was wrong. At paragraph 24 of her award, Arbitrator Schmidt concluded:

I am satisfied, without reservation, that Conductor AB is able to safely perform his duties as a conductor or locomotive engineer. For the reasons set out herein, the restrictions imposed on Conductor AB are to be lifted forthwith. As in the case with other conductors or locomotive engineers with the same condition as Conductor AB, he is to be given the option of remaining in one position or the other or by choosing a specific run and being subject to continued on the job evaluations with the Company official. The parties are to meet to facilitate the implementation of this award forthwith as well as to address any issue of compensation.

17. Initially, the parties could not agree on the compensation owing to the grievor arising from Arbitrator Schmidt's award. However, I was advised at the hearing that the

² Trainmaster Lee is an experienced trainmaster who often conducts investigation and assessments of employees.

issue of the grievor's compensation relating to **CROA 4297** and **Supplementary 4297** was resolved on February 11, 2016.

18. The incident that gave rise to the grievance that is before me occurred on October 29, 2015 when the grievor reported to work at the Mactier station building. Trainmaster Lee was present at the Mactier station building to take employee statements for an investigation he was conducting. I note at this point that October 29, 2015 was the very first occasion that Trainmaster Lee and the grievor had been together since the January 19, 2015 hearing before Arbitrator Schmidt.

19. Trainmaster Lee asked to speak with the grievor privately. According to the grievor, Trainmaster Lee expressed disappointment with the arbitration, indicating that he felt that his character was challenged. The Company does not dispute the grievor's recollection of the meeting, advising that Trainmaster Lee told the grievor he was not happy with how he had been portrayed in the arbitration case.

20. Shortly after the grievor's brief discussion with Trainmaster Lee, the grievor ran into a fellow employee who advised him that Trainmaster Lee had just told him and two other employees that the grievor was "colour blind".

21. There is no dispute that Trainmaster Lee advised three employees (two employees who were also Union representatives and one other employee) that the grievor was colour blind. I note that describing the grievor as "colour blind" is not an accurate description of the grievor's accepted disability. The grievor's disability is related to his vision, but he is not colour blind. The grievor's disability is much less severe and, as found by Arbitrator Schmidt, has no impact on the grievor's abilities to safely perform all of his duties as a conductor and engineer.

22. After being told of Trainmaster Lee's disclosure, the grievor requested a meeting with Trainmaster Lee and a Union representative. The grievor asked Trainmaster Lee

why he disclosed the specifics of his disability (albeit inaccurately). Trainmaster Lee advised that he believed that the disability was “common knowledge”. The grievor replied that the nature of his disability was not public knowledge and pointed out that he was not named specifically in the arbitration award to protect his privacy.

23. There is no dispute that at some point during this discussion, Trainmaster Lee apologized for disclosing the specifics of the grievor’s disability.

24. The grievor described his reaction to the disclosure as feeling emotionally ill to the point that he had to book off work. On October 30, 2015, the grievor attended at his family physician’s office and was prescribed treatment.

25. The evidence is clear that the grievor suffered mental distress, which was treated by both his family physician and a specialist. The details of the grievor’s symptoms were not disputed and are described in the Union’s brief as “horrible”.

26. There is no dispute that the grievor was absent due to mental distress and unable to fulfill his duties from October 29, 2015, until he returned to work on January 9, 2016. The grievor’s physician provided the Company with a Functional Abilities Form to substantiate the absence. I was also provided with a Report from Dr. S. Hasan MD FRCPC (psychiatry) confirming the diagnosis and treatment provided to the grievor.

27. The Union filed the grievance on November 7, 2015.

28. On December 21, 2015, the grievor received an unsigned apology letter from Trainmaster Lee. The apology letter states as follows:

I am writing this letter as a follow up to my verbal apology that I immediately gave you at Mactier station on October 29th of this year. My comments that day were completely unintentional. Again, I am offering this written apology for any issues that may have been created or upset you may have experienced over the incident.

Please know that there was no intent on my behalf to divulge any information with respect to the alleged medical condition that was subject to the arbitration case CROA 4297. I should not have discussed this matter in the manner in which I did. I made a mistake and I have learned from it.

I look forward to seeing you back on the property.

Terry Lee
Trainmaster, Mactier Subdivision

29. At the hearing, I asked the Company if they had a copy of the apology letter with a signature. The Company advised that they did not have a signed copy of the apology letter and they could not explain why the apology letter was not signed by Trainmaster Lee.

30. On December 30, 2015, the Company responded to the grievance indicating that they considered the issue “closed”.

31. While the grievor was absent from work due to his mental distress, he filed a WSIB claim, which was denied. The grievor also filed a claim for weekly indemnity benefits (“WI benefits”), which was ultimately approved up to January 5, 2016.

32. There is no dispute that the grievor had been without income from October 29 until after the Christmas and New Years holiday. This lack of income was in addition to the outstanding compensation dispute arising from Arbitrator Schmidt’s February 15, 2015 award. The grievor testified that he was forced to borrow money from his family to pay his mortgage and he could not afford Christmas presents for his immediate family.

33. The grievor indicated that his WI benefits were ultimately approved by the Company’s insurer (Manulife) on January 6, 2016. The grievor spoke with a Manulife representative on January 6, 2016 who advised the grievor that the WI benefits were only approved up to January 5, 2016. Manulife had determined that the grievor was able to return to work as of January 6, 2016.

34. The grievor advised that he was never contacted by the Company about returning to work. Instead, the grievor, by his own initiative, contacted the Company's Occupational Health and Safety department on January 7, 2016 to make inquiries.

35. Ultimately, the grievor returned to work on January 9, 2016.

36. Trainmaster Lee and the grievor have not seen each other since the October 29, 2015 incident. Furthermore, it is not unusual for Train Master Lee and the grievor not to have interaction for an extended period of time.

37. At the hearing, the grievor also testified that subsequent to October 29, 2015, he has been subject to ridicule by fellow employees relating to his disability. The grievor indicated that unfortunately he is going to have to live with this disclosure for the rest of his career. The grievor indicated that all he ever wanted to do was work for the Company that hired him 18 years ago. In his view, the Company has harassed, demeaned, discriminated and embarrassed him. The grievor is extremely concerned about the effect of the disclosure on the willingness of fellow employees to work with him and have confidence in his abilities as a conductor and locomotive engineer.

38. The Union claims that the grievor lost wages of approximately Twenty-two Thousand (\$22,000.00) Dollars as a result of the mental distress that he suffered (the difference between WI benefits and the grievor's normal wages).

39. In addition to the lost wages, the Union seeks the following additional damages on behalf of the Grievor:

- a. Breach of privacy \$10,000.00
- b. Harassment, failure to accommodate \$100,000.00
- c. Intentional infliction of mental suffering \$60,000.00

- d. Damages for injury to dignity under the *Human Rights Act* \$35,000.00
- e. Damages for failure to implement an arbitrator's order \$7,500.00
- f. Punitive damages \$25,000.00

40. The Union also sought a number of additional remedial orders against Trainmaster Lee and the Company.

41. I questioned the Union at the hearing about my jurisdiction to assess damages in relation to the failure to implement an order of Arbitrator Schmidt and any failure to accommodate the Grievor, which was addressed by Arbitrator Schmidt. The Union conceded that any issue relating to the matters before Arbitrator Schmidt are within her exclusive jurisdiction and not something for which I have jurisdiction to make an award of damages. Accordingly, no damages in this award relate to anything that was before Arbitrator Schmidt. The matter before Arbitrator Schmidt only provides context for the matter before me.

42. At the hearing, the Company conceded that the medical information substantiated the grievor's claim for mental distress and that he ought to be compensated in full for the lost wages. The Company takes the position that only damages for the lost wages are necessary and sufficient to rectify the error made by Trainmaster Lee. The Company submits that no other remedies ought to be granted to the Union or the grievor

43. There is no dispute that Train Master Lee violated the grievor's privacy rights by telling three employees that the grievor was "colour blind". The Company acknowledges that Trainmaster Lee made an error in judgement. The Company maintains that Trainmaster Lee has accepted responsibility for the error and is remorseful. Unfortunately, Trainmaster Lee did not appear at the hearing to elaborate or explain his conduct.

44. In my view, the disclosure of the grievor's disability (albeit inaccurately) was not only a breach of the grievor's privacy rights, but the conduct also violated the grievor's right to be free of discrimination and harassment in the workplace.

45. I am deeply troubled by Trainmaster Lee's failure to explain his conduct. Trainmaster Lee has failed to provide any explanation as to how it is possible for him to believe that the grievor's disability was "public knowledge". There is not one but two arbitration awards issued by Arbitrator Schmidt, which identified the grievor by two letters "to protect his identity as the grievance involves privacy issues relating to his disability", see paragraphs 1 of both **CROA 4297** and **Supplementary 4297**. Trainmaster Lee was certainly familiar with the second decision as he discussed his unhappiness with the decision, with the grievor, just prior to breaching the grievor's privacy rights. Trainmaster Lee has also not provided any explanation as to why he felt it necessary to confront the grievor in private about his unhappiness with Arbitrator Schmidt's February 3, 2015 award. Trainmaster Lee has also failed to explain why he felt the need to discuss the grievor's personal private medical information at all, even if it was public knowledge (which it was not).

46. In my view, the lack of any rational explanation leads me to agree with the Union that the timing of the disclosure was related to Trainmaster Lee's disapproval of Arbitrator Schmidt's award and was retaliatory. I specifically find that Trainmaster Lee's conduct was retaliatory and with the intention to punish the grievor for exercising his rights under the Collective Agreement and under the *Canada Human Rights Act* and the *Canada Labour Code*.

47. I find that Trainmaster Lee's conduct was flagrant and intentional with a view to causing the grievor to suffer. It was a foreseeable consequence that the grievor would suffer indignity and distress. The evidence clearly indicates that the grievor suffered actual harm that required medical treatment.

48. The Company knew about Trainmaster Lee's conduct but they did very little, if anything, to properly address the issue. As a result of the Company's failure to address the misconduct, the grievor was left without income during the holidays. The Company did not even contact the grievor about returning to work.

49. I acknowledge the written apology. But the apology is not signed, which in the absence of an explanation leads me to believe that it is not sincere.

50. After carefully considering all the evidence and submissions, I make the following findings:

- The Company violated the collective agreement's implied obligation to treat employees in good faith and without discrimination, see *Bell Canada and UNIFOR, Local 34-0*, 2016 CanLII 11573 (Surdykowski).
- The Company violated the *Canada Labour Code*, sections 94(3) and 124.
- The Company failed to provide the Grievor with a workplace free from discrimination and harassment in violation of sections 7(b), 14 1 (c) and 14.1 of the *Canada Human Rights Act*.
- The Company violated the grievor's rights under the *Personal Information Protection Electronic Documents Act*, see *Canadian National Railway Company and Teamsters Canada Rail Conference* (2013), 240 L.A.C. (4th) 100 (M.G. Picher)

51. Arbitrators have wide discretion to craft a remedy. The jurisdiction of an arbitrator has evolved to include not only granting remedies under a collective agreement but also granting remedies under the *Canadian Charter of Rights and Freedoms*, see *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929. More recently, the Supreme Court of Canada also acknowledged that arbitrators are entitled to consider a breach of an employment related statute and grant remedies in appropriate circumstances. In *Parry Sound*

(*District Welfare Administration Board v. OPSEU, Local 324*, [2003] 2 S.C.R. 157 at paragraphs 28-29, the Supreme Court of Canada indicated as follows:³

28. As a practical matter, this means that the substantive rights and obligations of employment related statutes are implicit in each collective agreement over which an arbitrator has jurisdiction. A collective agreement might extend to an employer a broad right to manage the enterprise as it sees fit, but this right is circumscribed by the employee's statutory rights. The absence of an expressed provision that prohibits the violation of a particular statutory right is insufficient to conclude that a violation of that right does not constitute a violation of the collective agreement. Rather, human rights and other employment related statutes establish a floor beneath which an employer and union cannot contract.

29. As a result, the substantive rights and obligations of the parties to a collective agreement cannot be determined solely by reference to the neutral intentions of the contracting parties as expressed in that agreement. Under *McLeod*, there were certain terms and conditions that are implicit in the agreement, irrespective of the mutual intentions of the contracting parties. More specifically, a collective agreement cannot be used to reserve the right of an employer to manage operations and direct the workforce otherwise than in accordance with its employee's statutory rights, either expressly or by failing to stipulate constraints on what some arbitrators regard as management's inherent right to manage the enterprise as it sees fit. The statutory rights of employees constitute a bundle of rights to which the parties can add but from which they cannot derogate.

52. The remedial creativity of arbitrators has been most recently acknowledged by the Supreme Court of Canada in the decision of *M.A.H.C.P. v. Nor-Man Regional Health Authority Inc.*, [2011] 3 S.C. R. 616. In *Nor-Man*, *supra*, the Supreme Court of Canada indicated at paragraphs 44 to 45 as follows:

44 Common law and equitable doctrines emanate from the courts. But it hardly follows that arbitrators lack either the legal authority or the expertise required to adapt and apply them in a manner more appropriate to the arbitration of disputes and grievances in a labour relations context.

45 On the contrary, labour arbitrators are authorized by their broad statutory and contractual mandates – and well equipped by their expertise – to adapt the legal and equitable doctrines they find relevant within the contained sphere of arbitral creativity. To this end, they may properly develop doctrines and fashion remedies appropriate in their field, drawing inspiration from general legal principles, the objectives and purposes of the statutory scheme, the principles of labour relations,

³ See *Alberta v. A.U.P.E.*, 2012 Carswell Alta 896 (Sims)

the nature of the collective bargaining process and the factual matrix of the grievances of which they are ceased.

53. The evolution of an arbitrator's jurisdiction to provide broad remedies with respect to privacy, mental distress and punitive damages is now well accepted, see *Greater Toronto Airports Authority and Public Service Alliance Canada Local 0004* (2011), 202 L.A.C. (4th) 204 (Ont. Div. Ct.).

54. I have carefully considered the parties submissions with respect to damages. In my view, it is not necessary to break down and quantify each of the specific heads of damages. The fact is that the conduct of Trainmaster Lee and the Company violated the grievor's privacy rights and clearly caused injury to the grievor's dignity resulting in mental distress.

55. I acknowledge that the breach of the grievor's privacy rights was a single incident, which on its own might not normally justify a significant award of damages. However, when viewed in context, the violation of the grievor's privacy rights was retaliatory and violated not only the Collective Agreement, but also the *Canada Human Rights Act* and *Canada Labour Code*. Furthermore, the evidence in this case is clear that the grievor suffered mental distress and injury to his dignity.

56. In my view, an award of \$25,000 in general damages is appropriate in these circumstances. This amount takes into consideration the different heads of damages. I also note that this amount is only in relation to the events that occurred on and after October 29, 2015 and are not in relation to anything that was before Arbitrator Schmidt.

57. I do not believe that this is a proper case for awarding punitive damages. The Company's conduct was not so shockingly harsh, vindictive, reprehensible and malicious as to warrant such damages. Punitive damages in labour arbitration should be reserved for the most extreme circumstances where no other remedy would suffice. Moreover, I am also of the view that the damages already awarded together with the

other remedies that I shall outline below, are sufficient to both denounce the conduct and deter future misconduct.

58. Accordingly, for all the reasons noted above, I make the following orders:

- a) The Company shall pay the grievor the difference between his regular wages and the WI benefits he received for the period he was absent from work after October 29, 2015 until he returned in January 2016 (approximately \$22,000). Payment to be made within 30 days.
- b) The Company shall pay the grievor general damages in the amount of \$25,000 within 30 days.
- c) The Company shall ensure that the grievor is provided with a harassment free workplace.
- d) The Company shall limit any interaction between Trainmaster Lee and the grievor.
- e) The Company shall not assign Trainmaster Lee to investigate or participate in any training with the grievor.
- f) The grievor is entitled to the presence of a Union representative in any meetings that may occur with Trainmaster Lee.
- g) The Company is ordered to remind all managers and employees that private personal information (including medical information and information obtained in the grievance and arbitration process) must be kept private and not disclosed.

59. I remain seized to deal with any issues arising from my award.

Dated at Toronto this 28th day of April, 2016.

"John Stout"
John Stout - Arbitrator