

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

Citation: 2015 CHRT 24
Date: December 31, 2015
File No.: T1956/3613

Between:

Ken Kelsh

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canadian Pacific Railway

Respondent

Ruling

Member: Olga Luftig

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I. Background – The Complaint

[1] On August 12, 2013, the Canadian Human Rights Commission (Commission) requested that the Acting Chair of the Canadian Human Rights Tribunal (Tribunal) institute an inquiry into the complaint (Complaint) of Mr. Ken Kelsh (Complainant) against the Canadian Pacific Railway (Respondent).

[2] The Complaint, as amended, alleges:

- discrimination in employment on account of disability, adverse differential treatment and failure to accommodate, contrary to section 7 of the *Canadian Human Rights Act (Act)*;
- retaliation, contrary to section 14.1 of the *Act*; and
- systemic discrimination in the Respondent's testing, bidding practices and procedures, contrary to section 10 of the *Act*.

[3] The Complainant belongs to a division of the Teamsters Union (Union). His employment is governed by a collective agreement between the Union and the Respondent (Collective Agreement).

[4] The Commission is not participating in the hearing. It takes no position on this motion.

II. Complainant's motion

[5] The Complainant's motion, as amended, is for a Ruling regarding the payment of witnesses and for disclosure of documents and information.

III. Subject of this Ruling

[6] The hearing of this Complaint is scheduled to start on January 11, 2016 and go to January 22, 2016. In this Ruling, I will deal with the motion's disclosure requests in motion paragraphs 2 through 6. I will issue a subsequent Ruling with respect to the payment of witnesses. I think the disclosure process is more time-consuming for the parties, and it is

in the interests of both of them that they know their disclosure obligations with respect to this motion. The Ruling separately addresses each disclosure request.

General

[7] Although this Ruling first cites the specific disclosure requests in the Notice of Motion, I have also set out the changes to the parameters of the requested disclosure since the Notice of Motion was filed. These changes occurred during oral submissions made at Case Management Conference Calls (CMCC) on December 8, 2015 and December 18, 2015, and in the contents of correspondence which the parties copied to the other parties and to the Tribunal.

IV. Statute law, Tribunal Rules and case law

[8] Subsection 50(1) of the *Act* states, in part, that the member or panel inquiring into a complaint "...shall give all parties ... a full and ample opportunity, in person or through counsel, to appear at the inquiry, present evidence, and make representations." Proper disclosure of documents is one way that the parties have a full and ample opportunity to present evidence.

[9] Rule 6 of the Canadian Human Rights Tribunal Rules of Procedure (03-05-04) (Tribunal Rules) deals with the Statement of Particulars (SOP), disclosure and production of documents and information.

[10] Rule 6(1)(d) is particularly relevant to this motion. It states:

Within the time fixed by the Panel, each party shall serve and file a Statement of Particulars setting out,

(d) a list of all documents in the party's possession, for which no privilege is claimed, that relate to a fact, issue, or form of relief sought in the case, including those facts, issues and forms of relief identified by other parties under this rule;

[11] Rule 6(5) makes the obligation to disclose ongoing in the circumstances described.

[12] The case law is well-settled that the standard for the disclosure of documents pursuant to Rule 6(1)(d) and (5) is that of “arguable relevance.” It is also settled law that the phrase “arguable relevance” means that a document requested to be disclosed must have a nexus or rational connection to a fact, issue or form of relief sought or identified by a party (*Seeley v. Canadian National Railway*, 2013 CHRT 18 (*Seeley*), at para. 6). A request for disclosure cannot be “...speculative or amount to a “fishing expedition” (*Johanne Guay v. Royal Canadian Mounted Police*, 2004 CHRT 34 (*Guay*), at para. 43).

V. Motion paragraph 2

[13] This paragraph requests “all significant management policy documents regarding TOP [Track Occupancy Permits] and sub-Foreman requirements or capabilities of Group 1 machine operators.”

[14] The Respondent’s Response to Motion (Response) named the materials it had disclosed related to Track Occupancy Permits, Sub-Foreman Protection, and Group 1 Machine Operators.

[15] The Respondent requested that the Complainant identify any specific document or documents which he believes the Respondent had not yet disclosed and, if the Complainant did so, the Respondent would search for and disclose them. The Respondent also stated that between the Response date and the hearing, it would disclose any additional documents of which it was not aware, in accordance with Rule 6(5).

[16] The Complainant’s December 7, 2015 Reply to Response (Reply) clarified that this disclosure request included “any relevant email messages or memoranda from” the Respondent’s management “discussing or commenting on” the above-named policies, “particularly in the period January 1, 2005 to the August 24, 2011 date” of the Complainant’s filing, “and thereafter any such documents that do not relate specifically to” the Complaint and “...would therefore not be privileged.”

[17] I find that the Complainant has sufficiently particularized this disclosure request in his Reply, both by specifying the type of documents requested, and also the time periods

for which they are requested. The Complainant also clarifies that for the period after the Complaint was filed, to date, the request excludes privileged documents.

[18] I conclude that these documents are arguably relevant, in that they are rationally connected to Track Occupancy Permits, Sub-Foreman Protection, and Group 1 Machine Operators, all of which are related to a fact or issue in the parties' Statements of Particulars.

[19] Therefore, the Respondent shall disclose, if it has not already done so, any arguably relevant management policy documents regarding Track Occupancy Permits, Sub-Foreman requirements or capabilities of Group 1 machine operators, including any arguably relevant email messages or memoranda from the Respondent's management with respect to the aforementioned policies, particularly in the period January 1, 2005 to August 24, 2011, and thereafter, any such documents that are not privileged with respect to the within Complaint.

VI. Motion paragraph 3

[20] This paragraph requests disclosure of all bid sheets for the Southern Ontario division for the period 2004 to the end of 2010 indicating the requirements for various Group 1 machine operator positions, in chronological order.

[21] The Respondent required clarification regarding the areas for which the "bid sheets" were required.

[22] In his Reply to Response, the Complainant clarified and amended this request as follows:

- a) before 2014, the present Eastern Region District 1 was called the Southern Ontario Division;
- b) the disclosure request changed as follows: the initial Job Bulletins and subsequent Awards issued in January and February respectively for each year for the period 2004 to 2015.

[23] The Complainant submitted that these documents were relevant to the issues of discrimination and accommodation because they "demonstrate the Group 1 positions

available, their requirements (D card or E card)...”, and to whom they were awarded “among the complainant and his peers” over the period.

[24] During the December 8, 2015 Case Management Conference Call (CMCC), Respondent counsel stated that “bid sheets” and “Bulletins” should not be confused with each other.

[25] The Respondent issues Bulletins containing every job for which employees can bid. Each employee then submits his or her bids. Just as there is a Bulletin history, there’s also a bid history for each employee. Each employee bids on a large number of jobs in the applicable Bulletin, ranking them in order of preference.

[26] At the December 8, 2015 CMCC, Complainant counsel clarified that the Complainant sought only the main Bulletins and Awards of jobs, not all the bid sheets of all employees. He submitted that this did not involve the Respondent putting a work product together, but was simply a matter of providing the record of these documents which the Respondent produced every year.

[27] During the December 8, 2015 CMCC, Complainant counsel changed the disclosure request in this category to the following:

Respondent’s Job Bulletins for January and November plus the resulting Awards, for the Eastern Region District 1 (called the Southern Ontario Division before 2014) and the Toronto Division, for each of the 5 years from 2011 to 2015.

[28] In paragraph 34 of the Respondent’s December 17, 2015 Notice of Motion requesting an adjournment (Adjournment Motion), Respondent counsel quoted from parts of a December 14, 2015 email from Complainant counsel. In it, Complainant counsel stated that the Complainant’s disclosure motion and reply requested “bulletins and awards back to 2004” and that he was repeating that request.

[29] In the December 18, 2015 CMCC, Complainant counsel stated that notwithstanding his December 14, 2015 email, he was confirming that the Bulletin and Award disclosure the Complainant sought were the January Bulletins and resulting Awards, and the November Bulletins and resulting Awards, for each year for the period 2011 to 2015.

[30] On December 21, 2015, Complainant counsel confirmed by email, copied to the parties and the Tribunal, that Respondent counsel Ms. Ainslie had disclosed all the January and November Bulletins and their associated Awards for both the Eastern Region District 1 and the Toronto Division, for the period 2011 to 2015.

[31] It is therefore not necessary to order their disclosure in this Ruling.

VII. Motion paragraph 4

[32] This paragraph seeks disclosure of all daily time sheet information including wages, chronologically ordered, for the period January 1, 2003 to December 31, 2015 for:

- (i) Ontario South Rail Crew No. 1 (as of January 1, 2015, Rail Crew No. 3) and
- (ii) the Toronto Division where the complainant has been employed on the section for 4 to 5 months every winter.

[33] In its Response, the Respondent's position was that:

- it would provide the Complainant with his own time sheet and wage information for the period January 1, 2003 to December 31, 2015;
- the Complainant needed to clarify the scope of this request, because if he required this information for all other employees employed on the named Rail Crews from 2003 to 2015, the documentation would be in the thousands of pages;
- this information is not probative or relevant, because the Rates of Pay of all maintenance of way positions are in the Wage Agreement, already disclosed; and
- the Respondent would contravene Section 4.3 of Schedule 1 of the *Personal Information Protection and Electronic Documents Act (PIPEDA)* if it disclosed this information.

[34] In paragraph 8 of the Reply, the Complainant:

- acknowledged that the Respondent had disclosed the Complainant's own time sheet information, but that they showed hours only, not wages;
- revised and reduced his disclosure request to be for the daily rail crew time sheets (DRCTS) for:
 - (i) January 1, 2011 to December 1, 2015 for all Ontario South Rail Crews; and

(ii) the winter period of November 1 to April 30, for each year from 2008 to 2015 for the Toronto Division;

- because the DRCTS list only the name and position of the crew member and the number of regular and overtime hours worked that day, confidentiality was not a significant concern; and
- when combined with the Bulletins and Awards, the DRCTS would permit the Complainant to calculate his lost overtime opportunity in those periods in which the Respondent did not permit him to drive the Stake Truck or Plough Trucks.

[35] During the December 8, 2015 CMCC, Respondent counsel said she had disclosed the following with respect to the Complainant himself:

1. his bid and award history from 2005 to 2011 – showing every position he bid on and every position he was awarded in that time period;
2. his position history from January 2003 to November 2015; and
3. his time history showing wage claims and time recorded, so if he worked overtime or special additional time claims, it shows that, from January 2003 to November 2015.

[36] The requested documents do not have a formal name. Complainant gave each daily sheet the name “Daily Rail Crew Time Sheet” for ease of reference. Each is typed into a chart and well-organized. Each shows 20 or 30 or 40 people on a crew, which position each occupied, and how much regular time and overtime each worked.

[37] During the December 8, 2015 CMCC, Complainant counsel submitted that the request for disclosure of the DRCTS ties in with the position history Respondent provided. However, that history only indicates whether the Complainant was working as a Group I machine operator, but nothing more. The Complainant also needs to know when he was working in a particular position.

[38] Complainant counsel further submitted that there was really no other way to show the Complainant’s wage and overtime loss in the 5 years he wasn’t permitted to drive the Stake Truck as he did before. The only way to prove this loss even in an estimated way was to look at the people who did get Stake Truck jobs in the period 2011 – 2015, and see the amount of overtime they worked.

[39] The Complainant required disclosure of only the Rail Crews' DRCTS.

[40] The Complainant stated that the foreman fills out the DRCTS, and the Respondent is supposed to keep them in the trailer for a while. They are sent to the timekeepers. The Complainant further stated that "this year", they were on the computer, and that there was one for each Rail Crew for each day.

[41] The Complainant stated that this year, the Eastern Region District 1 became "Algoma" and that the names are always changing. He also provided the names of the relevant supervisors in the time period from 2011 to date, and stated that in the Toronto Division, these daily time sheets are retained.

[42] During the December 8, 2015 CMCC, the Complainant amended his request for the DRCTS to the following:

all the DRCTS for the period January 1, 2011 to December 31, 2015 (there are 365 each year) for the Eastern Region District 1 (or whatever name that region was called and is presently called) and for the Toronto Division, for each Rail Crew for each of those years if available, with regular and overtime shown for each person, and their position.

[43] Respondent counsel stated she would:

- i) make inquiries asking the Respondent if it had the DRCTS for the Rail Crews during the designated time periods in the designated areas, which would include the names of each Rail Crew member, showing the regular time and overtime worked, and the position, or if the Respondent had any portion of them; and
- ii) if the Respondent has them, or any portion of them, she would disclose what the Respondent had; and
- iii) if the Respondent only had a portion of them, she would so advise the other parties in writing.

[44] Ms. Ainslie asked that the names on these documents be anonymized. However, this would make it impossible to assess the seniority of the employees in the DRCTS.

[45] Therefore, the Tribunal decided to make a confidentiality order governing all the DRCTS which the Respondent discloses. This means that no counsel, party or witness shall in any manner discuss, refer to, or transmit in any form, any information whatsoever

(including, without limitation, names or other personal information, wages, overtime, dates of birth) about any of the individuals in any of the DRCTS, except for the purposes of the hearing of this Complaint.

[46] Further, in any Ruling and decision arising from the hearing, these individuals will be anonymized.

[47] The issue of the DRCTS came up again in the December 18, 2015 CMCC. The Complainant reiterated that he required disclosure of them from 2011 to and including 2015, but if they were not available any longer for all those years, he required the DRCTS for 2015 because he thought they should be available for that year.

[48] Ms. Ainslie sent an email to Complainant counsel dated December 21, 2015 at 10:55 a.m., copied to the Tribunal, in which, among other things, she stated that her understanding was that the Complainant's request for the DRCTS had been withdrawn. I find that this was a misapprehension of what had transpired on this issue at the December 18, 2015 CMCC. I do understand how the error could have been made, as Ms. Ainslie was not at that CMCC, and its main topic was a motion for an adjournment of the hearing.

[49] On December 21, 2015, at 12:34 p.m., Complainant counsel emailed Ms. Ainslie in response, copied to the Tribunal, stating that the Complainant's request for disclosure of the DRCTS was at minimum for the disclosure of those for 2015.

[50] Then, on December 22, 2015, at 3:07 a.m., by email copied to the Tribunal, Complainant counsel suggested that the Complainant's overtime opportunities in 3 and ½ of the past 5 years could be calculated if the Respondent provided the same type of "Time History" indicating overtime hours for several key employees, identical to that which it had provided quite quickly for the Complainant on December 4, 2015. The Complainant named as an example a certain foreman, with whom the Complainant would have been working driving the Stake Truck. The Complainant submitted that the Respondent could access this history and print it off simply by inputting the employee's name into its computer. The Complainant further submitted that the employee's or employees' name(s) would be redacted so that he could be identified by his position and the fact he occupied the Stake

Truck, and suggested this would not be a hardship or a prejudice to the Respondent and would not result in any potential breach of privacy for the employee(s).

[51] The Complainant had been unaware that the Respondent could produce this type of history until he received his own from the Respondent.

[52] The Respondent did not respond directly to this proposed suggestion from the Complainant, and left it up to the Tribunal's decision.

Analysis

[53] As the Respondent did not respond directly to the suggestion for alternative disclosure in the Complainant's December 22, 2015, 3:07 a.m. email, I find that I do not have enough information to confirm whether the Complainant's suggestion is feasible. Therefore, at present, I cannot order it.

[54] In Schedule C of his SOP, the Complainant seeks, among other things, compensation for overtime hours he alleges he lost. His SOP alleges that for 2011, that amount was "apparently very large." He further alleges that [the fact that the amount was large] "...would be reflected by records regarding people who did drive the stake truck or other group one operators."

[55] My understanding is that the DRCTS provide the following information for each Rail Crew member: name (which will be kept confidential), seniority, position worked, regular time worked, and overtime worked. Therefore, the DRCTS are arguably relevant to a form of relief sought by the Complainant, and if they are available in whole or in part, the Respondent shall disclose them.

[56] Therefore, the Respondent shall disclose all Daily Rail Crew Time Sheets (DRCTS) for the 5 years in the period 2011 to 2015, for the Eastern Region District 1 (or whatever that region is now called, or was previously called) and for the Toronto Division. If the Respondent does not have all of these DRCTS in its records, then it shall disclose those that it does have.

[57] Pursuant to subsection 52(1)(c) of the *Act*, I am satisfied that because of the personal nature of the information that is contained in the DRCTS, as a result of the inquiry being conducted in public, there is a real and substantial risk that the disclosure of personal or other matters will cause undue hardship to the persons involved, such that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public, the information in the DRCTS, including the names of the employees therein, shall remain confidential, as further particularized below.

VIII. Motion paragraph 5

[58] The Complainant sought photographs of all Group 1 and Special Group machines (perhaps 15 to 20 machines) labelled with proper names, for the assistance of the Tribunal at the hearing.

[59] The Respondent's submitted that it did not have such photographs. Its position was that to require the Respondent to provide the photographs would be requiring the Respondent to provide a work product. Further, the Complainant can determine which machines are relevant to his Complaint, and should provide the photographs.

[60] At the December 8, 2015 CMCC, the Respondent also advised that its intranet website, RailCity, does not contain such pictures. Although the Respondent agreed that the requested photographs would be useful to both the parties and the Tribunal, the Complainant was more suited for the task of photographing the machines because he knew which were relevant to his Complaint.

[61] The Complainant then offered to take the photos at the Respondent's Toronto yard, provided he first obtain permission from his supervisor to enter Respondent lands. This was out of concern for potential liability for trespass.

[62] The parties agreed that the Complainant should take as many photos as he could of the relevant machines at the appropriate locations and produce them.

[63] The parties have agreed that the Complainant take the pictures. Further, in neither the December 18, 2015 CMCC nor any correspondence copied to the Tribunal since then

have the parties raised any remaining issue regarding the photographs. Therefore, this Ruling will not make an order with respect to the photographs.

IX. Motion paragraph 6

[64] The Complainant sought the home address of Vasile (“Romeo”) Cazecu and assistance to serve the Tribunal summons (sic) on its witnesses while working and their reasonable contact information, including home addresses.

[65] The Respondent submitted in its Response that releasing its employees’ home addresses would contravene Section 4.3, Schedule 1 of *PIPEDA*, but that it would be able to provide its employees’ business addresses.

[66] During the December 8, 2015 CMCC, the parties submitted the following:

- the Commission had served subpoenas on Mr. Cazecu and all of the Complainant’s other witnesses except a Mr. Ian Wilson;
- Complainant counsel stated that Mr. Cazecu had an “open” ticket to depart Canada on December 27, 2015 and was not scheduled to return until a date in January 2016 after the hearing and Mr. Wilson did not know if he was willing to return early;
- Mr. Cazecu is a very significant, essential witness for the Complainant, and someone whose name will arise in other witnesses’ testimony; and
- Respondent counsel stated that the Respondent would accommodate Mr. Cazecu at any time during the hearing.

[67] I then suggested that subject to counsel availability, I could attend in Peterborough on December 21, 22 or 23, 2015 for Mr. Cazecu’s examination and cross-examination. The parties advised that this was not an option because of scheduling conflicts.

[68] I also suggested that Complainant counsel could draft an Affidavit for Mr. Cazecu to sign before his departure, which would give the Respondent the opportunity, if it wished, to ask its own witnesses questions in light of the Affidavit’s contents. This might perhaps eliminate the need to call Mr. Cazecu at all, subject to the Respondent’s right to cross-examine him on his Affidavit.

[69] I granted Respondent counsel Ms. Ainslie's request for time to consult with outside counsel on the issue and review Mr. Cazecu's will-say before responding by end of business on December 9, 2015.

[70] In her December 9, 2015 email to the parties and the Tribunal, Respondent counsel submitted:

- the Respondent prefers *viva voce* evidence for all witnesses;
- if Mr. Cazecu returned in time to testify during the first or second weeks of the hearing, the Respondent agreed to bifurcate its case, subject to the understanding that the Tribunal permit the Respondent to recall witnesses for the specific purpose of replying to Mr. Cazecu's evidence;
- if Mr. Cazecu could not testify during the hearing, the Respondent agrees with the Tribunal further bifurcating and extending the hearing to additional dates, subject to the Tribunal permitting the Respondent to recall witnesses for the specific purpose of replying to Mr. Cazecu's evidence; and
- if the hearing requires additional dates, then the parties' closing arguments be made only after the hearing of all the *viva voce* evidence.

[71] On December 10, 2015, Complainant counsel responded that the Complainant agreed with the Respondent's December 9, 2015 proposal. Mr. Wilson undertook to keep the Tribunal and the Respondent advised about Mr. Cazecu's return date and ability to give evidence. Complainant counsel also submitted that each of the Complainant's witnesses and many of the Respondent's witnesses will address Mr. Cazecu's qualifications and the positions the Respondent has permitted him to perform. In combination with this evidence and the related documentary evidence, the parties may have a written agreement as to certain facts. In that way, Complainant counsel thought that this might eliminate the need for Mr. Cazecu to testify or to require more hearing dates. Complainant counsel also stated he would canvass Mr. Cazecu about being at the second week of the hearing.

Analysis

[72] The form of assistance requested in this category is now moot.

[73] The Tribunal takes notice of the parties' submissions set out above with respect to their agreement that Mr. Cazecu can testify at any time during the January hearing, and the conditions to that agreement. If he does not testify at that time, the parties can make their submissions above, as well as any others they wish to make to the Tribunal, and the Tribunal will take them into consideration in deciding how to proceed.

X. Ruling

[74] If it has not already done so, the Respondent shall disclose all arguably relevant management policy documents regarding Track Occupancy Permits, Sub-Foreman requirements or positions, capabilities of Group 1 machine operators, such documents to include any arguably relevant email messages or memoranda from the Respondent's management with respect to the aforementioned policies, particularly for the period January 1, 2005 to August 24, 2011, and with respect to the period from August 25, 2011 to date, any such documents which are not privileged with respect to the within Complaint.

[75] If the Respondent has them, the Respondent shall disclose all the documents referred to in this Ruling as the Daily Rail Crew Time Sheets (DRCTS) for the period January 1, 2011 to December 31, 2015 for the Eastern Region District 1 (which Region may also now be known as "Algoma", and may have been previously known by a different name) and for the Toronto Division, for each Rail Crew, each setting out the name of each Rail Crew member, the regular and overtime hours for each person, and their position.

[76] If the Respondent does not have all the DRCTS for the period January 1, 2011 to December 31 2015, for the areas named above, the Respondent shall disclose the DRCTS that is has for the period and areas, and shall provide written confirmation to the other parties that it does not have the balance of the requested DRCTS.

[77] The disclosed DRCTS shall be confidential. No party, counsel or witness shall discuss, refer to, or transmit in any form any information whatsoever about any individuals named in any of the DRCTS, including, without limitation, any personal information of any nature or kind, such as names, wages, overtime, dates of birth, home addresses, telephone numbers, email addresses, except for the purposes of the hearing of this Complaint.

Signed by

Olga Luftig
Tribunal Member

Ottawa, Ontario
December 31, 2015