CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 564

Heard at Montreal, Tuesday, September 14, 1976

Concerning

CANADIAN PACIFIC LIMITED

and

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES

EX PARTE

DISPUTE:

The extent of discipline applied to Security Guard C.H. Dargewitcz.

EMPLOYEE'S STATEMENT OF ISSUE:

Security Guard C.H. Dargewitcz was dismissed from the service of the Company as of January 8, 1976.

The Brotherhood claims that the discipline applied to Security Guard Dargewitcz was unwarranted and that he should be reinstated, compensated for all monetary loss sustained and his service record corrected accordingly.

FOR THE EMPLOYEE:

(SGD.) M. PELOQUIN
GENERAL CHAIRMAN

There appeared on behalf of the Company:

J. A. McGuire	– Manager, Labour Relations, Montreal
J. E. Palfenier	– Labour Relations Officer, Montreal
J. M. Mickel	– Assistant to Chief of Investigation, Montreal
M. J. Young	– Sub-Inspector, Department of Investigation, Montreal

And on behalf of the Brotherhood:

M. Peloquin	– General Chairman, Montreal
J. G. Conway	– Vice General Chairman, Montreal
C. H. Dargewitcz	– Grievor

PRELIMINARY AWARD OF THE ARBITRATOR

By letter dated June 11, 1976, the Union requested a hearing of this matter, and submitted a statement of the dispute, the issue and the Union contention in the case. The matter was then set down for hearing. The Company then raised the objection that the procedure established in the Canadian Railway Office of Arbitration for ex parte applications had not been followed, and that the matter should not be heard. The hearing was restricted to the presentation of the parties' submissions on that preliminary point.

It is material to set out the chronology of events relating to this grievance. The grievor was discharged on January 8, 1976. This discipline was appealed, in accordance with the collective agreement, at Step 3 of the grievance procedure on January 30, 1976, an extension of time limits having been granted. On February 6, 1976, the Company advised the Union that it would not alter its decision. On March 2, the Union requested that the Company join in the submission of the case to the Canadian Railway Office of Arbitration, and the Company subsequently indicated that it agreed to the submission of the case to the Office of Arbitration.

There followed an exchange of correspondence relating to a proposed Joint Statement of Issue. The parties did not agree as to a Joint Statement, and on June 11, 1976, the Union wrote to the Company advising that it was submitting a statement of the dispute, of the issue, and of its contention to the Office of Arbitration. Such statement was submitted to the Office of Arbitration as noted above.

The matter was, it appears, properly processed through the grievance procedure, and properly referred to arbitration in accordance with the provisions of the collective agreement. The parties were agreed that the matter would go before the Canadian Railway Office of Arbitration. The Arbitrator's jurisdiction, however, arises not only out of a particular Collective Agreement but also under the Memorandum establishing the Canadian Railway Office of Arbitration, and is conditioned upon strict compliance with its terms. Clause 8 of the Memorandum of Agreement dated September 1, 1971, concerning the Canadian Railway Office of Arbitration is as follows:

> **8.** The Joint Statement of Issue referred to in Clause 5 hereof shall contain the facts of the dispute and reference to the specific provision or provisions of the collective agreement where it is alleged that the collective agreement has been misinterpreted or violated. In the event that the parties cannot agree upon such joint statement either or each upon forty-eight (48) hours' notice in writing to the other may apply to the Arbitrator for permission to submit a separate statement and proceed to a hearing. The Arbitrator shall have the sole authority to grant or refuse such application.

In the instant case the parties did not agree on a joint statement, and it would appear to have been open to the Union to proceed ex parte. Such procedure, however, requires that forty-eight hours' notice thereof be given. In the instant case, such notice was not given. In its letter of June 11, the Union simply advised the Company that it was submitting its own statement to the Office of Arbitration, and it did so on the same day. There has not, then, been compliance with Clause 8 of the Memorandum, and I have no authority to relieve against this failure.

The effect of this, in my view (and, as this matter was not spoken to at the hearing except inferentially by reference to **CROA Cases** 149 and 409, I make no final determination thereon), is simply that the statement of dispute of issue and of the Union's contention has not been submitted in accordance with the procedure agreed to and is not properly before me. The parties have, however, referred the matter to the arbitration stage. It would still be open to them to agree upon a Joint Statement of Issue, and it would appear still to be open to either of them to submit an ex parte statement, provided it was done on forty-eight hours' notice.

As the matter now stands, the objection succeeds, and it is declared that there is no Statement of Issue properly before the Office of Arbitration at this time.

(sgd.) J. F. W. WEATHERILL
ARBITRATOR

On Wednesday, 10th November 1976, there appeared on behalf of the Company:

J. A. McGuire	– Manager, Labour Relations, CP Rail, Montreal
J. M. Mickel	– Assistant to Chief of Investigation, CP Rail, Montreal
M. J. Young	– Sub-Inspector, Department of Investigation, CP Rail, Montreal
E. Lanteigne	– Investigator, Investigation Department, Montreal
J. W. Bourgeois	– Investigator, Investigation Department, Montreal

And on behalf of the Brotherhood:

M. Peloquin	– General Chairman, Montreal
J. G. Conway	– Vice General Chairman, Montreal
K. Lasocki	– Representative, Montreal
C. H. Dargewitcz	– Grievor

AWARD OF THE ARBITRATOR

The grievor was dismissed on the ground of neglect of duty and submitting false information on December 15, l975. The penalty of dismissal was determined having regard to the grievor's disciplinary record. In a case of this sort, there is an onus on the Company to show that there were in fact grounds for the imposition of discipline and then, if that is met, to show that the penalty imposed was proper. The first question to be determined, then, is whether the grievor did commit the offences charged on the night in question.

The grievor is a security guard, and on the night in question was working from 1500 to 2300 hours. He began his shift at Place Viger Yard, Montreal, was then transported to Montreal West Station for passenger protection purposes, and was then returned to Place Viger to complete his shift.

There is some question as to the time when the grievor returned to Place Viger. The Company's evidence is that it was at 1900 hours, although the grievor and the other security guard who was on duty at that time say that it was l930. On the evening in question the grievor did not deny that he had finished his lunch (which would be after his return to Place Viger) at 1930. The statement of Sergeant White, who drove the grievor back to Place Viger was not made at the investigation, and cannot be given the same weight. In the circumstances, the grievor should be given the benefit of the doubt, and I would find that he returned to Place Viger at 1930, and that he took lunch, properly, from 1940 until 2000 hours.

It is said that from that point on the grievor failed to carry out his duties. The Union raised a question as to what the grievor's duties actually were, but while these seem not to have been made the subject of any detailed job description, it is nevertheless the case that a security guard does have duties, and there is no doubt that the grievor knew what his were on that night. The other security guard worked on the "clocks" that night, that is, he went on fire-protection rounds, while the grievor was to maintain security of the general yard, and to look out for "exceptions", that is, abnormalities in the condition of cars or property.

At 2000 hours, two investigators took up a position opposite the north entrance of the security guards' office, at the edge of the Craig Yard, part of the area for which the grievor was responsible. They were at a distance of 180 feet from the office, and would not be in a position to make very detailed observations of the grievor. They could, however, ascertain whether or not the grievor was in the office, and they could observe his movements in at least part of Craig Yard. The grievor's car was parked in Craig Yard, just north of the office. From the plans and photographs, there is no doubt that the presence of the grievor's car would not interfere with the investigators' observation of the office, and certainly the investigator would be aware of any movement involving the grievor's car, during their surveillance.

In determining what happened after 2000 hours that night, I rely on the statements given by the grievor and by the investigators at the investigation. The grievor and the investigators were also present at the hearing of this matter and gave certain evidence. In resolving conflicts in the evidence, there is nothing to choose as between the witnesses with respect to their demeanour, all appearing to give their testimony sincerely. I rely rather on an analysis of the statements made and on such contradictions as may be found, particularly in the statements of the grievor. As to the investigation itself, I am satisfied that it complied with the requirements of the collective agreement. The grievor had full opportunity to cross-examine those who gave evidence against him (as noted earlier, I do not rely on the statement of Sergeant White, who was not cross-examined).

At the end of the investigation on December 29, Mr. Young asked the grievor if he had anything more to add. The grievor replied that he had a lot to add, and began to describe what had occurred at 2005 hours on the day in question. This was a vital part of his case, but at that point Mr. Young closed the hearing. This appears very surprising, and if the matter had ended there I would have had serious doubts as to the propriety of the investigation. On the following day, however, the investigation continued, and the grievor had full opportunity to give his own account of the matter. In the result, then, I conclude that a proper investigation was held.

The investigators' evidence is that from 2000 hours until 2105 hours, the grievor remained in the guards' office. At 2105 he went into Shed 3 and returned to the office at 2225. He remained there until 2245, when he went out to his car with some personal belongings. He was then confronted by the Investigators and made certain statements, and at 2300 he booked off duty. The investigators maintained their surveillance from 2000 until 2245, with the exception of a period from 2110 until 2200. There is no doubt, in any event, that the grievor was engaged in his security duties from 2105 until 2225. What is complained of is that he seems to have done very little during the period from the time he completed his supper at 2000, or the interpretation most favorable to him) until 2105, when he went to Shed 3. What is further complained of is that a report made of an "exception" said to have been discovered at 2005 is, it is alleged, false.

The grievor's account of the evening is that after he completed his supper he went out to Craig Yard to check cars, at 2005. The first car he checked was DM 2231, on which the seals were found to be broken. He replaced them, and, discovering that he had left his keys for the yard in his car, he went to his car. Reaching across to the glove compartment for the keys, he accidentally sounded the horn. He returned to the office and switched on the lights, and at about the same time the other guard entered the office by another entrance, remarking on having heard the car horn.

Apart from that, the two sides' accounts of the sequence of events do not differ very significantly. It may be noted that it was not necessary that the investigators have any particular knowledge of what the grievor's duties were, they have reported simply on their observations of his actions, and the issue is whether those actions were in conformity with his duties. These duties do include the making of reports, and the grievor stated that during the period from 2000 to 2105, he made out a report dealing with an incident which had occurred while he was at Montreal West Station. That would be proper. The report is in evidence, and its preparation would not seem to have required more than a relatively short time, at the most fifteen or twenty minutes.

As to the grievor's statement that he went to check Craig Yard at 2105, it is, I think, significant that he did not, on his return, make any report on the condition of car DM2231. He stated that his ball point pen did not work outside in the cold weather, and that he made a mental note of the matter, but in that case he ought to have made a written memo immediately on his return to the office. He did not record the matter in the yard book; he did not then make out the appropriate report form (one was filed the following day), when he was confronted by the investigators, who enquired what he had done with his time, he made no mention of the matter, and at the end of his shift, on reporting to the desk constable, he advised that he had checked all cars and that there had been no exceptions. This check which the grievor says he made was at a time when, according to the investigators, the area was under surveillance. Even if the movements of the grievor had somehow been missed, his going to his car, opening the door and sounding the horn, and his return to the office and turning on the lights, would certainly have come to the investigators' attention unless of course they have not told the truth about the time they began their surveillance. That they were on the site later is undoubted, and their statements, while they contain one superficial inconsistency (at one point they do not make clear that there was a gap, noted above, in the surveillance), are essentially consistent with the known facts. The inconsistencies in the grievor's statement are numerous, and, considered together with the evidence referred to below forces me to the conclusion that, on the balance of probabilities, the Investigators' account of the matter is correct.

The other evidence to which I refer is that of the grievor's response when confronted by the investigators, and, later, when faced with that response at the investigation. He first told the investigators that from 1930 until 2225 he had been working in the yard (this of course is inconsistent with his subsequent position). When they replied that they considered he was lying, he said "You caught me. Sometimes you have good days, sometimes you have bad days, and this happens to be a bad one for me." His subsequent explanation of this as being, in effect, banter, is not sufficient in view of the obvious seriousness of the matter, and the fact that he was clearly being accused.

From a study of all of the material, I find, on the balance of probabilities, that the grievor was neglectful in the performance of his duties on the night in question, and that he did submit false information with respect to the conduct of those duties. This is a serious offence, and a severe penalty would be appropriate.

As to the penalty, the grievor's record shows a ten-day suspension in 1974, for leaving his post without permission, and a reprimand, later in 1974 for failure to report for duty. The ten-day suspension would appear to be a significant matter, although it occurred well over a year before the incident in question. In many cases, it would be my view that discharge would be an excessive penalty for a second offence of dereliction of duty; regard must, however, be had to the fact that the grievor occupies a position of responsibility and trust. Where a second breach of such responsibility occurs, and where it involves, as has been found, the submission of false information, the discharge is appropriate. In this respect, I am in agreement with what is said in the **Ford Motor Co. case**, 8 L.A.C. (2d) 18., where it is stated: "When any person engaged in carrying out the very important functions of a plant protection officer is found to have conducted himself in a manner which falls short of being completely honest, such a person is no longer qualified to function in the capacity of a plant protection officer."

For the foregoing reasons, the grievance is dismissed.

(sgd.) J.F.W. WEATHERILL
ARBITRATOR