

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 628

Heard at Montreal, Tuesday, September 13th, 1977

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

**CANADIAN BROTHERHOOD OF RAILWAY,
TRANSPORT AND GENERAL WORKERS**

DISPUTE:

Dismissal of Motorman W. A. Knitsch, Toronto.

JOINT STATEMENT OF ISSUE:

On January 7, 1976, Motorman W.A. Knitsch was given thirty demerit marks for "excessive lateness and absenteeism". This brought the total to seventy, and Mr. Knitsch was consequently dismissed for accumulation of demerit marks.

The Brotherhood has appealed the discipline on the basis that the investigation of the incident was not a proper one under the provisions of Article 24.2 of Agreement 5.1, rendering the discipline invalid.

The Company maintains that the investigation was a proper one, and that the discipline was warranted.

FOR THE EMPLOYEE:

(Sgd.) J. A. PELLETIER
NATIONAL VICE-PRESIDENT

FOR THE COMPANY:

(Sgd.) S. T. COOKE
ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

A. D. Andrew	– System Labour Relations Officer, Montreal
C. L. LaRoche	– System Labour Relations Officer, Montreal
W. W. Wilson	– Labour Relations Assistant, Toronto
T. E. Allison	– Labour Relations Officer – Express Division, Montreal
D. J. Lake	– Zone Supervisor, Express, Toronto

And on behalf of the Brotherhood:

J. D. Hunter	– Regional Vice President, Toronto
R. Robinson	– Local Chairman, Toronto

AWARD OF THE ARBITRATOR

Article 24.2 of the collective agreement provides as follows:

24.2 Investigations in connection with alleged irregularities will be held as quickly as possible. An employee may be held out of service for investigation (not exceeding three working days). He will be given at least one day's notice of the investigation and notified of the charges against him. This shall not be construed to mean that a proper officer of the Company, who may be on the ground when the cause for investigation occurs, shall be prevented from making an immediate investigation. An employee may, if he so desires, have the assistance of one or two fellow employees, or accredited representatives of the Brotherhood, at the investigation. Upon request, the employee being investigated shall be furnished with a copy of his own statement, if it is made a matter of record at the investigation. The decision will be rendered within 21 calendar days from the date the statement is taken from the employee being investigated. An employee will not be held out of service pending the rendering of a decision, except in the case of a dismissible offence.

There are, essentially, two respects in which the Union contends that the requirements of this article were not met, and for which reasons the discipline was not properly imposed. These are

- 1) that the Union representative who was present at the investigation was not allowed to make, or to persist in, certain interjections during the course of the hearing and, more importantly,
- 2) that the Company officer, with whose statements the grievor was faced at the hearing, was not made available for cross-examination.

It may be noted that at the conclusion of the investigation the grievor stated that he was "not fully" satisfied with the manner in which it had been conducted, since he felt that the presence of the Company officer in question would have made it more complete. While I believe the grievor's point to have been well taken in a general way, the question is more precisely whether that Company officer was necessarily subject to cross-examination during the investigation.

As to the role of the Union representative at an investigation of this sort, I am in agreement with what was said by Mr. O'Shea in the **CNR and Division No. 4 (Marchand)** [SHP 35] case, cited with approval by Mr. Beck in the **Canadian Pacific and Canadian Telecommunications Union (Zawoyski)** case. Mr. O'Shea's remarks on this point were as follows:

I therefore find that the investigation was conducted by the company in accordance with the provisions of the collective agreement. However, it should be noted that the presence of the union representative at such investigation meetings was not that of a mere observer. The union representative has the right to ensure that all the relevant facts are presented for the company's consideration and also has a right to endeavour to mediate any potential dispute with a view to avoiding the imposition of the penalty. The right is not only implicit in the provisions of the collective agreement but it is also inherent in the union's position as the sole bargaining agent of the employee it represents.

As in the **Zawoyski** case, it may be that the Union representative was not given the latitude to assist that he ought to have been given, but I do not find such a complete hindrance of his role as to set aside the discipline for this reason.

As to the cross-examination of the Company officer, it is my view that this particular collective agreement (and the precise terms of the agreement are to be considered in each case), does not provide such a right. The Company's investigations of what may appear to be disciplinary matters are not judicial or quasi-judicial proceedings as are, for example, arbitration hearings. The Company may, in making its determination as to what action to take, rely (subject to any restrictions in the collective agreement) on such evidence as appears to it to be cogent. That "evidence" of course, is not, in the absence of proper proof, or of agreement of the parties, evidence on which an Arbitrator would rely on any contested question of fact in an arbitration proceeding. There is an onus on the employer to show just cause for its disciplinary actions. It may be that it would be well advised to have the appropriate officers present at

investigations, and to permit their cross-examination. But the collective agreement here does not require that, and the disciplinary action which the Company took in this case is not affected by its denial of cross-examination of its officer in this case.

For the foregoing reasons, I conclude that there was no violation of Article 24.2. The grievance is accordingly denied.

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