CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 632

Heard at Montreal, Wednesday, October 12, 1977

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

DISPUTE:

Dismissal of MR. L.J. Spitfire formerly employed as Car Record Clerk, MacMillan Yard, Toronto.

JOINT STATEMENT OF ISSUE:

The Company discharged Mr. L.J. Spitfire on November 5, 1976, for insubordination and gross misconduct on September 24, 1976. The Brotherhood contends that Mr. Spiterie's discharge was unwarranted, unjust and severe and that his actions were not subject to discipline and that for these reasons he be returned to Company service with full seniority and pay for all time out of service.

The Company declined the Brotherhood's request for, at the relevant time Mr. Spitfire was subject to discipline and his employment history and conduct indicated that he was unsuitable and unacceptable for further railway employment. His conduct on September 24, 1976 was the culminating incident to his history of improper attitude toward the Company and supervisor authority as evidenced by his actions both prior and subsequent to his discharge.

This dispute has been progressed through the various steps of the grievance procedure and ultimately to arbitration.

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:

L. L. Band	– Counsel, Toronto
C. L. LaRoche	– System Labour Relations Officer, Montreal
P. A. McDiarmid	– Regional Labour Relations Officer, Toronto
E. D. Kearney	– Assistant General Superintendent, Toronto
R. J. Schnitzler	– Manager Carload Centre, Toronto
W. W. Wilson	– Labour Relations Assistant, Toronto
D. K. House	– Transportation Analyst, Toronto

And on behalf of the Brotherhood:

M. L. Levinson	– Counsel, Toronto
J. D. Hunter	– Regional Vice President, Toronto
R. J. Roussel	– Representative, Toronto
L. J. Spiterie	– Grievor

AWARD OF THE ARBITRATOR

The grievor, who was hired by the Company on September 14, 1965, was discharged on November 5, 1976, as a result of an incident which occurred on September 24, 1976.

While the facts were put in issue, and considerable time devoted to the receipt of evidence in this case, there is really no very substantial difference between the parties as to the significant facts, which may be briefly stated.

The grievor, employed by the Company at its MacMillan Yard as a Car Record Clerk, also acted as Local Chairman of the Union. As such, he had been responsible for putting forward a Union grievance to the effect that he was being harassed by certain Company officials. Whether that grievance was well-founded or not is not a question in issue in this case.

At the request of the Union's representative a meeting was held on Company premises on September 24, 1976, to discuss the grievance just described. At this meeting the Union was represented by Mr. Roussel, a Representative, and the grievor, Local Chairman. The Company was represented by Mr. Kearney, Superintendent of MacMillan Yard, Mr. Wilson, Labour Relations Assistant, Mr. Schnitzler, Manager of the Carload Centre, and another. Mr. Schnitzler was one of those alleged by the grievor to have been harassing him.

The meeting began with discussion of the use by employees of the Company's photocopying machine for personal matters. The grievor, it is said, had been refused the use of the machine for Union business, and seems to have felt that this constituted discrimination against him. Mr. Schnitzler advised that employees had been cautioned not to use the machine for other than Company business. At the grievor's request, he mentioned two such persons, one in the bargaining unit and one in an excluded position. While the evidence conflicts on this point, it would be my finding that the grievor replied to the effect that he did not believe Mr. Schnitzler.

Mr. Kearney then advised that a general directive would be issued relating to the use of the photocopier. Again, the grievor's response is the subject of conflicting evidence. I am prepared, for the purposes of this decision, to accept the Company's evidence on the point, which is to the effect that the grievor indicated he would use the machine if he found that others were continuing to use it for personal matters. He was then, quite properly, cautioned by Mr. Kearney that disregarding those instructions would lead to an investigation.

There was then some discussion about employees being watched by supervisors, and, in turn, about supervisors being watched by employees. In the course of this discussion, Mr. Roussel indicated his view that the grievor was indeed being discriminated against. It appears to have been in response to this that Mr. Schnitzler then stated that the grievor, Mr. Spitfire, had said on an earlier occasion that he, Spitfire, would get a Mr. Hyett, a Company supervisor. The grievor became excited at this, and said (and there is no conflict in the evidence on this point), "You're a lying bastard Mr. Schnitzler; in fact I can't call you mister, you lying bastard". At that, Mr. Kearney then advised the grievor, quite rightly, that if there were one more outburst like that he would be asked to leave the room, and Mr. Roussel made some remark in an attempt to calm the grievor down. Then, according to the Company's evidence, which I accept (and in any event it differs from the Union evidence only in minor details), the grievor repeated that Mr. Schnitzler was a lying bastard, that he was not going to wait to be thrown out, and that he would not remain in the room with liars. A certain amount of time was spent in examination and cross-examination of witnesses on this last remark, and particularly whether the grievor had said "liars" or "a liar". The point has, in my view, no importance. If the grievor, by using the plural, consciously sought to slander others in the room apart from Mr. Schnitzler, he did so in the excitement to which he had worked himself up, and it would be oversensitive of the others to react to that. In any event it is more likely that, if the grievor did indeed use the plural, he did so in the general sense, and it is not logically necessary to conclude that others than Mr. Schnitzler were intended to be designated by it. In any event, the grievor's outburst was, in my view, equally outrageous whatever grammatical analysis be made of it.

Following the remarks just noted, the grievor left the room, slamming the door. Mr. Kearney followed him out into the corridor, and told him that if he left the office in that fashion again, he'd be in trouble. "Who said so?", retorted the grievor. "I said so", replied Mr. Kearney. Mr. Kearney returned to the office, and very shortly the grievor came back in, looked about, and said that he had been threatened, and that he wanted everyone in the room to witness the fact. The grievor, of course, had not been "threatened" in any but the most trivial sense of the term, and all that the occupants of the room could witness was that Mr. Spitfire behaved in a very silly fashion in his excitement.

The events above described constitute, in my view, a single incident. The crucial event is the grievor's calling Mr. Schnitzler a "lying bastard". The whole matter took only a very few moments, and as I have indicated, there is no substantial dispute as to the facts. It is the Company's position that the grievor's conduct in the incident constituted "insubordination and gross misconduct", and that it was just cause for discharge.

By article 24.1 of the collective agreement, an employee is not to be disciplined or discharged without an investigation. The Company therefore, quite properly, held an investigation. The grievor, taking a position which is contrary to that which this and other Unions have advanced (and on which they have been upheld) at arbitration, stated that the investigation was unnecessary, since the Company knew the facts. He attended the investigation, however, and indulged himself in repetitive, tendentious, prolonged and generally irrelevant answers to such an extent that the investigation lasted some three full days. Insofar as it appears from the transcript, the patience of the investigating officer can only be admired. While it is clear that the grievor, as he now at least partially acknowledges, did misconduct himself at the meeting on September 24, 1976, the issue to be determined in these proceedings is whether, having regard to the circumstances, there was just cause for the imposition of discipline on the grievor. Before dealing with the matter, however, I would note my view that, assuming that it was proper to impose discipline on the grievor, the penalty of discharge would be too severe. The grievor was, at the time, an employee of some eleven years' service. His disciplinary record shows a current accumulation of ten demerits, and these are the subject of a grievance. Even if those demerits stand, I would not consider the equivalent of fifty demerits would be justified in this case which is, on the evidence, one of an isolated outburst of abusive language – even considering, as I do, that there was no very substantial provocation. In any event then, it would be my view that there should be an award of reinstatement in this case.

The real question in this matter is whether the Company was justified in imposing discipline upon the grievor at all. It is the Union's contention that there was no such justification, since the grievor, at the time of his outrageous behaviour, was acting in his capacity as Local Chairman. I have no doubt that although the particular grievance being discussed at the meeting of September 24, 1976, was one instigated by and involving the grievor, it was as Local Chairman that the grievor attended that meeting.

It appears to be well-established, at least in the American cases, that "Arbitrators carefully uphold the right of Union representatives to speak freely at Company-Union meetings": **Ormet Corporation**, 54 L.A.C. 363 (R. R. Williams). The arbitrator in that case noted that he could find no decision where discipline of an employee for words spoken as a Union representative to a Company official at a Company-Union conference, has been upheld. Indeed, in the **Federal Mining & Smelting Co. case**, 3 L.A.C 497 (J. E. Dwyer), where it was held that an employer was not entitled to discharge an employee for threatening physical violence and using abusive language in an argument with a foreman during a grievance meeting, the employee involved may not have been a Union official; the general rule enunciated in the case is simply that words spoken at a grievance meeting may not be used as a basis for discharge.

That is a very broadly-stated rule; in the cases referred to there is often some qualification of the freedom which is accorded Union representatives in the exercise of their Union functions. In the **Georgia-Pacific Corp. case**, 68-1 ARB 3461 (J.D. Larkin), it was held that a Company had no right to discharge a local Union president who unleashed his temper at a supervisor while attempting to discuss an overtime grievance. It was noted that since there were no other employees present during the clash, and no disturbance of any plant morale, the president's admittedly-less-than responsible conduct could not be made the basis for discharge, and reinstatement with full back pay was ordered. The arbitrator noted, however, that there were cases, often unreported, in which Union officials had been discharged for open defiance of management and disruption of production, and the discharges upheld. In this respect the **Firestone Steel Products case**, 8 LAC (2d) 164 (Brandt) is interesting, as the abusive behaviour of the Union representative there seems to have led to an interruption of production. In that case where there was, in my view, a stronger case for discipline than in the instant case, the Company had imposed a three and one-half day suspension.

In the instant case, the conduct complained of occurred in the course of a grievance meeting which the grievor attended as Local Chairman. Company officials are not obliged simply to sit and listen to abusive outbursts such as those of the grievor. When the grievor referred to Mr. Schnitzler as he did, Mr. Kearney quite properly advised him that if there were another such outburst he would be asked to leave the room. That was the correct course. Improper behaviour at such a meeting naturally leads to the forfeiture of the right to participate in the meeting. The real victim of the grievor's misconduct was the cause he purported to represent.

In the circumstances of the case before me, it is my view that the grievor's improper conduct occurred in the course of a grievance meeting in which he represented, however badly, the Union's interest. He was, of course, in the employ of the Company at that time, and it may well be that he was not docked any pay in respect of the time involved. However that may be he was acting as a Union representative at the time, and should not be considered as subject to the normal requirements of industrial discipline.

For the foregoing reasons it is my conclusion that there was not, in the circumstances, any occasion for the imposition of discipline on the grievor. Consideration of his record, or of his conduct subsequent to the event is not necessary. Accordingly, it is my award that the grievor be reinstated in employment forthwith, without loss of seniority or other benefits, and that he be paid compensation for loss of earnings.

(signed) J. F. W. WEATHERILL
ARBITRATOR