

# CANADIAN RAILWAY OFFICE OF ARBITRATION

## CASE NO. 784

Heard at Montreal, Wednesday, October 15, 1980

Concerning

### CANADIAN PACIFIC EXPRESS LTD.

and

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

#### DISPUTE:

Suspension of 3 days assessed employee J. Kelly, Obico Terminal. Request by the Union for removal of the disciplinary measure and full compensation for all time lost.

#### JOINT STATEMENT OF ISSUE:

On February 20, 1980, Employee J. Kelly was held out of service for five days for investigation into an incident involving Supervisor E. Walton. The employee was subsequently assessed a three-day suspension for fighting on Company property.

The Brotherhood grieved the suspension on the grounds the incident was initiated by Mr. Walton and requested the employee be reimbursed all monies lost while held out of service.

The Company has declined the Brotherhood's request.

#### **FOR THE EMPLOYEE:**

**(SGD.) J. J. BOYCE**  
GENERAL CHAIRMAN

#### **FOR THE COMPANY:**

**(SGD.) D. R. SMITH**  
DIRECTOR, INDUSTRIAL RELATIONS

There appeared on behalf of the Company:

D. R. Smith – Director, Industrial Relations, Personnel & Administration, Toronto  
B. D. Neill – Manager, Labour Relations, Toronto

And on behalf of the Brotherhood:

J. J. Boyce – General Chairman, Toronto  
J. Crabb – Vice General Chairman, Toronto  
F. W. McNeely – General Secretary Treasurer, Toronto  
G. Moore – Vice General Chairman, Moose Jaw

#### **AWARD OF THE ARBITRATOR**

There is no doubt that the grievor did engage in a fight with his supervisor on Company premises. For this, the imposition of discipline would be proper, although the extent of the discipline will depend on all of the circumstances relating to the event, and on the record of the grievor.

In the instant case, the grievor asserts that the supervisor began the matter when he came out of a doorway, hitting the grievor with the door which he opened violently, and then subjecting the grievor to verbal abuse, including racial slurs, when he objected. The supervisor's account is to the effect that the grievor held the door, preventing him from coming out, and that when he did get out the grievor pushed and "shouldered" him.

These stories are mutually contradictory and on the material before me it is impossible to assign a greater or less degree of probability to one or the other of them. All that can be said, from the statements of the two men and that of a witness to part of the incident, is that they had engaged in a shouting match, and that there had probably been some pushing – not, it would appear, of a particularly serious nature – when the supervisor kicked the grievor in the area of the groin, after which (perhaps not surprisingly) the two men began to fight.

Even if (although I make no finding in that regard) the grievor had been the original instigator of the matter by his speech and even by pushing the supervisor, the supervisor's reaction of kicking the grievor was entirely out of proportion, and must be said to constitute provocation of what followed. While the grievor is certainly not without blame in the matter, he must be considered – on the material before me in this case – as more sinned against than sinning, and this factor must be taken into account in assessing the penalty imposed.

The Union contended that the investigation conducted pursuant to Article 8.1 of the collective agreement was not "fair and impartial". After studying the transcripts of the investigation, I am satisfied that the investigation was quite proper. The grievor and his representative had ample opportunity to state their own side of the matter, and to examine the supervisor, who was himself questioned. At the hearing, the statement of one person who, from a distance, saw the persons involved after the fight had ended, was submitted although it seems that statement had not been shown to the Union previously. Article 8.4 allows an employee the right to be present during the examination of any witness whose testimony may have a bearing on his responsibility, or "to read the evidence of such witness, and offer rebuttal thereto". The time for such opportunity to be given is before the investigation has been concluded. Since that was not done in this case, the statement cannot be admitted in evidence. In the instant case, the statement has no bearing on the outcome of the matter in any event.

The Company stated that in assessing discipline, it took into consideration the "procrastination and evasiveness" of the grievor and of another employee who was a witness. From a study of the transcripts, I do not think that procrastination or evasiveness appear to any marked degree. The grievor's proper concern was to defend himself, and I do not consider that he did so in an improper manner. He cannot be held responsible for the conduct of another employee, who may well have wished to keep out of the affair, but whose conduct does not appear to have been improper.

The grievor was held out of service for five days pending investigation. That is a possibility contemplated by the collective agreement, and was not improper in a case such as this. The grievor was then suspended for three days. In fact, he suffered a loss of eight days' pay. In view of the provocation shown by the supervisor, and since I do not consider that it has been shown that the grievor was guilty of procrastination or evasion, it is my view that the time out of service should have been counted toward the loss of service due to suspension. It may also be noted that the supervisor (who has since resigned) was allowed to return to work while the grievor was still held out of service. Of course the supervisor is in a different position and the Company is not accountable for its actions with respect to him in the same way as it is in respect of its actions regarding a bargaining-unit employee. Nevertheless the two persons were involved in the incident, and to be seen to treat one of them (one who was at least as culpable as the grievor) more leniently than another would appear to be unfair. I think that consideration is a proper one in assessing the penalty imposed in this case. Finally, I note that there is no evidence of any previous discipline imposed on the grievor.

Having regard to all of the foregoing, it is my award that while a three-day suspension for fighting may remain on the grievor's record, he should not have lost eight days' earnings in this case, but the time held out of service should have been counted toward his suspension. Accordingly, it is my award that the grievor be compensated for three days' loss of earnings.

**(signed) J. F. W. WEATHERILL**  
ARBITRATOR