CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1562

Heard at Montreal, Wednesday, September 10, 1986

Concerning

CANADIAN PACIFIC LIMITED

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Mr. K. D. Gannon, Painter, was assessed 30 demerits for insubordination in failing to properly respond to the instructions of, and directing obscenities at his immediate Supervisor, Coquitlam, B.C., July 9 and 10, 1985, and dismissed for accumulation of demerits.

JOINT STATEMENT OF ISSUE:

The Union contends that: **1.** The Company violated Section 18.1, 18.2 and 18.3 of Wage Agreement 41. **2.** The discipline assessed was not warranted and should be removed. **3.** Mr. Gannon be paid for loss of wages since July 15, 1985, and onward until reinstated.

The Company denies the Union's contention and declines payment.

FOR THE BROTHERHOOD:
(SGD.) H. J. THIESSEN
SYSTEM FEDERATION GENERAL CHAIRMAN

FOR THE COMPANY:
(SGD.) L. A. HILL
GENERAL MANAGER, OPERATION AND MAINTENANCE

There appeared on behalf of the Company:

M. Shannon – Counsel, Montreal
R. T. Bay – Assitant. Supervisor Labour Relations, Vancouver
J. S. Craig – Assitant Regional Engineer, Toronto,Witness
G. J. Craig – Relieving B&B Master, Vancouver, Witness
K. H. Kirkpatrick – Bridgeman, Vancouver, Witness
R. A. Colquhoun – Labour Relations Officer, Montreal

And on behalf of the Brotherhood;

N. Jessin – Legal Counsel
H. J. Thiessen – System Federation General Chairman, Ottawa
L. M. DiMassimo – Federation General Chairman, Montreal
V. Dolynchuk – General Chairman, Edmonton
E. J. Smith – General Chairman, London
M. L. McInnes – General Chairman, Winnipeg
G. Valence – General Chairman, Sherbrooke

AWARD OF THE ARBITRATOR

I am satisfied on the material filed that the grievor, Mr. K. D. Gannon, was insubordinate in his response to his immediate supervisor in two verbal exchanges occurring on July 9 and 10, 1985. On the first occasion, when

supervisor Rogal advised the grievor that the "barber striping" paint job which he had done on his work cupboard was unauthorized, and that it must be painted over in grey, the grievor responded that he could paint the cupboard any way he chose. The next day, when Mr. Rogal again reminded him that he must repaint the cupboard as ordered, the grievor responded, "Rogal, you are a weak motherfucker".

Following a disciplinary investigation, in light of the grievor's prior record, 30 demerit marks were assessed aqainst him. Those demerits, coupled with 15 demerit marks assessed against the grievor (since rescinded in **CROA Case #1561**), brought the total of his demerits to 85, and he was discharged. While the Union alleges that the investigation, conducted by Division Engineer J. S. Craig, was not fair and impartial, and that the Company violated Sections 18.1, 18.2 and 18.3 of the Collective Agreement, the Arbitrator cannot sustain those objections. There is nothing in the circumstances of the instant case to sustain any reasonable apprehension of bias in Mr. Craig. It is not disputed that the conduct of the investigation would normally fall within his duties and responsibilities. In the Arbitrator's view the fact that Mr. Craig had participated in a prior investigation which made negative findings against the grievor does not, of itself, raise an apprehension of bias.

The Union further submits that the grievor has been denied a fair and impartial investigation in that he was not given an opportunity to confront and cross-examine persons making statements adverse to his interest. It is fair to assume that by adopting the standards of fairness and impartiality the parties intended to import the two most basic principles of natural justice: that the investigator be unbiased, and that the employee be given adequate notice of the accusation against him and an opportunity to be heard. (*See, generally, deSmith,* ***Judicial Review of Administrative Action****, 3rd edition, at p.134*.)

The Arbitrator has considerable difficulty with the suggestion of the Union that the concept of a fair and impartial investigation must import in all cases the right either to question or to cross-examine the author of an accusation or complaint. The standard of fairness in decision making does not necessarily equate to the conduct of a trial. This was, perhaps, best reflected in one of the most famous passages of English and Canadian administrative law. In **Board of Education v. Rice** (1911) A.C. 179 at p. 182, Lord Loreburn, L.C., commented:

> "Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds ... In such cases ... they must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything. But I do not think they are bound to treat such a question as though it were a trial ... They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view."

The degree to which a decision-making body or person is to act judicially will vary, according to principles of public law, depending upon the nature and consequences of the inquiry. In some instances, an exchange of letters or documents may satisfy the requirement for a hearing under certain public statutes. The meaning of what constitutes a fair hearing, whether it be in a public or a private proceeding, may vary, and will depend upon the nature and purpose of the proceedings.

Section 18 of the Collective Agreement provides, in part, as follows:

> **18.1** No employee shall be suspended (except for investigation), disciplined or discharged until he has had a fair and impartial investigation and his responsibility established.
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> **18.2** When an investigation is to be held, the employee will be notified of the time, place and subject matter of such hearing. He may, if he so desires, have a fellow employee and/or an accredited representative of the Brotherhood present at the hearing and shall be furnished with a copy of his own statement and, on request, copies of all evidence taken.

The Arbitrator is satisfied that the foregoing provisions contemplate, at a minimum, advance notice to the employee of the charge or accusation against him, as well as the right to be in attendance during the hearing, including those portions of the hearing during which evidence other than his own statement is taken. The employee is, in other words, entitled to hear first-hand what is being said against him. That is implicit in the right of the employee to have notice of the time and place of the hearing.

It does not follow, however, that he can assert a right to cross-examine such evidence. As a recent Court decision has held, he is not entitled to legal counsel, and to that extent the proceedings are not intended to take on the full trappings of a trial. It should be borne in mind that the purpose of the investigation is to determine whether discipline will issue against the employee. The individual's right to grieve against that determination, up to and including the arbitration hearing, remains unimpeded.

It should perhaps be emphasized that the overriding requirement of fairness and impartiality must be observed. In this regard the Arbitrator considers it significant, upon a close review of the transcript of the evidence, that the questioning of the grievor by the investigating officer contained no element of contradiction or cross-examination. If, as in fact did not occur, the grievor had been subjected to cross-examination while other witnesses were not, in the Arbitrator's view the fairness of the proceedings would be seriously called into question. A review of the material discloses that the hearing is directed at obtaining statements from each of the persons involved in the incidents in question, giving each witness an opportunity to know the content of the other witnesses' statements. At the hearing the contents of all of the witnesses' statements were given in writing to the grievor, and he was given the fullest opportunity to comment on them.

The Arbitrator does not disagree in principle with the assertion of counsel for the Union that in some instances allowing an employee or his Union representative to question other witnesses during the course of a hearing under Section 18 would, in some instances, shorten the fact-finding process and perhaps eliminate the need for recourse to arbitration. That, however, is not the procedure which the parties have agreed upon. In the Arbitrator's view, if the parties had intended to confer upon the grievor, or his Union representative, the right to ask questions or cross-examine other witnesses, they would have so provided in the language of Section 18, as has been expressly provided in other Collective Agreements. Absent such an express provision, the Arbitrator cannot accept the submission of the Union that Section 18 of the Collective Agreement implies a right of cross-examination. Moreover, it does not appear disputed that in the instant case the grievor neither sought to be present during the testimony of other witnesses, nor did he or his representative request the right to cross-examine their statements.

I turn to consider the merits of the discipline imposed. As noted, the Arbitrator is satisfied that the grievor did exhibit a degree of insubordination toward his immediate supervisor on the two occasions in question. There are, however, two mitigating factors of importance. Firstly, it appears that during his prior employment in Vancouver, the grievor was allowed by the Company to decorate his storage cupboard in colours of his own choosing. While this does not limit the ability of the supervisor at Coquitlam to enforce a different standard in his own shop, it does to some extent explain the grievor's initial belief that he had a "right" to decorate his cupboard as he pleased.

The second factor, and most important, is the grievor's record. He has been employed by the Company for some 20 years, and has worked within this bargaining unit since 1978. His record discloses no prior incident of insubordination. As noted, the charge of insubordination brought against him for an earlier incident in Vancouver, **CROA Case #1561**, has been rescinded. In the circumstances, the events at Coquitlam should be viewed as a first instance of insubordination, in consequence of which an assessment of 15 demerit marks would be appropriate. With the rescision of the earlier discipline, the grievor's discipline record would have stood at 40 demerit marks at the time of the incident in Coquitlam. The Arbitrator therefore orders that the grievor be assessed a further 15 demerit points, for a total of 55 demerit marks. Given the seriousness of that accumulation of demerits in a 60-point system, a substantial period of suspension is not inappropriate in the circumstances. The grievor shall therefore be reinstated into employment without compensation, and without any loss of seniority. I remain seized of this matter in the event of any dispute between the parties respecting the interpretation or implementation of this award.

(Sgd.) MICHEL G. PICHER
ARBITRATOR.