CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1575

Heard at Montreal, Friday, October 17, 1986

Concerning

CP EXPRESS AND TRANSPORT LIMITED

and

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

DISPUTE:

The discipline issued to Port Coquitlam terminal employees L. Craig, P. England and C. Knutson for the alleged breaking into of a customer shipment (Laura Secord) and subsequent incident on or about October 9, 1985.

JOINT STATEMENT OF ISSUE:

On or about October 9, 1985 these three Port Coquitlam terminal warehouse employees were stripping general freight from inbound boxcars; when it was alleged by a Company officer that these employees were involved in breaking into a shipment consigned to a Company customer - Laura Secord Candy Shops. Also of note is that the Company was in receipt of two further statements from employee, Mr. G. Fuller and employee, Mr. X. These two additional statements were used with the Company official's report to subsequently issue discipline to these three warehouse employees named.

The Brotherhood's position is that these employees did not break into any customer shipments on or about October 9, 1985; nor were they involved in any behaviour that would subject them to being issued demerits (discipline). Further, that the Company official's report was inaccurate, and that the two other Company supporting reports were done by the same individual. Further, that both of these reports/statements were false and contradictory (those of employee, G. Fuller and Mr. X); and that these three accused employees' statements were truthful and did independently compliment what actually took place on that evening in question.

The Company maintains that the discipline issued was warranted and progressive and therefore has to date declined the Brotherhood's request for the total removal of the issued demerits to these three employees

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD.) J. J. BOYCE	**(SGD.) B. D. NEILL**
SYSTEM GENERAL CHAIRMAN	**DIRECTOR, LABOUR RELATIONS**

There appeared on behalf of the Company:

B. D. Neill	– Director Labour Relations, Toronto
D. Bennett	– Manager Human Resources, CanPar, Toronto
B. Weinert	– Manager Labour Relations, Toronto

And on behalf of the Brotherhood:

J. J. Boyce	– General Chairman, Toronto
M. Gauthier	– Vice-General Chairman, Montreal
M. Flynn	– Vice-General Chairman, Vancouver
J. Bechtel	– Vice-General Chairman, Toronto

AWARD OF THE ARBITRATOR

In this case the Union raises a preliminary procedural objection. It submits that during the course of the Company's investigation the grievors were wrongfully denied the right to cross-examine the Company's witnesses. This they maintain is a violation of article 8.4 of the collective agreement, as interpreted in **CROA 1241**. The article in question is as follows:

> 8.4 An employee is entitled 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.

It is clear that the request to cross-examine was made, both in writing in advance of the investigative hearing, and at the hearing itself. It is not disputed that the request was denied. The issue is whether such a right is established under the terms of article 8.4.

The Union relies on **CROA 1241**. It should be emphasized that that award did not expressly find that the Company violated the terms of article 8.4 by denying to an employee the ability to cross-examine witnesses during the Company's investigation. Moreover the issue was to some extent academic since, as the Arbitrator relates "... at no time did the Trade Union request, indeed, demand the opportunity to cross-examine."

The issue in that case arose out of the Union's claim that because the grievor was not given the opportunity to be present during the examination of a number of witnesses he was effectively deprived of the opportunity to cross-examine their statements. Again, the Arbitrator found no violation of the article noting that in fact that the Union Representative acting on behalf of the grievor did not insist on the grievor's presence.

Given the importance of this issue, the following excerpts from **CROA 1241** bear repeating:

> "In the absence of any such request or demand, I am satisfied that the employer in offering the grievor or his trade union representative, the opportunity to provide rebuttal evidence to their statements, discharged its responsibilities under article 8.4. Unlike the CROA cases relied upon by the trade union in its brief, article 8.4 provides no guarantee concerning a grievor's attendance at investigations of witnesses unless a request is expressly made. And, if after the event, the trade union feels prejudiced by the lack of notification it is still incumbent on it to request the Company to provide the opportunity to cross-examine the statements of those witnesses. Otherwise it is quite appropriate for the employer to conclude that the trade union is content with copies of the witnesses' statements.
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> I have no difficulty with the rather trite proposition that cross-examined evidence has greater probative value (particularly when taken under oath) than uncontested statements taken during the course of an interview. Moreover when those unchecked statements are challenged by *viva voce* evidence at a hearing then the conflict in appropriate circumstances may very well be resolved in the favour of the sworn evidence. But the trade union cannot "wait in the bushes" to entrap the employer.
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> If the trade union is unsatisfied with the manner the employer has conducted the investigation of witnesses, it must protest immediately. It must request and demand the right to cross-examine the employer's witnesses. Moreover, if such a request is refused, it may then put the company on notice that at arbitration it operates at its peril in refusing such right. Indeed, the company then fails to adduce *viva voce* evidence at arbitration at the risk of losing its case.
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> In all the circumstances adduced herein the company has not violated article 8.4. Accordingly the evidence adduced through the employer's statements suffices to sustain the cause cited by the company for the grievor's discharge.

The foregoing passage must be read with great care, and interpreted within the context of the case then in issue. The Arbitrator comments critically on the Union's attempt to assert a right of cross-examination during the investigations stage, when no such claim was made at the investigative hearing where the violation of article 8.4 was alleged to have occurred. As I interpret the Arbitrator's words, he implies that the issue could only be ripe for consideration if there had been a request to cross-examine at or prior to the investigation, and a denial of that request on the part of the Company. The supplementary comments of the Arbitrator, which are *obiter* in nature, merely

record the observation that evidence taken during the course of an investigative hearing, without cross-examination, may ultimately be found to be less reliable than contrary evidence which the opposite party tenders *viva voce* at the arbitration hearing, where such evidence is subject to cross-examination. It is difficult to dispute the self-evident truth of that proposition. This Arbitrator cannot accept, however, that this passage, or any other part of the Arbitrator's award in **CROA 1241** affirms that grievor may assert a right of cross-examination pursuant to article 8.4 during the course of an investigative hearing.

In this case that issue has matured for determination. On behalf of the grievors, a request to cross-examine witnesses during the course of an investigative hearing was made both in advance of the hearing, in writing, and verbally during the actual proceedings. It was denied and the issue must therefore be resolved.

CROA 1562, which arose under a different collective agreement, is instructive in that it also concerned a Union's objection to an alleged violation of the collective agreement, on the grounds that evidence taken in an investigative hearing was not subject to cross-examination. The award finds that the right to a "fair and impartial investigation" does not necessarily import the right to the procedural trappings of a full blown trial, including right to counsel and the right to cross-examine statements made. It notes that so long as the grievor is not subjected to cross-examination there would appear to be no departure from the standard of fairness if other witnesses are also not cross-examined Lastly, it was noted that if the parties had intended to confer upon the grievor the right to cross-examine other witnesses, that right would have been expressly provided, as has been done in the language of other collective agreements.

I am satisfied that the principles expressed in **CROA 1562** apply in the instant case. Article 8.1 of the collective agreement mandates that no employee is to be disciplined or dismissed "... until after a fair and impartial investigation has been held ...". Article 8 is clear in its elaboration of procedural rights of the employee at the time of an investigation. Article 8.2 insures adequate notice of the time, place and subject matter of the investigation. Article 8.3 confers upon the employee the right to be accompanied and assisted by a fellow employee or Union Representative. Article 8.4, in turn, guarantees that an employee may be present while any witnesses whose evidence may touch on his responsibility are examined, or alternatively, has a right to a copy of that evidence in a written form. Next, the article confers upon the employee the right to "offer rebuttal" to any evidence against him. In the Arbitrator's view that must be construed as the right to offer his own evidence, or the evidence of other witnesses, in rebuttal. It would, in my view, strain the plain meaning of the language, and be inconsistent with the overall intention of article 8 of the Agreement, to interpret those words as implicitly conferring a right of cross-examination.

That interpretation would, moreover, offend the practical sense of article 8.4. To the extent that some or all of the evidence adduced might be conveyed to the grievor in a written form, rebuttal could not take the form of cross-examination. It must be borne in mind that in framing the provisions of article 8 the parties have given effect to their mutual interest to have investigative procedures proceed expeditiously and informally, while guaranteeing certain procedural standards to the employee concerned.

Had they intended cross-examination to be part of that procedure, they could have so provided. Absent such a provision, given the language and purpose of article 8, the Arbitrator cannot conclude that article 8.4 is intended to confer a right of cross-examination. It should perhaps be stressed, however, that if a grievor is himself cross-examined, the requirement of a fair proceeding would, in all likelihood, imply that he be given the same right with respect to other witnesses.

I turn to consider the merits of the grievance. It is well settled that when discipline is imposed for conduct which would qualify as criminal the standard of proof to support the allegation must be commensurate with the gravity of the offence. While the employer must establish its case on the balance of probabilities, the Boards of Arbitration and the Courts have consistently required clear and compelling evidence to tip the balance whenever criminal or quasi-criminal wrongdoing is alleged.

It may be noted that neither party sought to adduce any further evidence at the arbitration hearing. On a review of the transcripts of evidence filed, I am satisfied, on the balance of probabilities, that the grievor, Mr. Knutson, is guilty of the pilferage with which he was charged. In support of that conclusion is the evidence of both Dock Supervisor Gord Koshowski and Warehouseman Gary Fuller. Both men testified to seeing Grievor Knutson opening a carton of freight, containing nuts addressed to the Laura Secord Candy Shop. Their evidence and the photographs of the freight car in question, taken by the Dock Supervisor, substantially undermine the statement of Grievor Knutson that the carton in question fell while being moved from where it was stacked close to the ceiling of the

boxcar. In fact, as the photographs confirm, the only skid bearing goods destined to Laura Secord was on the floor of the boxcar standing some two or three feet in height. On the whole of the evidence I can see no basis to overturn any assessment of discipline registered against Mr. Knutson.

However, the evidence is considerably less compelling as against employees Craig and England. They were assessed demerit marks for "being party" to Mr. Knutson's action. Serious doubt arises as to what degree of culpable involvement they may have had. In a letter dated November 12, 1985, Terminal Manager J. C. Anderson writes to Union Protective Chairman B. Lynn, respecting Craig and England, in part: "additionally, both these gentlemen were observed as being party to the act (being there when the act occurred).". At the arbitration hearing it was not suggested by the Company that merely being present in the boxcar at the time of Mr. Knutson's misdeeds would clothe the grievors Craig and England with any degree of guilt. While it was suggested by the Company's representatives that these two employees filled their pockets with the pilfered nuts, the quality of the evidence adduced casts serious doubts on that assertion. The statement of Dock Supervisor Koshowski contains no observations on his part to inculpate either Craig or England. It is significant that his statement was recorded on October 9, 1985, the date of the incident in question.

Two days later on October 11, 1985, Employee Fuller was interviewed by Mr. K. Olson, Supervisor of Safety and Training. Mr. Olson's report of that date confirms that during their meeting Mr. Fuller read the report of Supervisor Koshowski written on October 9, 1985. According to Olson's account, Fuller "...confirmed that he did witness Clint Knutson physically tear open a carton addressed to Laura Secord Candy Shop. The other employees present did not appear to be a party to the act of Clint Knutson...". While it may be that that account is Mr. Olson's interpretation of what was conveyed by Mr. Fuller, it nevertheless calls into serious question the second account related by Mr. Fuller, only one week later on October 18, 1985, In a written statement made on that day Mr. Fuller related "... there were four guys in the boxcar at the time. Two other guys inside also participated by grabbing peanuts and stuffing their front pants pockets also. I am not sure which characters (their names) did this.. Apart from concern over the contradiction between his initial interview with Mr. Olson and the subsequent statement by Mr. Fuller, grave doubt is raised by the apparent admission by Mr. Fuller that he does not know which of the four employees in the boxcar participated in the pilferage. According to the transcripts of evidence filed, a fourth employee named Doug Blake also appears to have been present in the boxcar. It appears that three employees beside Knutson were there, yet according to Mr. Fuller only two joined in the pilferage and these he could not name.

Bearing in mind the standard of evidence required in a case of this kind, even if the second account of Mr. Fuller is accepted as truthful, it cannot be interpreted as establishing the guilt of employees Craig and England. There is nowhere in the evidence any direct testimony asserting that they participated in the pilferage. In the circumstances the Arbitrator cannot sustain the position of the Company that just cause is disclosed for the demerit marks assessed against Mr. Craig and Mr. England.

For the foregoing reasons the grievance of Mr. Knutson is denied and those of Messrs. Craig and England are allowed. The demerit marks assessed against Mr. Craig and Mr. England are to be removed from their records forthwith.

(signed) MICHEL G. PICHER
ARBITRATOR