CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2830

Heard in Montreal, Tuesday, 11 March 1997

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

TRANSPORTATION COMMUNICATIONS UNION

DISPUTE:

Dismissal of Mr. P. Berryman on July 15, 1996, for arranging for drivers to work beyond the legal maximum number of hours, failure to follow proper procedures in submitting driver sheets, providing a fictitious name for inclusion on driver sheets, and for accepting cash payment for contracted drivers in connection with pick-up and delivery of empty CP Rail Intermodal containers from Obico to Vaughan during the week of October 24, 1994.

JOINT STATEMENT OF FACT:

In accordance with *CROA Award 2702*, an investigation commenced with Mr. Berryman on May 3, 1996, in connection with the events during the week of October 24, 1994 and his involvement in arranging the pick-up and delivery of empty CP Rail Intermodal containers from Obico to Vaughan.

Based on the facts adduced from the investigation, Mr. Berryman was dismissed from Company service on July 15, 1996, for arranging for drivers to work beyond the legal maximum number of hours, failure to follow proper procedures in submitting driver sheets, providing a fictitious name for inclusion on driver sheets, and for accepting cash payment for contracted drivers in connection with pick-up and delivery of empty CP Rail Intermodal containers from Obico to Vaughan during the week of October 24, 1994.

JOINT STATEMENT OF ISSUE:

The Union progressed a grievance requesting that Mr. Berryman be restored to his employment and compensated in full back to the day he was originally held out of service (November 21, 1994). The Union specifically requested the following: **(a)** A gross-up payment to compensate for the higher marginal tax rate of a lump sum restitution of wages that were earned over a three calendar year period. **(b)** Interest on the outstanding amount. **(c)** Reconstruction of lost overtime opportunities and, based on his historic use of such opportunities, suitable compensation. **(d)** Reconstructed shift differentials based on reconstructed job bulletins. **(e)** Payment of the 1994 flat rate 2%, with interest to February of 1996, when the Arbitrator ruled in a preliminary matter that Mr. Berryman enjoyed protection of belonging to the bargaining unit.

The Union bases its above requests on the following allegations: **(a)** Mr. Berryman was not afforded a fair and impartial investigation. **(b)** The process used in the investigation was tainted, in that the Company used and made reference to material gathered in its earlier, aborted investigation which the Arbitrator clearly stated in his decision did not meet the standards of article 27. **(c)** The Officer conducting the investigation acted in bad faith, and should have disqualified himself from any involvement in the matter. The Union alleges that the bad faith was evidenced by his involvement in a scurrilous document, namely the Company's brief in respect of the April 1996 CROA hearing. **(d)** The Officer conducting the investigation acted in bad faith in that he should have had the investigation conducted by an Officer not associated with CP Intermodal. The Union alleges that the Investigating Officer had a personal stake in finding the grievor responsible to the point of dismissal. **(e)** The investigation revealed no information that Mr. Berryman had failed to perform the duties loyally and to the best of his ability. **(f)** There is no evidence that there was a standard of proper procedures for Intermodal Clerks to follow in regards to submitting driver sheets, providing fictitious names, or for accepting cash payments for drivers. **(g)** The reasons given for the instant dismissal are totally at variance from the reasons for the initial dismissal. **(h)** The conclusions reached are unreasonable and not supported by the facts.

Notwithstanding the above, the Union also views that the Company violated mandatory time limits in rendering its decision and that, therefore, it is precluded from taking any action against the grievor.

The Company has declined the Union's grievance stating that the investigation was fair and impartial, that the time limits stated in the collective agreement are directory and not mandatory and that, based on the facts adduced, dismissal was warranted.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) P. J. CONLON	(SGD.) C. GRAHAM
GENERAL CHAIRMAN	FOR: GENERAL MANAGER, FACILITIES AND ASSET MANAGEMENT

There appeared on behalf of the Company:

C. Graham	– Labour Relations Officer, Calgary
K. Ranger	– Manager, Intermodal Services, Toronto

And on behalf of the Union:

P. J. Conlon	– Assistant Division Vice-President, Toronto
N. Lapointe	– Assistant Division Vice-President, Montreal
H. Devlin	– Witness

AWARD OF THE ARBITRATOR

In **CROA 2702** this Office ruled that the instant grievance is arbitrable, and directed, in part, as follows:

> … the grievor be treated as continuing to hold the status of an employee, that his discharge be revoked pending an investigation generally in keeping with article 27 of the collective agreement, and that he be deemed held out of service pending the outcome of that investigation.

Pursuant to the foregoing direction the Company proceeded to conduct a disciplinary investigation of the grievor in relation to events which occurred at the Vaughan Intermodal Terminal during the week of October 24, 1994. As a result of that inquiry the employer decided to dismiss Mr. Berryman for a number of infractions, including arranging for truck drivers to work beyond legal limits, disregard of proper procedures in respect of driver sheets, fraudulently providing fictitious names for truck drivers and for accepting cash payments for contract drivers involved in the pick up and delivery of empty intermodal containers transported from Obico to the Vaughan terminal.

There is little substantial dispute regarding the events of the week of October 24, 1994. Mr. Berryman was charged with obtaining trucking services to pick up and carry empty containers from the Obico terminal to the Vaughan terminal. It does not appear disputed that, to facilitate the accomplishment of the work, Mr. Berryman instructed drivers to by-pass the gate registry systems at both terminals, thereby avoiding any recording of the movements of the units in question. To shield drivers from the illegality of working unlawfully long hours, Mr. Berryman created fictitious driver names and false driver sheets, and unit numbers, to justify the contract broker's invoice. He also requested cash payment from the contract broker to pay for the drivers, essentially becoming the conduit of cash from the contract broker to the drivers themselves. It appears that the entire incident came to light when two of the drivers to whom the grievor claims to have given envelopes of cash denied having received any such monies, and denied doing the work. The investigation resulted.

It does not appear disputed that certain of the monies involved have, to the present date, never been properly accounted for. While there is no direct evidence that the grievor himself retained any monies from the transactions involving the contract drivers, and the Company did not discharge the grievor for that infraction, the record discloses that Mr. Berryman was charged and ultimately convicted of fraud under $1,000.00 for his part in the falsification of records in relation to the work in question. The finding of guilt was combined with a grant of conditional discharge with one year's probation by the Honourable Judge P.C.J. Purvis of the Ontario Court (Provincial Division) at Newmarket, Ontario on September 25, 1996. As appears from the Court records, it is also common ground that the grievor was previously convicted, on a guilty plea, of the possession of stolen property, in 1992.

The Union raises a number of procedural objections in respect of the investigation conducted by the Company. Firstly, it asserts that the lapse of some sixty-nine days from the conclusion of the disciplinary investigation to the assessment of discharge is in breach of what it characterizes as mandatory time limits, contrary to article 27.3 of the collective agreement. Alternatively, it argues that if the time limits are directory, the discipline should not be allowed to stand in light of what it asserts was gross negligence by the Company.

The Company's representative notes that the investigation commenced on May 3, 1996 and concluded with an interview with Supervisor E. Venslovaitis on May 27, 1996. For a time, however, the Company awaited the outcome of the criminal proceedings, at least until they were unduly delayed following the postponement of a date for the determination of criminal guilt, originally scheduled for June 10, 1996. In the result, it submits that the assessment of discipline effective July 15, 1996 was made in the context of mitigating circumstances, and that, in any event, it is not in violation of any mandatory time limits within the provisions of article 27.3.

Article 27.3 of the collective agreement provides, in part, as follows:

> **27.3 (a)** A decision shall be rendered within 21 calendar days following the date of completion of the investigation, unless otherwise mutually agreed.

It is also useful to compare article 28.4, which deals with time limits in the grievance and arbitration process:

> **28.4** When a grievance based on a claim for unpaid wages is not progressed by the Union within the prescribed time limits, it shall be considered as dropped. When the appropriate officer of the Company fails to render a decision with respect to such a claim for unpaid wages within the prescribed time limits, the claim will be paid. The application of this rule shall not constitute an interpretation of the collective agreement.

For reasons reviewed in prior awards, the Arbitrator cannot sustain the position of the Union that the time limits reflected in article 27.3 of the collective agreement are mandatory (**CROA 1696** *and* **1733**). As can be seen from a review of the language quoted above, the parties have, in the case of the failure of the Company to render a decision in respect of a claim for unpaid wages, specifically articulated the consequence, within the language of article 28.4, which is that the claim will be paid. By contrast, there is no explicit language to indicate any specific adverse consequences in the event the Company does not meet the twenty-one calendar day time limit for issuing a decision following a disciplinary investigation. For the reasons amply discussed in the cases previously cited, and notwithstanding the able arguments of the Union's representative with respect to the frequency of the use of the word "shall" within the general context of article 27, I am satisfied that the Company was not constrained by mandatory time limits in the case at hand. I am further satisfied that in light of the extraordinary nature of the facts it was dealing with, including the parallel criminal trial which was unfolding at the same time, the delay of some two months was not unreasonable, nor was it prejudicial to the grievor in the circumstances. The Union's position with respect to timeliness, therefore, must be dismissed.

The Union next challenges the fairness and impartiality of the investigation, specifically suggesting that the conducting of the investigation by Supervisor Ken Ranger was inappropriate. The thrust of the Union's submission is that Mr. Ranger could be viewed as having a stake in the outcome of the investigation, as he had previously been involved in the decision to terminate Mr. Berryman pursuant to the Company's belief, at the time, that the grievor was acting in a supervisory or managerial capacity, a contention rejected by the Arbitrator in **CROA 2702**. It also argues that Mr. Ranger would have been constrained to defend the earlier actions in respect of Mr. Berryman in the face of the recent arrival of Mr. C.D. Sissons, a new manager to whom Mr. Ranger would report.

The Arbitrator cannot sustain the allegations of impropriety or apprehended bias made against Mr. Ranger. Plainly, the standard of a fair and impartial investigation must be construed within the context of the workplace in which it arises. There can little doubt that given the gravity of the conduct alleged against Mr. Berryman, and the criminal prosecution which resulted, few if any members of management beyond Mr. Ranger had a working knowledge of the operations of the Vaughan Intermodal Terminal, so as to be in a position to conduct a meaningful investigation. Significantly, there is no suggestion that Mr. Ranger was ever himself involved in the facts of the incident giving rise to the investigation, or that he conducted the investigation in other than a fair and dispassionate manner. The mere fact that Mr. Ranger had previously been involved in investigating Mr. Berryman in his alleged capacity as a temporary supervisor does not, in the Arbitrator's opinion, disqualify him from renewing or resuming the investigation following the award of this Office, which determined that in fact the grievor was entitled to the separate procedures provided under article 27 of the collective agreement. I do not see in the record anything, therefore, which would sustain the Union's allegation with respect to Mr. Ranger's involvement. Nor do I place any weight on the fact that the Company's brief to the Arbitrator in **CROA 2702** appears to have contained a factual error concerning the date of the prior conviction of Mr. Berryman. As explained by the Company's representative, the error was hers, and not Mr. Ranger's, based on a mistaken interpretation of police records made available to the Company's industrial relations officers.

As a third preliminary matter, the Union asserts that the grievor should be entitled to the payment of a wage adjustment made under article 6.3(a) of the collective agreement, whereby employees in the bargaining unit on

September 1, 1995, the effective date of the new collective agreement, are to be paid a lump sum payment equalling two percent of their 1994 earnings. Although the grievor was terminated on January 5, 1995, the Union's representative asserts that the decision of the Arbitrator in **CROA 2702**, which maintained the grievor's employee status, entitles to grievor to the payment of the wage adjustment.

I cannot agree. The issue in these proceedings is whether the Company was entitled to discharge the grievor effective January 5, 1995. If it was not, an order for his reinstatement would properly deal with the matter of compensation. If, on the other hand, it had just cause to terminate Mr. Berryman's employment, and that decision is not reversed, he cannot claim the benefit of employee status for any period of time after that date. As decisions of this Office have previously noted, employee status under the terms of a collective agreement can have many meanings, referring variously to persons who are actively at work, who are on leave of absence, on layoff or who, like the grievor, have been discharged, subject only to a right to process a grievance under the just cause provisions of the collective agreement. The core issue in **CROA 2702** was whether the grievor was a bargaining unit employee at the time of his discharge. The Arbitrator determined that he was, and that he continued to have the rights of an employee in respect of the merits of his discharge. That finding cannot be construed so as to give any entitlement he would not otherwise have to the benefits of article 6.3(a) of the current collective agreement. Those rights must depend on the outcome of this grievance.

I turn to consider the merits of the dispute. In mitigation of the grievor's conduct the Union argues that a certain degree of laxity operates within dispatch procedures, and that dispatchers in the position of Mr. Berryman are frequently encouraged by management to bend the rules to get a pressing work load accomplished. As Union witness Herb Devlin indicated at the hearing, it is not uncommon for trucking moves to be made without simultaneous documentation, so long as the documentation is later completed, so as to catch up with the work. The Union's representative also points to evidence within the record to suggest that the grievor's immediate supervisor, Mr. E. Venslovaitis either generally encouraged or tolerated corner cutting to get the job done.

The Arbitrator appreciates the weight of that argument. Indeed, it appears to have been something of a consideration for the criminal court with respect to the determination of sentence upon the fraud conviction of Mr. Berryman. The mitigating value of that argument, however, only goes so far. Certain critical facts remain undisputed. Firstly, as an individual with a university education, the grievor cannot assert a general ignorance of the importance of maintaining accurate and legitimate corporate business records. There is, very simply, no evidence to suggest that the Company has ever previously instructed or knowingly tolerated a dispatcher to resort to the payment of drivers by cash, as a means to conceal the fact that they are working hours which are unlawful under the **Canada Labour Code**, or other pertinent legislation. There is, similarly, no evidence to indicate that any Company supervisor suggested, encouraged or condoned the use of fictional driver names to further conceal such unlawful activity.

The Arbitrator has difficulty with the suggestion of the Union that the grievor should somehow be forgiven these transgressions because he was not presented with a copy of the Company's code of ethical conduct. In the Arbitrator's view the resort to cash transactions and the deliberate fabrication of false driver names and driver entries within the Company's records is a form of fraud so fundamental that any employee in the position of the grievor should reasonably have known that it was in gross violation of his obligations to his employer. The considerations raised by the Union may properly have some bearing in mitigation on the passing of a criminal sentence. However, they are not persuasive, in the Arbitrator's eyes, for the purpose of rebutting the assertion of the Company that, whatever the circumstances and motives, the actions of Mr. Berryman were so extreme as to destroy the bond of fundamental trust essential to the continuation of his employment relationship. Regrettably, the Arbitrator must conclude that that bond of trust is irrevocably broken. In the circumstances, therefore, I must find that the grievor's discharge was justified and cannot conclude that this is an appropriate case for a reduction or substitution of penalty.

For the foregoing reasons the grievance must be dismissed.

March 14, 1997

(signed) MICHEL G. PICHER
ARBITRATOR