

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2901

Heard in Calgary, Tuesday, 11 November 1997

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

**CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS
(UNITED TRANSPORTATION UNION)**

DISPUTE:

Discipline assessed to G.C. Biden, Moose Jaw, Saskatchewan.

JOINT STATEMENT OF ISSUE:

Subsequent to a formal investigation, Yard Foreman Biden was assessed 20 demerit marks for allegedly: "leaving Company property prior to the end of your assigned shift without authority; for performing your duties as a Yard Foreman at a level less than which you are capable; for becoming involved in a confrontation with a supervisor, March 17, 1996, Moose Jaw Yard."

The Union has requested that the discipline be removed from Yard Foreman Biden's record for two reasons: 1.) The investigation was neither fair nor impartial. 2.) The evidence adduced at the investigation did not support the Company's decision to render discipline.

The Company has disagreed with the Union's contention and declined to remove the discipline.

FOR THE COUNCIL:

(SGD.) J. KNOWLES
FOR: GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) K. E. WEBB
FOR: DISTRICT MANAGER, PRAIRIE DISTRICT

There appeared on behalf of the Company:

R. V. Hampel	- Labour Relations Officer, Calgary
K. E. Webb	- Manager, Labour Relations, Calgary
G. S. Seeney	- Manager, Labour Relations, Calgary
R. M. Smith	- Labour Relations Officer, Calgary

And on behalf of the Council:

L. O. Schillaci	- General Chairperson, Calgary
B. L. McLafferty	- Vice-General Chairperson, Moose Jaw
J. K. Jeffries	- Vice-General Chairperson, Cranbrook
E. DeCredico	- Vice-General Chairperson, Nanaimo
J. Knowles	- Vice-General Chairperson, Calgary
D. H. Finnson	- Secretary, Saskatoon
G. C. Biden	- Grievor

AWARD OF THE ARBITRATOR

The evidence discloses, without apparent dispute, that on March 17, 1996 Yard Foreman Biden, who was then assigned to the 1559 Tramp in the Moose Jaw yard and his immediate supervisor, Operations Co-ordinator Alan Dyck, got involved in a heated exchange which included verbal liberties worthy of neither of them. As a result, the grievor was assessed twenty demerits under three heads: leaving work prematurely, not being sufficiently productive and showing disrespect towards his supervisor.

The Council asserts, as a preliminary matter, that the discipline cannot stand by reason of the Company's violation of the obligation to conduct the disciplinary investigation of Mr. Biden in a manner that is fair and impartial, and in keeping with the requirements of article 32 of the collective agreement which provides, in part, as follows:

32 (c) If the employee is involved with responsibility in a disciplinary offence, he shall be accorded the right on request for himself or an accredited representative of the Union or both, to be present during the examination of any witness whose evidence may have a bearing on the employee's responsibility, to offer rebuttal thereto and to receive a copy of the statement of such witness.

32 (d) An employee will not be disciplined or dismissed until after a fair and impartial investigation has been held and until the employee's responsibility is established by assessing the evidence produced and no employee will be required to assume this responsibility in his statement or statements. The employee shall be advised in writing of the decision within 20 days of the date the investigation is completed, i.e., the date the last statement in connection with the investigation is taken except as otherwise mutually agreed.

The record discloses that the investigation of the grievor, including the examination of Locomotive Engineer deDelley, a member of his crew, proceeded on March 22, 1996, and that the examination of his yard helper, Mr. Lethbridge, on March 25, 1996 went forward notwithstanding the fact that the grievor was not present, and that a request for a postponement of the investigation until such time as he could be present was made by his union representative, Local Chairperson Barry McLafferty. It appears that the Company took the view that it was sufficient that the grievor's union representative was able to be present, even though the grievor was not. It does not appear disputed that Mr. Biden was absent for reasons justified on medical grounds.

The Arbitrator is compelled to sustain the Council's objection. As is clear from the language of article 32(c) of the collective agreement, it is an unqualified right of the employee that both he and his union representative be present at the examination of "... any witness whose evidence may have a bearing on the employee's responsibility". For reasons touched upon in prior awards of this Office (see **CROA 628, 1163, 1575, 1858, 2973, 2280 and 2609**) it is well established that a violation of the minimal standards of a fair and impartial investigation will cause any subsequent discipline to be null and void. If it were otherwise the mandatory requirements of article 32(c), and the elements of fairness and impartiality which they represent would be virtually meaningless.

If, in the instant case, it could be established that the grievor's absence from the investigation was without reasonable cause or was abusive, the position of the Company might be sustainable. Plainly, an employee cannot frustrate or defeat the Company's ability to conduct an investigation by improper conduct. The evidence in the instant case, however, does not establish that the grievor's absence on the days for which his union representative sought postponement of the investigation was other than for valid reasons. In the circumstances, the Arbitrator is without any discretion other than to apply the minimal procedural protections of article 32 as they were intended. Any supervisory officer conducting an investigation under the terms of that article knows, or reasonably should know, that a disregard of article 32(c) will bring the proceedings outside the minimal standard of a fair and impartial investigation mandated by article 32(d) of the collective agreement, and render null and void any resulting discipline.

For the foregoing reasons the Arbitrator declares that the discipline assessed against Mr. Biden is null and void, *ab initio*. The grievance is therefore allowed. The Company is directed to strike the twenty demerits assessed against the grievor from his disciplinary record.

November 25, 1997

(signed) MICHEL G. PICHER
ARBITRATOR