

# CANADIAN RAILWAY OFFICE OF ARBITRATION

## CASE NO. 2957

Heard in Calgary, Thursday, 14 May 1998

concerning

**CANADIAN PACIFIC RAILWAY COMPANY**

and

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

### **DISPUTE:**

Thirty (30) demerit marks assessed against the record of Conductor W.R. Plomish on November 15, 1996.

### **JOINT STATEMENT OF ISSUE:**

Conductor W.R. Plomish was assessed 30 demerit marks for harassment of his co-workers.

The Council contends that the Company had no just cause for disciplining Conductor Plomish on the basis that the evidence did not establish his responsibility for any of the violations cited on the Form 104.

Furthermore, the Council contends that the investigation was not carried out in a fair and impartial manner as required under the provisions of the collective agreement.

The Council also contends that Conductor Plomish has been disciplined twice for the same incident.

The Council requests that the 30 demerit marks be removed from Conductor Plomish's record and that he be made whole.

The Company contends that the discipline assessed was appropriate and has denied the Council's contentions and request for removal of this discipline.

### **FOR THE COUNCIL:**

**(SGD.) J. KNOWLES**

**FOR: GENERAL CHAIRPERSON**

### **FOR THE COMPANY:**

**(SGD.) K. E. WEBB**

**FOR: B. C. DISTRICT MANAGER**

There appeared on behalf of the Company:

R. V. Hampel	– Labour Relations Officer, Calgary
K. E. Webb	– Manager, Labour Relations, Calgary
M. E. Keiran	– Director, Labour Relations, Calgary
G. S. Seeney	– Manager, Labour Relations, Calgary

And on behalf of the Council:

D. E. Ellickson	– Counsel, Toronto
L. O. Schillaci	– General Chairperson, Calgary
J. K. Jeffries	– Vice-General Chairperson, Cranbrook
J. Knowles	– Vice-General Chairperson, Calgary
E. DiCredico	– Vice-General Chairperson, Nanaimo
D. H. Finnon	– Secretary/Treasurer, Saskatoon
W. R. Plomish	– Grievor

## AWARD OF THE ARBITRATOR

The material before the Arbitrator establishes that the Company did, as the Council alleges, fail to give to the grievor a fair and impartial investigation in keeping with the requirements of article 32 of the collective agreement. That article provides, in part, as follows:

**32 (a)** When an investigation is to be held, each employee whose presence is desired will be notified as to the time, place and subject matter.

...

**(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 each witness.

**(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 establishes that the grievor has experienced a long-standing antagonism between himself and fellow employee John Cowan. Following a letter of complaint made by the grievor that he was being harassed, partly on the basis of his physical disability, by Mr. Cowan and by another employee, Conductor Tim Walzak, the Company undertook an investigation of the two employees concerned. As part of that investigation it received a statement from the grievor on October 24, 1996. During the course of the investigation, which resulted in the assessment of discipline against Conductors Cowan and Walzak, certain letters and statements alleging improper conduct on the part of Mr. Plomish were entered into the record. It is not disputed that Mr. Plomish was not in attendance in the proceedings, which were instituted to deal with charges against Mr. Cowan and Mr. Walzak, when the statements contrary to his own interests were entered in evidence.

It is common ground that Mr. Plomish was, however, the subject of a separate disciplinary investigation concerning allegations of his own improper conduct in relation to statements made to passengers while he was on duty on the West Coast Express. Those statements, some of which concerned negative comments about Mr. Cowan, resulted in the grievor being taken out of that passenger service, a matter dealt with separately in **CROA 2956**. During the course of the statement given by Mr. Plomish in the second investigation made against Conductors Cowan and Walzak, investigating officer C.W. Gosling advised Mr. Plomish that the documentation and records of the separate investigation of Mr. Plomish for his department in front of passengers of the West Coast Express would be entered in evidence in the investigation of Conductors Cowan and Walzak, to which the grievor did not object.

It is important to note that during the prior investigation of the allegations against Mr. Plomish in respect of his conduct in passenger service, the parties agreed that in fact two separate investigations should proceed in respect of the grievor's conduct: the first to be confined to his actions as a conductor in passenger service and the second to deal with the larger question of his antagonistic relationship with Mr. Cowan. There appears to be little doubt that Mr. Gosling came to believe that the investigation instituted against Conductors Cowan and Walzak also involved the second part of the investigation against Mr. Plomish. In the result, following the conclusion of the investigation of the two other conductors, the Company assessed thirty demerits against Mr. Plomish "... for inappropriate and unacceptable behaviour as evidenced in your engaging repeatedly in conduct in the workplace obviously meant to offend, humiliate and demean a fellow employee while employed as a conductor in West Coast Express commuter rail service."

In the Arbitrator's view the discipline cannot stand, as the procedure followed by the Company is incompatible with the important procedural protections provided expressly within article 32 of the collective agreement. There was plainly no notice to Mr. Plomish, at any point, that the investigation being held into his complaint against Conductors Cowan and Walzak was also to be an investigation against himself, as a result of which he might be liable to discipline. In the circumstances there was no compliance with article 32(a) of the collective agreement. Secondly, even if it could be found that the investigation of the two other conductors should also be viewed as a

investigation of the grievor, the evidence is uncontradicted that certain statements highly prejudicial to the grievor were entered into the record without his being advised of their content or being provided any opportunity to offer rebuttal to them. On that basis, even if the investigation was an investigation of all three conductors, Mr. Plomish was denied the opportunity to offer rebuttal to adverse witnesses statements received in evidence against him, in violation of article 32(c). In that circumstance the Company should, at a minimum, have taken a supplementary statement from Mr. Plomish to give him the opportunity of reply and defence.

For the foregoing reasons the Arbitrator is compelled to conclude that the procedure followed by the Company leading to the assessment of thirty demerits against the grievor was not in keeping with the requirement of a fair and impartial investigation as contemplated within article 32 of the collective agreement. In the result that discipline must be viewed as a nullity, and the grievance must therefore be allowed.

The Arbitrator directs that the thirty demerits be struck from the grievor's record forthwith.

May 19, 1998

**(signed) MICHEL G. PICHER**  
**ARBITRATOR**