CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3112

Heard in Calgary, Wednesday, 10 May 2000

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS (BROTHERHOOD OF LOCOMOTIVE ENGINEERS)

DISPUTE:

The assessment of a Caution and 20 demerit marks to Locomotive Engineer R.W. Longworth resulting in his dismissal for an accumulation of demerit marks.

JOINT STATEMENT OF ISSUE:

On November 16, 1999, Locomotive Engineer Longworth's discipline record was assessed a caution for his inappropriate and unacceptable conduct and radio transmission on October 7, 1999.

On December 10, 1999, Locomotive Engineer Longworth's record was assessed 20 demerit marks for his inappropriate, unacceptable and insubordinate conduct, as evidenced by his behaviour towards a Company officer during a properly constituted formal investigation, between October 20 and November 1, 1999.

As a result of the above assessments, Mr. Longworth's discipline record was in excess of 60 demerit marks and he was dismissed from Company service on December 10, 1999.

The Council has requested that Locomotive Engineer Longworth be reinstated into Company service without loss of seniority, and that he be compensated for lost wages, interest on his lost wages and benefits form the time removed from service.

The Company has declined the Council's grievance.

FOR THE COUNCIL:	FOR THE COMPANY:
(SGD.) D. CURTIS	(SGD.) C. M. GRAHAM
GENERAL CHAIRMAN	FOR: GENERAL MANAGER, FIELD OPERATIONS

There appeared on behalf of the Company:

C. M. Graham	– Labour Relations Officer, Calgary
K. E. Webb	– Manager, Labour Relations Calgary
M. E. Keiran	– Director, Labour Relations, Calgary
R. Sutherland	– Labour Relations Officer, Calgary

And on behalf of the Council:

J. Flegel	– Sr. Vice-General Chairman, Saskatoon
D. Curtis	– General Chairman, Calgary
T. G. Hucker	– Vice-President, National Legislative Representative, Ottawa
G. Ranson	– Local Chairman, Vancouver
R. W. Longworth	– Grievor

AWARD OF THE ARBITRATOR

There are two dimensions to this grievance. The first involves the issue of whether the Company properly assessed a caution against the grievor for the content of his remarks to a rail traffic controller on October 6, 1999. The second is whether the Company was justified in assessing twenty demerits, and subsequently discharging Mr. Longworth, for his allegedly uncooperative and insubordinate conduct during the disciplinary investigation relating to the incident of October 6, 1999. Related is the Council's objection to the fact that the grievor was held out of service during the course of the investigation concerning his conduct during the initial investigation.

I deal with the first issue at the outset. In my view it is clear from the record before me that on the day in question Locomotive Engineer Longworth did communicate to the rail traffic controller a threat to exercise his right to take lunch in such a way as to tie up yard operations. His comments in that regard came as a result of some concern, apparently expressed by a number of yard crews to the rail traffic controller, in relation to congestion and delays in the yard and accommodations to be made to assist the movement of a commuter passenger train.

The Arbitrator is satisfied that the statement of Mr. Longworth went beyond shop talk or the mere expression of displeasure. The threat to take steps, whether or not they are available to the employee under the collective agreement, for the sole purpose of frustrating the Company's operations, and as a means of getting one's way is clearly unacceptable. Mr. Longworth's remarks to the rail traffic controller seemed to make it clear that he threatened to take steps to tie up yard operations if a light engine unit was not immediately moved to Coquitlam, as he wished. Given the nature of his statement, quite apart from whether it had an unsettling effect on the rail traffic controller, the Company was justified in investigating and issuing a disciplinary response in the form of a caution to Mr. Longworth. The Arbitrator therefore sees no reason to disturb the assessment of the caution against Mr. Longworth for the incident of October 6, 1999.

The issue of greater substance involves the discipline assessed against Mr. Longworth for his conduct during the course of the investigation of the incident of October 6, 1999. That investigation was held on October 25, 26 and November 1, 1999. It is common ground that on the 25th, at the first session of the investigation, Mr. Longworth utilized a personal tape recorder to record the proceedings. This was known to the investigating officer, and he apparently took no objection to it at the time.

At the commencement of the following day, on October 26, the investigating officer advised Mr. Longworth that he could not utilize a tape recorder during the investigation proceedings. There followed a disagreement between the investigating officer and Mr. Longworth as to whether he should have a right to tape record the proceedings, and a brief adjournment. When the hearing reconvened Mr. Longworth was asked by the investigating officer: "Are you still tape recording this proceeding?" Mr. Longworth then replied, "The question is irrelevant to this investigation. Out of courtesy to the investigating officer, I informed him that I was recording the investigation. Federal jurisprudence requires only that one part of the party to be aware of the recordings. In the future I will not inform the Company that I am recording any of my conversations. I would like it noted that the evidence the Company is using in this investigation is a recorded conversation I had with a fellow employee."

It appears that the disagreement between the investigating officer and Mr. Longworth became protracted and caused some agitation. At one point Mr. Longworth produced a camera and took a picture of the investigating officer, presumably for evidence to be used in another forum. Then, demonstrating the layman's equivalent of the adage that a lawyer who represents himself has a fool for a client, Mr. Longworth gratuitously asserted his belief that he was entitled to use both his tape recorder and camera, as a matter of federal law. As the stand-off continued, the investigating officer suspended the proceedings and advised the grievor that he was withheld from service.

The investigation reconvened on the morning of November 1, 1999. At the commencement of the proceedings the investigating officer reminded the grievor of his ruling with respect to the use of a tape recorder, and warned Mr. Longworth that if the grievor persisted in being uncooperative in the investigation it would be suspended, with the Company's decision to be made on the basis of the information then before it. When Mr. Longworth still refused to answer the investigating officer's question as to whether he was tape recording the proceedings, the investigating officer brought the process to an end. Mr. Longworth remained out of service until December 10, 1999 when his discipline record was assessed twenty demerits for his obstructive conduct during the investigation. He was also advised of his dismissal for the accumulation of demerits in excess of the permissible limit of sixty, under the Brown system of discipline. Prior to that assessment his record stood at fifty-five demerits.

The investigation process under the instant collective agreement is governed by article 19. It provides, in part, as follows:

> **19 (a)** When an investigation is to be held each engineer whose presence is desired will be notified as to the time, place and subject matter.
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> **19 (b)** An engineer, if he so desires, may have an accredited representative of the Brotherhood to assist him. The engineer will sign his statement and be given a carbon copy of it.
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> **19 (c)** If the engineer is involved with responsibility in a disciplinary offence, he shall be accorded the right on request for himself or an accredited representative of the Brotherhood, or both, to be present during the examination of any witness whose evidence may have a bearing on the engineer's responsibility, to offer rebuttal thereto and to receive a copy of the statement of such witness.
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> **19 (d)** Engineer will not be disciplined or dismissed until after a fair and impartial investigation has been held and until the engineer's responsibility is established by assessing the evidence produced and the engineer will not 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. It is understood that in complying with the provisions of this Clause the Company is not limited or restricted in the designation of the officer who is to conduct the investigation.
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> **19 (e)** An engineer is not to be held off unnecessarily in connection with an investigation. Layover time will be used as far as practicable. An engineer who is found blameless will be reimbursed for time lost in accordance with article 5(e).

As previously noted in the awards of this Office, the investigation process is not intended as the equivalent of judicial or quasi-judicial proceedings. It is conceived as an informal process to, on the one hand, assist the Company in the gathering of information concerning an incident which could result in discipline and, on the other hand, affording to the employee affected notice of the charge or charges being investigated, and an opportunity to receive and respond to the evidence in the possession of the Company, by way of rebuttal.

There is plainly nothing within the language of the collective agreement, much less within the long-standing practice in the industry, to suggest that an employee is entitled to bring a court reporter, a recording device or other means of transcription to an investigative interview being conducted by the Company. Should the Company agree to the employee having a tape recorder, there would obviously be no problem. However where, as in the instant case, the Company specifically directs the employee not to utilize a recording device, and the employee refuses to respond in such a way as to ensure compliance with that directive, the Arbitrator is compelled to conclude that the employee has failed to comply with a reasonable directive, and to that extent has demonstrated insubordination and a willingness to frustrate the investigative process. Needless to say, the taking of an unsolicited photograph of the investigating officer, without his or her permission, is equally inappropriate. On the basis of the evidence before me I am satisfied that the grievor was plainly liable to discipline for his ill-advised conduct during the course of the investigations conducted by the Company on October 26 and November 1, 1999.

The core issue is whether the stand-off between Mr. Longworth and the investigating officer, a confrontation arising from the investigation of a relatively minor incident resulting in the assessment of a caution against the grievor, is such as to justify the discharge of an employee of twenty-five years' service. The Arbitrator can readily understand the frustration of the Company and its officers in the face of Mr. Longworth's dubious assertion of federal rights, and his overly combative stance in a process that is not conceived as the equivalent of a trial.

There are, however, mitigating factors to be considered. Firstly, the grievor did disclose, during the course of the investigation on October 25, that he was taping the proceedings. There was then no apparent objection from the Company's investigating officer. The reversal of position on the following day would, perhaps understandably, have caused a degree of concern on the part of the grievor with what appeared to be a change in the rules. As well, what took place appears to have been a spinning out of control of an informal process, convened in respect of a relatively minor incident, escalating to the grievor's withdrawal from service and his eventual dismissal. In my view, notwithstanding the grievor's precarious disciplinary position at the time, and his obvious poor judgement, his removal from service pending a decision was not merited. The Company had not removed him from service after the

incident of October 6, 1999. He was not then, to any outward appearance, under investigation for what was contemplated to be a dismissable offence. Whatever may have transpired during the investigation proceeding, the quality and nature of his conduct on October 6, 1999 remained the same. Nor can his ill-advised conduct in the investigation be characterized as raising any real concerns about his ability to perform safe and productive work. On that basis I cannot sustain the position of the Company with respect to the grievor's removal from service pending the assessment of discipline against him on December 10, 1999.

The Arbitrator appreciates that the assessment of only five demerits for the grievor's failure to cooperate in the investigation could have resulted in his discharge. However, the fact remains that Mr. Longworth did not tape the investigation proceeding after he was told that he could no longer do so, nor did he attempt to photograph the investigating officer any further. Mr. Longworth's insensitivity to the proceedings and to the Company's right conduct them as it saw fit, subject of course to his right to grieve if he did not feel that he was being provided a fair and impartial investigation, does deserve a serious measure of discipline. That is particularly so to the extent that the grievor's prior record discloses a degree of recidivism in matters of inappropriate conduct towards Company officers. The registering of a suspension of some five months, being the time from the grievor's discharge to the hearing of this matter, should in my view cause Mr. Longworth to think more positively on the need to avoid "game playing" and to be co-operative in all matters relating to his employment, including disciplinary investigations.

For all of the foregoing reasons the grievance is allowed, in part. The Arbitrator directs that the grievor be reinstated forthwith into his employment, without loss of seniority, and that he be compensated for all wages and benefits lost for the period of time he was held out of service pending the assessment of discipline made against him on December 10, 1999. The time from that date until his reinstatement shall be recorded as a suspension for insubordination and obstruction of the Company's investigation into the incident of October 6, 1999.

May 12, 2000

(signed) MICHEL G. PICHER
ARBITRATOR