

# CANADIAN RAILWAY OFFICE OF ARBITRATION

## CASE NO. 3164

Heard in Calgary, Wednesday, November 15, 2000

Concerning

### CANADIAN PACIFIC RAILWAY COMPANY

And

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

#### **DISPUTE:**

Assessment of 25 demerit marks to Yardperson J.K. Fode and his subsequent dismissal for an accumulation of demerit marks.

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

On November 15, 1999, following an investigation into an incident that occurred in the Calgary Terminal on October 3, 1999, Yardperson J.K. Fode's discipline record was debited 25 demerit marks. He was subsequently dismissed for an accumulation of demerit marks under the Brown system of discipline.

The Union contends the discipline assessed to Yarperson J.K. Fode should be removed as the investigation into the incident was not conducted in a fair and impartial manner and violated article 32 of the collective agreement. Furthermore, the evidence produced does not support the decision to issue discipline. The Union further requests removal of the discipline, and reinstatement with full compensation of wages and benefits.

The Company has declined the Union's request stating that the investigation conducted was fair and impartial, that Mr. Fode's responsibility was established and that the discipline assessed was warranted and reasonable.

**FOR THE COUNCIL:**  
**(SGD.) D. H. FINNISON**  
**FOR: GENERAL CHAIRPERSON**

**FOR THE COMPANY:**  
**(SGD.) K. E. WEBB**  
**FOR: GENERAL MANAGER, OPERATIONS**

Appearing on behalf of the Company:

C. M. Graham	- Labour Relations Officer, Calgary
J. Copping	- Manager, Labour Relations, Calgary
B. Litowsky	- Yard Manager, Calgary
G. S. Seeney	- Manager, Labour Relations, Calgary
G. Wilson	- Legal Counsel, Calgary

Appearing on behalf of the Council:

M. A. Church	- Legal Counsel, Toronto
L. O. Schillaci	- General Chairperson, Calgary
D. H. Finnson	- Vice-General Chairperson, Calgary
G. R. Crawford	- Local Chairperson, Lethbridge
R. Van Pelt	- Vice-Local Chairperson, Lethbridge
J. K. Fode	- Grievor

## AWARD OF THE ARBITRATOR

It is not disputed that the grievor committed a negligent error while operating backpack equipment, resulting in a locomotive moving a short distance in the wrong direction, causing damage to two rail cars, in the amount of some \$2,730. As his disciplinary record stood at fifty-five demerits, the assessment of twenty-five demerits for that incident resulted in Mr. Fode's discharge.

The evidence before the Arbitrator confirms, however, that there was a violation of the grievor's right to a fair and impartial investigation, under the terms of article 32 of the collective agreement. Among other things, that provision mandates that the grievor be afforded the opportunity to be present at the statement of any witness whose evidence might have a bearing on his responsibility. It is common ground that when Mr. Fode's fellow crew member, Mr. Greg Porter, was examined on October 13, 1999 Mr. Fode was not present. The Arbitrator is satisfied that in fact Mr. Fode was in Calgary at the time, and that he did not receive proper notice of Mr. Porter's examination from the Company. The Company's officers appear to believe that a telephone call to the grievor's wife resulted in a message to him giving him specific notice of Mr. Porter's investigation. However, in fact that did not occur.

In matters of such importance it is clearly incumbent upon the Company to give proper notice, and to place itself in a position to ensure that such notice was in fact conveyed and received. The Company's evidence falls short of that standard in the case at hand. Mr. Fode's testimony, which is uncontradicted, is that he had some indication from Yard Manager B. Litowsky that he was considering holding the disciplinary investigations for both himself and Mr. Porter on their days off. Mr. Fode also acknowledges that he indicated to Mr. Litowsky that he was willing to waive the necessity of a forty-eight hour written notice of the investigations for the alternative of verbal notice.

The Arbitrator is satisfied that he never did receive verbal notice of Mr. Porter's investigation. According to his account, when he left Calgary to visit friends out of town on the 12th, he merely received a telephone call from his wife advising him that Mr. Litowsky had called, and that he should return the call to him. Mr. Fode relates that he reached the Yard Manager's home, and was advised by his daughter that he was asleep. Nothing further occurred, save that Mr. Fode returned to Calgary that same evening, and remained unaware of the examination of Mr. Porter which proceeded the next day. In the circumstances the Arbitrator is compelled to conclude that the Company failed to honour article 32(c) of the collective agreement which provides as follows:

**32 (e)** If the employee is involved with the responsibility in a disciplinary offense, 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.

The Company is without any evidence that Mr. Fode received the notice to which he was entitled as intrinsic to his right to be present at Mr. Porter's examination. Although I am satisfied that the grievor's right was violated, and that the discipline assessed against him must be found to be void *ab initio*, there are issues of equity with respect to the belief of the Company as to what transpired, and the apparent failure of the Council to object in a timely fashion. The evidence at the hearing confirms to the Arbitrator's satisfaction that Mr. Litowsky was under the impression, albeit erroneous, that Mr. Fode had in fact been advised by his wife of the specifics of the examination of Mr. Porter, and had decided not to attend. However, when Mr. Fode's examination was conducted several days later, on October 18, 1999, at which time Mr. Porter's statement was presented in evidence, nothing was raised with respect to any procedural objection by the Council. It appears that the procedural issue was raised only well after the assessment of discipline against Mr. Fode, as appears in a letter of the Council's General Chairperson, Mr. L.O. Schillaci, dated March 16, 2000.

In the Arbitrator's view the late raising of this issue has prejudiced the Company in that it assessed discipline resulting in the grievor's discharge without knowing that Mr. Fode was unaware of Mr. Porter's investigation or that the Council would contest that issue. In my view that goes to the issue of compensation. It would be unfair for the Council to be silent with respect to a fatal procedural irregularity, thereby allowing the Company to take the steps that it did without any awareness that a challenge would be made in that regard much later. Also, by now placing the Company in the position whereby the original discipline would be found to be void *ab initio*, the Council's original silence deprived the employer from considering a re-examination of Mr. Porter or an appropriate alternative disciplinary sanction.

The grievance is therefore allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without loss of seniority and without compensation for wages and benefits lost. The grievor's reinstatement shall also be conditional upon his accepting to be restricted from backpack service for such time as the Company deems appropriate.

November 20, 2000

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