CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3261

Heard in Calgary, Wednesday, 15 May 2002

concerning

CANADIAN PACIFIC RAILWAY

and

CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS
(UNITED TRANSPORTATION UNION)

DISPUTE:

Assessment of 30 demerit marks to Yardperson F.D. Terlecki and his subsequent dismissal for an accumulation of demerit marks.

JOINT STATEMENT OF ISSUE:

On October 6, 2000, following an investigation into an incident that occurred in the Winnipeg Yard on July 19, 2000, Yardperson Terlecki's discipline record was debited with 30 demerit marks. He was subsequently dismissed for an accumulation of demerit marks under the Brown system of discipline.

The Council contends the discipline assessed to Yardperson Terlecki 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. Alternatively, the discipline imposed was too harsh and in any event, the penalty of dismissal should be mitigated.

The Council requests removal of the discipline, reinstatement with full compensation for wages and benefits and no loss of seniority. Alternatively, the Council requests reinstatement on terms the Arbitrator considers appropriate.

The Company has declined the Council's requests.

FOR THE COUNCIL:	FOR THE COMPANY:
(SGD.) D. H. FINNSON	(SGD.) D. FREEBORN
FOR: GENERAL CHAIRPERSON	FOR: GENERAL MANAGER OPERATIONS

There appeared on behalf of the Company:

G. Wilson	– Counsel, Calgary
D. Freeborn	– Labour Relations Officer, Calgary
F. Devine	– Manager Operations, Winnipeg
D. Winiski	– Director Operations, NMC, Calgary
D. Cooke	– Manager, Labour Relations, Calgary
S. Seeney	– Manager, Labour Relations, Calgary
D. Guerin	– Labour Relations Officer, Calgary
C. Graham	– Labour Relations Officer, Calgary

And on behalf of the Council:

M. Church	– Counsel, Toronto
D. Finnson	– Vice-General Chairperson, Calgary
F. Ridgen	– Local Chairperson, Winnipeg
F. D. Terlecki	– Grievor

AWARD OF THE ARBITRATOR

Having reviewed the merits of the dispute the Arbitrator is satisfied that the grievor did commit a number of rules violations, as alleged, during the course of work performed in Winnipeg Yard on July 19, 2000. The infractions committed by the grievor, which I am satisfied are proved on the material before me, are described as follows in the Form 104 disciplinary notice which issued to the grievor on October 6, 2000, and reads as follows:

> Please be advised that your record has been debited with 30 demerit marks for failing to ensure proper lockout protection was first obtained prior to entering track F8, for failing to communicate with your crew member when putting your movement into emergency on two occasions, your failure to inspect your movement after such emergency applications, your failure to make emergency broadcasts after initiating emergency applications, your failure to perform required locomotive/beltpack air brake test after switching from remote to manual to remote mode and for failing to immediately notify the proper authorities of unsafe conditions; a violation of Special Instructions for the use of Beltpack Locomotive Technology dated August 1, 1998, items 1.6, 3.5, 5.0, CROR General Notice, CROR General Rules A(iv), (v), (vi), CROR 106(D), CROR 125, GO1 Section 5, item 15(b)(iii) and Winnipeg Best Operating Practices and General Information Bulletin while working as a UYE at Winnipeg Yard on July 19, 2000.

With respect to the quantum of discipline, the Arbitrator is satisfied that the Company was justified in assessing thirty demerits for the infractions involved. The grievor's record, which is not exemplary, does include prior rules violations, four of which occurred between 1990 and 1994. Even it were concluded that twenty demerits would be a more appropriate measure of discipline for the rules violations in question, the grievor would nevertheless still be in a dismissable position.

During the arbitration substantial argument was directed to what the Council alleges is a violation of the grievor's entitlement to a fair and impartial investigation under the provisions of article 32(c) of the collective agreement. It provides 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.

The material before the Arbitrator establishes that the grievor was working with another employee, Mr. Alvin Todoruk, who was in the position of yard service employee, when the incident giving rise to discipline occurred. Mr. Todoruk and Mr. Terlecki were assigned to two separate locomotive units performing switching operations using RCLS operating equipment when the incident occurred. The record discloses that the Company's intention was to conduct a joint investigation of the two employees. To that end the grievor was sent a notice dated July 27, 2000 directing him to attend at a disciplinary investigation on July 19, 2000. Unfortunately the notice was directed to the wrong address, and it was not received by Mr. Terlecki. In the result, the Company proceeded to do an examination of YSE Todoruk, as indicated in the notice, on the second scheduled date of August 2, 2000. It is common ground that the examination of Mr. Todoruk proceeded, with Mr. Todoruk having union representation, without the knowledge or presence of Mr. Terlecki or his own union representative.

It appears that Local Chairperson Frank Ridgen learned of the examination of Mr. Todoruk without actual notice to Mr. Terlecki. On August 3, 2000 he registered an objection with the Company's Manager of Operations, Mr. Frank Devine. Citing decisions of this Office, he protested that to have examined Mr. Todoruk without proper notice to Mr. Terlecki violated the standards of a fair and impartial investigation as provided under article 32 of the collective agreement. He concluded his letter by stating:

> Local 1894 feels that if this investigation were to continue now or in the future, it would be impossible for Yardman F.D. Terlecki to receive a fair and impartial investigation.

Faced with that objection the Company decided to reconvene the examination of Mr. Todoruk, to provide the grievor and his own union representative, Mr. Ridgen, with a transcript of the statement taken from Mr. Todoruk on August 2, 2000, and to allow the grievor and his union representative the opportunity to examine Mr. Todoruk and to present any evidence in rebuttal of his statement. The supplementary statement was accordingly conducted on August 8, 2000. It may be noted that at the outset of that supplementary statement Mr. Ridgen again recorded the objection of the Council to the procedure being followed, a position which was reiterated on the occasion of Mr. Terlecki's own statement, taken on August 10, 2000. Whatever the merit of the Council's position, this is clearly a case where it did not fail to raise an objection in a timely manner.

Counsel for the Council submits that, in light of the facts related, the Company did not comply with the requirements of article 32(c), and that the discipline assessed against Mr. Terlecki must be declared null and void. In support of that position he refers the Arbitrator to a number of awards of this Office, including **CROA 2901, 3164** and **3221**.

Counsel for the Council especially stresses a passage of the Arbitrator in **CROA 3221**. In that case the company assessed discipline against two employees for failing to properly secure locomotive units left standing on a track, resulting in the movement of the units and subsequent damage. An issue was whether a derailed locomotive was foul of the main line. After it had completed the statements of the two employees the company took a separate statement from a yardmaster who had been in radio communication with the two employees at the time of the incident. It failed, however, to give the employees notice of the statement of the yardmaster. When the investigating officer realized that an error had been made he offered the grievors and their union representative the opportunity to give their own evidence in reply to the written record of the statement of the yardmaster, offering to have the yardmaster available by telephone to answer any questions which they might wish to put to him. The union declined that proposal. The Arbitrator concluded that the manner in which the company proceeded did violate the provisions of article 32(c) of the collective agreement, and commented as follows:

> It appears to the Arbitrator undeniable that the Company's investigating officer did fail to provide to the grievors the protections to which they were entitled under article 32(c) of the collective agreement. Nor does the evidence disclose a situation which could not have been easily remedied by the Company. It could, very simply, have set aside the statement of Mr. Schettler taken on September 5, 1997 and rescheduled another statement by Mr. Schettler, with proper notice to the grievors and their union representative. That would have given them a fair opportunity to attend at Mr. Schettler's statement, as was their right.
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> For reasons elaborated in prior awards of this Office, the standards which the parties have themselves adopted to define the elements of a fair and impartial hearing are mandatory and substantive, and a failure to respect them must result in the ensuing discipline being declared null and void (**CROA 628, 1163, 1575, 1858, 2077, 2280, 2609** and **2901**). While those concerns may appear "technical", it must again be emphasized that the integrity of the investigation process is highly important as it bears directly on the integrity of the expedited form of arbitration utilized in this Office, whereby the record of disciplinary investigations constitutes a substantial part of the evidence before the Arbitrator, and where the testimony of witnesses at the arbitration hearing is minimized. (See, generally, Picher, M.G. "**The Canadian Railway Office of Arbitration: Keeping Grievance Hearings on the Rails**" Labour Arbitration Yearbook 1991 pp 37-54 (Toronto 1991).) Unfortunately, in the case at hand, the taking of a supplementary statement, albeit well intended, coupled with the possibility of a telephone conversation with Yard Master Schettler, falls short of the standard clearly and expressly established in the collective agreement, and did not remedy the procedural flaw, which did have a bearing on a significant aspect of the responsibility of the grievors. The opportunity of an after-the-fact telephone conversation is not the equivalent of being present during the actual examination of a witness.

The Company's representatives submit that the jurisprudence does not, as the Council suggests, confirm that setting aside and re-scheduling a statement is the only means by which a procedural flaw in an article 32 investigation can be remedied. In that regard they refer the Arbitrator to the decision of this Office in **CROA 2957**. In that case demerits were assessed against a conductor for the harassment of his co-workers. The record disclosed that the investigation of two other conductors concerned allegations against the grievor, although he was not given

notice of those investigations and the opportunity to deal with the information provided therein. In that context the Arbitrator sustained the union's objection to the assessment of discipline and commented, in part, as follows:

> 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.

The Company's representatives submit that the foregoing comments would indicate that in some circumstances the taking of a supplementary statement will be sufficient to cure a defect of procedure under article 32(c).

I turn to consider the relative merits of the positions argued by the parties. In doing so I consider it important to reiterate the following comments in **CROA 2073**:

> As previous awards of this Office have noted (e.g. **CROA 1858**), disciplinary investigations under the terms of a collective agreement containing provisions such as those appearing in Article 34 are not intended to elevate the investigation process to the formality of a full-blown civil trial or an arbitration. What is contemplated is an informal and expeditious process by which an opportunity is afforded to the employee to know the accusation against him, the identity of his accusers, as well as the content of their evidence or statements, and to be given a fair opportunity to provide rebuttal evidence in his own defence. Those requirements, coupled with the requirement that the investigating officer meet minimal standards of impartiality, are the essential elements of the "fair and impartial hearing" to which the employee is entitled prior to the imposition of discipline. …

The comments of the arbitrator in **CROA 3221** and **CROA 2957** would indicate that compliance with the substantive provisions of article 32(c), or for that matter similar provisions in other collective agreements, must be determined having close regard to the specific facts of the case under consideration. I cannot agree with counsel for the Council who asserts, implicitly, that **CROA 3221** stands for the absolute proposition that the only way of remedying a procedural discrepancy is to set aside an impugned statement and reschedule an entirely new statement. The award obviously suggests, in the facts there under consideration, that starting over was a simple solution which could have been followed. However, an overall review of the jurisprudence confirms that there may well be other solutions which are equally practical and equitable, to ensure the full protection intended by article 32(c) of the collective agreement. It is on that basis that the somewhat different cure of a procedural defect described in **CROA 2957** may be understood.

It should be borne in mind that the article, and similar provisions in other collective agreements, do not provide an absolute right to have all witnesses examined orally in the presence of the grievor or his Council representative. In such proceedings it is not uncommon for written reports of supervisors, or persons external to the Company, to be filed as part of the investigation. In that context the employee is to be given copies of any such documentation in the possession of the investigating officer, and the fullest opportunity to rebut their content. As a general rule, under a provision such as article 32(c), it is only when the Company determines to take a statement from an individual that the right of the employee to be present and to offer rebuttal applies.

When regard is had to the facts of the instant case, I am satisfied that the corrective action taken by the Company did cure what might otherwise have been a fatal flaw in the procedure. Realizing its error, the Company did convene Mr. Terlecki to an investigation at which Mr. Todoruk was present. Before that session Mr. Terlecki and his Council representative were provided with a transcript of Mr. Todoruk's prior statement. Mr. Todoruk was again examined, and the grievor and his Council representative had every opportunity to ask him questions and to offer evidence in rebuttal of his account of the facts. In these circumstances I am satisfied that there was substantial

compliance with the requirements of article 32(c) of the collective agreement. For all practical purposes, there is little to distinguish the procedure which was followed from the procedure which would have satisfied the Council's objection, namely entirely discarding the initial statement of Mr. Todoruk and having him answer the same questions a second time in the presence of the grievor. In my view that is what happened in substance and the objection of the Council is more technical than persuasive.

In the result, for the foregoing reasons the Arbitrator is satisfied that the Company did not violate the substantive requirements of article 32 in conducting its investigation of Mr. Terlecki. The grievance must therefore be dismissed.

May 21, 2002

(signed) MICHEL G. PICHER
ARBITRATOR