CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3917

Heard in Edmonton, 10 June 2010

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE
MAINTENANCE OF WAY EMPLOYEES DIVISION

DISPUTE:

Dismissal of Mr F. Tooke.

JOINT STATEMENT OF ISSUE:

On December 17, 2009, the grievor, Mr. Frank Tooke, was served with a Form 104 which provided that he was being dismissed from Company service for (1) his alleged removal and/or attempted removal of Company property without permission as indicated by the formal criminal charges filed against him, and (2) his insubordination when he failed to properly answer questions during the formal investigation held on December 7, 200. A grievance was filed.

The Union contends that the grievor was not insubordinate when he failed to answer certain questions during the investigation. He had been criminally charged and refused to answer on the advice of Union counsel. During the investigation, which was conducted on December 7, 2009, the grievor requested a postponement to permit him to confer with a criminal lawyer on December 9, 2009. The Company refused this short postponement and thus violated section 15.1 of the collective agreement by failing to conduct a fair and impartial hearing before dismissing him.

The Union contends that the dismissal of the grievor was excessive and unwarranted in the circumstances.

The Union requests that the grievor be reinstated into Company service immediately without loss of seniority and with full compensation for all wages lost.

The Company denies the Union's contentions and declines the Union's request.

FOR THE UNION:
(SGD.) WM. BREHL
PRESIDENT

FOR THE COMPANY:
(SGD.) K. HEIN
LABOUR RELATIONS OFFICER

There appeared on behalf of the Company:
M. Thompson – Labour Relations Officer. Calgary

R. Hampel	– Counsel, Calgary
T. Yamashita	– Service Area Manager
J. Drader	– CP Poloice Constable
L. Parsons	– CP Poloice Constable
K. Hein	– Manager, Labour Relations, Calgary

And on behalf of the Union:

Wm. Brehl	– President, Ottawa
D. W. Brown	– Workers' Advocate, Ottawa
A. R. Terry	– Assistant Vice-President,
S. Brighton	– Local Representative, Revelstoke
F. Tooke	– Grievor

AWARD OF THE ARBITRATOR

The record discloses that on November 13, 2009 the grievor was arrested and charged with intent to commit the indictable offence of theft as well as two counts of possession of property obtained by crime. The events leading up to that charge had caused a report to be provided to the Company on or about November 9, 2009 from the CP Police. As of that date the grievor was advised that he was being removed from service pending a formal investigation into what he was then advised were suspected property offences.

On December 9, 2009 the Company conducted a disciplinary investigation. During that investigation the grievor declined to answer any questions with respect to the substance of the charges he was then facing. He requested a postponement of the investigation for a period of forty-eight hours to allow him to consult with his criminal lawyer. That request was denied.

The Arbitrator cannot accept the Union's submission that the refusal of a postponement of the disciplinary investigation amounted to depriving the grievor of a fair

and impartial investigation as contemplated under the terms of the collective agreement. Mr. Tooke had then been aware for close to one month that he was under investigation by the police, had been criminally charged since November 13, 2009 and had been removed from service as early as November 9, 2009 in the knowledge he was being investigated in relation to irregularities concerning Company property. I am satisfied that the grievor knew, or reasonably should have known, that the Company would be making the inquiries which it made and that he had ample opportunity to consult his lawyer with respect to what he should or should not do in relation to the Company's investigation.

Of greater substance in the case of Mr. Tooke is the issue of whether the Company has presented evidence which would found just cause for any discipline against him. Under the Canadian legal system it is axiomatic that the making of criminal charges is not of itself conclusive evidence of any wrongdoing. Nor must a Company necessarily await a criminal conviction to discipline an employee for misconduct if it should have genuine evidence to sustain that discipline. However, in the case at hand, the Arbitrator is compelled to conclude that, apart from the criminal charge made against the grievor, a charge which I am satisfied would justify his having been removed from service until such time as the criminal process was completed, there was no factual evidence whatsoever before the Company to sustain any conclusion, on the balance of probabilities, that the grievor had engaged in any misconduct which would justify discipline.

Another employee, Mr. Raymond Baker, was also criminally charged as a result of the same CP Police investigation, for break and enter with intent to commit an indictable offence. As related in **CROA&DR 3916**, the record discloses that Mr. Baker was guilty of theft from the Company and made to his supervisor, by telephone, a statement to the effect that he had himself stolen Company property, although he also said no one else was involved. It appears that during that conversation he elaborated that Mr. Tooke had attempted to re-secure the stolen property from persons in possession of it but had been threatened. There is, very simply, no other evidence in the possession of the Company at the time of the investigation that would implicate Mr. Tooke in any criminal activity.

It appears that Mr. Baker provided an extensive statement to the CP Police in the course of an interview taken at 4:00 a.m. on November 8, 2009. That interview was filed in evidence, albeit over the objection of the Union. Having read Mr. Baker's statement in full detail, the Arbitrator has substantial concern as to its veracity, and in particular as to the reliability of statements of Mr. Baker which would have implicated Mr. Tooke in what Mr. Baker admitted was his own involvement in an attempt to steal a Company generator from a remote location. While it is not for the Arbitrator to determine whether Mr. Baker's confession was voluntary or not in accordance with the standards of criminal law, it is clear to me that the statements which he made were the result of suggestive questions put to him repeatedly by the investigating officers, including statements by them which suggested that his daughter and wife might be brought into the case as accessories. To put it bluntly, after reading Mr. Baker's "confession" of some 103 pages, I can attach no significant credibility to his account of events, and

most importantly for the purposes of this grievance, to his statements implicating Mr. Tooke in Mr. Baker's admitted involvement with yet another, unidentified, person in an attempt to steal a Company generator. It should further be noted that faced with the evidence gathered, the most significant part of which would appear to be Mr. Baker's statement, the Crown declined to proceed with any charges against either Mr. Baker or Mr. Tooke.

As argued by the Union's representative, and as stated in Brown & Beatty, *Canadian Labour Arbitration* (3rd Edition), para. 7:2500:

> As a general principle, the degree of probability employers must meet in each discipline case is commensurate with the seriousness of the allegations and the severity of the consequences faced by the employee. As a result, in cases involving allegations of particularly reprehensible misconduct, such as criminal or quasi-criminal behaviour, when an employee's reputation and future job prospects are at stake Arbitrator's typically use words such as "clear", "cogent", convincing", substantial", and "reliable" to describe the quality of evidence the employer must adduce to justify whatever sanction they imposed.

Simply put, at the time of its investigation the Company had no evidence of substance to justify its conclusion that Mr. Tooke was involved in criminal activity. While I accept that the criminal investigation of which it was aware justified his removal from service until such time as the cloud over him was removed, which occurred when the Crown declined to proceed with any charges, I can see no basis on the evidence before me to sustain a responsible conclusion grounded in evidence that he was involved in a conspiracy to steal Company property or to be in possession of stolen property as alleged.

The grievor is an employee of thirty years of service who has, it appears, been disciplined on only two occasions in all of that time. There is no suggestion of dishonesty or serious misconduct anywhere in his record, and indeed in the past he has, on occasion, been promoted into the ranks of management. Nor, for the reasons related in **CROA&DR 3916**, can I agree with the conclusion that his refusal to answer questions while criminal charges were pending can properly be characterized as insubordination justifying the termination of his employment. Finally, for the reasons stated above, the document which came into the Company's possession following his discharge, the purported confession of Mr. Baker dated November 8, 2009, is one to which the Arbitrator can assign no meaningful credibility.

For the foregoing reasons the grievance is allowed. The Arbitrator directs that the grievor be reinstated into his employment forthwith, with compensation for all wages and benefits lost and without loss of seniority, save that the grievor shall not be compensated for the period of time between his removal from service on November 9, 2009 and the date at which it was determined that no criminal charges would be brought against him by the Crown.

June 18, 2010

(signed) MICHEL G. PICHER
ARBITRATOR