

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 744

Heard at Montreal, Tuesday, March 11, 1980

Concerning

CANADIAN PACIFIC LIMITED (CP RAIL)

and

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT
HANDLERS, EXPRESS AND STATION EMPLOYEES - BOARD OF ADJUSTMENT #14

DISPUTE:

Assessment of 25 demerit marks to Mr. J. Frezza for failure to report
for duty July 17, 18, 19, 20 and July 23 and 24, 1979.

JOINT STATEMENT OF ISSUE:

The Union maintains that Mr. Frezza's absence from
work was due
to serious threats endangering his safety and that of his family if
he crossed
the picket line established by CP Express employees and that the 25
demerit
marks were not justified. The Union requested these demerit marks be
removed
from Mr. Frezza's file.

The Company denied the Union's request.

FOR THE EMPLOYEE:

(Sgd.) W.T. Swain
General Chairman

FOR THE COMPANY:

(Sgd.) G.C. McDonald
Assistant General Manager
Intermodal Services

There appeared on behalf of the Company:

D. W. Flicker	Counsel - Canadian Pacific Limited Montreal
D. Cardi	Labour Relations Officer, CP Rail, Montreal
G. C. McDonald	Asst. Gen. Manager, Intermodal Services, CP Rail, Montreal
L. G. Dowd	Reg. Manager, Intermodal Services, CP Rail, Montreal
K. Kobernick	Terminal Supervisor

And on behalf of the Brotherhood:

F. Cote	Counsel, Montreal
W. T. Swain	General Chairman, B.R.A.C., Montreal
J. Frezza	(Grievor) - Montreal

J. J. Boyce

General Chairman, B.R.A.C., Don Mills, Ont.

AWARD OF THE ARBITRATOR

The facts of this case are not, for the most part, in dispute. The grievor works as a General Clerk at the CP Rail Lachine Intermodal Terminal. He is the shop steward for the relatively small group of bargaining unit employees in his particular location.

In the summer of 1979 a strike occurred involving employees of CP Express, represented by another local of the Brotherhood. The grievor and the other employees of CP Rail were not involved in this strike. Although separate physical facilities were involved, those directly affected by the strike were related to, and located in fairly close proximity to those in which the grievor and his fellow employees worked.

The strike appears to have been a bitter one, and there were instances of violence and intimidation with respect to it. These affected not merely the operations, premises and employees of CP Express, but also those of CP Rail, because of their physical proximity and the relationship between those operations. Injunctions were sought and at least in part granted to limit the picketing; it would appear that the injunction granted was not entirely effective, as a contempt of Court motion was later made. It is clear, from the employer's own assertions, that there were at times massive picketing, difficulty of access to the premises, threats of violence and indeed acts of violence against the employer and those seeking to carry out their duties.

During the early part of the strike, the grievor and his fellow employees continued to report for work and to carry on their work as it was their duty to do. The grievor's evidence is that from and after the time when the strike began he received requests to act in "solidarity" with the striking CP Express workers, and that these requests were supported by threats of violence against him and his family. The grievor nevertheless continued to report for work and to carry out his duties. For this, it was necessary for him to cross the "informational" picket line which had been allowed at the entrance to the CP Rail premises where the grievor worked.

On July 16, the grievor asked the Terminal Supervisor if his safety could be guaranteed, and if it could be guaranteed that his automobile would not be damaged. The reply was that the Company's Investigation Department was in the area to ensure every employee's safety, and that if the grievor was concerned about his automobile, he could park it on any street in the vicinity and walk to work.

The grievor had received, so he states, threatening telephone calls both at home and at work, and in view of the incidents which had occurred, the nature of the work force involved in the strike, and the particular knowledge of the grievor's situation which had been indicated he was, so he states, in real fear both for himself and for his family. On July 17, as a result of what he took to be an intimidating statement made by certain individuals who were blocking his automobile for a time near the entrance to Company premises, the grievor decided not to go to work. He returned home and telephoned

his office to say that he would not be in that day nor for the next couple of weeks. His evidence was that he expected the strike to be over by that time.

The grievor, it seems, was the only employee in his area not to report for work on such grounds. A few days later, the grievor was advised that the Company considered that his absence from work was a violation of the collective agreement, and that he, as a union representative, should be setting an example for the other employees. The grievor replied that he was fearful of reprisals, and would not come to work for the duration of the strike.

On July 24, as a result of conversations with union officers, the grievor telephoned the Company to advise that he would return to work the next day. The strike still continued, and there were "informational" pickets at the entrance to the Intermodal Terminal until August 15. The union officers had given the grievor to understand that his job was in jeopardy if he did not return to work, although Company officers made no express threats in that regard. On his return to work the following day the grievor explained to the pickets that he had to come to work or he would lose his job, and he asked them to spread the word that that was why he had returned.

There is no evidence to suggest that the grievor was acting in active support of the strike of the CP Express employees, or that he was himself on strike in any sense. There is no suggestion that he sought in any way to involve his fellow employees in any movement of "sympathy" for the strikers. I am satisfied, from the material before me, that the grievor acted on his own, that he acted out of fear for the safety of himself and his family and that this fear was based at least in part on actual threats which he received. In view of the incidents of violence which undoubtedly took place in connection with the strike, I am further satisfied that the grievor's fears were not unreasonable. While his fellow employees continued, quite properly, to report for work, there is no evidence that they had been subject to similar threats.

It is part of any employee's duty to report for duty regularly and on time. Where he fails to do so, he will be subject to discipline, unless it can be shown that there was some justification for such failure. Such justification may occur by way of illness or accident, but it may also be based on a legitimate fear for the safety of the employee himself or of members of his family, even where this fear is caused by unlawful threats, of the sort which were made in this case.

Since the evidence which would establish that such threats were made, or that it was reasonable to be seriously concerned by them is difficult to verify, and since, it must be said, the very existence of civilized society calls for the display of a certain degree of fortitude in the face of threatened disorder, it is proper to view the excuse of fear with some scepticism, and require substantial proof thereof. In the instant case, from all of the material before me, I am satisfied that the grievor's absence from work on July 17, 1979, was justified on the ground of his fear of reprisals against him or his family if he reported to work. I am not satisfied that such fear justified his taking the position that he would not report to work until the strike was over. It is significant, however, that

while the Company made it clear to the grievor that he was expected to report to work and to "set an example" (apparently unnecessary), it did not give him any ultimatum, or clear order to report. It was, in fact, the union which advised the grievor that he must return to work, and he then did so, seeking, as I have noted, to have the strikers understand how unfair it would be to seek vengeance against him in the circumstances.

Since the grievor did not, as I find, act out of sympathy for the strikers or in support of the strike; since he did, as I find, fear for the safety of himself and his family; and since he did return to work when it was made clear that he must do so, it is my view that although the grievor's absence from work for more than a day or so was not justified, the penalty imposed on him was too severe, since justification for part of his absence is established.

In Case No. 216, the assessment of twenty demerits was upheld where it was found there were no reasonable grounds for an employee's refusal to cross a picket line. In Case No. 677, an assessment of twenty demerits was made in the case of a group of employees who left work without permission participating in an illegal work stoppage. The grievor's case is of a very different order. In all of the circumstances, it is my view that the discipline properly imposed on him should be symbolic rather than severe, and it is therefore my award that the penalty imposed be reduced to one of five demerits.

J.F.W. WEATHERILL
ARBITRATOR