CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 972

Heard at Montreal, Tuesday, July 13th, 1982
Concerning

CANADIAN PACIFIC LIMITED (CP RAIL)
EASTERN REGION

and

UNITED TRANSPORATION UNION

DISPUTE:

The dismissal of Conductor/Trainman/Yardman A. M. Coffin.

JOINT STATEMENT OF ISSUE:

Following an investigation on September 16, 1980, the Company, effective September 17, 1980, dismissed Mr. Coffin from service for "conduct unbecoming an employee of Canadian Pacific by indecently exposing yourself, while on duty in the vicinity of Mileage 104.9, Cartier Subdivisionm March 30, 1980".

The Union contends that the discipline imposed was too severe and request that Mr. Coffin be reinstated to Company service with full rights, but without payment for time out of service.

The Company has refused the Union's request to reinstate Mr. Coffin.

FOR THE UNION:

(SGD.) B. MARCOLINI
General Chairman

FOR THE COMPANY:

(SGD.) L. A. CLARKE
for A. A. Boyar,
Acting General Manager
Operation & Maintenance

There appeared on behalf of the Company:

L. A. Clarke - Supervisor, Labour Relations, CP Rail, Toronto
B. P. Scott - Labour Relations,Officer, CP Rail, Montreal
D. J. McMillan - Assistant Superintendent, CP Rail, Sudbury

And on behalf of the Union:
B. Marcolini - General Chairman, UTU, Toronto
J. Sandie - Vice-President, UTU, Sault Ste. Marie
A. M. Coffin - Grievor, Sudbury

AWARD OF THE ARBITRATOR

In March, 1980, the grievor, while on duty (although apparently during a lunch break taken while his train was on a siding), coamitted the offence of indecent exposure. He was, in fact, charged with indecent assualt as a result of a complaint which was made. The Company, it seems, was aware that a charge had been laid, but took no disciplinary action at the time awaiting, it would appear, the outcome of the grievor's trial. At the trial, a plea of guilty to

the lesser charge of indecent exposure was accepted, and the grievor was fined $150.00.

It would appear that there was no substantial foundation for the charge of indecent assault. As to the indecent exposure, however, it is clear that the offence was committed. Shortly after the conviction, an account of the proceedings, identifying the grievor as an employee of the Company, appeared in a local newspaper. There is no doubt that such publicity with respect to an employee, especially one who, like the grievor, had some responsibility and the possibility of some contact with the public (the grievor was working at the time as a yard foreman, but is a qualified conductor and engineman; he was described in the newspaper account as a conductor) is, even in an indirect and imprecise way, disadvantageous to the Company. Whether or not the grievor was on duty at the time (no question arises here as to any failure by the grievor to perform his assigned work), the Company would be entitled to assess some form of discipline against an employee whose conduct affected its interests in this way. That, indeed, is not in question. The issue here is as to the severity of the penalty imposed.

It may be noted that the Company's assessment of discipline was made following a proper investigation and the establishment of the facts. The newspaper account, which was presented at the investigation, was not "evidence". The grievor was simply asked if he were the person referred to, and if' he had indeed been convicted. He replied, quite properly, that he was, and that he had. There is, then, no question of proof involved.

It was argued that for the Company to investigate the matter and discipline the grievor was to subject him to double jeopardy, contrary to Section 11 (h) of The Canadian Constitution, which provides that a person found guilty and punished for an offence shall not be tried or punished for it again. The assessment of discipline by an employer, however, is an entirely different and distinct matter from criminal proceedings instituted by the Crown for an offence under the Criminal Code. Where an employee's actions constitute (as here) an offence under the Code, those same actions may (as here) also constitute an industrial offence against his employer. Whether or not criminal charges are laid in respect of those actions, and whether or not there is a conviction, the employer may nevertheless take whatever action may be justified in respect of the industrial offence. The power to discipline for just cause is not somehow removed by the fact of criminal proceedings, any more than would he the power of the victim of an automobile accident to sue the other party, by the fact of the other party's being charged with reckless driving.

In assessing the appropriate penalty, regard is to be had to all of the circumstances, including the action itself, the disciplinary record of the employee, and other pertinent matters particular to the case. As has been noted, the fact of such conduct by an employee reflects adversely on an employer and indeed on all those associated with the person. This adverse reflection, however, is of an indirect, imprecise and emotional kind, and would be difficul't to analyse or quantify.

The grievor's action, it appears, was attributable to an impulse which the grievor found difficult to control. It is, however, one which he recognized, and for which he sought treatment. He was convicted for the same offence in 1970. He sought treatment then, and was successful in controlling his impulse for some ten years. It would appear that he again sought treatment in March of 1980 (apparently immediately after the episode over which he was charged). He appears to have attended regularly for psychological and psychiatric treatment ever since. In September, 1980, the psychologist treating him certified that "the prognosis for adequate control over his behavioural problem is good", and in October of that year the psychiatrist certified to the same effect, stating his "hope that subsequent to this treatment, he will once again be able to control himself in terms of his behaviour for a prolonged period of time". While such prognoses were encouraging if not entirely reassuring, the grievor continued regular treatment, and in February, 1981, the psychologist stated that the grievor thought he had reached a point of satisfactory control over his impulses, and that "with the continuation of his treatment here, we trust he should be able to maintain this control". In May, 1981, the psychologist reported a "very good" prognosis for continued control, and clearly supported his reinstatement at work. In December he wrote that the grievor "appears to have established a secure control over his behaviour". In February, 1982, the psychiatrist stated that there was no reason to suppose that the grievor "would not be able to succeed again in controlling his feelings should they occur", and set out his feeling "that he is fit to return to his normal employment". The grievor has continued to receive treatment. He found employment with a delivery company, having explained his situation to that employer when he was hired. That employer gives him an excellent reference. The grievor is, further, supported by his wife and family in his efforts to deal with his problem.

The grievor's discipline record is a mixed one. He was hired by the Company in Septem?er, 1969, as an unclassified labourer, and has progressed to the qualifications noted above. He has been discipline on several occasions, never for misconduct involving his personal comportment, but usually for matters relating to safety practices. At the time of his discharge (in September, 1980), his record stood at 30 demerits, being made up of 15 demerits for improper switching on September 20, 1979, and 15 demerits for failure to appear for an investigation relating to that incident. At the time of his discharge, then, the grievor was only a few days away from being credited with one year's clear record. He had been so credited on four occasions in the past, and had, as well, been awarded merit points for rendering assistance beyond normal duties in rerailing cars, in April, 1976.

In the instant case, which may in some respects be compared to a case of alcoholism, the grievor has demonstrated a willingness to face and to treat a problem of impulsive behaviour. In this particular case, the evidence is that the grievor has undertaken such treatment sincerely and assiduously. It has, on the material before me, been successful, insofar as that would appear to be measurable. While the outrageous and indecent nature of the episode for which the grievor was convicted would justify his immediate suspension from employment, the fact of his successful treatment, and all the circumstances

relating to his employment, indicate that a term to such suspension was proper, and that discharge was not justified in this case.

Accordingly, it is my award that the grievance be allowed, and that the grievor be reinstated in employment forthwith, without loss of seniority, but without monetary compensation in respect of time out of service.

J. F. W. WEATHERILL,
ARBITRATOR.