

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1406

Heard at Montreal, Wednesday, September 11, 1985

Concerning

CANADIAN PACIFIC LIMITED (CP RAIL)
(Pacific Region)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

On July 6, 1984, the Company notified Mr. Robert B. McLoughlin that his record was closed effective immediately account failure to attend investigation July 5, 1984.

BROTHERHOOD'S STATEMENT OF ISSUE:

The Union contends that:

1. Mr. R. B. McLoughlin did not at any time refuse to attend the investigations, however, he desired to have legal counsel present as the investigation related to a charge of possession of railway ties valued over two hundred dollars. Section 312(1) of the Criminal Code.
2. Mr. Robert McLoughlin was dismissed without cause and the Company violated Section 18.4 and 18.5, Wage Agreement 41.
3. Mr. Robert B. McLoughlin be reinstated to his former position and paid for loss of wages and benefits from time held out of service until date reinstated to his regular position.

The Company denies the Union's contention and declines payment.

FOR THE BROTHERHOOD:

(SGD.) H. J. THIESSEN
System Federation
General Chairman

There appeared on behalf of the Company:

F. R. Shreenan	- Supervisor, Labour Relations, CPR, Vancouver
B. O'Rourke	- Division Engineer, CPR, Edmonton
R. Bay	- Asst. Supervisor, Labour Relations, CPR,

Vancouver
R. A. Colquhoun - Labour Relations Officer, CPR, Montreal

And on behalf of the Brotherhood:

H. J. Thiessen - System Federation General Chairman, BMW, Ottawa
R. Y. Gaudreau - Vice-President, BMW, Ottawa
L. M. DiMassimo - Federation General Chairman, BMW, Montreal
G. Valence - General Chairman, BMW, Sherbrooke

- 2 -

AWARD OF THE ARBITRATOR

At the outset of the hearing the company advised that it intended to waive the requirements of the time limits with respect to my entertaining this grievance under the collective agreement.

The grievor was terminated from the company's employ because of his failure to attend an investigation scheduled for July 5, 1984. The purpose of the investigation was to inquire into the grievor's failure to comply with a company directive that he report for work to a position that he had been awarded and into certain allegations of theft of company property, namely railway ties. There is no doubt that the latter allegation was the foremost concern of the company at that time. Indeed, criminal charges were laid by the Crown at the company's instance pursuant to the theft provisions of the Criminal Code. The relevant provisions of Article 18 read as follows:

"18.1 No employee shall be suspended (except for investigation), disciplined or discharged until he has had a fair and impartial investigation and his responsibility established.

18.2 When an investigation is to be held, the employee will be notified of the time, place and subject matter of such hearing. He may, if he so desires, have a fellow employee and/or an accredited representative of the Brotherhood present at the hearing and shall be furnished with a copy of his own statement and, on request, copies of all evidence taken."

The essential issue in this case is whether the grievor was warranted in his failure to attend the investigation, as scheduled, because of the employer's refusal to permit his counsel to attend as well in order to represent his interests. The grievor retained counsel to represent him in the criminal proceedings. There is no dispute that the grievor acted under instruction from counsel in his refusing to attend the investigation. Moreover, the trade union supported the grievor's position in wanting counsel to attend.

The company's main reason for refusing counsel's request to attend the investigation is because Article 18.02 purportedly limits an employee's representation at an investigation "to a fellow employee and/or an accredited representative of the Brotherhood". It is not without significance that the underlying concern expressed by the company with respect to the presence of counsel is that it would unnecessarily complicate the investigatory process and thereby prolong and impede the full disclosure of the facts relating to an allegation of wrongdoing brought against an employee. And so, it is argued that the investigation procedure solely represents an internal inquiry that is not intended to be subject to the rules of natural justice and the requirement that an employee alleged of a wrongdoing be extended the right to legal representation.

It is with much reluctance that I must disagree with the company's position. I say "with much reluctance" because I appreciate the concern for delay that might be encountered in reaching a conclusion of an allegation of employee misconduct because of the technical concerns that inevitably might be raised by counsel if allowed to participate at an investigation. It must be stressed, however, that the parties have not expressly precluded counsel from attending an investigation for the purpose of representing an employee's interests once suspected of misconduct. They have merely designated under Article 18.02 two individuals who might serve the purpose normally performed by counsel in advising an aggrieved employee during the course of an investigation.

- 3 -

In my view the significant provision that must be considered in resolving this dispute is the requirement under Article 18.01 that "no employee shall be.....discharged until he has had a fair and impartial investigation...". It is important to emphasize that considerable prejudice to an employee's job security might result because of what is said and admitted at an investigation. And, substantial prejudice to the employee with respect to a collateral criminal proceeding might also result by reason of the disclosure of damaging information. In this light the "fairness" of the investigatory process is clearly enhanced when counsel is permitted to attend as a surrogate of the employee in order to enable that employee to receive advice and give instruction with respect to his rights.

In the last analysis a lawyer's function is to ensure that his client's best interests are legitimately served by his vetting of information that may ultimately be used during an arbitration hearing or a collateral criminal trial.

It also is important to note that with respect to the criminal proceedings the employer has placed itself in a significant conflict of interest situation. The company conceded its responsibility in informing the police of its suspicions of the grievor's alleged theft of company property. On the basis of the company's information and the investigation that followed criminal charges were laid. Surely, the company has established a direct interest in the particular outcome of the criminal process. Yet, at the very moment the criminal charges were outstanding against the grievor the company still remained obliged under Article 18.01 to conduct an "impartial" investigation with respect to the potential imposition of discipline for the very alleged wrongdoing for which it has also played the role of police informant. Not only has its neutrality been compromised with respect to its ability to make an informed judgment as to an aggrieved employee's misconduct but it has placed the grievor in a situation where, as has already been suggested, he might make incriminating statements that could be later used in the criminal proceeding. In other words, the presence of counsel at the investigation serves the purpose of bridging the gulf that would otherwise inhibit a fair and impartial investigation from proceeding.

In the last analysis I am not satisfied that the grievor refused to attend an investigation. Rather, he refused to attend an investigation that was neither fair nor impartial. As a result, in demanding that his lawyer be allowed to attend the scheduled investigation as a condition for his attending I cannot conclude that the grievor has engaged in misconduct. In sum, the grievor has not been discharged for just cause.

Accordingly, the employer is directed to reinstate the grievor forthwith with full seniority and other benefits. I shall remain seized for the purposes of implementation.

DAVID H. KATES,
ARBITRATOR.