As per your request:-

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE N0. 1420

Heard at Montreal, Wednesday, October 9, 1985
Concerning

CANADIAN PACIFIC LIMITED (CP Rail)
(Prairie Region)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Mr. R. J. Masson, Track Maintenance Foreman, Craven, Saskatchewan, was notified to appear for an investigation on April 27, 1984, in connection with his abstinence from the use of alcohol. Mr. Masson did not appear. Subsequent investigations were scheduled for May 11 and July 19, 1984. Mr. Masson appeared for the May 11 investigation with a lawyer. The grievor was advised that the investigation could not proceed with his lawyer present, and the hearing was adjourned. The investigation scheduled for July 19 was not held as the grievor failed to appear.

The grievor was subsequently advised by letter dated August 17, 1984, that his record was closed effective August 17, 1984.

JOINT STATEMENT OF ISSUE:

The Union contends that:

1. Mr. R. J. Masson had previously arranged leave of absence for April 27, account personal business.

2. Mr. R. J. Masson appeared for investigation on May llth, with legal counsel and Union representative. Company refused to take statement.

3. Mr. R. J. Masson did not appear for investigation on July 19, account again denied legal counsel by letter of July 6, 1984.

4. The Company violated Section 18.1, 18.2 and 18.3, Wage Agreement No. 41.

5. Mr. R. J. Masson be reinstated to his position of Track Maintenance Foreman at Craven, Saskatchewan, all seniority rights restored, paid, for all loss of compensation, wages and benefits since April 26, 1984, and all expenses he incurred in connection with the removal from service since April 26, 1984.

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

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD.) H. J. THIESSEN	(SGD.) J. D. CHAMPION
System Federation	For: General Manager
Gcneral Chairman	Operation and Maintenance

There appeared on behalf of the Company:

J. D. Champion	- Supervisor, Labour Relations, CPR, Winnipeg
R. E. Noseworthy	- Asst. Supervisor, Labour Relations, CPR, Winnipeg
R. G. Tumak	- Asst. Division Engineer, CPR, Thunder Bay
R. A. Colquhoun	- Labour Relations Officer, CPR, Montreal

And on behalf of the Brotherhood:

H. J. Thiessen	- System Federation General Chairman, BMWE, Ottawa
R. Y. Gaudreau	- Vice-President, BMWE, Ottawa
M. L. DiMassimo	- Federation General Chairman, BMWE, Montreal
M. L. McInnes	- General Chairman, BMWE, Winnipeg

AWARD OF THE ARBITRATOR

Track Maintenance Foreman R. J. Masson was being treated under the company's Alcohol Control Program for his alcoholic condition. A condition for treatment under the program was the grievor's undertaking that he abstain from further consumption of alcoholic beverages. The company suspected that the grievor violated that undertaking by consuming alcohol. The company advised the grievor of an investigation for April 27, 1984 "in connection with his abstinence from the use of alcohol". The grievor refused to attend the investigation without legal representation. His trade union supported his insistance in that the grievor was entitled to representation by a lawyer. For purposes of this case the materials before me indicated that the lawyer retained to represent the grievor's interests at the investigation was hired by the trade union. After the grievor refused to attend the first investigation subsequent investigations were scheduled for May 11 and July 29, 1984. The grievor and his trade union representative failed to attend because the company refused counsel status to represent the grievor's interests during the course of the investigation.

The question squarely put before me is whether the company's refusal to allow the trade union's request for legal representation for the purposes of representing an employee's interests at a disciplinary investigation would adversely affect the "fairness and impartiality" of the investigation. Accordingly, the answer to that question will resolve the issue as to whether the company was justified in terminating the grievor's employ for his refusal to attend the investigation. The relevant provisions of the collective agreement 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 wi11 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.

18.5 When discipline is recorded against an employee he will be advised in writing. In the event a decision is considered unjust, appeal may be made in accordance with the grievance procedure."

Article 18.5 indicates that an employee where he feels the discipline assessed against him is unjust may grieve the employer's action under the grievance procedure and, in the absence of settlement, refer his grievance to arbitration. At arbitration the burden of proof lies with the company to adduce evidence that will, on the balance of probabilities, support the justness of the disciplinary response to the aggrieved employee's alleged misconduct. And, because the onus of proof lies with the employer to establish just cause it is open to the grievor to put the company to the strict proof of the allegations that resulted in discipline. In other words, a grievor may elect not to adduce any evidence in defence of the company's allegations but may simply choose to rely on the employer failing to make out a prima facie case. If the employer does not establish a prima facie case then an aggrieved employee's grievance against the discipline will succeed.

Article 18.1 and Article 18.2 foist upon the company the requirement to hold a fair and impartial investigation prior to taking disciplinary action against an employee suspected of alleged misconduct. At these investigations the grievor is entitled if he or she desires to have a fellow employee and/or an accredited representative of the Brotherhood attend the investigation. At the investigation questions are put forth and answers are recorded with respect to matters relevant to the suspicions of wrongdoing that promted the investigation. At the end of the investigation the company may then use the information that was obtained, inclusive of the grievor's own statements, in its deliberations as to whether its suspicions warrant disciplinary action.

It is clear that a prime consideration of introducing the investigation procedure into the collective agreement was with a view to affording the grievor the opportunity to respond to the employer's allegations and to give an appropriate explanation for his conduct if he so desires. The purpose of Article 18.1 and Article 18.2 is designed for the employee's benefit in order that an opportunity be presented to influence the employer's decision before any definitive disciplinary action is taken.

In this light the purpose of the investigation is not to afford the company the opportunity to bolster a case in support of discipline through the interrogation of an employee suspected of wrongdoing. And, it is for that reason that an employee may elect not to answer questions put to him during the investigation that may be

incriminating. (See CROA Case No. 833) Or, the employee may be instructed by his fellow employee or thc accredited representative of the Brotherhood attending the investigation not to answer a question because that answer could be used at a subsequent arbitration hearing to support the company's case for just cause for its disciplinary action. And, it is important to stress that the information taken from the employee during the investigation is neither privileged nor immune from use at a subsequent arbitration hearing. Moreover, as pointed out by the company's representatives the investigation procedure is not a judicial inquiry and therefore it is dubious that an cmployee may request the protection of the Canada Evidence Act if he were otherwise disposed to answer an incriminating question. In the last analysis the investigation procedure is designed to be fair and impartial so that the employee who may be subject of suspicion is given every opportunity to benefit from the inquiry process contemplated by Articles 18.1 and 18.2 as a condition precedent to the employer taking disciplinary action.

It may very well be that situations might arise, particularly when an employee's job security falls on the outcome of an investigation, when thc trade union holds that the employee's best interests may not be served by solely the representation of a fellow employee or an accredited trade union officiaI. Based upon the nature of the allegations that prompted the investigation, the information that may be related to the charges, the personalities that are involved and the risks that are in issue, the trade union, in representing a member, may decide that the attendance of a lawyer at the investigation may best serve that employee's best interests. In short, a lawyer may very well ensure that the objective of the investigation are preserved in circumstances where the trade union may feel inadequate to perform that duty. And so the question to be resolved is whether Article 18.1 and Article 18.2 prohibit the trade union from retaining counsel to represent an employee summoned to an investigation?

It is my view that Articles 18.1 and 18.2 do not Preclude counsel from attending an investigation. Firstly, nothing contained in Article 18.2 expressly restricts the trade union from retaining counsel merely because of the employee's entitlement to have a fellow employee or an accredited representative of the Brotherhood attend. It may very well be that a trade union's decision to retain counsel is consistent with its very attendance at the investigation. The solicitor-client relationship, once established, places the lawyer as surrogate of the trade union in representing an employee's interests. Counsel is the Agent of the trade union and therefore stands in its shoes during the course of the investigation process.

Secondly, Article 18.1 positively affirms that the investigation must be fair and impartial as a condition precedent to its efficacy. And, as previously indicated, a lawyer may very well serve the purpose of counselling an employee under suspicion as to how he or she should conduct themselves during the course of the investigation. Not only can counsel advise the employee against making inculpatory statements that can be used to his prejudice at an arbitration hearing but also as an advocate who may very well persuade the company's representatives from taking disciplinary action or in tempering the disciplinary action that might have been contemplated. In short,

where an employee's job may rest on the outcome of the investigation process I cannot appreciate how the presence of counsel can be viewed in any light other than being consistent with a fair and impartial investigation.

But because of the risks to the employee that may result from his attending an investigation without proper representation and having regard to the onus that ultimately falls on the company to establish just cause for any disciplinary action it may subsequently take I am convinced that Articles 18.1 and 18.2 mandate the presence of counsel at the investigation, where requested, in order that it may be both fair and impartial.

It is clear from the foregoing that the pronouncements that were made in my recent decision in CROA Case #1406 were not intended to be restricted to circumstances where an employee's alleged wrongdoing that prompted an investigation may also be the subject matter of a collateral criminal proceeding. The trade union's right to retain counsel on an employee's behalf at an investigation is simply a requirement for a fair and impartial investigation. In that decision I stated the fo1lowing:

> "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." (Emphasis added)

Accordingly, the company's decision to terminate the grievor for his refusal to attend an investigation without counsel was not for just cause. The grievor's reinstatement is directed and I shall remain seized for the purposes of compensation and all other matters.

(Sgd.) DAVID H. KATES,
ARBITRATOR.