CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1430

Heard at Montreal, Wednesday, November 13, 1985

Concerning

CANADIAN PACIFIC LIMITED (CP RAIL)
(Pacific Region)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Mr. L. V. Lunn, Track Maintenance Foreman, Radium, B.C. was dismissed March 12, 1985 for theft of Company gasoline supplies, July/August, 1984, Radium, B.C.

JOINT STATEMENT OF ISSUE:

The Union contends that:

1. Mr. L. V. Lunn be reinstated to his former position with all his seniority.

2. The Company violated Section 18.3, Wage Agreement 41, by not issuing the discipline within 28 days.

3. Mr. L. V. Lunn be paid for loss of wages and benefits from February 6, 1985, and onward, until reinstated.

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

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD.) H. J. THIESSEN	(SGD.) L. A. HILL
System Federation	General Manager
General Chairman	Operation and Maintenance

There appeared on behalf of the Company:

R. T. Bay	- Asst. Supervisor Labour Relations, CPR, Vancouver
R. A. Colquhoun	- Labour Relations Officer, CPR, Montreal
W. C. Liddell	- Engineer of Track, CPR, Montreal

And on behalf of the Brotherhood:

H. J. Thiessen	- System Federation General Chairman, BMWE, Ottawa
L. M. DiMassimo	- Federation General Chairman, BMWE, Montreal

AWARD OF THE ARBITRATOR

The grievor, Mr. L. V. Lunn, was discharged for theft of company property. The uncontradicted evidence established that the grievor in late August, 1984 misappropriated company gasoline for his own personal use in order to drive his vehicle from the work place to his residence. He did this without securing the permission of an appropriate company officer. Moreover, his explanation that his vehicle required gasoline in order to reach his home at a time when no company officer was in the vicinity is without substance. The grievor was duty bound at some appropriate time to have disclosed his action to the company and to have offered to make financial restitution. In short, because misappropriation of company property for an employees' personal use is a dismissible offence, the company prima facie had cause to discharge the grievor (see CROA Case #1060).

The trade union argued that there was a serious defect in the notice of disciplinary investig'ation with respect to the allegation of theft that resulted in the grievor s termination. Apparently, the grievor had reported in January, 1985, an incident of missing gasoline in the company's storage area. The company summoned CP Police to investigate. The police officers upon investigating the incident had had brought to their attention other incidents of missing gasoline that was communicated to them by the grievor's colleagues. On the basis of the information secured by the police the grievor was taken out of service pending investigation of his alleged acts of theft. It is fair to say, however, that the grievor would not have been advised of the several incidents of alleged theft that would have been disclosed to the police. In any event the grievor's notice of disciplinary hearing did not specify the allegations but merely recounted that the investigation was "in connection with the loss of gasoline from the Radium Section Supply".

The trade union alleges that because the particulars of theft for which the grievor was ultimately discharged did not pertain to the alleged misappropriation of gasoline in January 1985, but to an infraction that had occurred some seven months before (which was only brought to the grievor's attention at the disciplinary investigation), there existed a fundamental defect in the notice. And that defect constituted a violation of Article 18.1 and Article 18.2 of the collective agreement. Accordingly, it was argued that the grievor's discharge should be vitiated on that basis.

The company referred me to the Joint Statement of Issue which is set out in the preface to this decision. It is clear no mention of the allegation with respect to any defect in the notice of disciplinary investigation or the conduct of the investigation is expressed in the Joint Statement. Indeed, there is no reference to any allegation that the company has violated Articles 18.1 and 18.2 of the collective agreement.

Article 12 of the Rules and Regulations establishing CROA dated the 7th day of January 1965 (as amended) provides:

> "12. The decision of the Arbitrator shall be limited to the disputes or questions contained in the joint statement submitted to him by the

> parties or in the separate statement or statements as the case may be, or, where the applicable collective agreement itself defines and restricts the issues, conditions or questions which may be arbitrated, to such issues, conditions or questions.....".

On the basis of Article 12, the company objected to the trade union's attempt to advance an argument that was not included in the Joint Statement. Because the company had not been given advance notice of these allegations as contemplated by Article 12, the company was at a decided prejudice with respect to advancing a reply to the trade union's submissions. In short, the company was deprived of the opportunity to prepare a defence in its brief to the trade union's submissions.

This Arbitrator is duty bound to comply with the mandatory prerequisites of Article 12 of the CROA rules as recited by the company. Because the issues included in the Joint Statement are the only matters I have jurisdiction to deal with at arbitration, I have no choice but to rule that the trade union must be restrained from advancing its allegations with respect to the company's omission to comply with Article 18.1 and Article 18.2 of the collective agreement. Accordingly, those submissions must be set aside.

Moreover, it would serve no useful purpose for me to comment on whether or not the company's notice of the disciplinary investigation was defective or whether such defect was otherwise waived by the trade union at the time of the investigation.

It suffices to say that the company's case for just cause for discharge by reason of the grievor's act of theft has established. The grievance is therefore denied.

DAVID H. KATES,
ARBITRATOR.