C?NADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1473
Heard at Montreal, Wednesday, February 12, 1986

Concerning

CANADIAN PACIFIC LIMITED (CP RAIL)
(Pacific Region)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Mr. H. P. Grewal, Leading Track Maintainer, was dismissed on April 2nd, 1985 for improper use of a Company credit card to purchase gasoline for his personal automobile at Golden B.C. on May 18th, 1983, an offence for which he was convicted under Section 321 (1) (a) of the Criminal Code on March 12th, 1985.

JOINT STATEMENT OF ISSUE:

The Union contends that:

1. The Company violated Section 18.3 and 18.4 Wage Agreement 41, by exceeding time limits to assess discipline.

2. Mr. H. P. Grewal be reinstated with full seniority, benefits and payments of total compensation from March 12th, 1985 and onward.

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

FOR THE BROTHERHOOD:

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

FOR THE COMPANY:

(SGD.) L. A. HILL
General Manager,
Operation and
Maintenance

There appeared on behalf of the Company:

F. R. Shreenan - Supervisor, Labour Relations, CPR, Vancouver
C. J. Ewenson - Division Engineer, CPR, Revelstoke
P. E. Timpson - Labour Relations Officer, 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
R. Y. Gaudreau - Vice-President, BMWE, Ottawa

AWARD OF THE ARBITRATOR

The grievor, H. P. Grewal, was discharged for his alleged fraudulent use of a company credit card. The trade union, as the Joint Statement indicates, does not challenge the merits of the company's "cause" for having recourse to the discharge penalty. As is indicated in the Joint Statement the trade union seeks the vitiation of the discharge penalty because of the company's alleged procedural irregularity in its delaying beyond the requisite time limit the imposition of discipline after the disciplinary investigation was completed. In this regard Articles 18.3 and 18.4 read as follows:

> "18.3 An employee will not be held out of service pending the rendering of a decision, unless the offence is considered sufficiently serious to warrant such action. The decision will be rendered within twenty-eight calendar days from the date the investigation is completed unless otherwise mutually arranged.
>
> "18.4 An employee who has been suspended, disciplined or dismissed and who is subsequently found blameless shall be reinstated and paid at schedule wages for each day lost, and also reimbursed for any reasonable expenses incurred if required to be away from home in connection with the investigation."

A summary of the relevant facts is as follows: On May 18, 1983, the grievor allegedly engaged in the fraudulant use of a company credit card for his own personal purposes. After an investigation by CP Police the grievor was charged on October 6, 1983 under Section 320(1)(a of the Criminal Code. After a protracted delay occasioned by the grievor's vacation and an extended leave of absence the grievor did not return to work until April 4, 1984. On April 10, 1984 the grievor appeared for an investigation at which time he expressly denied the charge that he purchased gasoline for his personal automobile with a company credit card.

At that juncture the company "adjourned" the investigation because of the conflict between the information possessed by CP Police and the grievor's statement. And as events unfolded the adjournment was to last until the outcome of the collateral criminal matter. It is of some relevance to note that no effort was made by the company to secure the trade union's consent for the adjournment.

On March 12, 1985, the Provincial Court (B.C.) found the grievor guilty of the criminal offence and fined him $150.00, or, in default of payment imposed a seven day jail sentence. The trade union advised that the said conviction is presently pending appeal.

On the day of his conviction the grievor was advised of the date for the resumption of his disciplinary investigation. And, he was taken out of service pending the outcome of the company's deliberations. The grievor was dismissed on April 2, 1985.

As indicated during the hearing I am of the opinion that the company had no basis for unilaterally extending the disciplinary investigation until the outcome of the concurrent criminal proceedings. At no time was it alleged that the Company was

prevented, for reasons beyond its control, from making an informed decision with respect to the grievor's fate after the investigation proceeding of April 10, 1984 had terminated. For example, had information been denied the company that was withheld by the police authorities pending the outcome of the criminal trial then different considerations may apply. But in the circumstances described herein no such reason for the adjournment of the investigation was advanced by the company.

The company clearly was obliged to secure from the trade union its consent to an adjournment of the investigation if it was thought that the outcome of the criminal proceeding would contribute to a more mutually satisfactory result with respect to the disciplinary matter. But in the absence of such trade union consent and because there existed no other reason for delaying the completion of the investigation other than the certainty that a decision of the Provincial Court might have contributed to the deliberations with respect to discipline the investigation, in my view, was completed on April 10, 1984. In other words, I reject the company's argument that the criminal proceedings were an integral adjunct to the investigatory process contained in Article 18.3 and thereby warranted a protracted delay in its completion.

In dealing with the implications of the employer's breach of the time limit of Article 18.3 in issuing its decision with respect to discipline it is important to determine what prejudice to the grievor flowed from that particular procedural irregularity. In this regard Mr. Grewal continued to work for the entire period before the criminal conviction. And, it is my understanding of the CROA jurisprudence that the procedural irregularity complained of hereindoes not vitiate the disciplinary penalty (if otherwise warranted) that is ultimately imposed. Rather, the Arbitrator must address himself to the extent of the prejudice the grievor has endured by virtue of the protracted delay. Thus, if the grievor had been held out of service beyond the time limit after the completion of an investigation in violation of Article 18.3 then the victim employee is entitled to be compensated for the time he has been unreasonably held out of service. In other words, the employer's committal of the procedural irregularity does not exonerate the grievor for the infraction (in this case theft) that triggered the disciplinary penalty.

And so in the circumstances of this case I am satisfied that the employer's violation of Article 18.3 should not nullify the disciplinary penalty of discharge for the uncontested theft infraction committed by the grievor.

However, the grievor should be compensated at his regular rate of pay for the period between March 12, 1985 and April 2, 1985 when he was taken out of service.

Except for that proviso the grievance with respect to the vitiation of the discharge penalty is denied.

DAVID H. KATES,

ARBITRATOR.