CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1538

Heard at Montreal, Tuesday, July 8, 1986

Concerning

CANADIAN PACIFIC LIMITED (CP RAIL)
(Eastern Region)

and

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES
BOARD OF ADJUSTMENT #14

DISPUTE:

Dismissal of Mr. S. Girard for misappropriation of Company funds at Windsor Station Ticket Office for his personal use.

JOINT STATEMENT OF ISSUE:

The Brotherhood claimed that Mr. S. Girard was deprived the right to work from March 14 to April 15, 1985, based on the fact that the Company failed to notify him in writing of the charges against him as per Article 27.1 of the Collective Agreement.

The Brotherhood maintains that on March 12, 1985, Mr. Girard was questioned by members of the Company police. Such investigation played a very important role in the Company's decision to dismiss the grievor.

Article 27 provides certain protection for employees being investigated in connection with alleged irregularities and in this instant case, the Brotherhood alleges that Mr. Girard was deprived the right of representation during the investigation of March 12, 1985.

In reference to the investigation taken by the Office of the Superintendent which began on March 18, 1985, the Company did not introduce a letter from Mr. J. G. Collins, Superintendent, Department of Investigation which referred to an alleged written statement given by the grievor under Police caution March 12, 1985 until April 8, 1985, the date of a supplementary hearing. The Brotherhood contends that the said letter should have been introduced at the beginning of the investigation procedure of March 18, 1985 and therefore, the Company is in violation of Article 27.4 of the Collective Agreement.

It is also the Brotherhood's contention that the above-mentioned letter should not be considered as evidence but rather as hearsay based on the fact that the letter made reference to statement taken by investigators F. Desquilbet and R. Laroche and also a written statement of Mr. Girard but none of these statements were introduced during the investigation procedure.

For all the above-mentioned reasons, the Brotherhood is claiming on behalf of Mr. S. Girard all wages and benefits lost since March 14, 1985, and his immediate reinstatement.

The Company contends that the appropriate dismissal of the grievor was not compromised by any aspect of the investigation procedures utilized per Article 27 of the Collective Agreement, and denies the claim for reinstatement and payment for wages and benefits since March 14, 1985.

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD.) J. MANCHIP	(SGD.) F. DIXON
General Chairman	FOR: General Manager
Board of Adjustment #14	Operation and Maintenance

There appeared on behalf of the Company:

M. Shannon	- Counsel, CPR, Montreal
R. Decicco	- Supervisor, Labour Relations, CPR, Toronto
J. M. Audet	- Asst. Superintendent, Quebec Div., CPR, Montreal
P. E. Timpson	- Labour Relations Officer, CPR, Montreal
R. LaRoche	- Investigator, Dept. of Investigation, CPR, Montreal
F. Desquilbet	- Investigator, Dept. of Investigation, CPR, Montreal

And on behalf of the Brotherhood:

S. Handman	- Counsel, Montreal
D. J. Bujold	- General Chairman, BRAC, Montreal
J. Germain	- Vice-General Chairman, BRAC, Montreal
J. Manchip	- Vice General Chairman, BRAC, Toronto
M. Krystofiak	- General Chairman, BRAC, Calgary
D. Deveau	- General Chairman, BRAC, Calgary
S. Girard	- Grievor

AWARD OF THE ARBITRATOR

The grievor has been employed by the company for approximately thirteen years. He was terminated on April 15, 1985 from his position of demeurage clerk, Glen Yards, Montreal, for misappropriation of funds. The merits of the grievor's discharge are not before me.

The trade union has advanced several grounds as to why the discharge should be vitiated by reason of the company's failure to comply with the mandatory prerequisites of Article 27.1 of the collective agreement. In brief, for the reasons that will be disclosed, the general allegation was made that the company did not hold a fair and impartial investigation prior to terminating the grievor. Articles 27.1, 27.2 and 27.3 read as follows:

> "27.1 An employee shall not be disciplined or dismissed until after a fair and impartial investigation has been held and the employee's responsibility is established by assessing the evidence produced and the employee will not be required to assume this responsibility

in his statement. An employee is not to be held out of service unnecessarily in connection with an investigation but, where necessary, the time so held out of service shall not exceed five working days and he will be notified in writing of the charges against him.

27.2 When an investigation is to be held each employee whose presence is desired will be notified of the time, place and subject matter of the investigation.

27.3 An employee may be accompanied by a fellow employee or accredited representatives of the Union to assist him at the investigation."

Apparently there was an ongoing and prolonged investigation of suspected theft being conducted by CP Police at the company's premises at Windsor Station. This police investigation culminated in criminal charge being proferred against several of the company's employees. The grievor was included amongst the persons accused of misappropriation.

It is common ground that on March 12, 1985 the grievor was summoned to a meeting in the presence of Investigators LaRoche and Desquilbet of the CP Police. At the meeting, after the grievor was cautioned, he was interviewed. Arising out of the police interview the grievor gave a written statement, which was referred to at the hearing as "a confession". In due course the grievor was convicted of the criminal charge and was given a suspended sentence.

It is important to emphasize that no advance written notice of the "investigation" meeting of March 12, 1985 was given setting out the time, place and subject matter of the investigation. Nor was the grievor given the chance to be accompanied by a fellow employee or accredited representative of the union to assist him at that investigation.

Following the March 12 meeting the company summoned the grievor to a disciplinary investigation scheduled for March 18, 1985. Subsequently, further supplementary disciplinary investigations were held on March 19 and April 8, 1985. With respect to those meetings I am satisfied no shortcoming in the notices or with respect to trade union representation was established during the course of those proceedings.

The principal issue in this case pertains to whether the grievor's meeting of March 12, 1985 with the CP Police Investigators constituted a disciplinary investigation to which the "mandatory" and "substantive" procedural requirements of Article 27 of the collective agreement were relevant. There is no issue herein that information gathered by the CP Police during the course of the criminal investigation may and often is used as evidence at a collateral arbitration hearing to support the company case for invoking discipline.

The trade union, accordingly, has argued that the March 12, 1985 meeting should be viewed as a disciplinary investigation. In Counsel's view, both the criminal and disciplinary aspects of the

company investigation merged simultaneously. As a result since the two objectives were achieved at the same meeting the company was obliged to follow, as alleged, the procedural safeguards contained in Article 27.1, 27.2 and 27.3 of the collective agreement. And, to be perfectly clear in that regard, I am satisfied that the grievor's "statement" made at the police investigation of March 12 was of utmost significance in triggering the subsequent disciplinary investigations that culminated in the grievor's discharge.

Notwithstanding the foregoing, however, I am of the view the CP Police investigation of March 12, 1985 must been seen as a separate and distinct investigation with the primary purpose of securing the apprehension of persons suspected of theft. The police investigators assigned to perform the investigation of suspected acts of theft in the circumstances described are empowered under The Railway Act to conduct themselves as police officers. They have available to them a host remedies designed for the purpose of apprehending suspects who have engaged in crime. And so long as the CP Police obey the requisite procedural requirements for protecting the rights of the citizenry at large they owe no further obligation to particular employees convered under the collective agreement negotiated by the company.

In other words as CROA #669 has stated a criminal investigation by CP Police is not the same type of investigation that is contemplated by Article 27.1 of the collective agreement. Where the former investigation's primary purpose is criminal deterence the latters primary purpose is the deterence of misconduct at the work place. The notion that information that is garnered during a criminal investigation may be used (and is admissible) at a collateral arbitration case does not transform the fundamental nature of the criminal purpose of the police investigation. Or, more precisely, that information is admissible because of its relevance as evidence irrespective of its source.

This is not to say that the company ought to be allowed to exploit its police force for untoward purposes. It cannot be permitted to camaflouge a police investigation for disciplinary purposes. The company ought not to be seen to abuse the favoured status extended it by Parliament of applying its own police for improper purposes. And it is in this context that I have interpreted CROA Case #280. In that case, as I understood the decision, because there was no criminal investigatory purpose to the police role in its dealing with the grievor, it was ruled that the company was duty bound to invoke the procedural safeguards for a disciplinary investigation contained in the collective agreement.

I might say there occurred no abuse of this type (nor was any such abuse really alleged) that might warrant my applying the principles cited in CROA Case #280. Rather, I am quite satisfied that the principles applied in CROA Case #669 should apply in the instant circumstances. Accordingly, the trade union's submissions in regard to an alleged breach of Article 27.1, 27.2 and 27.3 of the collective agreement with respect to the March 12 police investigation are denied.

In dealing with the trade union's allegation with respect to the

denial of a fair and impartial investigation because of the "incriminating questions" that were asked at the disciplinary meetings of March 18, 19, and April 8, 1985, I am satisfied that the grievor, because he was represented by a trade union official, was properly protected with respect to how he chose to deal with those questions. Or, from another perspective, if the grievor chose to give "incriminating" answers to the questions that were put to him he did so at his peril.

In answer to the trade union's charge that the grievor was held out of service in excess of five working days (i.e., between March 12 and April 15, 1985) before he was terminated, I am satisfied that the company appears to have been in breach of Article 27.1 of the collective agreement. But because that particular allegation was not contained in the Joint Statement of Issue signed by the parties I am precluded by operation of the CROA Rules of giving remedial effect to that violation. Had I held such jurisdiction, however, I would have simply compensated the grievor at his regular rate of pay for the time held out of service in excess of the permissible five working days.

And, finally, in dealing with the trade union's objection with respect to the company's failure to produce for the grievor's perusal at the disciplinary investigations the signed statement he made at the March 12 police investigation I am satisfied that the company has provided a persuasive and compelling reason as to why that document could not be produced. As the company explained, (and it is also my understanding), evidence secured by the police during the course of a criminal investigation is kept under Crown custody so that the Crown's case in the criminal proceeding may not be compromised or jeopardized by any other collateral case. Notwithstanding the Crown's practice in this regard I am further satisfied that the synopsis of the grievor's confession given to his trade union representative at the April 8 supplementary investigation sufficed for the purposes of that investigatory process. It can hardly be said that such "hear-say" evidence which is presented so frequently at disciplinary investigations is the type of "irregularity" that ought to vitiate a discharge.

For all the foregoing reasons the grievance is denied.

DAVID H. KATES,
ARBITRATOR.