

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1561

Heard at Montreal, Wednesday, September 10, 1986

Concerning

CANADIAN PACIFIC LIMITED (CP RAIL)  
(Pacific Region)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Mr. K. D. Gannon, Painter, was assessed 15 demerits for repeatedly shouting an obscene remark at his Supervisor, Vancouver, B.C. May 29, 1985.

JOINT STATEMENT OF ISSUE:

The Union contends that:

1. The Company violated Sections 18.1, 18.2 and 18.3 of Wage Agreement No. 41.
2. Mr. Gannon be paid his scheduled wages while held out of service May 29 to June 21, 1985 and the demerits removed.

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:

M. Shannon - Counsel, CPR, Montreal  
R. T. Bay - Asst. Supervisor Labour Relations, CPR,  
Vancouver  
J. S. Craig - Asst. Regional Engineer, CPR, Toronto, Witness  
G. J. Craig - Relieving B&B Master, CPR, Vancouver, Witness  
K. H. Kirkpatrick - Bridgeman, CPR, Vancouver, Witness  
R. A. Colquhoun - Labour Relations Officer, CPR, Montreal

And on behalf of the Brotherhood:

N. Jessin - Legal Counsel  
H. J. Thiessen - System Federation General Chairman, BMW, E.

Ottawa

L. M. DiMassimo - Federation General Chairman, BMW, Montreal  
V. Dolynchuk - General Chairman, BMW, Edmonton  
E. J. Smith - General Chairman, BMW, London  
M. L. McInnes - General Chairman, BMW, Winnipeg  
G. Valence - General Chairman, BMW, Sherbrooke

AWARD OF THE ARBITRATOR

The Company alleges that the grievor made obscene and insubordinate remarks to his foreman, Mr. G. J. Craig. The grievor denies the allegation entirely, and asserts that on the occasion in question, which occurred on May 29, 1985, Mr. Craig used a racial slur in addressing him. It is common ground that the grievor did telephone the CP Police to complain of racial harassment by his Foreman. Mr. Craig, however, denies making any racist remark, and according to his evidence, and the evidence of another employee, Mr. Gannon, the grievor, said to Mr. Craig, "Kiss my black ass".

The charge and counter-charge are serious, and obviously turn on the credibility of the grievor and his foreman, Mr. Craig. Following an investigation it was concluded that the grievor had used obscene and insubordinate language, in consequence of which he was assessed 15 demerit marks. The investigation leading to the negative assessment was initially conducted by the Division Engineer, Mr. J. S. Craig, the father of Foreman G. J. Craig. It appears that the grievor objected to the apprehended lack of impartiality of the investigation in view of the blood relationship between his accuser and the person conducting the investigation. Following these objections, a supplementary statement was taken from both Foreman Craig and Mr. Gannon by Assistant Superintendent J. H. Bay. This additional step was taken to counter the grievor's complaints respecting the impartiality of the investigation. It is common ground, however, that the Foreman's father, Mr. J. S. Craig, was not entirely removed from the investigation. Mr. Craig reported on the investigation to the Superintendent, who in turn reported to the General Manager, who ultimately took the disciplinary action. It is not disputed that Mr. Craig reported to his superiors on both the statement which he obtained as well as those obtained by Mr. Bay.

Article 18.1 of the Collective Agreement provides as follow

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

The Arbitrator accepts the submission of the Company that the investigation contemplated in Article 18.1 is something less than a full-blow judicial inquiry with all of the trappings and procedure of a civil trial. The fact remains, however, that the parties have agreed to impose a minimal standard of fairness and impartiality on the investigation procedure. It is obvious that Mr. Gannon's case

was bound to turn on a judgement of his credibility as well as the credibility of Foreman G. J. Craig. Can it be said, in these circumstances, that justice, in the sense of fairness and impartiality, can be seen to be done beyond question when the father of the Foreman was the person principally responsible for the investigation?

I do not see how it can. Nor can I find that the supplemental involvement of Mr. Bay can be seen as curing the taint of the initial investigation. The statements obtained by Division Engineer Craig remained on the record, and he continued to be actively involved in the case, even to the point of reporting his own findings as well as Mr. Bay's to higher management. He was, in effect, the only conduit of information to the Superintendent and, ultimately, to the General Manager. While the Arbitrator makes no finding of bad faith against the Division Engineer, this case must turn on the principle that fairness must not only be done, but must be manifestly seen to be done. In the Arbitrator's view the requirement of fairness and impartiality established in Article 18.1 requires, at a minimum that an investigation must have, to any objective observer, an appearance of fairness and impartiality. That standard is plainly not met when the person who plays the role of the investigating judge is the father of one of two witnesses whose credibility is critical to the outcome.

The Arbitrator cannot accept the position of the Company that the failure to raise the violation of Article 18.1 earlier in the grievance procedure operates as a bar against the Union now relying upon it. The requirement of a fair and impartial investigation is a substantive right cast in terms of a mandatory obligation. As this case and others demonstrate there is much room for disagreement as to what constitutes an appropriate standard of fairness. In these circumstances I can attach no weight to the observation of the grievor, made to Mr. Bay after his segment of the investigation, that he found the investigation to be fair and impartial. Article 18.1 must be interpreted as imposing an objective, and not a subjective, standard of fairness and impartiality. Moreover, the material discloses no prejudice to the Company in its ability to meet the Union's objection on the grounds of a violation of Article 18.1.

It is well established that discipline imposed as a result of an investigation which is in violation of the standards established in the Collective Agreement must be viewed as void. (See CROA Case #290; CROA Case #550; CROA Case #1130 and CROA Case #1255). In light of the Arbitrator's finding on this issue, it is unnecessary to deal with the further objection of the Union respecting the issue of a right of cross-examination during the course of the investigation.

For the foregoing reasons the grievance must be allowed. The demerit marks assessed against the grievor in respect of the events of May 29, 1985 will be stricken from his record, and he shall be compensated for all wages and benefits lost for the period during which was held out of service from May 29, 1985 to June 20, 1985. I retain jurisdiction in the event of any dispute between the parties in respect of the interpretation or implementation of this award.

MICHEL G. PICHER,  
ARBITRATOR.