CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1737

Heard at Montreal, Tuesday 12 January 1988

Concerning

CANADIAN PACIFIC EXPRESS & TRANSPORT

And

BROTHERHOOD OF RAILWAY, AIRLINE &
STEAMSHIP CLERKS, FREIGHT HANDLERS,

EX PARTE

DISPUTE:

Dismissal of employee Daniel Poulin, Montreal, Quebec.

BROTHERHOOD'S STATEMENT OF ISSUE:

On April 30, 1986, employee Daniel Poulin was suspended and subsequently dismissed for allegedly being in possession of two bottles of cognac consigned to the Company, for allegedly being intoxicated during his working shift and for allegedly "having jostled a Company's official."

It is the position of the Union that the discipline and discharge are null and void because the investigations which were held on April 30, 1986, May 6, 1986 and May 14, 1986 were contrary to Article 8 of the Collective Agreement. In the alternative, it is the position of the Union that the Company may not rely on any statements which Mr. Poulin allegedly made at the improper investigation which was held on April 30, 1986, in the absence of a Union Representative.

In addition, it is the position of the Union that no cause existed for the imposition of any discipline. In the alternative, if there was any cause for discipline, it is the position of the Union that the discipline assessed was unduly harsh and excessive in the circumstances.

The Company has maintained that Mr. Poulin's employment was terminated for just cause.

FOR THE BROTHERHOOD:

(SGD) J. J. BOYCE
General Chairman
System Board of Adjustment 517

There appeared on behalf of the Company:

C.W. Peterson - Counsel, Toronto

B. F. Weinert	- Manager Labour Relations, Toronto
G. Vercaignie	- Regional Safety Pevention Manager Lachine
G. Noel	- Supervisor, Lachine
J.C. Langlois	- Supervisor, Lachine

And on behalf of the Brotherhood:

C. Wray	- Counsel, Toronto
M. Gauthier	- Vice-General Chairman, Montreal
G. Lemieux	- General Chairman, Montreal

At the request of the parties the case was adjourned until February 10, 1988.

On Tuesday, 10 February 1988, there appeared before the Arbitrator:

On behalf of the Company:

C.W. Peterson	- Counsel, Toronto
B. F. Weinert	- Manager Labour Relations, Toronto
G. Vercaignie	- Regional Safety Pevention Manager Lachine
G. Noel	- Supervisor, Lachine
J.C. Langlois	- Supervisor, Lachine

And on behalf of the Brotherhood:

C. Wray	- Counsel, Toronto
M. Gauthier	- Vice-General Chairman, Montreal
G. Lemieux	- General Chairman, Montreal
D. Poulin	- Grievor

AWARD OF THE ARBITRATOR

The Arbitrator is satisfied that the evidence discloses, on the balance of probabilities, that the grievor did pilfer two bottles of cognac in the Company's warehouse, consumed a portion of it while on duty, sustaining a degree of impairment, and that he did jostle Mr. Gilles A. Noel, a night shift supervisor when the latter discovered him in possession of the liquor. In an enterprise responsible for the safe transport of customers' goods, a high degree of trust is essential. The theft of such goods is obviously a most serious offense. The same is true of drinking on the job, particularly where, as in this case, the grievor is involved in the hazardous endeavour of moving pallets of cargo by the operation of motorized equipment including forklifts and tow motors. The grievor is a relatively junior employee, of some five years' service. In these

circumstances I must conclude that, standing alone, his infraction would be deserving of discharge and that there are no mitigating factors that would support a reduction of that penalty by the exercise of the Arbitrator's discretion under the Canada Labour Code. That conclusion is especially compelling given the Arbitrator's serious reservations about the candor of the grievor's testimony at the arbitration hearing.

The Union makes the alternative submission that the discipline against the grievor cannot stand because of what it maintains are violations of his rights under Article 8 of the Collective Agreement respecting the process of investigation prior to the imposition of discipline. That Article provides, in part, as follows:

> 8.1 An employee shall not be disciplined or dismissed until after a fair and impartial investigation has been held and the employee's responsibility has been established. The investigation must be held within 14 days from the date the incident became known to the Company, unless otherwise mutually agreed. An employee may be held out of service for such investigation for a period of not more than 5 working days and he will be notified in writing of the charges against him.
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> 8.2 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.
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> 8.3 An employee may be accompanied by a fellow employee or accredited representative of the Union to assist him at the investigation.
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> 8.4 An employee is entitled to be present during the examination of any witness whose testimony may have a bearing on his responsibility or to read the evidence of such witness, and offer rebuttal thereto.
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> 8.5 An employee or his representative must be given a copy of his statement, transcript of evidence, including all documents entered as evidence, within 4 working days following the investigation.

The facts pertinent to the Union's objection are not in substantial dispute. At approximately 8:30 a.m. on April 30, 1986 Supervisor Noel discovered Mr. Poulin in the possession of two bottles of cognac which were concealed within the cargo box of a truck being loaded at Cargo Bay 50A at the Company's Lachine terminal. Shortly after he radioed for assistance Supervisor J-C. Langlois arrived. Mr. Langlois, judging the grievor to be in an intoxicated state, escorted him to the office of Regional Safety Prevention Manager G. Vercaignie. Mr. Vercaignie, who was at a meeting elsewhere in the plant, immediately joined the grievor and Mr. Langlois in his office. He proceeded to question Mr. Poulin, asking him whether he had been drinking and where the liquor had originated. After some initial reluctance Mr. Poulin admitted that he had been drinking and that he

had taken the cognac from a consignment in the warehouse, although he refused to say precisely where. During the conversation the grievor, who appeared to the two supervisors to be in a state of intoxication, took one of the two bottles which were on a table in the office and drank from it, commenting that it was "good stuff." Being confronted with an apparent case of theft Mr. Vercaignie left the grievor with Mr. Langlois and proceeded to the investigation department of the CP Police where he was told by Officer Denis Lagac to detain the grievor in the office until Lagac arrived. When Mr. Vercaignie returned to his office he advised the grievor that he would be suspended. Shortly thereafter the grievor noticed that his shift was punching out. He then announced that he was leaving, and proceeded out of the office, only to be arrested minutes later by Officer Lagac in the adjacent parking lot. Criminal charges of theft ensued and the grievor was subsequently convicted of theft, subject to a conditional discharge.

During the time that he was in Mr. Vercaignie's office, which was approximately one hour, the grievor did not request the assistance of a Union representative nor was he offered the opportunity of Union representation at that stage. A formal investigation was held on May 6 and 14, 1986. It is common ground that the grievor was given written notification of the investigation on May 1, 1986 and that he had Union representation during the entirety of that proceeding.

The investigation was conducted by the Company's Regional Manager, Mr. G. Savoie. He heard the oral testimony of Mr. Noel, Mr. Langlois and Mr. Vercaignie, among others. It is not disputed that these supervisors had in their possession at the investigation copies of their own written reports to management concerning the incident, and that Mr. Savoie also had copies of those reports in his possession during the investigation. The request of the Union's representative to see copies of the three reports was denied. It is not disputed, however, that the Union's representative was given the fullest opportunity to cross examine each of the three supervisors on their questions and answers given at the investigation.

Counsel for the Union asserts, firstly, that the grievor was wrongfully denied the right to have Union representation during the course of his initial questioning in Mr. Vercaignie's office, immediately after the incident. Secondly, the Union argues that the denial by Mr. Savoie of the Union's request to have copies of the written reports of the three supervisors constitutes a violation of the Company's obligation to conduct a fair and impartial investigation as contemplated in Article 8.1 of the Collective Agreement. After careful consideration, and with some serious reservations about the wisdom of Mr. Savoie's course of action, the Arbitrator is compelled to conclude that neither of these objections can be sustained.

This Office is called upon to interpret and apply the investigatory procedures contained in a number of collective agreements. It is well established that when the language of an agreement predicates the Company's right to impose discipline upon the condition that the employee be given a fair and impartial hearing, subject to specific procedures articulated within the agreement, a failure to abide by such procedures renders any discipline null and void. (See C.R.O.A.

550, 563, 1255, 1475 and 1734.) It is trite to say, however, that each case must be judged on its own merits and in light of the specific language of the collective agreement in question.

The first issue to be resolved is whether what took place in Mr. Vercaignie's office constitutes an "investigation" within the meaning of Article 8 of the Collective Agreement. It is clear to the Arbitrator that Article 8 contemplates that information can, and indeed must, come to the attention of the Company's officers in some form prior to the formal investigation required by that article. By its own terms, Article 8.1 requires the Company to formulate a charge or charges against an employee prior to giving him notice of a formal investigation. That article also allows the Company to hold an employee out of service in appropriate cases, plainly suggesting that the Company is entitled, if not obligated, to gather some preliminary information before proceeding to the formality of an investigation. Common sense dictates that in many instances the first and best form of preliminary information can be obtained by asking the employee under suspicion for his or her version of what has happened. In a great many cases the employee's explanation may be fully accepted, thereby avoiding the need for any further inquiry and eliminating the possibility of discipline. The Company might well be chargeable with improper procedure if, in some circumstances, it accepts negative reports about the actions of an employee without obtaining, in the most preliminary way, his or her version of the events in question. To use an example advanced by Counsel for the Company, there is clearly nothing improper in a supervisor asking an employee who arrives at work late the reasons for his or her lateness. Article 8 of the Collective Agreement should not be construed so as to prohibit the normal conversation to be expected between employee and supervisor in circumstances of that kind, notwithstanding that more formal investigatory procedures and the imposition of discipline may ensue. If it were otherwise the conduct of the Company's day-to-day affairs would be unduly burdened by formalistic procedures that would work unnecessary hardship on supervisors and employees alike. While it is important for arbitrators to give full effect to the procedural protections afforded to employees within their collective agreement, it should not lightly be assumed that the parties intend the employer's enterprise to be conducted on the model of a courthouse (See C.R.O.A. 1575 and Re Canex Placer Ltd. and Canadian Association of Industrial, Mechanical and Allied Workers, Local 17, (1978) 21 LAC (2d) 127 (Weiler).)

The Arbitrator is satisfied that in the instant case the conversation between the grievor and Supervisors Langlois and Vercaignie did not constitute an investigation within the meaning of Article 8 of the Collective Agreement. The Company's officers were confronted with an employee who had apparently committed a theft and was intoxicated. In the circumstances there was nothing irregular or improper in removing him from the shop floor, asking him for his explanation of what happened and, on the instruction of a railway police officer, detaining him pending the arrival of the police. Even if it is assumed, without finding, that Mr. Poulin was entitled to have Union representation if he wished it, he communicated no such desire to his supervisors and they therefore made no refusal that could be construed as an interference with his rights in that regard.

Nor can the Arbitrator find a violation of the grievor's procedural rights in Mr. Savoie's failure to provide copies of the written statements of Mr. Noel, Mr. Langlois and Mr. Vercaignie during the course of the formal investigation. Under Article 8 of the Collective Agreement the decision of the investigating officer with respect to discipline is required to be based upon the evidence placed before him during the investigation. It is common ground that all three supervisors gave oral evidence during that proceeding, and the Union's representative was given the fullest opportunity to cross examine them on the content of their evidence. By the course of action he followed, Mr. Savoie chose to let the merits of the discipline imposed upon the grievor stand or fall on the basis of the questions and answers tendered in evidence at the investigation. Nothing in the procedure followed prejudiced the Union's right either to refute the content of that evidence or to argue, before the Arbitrator, that the evidence so gathered does not justify the disciplinary action taken by the Company. In these circumstances there is no unfairness to the grievor and no violation of the requirements of Article 8 is disclosed. It should be noted that the circumstances of this case are to be distinguished from those in C.R.O.A. 1734 where the material established that during an investigation the Company officer in charge of the proceedings made continued reference to the written statement of an employee who was not called as a witness while denying the Union's representative access to that statement. In that case the Arbitrator found a violation of the Collective Agreement, whose express terms required that "the employee ... be provided with a copy of all the written evidence ... which has a bearing on his involvement." The language of the Collective Agreement there in issue affords to the employee a limited right of discovery that is not to be found in the provisions of Article 8 of the instant Collective Agreement.

For the foregoing reasons the grievance must be dismissed.

MICHEL G. PICHER
ARBITRATOR