CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1830

Heard at Montreal, Thursday, 15 September 1988

Concerning

CP EXPRESS & TRANSPORT

And

TRANSPORTATION COMMUNICATIONS UNION

DISPUTE:

The termination of Fred Faiola, a warehouseman employed at the Company's Commissioners Street facility, on or about September 17, 1987.

JOINT STATEMENT OF ISSUE:

The Unions position is that Faiola's discharge was null and void in that the requirements of Article 8 of the Collective Agreement were not complied with. Furthermore, and in any event, the Union maintains that Faiola was discharged without just cause.

The Company's position is that Faiola was terminated in accordance with the Collective Agreement.

FOR THE UNION:	FOR THE COMPANY:
(Sgd) J. J. BOYCE General Chairman System Board of Adjustment 517	(Sgd) B. D. NEILL Director, Labour Relations

There appeared on behalf of the Company:

B. F. Weinert	- Counsel, Toronto
B. D. Neill	- Director, Labour Relations, Toronto
R. Slugocki	- Terminal Manager, Toronto, Witness
J. Durante	- Dock Co-Ordinator, Toronto, Witness

And on behalf of the Union:

G. Long	- Counsel
J. Crabb	- Secretary/Treasurer, Toronto
M. Gauthier	- Vice-General Chairman, Montreal
F. Faiola	- Grievor

AWARD OF THE ARBITRATOR

The principal facts are not in dispute. On or about August 29, 1987 the grievor was arrested and incarcerated at the Metro West Detention Centre, in Toronto, for a period of four months, at the conclusion of which the charges against him were dropped. Until the grievor's release from prison the Company was unaware of his whereabouts. The evidence establishes that on the first day of his absence Warehouse Manager Roman Slugocki received a telephone call from the grievor's sister who related that he would not be coming to work because of an injury to his knee. When the supervisor requested to be able to speak with the grievor she advised him that he was not available. The next day the grievor's sister called again, and advised Mr. Slugocki that her brother would not be coming to work that day, and that he could not speak to him because he had a broken jaw for which he was hospitalized. When the manager requested to know which hospital he was in, Mr. Faiola's sister refused to tell him. The Company received no other communication from the grievor or his family. It appears that on a few occasions Mr. Faiola's sister did contact another employee, Compton DaSilva, since deceased, apparently informing him that her brother would not be coming to work. It is not disputed that that communication to Mr. DaSilva was not an appropriate form of notice to the Company, and the evidence of Mr. Slugocki is that upon learning of Mr. Faiola's sister's calls to Mr. DaSilva he instructed him to advise her that she should call either himself or the Company receptionist with any message relating to her brother.

Mr. Faiola never communicated his circumstances to Mr. Slugocki, or to the Company's switchboard receptionist, by telephone from the Metro West Detention Centre. He testified that he did, on two occasions, attempt to make collect calls to the Company, as that is the only form of call that he could make from the telephone available to him in the detention facility, but that each time the receptionist declined to accept a reversal of the charges.

Not having heard from the grievor, on September 10, 1987 the Company sent him a registered letter in the following terms:

> Our records indicate that your last day worked was August 29, 1987. You have not since phoned the company on your whereabouts or intentions.
>
> If we do not hear from you within seven days from the date of this letter it will be understood that you are no longer interested in working for this company and your name will be taken off the seniority list.
>
> Your urgent attention to this matter is advised.

It does not appear disputed that the foregoing letter, which Mr. Slugocki described as the standard letter used to deal with employees who are absent without notice or explanation, was delivered to the grievor's place of residence, but was apparently not forwarded to him, and that he received both that notice and a subsequent letter advising him of his discharge only after he returned home in late December of 1987. Shortly thereafter this grievance was filed.

The Union submits that the grievor's termination is void by virtue of the Company's failure to observe the requirements of Article 8 of the Collective Agreement which governs the process of investigations and discipline. The article is, 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.

The Union submits that the Company was without any ability to terminate Mr. Faiola's employment without first holding an investigation within the terms of Article 8 of the Collective Agreement. Citing precedents of this Office, it submits that the termination must be deemed void from the outset, and on that basis requests the grievor's reinstatement with full compensation and benefits.

Counsel for the Company submits, firstly, that Article 8.1 was not intended to apply in a circumstance involving a missing employee, and maintains that the Company was within its rights to issue the seven-day-notice letter of September 10, 1987 and, failing any answer, to terminate the grievor's employment. Alternatively, Counsel argues that the letter itself constitutes, in the special

circumstances of this case, a sufficient form of investigation on the part of the Company, and that the failure of any reply from the grievor justified the action which it took.

The Arbitrator has substantial difficulty with the position advanced by the Union. It is a generally accepted precept of the interpretation of collective agreements that the language of such a document should be viewed in its normal sense, unless to give it such a meaning would lead to an absurdity. (Greyhound Line of Canada Ltd. (1974), 5 L.A.C. (2d) 1 (Forsyth)); 3M Canada Ltd. (1976), 11 L.A.C. (2d) 157 (Weatherill))

While it is true that Article 8 generally contemplates that employees are entitled to an impartial investigation prior to their dismissal, the very language of that provision implies that the employee is to make himself or herself available for the investigative process established within the article. One of the preconditions to the operation of the article is clearly the ability of the employee for whose benefit it is intended to be in attendance for the purposes of the investigation. It may well be, of course, that an employee who is unable to attend at the Company's premises, whether because of illness, incarceration or for any other reason, may fairly request that the investigation be held in whole or in part in some other location to accommodate his or her circumstances. That, however, is not the situation disclosed in the instant case, as the grievor either failed or refused to communicate his whereabouts for some four months.

In the Arbitrator's view an issue raised in this case is whether an employee can invoke the protections of Article 8 where it is established that the very actions, or inaction, of the employee frustrated the Company's ability to conduct an investigation in conformity with that article. The evidence in the instant case discloses that the grievor chose his sister as his agent of communication with the Company. Her inability to carry out any responsible endeavour in that regard is painfully evident.

Secondly, the Arbitrator cannot accept that the grievor was unable, by any number of other means, to communicate directly and clearly with the Company with respect of his whereabouts from the earliest point of his incarceration. By his own account he was able to send messages to his sister through the assistance of the Salvation Army. Further, it appears extremely doubtful that the Company receptionist would have declined to accept his collect telephone call. The evidence of Mr. Slugocki is that the standing instruction to the Company's telephone receptionist is to always receive and accept collect telephone calls from both drivers and other employees. Even without resolving whatever conflict there may be in that aspect of the evidence, I am satisfied that the material amply discloses a gross failure on the part of the grievor to communicate with the Company with respect to the reasons for his absence, his whereabouts, and the likely date of his return, contrary to his most fundamental obligation to the Company. In the circumstances the Company had every reason to conclude that he had abandoned his employment. (See C.R.O.A. 1723.)

In the instant case the real reason underlying the failure to hold an

investigation is Mr. Faiola's violation of his duty to notify the Company of his whereabouts. In the Arbitrator's view, quite apart from the general intention of Article 8, it would be inequitable to now permit him to gain full reinstatement with compensation in reliance on an article the very operation of which he rendered impossible. Because of the grievor's own inaction, the Company was entitled to conclude that he had abandoned his employment. In these circumstances the Union cannot assert the application of Article 8 of the Collective Agreement.

For these reasons the grievance is dismissed.

September 16, 1988 (SGD) MICHEL G. PICHER
ARBITRATOR