CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1937

Heard at Montreal, Thursday, 13 July 1989

Concerning

CANADIAN PACIFIC LIMITED

And

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

DISPUTE:

Discipline assessed to the record of Locomotive Engineer P.A. Spring of Vancouver, B.C.

JOINT STATEMENT OF ISSUE:

Following an investigation held in connection with the movement of Train Extra 5993 East on October 22, 1987, the Company assessed Locomotive Engineer P.A. Spring 25 demerits for "allowing train to accelerate after passing Signal 198 indicating Approach, resulting in train exceeding medium speed and permissible track speed; violation of UCOR Rule 285, and Timetable Footnotes on Extra 5993 East at Mileage 19.8 Cascade Subdivision, October 22, 1987".

The Union contends that the discipline assessed Locomotive Engineer P.A. Spring should be removed as the investigation into the incident was not conducted in a fair and impartial manner.

The Company denies the Union's contention and declines their request.

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD) T. G. HUCKER	(SGD) J. M. WHITE
GENERAL CHAIRMAN	GENERAL MANAGER OPERATION & MAINTENANCE WEST, HHS

There appeared on behalf of the Company:

L. J. Guenther	- Assistant Supervisor, Labour Relaitons, Vancouver
J. D. Huxtable	- Labour Relations, Vancouver
B. P. Scott	- Labour Relations Officer, Montreal

And on behalf of the Brotherhood:

T. G. Hucker	- General Chairman, Calgary
D. C. Curtis	- Vice-General Chairman, Calgary

AWARD OF THE ARBITRATOR

The sole issue is whether the investigation conducted by the Company was consistent with the requirements of Article 19 of the Collective

Agreement. The Brotherhood submits that the grievor was not afforded the opportunity to be in attendance at the examination of other members of his train crew in respect of his alleged speed violation and signal infraction, and was not provided with copies of their statements. Simply put, the Company's response is that while that is true, it was unnecessary for the grievor to be in attendance at the examination of the other employees, since his own culpability was established through his own examination, and the purpose of the other examinations was to assess the contributing responsibility of the other crew members.

The grievor's rights in this matter are governed by Article 19(c) of the Collective Agreement, which provides as follows:

> 19(c) If the engineer is involved with responsibility in a disciplinary offense, he shall be accorded the right on request for himself or an accredited representative of the Brotherhood, or both, to be present during the examination of any witness whose evidence may have a bearing on the engineer's responsibility, to offer rebuttal thereto and to receive a copy of the statement of such witness.

The incident giving rise to the charges against the grievor took place on October 22, 1987. He was investigated individually on November 2 with respect to the alleged speeding violation and on November 9 with respect to the charge relating to Rule 285. The material establishes beyond dispute that the other members of the train crew, being Trainman Rae and Conductor Williams, were investigated separately with respect to each of the two allegations, at various times on November 3, November 4 and November 6. The notice advising Locomotive Engineer Spring of the discipline assessed against him issued on November 23, 1987.

It is common ground that neither Mr. Spring nor his union representative were given notice that the Company intended to examine the other members of the crew, who are represented by another bargaining agent, nor did they receive notice of the time and place of those investigations. A threshold question is whether the investigation of the other crew members could be characterized as "the examination of any witness whose evidence may have a bearing on the engineer's responsibility." If so, the language of Article 19 would provide to the grievor the opportunity to request that either himself or his union representative, or both, be present during such examinations, receive copies of statements and have an opportunity of rebuttal.

The position of the Company is that in its opinion the examinations could have no bearing on the engineer's responsibility since, in its view, his responsibility was established on the basis of his own examination. With that assertion the Arbitrator has some difficulty. Firstly, the language of Article 19 is framed in objective terms, and is not made to depend upon the opinion of the Company. In other words, the question is not whether in the opinion of the employer a witness' evidence may have a bearing on the engineer's responsibility. It is, rather, whether viewed objectively, from the standpoint of the employee whose interests the article is designed to protect, it can be said that the evidence of the witness could have a

bearing on the culpability of the engineer. I do not see how, in the instant case, that question can be answered other than in the affirmative. It is true that there was some evidence upon which to draw a conclusions of culpability following the grievor's own examination. The degree of culpability is always a factor in the assessment of discipline. Issues of mitigation or aggravation may well be influenced by the accounts of other witnesses and the weight which the employer decides to give to them.

In response to that possibility, the Company's spokesperson asserts that in such an eventuality, as for example in the instant case if one of the crew members had revealed something still more damaging to the grievor, the Company would advise the grievor of such a statement and give him an opportunity to respond to it. While the Arbitrator has no reason to doubt the good intention of the employer generally, the protections provided in Article 19 are not intended to depend upon the subjective view of the Company after the fact. In the Arbitrator's opinion it must be concluded on the language of Article 19(c) that where, as in the instant case, several employees of a single crew are being examined with respect to the facts of a particular incident for the purposes of assessing their respective levels of responsibility, it must be recognized that, as a general rule, the evidence of the other crew members must, in advance of their examination, be viewed as evidence which may have a bearing on the engineer's responsibility. In that circumstance the engineer is plainly entitled to request to be present, either with or through a representative, to receive copies of statements and to offer rebuttal

Plainly the participation of the grievor and the Brotherhood in collateral investigations cannot be abusive. If, for example, the engineer's purported rebuttal of the statement of another crew member is merely a repetition of his or her statement given during the engineer's investigation, any such intervention would be dilatory in nature, if not procedurally abusive. Similarly, employees under investigation who seek unduly to assert technical positions that tend to delay and frustrate the investigation procedure do so at peril to any subsequent grievance (see CROA 1858).

Is it any answer in the instant case to say that there was no request on the part of Locomotive Engineer Spring to attend at the investigation of his fellow crew members or to receive copies of their statements? The material before the Arbitrator establishes beyond controversy that the grievor was not advised that such investigations were to take place nor provided notice of their time and location. To suggest that the grievor was entitled to request to be present, but that the Company was under no obligation to advise him that the investigations were taking place is roughly akin to asserting that he has a right without any practical remedy. In my view to so conclude would be to undermine the right of the employee provided in Article 19(c) in a way plainly not contemplated by the intention of that article. If, as the language of the article provides, the employee has a right to request to attend the investigation of other employees which might have a bearing on the degree of his responsibility, it must be implied from the scheme of the article that he or she has a correlative right to be advised that such an investigation will proceed, with reasonable advance notice of when and where it will be held. To conclude otherwise would render

the procedural protections of Article 19(c) illusory.

Given the importance of the procedures and protections of Article 19 to employees whose very job security may depend on the outcome of disciplinary proceedings, the Arbitrator is compelled to the conclusion that where the Company is to conduct an investigation in respect of an incident for which the responsibility of an engineer is in the process of being assessed, even if that investigation may also bear on the responsibility of the other employees, to the extent that their evidence may bear on the responsibility of the engineer, there is an obligation upon the Company to provide reasonable notice of such proceedings to the engineer, thereby allowing the engineer to exercise the right to request to be in attendance, to receive copies of statements and to offer rebuttal, if necessary.

As related above, the procedural safeguards so construed were not made available to Engineer Spring in the circumstances of the case at hand. He was not given notice of the examinations of his fellow crew members, which examinations were solely in relation to the same incident for which his own degree of responsibility was under consideration. It could not be known in advance whether the statements of his fellow crew members would mitigate or aggravate his own case in the eyes of the Company. By any normal reading of the language of Article 19(c), their statements could plainly have a bearing on his responsibility for the speeding and signal infractions under investigation. In all of the circumstances, therefore, the Arbitrator must conclude that the method of investigation conducted by the Company departed from the requirements of Article 19(c) of the Collective Agreement.

For these reasons the discipline assessed against the grievor must be found to be null and void. The twenty-five demerits assessed against Locomotive Engineer Spring shall therefore be removed from his record forthwith. The Arbitrator retains jurisdiction.

July 14, 1989 (Sgd.) MICHEL G. PICHER
ARBITRATOR