CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2175

Heard at Montreal, Tuesday, 10 September 1991

concerning

CANADIAN PACIFIC LIMITED

and

TRANSPORTATION COMMUNICATIONS UNION

DISPUTE:

The assessment of forty-five demerit marks to E. Kelley, Storeman, Ogden Store, and his subsequent dismissal for accumulation of demerits.

JOINT STATEMENT OF ISSUE:

On June 21 and July 9, 1990, the Company held investigations with Mr. Kelley concerning a petition dated June 12, 1990, received by Management from Ogden Store employees regarding their concerns for their own personal safety while working in Mr. Kelley's presence. As a result of said investigations, the Company assessed forty-five demerit marks to Mr. Kelley for behaviour unbecoming an employee of the Company when he physically attacked a fellow employee on June 11, 1990, causing bodily harm, resulting in Management receiving a petition from Ogden Store employees stating they feared for their safety while working in Mr. Kelley's presence.

Mr. Kelley was subsequently dismissed for accumulation of demerit marks.

The Union appealed the demerits.

The Company declined the grievance.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) D. J. KENT	(SGD.) J. L. LANGLAIS
for: SYSTEM GENERAL CHAIRMAN	for: DIRECTOR OF MATERIALS

There appeared on behalf of the Company:

H. C. Wendlandt	- General Solicitor, Montreal
R. Smith	- Solicitor, Montreal
D. David	- Labour Relations Officer, Montreal
J. P. Deighan	- Assistant Director of Materials, Stores Operations, Montreal
C. Graham	- Supervisor, Training & Accident Prevention Materials, Montreal
B. Benner	- Assistant Manager of Materials, Ogden

And on behalf of the Union:

G. Marceau	- Counsel, Montreal
D. Deveau	- System General Chairman, Calgary
C. Pinard	- Vice-General Chairman, Montreal

AWARD OF THE ARBITRATOR

The material establishes, without dispute, that during a social encounter prior to a union meeting, Storeman Kelley assaulted and seriously injured another employee. The unchallenged account of the victim of the assault, Mr. W. Pasveer, sheds some light on the incident. On the day in question, June 11, 1990 Mr. Pasveer, the grievor and other employees were in the bar at the Ogden Legion Hall, shortly prior to the convening of a union meeting and election to take place that evening in the same building. Mr. Kelley, who was running against Mr. Pasveer for the position of Local Chairman, approached him and asked him to disclose the content of a letter which Mr. Pasveer had provided to a member of management earlier in the day. When Mr. Pasveer declined to discuss the matter, Mr. Kelley invited him to step outside. Upon a further refusal of that invitation Mr. Kelley took hold of Mr. Pasveer and attempted to pull him out the door, kicking him in the stomach in the process. They were separated by another employee, and as Mr. Pasveer was attempting to proceed to the washroom he was again attacked by Mr. Kelley who threw him to the ground and kicked him in the face. The facial injuries sustained by Mr. Pasveer, which included the loss of several teeth, resulted in his hospitalization and two subsequent reconstructive surgical operations to restore his broken cheekbones. It is not disputed that he has suffered disfigurement and permanent numbness to part of his face. The actions of Mr. Kelley are the subject of pending civil litigation by Mr. Pasveer. Additionally, Mr. Kelley's attack on Mr. Pasveer resulted in his conviction of a charge of assault with bodily harm, and the assessment of a $1,000.00 fine and one day in prison.

On Tuesday, June 12, 1990 Mr. Pasveer reported the incident to Mr. B. Benner, the Assistant Manager of Materials at Ogden Stores. He advised Mr. Benner that he felt that his own safety was in jeopardy if Mr. Kelley should be allowed on the property, and that he would take legal action against the Company if it failed to protect him in that regard. Additionally, the Company received a petition on the same day, purportedly signed by thirty-two Ogden Stores employees, stating:

We the undersigned fear for the safety of ourselves and/or the safety of our fellow employees, should Ed Kelley be allowed to return to work before all investigations and problems involving his behaviour are resolved.

Mr. Kelley was immediately suspended pending an investigation of the incident. During the course of its further interview of the employees who it says signed the petition, the Company states that it was advised by twenty-three of them that they did not wish their

names to be disclosed to Mr. Kelley. Six others requested that their names be struck from the petition, with the result that only three signatories remain available for identification. The Company reports that it also received separate statements of concern from employees with respect to their fear of working with or near Mr. Kelley. It appears that as a result of those communications, including the concerns expressed by Mr. Pasveer, Mr. Kelley was transferred to Alyth Stores, without any apparent objection on his part, shortly after his return to work on July 3, following the completion of the Company's investigation.

The Union takes exception to the fact that the Company relied on the petition when, at the time of the investigation, it did not disclose to Mr. Kelley or the Union the signatures of all but three of the employees who signed it. Counsel for the Union argues that in the circumstances the petition can only be seen as a document reflecting the statement of the three employees whose identity is disclosed. The same position is taken with respect to additional written statements in the possession of the Company which were not provided to the Union.

In the Arbitrator's view that position is well founded. It is clear that the investigation and discipline procedures contemplated within Article 27 of the collective agreement contemplate the full disclosure of witnesses and their evidence, and the opportunity to rebut them, during the course of the investigation, as expressed in Article 27.4 of the collective agreement. In the instant case, however, the Union has not taken the position that any departure from the requirements of Article 27 rendered the procedures void. Rather, it maintains that the weight of the petition must be reduced to reflect the statement of three employees whose names are disclosed, each of whom indicates that he is not afraid for himself, but for other employees who are not specifically identified. Counsel for the Union submits that to the extent that the discharge of the grievor is justified on the basis of the supposed fears of other employees, as reflected through the petition, the burden of proof borne by the employer has not been discharged. In his view, the statement of three employees to the effect that they believe that other persons may be in fear of their safety is not a sufficient basis to justify the assessment of forty-five demerits against the grievor and his ultimate dismissal. Counsel argues that that conclusion is the more compelling because the incident occurred in a social setting away from the workplace and was not directly employment related.

With those submissions the Arbitrator has substantial difficulty. The unchallenged evidence is that the grievor engaged in an unprovoked and vicious physical attack against a fellow employee. While the event occurred away from the workplace, it was plainly work related, insofar as it occurred shortly before a union meeting during which Mr. Kelley and the victim of the assault were opposing candidates in an election for the position of Local Chairman, and immediately after Mr. Pasveer refused to answer Mr. Kelley's questions about the content of a letter which he had provided to a member of management earlier that day. Contrary to the submissions made by Counsel for the Union, it appears to the Arbitrator that the incident was manifestly work related and would have been seen to be

so by other members of the bargaining unit who were either present or who might have heard about it.

Nor can the Arbitrator accept the suggestion that there is insufficient evidence of fear on the part of employees with respect to their own safety in relation to the continued presence of Mr. Kelley in the workplace. The statement of Mr. Pasveer, and his own threat to take legal action should the Company fail to give him protection in that regard is, of itself, compelling in relation to that question. Additionally, however, the Arbitrator is satisfied that the Company was entitled to attach weight to the statement of three employees who expressed their own view that Mr. Kelley would be seen by other employees as a threat to their own safety, particularly in light of the violent beating which he inflicted upon a member of their ranks.

This Office has had prior occasion to deal with violence or threats of physical violence away from the workplace, but which are employment related. In CROA 1701 the Arbitrator sustained the discharge of an employee who carried his resentment of the working practices of another employee to the point of assaulting him in a hotel bar room and on the street outside. In dismissing the grievance the Arbitrator commented, in part, as follows:

> Boards of Arbitration have long recognized that the working place is not a tea party, and that momentary flare-ups may occur between fellow employees, both on and off the job. When an altercation between employees takes place off the job, and is apparently not linked to anything that is work-related, arbitrators may question the imposition of discipline, particularly where the interests of the employer are not affected. On the other hand, where such conduct is job-related, and can be seen to impact negatively on the legitimate business interests of the employer, discipline may well be justified, depending on the circumstances of the particular incident. Plainly the threatening of a fellow employee in a way that threatens the peace of mind and well-being of that person in his job, and the physical acting out of such threats, is prejudicial to an employer's interests and will justify the imposition of serious disciplinary measures. (See, Hitachi Sales Corp. of Canada Ltd. (1981), 30 L.A.C. (2d) 1 (Frumkin); City of Nanticoke (1980), 29 L.A.C. (2d) 64 (Barton). Kingsway Transports Ltd. (1982), 4 L.A.C. (3d) 232 (Burkett); Galco Food Products Ltd. (1974), 7 L.A.C. (2d) 350 (Beatty); Mattabi Mines Ltd. (1973), 3 L.A.C. (2d) 344 (Abbott); Liquid Carbonic Canada Ltd. (1972), 24 L.A.C. 309 (Weiler); Pedlar People Ltd. (1972), 24 L.A.C. 277 (Hanrahan); Canadian Food Products Sales Ltd. (1966), 17 L.A.C. 137 (Hanrahan); McCord Corp. (1966), 17 L.A.C., 321 (Hanrahan); Huron Steel Products Co. Ltd. (1964), 15 L.A.C. 288 (Reville);).

Further, in CROA 1775, the assessment of thirty demerits for threatening words and physical aggression to a fellow employee was sustained with the following observation:

> ... Physical abuse and threats to the security of a fellow employee or supervisor are plainly unacceptable in any workplace, and may justify the most serious of disciplinary consequences. That is

well established in the prior jurisprudence of the Office (see e.g. CROA 1701 and 1722).

The viciousness of the attack by Mr. Kelley on his fellow employee, and the permanent physical damage caused, qualify the incident giving rise to the grievor's discharge as among the most serious considered by this Office. Additionally, the clear statement by the victim, as well as three other employees advising the Company that the continued presence of Mr. Kelley in the workplace would cause fear in the minds of other persons is extraordinary evidence going to the issue of the disruption of the Company's operations and the well-being of employees, should these concerns be disregarded. The search for mitigating factors in support of the reinstatement of Mr. Kelley yields a most barren result. He has offered no apology and has expressed no remorse for his actions. An employee of relatively short years of service, his record stood at twenty-five demerits at the time of the culminating incident. This includes the assessment of demerits for two separate altercations with employees which occurred on April 3 and May 31, 1990. Additionally, he was assessed fifteen demerits for an altercation which took place in the locker room on April 2, 1990. While that discipline was initially grieved, it was not progressed in a timely manner, and now stands unchallenged on his record. In the result, Mr. Kelley has a total of three prior incidents involving verbal altercations and/or threats of assault against other employees on his record prior to the culminating incident. In these circumstances the Arbitrator can see little rehabilitative potential in substituting a lesser penalty than the forty-five demerits assessed against him. On the contrary the legitimate concerns of the Company and employees for on-going safety point compellingly to the opposite conclusion.

For the foregoing reasons the grievance is dismissed.

September 13, 1991

(Sgd.) MICHEL G. PICHER
ARBITRATOR