

CANADIAN RAILWAY OFFICE OF ARBITRATION  
CASE NO. 2306  
Heard at Montreal, Wednesday, 9 December 1992  
concerning  
CANADIAN PACIFIC EXPRESS & TRANSPORT  
and

TRANSPORTATION COMMUNICATIONS UNION

EX PARTE

DISPUTE:

On July 31, 1991, employee Russell MacIntyre received a letter of dismissal alleging assault of a fellow employee. The employee filed grievances with respect to the dismissal and the manner of the dismissal dated August 2 and August 6, 1991.

UNION'S STATEMENT OF ISSUE:

It is alleged that on July 23, 1991, the grievor had an altercation with a fellow employee. The grievor alleges that he was hit in the face by a key; there was some jostling but that he was not responsible for the occurrence.

The Union relies upon article 8 of the collective agreement in its entirety and submits that the discipline was not carried out in a proper fashion and that there was no just cause for the discharge. The grievor seeks reinstatement with full seniority and compensation or such other remedy as is appropriate.

The Company asserts the grievance ought to be denied.

FOR THE UNION:

(SGD.) J. CRABB

EXECUTIVE VICE-PRESIDENT

There appeared on behalf of the Company:

M. D. Failes

Counsel, Toronto

B. F. Weinert

Director, Labour Relations, Toronto

J. Goleski

Operations Supervisor, Calgary

C. Thomas

Warehouseman, Calgary

And on behalf of the Union:

F. Luce

Counsel, Toronto

J. Crabb

Executive Vice-President, Toronto

D. Elickson

Counsel, Toronto

R. McLean

Witness

R. MacIntyre

Grievor

#### AWARD OF THE ARBITRATOR

The material before the Arbitrator confirms that the grievor, Mr. R. MacIntyre, was involved in an altercation with other employees during the course of his duties as a warehouseman in the Company's Calgary terminal on July 23, 1991. It is not disputed that Mr. MacIntyre initiated a physical altercation with two other employees from whom he had requested a fork lift key. It would appear from the statements of the persons involved that the altercation was in the nature of a scuffle of relatively short duration, and that the grievor left the scene of his own volition upon the intervention of a supervisor.

The evidence also discloses certain mitigating circumstances. While there is some conflict as to precisely what was said between the grievor and the other two employees, Warehousemen C. Thomas and M. Francis, it is not disputed that one or both of them used abusive language towards him when he first requested the fork lift key. Mr. MacIntyre further maintains that Mr. Francis threw the key at him, striking him in the face, which precipitated the ensuing scuffle. The two employees deny that the key was thrown. In the Arbitrator's view it is not necessary to resolve the difference in the accounts of the incident given by the grievor, on the one hand, and Mr. Francis and Mr. Thomas on the other. It is clear that there was some degree of provocation of Mr. MacIntyre in the circumstances, a factor which should be weighed in mitigation.

The evidence further discloses that at the time in question Mr. Francis, who was first employed in 1986, had a clear record. The Union sought to plead the application of article 8.4 of the collective agreement, arguing that there was a violation of the grievor's rights in that he was not present at the taking of the statements of Mr. Thomas and Mr. Francis, as well of a third employee. The Arbitrator cannot sustain that position. It is common ground that the grievor's Union representative was present for the taking of the three statements, and there is no indication on the record that he objected to the fact that the grievor was not in attendance. Moreover, during the progressing of the grievance the Union gave the Company no indication that it sought to rely on the strict application of article 8.4. In all of the circumstances, the Arbitrator is satisfied that the inaction or acquiescence of the Union representative in the procedure followed constitutes a waiver of the strict application of article 8.4.

For all of the foregoing reasons the grievance is allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment, without compensation or benefits, and without loss of seniority.

December 11, 1992

(Sgd.) MICHEL G. PICHER  
ARBITRATOR