Canadian Railway Office of Arbitration
Case No. 2573
Heard in Montreal, Wednesday, 11 January 1995
concerning
Canadian Pacific Express & Transport
and
Transportation Communications Union
ex parte
Dispute:

On August 21st, 1992, P. Jaeger, linehaul driver, was assessed 55 demerits for "dangerous driving endangering lives of fellow employee and family of five in a second vehicle" on July 20th, 1992.

Ex Parte Statement of Issue

On the day in question, the grievor was riding double with Darryl Butler, driving between Kamloops and Sicamons. The grievor denies any wrongdoing whatsoever.

Further, the investigative interview was held on August 20th, 1992, and the grievor was not given the opportunity to confront his accuser; nor was the grievor given the opportunity to ask questions of the witness who was interviewed.

The Union asserts a violation of article 8 and any other relevant article of the collective agreement and requests that the correspondence and the 55 demerits be removed from the grievor's record or such other remedy as may be appropriate. The Union also asserts that the statements of the alleged witness canned be relied upon.

for the Union:
(sgd.) G. Rendell
for: Executive Vice-President, Trucking

There appeared on behalf of the Company:
B. F. Weinert – Director, Labour Relations, Toronto
W. B. Smith – Area Manager, Vancouver

And on behalf of the Union:
F. Luce– Counsel, Toronto
D. J. Bujold– National Secretary Treasurer, Ottawa
M. Prebinski– Education Director, Ottawa
P. Jaeger – Grievor

award of the Arbitrator

The discipline assessed against the grievor arose out of an incident which was reported to the Company by a motorist who alleged that Mr. Jaeger tailgated his vehicle and passed his car in a dangerous manner on a curve on July 20, 1992. The motorist's complaint was communicated to the Company in a letter dated August 10, 1992. It is common ground that after he received the letter, Area Manager Wayne Smith telephoned the complaining person to confirm the accuracy of the information contained in the letter. Subsequently the Company conducted an investigation during which the grievor and his Union representative were provided with a copy of the initial letter sent by the motorist.

It does not appear disputed that the Union was not made aware of the telephone interview of the motorist conducted by Mr. Smith until after the discipline was assessed. Mr. Smith states in a

letter to Mr. Jaeger dated August 21, 1992, advising of his decision, that "I further verfied the motorist complaint by a telephone interview. ..." In a further letter dated September 3, 1992, declining the grievance against the discipline assessed, Mr. Smith states as follows:

The facts are; I received a letter from the motorist and phoned them to establish validity. I was satisfied, after the telephone interview, the factual time, unit numbers, etc. that this was a legitimate complaint. Mr. Jaeger's log book indicates he was driving at the time and place described by the motorist.

The Union asserts, in part, that the Company violated the provisions of article 8.4 of the collective agreement by conducting an interview with the complaining motorist out of the presence of the grievor, in respect of which no transcript or written statement was provided. Article 8.4 provides as follows:

8.4 Whenever a person is interviewed by the Company and the statements of such person are to be used in any proceedings that relate to the disciplining or dismissal of an employee, such employee and his/her Union Representative shall be entitled to be present at such interview and ask questions as are felt appropriate, or read the evidence of such witness and offer rebuttal to such statements.

Failure to comply with this Article shall result in the Company not being able to rely upon the statements of such persons(s) in any proceedings and any discipline assessed will be null and void.

The Company's representative raises an objection with respect to the manner in which the article 8 objection was presented. Although it is contained in the ex parte statement of issue filed several months in advance of the arbitration hearing, he submits that the issue of the regularity of the Company's investigation was never raised during the course of the grievance procedure. On that basis he submits that it should not be entertained by the Arbitrator. Secondly, he refers the Arbitrator to prior awards, including CROA 1734 and 2491 as well as an ad hoc decision between these same parties in the grievance of employee A. Gasper, an unreported award dated December 6, 1989.

The Gasper case is in some respects similar to the case at hand, to the extent that it also involved a complaint by a third party. In that case the Company's terminal manager at Campbell River received a complaint from a third party who allegedly witnessed the grievor's truck doing damage to a gas pump. The Company subsequently received a written statement from the complaining witness, and, following the grievor's initial denial of any involvement, made informal inquiries of other employees whose trucks were in the same location at the time, to rule out any error of identity. It only decided to conduct a formal investigation after it had received preliminary information from the other employees involved. The Union objected that the Company violated article 8 of the collective agreement by speaking with other employees about the incident in question outside the context of a formal investigation, arguing that an inquiry under the collective agreement should have been initiated based on the original letter of complaint. At pp. 4-6 the Arbitrator considered and disposed of that argument in the following terms:

With that position the Arbitrator cannot agree. The operation of article 8 cannot, for practical purposes, be triggered unless

there is some clear indication that there is a genuine probability of discipline in respect of a given set of facts. The fact that an accident has taken place may, in some circumstances, result in discipline. In other cases it will not, depending on the facts disclosed. It is therefore not improper, nor in the Arbitrator's view unreasonable, for Company officials to ask an employee what, if any, knowledge he or she may have of an accident when a third party claim of damages is made. While the point at which it becomes obvious that discipline will ensue is difficult to define, there is nothing untoward in the Company soliciting statements from employees, including the individual who may himself be the subject of discipline, prior to deciding that the matter merits a formal investigation within the terms of article 8 of the collective agreement. In CROA 1737 the Arbitrator made the following remarks respecting the operation of this provision:

> 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 CROA 1575 and Re Canex Placer Ltd. and Canadian Association of Industrial, Mechanical and Allied Workers, Local 17, (1978) 21 LAC (2d) 127 (Weiler).)

I am satisfied that in the instant case the Company did not violate the grievor's rights by initially asking him, as well as other employees, outside the setting of the formal interview what

happened with respect to the accident. If there was a delay in processing this matter it was caused entirely by the grievor's initial denial of any involvement, which necessitated further inquiries by the Company's officers. When it became clear to the Company on the basis of information provided by two other employees as well as a third party eyewitness that Mr. Gasper had been involved in the accident at the gas pump, it gave him the appropriate notice and conducted the investigation contemplated under article 8 of the collective agreement prior to assessing discipline against him. That, in my view, is precisely what the collective agreement contemplates as the practical and fair way of proceeding.

In the Arbitrator's view the facts in the case at hand are substantially different from those considered in the Gasper grievance. As indicated in the second letter of Mr. Smith, who, I am satisfied acted in the best of good faith at all times, the information which he gained during the course of the telephone interview with the complaining motorist was, in substantial part, instrumental in his assessment of the merits of the complaint and the decision to assess discipline against the grievor. The information obtained from the motorist by telephone was received following the submission of the initial letter and was plainly intended to corroborate and/or supplement the content of that document. However, the fact of the telephone conversation was not disclosed to the grievor or his Union representative, nor was the content of the interview ever related to them, either in a narrative fashion or by way of a written transcript, prior to the assessment of discipline.

Article 8.4 of the collective agreement is critical to the procedural protections of employees in relation to investigations and discipline. It is an expression of the principle that the employee is entitled to know the identity of his or her accuser and the particulars of any written or verbal statement received by the Company, to the extent that such statements may be used in proceedings relating to the employee's discipline or dismissal.

Notwithstanding Mr. Smith's good faith, in the case at hand it would be impossible for Mr. Jaeger or his Union representative to know or to be able to test whether the telephone interview with the complaining motorist disclosed further facts or allegations more grievous than those which appear in the initial letter of complaint or, conversely, contained assertions which would assist the grievor's defence. It is among the fundamental purposes of article 8.4 to avoid such uncertainty. In keeping with the observations of this Office in CROA 1734, the employee is not to be put in the position of trusting that the Company has made no adverse use of information obtained by way of an interview from a complainant, without knowing with some degree of certainty what the information is. Significantly, in the case at hand, the letter issued by Mr. Smith denying the grievance appears to confirm that some reliance was placed upon the information gained in the telephone interview. In these circumstances the Arbitrator is satisfied that there was a violation of the provisions of article 8.4 of the collective agreement. As is evident from the language of the provision, the failure to comply with the requirements of article 8.4 results in the inability of the Company to rely upon the statements of the complainant, and the discipline must be declared null and void. I am also satisfied

that, notwithstanding the grievance procedure, there was nothing to prevent the Union from raising the issue of article 8.4 in the ex parte statement of issue. As compensation is not a factor in this case, no prejudice resulted to the employer in that regard. Nor is this a case where the Union was in a position to register its protest during the course of the investigation (cf. CROA 1241).

For the foregoing reasons the grievance must be allowed. The 55 demerits assessed against Mr. Jaeger shall be removed forthwith from his disciplinary record.

13 January 1995 _____

MICHEL G. PICHER
ARBITRATOR