

Canadian Railway Office of Arbitration

Case No. 2643

Heard in Montreal, June 14, September 14 and December 14, 1995, February 13, March 15, March 30,
April 27 and June 14, 1996

concerning

Canadian National Railway Company

and

**Canadian Council of Railway Operating Unions
(United Transportation Union)**

ex parte

Dispute:

Appeal of discharge of Yardmaster P. Gilmore of Montreal.

Ex Parte Statement of Issue

On February 25, 1994, Mr. P. Gilmore was called at 1415 hours to protect an extra assignment as yardmaster, on the 1500–2300 Turcot Yardmaster Assignment. The grievor advised that, due to the late call, he would be late and that he would arrive as soon as possible. When the grievor arrived at work and prior to assuming active duty, he was approached and advised by the Manager of Train Service, that he would like to discuss some concerns.

During the interview, the grievor advised the Company officer that he felt intimidated and as well that the interview was turning into an investigation. He exited the room to call his Union representative because of these concerns, even though the Company officer demanded that he remain.

The Company held investigations on March 7 and 15, 1994 subsequently dismissing the grievor on March 16, 1994.

The Union appealed the manner in which the investigation was held and as well appealed that the discipline assessed was unjustified and unwarranted. In any case, it is the Union's position that the dismissal was not the proper disciplinary response.

The Company has declined the Union's appeal and has refused to reinstate the grievor.

for the Council:

(sgd.) W. G. Scarrow

General Chairperson

There appeared on behalf of the Company:

M. Savard – Counsel, Montreal

D. C. St-Cyr – Manager, Labour Relations, Montreal
D. Laurendeau – Assistant Manager, Labour Relations, Montreal
S. Grou – Labour Relations Officer, Montreal
D. Belanger – Manager, Train Service, Montreal
P. Burton – Labour Relations Officer
S. Cournoyer – Labour Relations Officer, Montreal
G. Rochette – Manager, Train Service, Montreal
S. Matte – Witness, Carman, Montreal
C. Pelletier – Witness, General Supervisor, Montreal
R. Sénécal – Witness, General Supervisor - Equipment Car, Montreal
R. Levac – Witness, Track Supervisor, Montreal
S. Lachance – Witness, Office Intermodal Logistic, Montreal
L. Machado – Witness, Terminal Assistant Manager, Montreal
B. Huppé – Witness

And on behalf of the Council:

W. G. Scarrow – General Chairman, Sarnia
R. Michaud – Provincial Chairman, Q.L.B., Montreal
R. Doiron – Local Chairman, Montreal
H. Caley – Advisor, Toronto
M. P. Gregotski – General Chairman, Fort Erie
J. Gilmore – Assistant
Y. Jégou – Labour Canada Safety Officer
N. Belleveau – Transport Canada Safety Officer
L. Dalzel – Witness
A. P. Gilmore – Grievor

award of the Arbitrator

By notice dated March 16, 1994 the Company notified the grievor, Mr. Patrick Gilmore, that he was discharged by reason of the accumulation of 110 demerit marks. That accumulation of demerits resulted from the assessment of forty-five demerit marks for insubordination towards a Company officer on February 25, 1994 as well as thirty demerits assessed for failing to follow his supervisor's instructions and failing to communicate adequately with other departments while working as a yardmaster in Turcot Yard. The Union grieves both heads of discipline, and seeks the

removal of all of the demerits assessed from the grievor's record, together with his reinstatement with compensation for wages and benefits lost. The Company maintains that just cause is disclosed for the disciplinary actions, by reason both of the incidents giving rise to the assessment of demerits and the grievor's prior disciplinary record.

Mr. Gilmore was first hired as a yardman on June 2, 1980, and progressed to the rank of yard foreman in January of 1983. He thereafter qualified as a conductor and, in 1985, as a yardmaster.

Mr. Gilmore was the subject of three prior awards issued by this Office in relation to prior assessments of discipline against him, generally for behavioural reasons. **CROA 2345** concerned the assessment of ten demerits for his failure to comply with operating rules and by lacking courtesy in dealing with a section foreman. The ten demerits assessed for that incident were reduced to a written reprimand by the direction of the Arbitrator. **CROA 2346** concerned the assessment of twenty-five demerits for a threat of physical violence addressed to a car foreman in the yardmaster's tower of Turcot Yard on December 9, 1991. While the Arbitrator found that the grievor "... did threaten a supervisor in a manner which was unacceptable", by reason of certain mitigating factors the penalty was reduced to fifteen demerits. Finally, **CROA 2347** concerned the suspension of the grievor from working as a yardmaster for one year, by reason of insubordination which occurred on December 16, 1991. In that case it was found that the refusal of Mr. Gilmore to speak directly to carmen during the course of his work as a yardmaster, limiting his communications to the carmen's foreman, was a violation of clear directions which had been given to him by a trainmaster, and that the removal of the grievor from his yardmaster's functions was for proper cause. The actions of the grievor were prompted, in part, by his view of the inadequacy of radio communications within Turcot Yard, a matter which had been the subject of an investigation and direction of the Canada Labour Board pursuant to a complaint made by Yardmaster Gilmore. Again, by reason of mitigating factors, the Arbitrator directed the reduction of the penalty and reinstated the grievor into his employment. In doing so, however, the award concluded with the following admonition:

... In future, Mr. Gilmore must appreciate the importance of maintaining appropriate standards of civility and sensitivity in his communications with all persons with whom he is compelled to work.

Such was the record when Patrick Gilmore returned to his yardmasters' functions in late September of 1993, following a delay occasioned by a period of illness and the obtaining of medical clearances.

Mr. Gilmore's personal concern with the system of radio communications at the Turcot Yard had clearly not abated by the time of his return to work. The record discloses that on or about November 11, 1993, Mr. Gilmore refused to work, invoking Section 128(1) of the **Canada Labour Code**. As a result of investigation, a direction was issued by Labour Canada Representative Denis Lupien, resulting in certain directives with respect to the use of radios.

Not long afterwards, on February 19, 1994, Mr. Gilmore again invoked the **Canada Labour Code** to refuse to perform work as a yardmaster, citing ongoing problems with radio communications. That complaint resulted in discipline against Mr. Gilmore, and extensive litigation between himself and the Company, extending to, and including, the Canada Labour Relations Board. Mr. Gilmore's refusal to work cited, among other things, the over-crowding of radio frequencies, crews improperly using radio frequencies, lack of proper radio equipment and what he characterized as threats against him by his supervisor, Mr. Gilles Rochette, should he continue to register concerns with respect to radio safety. On February 24, 1994, Labour Canada Safety Officer Denis Lupien ruled that there was no danger justifying the work stoppage undertaken by Mr. Gilmore. Mr. Gilmore appealed the ruling of the safety officer to the Canada Labour Relations Board, and further, sought a reversal of the Company's removal of him from service, for an unjustified refusal to work, alleging a violation of article 147(a) of the **Code**.

The Canada Labour Relations Board dismissed both the appeal and the complaint with respect to the discipline against Mr. Gilmore, in CLRB Decision No. 1096 issued December 19, 1994. In light of the nature of the grievances before the Arbitrator, by way of appreciating the background to these events, I deem it useful to refer to excerpts from the decision of the Canada Labour Relations Board. Writing for the Board, the Chairman of the Board Mr. J.F.W. Weatherill wrote, in part, as follows:

The fundamental issue in this matter involves working conditions at Turcot Yard, in Montreal, where the complainant works as a yardmaster on the night shift. Turcot is a switching yard; trains are brought in and

out of the yard by road crews, but other movements within the yard are carried out by yard crews, and certain train inspections are carried out by carmen working in the yard itself. Turcot adjoins an intermodal yard, and there are many train movements in the course of the shift. The yardmaster, under the direction of a supervisor, coordinates and authorizes these movements. For the yard to operate safely and efficiently, it is clear that there must be good communication between the persons requiring movements to be made (to assemble trains, to switch cars, to carry out inspections), and those making the movements (train crews), those working on or inspecting trains within the yard (carmen) and the person authorizing and controlling movements (the yardmaster).

The days of mechanical and hand signals for the control of yard movements are largely, although not entirely, over and the principal method of communication currently relied on is radio. There is no single system of radio communication in effect, the needs of the various groups being different. Equipment is not uniform, and different frequencies are used. Effective and efficient communication with respect to yard movements, then, is a difficult task, and there is no doubt that yardmasters and others are justified in believing that there is considerable potential for dangerous situations to arise.

There are, however, rules – developed and modified over many years, and authorized by the National Transportation Agency – governing all train movements as well as the performance of work in yards. Where reliable communication by radio does not take place, compliance with the rules governing train movement, while no doubt slowing down yard activity, assures the safety of operations. Even where radio communication is effective, compliance with the rules – particular mention may be made of the "blue flag" rules protecting persons working on cars within a yard – must be maintained.

On February 19, 1994, when Mr. Gilmore considered that a dangerous condition existed, and when the safety officer, Mr. Lupien, made his investigation, it can properly be said to have been the case that there were problems and inadequacies in the system or systems of radio communication on which Mr. Gilmore, and all those involved in yard operations, had to rely to carry out their work. That the "chaos" which Mr. Gilmore felt existed was a rather exaggerated view of the situation would appear from the operation – how efficiently is not known – of the yard on other shifts, and on the night shift under other yardmasters. The safety officer, Mr. Lupien, investigated the situation and concluded that there was no danger within the meaning of the material provisions of the Canada Labour Code.

...

In the Board's view the safety officer's decision was correct. While the inadequacies of the radio communication system or systems would surely decrease the efficiency of yard operations, and while it could well be argued that such inadequacies increased somewhat the risks of potentially dangerous situations arising, it remains that all train movements and other yard activities were governed by rules designed to ensure safe operations. There is nothing to suggest that employees were not aware of these rules, or that they were not appropriately enforced. The situation, the Board concludes, was not one of "danger" within the meaning of the Code.

Mr. Gilmore again refused to carry out his duties as yardmaster on February 25, 1994, also on the ground of alleged reasonable cause to believe that a dangerous situation existed. Although it has now been determined, as set out above, that there was no danger within the meaning of the Code in the situation in issue, the question whether or not there was "reasonable cause" to believe that a dangerous condition existed is a distinct one. In my view, for the reasons set out above, Mr. Gilmore did not have reasonable cause to believe that a dangerous situation existed, much as he may have been justified in believing that the system or systems of radio communications were inadequate for efficient operations. As the Board stated in **David R. Holloway**, (1990), 83 di 50; and 14 CLRBR (2d) 293 (CLRB no. 835), it is not unreasonable to be wrong, and employees ought not to be discouraged from raising suspicions or fears about danger in the work place. In the instant case, however, the Board finds not only that Mr. Gilmore was wrong in his belief that there was a danger in the circumstances, but that his belief, however genuine, in the existence of such danger, was one for which there was no reasonable cause.

The foregoing would be, in itself, sufficient grounds to dismiss the complaint of violation of section 147(a) of the Code. ...

Accordingly, the Canada Labour Relations Board determined that there was no violation of any provision of the Code, nor any improper assessment of discipline against Mr. Gilmore for what was found to be an unreasonable refusal to perform his duties. Mr. Gilmore's request for a reconsideration of that decision was denied by way of a letter decision of a three person panel of the Board, dated March 14, 1995.

As can be seen from the foregoing, the prior decisions of this Office, and to some extent that of the Canada Labour Relations Board, reveal a pattern of dealing between Mr. Gilmore and his employer which is unfortunately marked by a confrontational attitude on the part of Mr. Gilmore in his relations both with fellow employees and supervisors, often relating to disputes which Mr. Gilmore would characterize as motivated only by his concerns for safety.

The record also discloses that the Company attempted, by a number of means, to resolve the difficulties relating to radio communications, and in particular to deal with Mr. Gilmore's unwillingness to act as a go-between in conveying messages from carmen to locomotive engineers to facilitate cuts on trains in Turcot Yard. The problem emanates from the fact that carmen are restricted by their portable radios to communicating on the UHF band, channel no. 1. Train crews, on the other hand, are on VHF band, channel no. 5. As the yardmaster was possessed of both bands of communication, it was necessary for carmen to communicate with the headend of a train during the course of making a cut by means of the yardmaster, whose role was to relay the communication. That practice, which appears to have been in place for a substantial number of years, was objected to by Mr. Gilmore, on what he considers grounds of safety. In the result, as confirmed by the evidence of Lead Hand Carman Serge Matte, carmen encountered substantial difficulties, and delays, in attempting to accomplish their work. The Company's concerns led to the issuing of circular no. 9410GR, dated February 23, 1994, which reads, in part, as follows:

1 – Radio instructions

The channel no 5 is the standby channel for Turcot Yard.

Since Turcot Yard carmen do not have access to channel no 5, channel no 1 (end to end) must be used as alternate in order to assist carmen to effect cuts on the trains.

The evidence further discloses that to facilitate operations, management decided to conduct conference calls involving the yardmaster, equipment lead head and the intermodal yard supervisor, at the beginning of each shift. As the evidence discloses, the intention was to facilitate communication with respect to planned or anticipated work over the course of the coming shift, with a view to achieving greater efficiency.

While there is some dispute in the evidence before the Arbitrator, I am satisfied on the preponderance of the evidence that Mr. Gilmore showed a consistent course of resistance to utilizing channel 1 to assist carmen in communication with headend crews. Also, I am satisfied that the evidence reveals that he was not willing to participate in conference calls at the commencement of each shift, and that he simply refused to do so, stating that he was too busy and that persons who wished to communicate with him could, in any event, do so by fax. These issues became matters of immediate concern to the grievor's supervisor, Manager, Train Service Gilles Rochette. Mr. Rochette received, among other things, a communication from Assistant Manager, MonTerm InterModal Terminal Louis Machado on February 17, 1994 complaining about Mr. Gilmore's lack of cooperation. It reads, in part, as follows:

I wish to inform you of the problems we face almost daily because of one of your yardmasters, Patrick Gilmore. Mr. Gilmore works on the night shift. As you know, our yard supervisor at MonTerm often has to contact the yardmaster to have cars placed on the pad and make sure trains are placed in time.

Yet it has been reported to me that Mr. Gilmore categorically refuses to cooperate with our yard supervisor, clearly telling him that he is not interested in talking to anyone, and regularly tells him to send a message by fax instead of constantly phoning. Moreover, Mr. Gilmore refused to participate in the conference calls at

11:30 p.m. last Monday and Tuesday. Once again, he said to send him a fax if there was anything he should know.

It goes without saying that this type of attitude cannot be tolerated. It indicates a blatant lack of good will and greatly interferes with our day to day operations, not to mention the numerous frustrations this type of conduct can create.

On February 25, 1994, the grievor was called to work as a yardmaster at Turcot Yard to cover a manpower shortage. As he came into work he was met by Mr. Rochette in the hallway outside Mr. Rochette's office. The latter asked Mr. Gilmore to come into his office as he wished to discuss certain matters with him. After attending to some personal business, Mr. Gilmore returned shortly to speak with Mr. Rochette. He refused, however, to enter the office until Mr. Machado, who was previously present, left, indicating that he did not wish to meet with Mr. Rochette with a witness present who was another Company supervisor. Mr. Machado then left.

While considerable evidence was called with respect to the exact details of the meeting between Mr. Rochette and Mr. Gilmore, the Arbitrator is satisfied that the essential elements of that encounter are beyond controversy. It appears that Mr. Rochette attempted to raise with Mr. Gilmore his refusal to participate in the conference calls and secondly, that he was failing to comply with the circular with respect to yardmasters utilizing channel 1 to assist carmen, reminding Mr. Gilmore of the need to use all channels available to him to assist carmen and others in their operations. Mr. Rochette indicated to Mr. Gilmore that he had received complaints from others about these problems.

Mr. Gilmore became extremely defensive, insisting that copies of any complaints be provided to him immediately. He went on in an agitated voice to state that he felt that Mr. Rochette was threatening him, and that he should be entitled to be accompanied by a union representative, and that he also wished to call Labour Canada. With that Mr. Gilmore left Mr. Rochette's office, as Mr. Rochette forcefully told him that he was not finished, and that he should stay. It appears that Mr. Gilmore proceeded to a nearby telephone, notwithstanding that Mr. Rochette followed him into the hallway, again directing him to return to their meeting. Mr. Gilmore ignored Mr. Rochette's direction and proceeded to the telephone where, according to his evidence, he attempted, unsuccessfully, to contact three union officers, François Garant, Roger Doiron and Robert Michaud. Thereafter he was successful in reaching Human Resources Manager François Morrison. It appears that as Mr. Gilmore was speaking with Mr. Morrison, Mr. Rochette advised him that he was removed from service, causing Mr. Gilmore to relate to Mr. Morrison "Rochette just fired me." Thereafter, Mr. Rochette summoned a CN constable who escorted Mr. Gilmore from the property.

Mr. Gilmore was summoned to an investigation on March 7, 1994, to inquire into the incident of February 25. The record of the investigation reveals an unfortunately confrontational encounter between Mr. Gilmore and the investigating officer, Manager Train Service Daniel Belanger. The grievor refused to acknowledge that he had received proper notice. Mr. Gilmore was accompanied by a personal friend whom he wished to attend as a witness, although he did not have any union representation. An exchange occurred in which Mr. Gilmore attempted to characterize his friend as being entitled to the status of an accredited representative, for the purposes of the collective agreement, who should be allowed to attend the investigation. After unsuccessfully attempting to ask the friend whether she was a lawyer, the investigating officer noticed that Mr. Gilmore was tape recording the proceedings, and immediately asked him to remove the tape recorder. When Mr. Gilmore refused to do so, based on the fact that he was accompanied by a person other than an accredited union representative, and the grievor's refusal to refrain from tape recording the proceedings, Mr. Belanger indicated that he would be compelled to adjourn the investigation to obtain instructions from his superiors. At that point Mr. Gilmore agreed to his friend leaving the room and to turning off the tape recorder.

Matters did not improve, however. Mr. Gilmore took the position that he was not provided with sufficient particulars and documentation, and sought clarification as to which documentary evidence would be used in the investigation. Mr. Belanger confirmed that the statements of Mr. Machado and Rochette were the sole evidence admitted to that point in the proceedings and, again sought an answer as to whether Mr. Gilmore wished union representation. When Mr. Gilmore eventually replied that he wished to speak with his lawyer with respect to the use of his tape recorder, having a witness and having a local chairman present, Mr. Belanger agreed to adjourn the proceedings to March 10th, to give Mr. Gilmore the opportunity to obtain the advice which he wished.

Mr. Gilmore returned to the investigation on March 10, accompanied by Union Representative François Garant. Following certain objections by Mr. Gilmore to the quality of the secretarial recording of the investigative proceedings, Mr. Belanger advised that neither a tape recorder nor legal counsel could be present during the investigation. Mr. Gilmore, who was taping the proceedings at that point, refused to remove his tape recorder or to turn it off. The grievor then made a number of statements, including accusations against Mr. Belanger of resorting to "third world dictatorship type tactics". Faced with a complete refusal on the part of Mr. Gilmore to adhere to the established procedures of a company investigation, including his continued refusal to turn off his tape recorder, Mr. Belanger closed the investigation. The record reveals the following closing statement on his part:

You were [summoned] here twice for 8:30 hrs, twice you arrived late, without even giving any explanations or calling us for your lateness. Several times, you were asked to turn off your recorder, you do not answer to the questions asked and I even gave you the opportunity to get an accredited representative to represent you here today. I could easily go on but for all the above mentioned, I have no choice but to close this investigation again because I am convinced that I will not be able to get the facts to know what happened on the February the 25th, 1994. A copy of this statement will be given to my superiors and a decision will be made by the Company with regards with this matter.

Based on the statements of Mr. Machado and Mr. Rochette, the Company assessed forty-five demerits against Mr. Gilmore for insubordination.

I turn to consider the facts of the second head of discipline, concerning the assessment of thirty demerits for the grievor's alleged refusal to communicate politely and productively with fellow employees and supervisors during the course of his duties as yardmaster. This aspect of the case involves a number of separate incidents or complaints, none of which, standing alone, would merit a severe degree of discipline. However, when all of the incidents are viewed in relation to each other, and are weighed by reason of their cumulative impact, they do raise concerns about the grievor's apparent continuing inability to work in a civil and cooperative manner with fellow employees and supervisors.

Reference is made above to the complaint filed by Mr. Machado with respect to the alleged failure of Mr. Gilmore to communicate properly with the MonTerm Yard supervisor and refusing to involve himself in conference calls. The evidence of Ms. Sophie Lachance, the substance of which is related in an E-Mail communication from Ms. Margy Haines-Hitchcock, Asset Management Officer, dated February 23, 1994 is that during the course of her duties at MonTerm she was called upon to request Mr. Gilmore's assistance as the yardmaster at Turcot Yard to determine the reason for the delay to a train. She relates that transportation authorities contacted her at MonTerm to inquire as to the reasons for delay in a train. Upon learning from Mr. Pierre Montagne, the supervisor at the MonTerm Yard, that the intermodal operation was not responsible for the delay, she was instructed to check with the yardmaster at Turcot Yard to inquire as to the reasons for the delay. She relates that Mr. Gilmore answered her call and, when she explained that she needed to know the reasons for the delay in a train, he responded that he did not have time to deal with her, that he would call her back, and he hung up on her. She relates that his tone was "very arrogant and aggressive, and not very cooperative." She went on to explain that having met a dead end in attempting to deal with Mr. Gilmore she was compelled to take another route to obtain the information that she needed, which she did. Her concern about the abruptness of Mr. Gilmore's tone caused her to record the complaint which was related to Mr. Rochette by Ms. Haines-Hitchcock in the E-Mail referred to above.

Evidence was given by Mr. Claude Pelletier, General Supervisor of Carmen at Turcot in February of 1994, with respect to problems which he encountered, according to complaints brought to him by persons under him, including his assistant Robert Senecal and Mr. Serge Matte, his lead hand on the night shift. Primary among the concerns brought to him was the refusal of Mr. Gilmore to facilitate communication between carmen and train crews in relation to making cuts on trains. He also stated that problems were encountered with respect to information on incoming trains and the allocation of tracks. The evidence of Mr. Pelletier confirms that his frustration with communications problems, primarily relating to Mr. Gilmore, caused him to direct the carmen under his supervision to no longer handle the moving of TIBS units on By-Pass trains, or performing emergency tests and cuts on trains in Turcot Yard. This caused a communication to be issued to Car Equipment Supervisor F. Galarneau by Mr. Rochette on Friday, February 25, 1994, at or about 1:34 p.m. which reads, in part, as follows:

Subject: Claude Pelletier, Carmen Supervisor, stopping carmen from moving the TIBS units and performing emergency tests and cuts on all trains at Turcot Yard on February 25, 1994.

This is to inform you that Claude Pelletier, Supervisor, Car Equipment, Turcot Yard, has refused since the above mentioned date to cooperate as in any other yard, claiming that it is not their job even though the work has always been done by that department since the arrival of the TIBS. Moreover, Mr. Pelletier says that his actions are also due to a lack of cooperation from transportation and more specifically because we are not doing anything to correct a behavioural problem with Yardmaster Pat Gilmore.

I would like to point out here that Mr. Pelletier is making a rash judgment in this case and his decisions will undoubtedly cause additional delays to series 100 and 200 trains in Turcot Yard. I sincerely believe that Mr. Pelletier should reconsider his position and understand that the case involving Mr. Gilmore is very complicated. I do not think that Mr. Pelletier's reaction will speed up the normal procedure in this case.

Our customers should not have to suffer because of our internal problems.

The above communication issued shortly before the meeting between Mr. Rochette and Mr. Gilmore described above. According to Mr. Pelletier's evidence he reversed his course of action that same day, as reflected in an E-Mail to Mr. Rochette from Mr. Pelletier at 5:33 p.m. Mr. Pelletier stated:

Further to our telephone conversation regarding P. Gilmore being suspended from duty until further completion of the investigation, I am changing my position in order to reestablish service for By-Pass Trains provided that close cooperation and communication is maintained between the two departments in order to ensure employee safety and high-quality customer service.

Mr. Robert Senecal, the car foreman at Turcot Yard who works directly under Mr. Pelletier confirmed that he frequently received complaints from his night shift carmen, in particular Lead Hand Serge Matte, with respect to recurring communication problems with Mr. Gilmore. According to his evidence the problem seemed to get more serious over a period of a month to a month and a half. He relates, however, that he had relatively little direct contact with Mr. Gilmore himself, recalling that they did have one disagreement with respect to a crew of carmen changing out a set of wheels on a car in Track 3.

Richard Levac held the position of Roadmaster responsible for territory including Turcot Yard in February of 1994. An incident occurred on February 15 which created tension between the track maintenance personnel and Mr. Gilmore. It appears that a crew under Track Maintenance Foreman Serge Gauthier was in the process of removing snow from track 8 when Mr. Gilmore asked Mr. Gauthier for permission to place a certain number of cars in the track. The Company's position is that the request from Mr. Gilmore was for eight or nine cars to be placed in the track, a cut which could be accommodated given that enough snow had been cleared to take that quantity of cars. According to Mr. Gilmore, however, he requested to place between thirty and forty cars in the track, and got clearance from Mr. Gauthier to do so.

Whatever the truth may be with respect to that communication, the fact is that Mr. Gilmore proceeded to direct a crew to place a substantial cut of cars, well in excess of eight or nine, into track 8 where they occupied an uncleared area which had up to three feet of snow on it. The yardmaster's actions immediately brought to a halt the snow clearing operations of the crew, which included such equipment as a sweeper, a snowplow/blower, a loader and a number of trucks. The situation obviously caused great surprise to Mr. Gauthier, who called his supervisor, Mr. Levac at Taschereau Yard, asking his assistance with the problem. Mr. Levac was required to proceed to Turcot Yard where he met with Mr. Huppé, Mr. Gilmore's supervisor, as Mr. Gilmore immediately withdrew from the tower when Mr. Levac arrived and a situation of obvious controversy began to develop. According to Mr. Levac's evidence, he was advised by Mr. Gauthier that he had gone to the tower in an attempt to speak with Mr. Gilmore about the problem, and had been told that Mr. Gilmore was too busy to deal with him and that he should leave, which caused him to call his supervisor.

Mr. Levac relates that before proceeding to the tower at Turcot Yard he called Mr. Gilmore on his cellular phone to inquire as to why he had placed so many cars in the snow-bound track. According to his evidence Mr. Gilmore

simply responded that he had work to do. When Mr. Levac expressed his view that Mr. Gilmore could not do things that way, Mr. Gilmore hung up the telephone, prompting Mr. Levac to proceed to the tower. Mr. Levac obviously viewed the incident as serious, stating in his evidence that it could easily have resulted in a derailment. He further commented that, with respect to Mr. Gilmore's bearing and communications with him, that: "It was as though I was not there. It was impossible to have any discussion of the situation with him."

With respect to this incident, even if the Arbitrator should accept that there was an inadvertent mistake in communication between Mr. Gilmore and Mr. Gauthier with respect to the space available for storing cars in track no. 8, there are still grounds for concern as to Mr. Gilmore's comportment in this incident. Firstly, the unchallenged evidence appears to be that from his tower Mr. Gilmore had a clear view of track no. 8 and should, by the exercise of normal diligence, have appreciated that it was improper to store a substantial number of cars in that area, as it had not been cleared of a heavy fall of snow. Secondly, even if the communication with Mr. Gauthier was as Mr. Gilmore suggests, he was plainly less than civil or forthcoming in dealing with Mr. Levac in an effort to clarify the situation and bring it to some constructive resolution. Lastly, if it is necessary to choose as between Mr. Gauthier's account to Mr. Levac and the account of Mr. Gilmore, the Arbitrator is inclined to find it implausible that the track maintenance foreman would have authorized the storing of more than eight or nine cars in track 8, as his crew was meant to complete the snow removal, and to that point the area cleared was only such as to accommodate some eight or nine cars. In the Arbitrator's view Mr. Gilmore's account of this incident is extremely implausible, and should not be accepted, on the balance of probabilities.

Lead Hand Carman Serge Matte gave evidence with respect to radio communication problems encountered with Mr. Gilmore. He relates that for a long time the normal means of communication between carmen crews coupling or uncoupling cars was to have the yardmaster speak with the headend crew, on a radio channel not available to carmen. He explained that the situation becomes extremely dangerous for a carman working in close proximity to cars if there is not a reliable method of relaying information from the carman to the locomotive engineer. In the result, when Mr. Gilmore refused to act as the relay in respect of such messages, as he had access to both the carmen's and the engineers' radio channels, the carmen were placed in a position of substantial jeopardy.

Mr. Matter further relates that further difficulties were caused by Mr. Gilmore taking the position that he would not speak to carmen, but would only speak with their lead hand or foreman, in any form of communication in respect of their work. He relates that this gave rise to a number of verbal complaints from other carmen who found it frustrating to attempt to perform their functions when they were compelled to rely on Mr. Gilmore for information. According to Mr. Matte's evidence the difficulties with Mr. Gilmore became more serious in mid-January of 1994 and generally deteriorated. He also gave evidence with respect to Mr. Gilmore's refusal to involve himself in conference calls, indicating that Mr. Gilmore's supervisor, Mr. Benoit Huppé, often filled in in that capacity. According to Mr. Matte, in his eighteen years as a carman he never previously encountered difficulties such as those which he experienced with Mr. Gilmore.

As noted above, the various incidents and problems relating to the quality of Mr. Gilmore's communications with other employees and supervisors became the subject of a separate investigation conducted on March 15, 1994. The investigation was again conducted by Manager Train Service Daniel Belanger. In the face of Mr. Gilmore's insistence that he would tape record the proceedings and his objection that the denial of a lawyer during the course of the Company's investigatory meeting was contrary to his rights, the Company officer discontinued the investigation, advising the grievor that the documentary evidence tendered, copies of which were given to him, would be the basis for the decision to be made in respect of the complaints in question. As noted previously, by notice dated March 16, 1994, Mr. Gilmore was advised that thirty demerits were assessed for his "... failure to comply with your supervisor's instructions and your lack of communications with other departments while working as yardmaster in Turcot Yard." He was further advised, on the same date, that he was discharged by reason of an accumulation of one hundred and ten demerits, being in excess of the allowable maximum of sixty demerit marks.

The Union raises an issue with respect to the regularity of the investigation conducted by Mr. Belanger. During the course of his testimony he related that, although he was in possession of the written complaints which were provided to Mr. Gilmore at each of the two investigation hearings, he also had conversations with certain of the persons who made written complaints. According to his evidence, for example, he spoke briefly with Ms. Lachance, as well as with

Mr. Rochette and Mr. Machado, essentially to confirm the accuracy of the written documents which they had submitted by way of complaint. The Union's representative argues, in part, that such conversations constitute the gathering of evidence not made available to the grievor contrary to the provisions of the collective agreement relating to disciplinary investigations. He cites article 17 of the collective agreement which contains the following:

... Employees may select an accredited representative to appear with them at the investigation, and the employee and such accredited representative will have the right to hear all of the evidence submitted, and will be given an opportunity through the presiding officer to ask questions of witnesses whose evidence may have a bearing on the employee's responsibility.

In the Arbitrator's view the case at hand does not disclose a violation of the standards contemplated in the above provision. The prior awards of this Office have confirmed, quite properly, that it is inappropriate for an investigating officer to have in his or her possession a document containing information or complaints relating to an employee, and to refuse to provide that document to the employee or his or her representative. Such action would, it has been found, violate the standards of a fair and impartial investigation (see **CROA 1581**).

This Office has also had occasion in the past to comment on the informal nature and general fact finding purpose of disciplinary investigations, as contemplated under the terms of a number of collective agreements. In **CROA 2073** the following appears:

As previous awards of this Office have noted (*e.g.* **CROA 1858**), disciplinary investigations under the terms of a collective agreement containing provisions such as those appearing in Article 34 are not intended to elevate the investigation process to the formality of a full-blown civil trial or an arbitration. What is contemplated is an informal and expeditious process by which an opportunity is afforded to the employee to know the accusation against him, the identity of his accusers, as well as the content of their evidence or statements, and to be given a fair opportunity to provide rebuttal evidence in his own defence. Those requirements, coupled with the requirement that the investigating officer meet minimal standards of impartiality, are the essential elements of the "fair and impartial hearing" to which the employee is entitled prior to the imposition of discipline. In the instant case, for the reasons related above, I am satisfied that that standard has been met.

Further, in **CP Rail and CAW-TAC Canada Rail Division, Local 101**, an unreported decision of this arbitrator dated October 26, 1992, the following was said at pp. 6 and 7:

With the greatest respect for the zeal exhibited by Mr. Lemyre, the Arbitrator cannot sustain his view of the nature and purpose of the process contemplated within Rule 28 of the collective agreement. The procedures under that rule have a two-fold purpose which involves a balancing of the interests of the Company and of the employee. On the one hand, the Company is to have an opportunity to question the employee who is the subject of the investigation, prior to making a decision with respect to the possible assessment of discipline. On the other hand, it provides to the employee, and his union, a minimum degree of due process, whereby the employee has at least one day's notice of the investigation and the matter to be investigated, the assistance of an authorized representative of the union and, if requested, copies of all pertinent statements, reports and other evidence in the possession of the investigation officer which may be used against the employee. The right to a fair and impartial investigation implies that the employee be afforded the opportunity to respond to the statements or evidence in the possession of the Company, and be given the opportunity to make a full answer and explanation.

The process so contemplated is not a trial nor a hearing which must conform in all respects with judicial or quasi-judicial standards. It is, rather, an information gathering process fashioned, in accordance with the requirements of the collective agreement, to give the employee the opportunity to know the information gathered, and to add to that information before any decision is taken with respect to the assessment of discipline.

If, in the case at hand, the evidence disclosed that Mr. Belanger learned of other incidents or accusations being made by the people with whom he spoke, and did not proceed to reduce those allegations into written complaints to be

provided to the grievor, an arguable case for a departure from the standards of a fair and impartial hearing might be made out. That, however, is not what transpired. On the basis of Mr. Belanger's evidence I am satisfied that what he attempted to do, quite properly, was to communicate with certain of the persons whose complaints were before him to ensure that there was nothing further that should be added to their statements. According to his testimony, which I accept without reservation, he was advised by Ms. Lachance, Mr. Machado and Mr. Rochette that there was nothing further to add, and consequently nothing further was gathered in a documentary form. There is, in my view, nothing improper in that way of proceeding, and the evidence does not disclose a departure from the standards of fairness contemplated within article 17 of the collective agreement.

On behalf of Mr. Gilmore the Union called evidence, through several witnesses, going to the reasonable basis for Mr. Gilmore's concern about the safety of radio communications in Turcot Yard. The evidence of Mr. Yves Jégou, a Health and Safety Officer with Labour Canada with some knowledge of the operations of the yard confirms that there were problems with the radio system, particularly over-crowding of certain channels and some communication without appropriate identification. According to his evidence, he has been involved in monitoring the quality of radio communications in Turcot Yard since 1991 and continues to do so to the present. He confirms, however, that he has never ordered the stoppage of work or directed a change in the practice followed by the Company and its employees in the yard. Mr. Jégou did, however, give anecdotal evidence of certain specific incidents of unsafe practices which he witnessed, for example crews changing out TIBS units without flag protection or proper radio communications, and, on one occasion, a crew working on a switch, again without proper flag protection.

The Union sought to rely on evidence that, in fact, the conference call in which Mr. Gilmore declined to participate was eventually discontinued. It does not appear disputed that in fact the timing of the conference call, at the commencement of the yardmasters' night shift, was not appropriate as he was normally busy at that time, and therefore unable to usefully participate. It is not clear to the Arbitrator, however, that that reality would justify an employee's refusal to participate in the face of directions to do so.

I turn to consider the merits of the two grievances. Firstly, as noted several times by the Arbitrator during the course of the hearing, this Office does not exercise jurisdiction, possessed by the Canada Labour Relations Board, to determine whether working conditions in the Turcot Yard were unsafe in relation to federally regulated standards, or indeed whether Mr. Gilmore had reasonable grounds to refuse work when he did so in February of 1994. Those issues were, in fact, dealt with extensively by the Health and Safety officer of Labour Canada and, ultimately, by the Canada Labour Relations Board itself. Mr. Gilmore's refusal of work was found to be wrongful, and without reasonable basis. In the result, the Canada Labour Relations Board found that the discipline assessed against Mr. Gilmore was not in violation of the **Code**. This Office's jurisdiction goes to a separate question, namely whether there was just cause for the penalties assessed against Mr. Gilmore.

In the Arbitrator's view the conduct of Mr. Gilmore in Mr. Rochette's office, and the manner in which he broke off the meeting and refused to return to speak with Mr. Rochette when directed to do so on the evening of February 25, 1994 was, as the Company alleges, without fundamental justification and was insubordinate. Whatever Mr. Gilmore may hold as a personal opinion of Mr. Rochette, or Mr. Machado, as an employee of the Company under Mr. Rochette's supervision he had a duty to take direction from Mr. Rochette, and implicit in that duty was an obligation to listen to the concerns, cautions or other directions which Mr. Rochette wished to communicate to him. Unfortunately, the incident is typical of a pattern of conduct which the Arbitrator has noted through a number of incidents involving Mr. Gilmore, reflecting as it does his tendency to invoke what he believes to be his rights and to "legalize" an encounter with another individual, making normal civil discourse impossible. His voicing of concerns about a witness in the room, demanding copies of complaints and claiming a right to communicate with his union before speaking with his supervisor reflect a fundamental misunderstanding on the part of the grievor as to the fundamental right of management to communicate with employees. Moreover, if Mr. Gilmore had any difficulty with the statements or actions of Mr. Rochette, his obligation was to obey Mr. Rochette's directives, and to carry out his orders, subject of course to their being lawful. In this circumstance the "obey now - grieve later" principle had its application. Should Mr. Gilmore have objected to anything Mr. Rochette might have said to him, or the manner in which the meeting was conducted, he had the grievance process available to him to redress that concern. Rather, in what appears to have become a pattern of conduct, he simply refused to deal with his supervisor, declining his repeated directions to return to the room to discuss problems which, the Arbitrator is satisfied, were well documented and had become extremely

serious, to the point that the supervisor of carmen had withdrawn his department's involvement in facilitating the movement of By-Pass trains. In the result, the Arbitrator is satisfied that a serious degree of discipline was justified in respect of Mr. Gilmore's conduct.

The question then becomes whether the forty-five demerits assessed against him were excessive. Are there mitigating factors to consider? Firstly, the Arbitrator is not persuaded by the efforts of Mr. Gilmore to clothe himself in the mantle of safety as a justification for his conduct. The day previous, February 24, 1994, Labour Canada Safety Officer Denis Lupien had issued a formal decision denying Mr. Gilmore's claim that working conditions were unsafe by reason of overcrowding and improper practices in the use of the radio systems in Turcot Yard. Later, that decision was fully confirmed, on appeal, by the Canada Labour Relations Board. Unfortunately, neither the decision of Mr. Lupien, nor, it would appear, that of the Canada Labour Relations Board seem to have made any impression upon Mr. Gilmore. Where this issue is concerned he is, quite literally, the out-of-step soldier who stubbornly insists that the rest of the army is out of step.

In considering the appropriate measure of discipline, therefore, I do not view the issue of safety raised by Mr. Gilmore as bearing much weight. He knew, or reasonably should have known, that the safety concerns which he raised with Labour Canada had been considered and dealt with. He should further have appreciated that Mr. Rochette had genuine problems, in the form of a number of complaints, which needed to be discussed with Mr. Gilmore and dealt with immediately. His clear refusal to allow such a discussion to take place, and his conversion of what should have been a straightforward conversation with his supervisor into an incident of alleged threats and violations of his rights under the **Canada Labour Code** is evidence of what I am satisfied has become the terminal intractability of Mr. Gilmore as an employee.

It should be stressed that the issues which concerned Mr. Rochette are extremely serious, going as they do to genuine safety concerns. The Arbitrator accepts the evidence of Mr. Serge Matte with respect to the severe danger in which carmen were placed by reason of Mr. Gilmore's refusal to assist them in communicating with the headend of trains on which they were working in extremely dangerous circumstances. The yardmaster does have a critical role to play in overseeing all movements within a switching yard, and ensuring the fullest communication among operating crews, carmen crews and engineering staff who might be working within the confines of the yard. The conversation which Mr. Rochette sought to have with Mr. Gilmore on February 25, 1994 was prompted by legitimate concerns with respect to the jeopardy to both safety and productivity which Mr. Gilmore's increasingly idiosyncratic practices were having.

Further, it must be appreciated that Mr. Gilmore did not come to this incident without a prior record of some concern. As noted above, he was reinstated into employment by this Office in **CROA 2347** with the very specific admonition:

... In future, Mr. Gilmore must appreciate the importance of maintaining appropriate standards of civility and sensitivity in his communications with all persons with whom he is compelled to work.

By simply refusing to obey Mr. Rochette's direction to stay and discuss profound concerns for safety and productivity, notwithstanding Mr. Rochette's repeated requests to Mr. Gilmore to not leave, the grievor utterly disregarded his obligation as an employee, and obviously displayed a total failure of rehabilitation with respect to his ability to relate rationally with his supervisors and peers on the job. In my view the seriousness of his action, particularly taken in light of his prior disciplinary record, was such as to justify a degree of discipline which would support the assessment of forty-five demerits. In my view the Arbitrator should not disturb the Company's decision in that regard.

I am likewise satisfied that the assessment of thirty demerits for various incidents of rude communication, or absolute refusal of communication, on the part of Mr. Gilmore in relation both to supervisors and other employees in the period immediately prior to his discipline is amply made out. The abruptness which he displayed towards Ms. Sophie Lachance on the telephone, when he hung up on her, his obvious inability or refusal to communicate reasonably with Mr. Serge Gauthier or, by telephone, with Mr. Levac in relation to the snow-bound track no. 8, and his general refusal to communicate with carmen, particularly in assisting them to communicate with the headend crews in the performance of dangerous work, are all deserving of discipline. On the whole, Mr. Gilmore's conduct was such as to

justify the letters of concern of a number of supervisors, which precipitated the Company's investigation. In this regard the Arbitrator has reference to the letter of Mr. Rochette of December 13, 1993, the memo of Mr. Machado to Mr. Rochette dated February 17, 1994, the letter from Mr. Rochette to Mr. Galarneau dated February 25, 1994, the statement of Supervisor Robert Senecal provided to Mr. Belanger on March 3, 1994 and a letter to Mr. Rochette from Mr. Claude Pelletier on February 23, 1994. I find that the content of all of these documents is established, on the preponderance of the evidence.

Very simply, for reasons which he must best appreciate, Yardmaster Patrick Gilmore became a thorn in the side of almost every supervisor and fellow employee that he was compelled to work with. Again, this employee had previously been the subject of serious discipline precisely for an inability to relate properly with others at work, to the point of his prior dismissal, mitigated only by a "second chance" decision of this Office. Unfortunately, that second chance has proved fruitless. For the reasons touched upon above, the Arbitrator must view as justified the thirty demerits assessed against Mr. Gilmore for the repeated incidents of rude or abrupt communication with other employees and supervisors and, on some occasions, the resulting refusal to carry out what should have been his normal assigned duties.

On the whole, the Arbitrator can see no responsible basis on which the total of demerits assessed against Mr. Gilmore, and his resulting discharge, should be reduced. Unfortunately, in his relations with supervisors and peers alike, Mr. Gilmore has descended to pattern of continuous irrational confrontation which has rendered him unemployable by the Company. For these reasons the grievances must be dismissed.

August 23, 1996 **(signed) MICHEL G. PICHER**

ARBITRATOR

Appearance List for CROA 2643:

On 14 June 1995, there appeared on behalf of the Company:

- M. Savard – Counsel, Montreal
- S. Grou – Labour Relations Officer, Montreal
- D. C. St-Cyr – Manager, Labour Relations, Montreal
- D. Belanger – Manager, Train Service, Montreal
- P. Burton – Labour Relations Officer

And on behalf of the Council:

- W. G. Scarrow – General Chairman, Sarnia
- R. Michaud – Provincial Chairman, Q.L.B., Montreal
- A. P. Gilmore – Grievor

The Arbitrator adjourned the hearing to September 1995.

On Thursday, 14 September 1995, there appeared on behalf of the Company:

- M. Savard – Counsel, Montreal
- D. Laurendeau – Assistant Manager, Labour Relations, Montreal

S. Cournoyer – Labour Relations Officer, Montreal

G. Rochette – Manager, Train Service, Montreal

And on behalf of the Council:

W. G. Scarrow – General Chairman, Sarnia

R. Michaud – Provincial Chairman, Q.L.B., Montreal

R. Doiron – Local Chairman, Montreal

A. P. Gilmore – Grievor

The Arbitrator adjourned the hearing to December 1995.

On Thursday, 14 December 1995, there appeared on behalf of the Company:

M. Savard – Counsel, Montreal

D. Laurendeau – Assistant Manager, Labour Relations, Montreal

G. Rochette – Manager, Train Service

S. Matte – Witness, Carman, Montreal

C. Pelletier – Witness, General Supervisor, Montreal

And on behalf of the Council:

R. Michaud – Provincial Chairman, Q.L.B., Montreal

A. P. Gilmore – Grievor

J. Gilmore – Assistant

Y. Jegou – Labour Canada Safety Officer

N. Belleveau – Transport Canada Safety Officer

R. Doiron – Local Chairman, Safety Committee

L. Dalzel – Witness

The Arbitrator adjourned the hearing to February 1996.

On Tuesday, 13 February 1996, there appeared on behalf of the Company:

M. Savard – Counsel, Montreal

D. Laurendeau – Assistant Manager, Labour Relations, Montreal

G. Rochette – Witness, Manager, Train Service

C. Pelletier – Witness, General Supervisor, Montreal

R. Sénécal – Witness, General Supervisor - Equipment Car, Montreal

R. Levac – Witness, Track Supervisor, Montreal
S. Lachance – Witness, Office Intermodal Logistic, Montreal
L. Machado – Witness, Terminal Assistant Manager, Montreal

And on behalf of the Council:

W. G. Scarrow – General Chairman, Sarnia
H. Caley – Advisor, Toronto
M. P. Gregotski – General Chairman, Fort Erie
A. P. Gilmore – Grievor
J. Gilmore – Assistant
L. Dalzel – Witness

The Arbitrator adjourned the hearing to March 1996.

On Friday, 15 March 1996, there appeared on behalf of the Company:

M. Savard – Counsel, Montreal
D. Laurendeau – Assistant Manager, Labour Relations, Montreal
G. Rochette – Witness, Manager, Train Service
D. Belanger – Witness, Manager, Train Service, Montreal

And on behalf of the Council:

W. G. Scarrow – General Chairman, Sarnia
A. P. Gilmore – Grievor
R. Michaud – Legislative Chairman, Quebec
J. Gilmore – Assistant
L. Dalzel – Witness

The Arbitrator adjourned the hearing to 30 March 1996.

On Saturday, 30 March 1996, there appeared on behalf of the Company:

M. Savard – Counsel, Montreal
D. Laurendeau – Assistant Manager, Labour Relations, Montreal
G. Rochette – Manager, Train Service
D. Belanger – Witness, Manager, Train Service, Montreal
B. Huppé – Witness

And on behalf of the Council:

W. G. Scarrow – General Chairman, Sarnia
R. Michaud – Provincial Chairman, Q.L.B., Montreal
A. P. Gilmore – Grievor
J. Gilmore – Assistant
Y. Jegou – Labour Canada Safety Officer
R. Doiron – Local Chairman, Safety Committee
L. Dalzel – Witness

The Arbitrator adjourned the hearing to April 1996.

On Saturday, 27 April 1996, there appeared on behalf of the Company:

M. Savard – Counsel, Montreal
D. Laurendeau – Assistant Manager, Labour Relations, Montreal
G. Rochette – Manager, Train Service

And on behalf of the Council:

W. G. Scarrow – General Chairman, Sarnia
R. Michaud – Provincial Chairman, Q.L.B., Montreal
A. P. Gilmore – Grievor
J. Gilmore – Assistant
L. Dalzel – Witness

The Arbitrator adjourned the hearing to June 1996.

On Friday, 14 June 1996, there appeared on behalf of the Company:

M. Savard – Counsel, Montreal
D. Laurendeau – Assistant Manager, Labour Relations, Montreal
G. Rochette – Manager, Train Service

And on behalf of the Council:

W. G. Scarrow – General Chairman, Sarnia
A. P. Gilmore – Grievor
R. Michaud – Legislative Chairman, Quebec