CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2715

Heard in Montreal, Wednesday, 13 March 1996

concerning

CANADIAN PACIFIC LIMITED

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Claim on behalf of Extra Gang Foreman D.J. Stang.

EX PARTE STATEMENT OF ISSUE:

On June 1, 1995, the grievor was assessed 40 demerits for his involvement in a verbal exchange with another employee. As a result of this, the grievor was dismissed for accumulation of demerits.

The Union contends that the discipline assessed was excessive and unwarranted in the circumstances.

The Union requests that the grievor be reinstated forthwith without loss of seniority and with full compensation for all earnings lost as a result of this matter.

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

FOR THE BROTHERHOOD:

(SGD.) J. J. KRUK
SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

R. M. Andrews	– Labour Relations Officer, Vancouver
D. T. Cooke	– Manager, Labour Relations, Montreal
D. E. Guerin	– Labour Relations Officer, Montreal
G. D. Wilson	– Counsel, Montreal
D. K. Harder	– Assistant Track Maintenance Supervisor, Revelstoke
S. Moutinho	– Labour Relations Officer, Montreal

And on behalf of the Brotherhood:

D. W. Brown	– Senior Counsel, Ottawa
J. J. Kruk	– System Federation General Chairman, Ottawa
P. Davidson	– Counsel, Ottawa

AWARD OF THE ARBITRATOR

The evidence establishes that the grievor, Extra Gang Foreman D.J. Stang, did make an unacceptable verbal threat to another employee during the course of a work related altercation at Mission, B.C., on April 17, 1995. It appears that when he and the other employee, Mr. Rick Iglesias, had a disagreement over an exchange of tools, and Mr. Iglesias either accidentally or deliberately tapped or jostled the grievor's hard hat, Mr. Stang stood in front of him and responded, in a heated tone: "The only reason that I don't fucking kill you right now is because I only have ten demerits to go and I want to keep my job."

There can be little doubt that the words and tone of the grievor caused genuine fear to Mr. Iglesias and, it would seem, other employees working on the crew. The grievor had previously been disciplined for an altercation with another employee, in relation to an incident in 1992 which resulted in the assessment of twenty demerits against him. That event, coupled with certain defensive comments made by Mr. Stang in the course of the Company's investigation of the incident at hand, gave the Company concern that the grievor was too easily prone to threats of violence in his relations with other people. On that basis it assessed forty demerits against his record which, coupled with the previous thirty demerits outstanding, caused the termination of his employment for the accumulation of demerits in excess of sixty.

This Office well appreciates the importance of employees being protected from threats or concerns for their safety while on the job or in any related job related matter. In **CROA 1701** the following observation was made:

> 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)*;).

The foregoing remarks were written in the context of a case where the arbitrator found that the discharged employee had engaged in "... a sustained and long-standing vendetta" against another employee which culminated in a death threat coupled with a physical assault outside a drinking establishment. In that circumstance the Company's decision as to discharge was sustained.

It is trite to say that each case must, however, be determined on its own specific merits. Close regard must be had to the facts of the incident giving rise to the culminating discipline, as well as to any mitigating factors which may be brought to bear, including such issues as provocation, and the length and quality of the employee's prior service.

When those considerations are examined in the instant case, there is reason to conclude that, although a serious degree of discipline was justified, there are grounds for the substitution of a lesser penalty by the exercise of the Arbitrator's discretion. Firstly, as Counsel for the Brotherhood stresses, the incident in question does appear to be a brief altercation, in the heat of the moment, between two employees. It can also be said to contain a degree of provocation. Even if the Arbitrator should accept that Mr. Iglesias did not deliberately strike the grievor on his hard hat, it does not appear disputed that Mr. Stang did not see it in that light, and was plainly angered by what he perceived to be a threatening gesture by a fellow employee.

Secondly, to these elements the Arbitrator must give consideration to the length and quality of the grievor' prior service. While it is true that Mr. Stang was involved in a prior altercation with an employee, some three years earlier, for which he was disciplined, there is no evidence of any other incident in which Mr. Stang ever acted out in a violent way against another employee, or that he was ever disciplined for such conduct. He is a relatively long term employee, with sixteen years of service, some of which were in a management position, as supervisor. On the whole, the Arbitrator is satisfied that the mitigating factors in the instant case do justify a substitution of penalty short of discharge. That said, however, there are compelling grounds in the material before me to conclude that this is an appropriate case for a conditional reinstatement, having regard to the evidence of the reaction of Mr. Iglesias, and it would appear of other employees, to the words and general demeanor of Mr. Stang which, it seems involved the use of similar words on other occasions. In the Arbitrator's view, it is appropriate to condition the reinstatement of the grievor so as to allow the opportunity for rehabilitation in an individual who appears to have exhibited, for some time, obvious shortcomings in personal anger control and a failure to appreciate the sensibilities of others.

For 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, with his discipline record to stand at thirty demerits. Mr. Stang's reinstatement, however, shall be conditioned upon his satisfying two conditions. Firstly, he shall tender an unconditional written apology to Mr. Iglesias, a copy of which shall be provided to the Brotherhood and the Company. Secondly, his reinstatement is conditioned upon his accepting to be assessed for counselling in respect of anger control through the Company's EFA Program, or such other program as the parties may agree upon, and, if it is deemed appropriate by the assessors, to follow any such counselling program as may be prescribed. Should a program be established, the grievor shall provide quarterly written reports from the counselling agency, to confirm his ongoing participation in the program, until such time as the program is judged by the agency in question, or by the parties, to be appropriately concluded. Failure to accept and abide by these conditions shall render Mr. Stang liable to the forfeiture of his reinstatement. Should the parties be disagreed as to the interpretation or implementation of any aspect of this award, the matter may be spoken to.

March 15, 1996

(signed) MICHEL G. PICHER
ARBITRATOR