

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2871

Heard in Montreal, Tuesday, 8 July 1997

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

**CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS
[UNITED TRANSPORTATION UNION]**

DISPUTE:

The discipline assessed to the record of Mr. M.L. Douglas, of Coquitlam, British Columbia.

JOINT STATEMENT OF ISSUE:

On October 24, 1994, Yard Foreman M.L. Douglas' record was debited with 30 demerit marks for:

“conduct unbecoming an employee, as evidenced by your physical and verbal abuse and threatening gestures directed towards a Supervisor, Coquitlam, September 14, 1994.”

The Council requested that the Company remove the discipline from Mr. Douglas' record contending that the investigation was neither fair nor impartial and that the Company failed to meet the necessary burden of proof to assess discipline in this case.

The Company has declined the Council's request.

FOR THE COUNCIL:

(SGD.) L. O. SCHILLACI
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) G. S. SEENEY
FOR: DISTRICT GENERAL MANAGER, BC DISTRICT

There appeared on behalf of the Company:

M. E. Keiran	– Manager, Labour Relations, Calgary
R. V. Hampel	– Labour Relations Officer, Calgary
T. Sheridan	– Assistant General Yardmaster, Vancouver

And on behalf of the Council:

B. McLafferty	– Vice-General Chairman, Calgary
M. L. Douglas	– Grievor

AWARD OF THE ARBITRATOR

Upon a review of the material filed, the Arbitrator is driven to the conclusion that this dispute involves a clash of two strong-willed individuals whose egos overtook their judgement. It is common ground that on or about September 14, 1994 Yard Foreman Douglas and Assistant General Yardmaster Sheridan engaged in a heated argument. While it is not necessary to deal with the evidence in detail, the conflict between them arose in relation to the implementation of a prior understanding concerning the release of employees to work on behalf of the United Way campaign of Coquitlam, of which Mr. Douglas had been assigned as campaign chairman on behalf of the Company.

It appears that Mr. Sheridan had some difficulty in scheduling Yardmaster Brian Burton to work a shift which required urgently to be covered. It would seem that Mr. Burton pleaded fatigue as a result of charitable work which he had been performing under Mr. Douglas. This led to a meeting between Mr. Sheridan and Mr. Douglas in a ground floor conference room which was being utilized as the headquarters for the United Way campaign. Mr. Sheridan concedes that he entered the conversation considerably annoyed and was, in the Company's own words, "in a dark mood." According to his evidence, during the course of the heated verbal argument which ensued, Mr. Douglas blocked Mr. Sheridan's egress from the room by standing in the doorway through which he wanted to pass. He states that when he reached out with his left hand to brush the grievor aside to proceed out the door Mr. Douglas allegedly grabbed Mr. Sheridan, and made a threatening gesture with a closed fist with his other hand, stating that if Mr. Sheridan should ever touch him again he would report him and make sure that Mr. Sheridan lost his job. Mr. Sheridan states that he was then let go, and that when Mr. Douglas had finished making his point, he left the conference room without further incident.

The account of Mr. Douglas, supported in part by the statement of employee R.W. Longworth, who was then located by an open window to the conference room, is that Mr. Sheridan grabbed the grievor's upper left arm and raised his fist in front of the grievor's face. Mr. Douglas maintains that he simply told Mr. Sheridan to take his hands off him and to never touch him like that again. He denies that he made any threat to report Mr. Sheridan.

It does not appear disputed that the two antagonists had a further opportunity to discuss the incident. Upon obtaining additional information about the arrangements with respect to Mr. Burton's availability, Mr. Sheridan convened a meeting involving Assistant General Yardmasters Mike King and Ernie Gjertsen as well as the grievor, to discuss the problem. It appears that towards the end of the meeting the grievor asked to be left alone with Mr. Sheridan, at which point he again repeated the statement "...if I ever touched him he would have my job." The evidence further discloses that Mr. Sheridan was given a written reprimand by the Company as a result of this incident.

As a preliminary matter the Council submits that the grievor was deprived of a fair and impartial investigation, by reason of the fact that certain documents were not provided to him in advance of the disciplinary investigation. That objection cannot be sustained. Article 32 of the collective agreement, which governs the terms and conditions of a fair and impartial disciplinary investigation, coupled with Appendix B-32, makes no specific provision whereby employees are entitled to documents or statements in advance of a disciplinary investigation. As is evident from the text of Appendix B-32 the employee and his representatives are to be "allowed time to study [such] evidence as well as any other evidence to be introduced **at the commencement of the investigation.**" The evidence discloses that such opportunity was provided to the grievor in respect of the statement of Mr. Sheridan, shortly after the commencement of the investigation. In the circumstances I am satisfied that there was substantial compliance with the provisions of the collective agreement in this respect.

I turn to consider the merits of the dispute. As is evident from the foregoing account, this unfortunate grievance involves conduct on the part of two individuals which is worthy of neither of them. At the outset, on the balance of probabilities, I am satisfied that the first physical contact between the two individuals was initiated by Mr. Sheridan. There appears to be no dispute that the verbal retort of Mr. Douglas was directed at warning Mr. Sheridan never to touch him again. The Company does not dispute that there was a degree of provocation on the part of Mr. Sheridan in the circumstances. The issue then becomes whether there was a physical touching and threat by Mr. Douglas. On balance, I cannot find that the Company has discharged the burden of showing that such a touching or threat in fact occurred. The evidence of Mr. Sheridan, who was admittedly in an agitated state at the time of the incident, is less than reliable with respect to recall as to what might have occurred. On the opposite side of the ledger, the evidence of

Mr. Douglas, supported by the evidence of Mr. Longworth and to some extent by Mr. Sheridan, is that the initial touching by Mr. Sheridan appears to have triggered the event. There is, apart from Mr. Sheridan's statement, no direct evidence as to any touching or physical threat by Mr. Douglas. While the Company may entertain doubts as to the credibility of Mr. Douglas and Mr. Longworth, I am compelled to conclude that the Company has not proved the allegation of a physical threat by the grievor, on the balance of probabilities.

That does not dispose entirely of the grievance. The discipline assessed Mr. Douglas is assessed, in part, for his verbal abuse of his supervisor. I am satisfied, on the whole of the evidence, that there was an unjustified degree of verbal abuse utilized by Mr. Douglas in dealing with Mr. Sheridan during the course of the incident in the conference room on or about September 14, 1994. I am satisfied that the grievor did, in fact, utilize unduly strong and disrespectful language in dealing with his supervisor, and that, notwithstanding the provocation, his conduct is deserving of some discipline, albeit at a substantially reduced level.

In the result, the grievance is allowed, in part. The Arbitrator directs that the thirty demerits assessed against Mr. Douglas be stricken from his record, and that a letter of reprimand for verbal abuse and insubordination be substituted for the incident in question.

July 16, 1997

(signed) MICHEL G. PICHER
ARBITRATOR