CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 2963
Heard in Montreal, Thursday, 11 June 1998
concerning
CANADIAN PACIFIC RAILWAY COMPANY
and
CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS
(UNITED TRANSPORTATION UNION)

DISPUTE:

The dismissal of Conductor W.R. Plomish.

JOINT STATEMENT OF ISSUE:

Conductor W.R. Plomish was dismissed by the Company on September 22, 1197 "for conduct incompatible with your continued employment as evidenced by your involvement with the writing, publishing and distribution of *"The Village Idiot"* newspaper, Coquitlam, B.C."

The Union contends that Conductor Plomish's termination was without just cause for the following reason: 1.) The Company has failed to establish that Conductor Plomish was responsible for the writing, publishing and distribution of *"The Village Idiot"* newspaper. 2.) The issue of *"The Village Idiot"* newspaper was settled in 1995. 3.) Despite suspecting Conductor Plomish of being involved in *"The Village Idiot":* newspaper in 1995, the company waited over two years to conduct an investigation. 4.) The conduct of the investigation was not fair and impartial as the Investigating Officer had prejudged Conductor Plomish's guilt and failed to ensure that the witnesses brought into the statement abided by the requirements of a fair and impartial investigation.

The Union requested that Conductor Plomish be reinstated without loss of seniority and with compensation for all wages and benefits.

The Company disagrees with the Union's contentions and has declined the Union's request.

FOR THE COUNCIL:	**FOR THE COMPANY**
(SGD.) L. 0. SCHILLACI	**(SQQ.) K. WEBB**
GENERAL CHAIRPERSON	FOR: **DISTRICT GENERAL MANAGER, B.C. DISTRICT**

There appeared on behalf of the Company:

R. V. Hampel	- Labour Relations Officer, Calgary
M. E. Keiran	- Director, Labour Relations, Calgary
M. G. Mudie	- District General Manager, Vancouver
D. A. Lypka	- Manager, Road Operations, Vancouver
M. Hodge	- Witness
R. Hnatiuk	- Witness
G. Shannon	- Witness
M. Douglas	- Witness

And on behalf of the Council:

D. J. Wray - Counsel, Toronto
L. 0. Schillaci - General Chairperson, Calgary
J. W. Armstrong - National President, UTU, Ottawa
J. K. Jeffries - Vice-General Chairperson, Cranbrook
E. DiCredico - Vice-General Chairperson, Nanaimo
D. H. Firmson - Secretary, Saskatoon
W. R. Plomish - Grievor

The hearing was adjourned by the Arbitrator for continuation in July 1998.

On Wednesday July 15, and Thursday July 16, 1998:

There appeared on behalf of the Company:
R. V. Hampel - Labour Relations Officer, Calgary
M. E. Keiran - Director, Labour Relations, Calgary
M. G. Mudie - District General Manager, Vancouver
D. A. Lypka - Manager, Road Operations, Vancouver
Dr. L. Scott - Chief Medical Officer, Calgary
C. Eichler - Manager, RCLS, Vancouver
M. Hodge - Witness
R. Hnatiuk - Witness
G. Shannon - Witness
M. Douglas - Witness
And on behalf of the Council:
D. J. Wray - Counsel, Toronto
D. H. Firmson - Secretary, Saskatoon
J. W. Armstrong - Vice-President, UTU, Ottawa
J. K. Jeffries - Vice-General Chairperson, Cranbrook
B. J. McLafferty - Vice-General Chairperson, Moose Jaw
M. G. Eldridge - Vice-General Chairperson (CNR), Edmonton
R. Sharpe - General Chairman (BC Rail), Vancouver
W. R. Plomish - Grievor

AWARD OF THE ARBITRATOR

The discharge of Conductor Plomish, an employee with 23 years' service at the time of the Company's action, is the result of an investigation in relation to the anonymous writing and publication of a newsletter entitled *"The Village Idiot".* Copies of *The Village Idiot* newspaper were distributed in several of the Company's locations around Vancouver and Coquitlam, British Columbia in the late spring of 1995. Sub-titled "News For and About Vancouver Division Management" and described as "Issue One, Volume I - CP Rail System", the publication made a number of scurrilous comments about various members of management. Most particularly, it profiled a particular named member of management as "Village Idiot of the week", and suggested that he is a paedophile. Other parts of the newsletter make immature and sophomoric references to other managers, generally subjecting them to personal insult and ridicule. For example, one is referred to as "Fat Roger", while another is referred to as "No-Brain". Two named managers are described as having competed for

"ass-hole of the month".

Clearly, by any standard, the publication of *The Village Idiot* is of itself a gross impropriety deserving of the most serious measure of discipline. It represents a malicious and cowardly attack upon both the Company and its managers in a way which is clearly unacceptable in any industrial enterprise.

Mr. Plomish was discharged following a disciplinary investigation conducted in the summer of 1997, after the obtaining of certain employee statements by the Company in relation to the authorship of *The Village Idiot.* As a result of the investigation the Company came to the conclusion that Mr. Plomish, who was on a compensable leave of absence at the time of the publication of the anonymous newsletter, was its author, and on that basis discharged him from service. In these proceedings Mr. Plomish denies that he had any involvement with the publication of *The Village Idiot.* His bargaining agent further alleges that the publishing of the newsletter had been previously settled in 1995, that the Company in any event waited too long to conduct the investigation and that the investigation was not within the standards of fairness and impartiality required by the collective agreement.

Upon a careful review of the entirety of this file and the evidence placed before the Arbitrator, which is extensive, I cannot sustain any of the positions advanced by the Council in this case. Critical to the resolution of the merits of this dispute is the conflict in evidence between the grievor and Conductor Mitch Hodge, the Treasurer of Local 422 at the time of the publication. The evidence of Mr. Hodge, given both in the Company's investigation process and before the Arbitrator, is that he and fellow employee, Locomotive Engineer Al Miller, met Mr. Plomish during their coffee break at the New Westminster Quay Restaurant at a time which Mr. Hodge estimates to have been several days in advance of the publication of *The Village Idiot.* Mr. Hodge relates that Mr. Plomish then produced a printed copy of *The Village Idiot* and showed it to him. He relates that upon reading it, and noting that its letterhead made reference either to the United Transportation Union, or to its Local 422, he immediately stated to Mr. Plomish that the newsletter could not be issued under the name of the Union or its Local. He states that he further inquired of Mr. Plomish as to whether he had "run this by" the Union's General Chair-person, Mr. Lou Schillaci. He says that Mr. Plomish laughed at that suggestion, stating that Mr. Schillaci would never condone the paper. Mr. Hodge states that he briefly showed the publication to Mr. Miller, who glanced at it and returned it to him. According to Mr. Hodge it was a few days later that the same document, without the letterhead reference to the Union or its Local 422, appeared on the Company property.

Considerable other evidence was adduced before the Arbitrator, some of it for the purpose of suggesting that a conspiracy existed among officers of Local 422 to rid themselves of Mr. Plomish. It is common ground that Mr. Plomish occupied the position of Legislative Representative for the local,

and that his championing of certain grievances within the workplace, notably a sexual harassment complaint made against one of the union's local officers, had placed him in a position of antagonism in relation to certain individuals within the Union's local executive. In the Arbitrator's view little of substance can be concluded from the evidence relating to those antagonisms, save perhaps to say that management of the local appears to be in some need of attention.

The record before the Arbitrator discloses that the testimony of Mr. Miller, given during the course of the Company's investigation, generally corroborates the account given by Mr. Hodge with respect to the coffee break meeting with Mr. Plomish, estimated to have occurred in or about early June of 1995. The fact that the Company's investigation did not occur for some two years after the fact is explained by the late disclosure of Mr. Plomish's alleged involvement in relation to the newsletter. This emerged only during the course of the Company's investigation into the sexual harassment complaint of an employee made against a member of the Union's local executive. It seems that during the course of the Company's investigation of the sexual harassment complaint a Union officer placed in evidence a letter received internally, addressed to the Union executive, alleging that Mr. Plomish was the author of *The Village Idiot* and seeking his resignation from the executive. In the result, the investigation only materialized when the letter in question eventually came to the attention of Mr. Lypka, the Company's Manager of Road Operations. In the circumstances, it appears to the Arbitrator that the Company acted expeditiously as soon as it had reasonable grounds to suspect Mr. Plomish. This is not, in my view, a circumstance in which it can be alleged that the Company was lax in the enforcement of its rights by not conducting an investigation previously, as it had no prior basis of information on which to do so.

Nor can I accept the suggestion of the Council that there had ever been any settlement in relation to the publication of *The Village Idiot* newsletter. The Council's position in respect of a prior settlement is based on the settlement of a separate complaint of an unfair labour practice pursuant to section 97(l) of the Canada Labour Code filed with the Canada Labour Relations Board, a dispute apparently triggered by the Council's objection to the removal by the Company of a copy of a Local 422 newsletter from a glass case on work premises where such publications are normally displayed. It does not appear disputed that the Company did remove the newsletter, although it appears that it was subsequently re-posted. In any event, the parties resolved the Labour Board complaint by a brief statement of settlement signed June 1, 1995 which includes the following:

On the foregoing basis, both parties agree that this disposes of this matter in its entirety and the complaint before the CLRB is withdrawn.

Mr. Plomish contends that the issue of the earlier anonymous newsletter, entitled *The Village Idiot,* was somehow finally resolved by the inclusion

of the phrase "this matter in its entirety". That, he submits, would flow from the fact that there was some discussion of *The Village Idiot* newsletter within the context of the Company's actions in removing the subsequent legitimate Union newsletter. I see no rational substance to that argument. The fact that *The Village Idiot* newsletter may have been referred to as explaining the motivation of the Company in removing a subsequent Union newsletter from its position of display is neither here nor there for the purposes of understanding the settlement of the dispute between the Council and Company before the Canada Labour Relations Board. At best, the belief of Mr. Plomish that the matter of *The Village Idiot* newsletter was somehow closed by the subsequent dispute is tortured and fanciful, and cannot be sustained by this Arbitrator.

The final Council objection relates to its allegation that the Company's investigation was not conducted in a fair and impartial manner. Among its contentions in that regard is that the investigating officer, Mr. Lypka, was "intimately involved" with the subject matter of the grievor's dismissal. Specifically, it is contended that because Mr. Lypka is the officer who received a copy of the internal Union letter seeking Mr. Plomish's resignation from the local executive, dated February 25, 1997, and that he had discussions with certain of the authors of the letter, he could not chair the investigation in a fair and impartial manner. Additionally, it is alleged that Mr. Lypka violated the standards of the collective agreement provisions governing disciplinary investigations by allowing two other employees to remain present as observers throughout the investigation, with the opportunity for themselves to introduce evidence and question witnesses. Further allegations are made in relation to certain rulings made by Mr. Lypka and the fact that on occasion the investigation was disrupted by outbursts of other persons made against Mr. Plomish. It is also suggested that because the actions of Mr. Lypka are called into question in the sexual harassment complaint which Mr. Plomish was involved in processing, he would be in a biased position with respect to the investigation of the grievor.

After a careful review of the evidence the Arbitrator can see no substance to any of these allegations. Firstly, it must be appreciated that Mr. Lypka found himself faced with an extremely complex and sensitive investigation. The charges being made against Mr. Plomish, if they were false, could easily result in a serious degree of discipline being levied against the Union officers who made them through their authorship of the internal Union letter seeking Mr. Plomish's resignation, which letter ultimately came into the possession of Mr. Lypka. The fact that Mr. Lypka was the person who received the letter, and that he had certain verifying conversations with its authors before undertaking the investigation does not disqualify him from conducting the proceedings. Obviously it is appropriate, and arguably necessary, for a person contemplating instituting a disciplinary investigation to make such preliminary inquiries as are necessary to determining that there is indeed sufficient substance to justify such a step. I am satisfied that the involvement of Mr. Lypka in the receiving of the letter of complaint in respect of Mr.

Plomish, and his brief preliminary inquiries of the authors of that letter, do not violate the standards of a fair and impartial investigation, and did not place him in a position of bias or pre-judgement.

I consider next the question of the attendance and participation of the two other employees in the investigation proceedings. As Mr. Lypka explained, he felt it appropriate that two employees, who were authors of the internal Union letter of complaint made against Mr. Plomish, be allowed to remain present during the investigation. By his reckoning, if the charges against Mr. Plomish should prove to be false, at a minimum the employees in question would become liable to a serious degree of discipline themselves. Indeed, Mr. Lypka took guidance from a prior award of this **Office, CROA 1937,** and his own interpretation of the collective agreement which, on its face, within the text of article 82, makes reference to employees being pen-nitted to be present at an investigation when evidence is given which may have a bearing on their ultimate responsibility. While the Arbitrator makes no comment as to the correctness of Mr. Lypka's interpretation, I am satisfied that in the circumstances his actions were in good faith, that they did not in any event prejudice the rights of Mr. Plomish, who had the fullest opportunity to hear all allegations against him and present his own rebuttal evidence. There was no departure in any aspect of the proceedings from the fundamental standards of fairness and impartiality provided within article 82 of the collective agreement. For the reasons related, the Arbitrator can sustain none of the procedural objections raised by the Council.

As to the merits of the grievor's alleged authorship of *The Village Idiot, I* accept without reservation the evidence of Mr. Hodge, corroborated in part by Mr. Miller, as establishing the grievor's responsibility for the publication. Mr. Hodge was a fair and candid witness whose testimony was given carefully and credibly. While it may well be that Mr. Plomish has enemies within the Union's executive, I am satisfied that the testimony of Mr. Hodge is untainted in that regard, and is to be believed.

Tragically, this grievance reveals a serious act of malicious defamation, which in the Arbitrator's opinion justifies the ultimate disciplinary sanction of discharge. While the grievor is a long service employee of relatively senior years, he does not have an unblemished disciplinary record. Part of his record includes recent findings by this Office that he made unprofessional and defamatory comments about another conductor to members of the public on the passenger train to which he was assigned **(CROA 2956).** In the instant case, as noted above, the Arbitrator is persuaded that the evidence of Mr. Hodge is to be preferred to that of Mr. Plomish. On the strength of that testimony I am satisfied, on the balance of probabilities, that Mr. Plomish was the author of *The Village Idiot* newsletter, and that his discharge for such an egregious action was appropriate, and should not be disturbed.

For all of the foregoing reasons the grievance is dismissed.

September 4, 1998

MICHEL G. PICHER
ARBITRATOR

SUPPLEMENTARY AWARD TO CASE NO. 2963

SUPPLEMENTARY AWARD OF THE ARBITRATOR

The award herein issued on September 4, 1998. It concluded that the grievor, Mr. Walter Plomish, did engage in grossly improper misconduct by anonymously publishing a newsletter containing extremely negative comments, including sexual innuendo, in relation to a specifically named supervisor, as well as insulting and degrading references to other managers.

The record discloses that Mr. Plomish made a complaint to the Canada Labour Relations Board with respect to certain alleged unfair labour practices by the Company in relation to the termination of his employment. In a memorandum dated April 7, 1998 the parties agreed to adjourn the matters before the Canada Labour Relations Board and to have the issues relating to alleged unfair labour practices heard and disposed of by this Office. The document reads, in part, as follows:

> NOW THEREFORE, IT IS HEREBY AGREED THAT:
>
> I . The arbitrator oil the Canadian Railway Office of Arbitration shall have jurisdiction over the anti-union animus allegations raised in the grievance concerning the dismissal of the complainant. The Respondent further agrees specifically that it will not object to the arbitrator's jurisdiction over such allegations.
>
> 5. The parties shall not attempt to progress the above-described complaint to the Board again unless the arbitrator refuses the jurisdiction described in paragraph I above. The parties further specifically agree that if the arbitrator seizes jurisdiction over the anti-union animus allegations raised in the grievance, the decision of the arbitrator shall be final and binding on these allegations and the parties agree that the Canada Labour Relations Board will be asked by the Respondent, with consent of all parties, such consent being hereby given, to refuse to hear and determine the complaint in accordance with s. 98(3) of the **Canada Labour Code.**

In the award which issued on September 4, 1998 the Arbitrator did not make specific mention of the issue of anti-union animus. That was by oversight, given the extent to which the award concentrated upon the evidence relating to the grievor's gross misconduct, which was highly unusual in its nature, and the conclusion that the Company had ample just cause for his termination. The Council now requests that the Arbitrator complete the unfair labour practice aspect of the award, given that the grievor appears to be taking the position that the anti-union animus question was not

considered and disposed of by the Arbitrator.

It is well settled that a board of arbitration can retain jurisdiction to complete any aspect of an award. It is further established that, in keeping with the decision of this Office in **CROA 1861,** the arbitrator of the Canadian Railway Office of Arbitration is deemed to always retain jurisdiction in matters before him, even though there may be no specific statement to that effect within the body of the award. CROA 1861 reads, in part, as follows:

It is well settled that boards of arbitration should conduct their proceedings in furtherance of the statutory purpose of settling the substance of labour disputes during the term of a collective agreement, and should avoid an unduly technical approach to procedures and remedies *(see Blouin Drywall Contractors Ltd. (1973) 4 L.A. C (2d) 254 (OShea), affirmed on judicial review 57 D.L.R. (3d) 199 (Ont CA.)).* The Canadian Railway Office of Arbitration was established for the purpose of providing a relatively informal and expeditious system of arbitration to serve the employers and unions within the railway industry in Canada. The format of the hearing, the extensive use of documentary evidence and the generally abbreviated reasons for the Arbitrator's decisions have all evolved in furtherance of that goal. As reflected in the prior awards of this Office, the general understanding and expectation has been that the Arbitrator retains jurisdiction in any case for the purposes, if necessary, of finally disposing of any issue, such as compensation, which may not be dealt with in detail in the original award. While in the normal stream of ad hoc arbitrations outside this Office, it is normal for boards of arbitration to expressly state that they retain jurisdiction in respect of any aspect of a particular grievance, for many years such statements were not made within the context of the awards issuing from this Office. Notwithstanding the absence of any such statement, however, it appears to have been the consistent view of the parties and the Arbitrator that jurisdiction does continue in respect of the completion of any award.

I am therefore satisfied that I am not functus *officio* with respect to the issue of anti-union animus in this matter. At the request of the Union, and in light of the submissions received from the Company and Mr. Plomish, I consider that I have full jurisdiction to complete and clarify the award in respect of the matter of anti-union animus. It is my finding and declaration that there is no evidence whatsoever in any of the material which would sustain a finding of anti-union animus on the part of the Company with respect to its decision to institute a disciplinary investigation of Mr. Plomish and, eventually, to terminate his services for grossly improper conduct. While the evidence does disclose that Mr. Plomish held office within the Union executive, there is simply no meaningful evidence to suggest that the Company sought, directly or indirectly, to limit his union activities or to threaten or visit actual reprisals upon him for any involvement he may have had in the activities of his trade union. Even if it is considered that the burden of proof on this aspect resides in the employer, I am satisfied, beyond any doubt,

that the evidence falls short of establishing any violation of sections 94(l)(a), 94(3)(a)(i) and 94(3)(a)(iii) of Part I of the Canada Labour Code. I am satisfied that the Company did not involve itself in interference with the administration of the trade union or its representation of employees. It did not refuse to employ or continue to employ Mr. Plomish by reason of his union activities or by reason of his possible involvement in proceedings under the Canada Labour Code. In the result, to the extent that I am granted jurisdiction by the agreement of the parties in the memorandum of agreement dated April 7, 1998 1 hereby determine that the complaint of Mr. Plomish in relation to alleged violations of section 94 of Part I of the Canada Labour Code must be dismissed.

April 19, 1999

MICHEL G. PICHER
ARBITRATOR