

**CANADIAN RAILWAY OFFICE OF ARBITRATION**

**CASE NO. 3061**

Heard in Montreal, Thursday, 10 June 1999  
concerning

**CANADIAN NATIONAL RAILWAY COMPANY**

and

**CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS**

**(UNITED TRANSPORTATION UNION)**

**DISPUTE:**

25 demerits assessed Conductor Glen Gower.

**JOINT STATEMENT OF ISSUE:**

On December 12, 1997 the Company issued 25 demerits to the grievor, Mr. Glen Gower, effective November 21, 1997 for:

"violation of CROR 112 and 104(c) while working as conductor in charge of Roadswitcher 548, November 21, 1997."

The Union appealed the discipline assessed on the grounds that the grievor did not receive a fair and impartial hearing and in any event, the evidence does not support the discipline assessed.

The Union requests that the discipline assessed be removed from the grievor's record.

The Company disagrees with the Union's contention and has declined the grievance.

**FOR THE COUNCIL:**

(SGD.) **N. MATHEWSON**

FOR: **GENERAL CHAIRPERSON**

**FOR THE COMPANY:**

(SGD.) **F. O'NEILL**

FOR: **VICE-PRESIDENT, LABOUR RELATIONS**

There appeared on behalf of the Company:

F. O'Neill	- Labour Relations Associate, Toronto
R. Rennie	- Associate, Don Yard, Toronto
J. W. Sauv6	- General Supervisor, Transportation, Toronto

And on behalf of the Council:

R. A. Beatty	- General Chairman, Sault Ste. Marie
D. O. Glass	- Secretary, GCA, Sarnia
C. Beale	- Local Chairman, Brockville
C. C. Goudreau	- Local Chairman, Windsor
E. E. Beatty	- Local Chairman, Belleville
G. E. Gower	- Grievor

**AWARD OF THE ARBITRATOR**

This grievance arises out of the assessment of twenty-five demerits against Conductor Glen Gower, home stationed at the Company's Don Yard facility in Toronto. On November 21, 1997 the grievor worked an assignment

which involved switching cars at Port Union and Ajax. On the day of the grievor's assignment Assistant Superintendent R. Rennie conducted an audit of the work performed by the grievor and his crew, which was also comprised of a locomotive engineer, a brakeperson and a trainee. According to Mr. Rennie's observations in two industrial switching yards at Port Union and Ajax a number of discrepancies were found. At Ajax a group of six cars, including a car containing dangerous goods, was allegedly secured with a single hand brake, as opposed to two hand brakes, as required by Rule 112 of the Canadian Rail Operating Rules. A second group of five cars found on another track at the same location, was said to be similarly secured with only one hand brake. In addition, a switch, identified as switch W450 at Ajax was found by Mr. Rennie to be lined for the diverging route, and not locked. At Port Union Mr. Rennie also observed a switch incorrectly lined for the diverging route, and locked. The Company relates that Mr. Rennie corrected the deficiencies observed and prepared a written report of his observations for the purposes of a subsequent disciplinary investigation.

Subsequently Mr. Rennie prepared and issued a notice to the grievor, advising him to appear for a formal investigation into the alleged discrepancies found at Ajax and Port Union on November 21, 1997. When the grievor appeared for the investigation the investigating officer was Mr. Rennie himself. It appears that at the outset of the investigation the investigating officer, Mr. Rennie, presented the grievor and his Union representative with a copy of Mr. Rennie's report, the substance of which constituted the totality of the evidence against Mr. Gower.

As is evident from the record of the investigation, Mr. Gower denied having violated any rules in respect of the alignment of the switches, and affirmed that he follows proper practice in respect of the securing of cars. He further indicated that he was aware that Mr. Rennie was monitoring his work, and that he was extra cautious in complying with all rules. When the grievor's representative asked for the opportunity to ask questions of Mr. Rennie on his written report against Mr. Gower, that request was denied. When the Union representative, Mr. Scott Polley, asked why he could not ask questions on the evidence against Mr. Gower the response recorded by Mr. Rennie is: "Company officers investigating CROR violations will not be questioned during his (sic) duties as investigating officer."

During the course of the investigation the grievor and his representative made it clear that they objected to the manner in which the investigation was being conducted. Prior to his final answer, which was to deny having violated any operating rules during the course of his assignment on November 21, 1997 the grievor made the following protest:

A.15 This investigation has not been conducted in an unbiased and fair manner by the fact that you refused to submit any evidence against me, which you read from to derive your questions from.

Your entire investigation was based on evidence you yourself collected. I was not given a chance to refute or question as per my right under article 82.2 of 4.16.

I consider this entire investigation both an insult to my professionalism and intelligence and harassment in a blatant form.

I feel this is some sort of petty vindictiveness due to previous incident to which I refused to be driven by the investigating officer due to his inability to drive in a safe manner.

On the basis of the investigation the decision, apparently communicated to the grievor by Mr. Rennie, was that twenty-five demerits should be assessed against Mr. Gower for the rules violations alleged.

The Council submits that the facts at hand disclose a gross violation of the Company's obligation to conduct a fair and impartial investigation prior to the assessment of discipline, in accordance with article 82 of the collective agreement which provides, in part, as follows:

82.1 Employees will not be disciplined or dismissed until the charges against them have been investigated. Employees may, however, be held off for investigation not exceeding 3 days and will be properly notified, in writing and at least 48 hours in advance, of the charges against them.

82.2 Employees may have an accredited representative to appear with them at investigations, 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. Questions and answers will be recorded and the employee will be furnished with a copy of the statement taken at the investigation.

The Council submits that the manner in which the investigation against Mr. Gower was conducted is highly suspect. Firstly, it points to the fact that Mr. Gower held the position of Vice-Local Chairman in the Council, and had been involved in a number of confrontational situations in that regard. Secondly, its representative points to the fact that the grievor and Mr. Rennie had a personal disagreement some two days prior to the audit of Mr. Gower's work performance by Mr. Rennie. On that occasion Mr. Rennie was in the process of driving the grievor and his crew to Ajax to commence an assignment. As he was leaving the yard Mr. Rennie made an unlawful left-hand turn, which caused the grievor to express concern as to the safety of driving with him. It does not appear disputed that Mr. Rennie then returned to the yard and called a taxi to deliver the grievor and his crew to Ajax. The Council's representative submits that the unsafe driving incident, as well as Mr. Gower's profile as an active union representative, prompted Mr. Rennie's decision to monitor his work. He

further questions the legitimacy of the investigation, noting that although the grievor's crew at Ajax and Port Union consisted of three other employees, including a brakeperson and locomotive engineer, none of them were summoned to an investigation in relation to the same irregularities. Most fundamentally, he submits that based on the prior jurisprudence of this Office, as well as the language of article 82.2 of the collective agreement, there was a fundamental failure to provide the grievor with a fair and impartial investigation prior to the assessment of discipline against him.

The Company's representative submits that it is not feasible to at all times ensure that a disciplinary investigation is conducted by an individual who is not himself or herself involved in uncovering the irregularities giving rise to that process. He notes that certain collective agreements specifically contemplate that an investigation is to be conducted by the employee's supervisory officer. In the Company's submission the grievor's posture at the investigation was to be argumentative and uncooperative, for the purpose of frustrating Mr. Rennie's efforts. He argues that no violation of the grievors' procedural rights is disclosed.

The Arbitrator cannot agree. At the most obvious level, it is clear that the grievor was entitled to hear the evidence submitted against him and to have an opportunity "... to ask questions of witnesses whose evidence may have a bearing on the employee's responsibility." as mandated by article 82.2 of the collective agreement. Not surprisingly, investigating officer Rennie declined to be cross-examined on his own report, which was the sole evidence against Mr. Gower.

This Office has had a number of occasions to deal with circumstances in which a company officer conducting a disciplinary investigation is also a material witness against the employee being investigated. Absent extraordinary circumstances or justification, such a situation has been found to violate the right to a fair and impartial investigation. In **CROA** 1720, which concerned an alleged violation of Rule G, the trainmaster who formed the judgement that the grievor was impaired and pulled him out of service also conducted the disciplinary investigation, to the extent of examining other witnesses who gave opinions contrary to his own. In that context the arbitrator commented as follows:

Apart from the merits of the case, the Arbitrator must also express concern with the manner with which the investigation was conducted. The investigatory hearing consisted of the examination of the grievor as well as a number of other employees. The chief, and indeed only, evidence against Engineer Primeau was in the form of a narrative report submitted by Trainmaster Hey. The record reveals, however, that the examination of all of the employees, with the exception of the grievor, was conducted by Mr. Hey himself. I have substantial difficulty appreciating how Mr. Hey could cast himself in the role of a person charged with impartially evaluating the statements of the

employees, given that the validity of his own personal report was the very subject of the investigation. It is difficult for the Arbitrator to understand how that manner of proceeding can be seen to be consistent with the requirement for "a fair and impartial hearing" as a condition precedent to the discipline of a Locomotive Engineer mandated by Article 86.1 of the Collective Agreement. If it was necessary to so conclude, the grievance would succeed on this ground alone.

In a similar case, **CROA 1886**, the following comments appear:

In the context of this case the Arbitrator believes that two further comments are appropriate. The Union disputes the conduct of the disciplinary investigation by the Company. The investigation into the state of Mr. Travers, which was required to be in compliance with Article 82.2 of the Collective Agreement, was conducted by Assistant Superintendent J.H. Hiel. Mr. Hiel was one of the Company representatives who questioned the grievor at the time he reported for work, and was the person who in fact removed him from service for being under the influence of alcohol. The comments of Mr. Hiel at the investigation, in which he also acted as a witness, confirm his own conviction from that time forward that the grievor was intoxicated. If the investigation had exonerated the grievor the decision to hold him out of service, taken by Mr. Hiel, would have been proved wrong, with compensation payable by the Company. The record of the proceedings further reveals that when he acted as both witness and chairman of the investigation, Mr. Hiel ruled certain questions put to him by the Union's representative to be irrelevant.

The Company does not dispute that Article 82.2, which governs the disciplinary investigation, implicitly requires that it be conducted in a fair and impartial manner. Mr. Hiel was centrally involved with the formulation of the charge against the grievor. As the investigating officer it was his responsibility to recommend whether the charge was correct and discipline should be imposed. In these circumstances I cannot see how the investigation could be said to have been conducted in a fair and impartial manner. There is nothing to suggest that the Company could not have utilized another supervisor, with no personal viewpoint to defend, to be the officer in charge of conducting the investigation and making the ultimate recommendation as to discipline. In the Arbitrator's view the facts at hand are in all material respects indistinguishable from those in **CROA 1720**, and the grievance would have succeeded on this separate ground alone.

See also CROA 1561, 1597, 1734 and 2041.

There may, of course, be circumstances where it is impracticable for the Company to provide an officer to conduct an investigation in circumstances where its local responsible officer was in some measure involved in the discovery of an employee's alleged wrongdoing. It is difficult to see,

however, how that can be justified in the circumstances of the instant case. The Arbitrator has some difficulty with the Company's representative's characterization of the Don Yard as an "outpost" where it would have been unmanageable to find an officer other than Mr. Rennie to conduct the investigation. Without commenting on the technical characterization of a facility in the heart of Metropolitan Toronto as being an "outpost", it appears to the Arbitrator that there were ample personnel resources available to the Company within the immediate area to allow for an investigation to be presided over by a person other than the chief witness against the employee concerned.

As noted in prior awards of this Office, in discipline cases the form of expedited arbitration which has been used with success for decades within the railway industry in Canada depends, to a substantial degree, on the reliability of the record of proceedings taken prior to the arbitration hearing at the stage of the Company's disciplinary investigation. As a result, any significant flaw in the procedures which substantially compromise the integrity of the record which emerges from that process goes to the integrity of the grievance and arbitration process itself. Consequently, in keeping with general jurisprudence in this area, it is well established that a failure to respect the mandatory procedures of disciplinary investigations results in any ensuing discipline being ruled void ab initio.

That, in my respectful opinion, is the only ruling possible in the instant case. Not only did Mr. Rennie assume the position of chief witness against the grievor, over whose investigation he then presided, he also clearly denied to Mr. Gower and his union representative the opportunity to ask questions of the only witness involved, the investigating officer himself. In a circumstance such as this it is not sufficient for the Company to ask the Council and the Arbitrator to accept that the grievor received a fair and impartial investigation because Mr. Rennie's honesty is beyond reproach. That argument fails to appreciate that in such matters it is not only critical that justice be done, but that it manifestly be seen to be done. That, in my view, could only happen in this case if the investigation had been conducted by a person other than Mr. Rennie, and if the Council been provided the fair opportunity contemplated within article 82.2 to ask questions of him which might bear on the grievor's responsibility.

Nor is the Arbitrator impressed by the Company's argument to the effect that previously other local chairmen of the Council have tolerated Mr. Rennie acting in the dual capacity of witness and investigatory officer. The failure of a union representative to diligently enforce the standards of the collective agreement is not tantamount to a general waiver or amendment of that agreement by the Council, any more than an error by the Company in the overpayment of wages must necessarily result in a permanent alteration of its obligation.

For all of the foregoing reasons the grievance must be allowed. The

Arbitrator declares that the discipline assessed against Mr. Gower is void by virtue of the Company's violation of article 82.2, and directs that the twentyfive demerits assessed against Mr. Gower be removed from his record forthwith.

June 14, 1999

**MICHEL G. PICHER**  
**ARBITRATOR**