CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 2940
Heard in Montreal, Thursday, 12 March 1998
concerning
CANADIAN PACIFIC RAILWAY COMPANY
and
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYE
EX PARTE

DISPUTE:

Claim on behalf of Mr. J. Zyznomirski.

EX PARTE STATEMENT OF ISSUE:

By way of form 104 dated January 30, 1995, the grievor, Track Maintenance Foreman (TMF), was demoted to the position of Track Maintainer for, in the words of the Company, submitting "misleading and inaccurate track inspection reports, resulting in reports being filed for track inspections that were not performed

The Brotherhood contends that: 1.) The discipline assessed was excessive and unwarranted in the circumstances; 2.) In particular, the assessment of a demotion without time limits was unfair, illegal and excessive in the circumstances; 3.) The grievor has been unjustly dealt with in violation of section 18.6 of agreement no. 4 1.

The Brotherhood requests that the grievor's demotion be rescinded immediately and that he be returned to his former TMF position without loss of seniority and that he be compensated for all regular and overtime hours lost as a result of this matter.

The Company denies the Brotherhood's contentions and declines the Brotherhood's request.

FOR THE BROTHERHOOD: (SGD.) J. J. KRUK
SYSTEM FEDERATION GENERAL CHAIRMAN
There appeared on behalf of the Company:
J. Dragani - Labour Relations Officer, Calgary
R. M. Andrews - Manager, Labour Relations, Calgary
E. J. Maclsaac - Labour Relations Officer, Calgary
L. Kohiman - Field Specialist
And on behalf of the Brotherhood:
P. Davidson - Counsel, Ottawa
J. J. Kruk - System Federation General Chairman, Ottawa
D. Brown - Sr. Counsel, Ottawa

AWARD OF THE ARBITRATOR

The material before the Arbitrator does not establish that the grievor knowingly or deliberately submitted reports in an effort to mislead the

Company as to his having performed track inspections when, in fact, he did not. Rather, what occurred is that the grievor apparently made notes of his track inspections, provided the notes to his wife and, on the strength of those, she completed the track inspection reports which he then signed and submitted to the Company. The problem leading to the grievor's demotion resulted from an error made by his wife in the transcribing of his records.

It is common ground that the grievor did not perform track inspections on either the Brooks or MacLeod Subdivisions on September 5, 9, 12, 16 and 19, 1994. In fact Mr. Zyznomirski was absent from work on authorized sick leave on the 9th, 12th, 16th and 19th. It appears that on the 5th he was assigned to work on the Laggan Subdivision. In the circumstances, therefore, he was not responsible for track inspections on the territory for which he is normally responsible, over segments of the Brooks and MacLeod Subdivisions. Unfortunately, in transcribing his notes, his wife did submit reports which would indicate to the Company that he perfon-ned track inspections on the dates in question, when in fact he did not. There is no dispute that the persons responsible for track inspections on those dates properly performed their duties and what transpired did not involve any risk from the standpoint of safety or the integrity of the Company's operations.

Following an investigation the grievor was demoted to the position of track maintainer. At issue in these proceedings is whether the demotion was appropriate, and if so, whether relief should now be provided against it, some three years later.

Demotion is an extremely serious form of discipline, in that the permanent removal to a lower rated job classification occasions a long term, perhaps indefinite, financial penalty against the employee in question. It is generally viewed as an extraordinary form of discipline, to be resorted to only where the employer's legitimate business would necessitate that outcome (see **CROA 1697, 2877).**

It is also well established that a permanent demotion does not necessarily foreclose an individual from future promotion. **In CROA 2877** the following comments appear:

> Is the discretion of the Company with respect to the future promotion of an employee who has been permanently demoted absolute and unreviewable? I think not. An award which confirms a disciplinary demotion acknowledges that the Company has legitimate business interests to protect in removing an employee from a particular position, be it related to safety, efficiency or some other legitimate concern of the employer. By the same token, however, in the event that the Company should later refuse to promote the employee in question, it can do so only for legitimate business purposes, and cannot act for extraneous reasons, or in a manner which is arbitrary, discriminatory or in bad faith. A failure of that very

basic standard could, in an appropriate case, be the basis of a valid grievance.

At issue in the case at hand is whether the actions of the grievor merited his demotion from the position of Track Maintenance Foremen for a period of three years, and possibly longer. At the outset it is important, I think, to fairly characterize the actions of the grievor. This is not a case where an individual knowingly misrepresented to the Company that work was performed by him so as to gain some payment or other advantage. Nor does the evidence reveal that there was any threat to safety occasioned by the deliberate registration of a known falsehood. What in fact transpired is that the grievor, obviously without justification, delegated to his wife the responsibility of preparing his track inspection reports, based on notes which he had taken in the field. She erroneously entered report information for dates he did not in fact work, an oversight which he did not notice until it was brought to his attention by his supervisor. In the circumstances the Arbitrator is inclined to agree with the Brotherhood's characterization of Mr. Zyznomirski's actions as an error in judgement and shoddy record keeping, rather than a deliberate and malicious intent to falsify safety sensitive records.

Can it be said that the grievor has irrevocably broken the bond of trust implicit in his holding the responsibilities of a track maintenance foreman? It is difficult to reply to that question in the affirmative in light of the subsequent treatment of the grievor by the Company itself. Mr. Zyznomirski previously worked as a Track Maintenance Foreman some seven years. It is common ground that he was assigned to act as a relieving foreman on some two occasions following his demotion in 1995 and 1996. In addition, it appears that he has also been assigned as flagman, holding track occupancy permits while working in conjunction with a contractor. More recently he was given track occupancy permits in the summer of 1997 and, on at least one occasion, on August 4, 1997 was called upon to fill a track inspection report.

When the whole of the material before me is examined, I have difficulty accepting the position of the Company that an indefinite demotion of three years or more was an appropriate measure of discipline in the case at hand. Firstly, for the reasons touched upon above, this is not a case, as the Company contends, where the grievor's honesty is at issue. While there may be a genuine concern with the degree of care and responsibility with which he filled track inspection reports, there is no evidence of any deliberate attempt on his part to defraud or mislead the Company. Given that the grievor had served well as a track maintenance foreman for some seven years prior to the incident in question, and that he has shown himself worthy of the Company's trust since his demotion, I am satisfied that it is appropriate, in the case at hand, to direct a reduction in penalty, albeit I do not deem it appropriate to make an order of compensation. It light of the arbitrator's determination on the merits of the just cause issue, and the appropriate disciplinary penalty, it is unnecessary to comment on the arbitrability of the Brotherhood's

alternative claim that the grievor were unjustly dealt with in violation of article 18.6 of the collective agreement *(see* **CROA 2939).**

For the foregoing reasons the Arbitrator directs that the grievor be reinstated into his prior position as a track maintenance foreman, without loss of seniority, subject to the following condition. For a period of one year from the time of his reinstatement Mr. Zyznomirski shall be in a probationary capacity as a track maintenance foreman. If, during that time, he should commit significant errors with respect to filing reports or other documentation for which he is responsible, he shall be subject to immediate demotion.

April 3, 1998

MICHEL G. PICHER
ARBITRATOR