CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 3221
Heard in Calgary, Thursday, 15 November 2001
concerning
CANADIAN PACIFIC RAILWAY
and
CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS
(UNITED TRANSPORTATION UNION)
EX PARTE

DISPUTE:

Discipline assessed to Conductor R.S. Collen and Trainperson J.D. Gwyer of Minnedosa, MB.

COUNCIL'S STATEMENT OF ISSUE:

Conductor Collen and Trainperson Gwyer were assessed 40 demerit marks on September 25, 1997 for their involvement in an incident that took place on August 19, 1997.

The Council contends that the Q&A investigations in connection with the incident weren't taken in a fair and impartial manner and has requested that the discipline be expunged from the grievors' records. In the alternative, the Council contends that the discipline assessed is excessive given the circumstances of the incident.

FOR THE COUNCIL:
(SGD.) D. H. FINNSON
FOR: GENERAL CHAIRPERSON

There appeared on behalf of the Company:
K. Fleming - Legal Services, Calgary
G. S. Seeney - Manager, Labour Relations, Calgary
D. E. Freeborn - Labour Relations Officer, Calgary
D. E. Guerin - Labour Relations Officer, Calgary
C. D. Carroll - Director, Labour Relations, Calgary

And on behalf of the Council:
L. O. Schillacci - General Chairperson, Calgary
D. Finnson - Vice-General Chairperson, Calgary

AWARD OF THE ARBITRATOR

The issue of substance in this grievance is whether the Company failed to accord to the grievors a fair and impartial hearing within the meaning of article 32, clause (c) of the collective agreement, which provides as follows:

32 (c)If the employee is involved with responsibility in a disciplinary offence, he shall be accorded the right on request for himself and an accredited representative of the Union or both, to be present during the examination of any witness whose evidence may have a bearing on the employee's responsibility, to offer rebuttal thereto and to receive a copy of the statement of such witness.

It is not disputed that the grievors were responsible, by their own error, for the improper securing of two locomotive units which had been uncoupled and left standing on the track at Minnedosa East during their tour of duty on August 19, 1997. The handbrake intended to secure the locomotives was not properly applied, and they moved forward until they crossed an engaged derail, resulting in the derailment of one of the locomotives.

An issue which arose during the investigation was whether the movement of the locomotives stopped foul of the main line, a fact alleged in the memorandum of

Road Manager D. Ditota, and denied by the grievors. The record discloses that following the conclusion of the grievors' investigatory statements, unbeknownst to the grievors or their union, the Company conducted a separate examination of Yard Master Bryan Schettler of Brandon, to determine whether his radio communications with the crew provided any information as to whether they had reported the movement as having fouled the main line.

It appears that the Company's investigating officer realised that an error had been made in failing to give the grievors or their union representative notice of the examination of Yard Master Schettler. In an attempt to remedy the problem the Company scheduled supplementary statements to be taken from the grievors on September 7, 1997, to allow them to respond to a written record of the statement taken from Mr. Schettler on September 5, 1997. Additionally, the investigating officer offered to have Mr. Schettler available, by telephone, for any questions which the grievors or their union representative might have to put to him. That offer was not taken up.

The Council submits that, based on prior jurisprudence of this Office, it is clear that the grievors were in fact deprived of one of the rights established within article 32(c) of the collective agreement. Specifically, they were not advised and therefore were denied the opportunity to request to be present during the examination of Yard Master Schettler. As the records indicates, the interview of Mr. Schettler was considered important by the Company, to the extent that it might bear of the degree of responsibility exhibited by the grievors in failing to issue an emergency broadcast. Part of the grievors' explanation for their action in that regard was that the movement was not foul of the main track. As is evident from Mr. Schettler's statement, he believed that Mr. Collen had reported to him that the derailed units were foul of the main line.

It appears to the Arbitrator undeniable that the Company's investigating officer did fail to provide to the grievors the protections to which they were entitled under article 32(c) of the collective agreement. Nor does the evidence disclose a situation which could not have been easily remedied by the Company. It could, very simply, have set aside the statement of Mr. Schettler taken on September 5, 1997 and rescheduled another statement by Mr. Schettler, with proper notice to the grievors and their union representative. That would have given them a fair opportunity to attend at Mr. Schettler's statement, as was their right.

For reasons elaborated in prior awards of this Office, the standards which the parties have themselves adopted to define the elements of a fair and impartial hearing are mandatory and substantive, and a failure to respect them must result in the ensuing discipline being declared null and void (CROA 628, 1163, 1575, 1858, 2077, 2280, 2609 and 2901). While those concerns may appear "technical", it must again be emhasized that the integrity of the investigation process is highly important as it bears directly on the integrity of the expedited form of arbitration utilized in this Office, whereby the record of disciplinary investigations constitutes a substantial part of the evidence before the Arbitrator, and where the testimony of witnesses at the arbitration hearing is minimized. (See, generally, Picher, M.G. "The Canadian Railway Office of Arbitration: Keeping Grievance Hearings on the Rails" Labour Arbitration Yearbook 1991 pp 37-54 (Toronto 1991).) Unfortunately, in the case at hand, the taking of a supplementary statement, albeit well intended, coupled with the possibility of a telephone conversation with Yard Master Schettler, falls short of the standard clearly and expressly established in the collective agreement, and did not remedy the procedural flaw, which did have a bearing on a significant aspect of the responsibility of the grievors. The opportunity of an after-the-fact telephone conversation is not the equivalent of being present during the actual examination of a witness.

For the foregoing reasons the Arbitrator is compelled to find and declare that the Company did fail to provide to the grievors the fair and impartial hearing contemplated within article 32(c) of the collective agreement, and that the

discipline assessed against them is null and void, and is to be removed from their records forthwith.

November 16, 2001 MICHEL G. PICHER
ARBITRATOR