CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3304

Heard in Calgary, Wednesday, 13 November 2002

concerning

CANADIAN PACIFIC RAILWAY

and

CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS
(UNITED TRANSPORTATION UNION)

DISPUTE:

The dismissal of Mr. G.C. Biden of Moose Jaw, Saskatchewan.

JOINT STATEMENT OF ISSUE:

On December 20, 2001, Mr. Biden provided a formal statement to the Company. On January 7, 2002, Mr. Biden was dismissed for :

> "your role in the organization of an illegal strike commencing on October 11, 2001 at and around Moose Jaw, Saskatchewan, resulting in significant disruption to train services."

The Union advanced a grievance on the basis that the Company failed to meet the burden necessary to justify dismissal, the Company violated the collective agreement as it applies to formal investigations and the Company has ignored relevant facts.

The Union seeks the reinstatement of Mr. Biden without loss of seniority and benefits, and with payment for all lost wages.

The Company has declined the grievance.

FOR THE COUNCIL:	FOR THE COMPANY:
(SGD.) D. H. FINNSON	(SGD.) C. M. GRAHAM
for: GENERAL CHAIRPERSON	FOR: GENERAL MANAGER OPERATIONS

There appeared on behalf of the Company:

M. Shannon	– Counsel, Calgary
C. M. Graham	– Labour Relations Officer, Calgary
C. Carroll	– Director, Labour Relations, Calgary
J. Copping	– Manger, Labour Relations, Calgary
D. Guérin	– Labour Relations Officer, Calgary
M. Franczak	– General Manager, Field Operations
G. Johnson	– Service Area Manager
G. Denham	– Manager Operations
R. Fosberg	– Manager Road Operations
R. Biskett	– Road Manager
G. Bernt	– Witness

And on behalf of the Council:

M. A. Church	– Counsel, Toronto
L. O. Schillaci	– General Chairperson, Calgary
D. H. Finnson	– Vice-General Chairperson, Calgary
B. L. McLafferty	– Local Chairperson, Moose Jaw
G. C. Biden	– Grievor

AWARD OF THE ARBITRATOR

This grievance involves the discharge of Conductor G.C. Biden for his alleged involvement in planning an illegal work stoppage at Moose Jaw commencing on October 11, 2001. The material before the Arbitrator, which is extensive and has been reviewed in detail, confirms that two admitted organizers of the illegal work stoppage were Conductors Paul Keeler and K.R. Fryklund. The record discloses that shortly following the illegal work stoppage Mr. Fryklund provided statements to Company officers, confirmed in a subsequent formal investigation on December 12, 2001, to the effect that Mr. Biden and himself had met with Mr. Keeler at Mr. Keeler's residence on an evening shortly before the commencement of the work stoppage. He related that the purpose of that meeting was to divide lists of employees and their phone numbers to canvass them for support of an illegal strike on the weekend of October 11, 2001.

Mr. Biden consistently denied any knowledge of or involvement in the planning of the illegal strike, although he admits to having been present at Mr. Keeler's house on the evening in question. He relates that for some time Mr. Keeler, who apparently has a side-line business of selling ACN telephone service, had been after him to become a subscriber. It appears that Mr. Keeler had extended an open invitation to Mr. Biden to drop by his house to obtain literature on the ACN service. Mr.

Biden explains that he is the proprietor of a rental property approximately a block from Mr. Keeler's home, and upon visiting the property he took advantage of the occasion to stop by Mr. Keeler's. It appears that when he arrived at Mr. Keeler's house Mr. Fryklund was already there, and that Mr. Keeler and Mr. Fryklund had been meeting for the purpose of organizing the illegal work stoppage.

Mr. Biden's evidence, which the Arbitrator accepts, is that he remained at Mr. Keeler's home no more than two or three minutes. During that time Mr. Keeler handed him a sheaf of materials, including brochures on the ACN service and a list of CP employees of their mutual acquaintance who were already subscribers to the ACN. The purpose of that list was to allow Mr. Biden, if he chose, to inquire of the subscribing employees as to their satisfaction with the telephone service. It appears that the piece of paper handed to Mr. Biden had only names on it, and no telephone numbers.

For reasons he best appreciates, Mr. Fryklund concluded that Mr. Biden attended at Mr. Keeler's residence to obtain a list of employee names to call as part of the campaign to recruit support for the illegal work stoppage. That is the thrust of the information he initially provided to Company officers and confirmed in his investigative statement of December 12, 2001.

Considerably later, however, Mr. Fryklund recanted his initial account of the events which transpired at Mr. Keeler's home. On January 21, 2002 he signed a notarized statement, admittedly drafted by Mr. Biden, and addressed to Union Local Chairman Barry McLafferty. That statement radically qualified Mr. Fryklund's earlier statements to the Company. In the course of that statement he affirms that while he did see Mr. Biden briefly at Mr. Keeler's home, and saw him receive a list of employees, he in fact had no knowledge as to the content of the list or the purpose for which it was given to Mr. Biden. His statement relates, in part: "I have no knowledge to support my prior assumption that Mr. Biden was recruited to make phone calls to organize a work stoppage."

In light of the notarized statement of Mr. Fryklund, a supplementary investigation statement was taken from Mr. Fryklund by the Company on September 25, 2002. During that

investigation Mr. Fryklund confirmed the content of his notarized statement of January 21, 2002. While he agreed that he felt pressure because Mr. Biden had lost his job by reason of his earlier statement, he expressly denied that he felt intimidated, threatened or harassed into signing the letter. When asked whether his most recent letter was accurate he said: "I believe so, I assumed a lot of things."

In this grievance, as in any matter of discipline, the burden of proof is upon the Company. The only direct evidence, drawn from a massive investigation of a great number of employees, which implicates Mr. Biden in the organization of the illegal work stoppage is the testimony of Mr. Fryklund. A careful examination of that testimony, both in its original form and in the revised format of his statement of September 25, 2002, leaves considerable doubt as to the validity of the Company's conclusion, based solely on the original evidence of Mr. Fryklund, that Mr. Biden was instrumental in organizing the work stoppage. It is clear from the material before the Arbitrator that Mr. Fryklund and Mr. Biden did not proceed to Mr. Keeler's home together, nor did they meet with Mr. Keeler in a combined or concerted fashion. It appears beyond dispute that Mr. Biden arrived independently, at a time when Mr. Fryklund was already there, and stayed only a few minutes. In the Arbitrator's view it is entirely plausible that if, as Mr. Biden explains, he simply received from Mr. Keeler promotional material on the ACN telephone service as well as a list of employees who were subscribers, a casual observer in the position of Mr. Fryklund might have drawn the conclusion that there had been some prior discussion of the work stoppage plan between Mr. Keeler and Mr. Biden, and Mr. Biden was there to receive a list of employees he would be responsible to contact. It appears clear that that was the assumption made by Mr. Fryklund.

From the outset, Mr. Biden has consistently denied any involvement in the planning of the work stoppage, and has held to his explanation that he chanced to stop at Mr. Keeler's home only to receive the promotional telephone material from Mr. Keeler, along with a list of employees who were subscribers. His statement in that regard is confirmed in the account of events ultimately given by Mr. Keeler. Mr. Keeler admits that he and Mr. Fryklund were complicit in dividing a list of names and telephone numbers of employees to call to solicit their support for an illegal work stoppage. He denies any involvement

whatsoever on the part of Mr. Biden. Mr. Keeler's statement of December 18, 2001 affirms that Mr. Biden stopped by his home on the evening of October 10, pursuant to an earlier open invitation from Mr. Keeler to come at his convenience to obtain informational ACN telephone service material. He expressly confirms that Mr. Biden was not present for any conversation between himself and Mr. Fryklund concerning the strategy surrounding the planned work stoppage, and that Mr. Biden was present for a substantially shorter time than Mr. Fryklund. His statement relates that Mr. Biden arrived at his home approximately thirty minutes after Kelly Fryklund and he was "… only there for ACN purposes".

When all of the objective evidence is examined, with the fullest allowance for any residual suspicions which the Company may have, the Arbitrator is compelled to conclude that the evidence does not support, on the balance of probabilities, the conclusion that Mr. Biden participated in planning the illegal work stoppage which commenced at Moose Jaw on October 11, 2001. In the end, the thrust of the evidence is to the contrary, and I am compelled to conclude that the Company did not have just cause for any discipline of Mr. Biden in relation to the work stoppage which occurred.

The grievance must therefore be allowed. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without loss of seniority and with compensation for all wages and benefits lost.

November 19, 2002

(signed) MICHEL G. PICHER
ARBITRATOR