CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 3374

Heard in Montreal, Tuesday, 14 October 2003

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION
EX PARTE

DISPUTE:
Removal of the Brown System of Discipline.

UNION'S STATEMENT OF ISSUE:
In early June 2003 the Union became aware that the Company was not applying the Brown System when exercising its rights to discipline members of the bargaining unit. The Union filed a policy grievance on June 29th, 2003 requesting that the Company "cease and desist from any unilateral action which in any way adds to, subtracts from, modifies, rescinds or disregards any portion of the Brown System of Discipline."

The Company declined the Union's request.

FOR THE UNION:
(SGD.) R. A. BEATTY
GENERAL CHAIRPERSON
There appeared on behalf of the Company:
J. A. Coleman – Counsel, Montreal
C. Joannis– Manager, Labour Relations, Montreal
B. Olson – Director, Human Resources, Toronto
And on behalf of the Union:
M. Church – Counsel, Toronto
W. G. Scarrow – Vice-President, Ottawa
G. Anderson – Vice-General Chairperson,
R. LeBel – General Chairperson, Quebec City
B. Boechler – General Chairperson, Edmonton
R. Hackl – Vice-General Chairperson, Edmonton

AWARD OF THE ARBITRATOR

The Union grieves that the Company has violated the collective agreement by instituting a new policy whereby discipline would no longer automatically be dealt with under the Brown System but, rather, would involve a combination of the Brown System with a system of suspensions, including the possibility of deferred suspensions. The Company denies that it has violated any provision of the collective agreement, stressing that the Brown System of discipline is not imbedded within the collective agreement and that the initiative which the Company has taken to

adjust its approach to discipline is entirely within the Company's management prerogatives.

The record discloses that effective November 1, 2002 the Company did introduce an adjusted approach to discipline termed the "Individual Corrective Action Policy" (ICA). The policy was described as follows in a letter to the Senior Vice-President of the Union from the Company's Vice-President, Labour Relations dated October 10, 2002:

Dear Mr. Scarrow:

At the recent joint Union/Management session held at Mont Tremblant, the Unions raised concerns about discipline and the treatment of rules violations in general at CN. In response to your concerns, Messrs Heller, Edison and Creel will be communicating directly with your regional officers regarding the attached Individual Corrective Action Policy, which they are introducing, effective Nov. 1, 2002. Copies of the letters they will be distributing which reflect the goals of our new Policy will be sent to you.

As these letters explain, we are advancing a "two avenue" approach to discipline: the traditional and more formal investigative process conducted under the terms of the collective agreements, or the Individual Corrective Action (ICA) approach, which is intended to place more emphasis on addressing and correcting work-related behaviours. The ICA process is appropriate for those instances where an individual employee acknowledges that his or her actions violated a rule, and education/training will prevent future occurrences.

We realize this is a departure from the traditional approach to "corrective discipline" and therefore we have designed it as a voluntary process, where the decision is one left up to the Company, employee and his/her bargaining agent. However, the Individual Corrective Action Policy will not apply in cases involving major infractions such as, but not limited to, Rule G and/or violations of the Company's Policy to Prevent Workplace Alcohol and Drug Problems, assault, insubordination, theft, fraud, misappropriation, reckless or wilful endangerment, harassment and second infractions of other serious offences. It is our belief such infractions require the use of traditional processes at this time.

Your support and cooperation will help us achieve our mutual objective of focusing all our attention on ways to improve our operations.

If you have any concerns or comments, I would be glad to discuss them with you.

Kimberly A. Madigan
Vice-President, Labour Relations

North America

The record before the Arbitrator reflects that the Company's concern about the avoidance of investigation procedures in circumstances where wrongdoing was admitted, as well as other aspects of its ICA process, did meet with the approval of at least two of trade unions representing the Company's employees. It appears that the Eastern Division of the Brotherhood of Maintenance of Way Employees as well as the CN Police have not objected to the new policy.

The Arbitrator can understand the concerns which motivate the Union's grievance. For many decades discipline within the Company, and indeed within other railways in Canada, has been based upon the Brown System of Discipline. That system is generally predicated on the belief that it is more efficient to assess demerits against an employee for his or her misconduct, on a cumulative basis, with an individual being liable to dismissal upon the accumulation of sixty demerits. The Brown system avoids the hardship of an employee who is suspended being without wages for a period of time and avoids depriving the Company of his or her services during that same period. However, as reflected in the jurisprudence of this Office, virtually all railways have also had recourse of other forms of discipline, including suspensions and, occasionally disciplinary demotions. Suspensions have sometimes been coupled with the assessment of demerits and on some occasions have been assessed as a stand alone penalty. The records of this Office also reflect that on occasion parties have negotiated specific aspects of the system of disciplinary penalties: for example, the Rule G By-Pass and the system of deferred discipline utilized by CP Rail.

Counsel for the Union submits that the history of negotiations between the parties reflects an understanding that the Brown System effectively forms part of their collective agreement. He argues that that is reflected in a series of documents developed over the years concerning the disciplinary process. In that regard he points, among other things, to negotiations in the 1975 round of bargaining concerning the discipline system. That resulted in a joint letter of understanding signed by representatives of the Company as well as representatives of the Union and representatives of the Brotherhood of Locomotive Engineers and reads, in part, as follows:
Gentlemen:

For some time now, both the Unions, as well as many in management, have expressed varying degrees of dissatisfaction with the current discipline system. As a result of these concerns, both the U.T.U.(T) and the Company submitted demands seeking changes to the discipline and investigation provisions of the collective agreement.

During these early discussions, it became apparent that the Unions were seeking measures that would provide increased

protection for their members who became subject to a formal investigation. For their part, the Company saw much of the problem, i.e. the apparent friction, as emanating from the system itself and sought to lessen the formal aspects of the investigation procedure. After some further lengthy discussions, an agreement in principle was eventually reached during the 1975 round of negotiations and was reflected in a letter dated July 19, 1976 that would provide for:

(a) the Unions' acceptance of the Company's policy on Corrective Discipline (issued in May 1974);

(b) an arrangement that would allow the Company to assess a level of discipline without the need for a formal investigation;

(c) the role of the fellow employee appearing with the employee under investigation being better defined as to his role as a representative of the employee;

(d) the proposed changes to be introduced at certain locations and territories on a trial basis for a period of twelve months.

Both the U.T.U.(E) and one segment of the B. of L.E. as represented by Mr. D.E. McAvoy also agreed during negotiations to join the program.

Further to the above initiative, a memorandum of agreement was executed between the Company and the Union on May 30, 1977 dealing with a dual system of informal and formal investigations in matters of discipline. That document reads, in part, as follows:

I. INFORMAL INVESTIGATION

(a) Subject to the provisions of Item (a)(ii) of Section II hereof, minor incidents will be handled without the necessity of a formal investigation.

(b) Such incidents will be investigated as quickly as possible by a proper officer(s) of the Company and subsequently reviewed with the employee(s) concerned.

(c) In cases where the assessment of discipline is warranted, the employee will be advised in writing within 20 calendar days from the date the incident is reviewed with the employee except as otherwise mutually agreed.

(d) From the time of notification of the conclusions reached by the Company, or the discipline assessed, the employee will advise the proper officer of the Company within 72 hours of receipt of such notification:

(i) that he accepts the conclusions reached by the Company and the discipline assessed; or

(ii) that he is not in accord with the conclusions reached by the Company and requests a formal investigation under the procedures set forth in Section II hereof; or

(iii) that he accepts the conclusions reached by the Company but may initiate an appeal of the discipline in accordance with the grievance procedure of the respective collective agreements.

II FORMAL INVESTIGATION

(a) A formal investigation will be held:

(i) in the case of an employee committing an alleged dismissible offence;

(ii) when an employee is alleged to have committed a minor offence where the seriousness of such offence might warrant discipline to the extent that when added to his current record could result in discharge for accumulation of demerit marks;

(iii) when an employee is alleged to have been involved in a major incident;

(iv) when an employee is involved in an incident where the need for information and appropriate documentation is required by order, regulation or Company requirements.

(b) If required to attend a formal investigation, the employee will be properly notified in writing, which will outline the incident under investigation, and given at least 24 hours' notice.

(c) Lay over time will be used as far as practicable.

(d) The employee may have an accredited representative appear with him at the investigation. At the outset of the investigation, the employee will be provided with a copy of all of the written evidence as well as any oral evidence which has been recorded and has a bearing on his responsibility. The employee and his accredited representative 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 the witnesses (including Company officers where necessary) whose evidence may have a bearing on his responsibility. The questions and answers will be recorded and the employee and his accredited representative will be furnished with a copy of the statement.

(e) If corrective action is to be taken, the employee will be so notified in writing of the Company's decision within 20 calendar days from the completion of the employee's investigation unless otherwise mutually agreed. Such notification will be given at the same time or after the employee has been personally interviewed

by the appropriate Company officer(s) unless the employee is otherwise unavailable.

(f) Employees will not be held out of service pending investigation unless:

(i) the circumstances of the incident are such that there is reason to believe that the employee's continued performance on the job could constitute a hazard to himself, other persons or the operations;

(ii) the offence with which charged is of a nature which could result in suspension or dismissal;

(iii) it is essential to carrying out the investigation.

(g) Employees who are held out of service while under investigation, except in cases where the offence with which charged is of a nature which results in suspension or dismissal, will be paid for any loss of regular earnings. Suspension or dismissal will commence from the date the employee is removed from service.

The record also indicates that a similar understanding was reached with the members of the Union, as well as of the Brotherhood of Locomotive Engineers, on CN Lines West as reflected in Addendum No. 21 to collective agreement 4.3 dated November 20, 1978.

Counsel for the Union stresses that the disciplinary policy in effect at the time of these agreements was largely based on the Brown demerit system, and that recourse to suspensions would be exceptional, as reflected in the Company's own Management Guide Bulletin No. 2.72 issued in December of 1978.

Tracing the history of discipline for employees represented by the Union, counsel points to the fact that in March of 1986 the initiatives of 1977 were apparently abandoned, but the Company nevertheless continued to utilize the Brown System. Reference is also made to a letter addressed to all of the Company's unions by the Company on May 20, 1986 advising of further amendments to the Company's discipline policy including, among other things, "the maximum period of suspension which can be assessed for one offence will be increased from 60 days to six months." Counsel also notes, however, that under the provisions of that new policy the Company seeks to limit recourse to suspensions. In that regard article 5 reads, in part: "If all steps of the discipline procedure are followed the frequency with which suspension will be required will be minimal." Counsel also stresses that the same policy reflects what he characterizes as the equitable rule whereby an employee's accumulation of demerits will be reduced by twenty demerit marks for each twelve consecutive months of active service free of discipline.

Counsel submits that against the foregoing background what he characterizes as the radical change introduced by the Company through its ICA policy in October of 2002 departs from the agreements and legitimate expectations of the parties. He highlights a number of concerns which the Union harbours with respect to the new approach being taken by the Company. In particular, he submits that the apparent intention of the Company to offer a waiver of the investigation process if an employee should admit to his or her wrongdoing in exchange for an agreed penalty, which might include a deferred suspension, tends to undermine the Union's rights of representation. Counsel also suggests that employees would be discouraged from exercising their right to grieve under the collective agreement, and might eventually find themselves "loaded up" with deferred discipline which could be applied at a later date, for example if they should fail to remain discipline free during the deferral period of six months. Counsel for the Union also submits that the Company, in response to a letter of protest dated October 16, 2002 by General Chairman Rex Beatty, indicated that its policy would not be implemented but that in the winter of 2002 the Company commenced to implement its new policy "… notwithstanding its assurances that it would not formally implement such unless it received agreement from the Unions."

It should be noted at this point that the Arbitrator has some difficulty with the accuracy of that submission. The letter of October 28, 2002 sent by Sr. Vice-President, Eastern Canada Division Keith L. Heller to Mr. Beatty states, in part:

The original implementation date was slated for November 1, 2002. However, recognizing the short time frame and the need to get your input on our approach, I've delayed implementation for Union groups in Eastern Canada, until such time as I have had the opportunity to review this in greater detail with you. …

I do believe that this approach can generate positive results for everyone. Your support and cooperation will help achieve our mutual objective, a productive and safe work environment.

Similarly, Keith E. Creel, Vice-President, Prairie Division wrote to General Chairman Barry J. Henry on October 30, 2002 stating, in part:

Further to my letter of October 16 introducing the Individual Corrective Action (ICA) Approach, I would like to openly discuss this new process with you.

I heard your comments and recognize some of your concerns. As a result, I am delaying the implementation of this Approach until we have had an opportunity to discuss.

With respect, at best the foregoing letters cannot be characterized as an undertaking on the part of the Company that the Company's ICA policy would not be introduced without the

agreement of the Union. What the letters reflect is an indication on the part of the employer that it valued the input of the Union's chairpersons and that it was willing to postpone the implementation of the ICA until such time as it was able to get further input from them following further discussions. That approach, which is obviously consistent with fostering better labour relations, indicates a willingness to hear and fully consider the Union representatives' concerns. It is not, however, as counsel for the Union would have it, an undertaking or representation on the part of the Company that it would not proceed without the agreement of the Union. There is no compelling evidence of any such agreement or understanding before the Arbitrator.

With respect to the earliest implementation of the new ICA policy, counsel for the Union questions whether there have not been violations of the procedural requirements of the collective agreement, particularly having to do with time delays. As an example, he cites the assessment of thirty demerits against employee L. Devine for a rule violation on February 13, 2003. However, it appears that the form 780 was amended to reflect a period of suspension, the employee being advised that the suspension would be deferred for a period of six months provided that no further CROR rule infractions occurred during that time. Counsel questions how that practice can be squared with the requirements of article 82.5 or the collective agreement which stipulates that when an employee is disciplined "… the discipline will be put into effect within thirty days from the date investigation is held."

As a further example of concern, counsel for the Union draws to the Arbitrator's attention what he characterizes as an attempt by the Company, in the treatment of one employee, to "force employees to sign last chance agreements". Reference is made to a proposed last chance agreement relating to employee Patrick Charette as a result of an extensive record of attendance problems.

Counsel also raises questions as to the fairness of suspensions, as opposed to the traditional use of demerit marks. He notes, for example, that a thirty day suspension imposes upon the employee concerned a substantial financial penalty, in the thousands of dollars, contrary to what might have occurred under the Brown System.

Counsel draws to the Arbitrator's attention certain provisions of the collective agreement, including articles 85.2, 85.3 and 85.4, which deal with rulings of interpretations and local arrangements between the parties concerning the application and interpretation of the collective agreement. Reference is also made to articles 82, 82.1 82.3, 82.5 and article 84 of the collective agreement. Article 82 generally governs the process by which discipline is administered, including the requirements of disciplinary

investigations. Article 84 deals with the grievance procedure, and notes, among other things, in article 84.1(b):

84.1(b) Appeals against discharge, suspension, demerit marks in excess of thirty, restrictions (including medical restrictions) and conditions of "mobile accommodation" (i.e. whether or not they are comfortable and sanitary) will be initiated at Step 3 of the Grievance Procedure.

Counsel also submits that the new policy violates the standards of **Re KVP** (1965) 16 L.A.C. 73 (Robinson), and in particular that the rules introduced by management are not reasonable in the circumstances.

Counsel for the Company maintains that a number of the concerns raised by the Union fall well outside the purview of this grievance as circumscribed by the *ex parte* statement of issue filed by General Chairperson R.A. Beatty. He stresses that the statement of issue addresses only the question of whether the Company can depart from applying the Brown System when it assesses discipline against members of the bargaining unit. In that regard he stresses that there is no express language within the collective agreement, nor any provision which by implication would support the Union's contention that the continuation of the Brown System as the principal means of assessing discipline is a collective agreement right or obligation. In his submission, the Brown System of discipline is not imbedded within the collective agreement and is not a working condition that must be immutably and indefinitely applied, absent the agreement of the Union.

Counsel for the Company points to prior jurisprudence which acknowledges that the Brown System is not incorporated within collective agreements in the railway industry. Firstly, he draws the Arbitrator's attention to the following passage in the award of Arbitrator Hope in **Canadian Pacific Railway (Mechanical Services) and CAW, Local 707, SHP-423**:

Turning in that context to the question of whether a caution is a disciplinary initiative under the Brown System, it is worth noting that the Brown System has no contractual force. It is not a discipline code agreed to by the parties. It is a discipline code which was introduced unilaterally by the Railway and which the Railway is free to interpret and restructure, subject only to proof of facts that disclose that the Union and individual employees have been kept informed of the code and its implications in terms of acts of alleged misconduct. The significance of a discipline code unilaterally introduced by an employer was addressed by Professor Bora Laskin as he then was in **Canadian General Electric Co. Ltd. and United Electrical, Radio, and Machine Workers of America, Local 524**, (1951) 2 L.A.C. 688. On p. 689 he wrote:

The Company has … unilaterally set out a number of plant rules with indicated penalties for infractions, and these are posted throughout the plant. In doing this the company has given its interpretation of the scope of its disciplinary powers. It is unnecessary in this case to determine how far the Company, by publishing certain rules, is estopped from relying on other grounds for discipline. **While the published rules may be controlling for the Company in what they cover, they are not, of course, controlling under the Agreement except as they may be found to square with "reasonable cause"**
(emphasis added)

Similarly he refers the Arbitrator to a decision of this Office in **CROA 2654**, an award between Canpar and the Transportation Communications Union which issued on September 15, 1995 where the following comments appear:

It is common ground that under the new rules demerits for accidents are to be cleared only by periods of accident free service. Under the old rules the grievor would have had a greater benefit, as argued by the Union, as he could apply discipline free service that is not accident related. As an initial position, Counsel for the Union submits that the Company could not unilaterally change the rules governing the removal of demerits without negotiating the substance of the new rules with the Union. I have some difficulty with that submission. It is not disputed that the Brown System of discipline does not form a part of the collective agreement, nor that the contents of the Driver and Warehouse Instruction Manual, whether before or after their amendment, have ever been the subject of negotiation with the Union. Indeed the Union quite appropriately maintains that it has never agreed to those provisions. In the Arbitrator's view the instant case is best understood in light of the well accepted principles expressed in **Re KVP** (1965), 16 L.A.C. 73 (Robinson). Since that decision, it has been well settled that an employer may establish appropriate rules for the workplace from time to time, subject of course to any limitations in that regard which may be found in the collective agreement. A hallmark of such rules, however, is that they must be clearly communicated to the employees who are subject to them. It is, needless to say, unfair and inconsistent with well established principles of discipline to visit serious disciplinary consequences upon an employee who can assert that he or she was never made aware of the rules governing his or her circumstances. The unfairness is arguably greater when a change is made to a long established rule, without proper notification.

Further, with respect to an employer's ability to make alterations in its system or style of disciplinary sanctions, reference is made to **Re Pride of Alberta and U.F.C.W., Local 280P** (2001) 45 C.L.A.S. 486 (Power) and **Re Toronto Transit Commission and Amalgamated Transit Union, Local 113** (1989) 5 L.A.C. (4th) 166 (Samuels). Additionally, citing the decision of the Quebec

Court of Appeal in **Société d'électrolyse et de chimie Alcan Ltée, c. Gravel**, [1988] R.D.J. 362 (C.A.), counsel submits that the mere passage of time does not remove industrial relations subject matter from the control of management, and that a clear contractual covenant must be evidenced to extinguish an established management right. In that regard further reference is made to **Re Port Colborne Poultry Ltd. and U.F.C.W. Local 617P** (1990) 11 L.A.C. (4th) 445 (Welling); **Re J.M. Schneider Inc. and Schneider Employees' Association**, (2001, 60 C.L.A.S. 97 (Saltman).

Finally, counsel maintains that there is no basis upon which to find that the Company is estopped from exercising its discretion to make adjustments in its system of discipline. Firstly, counsel stresses that there was never any representation on the part of the Company that it would limit itself exclusively to the Brown System of discipline. Significantly, he stresses that the record is clear that in many circumstances the Company has departed from the Brown System in the past, and has resorted to suspensions in various circumstances as constituting the appropriate form of discipline in given cases. There is not, he submits, any evidence of an invariable practice of adherence to the Brown System nor anything which could fairly be characterized as an undertaking on the part of the Company with respect to its approach to discipline which would ground an estoppel. Indeed, he stresses that in fact the Brown System does continue to be utilized by the Company in appropriate circumstances. In conclusion, he maintains that the Brown System is not an exclusive code of discipline adopted by the Company and cannot be elevated to the status of a working condition. The Company has not formally opted out of the Brown System as alleged and its current approach to discipline does not conflict with any provision of the collective agreement. With respect to the **KVP** standards, counsel stresses that the Company's approach is well disseminated and is not unreasonable, and finally he stresses that there is no basis to ground an estoppel from any departure from or adjustment in the Brown System of discipline by the Company.

I turn to consider the merits of the dispute. In doing so, I must at the outset share the view of counsel for the Company that the issue to be resolved by the Arbitrator in this case is relatively narrow, and is jurisdictionally constrained by the *ex parte* statement of issue filed by the Union, in keeping with the provisions of article 12 of the memorandum of agreement establishing the Canadian Railway Office of Arbitration. It is therefore important to stress what this decision is not about. It does not concern the specific merits or demerits of any of the examples respecting the treatment of individual employees advanced in support of the Union's case. Indeed, in fairness I do not believe that the Union intended to request specific rulings on individual cases, but sought by the use of examples to bring some illustrative context to the debate at hand. Be that as it may, the question to which the Arbitrator is confined is to

determine whether it is open to the Company to choose, in individual cases, to not assess demerits in keeping with the Brown System of discipline, but rather to opt for the assessment of a suspension, including the possibility of a deferred suspension, without violating the collective agreement.

As a matter of general background it should, I think, be acknowledged that there is nothing new in the concern expressed by the Company in its communications to the Unions' representatives with respect to what it views as improvements in the disciplinary process. As the record indicates, as early as 1973, and on a sustained basis thereafter, the Company made a number of efforts at bringing forward adjustments to the disciplinary process, and in particular attempting to simplify, and in some cases avoid, what was perceived to be a burdensome formal investigation process. Of equal significance, I think, is a recognition that throughout those attempts at adjustment in the 1970s and 1980s, the Company never surrendered what it obviously views as its own prerogative to establish disciplinary policy. For example, the disciplinary policy in place in May of 1986, communicated by letter to various union representatives by Assistant Vice-President, Labour Relations D.C. Fraleigh, describes certain changes to the "Company's Policy on Corrective Disciplinary Action". That document is plainly not in the nature of an agreement or contractual undertaking. On the contrary, it is a statement of an internal Company policy fashioned within the employer's discretion, albeit against a background of discussions with trade union representatives and the framework of their collective agreements.

Nor can the Arbitrator agree with the suggestion implicit in the submissions of counsel for the Union that sinister motives are to be inferred from the Company's initiative, assuming that motive is a relevant consideration. It is plainly open to the Company to form the opinion, as it apparently has, that the existing system of disciplinary procedures and sanctions is unduly formalistic and is not achieving the desired rehabilitative goals. On what basis can it be argued that the Company cannot choose greater recourse to suspensions, a sanction which it has applied for decades, in preference to the assessment of demerits, in the formulation of disciplinary sanctions? (See, e.g.; **CROA 2161** and **2953**.) To be sure, nothing which the Company does can derogate from the standards of just cause and the overall remedial jurisdiction of a board of arbitration entrenched within the **Canada Labour Code**. How can it be concluded that the Company is prevented from making such changes as long as it does not violate the procedural requirements and protections negotiated within the collective agreement concerning the process of disciplinary investigation and the administration of disciplinary sanctions in a timely manner, as prescribed?

For reasons touched upon above, in the Arbitrator's view some of the specific examples and concerns raised by the Union would be

better addressed in individual grievances, on a case by case basis, having regard to the specific provisions of the collective agreement. That said, it is not immediately apparent to the Arbitrator that the assessment of a suspension, with the advantage of a deferral, communicated to an employee in a timely fashion, violates any procedural provision of the collective agreement. Nor do I see anything particularly novel in the Company proposing a last chance agreement to an employee, the terms of which must be agreed to by his or her bargaining agent, as has been done for years. Without diminishing the understandable concerns which prompt this grievance, it would appear that there a number of "hypothetical horribles" which are simply not demonstrated in fact within the confines of this grievance. Additionally, while the Arbitrator appreciates the burdensome nature of extensive periods of suspension, the correctness of any disciplinary sanction, including a suspension, can only be assessed on a case by case basis through the prism of just cause. The Company will always bear the burden of justifying any measure of discipline. Finally, while concerns of illegality might well arise should the Company attempt to negotiate a waiver of an employee's procedural or substantive rights under the collective agreement without the knowledge and assent of his or her bargaining agent, the material before the Arbitrator in the case at hand simply does not disclose such a situation.

It is difficult to see the ICA initiative as undermining the Union. If anything, the efforts of the Company in arriving at a new form of disciplinary system have sought at every step to involve the Union in the discussion of the direction which the employer was considering. As noted in the Union's brief, in May of 1995, having unsuccessfully resolved bargaining table issues concerning disciplinary procedures and sanctions, an agreement was made to discuss the issue during the closed period of the collective agreement, albeit that never occurred. More recently, in the development of the ICA the Company, through Ms. Madigan, explored a number of alternatives with union representatives, including the possibility of a joint committee system to oversee the discipline process and review and dispose of grievances on the basis of a majority vote, as reflected in a letter from Ms. Madigan to Mr. Scarrow, dated October 10, 2002. On the whole, while it is clear that the parties do not see eye to eye on the issue of amending or departing from the Brown System, it appears clear from the record before the Arbitrator that the Company has at all times proceeded in good faith, has endeavoured to keep the Union aware of its concerns and the direction of its thoughts and has fully attempted to consider and weigh the Union's concerns as its new policy emerged. That it has not succeeded in persuading all of the unions of the merits of its new approach does not of itself limit or inhibit its right to take the policy direction it deems appropriate, absent any contrary constraint within the terms of the collective agreement.

As noted above, contrary to certain of the submissions made by counsel for the Union, the Arbitrator can find nothing in the

record to suggest that the Company, whether recently or in the more distant past, ever made its disciplinary system a subject conditioned upon the agreement of the Union insofar as penalties are concerned. Reference to the Brown System within the collective agreement is extremely spare. For example, the allusion in article 84.1(b) to the fact that demerit marks in excess of thirty are to be dealt with at step 3 of the grievance procedure is little basis to find that demerit marks must predominate over other forms of discipline, including verbal counselling, written warnings and suspensions, under the collective agreement. As stressed in the foregoing, nothing before the Arbitrator, nor in the text of the collective agreement, would suggest that the Company has ever surrendered its ability to resort to the widest range of disciplinary sanctions it deems appropriate in any given case. Whether specific procedures depart from the standards of the collective agreement or of the **Canada Labour Code**, or whether specific disciplinary sanctions, including suspensions, are unfair or excessive, are issues which can only be considered on a case by case basis, having regard to the specific facts.

In the result, the answer to the narrow question put forward in the statement of issue must be a declaration that the Company's Individual Corrective Action Policy, including its partial departure from the Brown System, does not constitute a violation of any provision of the collective agreement.

For all of the foregoing reasons the grievance must be dismissed.

November 4, 2003

MICHEL G. PICHER
ARBITRATOR