# CANADIAN RAILWAY OFFICE OF ARBITRATION

# CASE NO. 720

Heard at Montreal, Tuesday, September 11,1979

Concerning

## CANADIAN PACIFIC LIMITED (CP RAIL)

and

## UNITED TRANSPORTATION UNION (T)

**DISPUTE:**

Removal of discipline assessed Conductor H.C. Gaffney, Coquitlam, B.C., resulting from investigation into his failure to appear for investigation on August 15, 1978, and payment for lost wages when withheld from service.

**JOINT STATEMENT OF ISSUE:**

On August 14, 1978, Conductor H.C. Gaffney was advised to appear for investigation into the derailment on August 2, 1978, of the caboose on the 1st Branch, Road Switcher Assignment. Mr. Gaffney did not report for the investigation and was held out of service pending investigation. In the course of this investigation, statements were taken from Mr. Gaffney on August 16, 1978, August 22, 23 and 26, 1978 and September 11, 1978. Following the investigation, Mr. Gaffney was issued a form 104 dated September 14, 1978, reading as follows:

> Please be informed that your record has been debited with 45 demerit marks for your act of insubordination in connection with your failure to appear for investigation at Coquitlam, August 15th, 1978 after having been duly notified, and for your acts of insubordination as displayed by your answers to reasonable questions and your failure to sign statement taken at Coquitlam, August 16th, 1978, and statement taken at Coquitlam August 22nd, 23rd and 26th, 1978 into your failure to appear for investigation after having been duly notified.

The Union appealed the discipline assessed Conductor H.C. Gaffney, requesting the removal of the 45 demerit marks and payment for all time lost on the grounds that the Company did not establish Conductor Gaffney's responsibility in respect of the charges against him. The Union further contends that the Company violated Article 32, Clauses (a), (b), (c}., (d) and (e) in its handling of the investigation.

The Company contends that the investigation was conducted in accordance with the provisions of Article 32, that Conductor Gaffney's responsibility was established by the evidence adduced at the investigation and that he was properly disciplined therefor. Accordingly, the Company declined the Union's appeal.

| FOR THE EMPLOYEE: | FOR THE COMPANY: |
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| (SGD.) P.P. BURKE | (SGD.) J.M. PATTERSON |
| GENERAL CHAIRMAN | GENERAL MANAGER, OPERATION & MAINTENANCE, PACIFIC REGION |

There appeared on behalf of the Company:

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| P. E. Timpson | – Assistant Supervisor, Labour Relations, Vancouver |
| J. H. Bay | – Assistant Superintendent, Vancouver |
| J. Ramage | – Special Representative, Montreal |
| B. P. Scott | – Labour Relations Officer, Montreal |

And on behalf of the Brotherhood:

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| P. P. Burke | – General Chairman, Calgary |
| R. T. O'Brien | – Vice-President, Richmond |

## AWARD OF THE ARBITRATOR

The material provisions of Article 32 of the collective agreement are as follows:

> **(a)** When an investigation is to be held, each employee whose presence is desired will be notified as to the time, place and subject matter.
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> **(b)** An employee, if he so desires, may have an accredited representative of the Union assist him. The employee will sign his statement and be given a carbon copy of it.
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> **(c)** If the employee is involved with responsibility in a disciplinary offense, he shall be accorded the right on request for himself or 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.
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> **(d)** An employee will not be disciplined or dismissed until after investigation has been held and until the employee's responsibility is established by assessing the evidence produced and no employee will be required to assume this responsibility in his statement or statements. The employee shall be advised in writing of the decision within 20 days of the date the investigation is completed, i.e., the date the last statement in connection with the investigation is taken except as otherwise mutually agreed.
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> **(e)** An employee is not to be held off unnecessarily in connection with an investigation. Layover time will be used as far as practicable. An employee who is found blameless or an employee called by the Company as a witness, will be reimbursed for time lost, in accordance with Article 27 Clause (a), paragraphs (1), (2) and (4).

The questions to be determined in this case are whether or not there was just cause for the discipline imposed on the grievor, and whether or not the Company complied with the requirements of Article 32 with respect to the investigation of the matter.

As to the first question, the grievor did not appear for investigation on August 15, 1978, after due notification; he did not sign the statements referred to; and his answers to certain questions in the course of the investigation referred to do, in my view, constitute acts of insubordination.

There is no doubt that the grievor was given notice in writing of the investigation to be held on August 15. The investigation related to a derailment which had occurred on August 2. There had been previous unsuccessful attempts to have the grievor attend an investigation into that matter. (In the end, no discipline was imposed on the grievor in respect of the derailment). Although notified of the investigation, and although it is clear that he himself was in no way unable to be present, the grievor did not attend. It is clear that his failure to attend was deliberate. It was his contention, subsequently, that he did not attend because he could not arrange for the attendance of the Union representative of his choice, and because certain comments said to have been made by the investigating officer had changed the nature of the issue raised by the notice.

Neither of those points is valid. Whether or not he could be sure that a Union representative would be present, it was the grievor's duty to comply with the notice and appear as requested. He was, of course, entitled to have an accredited representative of the Union assist him. If, by the time the investigation began, he had been unable to arrange for the attendance of a Union representative, then there might have been good grounds for him to request an adjournment. But it was not proper for him simply to refuse to attend. It may be added that it does not appear that the grievor made appropriate efforts to seek the assistance of a Union representative. Further the collective agreement does not give an employee an unfettered right to the Union representative "of his choice". He is entitled to the assistance of an accredited representative, and it is of course the Union's business to provide such assistance in accordance with its own procedures and subject to whatever obligations it may be under.

As to the comments said to have been made by the investigating officer, these did not change the notice. If, at the investigation some other matter had been proceeded with, then of course a proper objection could have been taken. But that was not the case at all. In any event, I am satisfied from the material before me that the investigating

officer, while he may have indicated (quite properly) that some discipline on the grievor was a possible result did not indicate that it would be imposed. That, indeed, was not a decision for him to make.

In this particular case, then, there was no sufficient ground for the grievor's failure to attend the investigation as requested, and he was subject to discipline on that account.

The grievor did not sign certain statements, although there is no suggestion that they were not accurate records of what was said. The signing of an employee's statement is a requirement of the collective agreement: Article 32 (b). Such signing does not represent an acceptance of all that is said or of the propriety of the procedure, and does not prejudice the employee it simply certifies that it is a record of the proceedings, such as they were. Where, for example, the record shows the employee as giving answers he did not give, or as not giving answers which he did give then the employee would be justified in refusing to sign. That is not, however, this case, and the grievor had no such justification. His refusal to sign seems to have been nothing more than an obstructionist tactic. It was a violation of the collective agreement and was, in the circumstances, conduct for which discipline might be imposed.

The answers given by the grievor to certain questions put during the investigations referred to were, in my view, acts of insubordination in many cases. In order to appreciate the quality of the grievor's responses to questions, it is proper to bear in mind that the investigating officer had been trying for some time to proceed with the matter. Thus, when, in the course of investigation, the grievor first denies a statement put to him and then asked to indicate what he had said, states "I don't know what your talking about", the strong likelihood appears that the grievor was simply being obstructive. This becomes particularly clear when the grievor's answer to the first question put to him on August 22 is considered. That was the second day of the investigation into a matter which could have been dealt with with dispatch. The investigating officer began by outlining his view of the chronology of events which had led to the investigation. He then asked the grievor if that chronology of events was correct. This was a perfectly proper question, of a sort which is used in many situations. It was an outline of a series of simple events, not calling for conclusions or judgments, which the grievor was free to affirm or deny in whole or in part. In fact, as a consideration of all of the material shows, the actual chronology of events (as apart from the significance of those events) is not in question. The grievor's reply, however, was "I can't answer the question for Mr. Bay (the investigating officer) who can record whatever he wants".

This response was, it is clear, simply an evasion. To state something as a supposed fact and then to ask a witness if it is a fact is not, in reality, for the questioner to advance the statement as his own: rather, it is to ask the witness whether or not the proposition is true. That is to ask a question, and in this case it was a perfectly proper question. The only proper objection to it might have been that it was long, since it was, indeed an account of a series of events. Its length (although it was not particularly complex) might perhaps have made it difficult for the grievor to follow, although that was not his objection. His objection – that it was Mr. Bay's statement – was without foundation. In any event the investigating officer then proceeded to deal with certain items of the "chronology" in turn, and in most cases the answers of the grievor were evasive or argumentative. From a review of the statements as a whole, it is clear to me that the grievor's attitude and conduct at the investigation were deliberately uncooperative and unresponsive. The questions put to him were reasonable and proper ones, and his responses thereto were, in many instances, evasive and improper. His conduct amounted to an attempt to undermine the exercise of a proper management function, and was thus insubordinate. He was subject to discipline on that account.

For the foregoing reasons, it is my conclusion that the grievor was, in the circumstances, subject to discipline on the grounds stated. It remains to be considered whether or not the Company complied with the requirements of Article 32 with respect to the investigation.

As to Article 32 (a), there was proper notice given the grievor. This matter has been referred to in the foregoing portion of this award.

As to Article 32 (b), the grievor did in fact have an accredited representative of the Union to assist him when he was questioned. As has already been noted, his failure to attend on August 15 was not justified by his not having arranged such representation. The only violation of Article 32 (b) was by the grievor himself, in refusing to sign his statement.

As to Article 32 (c), the grievor was present at the investigation held after August 15, and had every opportunity to ask questions and offer rebuttal. There is no indication that any request he may have had in that regard was refused. The major contention of the Union in this matter appears to be that the investigation was carried out by Mr. Bay, the Assistant Superintendent, who had knowledge of the events in question. He was not called as a witness as

such, but made a number of statements as to the circumstances, asking the grievor whether they were true or not. This procedure was not in itself improper – similar situations have occurred in other cases dealt with in this office – and the grievor had every opportunity to have his views of the facts recorded, and to rebut any statement made by Mr. Bay. Much of the evidence in this matter, of course, consists of the responses – or non-responses – of the grievor to the questions put to him. Mr. Bay was not the "judge" of the matter, but in any event his role was simply that of putting questions to the grievor. The questions were not abusive, or harassing, or improper in any way. In my view, there was no violation of Article 32 (c) in the circumstances.

As to Article 32 (d), that article was, in my view, complied with. The general propriety of the investigation has been dealt with in the foregoing. There is no other particular allegation of non-compliance with the article which requires to be dealt with.

As to Article 32 (e), it is my view that the grievor was not held off unnecessarily in connection with the investigation in this particular case. He was not found blameless, and is not entitled to reimbursement.

For all of the foregoing reasons, it is my conclusion that the grievor was properly subject to discipline and that the Company was not in violation of the procedural requirements of the collective agreement. Having regard to all of the circumstances, I do not consider that the penalty imposed was excessive. The grievance is accordingly dismissed.

**(signed) J. F. W. WEATHERILL**
**ARBITRATOR**