CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1578

Heard at Montreal, Tuesday, November 11, 1986

Concerning

CP EXPRESS AND TRANSPORT LIMITED

and

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES

EX PARTE

DISPUTE:

Concerns the physical altercation between supervisor K. Osterhout and employee G. Whiteside on the night of February 6, 1986, which resulted in a one month suspension to K. Osterhout and 40 demerit marks and dismissal of G. Whiteside from Company service.

BROTHERHOOD'S STATEMENT OF ISSUE:

At approximately 23:30 p.m. on the night of February 6, 1986, an altercation developed between supervisor K. Osterhout and employee G. Whiteside, which resulted in a one month suspension to supervisor K. Osterhout and 40 demerit marks and dismissal from Company service of employee G. Whiteside.

The Union's position is that it was the supervisor's responsibility and obligation to avoid an altercation at all costs, but that they believe that it was the supervisor who initiated the physical altercation, in which the Company was convinced to the point that they suspended this supervisor for one month.

The Company's position is that they agree the facts contradict each other in some instances and that perhaps supervisor K. Osterhout should have walked away from the situation, but even so, the Union's request is declined.

The relief requested is that employee G. Whiteside, Edmonton, Alberta, be returned to full Company service and paid for all time and protected for all fringes since April 21, 1986.

FOR THE BROTHERHOOD:

(SGD.) J. J. BOYCE
SYSTEM GENERAL CHAIRMAN

There appeared on behalf of the Company:

B. Weinert – Manager Labour Relations, CPE&T, Toronto
D. Bennett – Manager Human Resources, CanPar, Toronto
B. D. Neill – Director Labour Relations, Toronto

And on behalf of the Brotherhood:

J. J. Boyce – General Chairman, Toronto
G. Moore – Vice-General Chairman, Moose Jaw
M. Flynn – Vice-General Chairman, Vancouver

AWARD OF THE ARBITRATOR

On a careful review of the material filed, the Arbitrator has some difficulty accepting the Union's version that the actions of the grievor were entirely in the nature of self-defense and solely in response to the provocation of his supervisor. If the grievor's account is to be believed, his supervisor invited him to leave the work area, and to proceed to a downstairs level to "have it out" by fighting, even though Mr. Whiteside had done or said nothing insubordinate, insulting or provoking to his supervisor.

I am satisfied that in fact the grievor protested verbally and in unacceptably strong terms, when his supervisor advised him that he would lose a half an hour's pay for having failed to proceed immediately to work at the beginning of the shift. Thereafter, he willingly proceeded into a situation which he knew, or should have known, was going to involve a fight between himself and Mr. Osterhout. While the two men's respective accounts of the fight differ in some details, they both confirm that it was a vicious altercation which could have resulted in serious injury.

The actions of Supervisor Osterhout cannot be too strongly condemned. A supervisor who baits employees into physical confrontations calls seriously into question his ability to be entrusted with any substantial authority. The Company's imposition of a one month suspension on the supervisor is readily understandable. The irresponsibility of Mr. Osterhout, however, does not reduce the severity of the grievor's own actions. Quite apart from who threw the first punch, it is clear that the grievor was not compelled to defend himself until he had first agreed to proceed downstairs with his supervisor. In that venture each was as irresponsible as the other, and the actions were in obvious disregard of their obligation to their employer, and to each other.

In the circumstances the Arbitrator cannot find that the imposition of 40 demerit marks against Mr. Whiteside did not fall within the appropriate range of discipline. Having previously amassed 55 demerit marks, 60 demerits being the number to justify discharge, even a reduction of the sanction to 5 or 10 demerit marks, which the Arbitrator does not consider justified, would have no practical effect.

Lastly, the Arbitrator can give no weight to the submission of the Union that the grievor has been the subject of "double jeopardy", on the apparent theory that his supervisor initially agreed not to report the incident. This argument would supposedly rest on the dubious theory that the beating given to the grievor and the undertaking of silence by his co-combatant constitute a final settlement of the case. Suffice it to say that in Canada supervisors in the position of Mr. Osterhout do not according to the common law of the work place, have any ostensible authority to settle issues of discipline in that way. For obvious policy reasons, any understanding reached between the two men should be given no force and effect by any tribunal with statutory authority under the laws of Canada. To countenance such "agreements" would do little to advance the interests of order and safety in the work place.

For the foregoing reasons the grievance must be dismissed

(signed) MICHEL G. PICHER
ARBITRATOR