CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1858

Heard at Montreal, Wednesday, 14 December 1988

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

UNITED TRANSPORTATION UNION

DISPUTE:

Appeal of discipline assessed Yard Foreman W. Czumak, Toronto, 18 October 1986.

JOINT STATEMENT OF ISSUE:

At the material time, Mr. Czumak was employed as Yardman and assigned to the Toronto Yardman's Spareboard, Toronto, Ontario. On October 18, 1986, Mr. Czumak was involved in an incident in the Crew Management Centre.

Following investigation of the incident Yard Helper Czumak was assessed 20 demerit marks for:

> "Conduct unbecoming an employee while interacting with Toronto Crew Management Personnel on October 18, 1986."

The Union appealed on the grounds that the discipline was unwarranted. The Union further contends that the Company's investigation was unfair and that it was not conducted in compliance with Addendum 41 to Agreement 4.16.

The Company declined the appeal.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) W. G. SCARROW	(SGD.) M. DELGRECO
GENERAL CHAIRMAN	FOR: ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

J. B. Bart	– Manager, Labour Relations, Montreal
P. D. Morrisey	– Labour Relations Officer, Montreal
D. E. Lussier	– Co-Ordinator, Transportation, Montreal

And on behalf of the Union:

W. G. Scarrow	– General Chairman, Sarnia
L. W. Karn	– Vice-General Chairman, Windsor
R. J. Roach	– Local Chairman, Toronto
B E. Phillips	– Local Chairman, Belleville
W. Czumak	– Grievor

AWARD OF THE ARBITRATOR

The material establishes that on October 18, 1986 the grievor proceeded to the Crew Management Centre following two telephone conversations with a crew dispatcher and supervisor, respectively. Both of them had verbally chastised the grievor for calling the crew dispatcher to inquire about his position on the spareboard before advising that he was booking sick. It is not in dispute that both the dispatcher and supervisor hung up on the grievor. In the case of Crew Supervisor C. H. Cook, the phone was hung up after the grievor stated to Mr. Cook "... next time someone phones or hangs up on me in the yard, whether its the crew supervisor or yard, I'm gonna come down personally and straighten you people out."

The grievor kept his word. The evidence is uncontroverted that shortly following that conversation Mr. Czumak, accompanied by his brother who is also an employee, appeared in the crew dispatch centre on Front Street in Toronto. Not surprisingly, a verbal confrontation between the grievor and Mr. Cook ensued. Supervisor Cook told the grievor that he had no business being in the dispatch centre, advised him that he would call the CN police to have him removed and, when the grievor refused to leave, finally acted upon that statement by actually calling the police.

Following Mr. Cook's telephone call to the police Mr. Czumak stated to the supervisor "If you were twenty years younger, I'd push your teeth down your throat!", and then continued "Come on, let's go outside." When neither Mr. Cook nor the crew dispatcher, Mr. Amal Paul, agreed to go outside the grievor said to Mr. Paul that some day he would see him in a bar. Fortunately Mr. Czumak's brother, who had been considerably less aggressive in his behaviour, prevailed upon his brother and persuaded him to leave at that point.

On the merits, the grievor's conduct rendered him plainly liable to discipline. As this Office noted in **CROA 1775**:

> ... Physical abuse and the threats to the security of a fellow employee or supervisor are plainly unacceptable in any workplace, and may justify the most serious of disciplinary consequences. ... (*See e.g.* ***CROA 1701*** *and* ***1722***)

In the Arbitrator's view the assessment of twenty demerits was clearly within the range of penalty appropriate in the circumstances. It is true that both Mr. Paul and Mr. Cook were abrupt with the grievor on the telephone, and that he was angered by their attitude towards him. Even in these circumstances, however, recourse to threats of physical violence was totally unwarranted. It was plainly open to the grievor to write a letter of complaint to the appropriate supervisory officer if he felt that he had been shown insufficient respect. Alternatively, if he believed that his rights under the Collective Agreement had been violated the grievance procedure was available to him.

Nor is this a situation where an employee has reacted on the spur of the moment. A considerable period of time elapsed between Mr. Czumak's telephone conversations with Mr. Paul and Mr. Cook and his subsequent appearance at the Front Street office with his brother. The conclusion to be drawn, on the balance of probabilities, is that the grievor consciously and deliberately went to the crew dispatching centre to provoke a confrontation which he knew, or reasonable should have known, could escalate into a potentially violent situation.

The Union asserts that the grievor's rights under Addendum 41 to the Collective Agreement, which governs the investigation procedure, were violated in a way that renders the discipline null and void. Firstly it maintains that the investigating officer wrongfully overruled certain questions as irrelevant. Secondly, it asserts that the Company violated the grievor's rights by failing to disclose to him the content of a CN police report relating to statements given by Supervisor Cook and Crew Dispatcher Paul to the police subsequent to the incident. Lastly, the Union objects to the fact that the investigating officer adjourned the examination of Dispatcher Paul because of some uncertainty as to whether he was entitled to be accompanied by a representative from his own union. When the officer instructed the grievor and his union representative that the investigation would continue with another witness until Mr. Paul's situation was clarified, the grievor and his advisor took the position that they would not continue to participate in the investigation, arguing that forcing the grievor to proceed from one unfinished cross-examination to the examination of a new witness would impact unfairly on the conduct of the investigation. The grievor and his representative then withdrew. The Company did not accept the Union's position and proceeded to complete the investigation in the grievor's absence.

The Arbitrator sees no merit in any of the assertions made by the Union with respect to the conduct of the investigation. Article 4 of Addendum 41 provides, in part, as follows:

> **4(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 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.

As this Office has noted in the past, investigation procedures such as those contemplated in Addendum 41 are intended to provide an expeditious, fair and open system of fact finding in serious disciplinary cases. The procedure is not, however, intended to take on the procedural trappings of judicial or quasi-judicial hearings. It is not disputed that the person conducting the investigation is entitled to rule upon the relevance of questions put by an employee or his representative. While the explanatory letter to Addendum 41 indicates the understanding of the parties that questions ruled irrelevant will be recorded, and that answers given are also to be recorded, that document does not expressly provide that the Union is entitled to insist upon an answer being given and recorded to a question that has been ruled irrelevant.

In the Arbitrator's view it is highly doubtful that the parties intended that the making of an "incorrect" ruling as to the relevance of a particular document or question must vitiate the entire proceeding and nullify any discipline which results from it. Decisions on relevance are judgement calls at the best of times, the correctness of which may well be disputed. The clear thrust of Addendum 41 is that the employees have a right to a fair and impartial investigation. Where rulings as to admissibility or relevance are so egregious as to demonstrate a departure from that minimal standard, it may well be that a violation of the requirements of Addendum 41 will be established.

In the instant case the Union has directed me to no specific rulings on admissability made during the grievor's investigation which in my view can be said to have prejudiced his right to a fair and impartial investigation. Consequently the Union's objection with respect to the rulings on relevance made by the investigating officer fails. Secondly, it does not appear disputed that the investigating officer was not in possession of a report of the CN police concerning the statements which its constables may have taken from Supervisor Cook and Crew Dispatcher Paul. If such a report had been in the hands of the investigating officer and had been withheld from the Union representative, an arguable case of unfairness might be made. That is not the case, however, and no violation of the standards of Addendum 41 is disclosed in this regard. Lastly, there is nothing in the language of the addendum, nor implicit within it, to support the Union's assertion that the interruption of the cross-examination of a particular witness pending the resolution of a procedural point, and the substitution of a further witness, is an abrogation of the standards of procedural fairness to which the grievor is entitled. The standing-down of witnesses whose evidence is not completed is commonplace in the most highly judicial proceedings. The Union's assertion that it was improper to follow that procedure in the instant case is so startling as to risk casting a cloud on the general credibility of all of its procedural objections. By withdrawing from the investigation the grievor plainly proceeded at his peril, and cannot now be heard to complain of its outcome (*see* ***CROA 1222***).

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

December 16, 1988

(Sgd.) MICHEL G. PICHER
ARBITRATOR