IN THE MATTER OF AN ARBITRATION

BETWEEN

CANANDIAN NATIONAL RAILWAY COMPANY

(the "Company")

AND

UNITED TRANPORTATION UNOIN, LOCAL 1923

(the "Union")

RE: GRIEVANCE OF BRIAN SAUNDERS

SOLE ARBITRATOR: John M. Moreau QC

Appearing For The Union:

John Holliday	-	General Chairperson
Wade Martin	-	Local Chairman, UTU Local 1778
Tom Jackson	-	Vice Local Chairman, UTU Local 1923
Brian Saunders	-	Grievor

Appearing For The Company:

Donna Crossan	-	Manager, Labour Relations, Prince George
Patricia Payne	-	Manager, Labour Relations, Edmonton
Wade Spencer	-	Trainmaster, Transportation, Prince George

A hearing in this matter was held in Calgary, Alberta on July 17, 2008

A. PARTIES TO THE DISPUTE

1. The parties before the Arbitrator are the United Transportation Union Local 1923 (the "Union") and the Canadian National Railway Company (the "Company").

2. The dispute referred to the Arbitrator involves employees governed by the United Transportation Union Locals Nos. 1778 and 1923 representing the services of train and yard services employees.

B. DISPUTE

The dismissal of Brian Saunders of Chetwynd, BC for conduct unbecoming and for providing unauthorized access to the workplace on November 2, 2006.

C. EX-PARTE STATEMENT OF ISSUE FOR THE UNION

1. On November 2, 2006, Mr. Saunders was employed as the Conductor on train TL57851 commencing at 2115k operating out of Chetwynd, BC.

2. During the November 2, 2006 tour of duty, Mr. Saunders provided passage to a non-CN employee.

3. CN has a policy governing access to CN workplaces titled: "Guidelines Regarding Access to CN Workplace".

4. Following an investigation into the incident, Conductor Saunders was dismissed for conduct unbecoming and providing unauthorized access to the workplace on November 2, 2006.

5. The Union has requested that Mr. Saunders be reinstated into service and reimbursed for lost wages. The Union contends that:

   (a) CN cannot terminate Mr. Saunders for breach of the "Guidelines Regarding Access to CN Workplace", because the well established criteria set out in the *Re Lumber and Sawmill Workers' Union, Local 2537 v. KVP Co.* (1965), 16 L.A.C. 73 (Robinson) have not been met;

   (b) CN is prohibited from relying on the doctrine of culminating incident, since at the time of termination, CN did not rely upon the Grievor's past disciplinary record to justify his discharge;

   (c) The November 2, 2006 incident is not sufficient, in and of itself, to warrant the Grievor's discharge, given the nature of the incident and his length of service;

(d) If the November 2, 2006 incident provides cause for discipline, the disciplinary penalty of discharge is far too severe and a lesser penalty should be substituted;

(e) The Union seeks an Order reinstating the Grievor, with a make whole Order for all lost wages and benefits.

6. The Company contends that the discipline assessed was warranted and justified, and has declined the Union's grievance.

"John Holliday"
John Holliday
General Chairperson, UTU

D.EX-PARTE STATEMENT OF ISSUE FOR THE COMPANY

On November 2, 2006, Mr. Saunders was employed as the Conductor on train TL57851 02 commencing at 21:15 operating out of Chetwynd, BC. Mr. Saunders, during this tour of duty took it upon himself to provide passage to a non-CN employee in violation of CN's "Guidelines Regarding Access to Workplace".

Following an investigation into the incident, Conductor Saunders was dismissed for conduct unbecoming and for providing unauthorized access to the workplace on November 2, 2006.

The Union contends that the assessment of discipline is excessive and that the grievor was not treated in conformity with the Company's progressive discipline policy. The Union has requested that the Mr. Saunders be reinstated into service and reimbursed for lost wages.

The Company contends that the discipline assessed was warranted and justified, and has declined the Union's appeal.

FOR THE COMPANY:

"Donna Crossan"
Donna Crossan,
Manager, Labour Relations

AWARD

The grievor commenced his service with the Company in December 1997. Prior to that time, he was employed for some 25 years with CP Rail. The grievor has worked in the Chetwynd area of British Columbia since 2004. His employment was terminated on January 2, 2007 as a result of an allegation that he violated the Access to Workplace policy (the "policy") of the Company on November 2, 2006.

The facts are that on November 2, 2006, the grievor was assigned to a train leaving Chetwynd at 21:15 for Ground Birch. The locomotive engineer at the time was Mr. Sheridan Marshall. Upon arrival at the Chetwynd station, at approximately 21:00, the grievor introduced an acquaintance of his to Mr. Marshall. According to Mr. Marshall, the person was introduced to him by the grievor as a CN employee who would be onboard familiarizing with the crew. Mr. Marshall asked the grievor at the time whether the individual would be familiarizing as a trainman or engineman. The grievor replied that he would be familiarizing as a trainman.

The Company asserts that five days later, on November 7, 2006, the assigned trainmaster, Lindsay Gidney, upon hearing of an additional employee familiarizing on the November 2, 2007 assignment, asked the grievor about the identity of the additional crew member. According to trainmaster Gidney, the grievor now replied that the individual was a "CN intermodal employee from Vancouver". By December 13, 2006, trainmaster Gidney became suspicious of the identity of the grievor's acquaintance on

November 2, 2006. He wrote a letter to the grievor requesting clarification of the information that he originally provided on his tour of duty on November 2, 2006. In that regard, he wanted to know the SRB number, work location and name of the acquaintance.

The grievor, who had made an earlier trip on November 2, 2006 at 10:00, replied with details of his trip at 10:00, rather than his 21:15 assignment. The trainmaster then followed-up with a further written request on December 15, 2006 to the grievor seeking additional information on the 21:15 assignment. The grievor replied as follows:

> "As to the formal request that you put forth, that took place about 40 days ago, at the present time I am unable to supply the requested information. So to expedite this matter, I will have to say that he was not an employee."

On January 2, 2007, the grievor provided a formal statement on an allegation of Conduct Unbecoming and Access to Workplace incident on November 2, 2006. Following the statement, the Company determined that the grievor's actions on November 2, 2006, along with his previous discipline history, his dishonesty and evasive actions, broke the bond of trust and merited dismissal.

A preliminary issue arose at the arbitration hearing regarding a discussion that took place at the outset of the investigation between trainmaster Wade Spencer, who conducted the statement, and the grievor. The grievor alleges that he requested a break after receiving copies of the investigation documents which included the policy

and the Code of Business Conduct. The grievor claims that Mr. Spencer declined the break request and told him that the statement would be "done today".

Mr. Spencer's recollection of the exchange prior to the statement was different than the grievor's. According to Mr. Spencer, the grievor actually asked him to "cancel the statement". Mr. Spencer replied to the grievor at that point that he would not cancel the statement but would recess and give the grievor time to obtain union representation. The grievor, according to Mr. Spencer, replied: "I am the Union". Mr. Spencer testified that the grievor then took about 15 minutes to review the policy, and the other related investigative documents, before indicating that he was prepared to proceed with his statement. The grievor maintained at the investigation, and throughout these proceedings, that he was not familiar with the policy and had never seen it, either posted or otherwise, before the day of the investigation on January 2, 2007.

Apart from the Union not raising any issue over the investigation in their *ex parte* statement, I have trouble with the Union's assertion that the investigation was not conducted improperly. The record of the investigation indicates the grievor was provided with a series of nine documents, which included all the relevant memorandum and supporting company policies. I note in that regard that Mr. Spencer had all the pertinent documents in order and was evidently prepared for the investigation.

There is no evidence that Mr. Spencer had any personal interest in the whole matter under investigation or harboured any animosity for the grievor. Mr. Spencer was

also not a witness to what transpired on November 2, 2006 and there is no evidence which suggests that he conducted himself improperly-other than the allegation of the grievor, which is unsupported. The grievor's testimony also does not stand up to close scrutiny when one considers that there was no urgency in the Company obtaining immediate answers over the incident. Mr. Spencer had made arrangements to stay overnight in the event he was unable to complete the investigative statement that afternoon of January 2, 2007.

In the end, I prefer Mr. Spencer's account that the grievor took a break to review the written material provided to him by the Company before indicating that he was prepared to answer questions over the incident. I also accept Mr. Spencer's version of events that the grievor made the rather stark and memorable statement "I am the Union". That kind of gratuitous statement is similar to the one he made in his December 15, 2007 response where he admitted for the first time - in order "to expedite this matter" - that his acquaintance was not an employee after all. Overall, I find that the investigation was conducted properly and that Mr. Spencer allowed the grievor a full opportunity to seek union representation and to review the documents presented to him at the investigation. The Union's objection that the statement was taken improperly, and thus voiding the discipline, is therefore dismissed.

The Company claims that the safety of the assignment was compromised as a result of the grievor's dishonest actions on November 2, 2006. Given the grievor's

similar behaviour in the past, the Company maintains that it was left with no alternative but to terminate the grievor from its service.

In its submissions, the Union first pointed out that the policy does not contain a provision setting out the disciplinary consequences of non-compliance. The Union refers to the rules set out in the *KVP Co.* decision which underline that employees have a right to know in advance what conduct is expected of them "...and a minimum of clarity in the formulation of the rule itself, and the publication of the rule prior to the time of any violation." The Union further claims that the Company failed to warn the grievor that discharge would result from a breach of the policy. The Union also submits that the Company cannot rely on the doctrine of culminating incident to justify the termination penalty because of the absence of notice to the grievor, at any point in time, that his job was in jeopardy.

In addition, and in the alternative, even if the grievor was knowingly in breach of the policy, the Union submits that a short suspension would be the appropriate disposition, given the grievor's length of service; his lack of notice and awareness of the policy; the fact that he apologized for his conduct once he was made aware of the policy; and, for the Company's failure to advise the grievor at the time of discharge that it would be relying on his past disciplinary record for the current discipline. The Union also stated that the termination has had harsh impact on the grievor and his family and that he has been unable to find employment since his dismissal on January 2, 2007.

The grievor's claim that he was unaware of the policy rings hollow in face of the rather trite proposition that those with no business on the train can only be allowed on the equipment with express permission. In this case, it was not really a lack of knowledge of the policy that led to his behaviour. In my view, based on the evidence before me, I believe that the grievor knew all along that it was improper to invite a guest on board unless he had prior written permission. His suggestion that he was unfamiliar with the policy is simply, in my view, an attempt to excuse his otherwise unacceptable behaviour.

By the time he was questioned at the investigation over the incident, the grievor had already misrepresented the identity of his on-board guest on two occasions. Those mispresentations are consistent with the grievor's prior record in that he has twice received serious discipline for providing false information to the Company. He received a 5 day suspension on April 10, 2003 for providing a false reason for booking off after being called to work; he received a 10 day suspension for completing a false report and providing false information during a March 31, 2003 hearing. He also received a 10 day suspension for booking off sick after being denied a request for personal leave on August 10, 2004.

Even though the following case involved the passenger rail service, the arbitrator's comments in **CROR 3607** are equally applicable here:

> In the facts of the case at hand, it is the failure of candour and honesty on the part of the grievors, much more than their rules infractions in the

operation of their train, which calls into question their ongoing employability in the operation of a high-profile pubic passenger train service.

The grievor was aware of the importance of honesty in the workplace when he received his earlier disciplinary suspensions over the same Company concern. Rather than make a determined effort to work within the rules in an honest fashion, the grievor once again has slipped into his unfortunate old pattern of taking on the risk of breaching company rules to suit his own interests. The evidence is uncontradicted that he clearly misrepresented the identity of his acquaintance as a CN employee who was entitled to be on board for the tour of duty. He only admitted to the fact that his acquaintance was not an employee when he was confronted with the allegation by trainmaster Gidney well after the incident. Rather than take capitalize on that opportunity to make a clean admission, he hedged his answer by stating that he was only admitting that his acquaintance was not an employee in order to expedite matters.

The grievor, regrettably, has left me with no confidence that he can be trusted to work honestly and follow the company rules in the future. There are no mitigating factors, including the grievor's tenure with the Company or his personal circumstances, which persuade me to alter the penalty. The grievance is dismissed.

Dated at Calgary this 24th day of July, 2008.

JOHN M. MOREAU, Q.C.
ARBITRATOR