IN THE MATTER OF AN ARBITRATION

BETWEEN:

PROGRESS RAIL/CANADIAN PACIFIC RAILWAY
(hereinafter referred to as the "Company")

AND:

CAW/TCA CANADA, LOCAL 101
(hereinafter referred to as the "Union")

ARBITRATOR: **Sidney G. Soronow**

APPEARANCES:

FOR THE COMPANY: **John H. Bate, Labour Relations Consultation**
Adrianne McCulloch, Manager, Human Resources
Al May, Operations Manager, Wheel Shop
Harvey Groleau, Quality Assurance & Safety Specialist

FOR THE UNION: **Brian McDonagh, CAW National Representative**
Ken Hares, Vice-President, CAW Local 101
Eamonn Pattierson, Witness
Derek Ternowetsky, Grievor

AWARD

At the commencement of the hearing, the parties agreed that the Arbitrator was properly appointed and had jurisdiction to hear and determine this matter. Two grievances relating to the same individual were set to be heard and determined by the Arbitrator on July 12th, 2007. As the parties presented their cases with respect to the first grievance, it appeared that it would not be possible to address the second grievance that day and a new hearing date of September 20th, 2007 was ultimately set. At the commencement of the hearing, both parties provided the Arbitrator with comprehensive written submissions.

The grievance heard by the Arbitrator relates to the assessment of 20 demerits to Derek Ternowetsky for alleged inappropriate behaviour with respect to the operation of a "walkie" forklift on July 7th, 2005 during the performance of his job duties.

The Collective Agreement contemplates that the parties will submit to the Arbitrator a Joint Statement of Fact and Issue (the "Joint Statement"). The Joint Statement, in large measure, frames the difference or issue between the parties. In this instance, the Joint Statement reads as follows:

> *"**Dispute:** Discipline – Machinist Derek Ternowetsky's record being debited 20 demerits.*
>
> ***Statement of Fact:***
> *Machinist Derek Ternowetsky's record was debited 20 demerits in connection with:*
> *"... your inappropriate behaviour in the workplace, re: your operation of the bearing room electric walkie forklift on July 7, 2005."*
>
> ***Statement of Issue:***
> *It is the contention of the Union that:*
>
> - *the Company did not establish wrong doing on Machinist Derek Ternowetsky's behalf sufficient to give the Company cause to discipline him;*
> - *Machinist Derek Ternowetsky was treated in an arbitrary, discriminatory and an excessive manner in regard to the 20 demerits debited against his record;*

- *The Union contents that the Pallets being utilized by the Company were inferior for their intended use.*

Therefore, with regard to the foregoing, it is the position of the Union that the discipline of 20 demerits [to] Machinist Derek Ternowetsky's record should be removed and his record adjusted accordingly.

Should the Arbitrator Rule in Favour of the Union in this case, it is the position of the Union that Machinist Derek Ternowetsky, should be returned to duty forthwith without loss of seniority, with full redress for all lost wages, benefits and losses incurred as a result of his dismissal, including, but not limited to, interest on any monies owing.

The Company denies the Union's contentions and claim."

The background to this dispute arises from the assessment of 20 demerits against Mr. Ternowetsky (hereinafter for convenience referred to as "Mr. T") for his conduct on July 7th, 2005. At the time of this discipline, Mr. T was a Machinist with the Company in Winnipeg, and worked in the wheel bearing room. As well, Mr. T was approximately 47 years of age and had accumulated approximately 26 years of service with the Company.

The conduct at issue relates to Mr. T's operation of what is referred to as a "walkie forklift", which is apparently a small forklift operated by a person walking from behind. At first blush, this appeared to be a straightforward discipline case from a factual perspective. As the hearing progressed, however, it became apparent that few of the facts were common to both sides.

In simple terms, it is the Union's contention that Mr. T was in the process of endeavouring to pick up a pallet holding a shop-vac with the "walkie forklift" in order to relocate this pallet out of his way. According to the Union, there was a failure of the braking system of the forklift (which braking system is to be activated by raising the handle). As a result, it is alleged by the Union that the forklift failed to brake and the pallet (holding the shop-vac)

struck a second pallet which held a number of finished wheel bearings. The Union contends that Mr. T attempted to reverse the forklift, but that in order to avoid backing over himself, he reactivated the forward motion which resulted in the pallet with the shop-vac striking the pallet of wheel bearings a second time.

It is the contention of the Company, however, that after using the "walkie forklift" to pick up the pallet with the shop-vac, Mr. T, out of frustration, purposely rammed the pallet with the shop-vac into the pallet of wheel bearings, proceeded to back up, and then purposely rammed the pallet of wheel bearings again.

II. SIDE ISSUES

While the facts and evidence with respect to the conduct of Mr. T relating to the operation of the "walkie forklift" was the central issue of this case, several other issues surfaced, most particularly:

1. An assertion by the Union that Form 104 (the Disciplinary Notice) does not reference the griever's conduct being in violation of any particular "work rule." As such, the Union suggests that without a violation of a work rule, there could be no investigation conducted, and that without any investigation, there could not be a discipline and therefore the discipline of 20 demerits is void.

2. An assertion by the Union that Rule 28.1 of the Collective Agreement requires a fair and impartial investigation and that a review of the investigation statement discloses that Mr. Alex May, the Company official who conducted the investigation, exhibited partiality and bias in the course of the investigation.

3. With respect to both 1 and 2 above, the Company advanced the position that the

Union is attempting to expand the issues to be dealt with at arbitration and that they ought not to be permitted to do so.

At this juncture, it should be noted that neither of the assertions raised by the Union at the arbitration were either raised or identified in the Joint Statement prepared and signed off by the parties. In its Stage 2 grievance, the Union did amend its complaint somewhat and did raise the spectre of a lack of impartiality of the investigating officer. However, no written reply to the Stage 2 grievance was ever provided by the Company. At the hearing, the parties both accepted that no specific consequences flow from the Company's failure to respond to the Stage 2 grievance.

Side Issue #1

Early in the hearing, the Union suggested to the Arbitrator that Form 104 (the Disciplinary Notice) does not reference the griever's conduct being in violation of any particular "work rule." As such, the Union argued that without a violation of a work rule, there could be no investigation conducted, and that without any investigation, there could not be a discipline and therefore the discipline of 20 demerits is void. The Union further suggested that there was case law in support of its argument.

Although I advised the parties that I was not aware of any jurisprudence which would require an employer to cite the violation of a particular work rule in order to assess discipline, I invited the Union to provide case law subsequent to the hearing. No case law was ever forwarded with respect to this issue. As such, absent any specific limitation in the collective agreement, I am satisfied that there is no requirement for the Company to cite a specific work rule in order to discipline Mr. T.

Side Issue #2

A second issue and assertion raised by the Union is that Rule 28.1 of the Collective Agreement requires a fair and impartial investigation and that a review of the statement of Mr. T taken on July 13th, 2005 by Alex May, Operations Manager of the Wheel Shop, as part of the Company's investigation into the alleged incident, discloses partiality and bias on the part of Mr. May.

Rule 28.1 of the Collective Agreement reads (in part) as follows:

> *No employee shall be disciplined or discharged until he/she has had a fair and impartial investigation and his/her responsibility established.*

The Investigation Statement is, for the most part, conducted on a question and answer basis with a notation of the letter "Q" for questions and a notation of the letter "A" for answers. In this instance, the written recording of the investigation statement (both in the originally handwritten version and subsequent typewritten version) disclosed certain statements made and identified by the notation of the letter "S". At the hearing, in response to a question from the Arbitrator, it became clear that the letter "S" referenced statements made by Mr. May.

It is the Union's position that an investigating officer, such as Mr. May in this instance, should not include personal statements as part of his or her investigation, and that the job of the investigator is simply to gather facts. The Union argued that by including his own statements as part of the investigation statement, Mr. May was passing judgment on the matter rather than acting in a purely neutral capacity.

The specific statements made by Mr. May which were the subject of argument by the Union are the following:

1. On page 3:

> *"S. By ramming into the pallets further damage may have occurred had any bearings been dislodged and fallen onto the shop vac, the electric walkie forklift or onto yourself."*

2. On page 4:

> *"S. The job of building backing rings requires the use of he electric walkie forklift to move material in and out of the area as required. On account of your demonstrated display, you[r] assignment in this position will be reviewed and reassessed."*

Whether or not the statements by Mr. May reach the threshold of disclosing a lack of impartiality is a question of fact to be determined by the Arbitrator. If the statements do disclose a lack of impartiality, the question becomes whether such statements had an affect on the subsequent decision to discipline Mr. T. If there was an affect on the subsequent decision to discipline Mr. T, then the question becomes whether the statements made by Mr. May render the discipline null and void as suggested by the Union.

In order to assist the Arbitrator with respect to this issue, the Union was given an opportunity to submit additional jurisprudence. One of the cases provided by the Union is an Arbitration between *Algoma Central Railway Inc. and United Transportation Union* (AH517). This arbitration arose out of the dismissal of a Mr. M. Rivard from the employment of the Algoma Central Railway on March 16, 2001. One of the arguments of the Union in the Algoma Railway case is that the notice to Mr. Rivard of the pending investigation with respect to his conduct was misleading, late and incomplete. The Union argued that *"the investigation contemplated requires a griever to be provided a sufficient*

idea of the charges levelled against him so that he can prepare himself to present his case at the hearing of the matter." In the *Algoma Railway* case, the employer did not provide the griever with any mention at all of the materials and witnesses that might be used in its case against him. As a result, the Union argued that the griever was prevented from adequately preparing himself for the investigation.

In his decision in the *Algoma Railway* case, Arbitrator E.E. Palmer, Q.C. found that the notice provided by the employer was in fact deficient in that it did not adequately set out the nature of the charges against Mr. Rivard, and that as a result, the investigation was not fair and therefore the discipline imposed was rendered null and void. In commenting generally on the requirement of a fair and impartial investigation, Arbitrator Palmer quotes a passage from Arbitrator Picher which reads as follows:

> *As previous awards of this Office have noted (eg. C.R.O.A. 1858), disciplinary investigations under the terms of a collective agreement containing provisions such as those appearing in Article 34 are not intended to elevate the investigation process to the formality of a full-blown civil trial or an arbitration. What is contemplated is an informal and expeditious process by which an opportunity is afforded to the employee to know the accusation against him, the identity of his accusers, as well as the content of their evidence or statements, and to be given a fair opportunity to provide rebuttal evidence in his own defence. Those requirements, coupled with the requirement that the investigating officer meet minimal standards of impartiality, are the essential elements of the "fair and impartial hearing" to which the employee is entitled prior to the imposition of discipline. In the instant case, for the reasons stated above, I am satisfied that the standard has been met.*

A second case provided by the Union is an Arbitration between *Canadian Pacific Limited and Brotherhood of Maintenance of Way Employees* (C.R.O.A. 1561) (Arbitrator Picher). In that case, the griever was disciplined for allegedly making obscene and insubordinate remarks to his foreman, Mr. G.J. Craig. The Union alleged that the griever did not receive

a fair and impartial investigation and that as a result the discipline assessed against him should be ruled null and void. Specifically, the Union objected to the fact that the chief investigating officer was Mr. J.S. Craig, the father of the foreman to whom the alleged remarks had been made. Even though Mr. J.S. Craig was replaced as chief investigating officer and a supplementary statement was taken from the griever, the evidence confirmed that Mr. J.S. Craig remained involved in the investigation. According to Arbitrator Picher:

> *"The requirement of a fair and impartial investigation is a substantive right cast in terms of a mandatory obligation. As this case and others demonstrate there is much room for disagreement as to what constitutes an appropriate standard of fairness. ... Article 18.1 must be interpreted as imposing an objective, and not a subjective, standard of fairness and impartiality."*

Arbitrator Picher continues by stating that:

> *"It is well established that discipline imposed as a result of an investigation which is in violation of the standards established in the Collective Agreement must be viewed as void."*

After reviewing the facts and evidence, Arbitrator Picher determined that the investigation was not fair and impartial and that it was in violation of Article 18.1 of the collective agreement. As a result, he allowed the grievance and ruled the discipline imposed by the employer to be null and void.

A third case provided by the Union is an Arbitration between *Canadian Pacific Railway Company and Canadian Counsel of Railway Operating Unions (United Transportation Union)* (C.R.O.A. 3164) (Arbitrator Picher). In that case, the griever was assessed 25 demerits for committing a negligent error while operating beltpack equipment, resulting in a locomotive moving a short distance in the wrong direction, causing damage of approximately $2,730.00 to two rail cars. Arbitrator Picher ruled that there was a violation

of the griever's right to a fair and impartial investigation under the terms of article 32 of the collective agreement. Specifically, the griever was not afforded reasonable notice to enable him to be present when a fellow crew member was examined by the Company and gave a statement to the Company on October 13, 1999.

In the aforementioned arbitration (C.R.O.A. 3164), Arbitrator Picher noted that the issue of lack of reasonable notice to the griever was not raised by the Union when the griever was interviewed by the Company on October 18, 1999. It was not in fact raised until well after the assessment of discipline against the griever. In Arbitrator Picher's view, the late raising of this procedural issue did prejudice the Company in that it assessed discipline which resulted in a discharge of the griever without realizing that an issue of lack of procedural fairness would later be raised. Arbitrator Picher felt, however, that such prejudice to the company should only affect the later decision with respect to the compensation to the griever.

A fourth case provided by the Union in support of its argument that the investigation of Mr. T was not fair and impartial is an Arbitration between *Canadian National Railway Company and Canadian Council of Railway Operating Unions (United Transportation Union)* (C.R.O.A. 3061) (Arbitrator Picher). In that case, the griever was issued 25 demerits for alleged violations of Canadian Rail Operating Rule 112 and 104(c) while working as a conductor. It was clear from the evidence that the griever and his union representative had objected to the manner in which the investigation was being conducted almost right from the start. Arbitrator Picher found that the during the investigation, the griever did not have a fair opportunity to hear the evidence submitted against him, nor was he given an opportunity " ... to ask questions of witnesses whose evidence may have a bearing on the employee's responsibility." as mandated by article 82.2 of the collective agreement.

An additional problem was that the investigating officer was also a material witness against the griever during the investigation. According to Arbitrator Picher, absent extraordinary circumstances, such a situation would violate the provision in the collective agreement which requires there to be a fair and impartial investigation. According to Arbitrator Picher:

> *As noted in prior awards of this Office, in discipline cases the form of expedited arbitration which has been used with success for decades within the railway industry in Canada depends, to a substantial degree, on the reliability of the record of proceedings taken prior to the arbitration hearing at the stage of the Company's disciplinary investigation. As a result, any significant flaw in the procedures which substantially compromise the integrity of the record which emerges from that process goes to the integrity of the grievance and arbitration process itself. Consequently, in keeping with general jurisprudence in this area, it is well established that a failure to respect the mandatory procedures of disciplinary investigations results in any ensuing discipline being ruled void ad initio. (C.R.O.A. 3061 at page 4)*

In light of the case law submitted by the Union and other relevant case law considered, I am unable to agree with the position advanced by the Union. This is not a situation similar to AH517 where adequate notice of the nature of the charges against the griever was withheld from him. Nor is this a situation similar to C.R.O.A. 1561 where one of the investigating officers was a close relative of the company official who made the complaint against the griever. Likewise, this is not a situation similar to C.R.O.A. 3164 where the griever was not given reasonable notice to enable him to be present during the examination of a fellow crew member by the Company. Finally, unlike C.R.O.A. 3061, this is not a situation where the griever was denied a fair opportunity to hear the evidence against him or denied the opportunity to ask questions of witnesses whose evidence may bear on his responsibility.

In the Arbitrator's view, the statements made by Mr. May, while unfortunate and perhaps imprudent, do not disclose a lack of impartiality to the extent that would result in a denial

of the griever's right to a fair and impartial investigation in violation of Rule 28.1 of the collective agreement. That being said, however, it is fair to say that it would be a far better practice for an investigating officer to avoid statements which give an impression that he or she may have already drawn a conclusion as to the grievor's culpability.

Since I find that the statements made by Mr. May do not disclose a lack of impartiality to the extent that would result in a denial of the griever's right to a fair and impartial investigation, it is unnecessary to ask the further questions which would have been necessary had my determination been different.

Side Issue #3

As noted earlier in this decision, the Company advanced the position that by raising the first two side issues, the Union is attempting to expand the issues to be dealt with at arbitration and that they ought not be permitted to do so. More particularly, it is the Company's position that if the Union felt that these issues were important and relevant, they should have been raised earlier and could have been included as part of the Joint Statement.

With respect to the first side issue, no specific explanation was offered by the Union as to why the issue of the failure by the Company to identify a "work rule" was not contained in the Joint Statement. As to the second side issue, the Union recognized that it did not put forward the issue of lack of impartiality at an earlier date. It's explanation is, however, that it only became clear as to the meaning of the letter "S" in the investigation statement when Mr. May was asked questions by Arbitrator during his testimony. Until that time, the Union claimed that they were labouring under the assumption that "S" simply referred to another person, perhaps a supervisor, an assumption which seems entirely plausible.

During the hearing, the Company submitted case law to the Arbitrator which addressed situations where one party had made attempts to expand the issues at arbitration to encompass new issues that were not previously raised and are not part of the Joint Statement of Fact and Issue. The Union was also given an opportunity to submit case law on the subject and subsequently did so.

Since I have determined that (1) it was not necessary for Form 104 (the Disciplinary Notice) to reference the griever's conduct being in violation of any particular work rule and (2) that Mr. May's statements which were included as part of the investigation statement do not disclose a lack of impartiality to an extent that would result in a denial of the griever's right to a fair and impartial investigation, it is not necessary for me to address the Company's argument that the Union is attempting to expand the issues to be addressed at arbitration, and so I decline to do so.

II. SUBMISSIONS & EVIDENCE

As this is a discipline case, the Company presented its submission first. As part of its written submission, the Company indicated that Mr. T had been disciplined on nine (9) separate occasions during the course of his career and that his discipline record stood at 20 demerit marks prior to the incident giving rise to this arbitration. The Company further indicated that of those nine (9) incidents of discipline, five (5) incidents for a total of 135 demerits marks between the years 1992 and 2005 were for inappropriate, insubordinate, aggressive or threatening behaviour. Specifically, paragraph 6 of the written submission of the Company reads as follows:

> "6. *Of those 9 incidents of discipline, Mr. Ternowetsky has been disciplined on five (5) different occasions for a total of 135 demerits for inappropriate, insubordinate, aggressive or threatening displays of behaviour, as follows;*

(a) *On July 7, 1992 Mr. Ternowetsky was assessed 40 demerits, (later reduced to 25 demerits by-way of joint resolution) for using a pry bar to hit lockers, machinery and subsequently throwing the pry bar toward wheel sets in the middle of the shop in an area where there were some 40 employees present;*

(b) *On March 16th, 2000, Mr. Ternowetsky was assessed 40 demerits for damaging Company property for using a sledgehammer to smash a door window and batter the door knob and lock off of a shop exit door;*

(c) *On May 3rd, 2002, Mr. Ternowetsky was assessed 25 demerits for leaving a safety meeting prior to it[s] conclusion and refusing a directive to return to the meeting;*

(d) *On February 1, 2005, Mr. Ternowetsky was assessed 10 demerits for a verbal altercation with another employee;*

and

(e) *On February 4, 2005, Mr. Ternowetsky was assessed 20 demerits (later combined with item d above in a joint grievance resolution meeting for a total of 20 demerits for both incidents) for insubordination toward a Company Officer by way of comments he had provided in a formal investigation pertaining to the February 1st, 2005 incident;"*

The Union raised an objection, which was vigourously argued, that the Company is not at liberty to include greater detail of the alleged incidents than what is included in the Employee Discipline Record which is attached at Tab 2 of the submission of the Company. There was no question or dispute that the griever had a prior disciplinary record, but the Union argued that the Company is attempting to paint Mr. T as a violent and aggressive person without tendering evidence to that effect.

On the one hand, the Union argued that if the Company is at liberty to give this character of background information, then it is open to the Union to provide its own narrative of the surrounding events to each discipline referred to by the Company. On the other hand, the Union argued that it was completely inappropriate for the Company to provide its own narrative and that the Arbitrator should not take any such narrative into account. In short, the Union's second argument is that the inclusion of anything more than the bare bone details disclosed in the Employee Discipline Record would not be in accordance with the principles of natural justice and that there is case law to support its position.

In response, the Company argued that the misconduct detailed in paragraph 6 of its submission was the same misconduct that was the subject of the earlier discipline and that it's inclusion of the details would not in any way violate natural justice. Furthermore, the Company argued that the reason it provided the narrative was to validate that the griever had some historical background of intentional misconduct and that such background was taken into account when assessing the quantum of discipline with respect to the incident involving the "walkie forklift".

Indeed, a review of the Employee Discipline Record does disclose far less detail of the conduct which was the subject of prior discipline. At the hearing, I advised the parties that the details of the previous record will not be given any weight and that I will rely on what is disclosed in the official Employee Discipline Record.

As the Union continued to express concern about the validity of the inclusion by the Company of a detailed narrative of prior incidents, I deferred a formal ruling on its objection in order to afford both parties an opportunity to present case law on this issue. No case law in respect of this issue was ever provided.

In any event, the point is somewhat moot as I accord no weight to that detailed narrative. Instead, I have relied on the official Employee Discipline Record which does disclose some incidents of inappropriate conduct and difficulties with anger, but in the my view, does not demonstrate any significant pattern of aggressive, inappropriate or insubordinate behaviour.

In paragraph 14 of its written submission, the Company suggests that when first questioned about the incident of July 7th, 2005, Mr. T confirmed to his Supervisor, Harvey Groleau, that he was trying to get the pallet of wheel bearings out of his way. However, the Company indicated that during the formal investigation, Mr. T changed his story by suggesting that he was attempting to dislodge the pallet with the shop-vac off of the forks of the walkie forklift and that the pallet with the shop-vac was already broken prior to it making contact with the pallet of wheel bearings.

In its submission, the Union argued passionately that the pallet with the shop-vac was already damaged prior to being lifted by Mr. T with the "walkie forklift". In Tab B of their submission, the Union included a copy of a photograph marked as "Document B" which photograph was apparently taken shortly after the incident involving Mr. T. It is clear from the photograph that the pallet with the shop-vac was seriously damaged (at the time the photograph was taken), with at least one board missing and one board broken off. The Union further suggested that many of the pallets in the bearing room were damaged or defective and that safety issues had previously been raised and investigated with respect to many of the pallets. As well, the Union brought to the attention of the Arbitrator a number of accident reports and safety alerts, dating back to 2004, which directly involve the structural integrity of the wooden pallets being used in the workplace.

Specifically, the accident report of November 4, 2004 identified an incident where an employee was in the process of unloading 12" roller bearings from a pallet to his

workstation, and that one of the bearings jammed on an uneven board, causing the bearing to flip towards the employee and his thumb and hand area to come into contract with a previously moving bearing. This resulted in swelling and pain to the hand and thumb of the employee. As a preventative measure, the accident report identifies that all employees are reminded to thoroughly inspect all pallets for the following defects:

1. Uneven surfaces such as thicker and thinner boards;
2. Broken or damaged boards; and
3. Improperly positioned material. This may include material that has shifted during transportation.

The accident report of November 5th, 2004 identified an incident whereby two employees were in the process of removing recently emptied pallets and a bearing (weighing approximately 30 lbs) came into contact with one of the employee's feet causing minor swelling and pain. The accident was apparently the result of a damaged pallet and that pallet was subsequently taken out of service.

The Safety Alert of October 2005 involved an accident at Weston Shops on April 7th, 2005. Specifically, an employee was in the process of transferring several coupler keys for shipment when 25 coupler pines (weighing 53 lbs each) fell to the floor. After contacting the pallet manufacturer, it was discovered that the components of the pallets had been changed to a lesser grade to offset the increased cost of wood and nails. The Safety Alert indicated that the manufacturer of the pallets has now "been instructed to use higher-grade wood and longer nails."

In addition to arguing that the pallet with the shop-vac was defective, the Union also argued that the "walkie forklift" being operated by Mr. T on the day in question had a defective braking system. It is the position of the Union that the defective braking system was a

contributing factor to the incident of July 7th, 2005.

The sole witness for the Union was a gentleman by the name of Eamann Pattierson. Mr. Pattierson replaced Mr. T after Mr. T's dismissal from Progress Rail in 2006. Mr. Pattierson is a machinist with approximately 30 years of experience, approximately 3 years of which have been in the bearing room. As part of his testimony, Mr. Pattierson confirmed that the bearing room has the use of two "walkie forklifts", one of which is the one that had been operated by Mr. T at the time in question. Mr. Pattierson testified that there have been problems with pallets being defective for many years, and that although some of the pallets identified as damaged have been removed, many of the damaged/defective pallets have not been taken out of service by the Company.

In addressing questions regarding what happens when the forks of a "walkie forklift" enter a damaged pallet, Mr. Pattierson testified that it is common for bearings to fall off and that this has resulted in many injuries in the workplace.

In addressing questions about the particular "walkie forklift" being used by Mr. T at the time in question, Mr. Pattierson testified that there have been many problems with the brakes on this particular forklift. He testified that as a result of complaints from himself and others in the bearing room, this forklift has undergone brake repairs numerous times, but that after being repaired, the brakes never work for more than a day or two. He also said that there had been problems obtaining parts for this particular forklift. According to Mr. Pattierson, the consequence of the brakes not functioning is that the forklift continues to move forward even when the operator wishes for it to stop. He said that this is quite problematic considering the tight quarters of the bearing room, but that the Company simply told employees that the forklift is obsolete and just to be careful.

In answering my question regarding how, as an operator of this particular forklift from time to time, Mr. Pattierson compensates for the defective brakes, he indicated that he is forced to slow down and be extra careful. He further indicated that this forklift always nudges the pallet being entered because it only comes to a stop by hitting into the pallet.

The following are the last two questions asked of Mr. Pattierson by the Union and his responses thereto, as recorded by me:

Question: "Were you there at the time of the incident in question?"

Answer: ""Yes. Harvey said "Did you see that"? I responded "Yes, the thing has no brakes.""

Question: "What did you see?"

Answer: "The pallet on which the shop-vac sat was very damaged. It was an old pallet and is the pallet in question. I asked the foreman why this pallet was there as it should have been with the millwrights. He just walked away."

On cross-examination by the Company, Mr. Pattierson acknowledged that there is no specific consequences under the Canada Labour Code which flow from an employee refusing to work with a damaged pallet, but suggested that employees who do so are added to a "non-written list" kept by the Company. He was unable, however, to provide any evidence of the existence of such a list.

Although Mr. Pattierson had no means of confirming whether the brakes on the "walkie forklift" were working at the time of the incident involving Mr. T, he did testify that he used the same forklift immediately after Mr. T, within a period of approximately 10 - 15 minutes, and that the brakes were not functioning at that time.

The following are questions the Arbitrator asked of Mr. Pattierson and his responses thereto, as recorded by me:

Question: As I understand it, you would apply the brake by lifting up on the handle. But, what you saw was that he [Mr. T.] lifted up the handle and nothing happened?

Answer: Yes

Question: Then what?

Answer: Derek put the machine into reverse.

Question: Then what happened?

Answer: Derek was flat footed and the forklift came back at him. You don't want to get run over, so he flipped the thing back forward and it went into the pallet with momentum. At that time, Harvey asked me "Did you see that?" I said yes, that forklift has no brakes. This all happened in about 2 seconds.

Question: Should an employee have noticed that this was a damaged pallet?

Answer: Yes

Question: Should an employee have picked up such a pallet?

Answer: Probably not.

Question: What would you have done?

Answer: I would have put it on another pallet.

Question: Did Derek cause any additional damage to the pallet?

Answer: A bit. The forklift knocked the first board off which had only previously

been attached at one end. Also, the piece of aspenite which had been placed on the pallet would have prevented Derek from seeing the missing second board.

Question: Is it your evidence that the blame here is due to the defective machine?

Answer: Yes, and the defective pallet. I was shocked that the employer was taking a statement as this happens all the time.

The first witness who testified for the Company was Mr. Harvey Groleau who is a supervisor and Quality Assurance Safety Specialist with Progress Rail. Part of Mr. Groleau's job is to ensure that the workplace is safe and functions well. Mr. Groleau testified that he had seen the shop-vac on the pallet in the bearing room and had not noticed anything unusual about the pallet. He also testified that any defects in pallets or equipment noticed by employees were to be brought to the attention of a supervisor or safety coordinator and that all employees were at liberty to refuse to use pallets which they deemed to be defective. He further testified that if he saw an employee using a damaged/defective pallet, he would bring this to the attention of the employee.

With respect to the incident of July 7th, 2005, Mr. Groleau testified that nothing had been brought to his attention that day about either the pallet with the shop-vac being defective or the "walkie forklift" operated by Mr. T having a defective braking system. He further testified it is the responsibility of employees to check equipment prior to use in order to avoid accident or injury.

On cross-examination, Mr. Groleau acknowledged that he does not inspect the pallets in the bearing room regularly, but indicated that the forklift operator has the power to take any pallet deemed to be defective out of service. Also, Mr. Groleau acknowledged that Mr.

Pattierson was in the same position to observe the incident involving Mr. T as he was, and that it was entirely possible that the pallet with the shop-vac had previously been in the pile of scrap pallets which are stored in the bearing room.

In answering some of the Arbitrator's questions, Mr. Groleau testified that the forklift travelled approximately 10 feet before coming into contact with the pallet of bearings. He admitted that he is not in a position to comment on whether the "walkie forklift" was operating properly and whether it had functioning brakes on the day and time in question. He insisted, however, that even if he knew that the brakes weren't working, that would not have changed his opinion in respect of Mr. T's operation of it. According to Mr. Groleau, the forklift doesn't move very fast and it is used by many employees in the bearing room without being operated in the manner exhibited by Mr. T.

The second witness for the Company was Mr. Alex May. Mr. May is the Operations Manager of the wheel shop and Mr. Groleau reports to him. It was Mr. May's decision to proceed with a formal investigation after receiving a memo of the incident from Mr. Groleau dated July 7th, 2005. According to Mr. May, the allegation that the pallet with the shop-vac was damaged/defective was never made during the investigation. Mr. May testified that he had heard about one of the two "walkie forklifts" in the bearing room having problems with the brakes on one or two previous occasions, but that it would have been repaired. Other than that, he was unaware of one of the forklifts being in any way defective. Mr. May also denied ever being told by Mr. Pattierson about problems with the "walkie forklift" in question.

In addressing questions about what the Company has done to remedy the deficiencies with many of the pallets, Mr. May testified that many steps have been taken including replacement, repair and the addition of metal bars and/or aspenite on top. Mr. May also testified that he came to the conclusion that Mr. T must have collided with the pallet of

bearings on purpose because it happened twice.

On cross-examination, Mr. May acknowledged that problems with the integrity of the pallets are ongoing and that other employees in the shop have caused damage to pallets. He further acknowledged that to the best of his knowledge, no other employees have been disciplined for causing damage to or breaking pallets. He clarified his answer, however, by indicating that other employees may not have hit the same pallet twice.

The following is a question asked by the Arbitrator of Mr. May and his response thereto, as recorded by me:

Question: You said that you thought it was intentional because he did it twice. Would your opinion have changed if you knew the forklift was defective?

Answer: If we knew the machine was defective, we wouldn't have conducted the investigation.

III. DECISION

One of the troubling aspects of this case is the fact that the Union chose not to call the griever to testify. The Arbitrator does recognize that in many railway cases, even those with disputed facts, no evidence is called. However, it was apparent early on that both parties intended to call evidence to advance, supplement and/or validate their submissions. On the Union side, they called evidence through Mr. Eamann Pattierson, a fellow employee of the griever.

According to his evidence, Mr. Pattierson witnessed the incident involving Mr. T and was able to give rather articulate evidence of what he saw. It certainly would have been helpful to the Arbitrator to hear what the griever had to say about the brakes on the "walkie forklift"

and about the condition of the pallet holding the shop-vac. Indeed, such evidence may have significantly bolstered the case of the Union. Considering that the Company's position is that the griever rammed the pallet with the bearings, either wilfully or intentionally, one would have contemplated that the griever would be in the best position to defend himself and provide some exonerating evidence.

In any event, by way of summary, Mr. Pattierson testified that on the day in question, he saw Mr. T using one of the "walkie forklifts" to move a pallet with a shop-vac on it. According to Mr. Pattierson, Mr. T pulled up on the handle to engage the brakes on the forklift in order to prevent the forklift from moving further forward, but that the brakes were clearly not working. He further testified that the particular "walkie forklift" being used by Mr. T was well known to employees in the shop and to the Company to have problems with the brakes. As well, he indicated that shortly after the incident involving Mr. T, he too used this forklift and confirmed that the brakes were not working, at least at the time of his use. According to Mr. Pattierson, the consequence of the brakes not functioning is that the forklift continues to move forward even though the operator may wish for it to stop. This can occasion damage to the pallet being lifted.

Mr. Pattierson confirmed that he could see that the pallet with the shop-vac on it was damaged and missing boards when it was being moved by Mr. T. He further confirmed that many of the pallets in the bearing room exhibit some level of damage or deficiencies, and that only "a bit" of additional damage to the pallet would have resulted from the incident involving Mr. T.

Mr. Pattierson did acknowledge, however, that Mr. T should have noticed that the pallet with the shop-vac was damaged, and should not have attempted to use the "walkie forklift" to lift and move it. Finally, Mr. Pattierson testified that it was his view that if there was any blame to be assessed for the incident, it is attributable to the defective forklift and the

previously damaged pallet.

On the balance, I find Mr. Pattierson's evidence to be extremely credible and nothing which emerged on cross-examination by the Company diminished his evidence with respect to defects involving both the "walkie forklift" and the pallet with the shop-vac. Both Mr. Groleau and Mr. May acknowledged that there was a problem in the shop with damaged/defective pallets being recycled back into the workplace. It was clear from Mr. May's testimony that although attempts have been made to remedy the deficiencies with many of the pallets, the problems with pallets are ongoing. This is further confirmed by the copies of accident reports and safety alerts provided by the Union.

With respect to the issue of defective brakes, Mr. Groleau denied being made aware that this particular "walkie forklift" had problems with its brakes, and that in any event, it is the responsibility of employees to check equipment prior to use in order to avoid accident or injury. In his evidence, Mr. May denied ever being told by Mr. Pattierson that the "walkie forklift" in question had defective brakes, but acknowledged being aware that one of the forklifts in the bearing room had experienced problems with the brakes on one or two previous occasions, but that to the best of his knowledge, the brakes had been repaired.

The Arbitrator has no evidence to definitely confirm that the Company knew that the "walkie forklift" in question had defective brakes generally or on the day in question. If the Company knew that the forklift was defective, even Mr. May acknowledged that they would not have conducted an investigation of the incident involving Mr. T. That being said, however, it is clear that the Company was at least aware of the fact that the forklift in question had experienced problems in the past with its braking system, and although not specifically argued, it seems logical to assume that the Company has an obligation to provide functional and safe equipment to its employees.

Based on the submissions and evidence, I am satisfied that the brakes on the "walkie forklift" were not functioning at the time of the incident of July 7th, 2005 involving Mr. T. I am further satisfied that the pallet with the shop-vac was damaged prior to being lifted by the forks of the "walkie forklift". As a result of these deficiencies, Mr. T had difficultly moving the pallet with the shop-vac out of the way, resulting in the collision of this pallet, on two occasions, with a pallet of wheel bearings.

In the Arbitrator's view, the evidence and submissions presented are not sufficient for a conclusion to be reached that the collision with the pallet of wheel bearings was either wilful or intentional. That being said, however, the griever is not free of culpability and I find that he did exhibit some degree of carelessness in using the "walkie forklift" in question to pick up the pallet with the shop-vac. According to the Union, it was well known by employees in the shop that this forklift had problems with the brakes. This knowledge is all the more reason that Mr. T should have tested the forklift to determine in advance whether the braking system was fully operative, and furthermore all the more reason he should have been extra careful in attempting to move a pallet which presented challenges due to pre-existing damage. Perhaps if Mr. T had testified, he would have been able to explain why he made the decision to lift the damaged pallet with this "walkie forklift".

Under the Brown System of Discipline, an employer is entitled to consider the past conduct of an employee in determining the appropriate level of discipline. In this instance, the Company acknowledged that the quantum of discipline may have been excessive if it were not for past incidents involving Mr. T's difficulty in controlling his anger. As the Arbitrator indicated earlier in this decision, although the Employee Discipline Record does disclose some examples of incidents involving loss of temper by the griever, there does not appear to be any significant pattern of misconduct involving anger management. Mr. T is a long term employee and the incidents referenced in the Employee Discipline Record span many years. In any event, as above noted, this incident has not been found to have been the

product of wilful or intentional conduct. As a result, the past discipline history involving wilful or intentional misconduct is not particularly relevant to the determination of the appropriate quantum of discipline.

In the Arbitrator's view, some level of discipline is appropriate for what can fairly be classified as careless conduct on the part of Mr. T. The issuance of 20 demerits is, in my view, excessive. The grievance is therefore allowed in part, with an order that the discipline imposed be reduced from 20 demerits to 10 demerits.

The Arbitrator retains jurisdiction to deal with any issues regarding implementation of this Award in the (unlikely) event the parties cannot agree between themselves.

As in often the case, the issues raised in this arbitration were important and interesting. Both the Union and the Company presented thoughtfully prepared submissions, accompanied by well articulated arguments. Significant case law was also provided to the Arbitrator which was reviewed thoroughly and considered for the purpose of issuing this Award. I would like to express my sincere appreciation and thanks to both parties for their skill, competence and clarity in presenting their respective positions and arguments, all of which were of great assistance to me in making my decision.

Dated at Winnipeg, Manitoba this 29th day of November, 2007

Sidney G. Soronow
Sole Arbitrator