CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 217

Heard at Montreal, Tuesday, June 9th, 1970

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

DISPUTE:

The Brotherhood claims that Mr. H. E. Richards was improperly disciplined when on May 24, 1969 the Company issued a letter to him in connection with an accident sustained April 22,1969.

JOINT STATEMENT OF ISSUE:

On April 22, 1969 Warehouseman H. E. Richards was involved in a personal injury accident which made it necessary for him to lay off work until May 5, 1969.

Following a review of the circumstances surrounding the accident the Company concluded that it was due to carelessness on Mr. Richards' part. Accordingly the Company wrote Mr. Richards indicating to him that in future he should be more alert to obvious conditions and safe practices required to prevent injury to himself or fellow employees. The Brotherhood alleges that such warning letters are a violation of Article 24.1 of Agreement 5.1 as a formal investigation was not held. The Company contends that such letters are not discipline and that no violation of the Agreement has occurred.

FOR THE EMPLOYEES:	FOR THE COMPANY:
(SGD.) J. A. PELLETIER	(SGD.) K. L. CRUMP
EXECUTIVE VICE PRESIDENT	ASSISTANT VICE-PRESIDENT LABOUR RELATIONS

There appeared on behalf of the Company:

D. O. McGrath	System Labour Relations Officer, C.N.R. Montreal
G. A. Carra	Regional Labour Relations Officer, C.N.R. Montreal
M. Joannette	Asst. Crew Director, C.N.R. Montreal
W. Long	Labour Relations Assistant, C.N.R. Toronto

And on behalf of the Brotherhood:

J. A. Pelletier	Executive Vice President, CBRT&GW, Montreal
F. C. Johnston	Regional Vice President, CBRT&GW, Toronto
T. N. Stol	Local Chairman, Local 26, CBRT&GW, Toronto
R. Beckwith	Local Chairman, Local 327, CBRT&GW, Toronto
P. E. Jutras	Regional Vice President, CBRT&GW, Montreal
H. L. Critchley	Representative, CBRT&GW, Edmonton

AWARD OF THE ARBITRATOR

The letter complained of was dated May 20, 1969, and was addressed to the grievor from the general supervisor-outside operations. It was as follows:

> "You were involved in an accident on April 22, 1969 in which because of injury it was necessary for you to lay off work.
>
> A review of the circumstances surrounding your accident would indicate that the accident was preventable and was only caused through carelessness on your part. This is a warning letter to advise you that you must be alert to obvious conditions and the safety practices required to prevent injury to yourself or fellow employees.
>
> "If you are involved in any further preventable accidents which are decided resulted in carelessness, further discipline will have to be considered."

Upon complaint being made, that letter was revoked, and another letter was issued to supercede it. The second and third paragraphs of the letter were altered, so as to read.

> "A review of the circumstances surrounding your accident would indicate that the accident was preventable and was caused through carelessness on your part. The intent of this letter is to caution you that you must be alert to obvious conditions and the safe practices required to prevent injury to yourself or fellow employees.
>
> If you are involved in any fruther preventable accidents which are the result of your carelessness disciplinary action will have to be considered."

The second letter is the one which stands, and which is now in question. It does not state on its face that it is a "warning letter" or that "further discipline" would be considered. The real substance of the two letters is patently the same.

No issue arises in this case as to whether the grievor might properly have been subject to any form of discipline over the incident in question. There was no "investigation" of the sort contemplated by Article 24 and without such an investigation an employee may not be disciplined or discharged. Article 24.1.

There may well be situations in which the company quite properly communicates directly with an employee with respect to his work, and

in particular with respect to working methods and safety practices. In most cases, no doubt, this is done by way of on-the-spot instruction or advice given by the immediate supervisor. This would not, however, prevent the issuing of written memoranda relating to such matters. Such instructions, reminders or other sorts of advice do not in themselves constitute "discipline", although the fact of the necessity of issuing such advice unusually frequently to a particular employee is a matter which might be taken into account where a disciplinary matter does arise, just as, for example, a foreman's "always having to speak" to an employee on some matter may be established, even though each of the individual occasions on which the foreman spoke to him did not constitute the imposition of discipline.

There is, therefore, a distinction between the sort of advice which may properly be given, and the actual imposition of discipline. A "warning" or "penalty warning" or "disciplinary memorandum" or whatever it may be called, is a form of discipline. It is often used as a part of a pattern of progressive discipline, and while it involves no immediate loss of work, there can be no doubt that a "warning" does have a cumulative effect, and may realistically be said to deprive the employee of some degree of job security. lt is a serious matter, and its issuance affects recognizable and important rights of the employee. There must be proper cause for its issuance. By Article 24.1, discipline cannot be imposed without an investigation. Certainly a warning can be made the subject of a grievance.

The question in this case is simply whether the letter issued to the grievor constituted a "warning", that is, an exercise of the company's power of discipline. While the letter in its revised form purports to "caution the grievor, and raises in the last paragraph the possibility of disciplinary action, it must be my conclusion from consideration of the letter as a whole that it is in fact a form of discipline. It states that the accident in which the grievor was involved was preventable and was caused through carelessness on his part. The last paragraph of the letter is quite plainly a warning of future discipline. The matter is put in writing and copy of it was sent to the employee relations supervisor with the notation "please attach copy of warning letter on this employee's file". The letter is a reprimand to the grievor, over a matter for which, in a proper case, discipline might be imposed; and could clearly have some adverse effect on his status or rights. That is what a "warning" is, and that is what the grievor received. The disciplinary effect of the letter was not affected by the label.

The grievor was disciplined without an investigation as required by Article 24.1. This was a violation of the collective agreement, and the discipline imposed is therefore without effect.

It may be of some value to the parties to comment briefly with respect to the presentation of cases in the Canadian Railway Office of Arbitration, where a somewhat special procedure enables a great number of cases to be heard expeditiously. The procedure requires the cooperation of the parties in the preparation of joint statements of issue (where possible) and in the presentation of briefs in which the material facts are set out and arguments made. At the hearing,

these briefs are presented and supplemented or clarified where necessary. It is desirable, however, that the thrust of each party's position be set out in the brief and presented to the Arbitrator by a single spokesman. The usual order of procedure should be that the party opening presents its brief, with the appropriate supporting evidence where necessary. Its case should be fully set out at this time. The other party may then present its brief, with supporting evidence, and may at the same time put forward its contentions in answer to the brief of the opening party. In most cases, this should conclude the case of the answering party. The party opening is then entitled to a right of reply to the arguments made by the answering party, but in this reply should not go on to deal with new matters. While considerable leeway may be extended to the parties in the above procedure, it is most desirable that representations be restricted to matters material and relevant to the issue to be decided, and that points already made not be repeated.

For the reasons set out above, the grievance must be allowed. The disciplinary action taken against the grievor is set aside, and the letter should be removed from his record.

J. F. W. WEATHERILL
ARBITRATOR