CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 363

Heard at Montreal, Tuesday, June 13th, 1972

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

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

DISPUTE:

The Brotherhood claims that the Company violated Article 9 in Agreement 6.1 when it assessed ten demerit marks to Warehouseman Grade 2 - Driver Clayton M. Butt, St. John's, Newfoundland.

JOINT STATEMENT OF ISSUE:

The Company assessed Warehouseman Grade 2 - Driver C. M. Butt ten demerit marks in regard to his operation of a Company vehicle and resulting damage to Company property on December 8, 1971.

The Brotherhood demanded that the ten demerit marks be removed and this was denied by the Company.

FOR THE EMPLOYEES:	FOR THE COMPANY:
(SGD.) E. E. THOMS GENERAL CHAIRMAN	(SGD.) K. L. CRUMP ASSISTANT VICE-PRESIDENT - LABOUR RELATIONS

There appeared on behalf of the Company:

P. A. McDiarmid	System Labour Relations Officer, C.N.R., Montreal
H. Peat	Employee Relations Supervisor, C.N.R., St.John's, Nfld.
D. MacDonald	Agreements Analyst, C.N.R., Moncton, N.B.
W. F. Harris	System Driving Supervisor, C.N.R., Montreal
B. Lynch	Shed Foreman, C.N.R., St. John's, Nfld.

And on behalf of the Brotherhood:

E. E. Thoms	General Chairman, B.R.A.C., Freshwater, P.B., Nfld.

M. J. Walsh		Local Chairman, Lo.443, B.R.A.C., St.John's, Nfld.
M.	Peloquin	Admr. Asst. to lnt'l Vlce Pres., B.R.A.C., Montreal

AWARD OF THE ARBITRATOR

At the time of the incident in question, the grievor was employed as a Warehouseman 2-Driver. On December 8, 1971, he was operating unit 69111. At the time of the accident, he was backing into No.1 door of the South Side shed at St. John's when, according to his statement, he noticed that the clearance overhead was not sufficiently rolled up. He stopped the unit, and as it stopped it locked into reverse gear. When he tried to get it out of gear, it rolled back and struck the door.

If indeed there was any mechanical breakdown of the vehicle, the grievor did not follow the correct procedure, which would have been to set the brake and report to his supervisor. On the material before me, it does not appear that there was in fact any mechanical breakdown. In any event, it is obvious that the grievor's starting the vehicle while it was in reverse gear was a hazardous practice, and created a very probable risk of the sort of accident which occurred. He stated in the investigation that "it was a common occurrence to have trouble with our units and we had to find the best way out to correct the problem". As noted, it is not established that the unit was faulty, but in any event the "way out" which the grievor attempted was so obviously a risky one that it can only be described as carelessness.

At the investigation, reference was made to a number of accidents in which the grievor was involved, and which, it was said, were caused by carelessness on his part. None of these, it seems, had been the subject of disciplinary proceedings, and for them now to be held against the grievor as justifying the discipline imposed is clearly contrary to the intent of the agreement. The present case must be regarded as the first incident of improper conduct on the grievor's part. While the other accidents no doubt occurred, they cannot be attributed to the grievor's fault in the absence of disciplinary proceedings establishing such a conclusion. As to the severity of the discipline imposed, then, the case must be regarded as a case of first offence, and the assessment of 10 demerits is, in the circumstances, and by comparison with other cases, excessive. Assessment of five demerit marks would not have gone beyond the range of reasonable disciplinary responses to the situation.

The Union raised certain objections to the investigation conducted by the Company, saying that the grievor was not advised of specific charges against him; that the objections taken to the conduct of the hearing were not properly recorded, and that the grievor did not receive a fair and impartial hearing.

The Company took the position generally that the investigation contemplated by Article 9 of the collective agreement was an enquiry rather than a trial, and with that I agree. Discipline is imposed after, rather than before the investigation. The notice of

investigation given the grievor was that it was "for the purpose of investigation into your performance in the operation of Company Equipment on December 8, 1971 resulting in damage to No.1 door of the Southside Shed". There can be no doubt that the grievor understood what the investigation was about, and the possibility of discipline against him is clearly implicit in the notice. In my view, this was a sufficient statement of the "charges" against the grievor to comply with Article 9.2 of the collective agreement.

In the course of the hearing, the grievor's union representative as he was entitled to do, took objection to certain questions put by the investigating officer. In particular, when the investigating officer put to the grievor questions relating to a number of accidents said to have been caused by carelessness on the grievor's part, the union representative took objection after the second of some six accidents was referred to. The objection, as appears from what has been said above, was well taken. The investigating officer was nevertheless entitled to continue with such questions, as it seemed fit to him to do, the objection having its real effect in the proceedings before me. The Union's point with respect to this is, however, that its objection was not recorded in the transcript of the investigation at the point at which it was made, but rather after the whole series of questions had been put. Clearly the transcript is inaccurate to this extent. It would have been better had the investigating officer recorded the objection as it was made, so that the report of the investigation would accurately describe the course of events. In the circumstances of the case, however, I cannot conclude that this inaccuracy vitiates the whole investigation, or that it in fact prejudiced the Union's case in any way.

Generally, it cannot be said that the investigation was unfair. The grievor expressed his satisfaction with the manner in which it was conducted and the union representative was given the opportunity to suggest lines of questioning which he wished to have developed. It is clear that the grievor was given an opportunity to give his account of the matter, and that he did so. Thereafter, as has been noted, discipline was imposed. I have indicated my view that there was just cause for discipline, although; since the Company improper relied on an alleged record of carelessness, the discipline imposed was too severe.

For the foregoing reasons it is my award that the discipline imposed on the grievor be reduced to the assessment of five demerit marks.

J. F. W. WEATHERILL
ARBITRATOR