CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1326

Heard at Montreal, Thursday, January 10, 1985

Concerning

CP EXPRESS AND TRANSPORT

and

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

EX PARTE

DISPUTE:

The assessing of twenty-five demerits to employee D. Bolduc, Quebec City, Quebec, which resulted in his dismissal.

BROTHERHOOD'S STATEMENT OF ISSUE:

Employee D. Bolduc was assessed twenty-five demerits for exceeding the speed limit and unauthorized rest stop.

The Union maintains the assessing of the demerits was not warranted and requested they be expunged from his record, and he be reinstated and reimbursed all monies lost while he was held out of service.

The Company refused the Union's request.

FOR THE BROTHERHOOD:

(SGD.) J. J. BOYCE
General Chairman, System Board
of Adjustment No. 517.

There appeared on behalf of the Company:

Guy Gagnon	- Counsel, Montreal
D. R. Smith	- Vice-President, Human Resources, CPE&T, Toronto
Jean Deschene	- Driver Trainer - Toronto
Jean Gladu	- Area Terminal Manager, Quebec
Frank Pompizzi	- Claims Agent, CPR, Montreal

And on behalf of the Brotherhood:

Normand Beaulieu	- Counsel, Montreal
J. J. Boyce	- General Chairman, BRAC, Toronto
M. Gauthier	- Vice General Chairman, BRAC, Toronto
D. Bolduc	
J. G. Boivin	- Witness, Montreal

AWARD OF THE ARBITRATOR

Because of the interrelationship between the facts and issues that were raised with respect to both grievances presented on Mr. Bolduc's behalf I have consolidated both cases in the one award.

There is no dispute that the grievor during the cours of his regular run between Quebec City and Montreal on May 7, 1983 was involved in an accident on the return leg of his trip at the first intersection off the exit ramp leading to the Laurier Station, Quebec City. It is also common ground that the grievor ran through a flashing red light at what was described as a "blind" intersection where he collided with another vehicle thereby causing the death of the driver. The admitted evidence also showed that the grievor was in the process of making "an unauthorized stop" to take rest at the Laurier Station. The tachometer reading shows that, prior to the collision, no apparent effort was attempted by Mr. Bolduc to bring his vehicle to a stop at the blind intersection.

The Accident Committee's Report dated August 24, 1983., held unanimously that the accident was "preventable" and recommended that the grievor be penalized 40 demerit marks for his responsibility "because he did not try to slow down in a dangerous zone and he has been careless with the company equipment". It is important to stress that the union nominee on the Accident Committee concurred in the report's conclusions. In this regard, the Accident Committee did not feel constrained to follow the established guideline of twenty demerit marks for accidents involving a collision of vehicles at a street intersection. Nor apparently was the committee impressed with the grievor's excuse that his vehicle's brakes were not properly functioning prior to impact.

The company, because of its understanding With the trade union, implemented the recommendation of the Accident Committee. On August 24, 1983, the grievor was penalized 40 demerit marks for:

> "Manque de Precaution suffisante causant
> un accident de camion a Laurier Station
> le 7 mai, 1983."

I am satisfied that nothing was adduced in the trade union's brief or by its counsel during the course of his submissions that would warrant any alteration of the 40 demerit mark pcnalty assessed in the company's notice of discipline. By the same token, whether or not I agree with the company's concern that this penalty, in all the circumstances, represented "a conservative" or moderate disciplinary result is of no consequence. At arbitration, I am bound in the exercise of my jurisdiction to the penalty imposed by the company that apparently was based on the recommendation contained in the Accident Committee's report.

The second offence or offences for which the grievor was assessed twenty-five demerit marks (thereby resulting in his discharge) pertained to several infractions allegedly committed during the same run of May 7, 1983, in violation of the company's Vehicleman's Instruction Manual. For each of these alleged violations the employer submitted that Mr. Bolduc could have been "subject to

dismissal". In this regard, the disciplinary notice dated August 31, 1983, advises as follows:

> "Exces de vitesse et avoir laisse
> 1a route assigne pour des arrets de
> repos non autorises le 7 mai 1983."

The grievor's statement taken during the course of his disciplinary interview on August 23, 1983, as well as the informa|tion contained on the tachometer card established that during the course of the grievor's run on May 7, 1983, inclusive of the period immediately prior to the accident, the grievor invariably operated his vehicle in excess of the speed limit imposed by the company as well as the speed limits required by the Province's Highway Traffic Act. Moreover, the admitted evidence also showed that the grievor made three unauthorized stops (and was about to take a fourth prior to the accident) during the course of this run.

The real issue raised before me is not whether these alleged infractions per se merit twenty-five demerit marks. Rather, the principal question that was argued is whether the company, under the guise of the said infractions, has sought to impose a double penalty for the grievor's responsibility for the accident. Or, more precisely ha the company, once it imposed a penalty of 40 demerit marks, abused its disciplinary prerogative in securing the grievor's discharge for the same offence?

Both counsel recognized that the defence of "double jeopardy" applies just as cogently to the arbitration process as is the case in other civil and criminal matters. For that reason, it is unnecessary for me to engage in an analysis of the rather helpful arbitral jurisprudence contained in the trade union's brief. Suffice it to say, if the evidence shows that the employer has sought to abuse its prerogative, as alleged, the twenty-five demerit marks assessed for the grievor's purported violation of the provisions of the Vehicleman's Instruction Manual would have to be nullified. If that conclusion is made, it would also result in the grievor's reinstatement.

The company's principal argument in answer to the trade union's defence of "double jeopardy" rests on the premise that the charges of exceeding the speed limit and of making of unauthorized stops are clearly separate and severable offences from the allegations that pertained to the grievor's responsibility for the accident. The latter charge should be perceived as being confined to the grievor's actions in failing to take proper care of his vehicle's operation immediately prior to the accident's occurrence. To all intents and purposes this specific allegation was restricted to the grievor's "gross negligence" in running the flashing red light at a blind intersection where the collision occurred. Any infraction that preceded the immediate cause of the accident, particularly those allegedly giving rise to the second grievance has absolutely no relevance to the allegations that prccipitated the first grievance. Accordingly, it was argued that the company properly imposed the discipline of twenty-five demerit marks for the grievor's admitted misconduct that transpired outside the events immediately precipitating the accident.

With much respect to the able and persuasive argument advanced by the company's counsel, I find no merit in the employer's position. The first grievance clearly indicated that the grievor was disciplined for his failure to exercise sufficient care in the handling of his vehicle thereby causing the accidcnt of May 7, 1983. The notice of discipline constituted a general allegation that was sufficiently wide in scope to encompass the grievor's overall demeanour in the operation of his vehicle during the course of his entire run. In this regard, I might add, that allegation might specifically include the particular violations of the required speed limit as well as the unauthorized rest stops. In my view, as expressed in the first notice of discipline, the grievor's responsibility for the accident encompassed a continuum of events of improper and reckless conduct throughout the entire run that climaxed in the tragedy that was described in evidence.

This conclusion is not only reflected in the description of the events leading to the accident as discussed in the company's own, brief but is supported in the company's correspondence that both preceded and followed the employer's decision to assess the "conservative" penalty of forty demerit marks. For example, in the company's brief both the grievor's operation of his vehicle at the improper speed limit prior to his running the flashing red light at the intersection leading to the Laurier Station as well as his making an unauthorized stop are both stressed. Moreover, the company's correspondence indicated that at all material times management's principal focus related to the task of ascribing to the grievor appropriate responsibility for the accident's cause. This would explain why the notice of the disciplinary interview sent to the grievor and the questions asked during the course of that interview revolved around the grievor's general state during his entire run on the day in question. For example, why else is Mr. Bolduc questioned about whether he had sufficient sleep the day before? Moreover, as the trade union's counsel pointed out even after the interview (and after discipline had already been exacted for the two alleged offences) the company representative (Mr. Martel) continued in his correspondence with the trade union to link the grievor's excess speed limit and his attempted unauthorized stop at the Laurier Station as direct causes of the accident.

In the final analysis, it is of some relevance to appreciate why the employer would go to the trouble of securing the grievor's discharge on a piecemeal basis where, technically, it could have fired him (perhaps justly) for the one incident. It is important to stress that the Accident Committee's report is dated August 24, 1983. The initial disciplinary interviews took place and were signed the day before on August 23, 1983. The company's own brief exhibited management's disappointment with the Accident Committee's recommended assessment of the forty demerit mark penalty for the grievor's responsibility for the accident. On the very day of the receipt of the Accident Committee's report however the company was then constrained, because of its under- standing with the trade union, to implement the recommended penalty. Accordingly, on August 26, 1983, the company then amended (on the pretext that a mistake had been made) the title of the second disciplinary interview to indicate

"Exces de vitesse, etc." from "Un accident survenu, etc.". In other words, I am quite satisfied that the second disciplinary penalty of twenty-five demerit marks was precipitated because of the straight-jacket in which the company found itself because of its policy commitment to the trade union to adhere to the disciplinary recommendation of the Accident Committee. And, through the camouflage of allegations pertaining to the company's Vehicleman's Instruction Manual the employer then sought to overcome that constraint in order to justify the grievor's discharge for what in essence was his responsibility for the accident. Because the company had hitherto assessed the grievor forty demerit marks for that infraction, I am of the view it was precluded from amending thereafter the discipline it had originally imposed.

As a result the company's decision to impose forty demerit marks for the grievor's responsibility for the accident is sustained. For the reasons alleged the added discipline of twenty-five demerit marks for the same infraction is to be removed from the grievor's personal record. Accordingly, the grievor is to be reinstated effective the date oi' discharge with full compensation and other benefits. I shall remain seized in the interim.

DAVID H. KATES
ARBITRATOR.