

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1358

Heard at Montreal Thursday, May 16, 1985

Concerning

CP EXPRESS AND TRANSPORT

and

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

DISPUTE:

The assessing of five demerits to employee Charles Lacombe, Quebec City, Quebec.

JOINT STATEMENT OF ISSUE:

December 7, 1983, employee Charles Lacombe was assessed five demerits for insufficient precaution resulting in a personal injury.

The Brotherhood grieved the assessing of punishment for personal injury and requested the demerits be expunged from his record.

The Company rejected the union's request.

FOR THE BROTHERHOOD:

(SGD.) J. J. BOYCE
General Chairman, System Board #517

FOR THE COMPANY:

(SGD.) N. W. FOSBERY
Director, Labour
Relations

There appeared on behalf of the Company:

N. W. Fosbery - Director, Labour Relations, CPE&T, Toronto

And on behalf of the Brotherhood:

J. J. Boyce - General Chairman, BRAC, Don Mills
G. Moore - Vice-General Chairman, BRAC, Moose Jaw

AWARD OF THE ARBITRATOR

The grievor, Mr. Charles Lacombe, was assessed five demerit marks for his alleged negligence in leaving the rolled rear door of his truck at the half way position thereby causing him personal injury when the wind blew the door down.

The report of the Personal Injury Committee (a three person body with trade union representation) unanimously determined that the personal accident was avoidable and recommended the imposition of five demerit marks.

The Company obviously implemented the Committee's recommendation.

The parties are agreed that the company did not conduct "a fair and impartial investigation" prior to the imposition of discipline as is mandatorily required under Article 8.1 of the collective agreement.

Apparently the parties understanding is that they will abide by the findings of a Vehicle Accident Committee's recommendations where an employee is involved in a vehicle accident. In those situations, in the event the company applies the Vehicle Accident Committee's recommendation with respect to discipline; the trade union has agreed to waive the exigencies of Article 8.1.

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The trade union insists that its understanding with the company did not extend to personal accidents committed by an employee during the course of his shift. In those situations the trade union indicated that the company is required to follow the regular procedure, irrespective of the Personal Injury Committee's recommendations, in the event discipline is assessed. There is no dispute in this case that a trade union representative participated in the deliberations of the Personal Injury Committee and concurred in its recommendations.

The principal issue is whether the company's assessment of five demerit marks should be vitiated because it omitted to invoke an investigation under Article 8.1.

It is important that I stress that no amendment was made to the collective agreement altering the mandatory language of Article 8.1. And, indeed, I am proscribed by the collective agreement from making any such amendment. Accordingly, the only remedy available to the company to prevent the trade union from relying upon the strict language of the collective agreement is the doctrine of "promissory estoppel". And in numerous instances the company has provided documentary evidence where the trade union has participated in and presumably abided by the implemented recommendations of the Vehicle Accident Committee. Absent from the documentary evidence is there any precedent indicating like trade union approval to abide by the results of the Personal Injury Committee.

Although I cannot apply the estoppel principle in the circumstances herein because of an absence of a past practice that would indicate the company was lulled into a false notion that the trade union would not rely on Article 8.1. I am still concerned about the trade union's participation and indeed acquiescence in the deliberations of the Personal Injury Committee. In this regard, I am satisfied that if the trade union intended to protest the competence of the Personal Injury Committee to determine the propriety of the grievor's actions and the recommendations that might flow from its findings then surely its representative should have protested. Instead that representative participated in the Committee's deliberations and concurred in its findings. In short, I am satisfied that the trade

union waived its entitlement to rely on the investigation procedure provided under Article 8.1.

Although I am not bound by the Committee's findings at arbitration I have had no evidence adduced before me to vary the conclusion that the grievor's handling of the rolled back door of his truck was negligent and therefore his subsequent injury was avoidable.

Having made this finding I am not satisfied that any disciplinary demerit marks should have been assessed the grievor. The grievor made a mistake, albeit it was preventable, and has suffered personal injury as a consequence. I would have placed a written reprimand on the grievor's file for the infraction.

Accordingly, the employer's penalty of five demerit marks is to be expunged from the grrevor's record and replaced with a written reprimand.

DAVID H. KATES,
ARBITRATOR.