CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1396

Heard at Montreal, Thursday, July 11, 1985
Concerning

CP EXPRESS AND TRANSPORT LIMITED

and

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

EX PARTE

DISPUTE:

The assessing of fifteen demerits to employee W. Kiernan, Toronto Terminal, which resulted in his dismissal.

BROTHERHOOD'S STATEMENT OF ISSUE:

September 19, 1983, employee W. Kiernan was assessed fifteen demerits for misjudging clearance while driving his vehicle.

The Union requested the fifteen demerits be expunged from his record.

The Company refused to adhere to 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:

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

And on behalf of the Brotherhood:

J. J. Boyce - General Chairman, BRAC, Toronto
J. Crabb - General Secretary-Tr. BRAC, Toronto
G. Moore - Vice-General Chairman, BRAC, Moose Jaw
M. Gauthier - Vice-General Chairman, BRAC, Montreal
W. Kiernan - Grievor
D. Wray - Counsel, Toronto

AWARD OF THE ARBITRATOR

The sole issue in this case is whether the employer waived the mandatory time limits contained in the collective agreement for processing the grievor's grievance to the Step 3 level of the grievance procedure and ultimately to arbitration.

It is of some importance to stress that the 15 demerit marks assessed the grievor for his alleged infraction resulted in his dismissal. As a result the trade union representatives at the hearing emphasized that they were specially concerned about their adhering to those time limits.

Indeed, the evidence demonstrated that the trade union asked for and received an extension of time limits for processing the grievor's grievance to the third step of the grievance procedure until November 25, 1983.

As that deadline approached Mr. J. Crabb, General Secretary-Treasurer, made several attempts by telephone to obtain from Mr. E. G. Schw?rz, Regional Manager, Toronto, a second extension. Because Mr. Schwarz could not be reached Mr. Crabb telephoned Mr. N. W. Fosbery, Director Labour Relations on November 24, 1983. Mr. Crabb was left with the impression that Mr. Fosbery waived the time limit in that he advised that "he could see no problem" with respect to that difficulty.

Mr. Fosbery stated at the hearing that he communicated the message that he could see no problem but also indicated that he had better clear up the problem with Mr. Schwarz. Indeed, Mr. Fosbery stressed that h would have no authority to extend a time limit that was the appropriate responsiblity of the company officer at the Step 3 level.

Following this telephone conversation with Mr. Fosbery, the trade union was made aware of the company's position with respect to the requirement for strict adherence to the time limits in Mr. Fosbery's response of December 13, 1983, to a trade union letter dated December 8, 1983:

> "Mr. Schwarz granted you an extension of time limits to November 25, 1983 as outlined in his letter of November 8, 1983.
>
> Your reply is outside time limits and must therefore be declined on that basis."

Apparently nothing of substance occurred until July 1984 with respect to the grievor's grievance except for exchanges of correspondence between the parties on the time limit problem. At that time the parties attempted to achieve a settlement of the grievor's dispute but their negotiations proved unsuccessful. Ultimately, Mr. J. J. Boyce, General Chairman, wrote Mr. Fosbery on January 28, 1985, advising him of the trade union's lntention to refer the grievance to CROA, and he enclosed a joint statement of issue for that purpose. On May 22, 1985, the grievance was referred Ex Parte to CROA.

In resolving the arbitrability issue I do not have to determine the issue of whether Mr. Fosbery can be held accountable for the waiver of the time limit at the Step 3 level. Even if I were to assume tha

an extension of the time limit at that level was secured on the basis of Mr. Fosbery's representation surely the time limits thereafter (however one may elect to calculate its duration) for referring that grievance to CROA was violated. Approximately two years after Mr. Fosbery's alleged extension on November 24, 1983 the grievance was finally referred to CROA on May 28, 1985.

Nor is there any basis for the advancement of an estoppel argument in order to overcome the mandatory time limits contained in the collective agreement for processing the grievance to CROA. Quite clearly, as of December 13, 1983 Mr. Fosbery made it perfectly clear that the company, owing to the fact' that Mr. Kiernan's grievance pertained to a dismissal, was going to strictly apply the time limits contained in the collective agreement. And, what is more relevant the trade union, for like reasons, was well aware of the company's intention to adhere to these time limits.That concern is why the trade union asked and received an initial extension of the time limit at the Step 3 level and requested a further extension thereafter. In other words, there has not been established before me (irrespective of how the company has treated other grievances) that a representation was made, express or otherwise, that would give rise to any illusion on the trade union's part that the company intended to apply strictly the mandatory time limits of the collective agreement.

Accordingly, since the mandatory time limit for processing the grievor's grievance to arbitration was not complied with I have concluded that the grievance is not arbitrable.

DAVID K. KATES
ARBITRATOR.