CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1669

Heard at Montreal Wednesday, July 15, 1987

Concerning

CP EXPRESS AND TRANSPORT

and

BROTHERHOOD OF RAILWAY, STEAMSHIP & AIRLINE CLERKS

DISPUTE:

The issuing of 10 demerits each respectively to Port Coquitlam linehaul employees, A. Campbell and B. Hinchberger for failure to make mandatory brake check on October 7th, 1986 at the top of Mine Hill on Provincial Highway No. 3.

JOINT STATEMENT OF ISSUE:

The Company to date have stated that these employees through negligence failed to stop at the mandatory brake check station and fabricated the story that a third party was following their vehicles that day.

The Brotherhood maintains that as indicated in these employees investigation statements that there was a pick-up truck for a number of miles following them. These employees correctly assumed that there existed a possibility of 'hi-jacking' and because there was no Police on this stretch of road felt it necessary to drive through this brake check station for their own safety as well as the protection of Company property.

The Company to date have declined this scenario as plausible and therefore have not rescinded the issued discipline.

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD) M. FLYNN	(SGD) B.D. NEILL
FOR: General Chairman	Director, Labour Relations

There appeared on behalf of the Company:

B.F. Weinert	- Manager Labour Relations, CPET, Willowdale
D. Bennett	- Labour Relations Officer, Mississauga

And on behalf of the Brotherhood:

J.J. Crabb	- General Secretary Treasurer, Toronto
J. Bechtel	- Vice General Chairman, Toronto
Lemire	- Local Chairman, Observer

AWARD OF THE ARBITRATOR

It is common ground that the grievors did fail to stop to make a mandatory brake check before descending a steep hill on provincial highway number 3 at Mine Hill, British Columbia on October 7, 1986. Their statements establish that it was approximately 2 A.M., they were in an isolated location and both of their trucks had been followed mysteriously for some time by a silver coloured pick-up truck which was unfamiliar to them. They became concerned because the truck appeared to slow down when they did, rather than pass them, causing them to fear that its occupants might be intending a hijacking. They state that for that reason they communicated by radio, agreeing to proceed through the brake check point.

It appears that the truck's movements at this stage were observed by Mr. Barham, the Company's regional safety manager, who subsequently reported the tractor units' failure to stop. The Arbitrator is, however, not in possession of any statement on the part of the Company's Officer', nor did the grievors or the Union have any opportunity to question him about the circumstances he observed. For reasons best known to itself, the Company did not include the taking of any statement, oral or written, from Mr. Barham as part of its formal investigation of the grievor, thereby foreclosing his input into the record for the purposes of this proceeding. The Union was therefore unable to know precisely what information had been provided by the Company's Officer and, in particular, was deprived of the ability to determine whether, as it believes, the driver of the suspicious pick-up truck was in fact Mr. Barham. If that were so he could then presumably corroborate their account of what happened.

As this is a matter of discipline, the burden of proof is upon the Company. While it is established that the grievors did violate a rule, they have provided a plausible excuse for why they did so. It appears to the Arbitrator that it is within the capacity of the Company to rebut that explanation by producing contrary evidence, if it is available, from the Officer who witnessed the event, and whose initial report gave rise to the investigation. Given the Company's failure to do so, I am compelled to draw inferences adverse to the employer, and to accept the account of events put forward by the grievors. For these reasons the grievance must be allowed. The 10 demerit marks assessed against Mr. Campbell and Mr. Hinchberger shall be removed from their records forthwith.

MICHEL G. PICHER
ARBITRATOR