CANADIAN RAILWAY OFFICE OF ARBITRATION

CANSE NO. 1682

Heard at Montreal, Tuesday, September 8, 1987

Concerning

CANADIAN PACIFIC EXPRESS LTD.

and

THE BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS

DISPUTE:

Mr. Jean-Pierre Levac, a trucker employed by CANPAR in Ville St. Laurent, was twice assessed 15 demerit marks for two accidents that occurred on October 7, 1982.

Moreover, Mr. Levac was dismissed on November 3, 1982, for accumulation of 60 demerit marks.

JOINT STATEMENT OF ISSUE:

The employee contends that:

1. The Company did not respect Articles 6.1, 6.4 and 6.5 of the collective agreement in assessing the disciplinary penalty.
2. The Company did not respect the procedure provided for assessing demerit marks:
   a) No investigation was held before assessment of the demerit marks;
   b) Mr. Levac never received notification of the demerit marks debited to his record for the second accident that occurred on October 7, 1982.
3. The Company did not consider the circumstances before assessing the demerit marks for the accidents of october 7, 1982.
4. The Company had no right to assess two penalties for waht amounted to the same accident.
5. The Company did not respect the procedure provided in the collective agreement before dismissing the employee, since no investigation was held.
6. The Company did not consider the circumstances before assessing the demerit marks.
7. Supposing that Mr. Levac has accumulated 60 demerit marks (though he contest this):
   a) Mr. Levac contests the assessment of 15 demerit marks for the accidents that occurred on October 7, 1982;
   b) If the Arbitrator upholds the Company's decision to assess 30 demerit marks for the two accidents of october 7, 1982, then Mr. Levac considers the measure to be too harsh, given the circumstances;
   c) The Arbitrator is not bound by the employer's decision to dismiss Mr. Levac after he had accumulated 60 demerit marks, as the Brown System is not part of the collective agreement;

d) If the Arbitrator does feel bound by the Brown System, he should award 10 merit marks to Mr. Levac, for not having had any accidents for six months prior to November 3, 1982, the date of his dismissal.

8. Mr. Levac asks to be paid the wages he has lost since November 3, 1982, and to be reinstated retroactively with all rights and benefits.

The Company rejects the employee's claims and refuses to compensate or reinstate him. The Company adds that the Arbitrator does not have jurisdiction to hear the matter raised in point 7 d above.

This arbitration will be conducted in accordance with the Canada Labour Relations Board decision handed down March 27, 1986, a copy of which is attached.

FOR THE COMPANY:	FOR THE EMPLOYEE:
(sgd.) WENDLANDT, PARE	(Sgd) LAMOUREUX, MORIN, LAMOUREUX
SOLICITORS FOR THE COMPANY	SOLICITORS FOR THE EMPLOYEE

There appeared on behalf of the Company:

G. Despars	- Solicitor, CP Ltd.
B. D. Neill	- Director, Labour Relations, CP Trucks, Toronto
J. Crosby	- Linehaul Supervisor, CANPAR
F. Dubuc	- Constable, Investigation Department, CP Rail
J. Dipiano	- District Manager, CANPAR
J. Taylor	- Area Manager, CANPAR

And on behalf of the Employee:

J. Lamoureux	- Solicitor for the Employee, Montreal
J. P. Levac	- Grievor
C. Newman	- Witness
M. Gauthier	- Vice General Chairman, Montreal

AWARD OF THE ARBITRATOR

This grievance has been filed in accordance with a decision handed down by the Canada Labour Relations Board (File 745-1946, Decision No. 565, handed down March 27, 1986). The issue requiring resolution is Mr. Levac's dismissal. Referral to arbitration was ordered by the Board in the following terms:

> The Board therefore orders the case of Mr. Levac's dismissal and the various disciplinary measures taken against him in October and November 1982, save the demerit marks assessed to his record for the accident of october 12 and the marks withdrawn by the meployer, to be referred to arbitration. (CP translation)

The evidence shows that Mr. levac was dismissed for having accumulated too many demerit marks, including 25 demerit marks for two accidents that occurred on October 7, 1982.

The employee's solicitor claims that the investigation procedure

followed by the Company did not respect the requirements set out in Article 6 of the collective agreement, which stiplulates:

> 6.1 An employee shall not be disciplined or dismissed until after a fair and impartial investigation has been held and the employee's responsibility is established. An employee may be held out of service for such investigation for a period of not more than 5 working days and he will be notified in writing of the charges against him.
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> 6.2 When an investigation is to be held, each employee whose presence is required will be notified of the time, place and subject matter of the investigation.
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> 6.3 An employee may be accompanied by a fellow employee or accredited representative of the union to assist him at the investigation.
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> 6.4 An employee is entitled to be present during the examination of any witness whose testimony may have a bearing on his responsibility, or to read the evidence of such witness, and offer rebuttal thereto.
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> 6.5 An employee shall be given a copy of his statement and a transcript of evidence taken at the investigation or, on the appeal, shall be furnished on request to the employee or his representative.

The Arbitrator cannot uphold this aspect of the submission made by the employee's solicitor. The evidence shows that for a good number of years now, with the support of the bargaining agent, a specific procedure has been observed in assessing demerit marks following an accident. The employee is asked to submit a written report of the circumstances surrounding the accident. The employee's report is examined by a joint committee made up of both Company and union representatives. The committee's recommendations are submitted to the employer for a final decision, which is always subject to the employee's right to file a grievance against the disciplinary measure taken. This procedure has long been accepted as consistent with the disciplinary procedure provided uner Article 6. (See the previous decision handed down by this office, in particular award CROA 1358).

In the case at hand, the facts about the two accidents were taken entirely, and without contradiction, from the written report that Mr. Levac submitted in accordance with the accepted procedure. Thus, there is no question of contracidtory evidence being presented by other witnesses in the absence of the employee, and the Arbitrator cannot find any grounds for stating that the employee was denied his right to a "fair and impartial" investigation, as set out in Article 6.1. It must also be pointed out that the grievor, who had already been investigated on a number of previous occasions, ahd never asked to be present in person at a meeting of the joint committee, nor did he ask to be present at the investigations into the accidents of october 7, 1982, before discipline was assessed. Under these circumstances, he has no grounds now for complaining about the procedure.

The Arbitrator is also satisfied that Mr. Levac, who signed a notice to this effect, was fully aware of the fact that the two accidents were being treated separately as regards discipline. His solicitor's claim that he is victim of a surprise or unfair measure, insofar as a double penalty was assessed for a single offence, therefore has no grounding in the facts.

The Arbitrator's jurisdiction with respect to the validity of the discipline, including the dismissal, assessed against Mr. Levac, is defined under Article 157b (sic) of the Canada Labour Code, which reads as follows:

> An Arbitrator or arbitration board:
>
> d) where
> i) he or it determines that an employee has been discharged or disciplined by an employer for cause, and
> ii) the collective agreement does not contain a specific penalty for the infraction that is the subject of the arbitration,

The evidence shows that Mr. Levac was hired as a linehaul truck driver. After a short layoff in May 1982, he was called back to work in a different position, assigned most of the time to "shunting" in a new warehouse of the Company where he was less familiar with the work. It was here that he was involved in a series of minor accidents, three of which occurred within the space of a month, including the two accidents of October 7, 1982. Although this does not excuse the grievor's conduct completely (his disciplinary record already leaving much to be desired), the Arbitrator sees in these circumstances grounds that justify assessing a lesser penalty than dismissal, though still relatively severe, for the two accidents of October 7. I therefore judge that the employer had sufficient reason to assess serious disciplinary measures but tht in this case a reduced penalty is warranted.

For the above reasons, the Arbitrator orders the Company to reinstate Mr. Levac in his position, without compensation, but without loss of seniority, with a total of 50 demerit marks against his record. This grievance shall remain before me for resolution of any misunderstanding that might arise in interpreting or implementing this decision.

MICHEL G. PICHER
ARBITRATOR