

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1781

Heard at Montreal, Wednesday, May 11, 1988

Concerning

CANADIAN PARCEL DELIVERY
(CP EXPRESS & TRANSPORT)

And

TRANSPORTATION COMMUNICATIONS UNION

DISPUTE:

The assessment of 19 demerits to employee G. Cormier of Moncton, New Brunswick, for unsecured vehicle, which resulted in his dismissal.

JOINT STATEMENT OF ISSUE:

Employee Cormier was making a delivery at the Centreville Mall, Shediac, New Brunswick, on August 11, 1987. Regional Manager Kendrick and Terminal Manager Killam, who had been following Cormier in his deliveries, approached his truck while he was in one of the stores. They found a window, on the driver's side of the truck, some distance down from the top. An investigation was held on the incident.

The Union contends that an unfair investigation was held as the statements of Mr. Kendrick and Mr. Killam were false. Their statements, that they were inside the truck while Mr. Cormier was away, were challenged at the investigation and the challenge was not denied. The Union also contends that all doors of the truck were locked as was recorded at the investigation and that only one window was not completely closed.

The Company contends that the statements used in the investigation are correct, however the argument is irrelevant as the vehicle was not secured, a fact admitted by the employee.

The relief requested is that the demerits be removed from the employee's record and that he be reinstated without any loss of seniority or benefits.

FOR THE UNION:

(Sgd) J. J. BOYCE
General Chairman
System Board of Adjustment 517

FOR THE COMPANY:

(Sgd) B. D. NEILL
Director,
Labour Relations

There appeared on behalf of the Company:

P. Thorup - Counsel, Toronto

D. Bennett	- Labour Relations Officer, CanPar, Toronto
P. Kendrick	- Regional Manager, CanPar, Atlantic, Witness
L. Killam	- Terminal Manager, Moncton, CanPar Witness

And on behalf of the Union:

N. Austin	- Counsel, Toronto
J. J. Boyce	- General Chairman, Toronto
M. Gauthier	- General Chairman, Montreal
G. Cormier	- Grievor

AWARD OF THE ARBITRATOR

It is not disputed that Mr. Cormier did leave his vehicle unsecured while making a delivery at the Centreville Mall in Shediac, N.B. on August 11, 1987. It is common ground that it is the obligation of an employee to ensure that his or her delivery vehicle is fully secured while making a delivery. On the occasion in question Mr. Cormier left the window on the driver's side of his truck open, thereby allowing access to the inside of the vehicle in his absence. As his van contained parcels for delivery, his error obviously imperiled the security of property belonging to the Company's clients. Standing alone, that is a serious infraction which would merit a corresponding degree of discipline. Previously, in November of 1986 the grievor also received ten demerit points for having left his vehicle unsecured. In the Arbitrator's view the recidivism reflected by the repetition of a similar infraction within one year gave the Company legitimate grounds for concern. I am satisfied that, in these circumstances the imposition of nineteen demerits was justified.

The Union further alleges that the grievor was denied a fair and impartial investigation within the meaning of Article 6.1 of the Collective Agreement which was in effect at the time. The sole basis for the Union's objection is that there was some apparent controversy over whether Supervisors Kendrick and Killam immediately entered the grievor's van when they discovered it in an unsecured state at the Centreville Mall. That issue arose because the written statement filed by Mr. Kendrick on August 11, 1987 suggested that while the grievor was still absent he and Mr. Killam entered the vehicle and awaited his return. The grievor's recollection is that the two supervisors were standing outside the van when he came back from his delivery. He relates that Mr. Kendrick then asked him to open the passenger door to allow him to enter the van, which he did.

The Union stresses that the grievor's account of the facts respecting the actions of Mr. Killam and Mr. Kendrick differs from the report filed by Mr. Kendrick which suggests that both he and Mr. Killam entered the van before the grievor returned. Mr. Killam conducted the investigation. Counsel for the Union argues that because differing accounts of Mr. Killam's actions were put forward by the grievor and Mr. Kendrick, the conditions of a fair and impartial investigation were not met.

A previous decision issuing from this Office has indicated that the requirement of a fair and impartial investigation prior to the imposition of discipline may not be met when the investigation is conducted by a supervisory officer whose own report gave rise to the investigation and contradicts the statement of the employee under investigation as well as that of other material witnesses. In C.R.O.A. Case No. 1720 it was alleged by a trainmaster that a locomotive engineer reported for duty under the influence of alcohol, in violation of U.C.O.R. Rule 'G'. The only evidence against the engineer was a narrative report filed by the trainmaster. The trainmaster then presided at a portion of the investigation which involved the examination of employees other than the grievor, with respect to their assessment of his condition. In that circumstance the Arbitrator made the following observation:

Apart from the merits of the case, the Arbitrator must also express concern with the manner with which the investigation was conducted. The investigatory hearing consisted of the examination of the grievor as well as a number of other employees. The chief, and indeed only, evidence against Engineer Primeau was in the form of a narrative report submitted by Trainmaster Iley. The record reveals, however, that the examination of all of the employees, with the exception of the grievor, was conducted by Mr. Iley himself. I have substantial difficulty appreciating how Mr. Iley could cast himself in the role of a person charged with impartially evaluating the statements of the employees, given that the validity of his own personal report was the very subject of the investigation. It is difficult for the Arbitrator to understand how that manner of proceeding can be seen to be consistent with the requirement for "a fair and impartial hearing" as a condition precedent to the discipline of a Locomotive Engineer mandated by Article 86.1 of the Collective Agreement. If it was necessary to so conclude, the grievance would succeed on this ground alone.

The foregoing passage reflects nothing more than the common sense proposition that a supervisory officer who is cast in the role of a prosecuting policeman or witness cannot subsequently assume the role of judge in the ensuing disciplinary investigation, if the investigation procedure is to meet the most fundamental of standards of fairness and impartiality. In the Arbitrator's view, however, there is an important distinction between the facts in C.R.O.A. 1720 and the instant case. In the case at hand the question to be determined through the Company's investigation was whether the grievor left his delivery van unsecured. The fact that the van was left unsecured was not denied by Mr. Cormier, and the imposition of demerits ensued. The issue raised by the Union is whether the difference of opinion between the grievor and the two supervisors respecting which of them entered the van and at what time abrogates the grievor's right to a fair and impartial investigation.

In the Arbitrator's view it does not. Given the grievor's admission that the vehicle was left unsecured the question of whether the supervisors entered the van before or after his return is immaterial to the purpose of the investigation and the discipline that resulted.

It is trite to say that in the recall of the interaction of human beings memories may differ. The substantive rights of employees and employers alike should not be overridden because of a disagreement on factual matters that are not probative or even pertinent to the merits of their dispute.

In the instant case there was no conflict between Mr. Killam and the grievor on the sole question which was the focus of the investigation, namely whether Mr. Cormier left his truck in an unsecured state so as to justify the imposition of discipline. Had there been a denial by the grievor at the investigation that his window was in fact left open, a very different conclusion might obtain. In that circumstance a fair and impartial investigation could in all likelihood only be achieved if the conduct of the investigation was immediately handed over to a Company officer who was not himself or herself a witness to the event. In this case, however, no such conflict was present. The Arbitrator must therefore conclude that the grievor was not denied a fair and impartial investigation within the meaning of Article 6.1 of the Collective Agreement.

For the foregoing reasons the grievance must be dismissed.

May 13, 1988

(SGD) MICHEL G. PICHER
ARBITRATOR