CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1864

Heard at Montreal, Thursday, 15 December 1988

Concerning

CANADIAN PARCEL DELIVERY
(CP EXPRESS AND TRANSPORT)

And

TRANSPORTATION COMMUNICATIONS UNION

DISPUTE:

The issuance of a total of 59 demerits by the Company from November 4th, 1987 through April 27th, 1988 (nine separate discipline issuances) which culminated on April 27th in the Company dismissing Vancouver driver-rep, D. Crawford for failure to maintain "service standard".

JOINT STATEMENT OF ISSUE:

The Union processed this grievance immediately to Step 3 requesting that this employee be returned to service and to be given assistance or alternatively another route.

The Union maintains that the "service standards" are arbitrarily imposed on the Company's part and consideration was never given to the employee for the variables encountered when performing his work.

The Union maintains that the productivity standards and service standards imposed on the employees by the Company are arbitrary and inequitable.

To date the Company has declined the Union's request.

FOR THE UNION:	FOR THE COMPANY:
(SGD) M. W. FLYNN for: General Chairman System Board of Adjustment 517	(SGD) D. J. BENNETT Labour Relations Officer

There appeared on behalf of the Company:

M. D. Failles	- Counsel, Toronto
P. McLeod	- Labour Relations Officer, Toronto
D. Dougan	- Regional Manager, Western Canada
R. Johnson	- Terminal Manager, Calgary
R. Dearden	- District Manager, BC Centres outside Vancouver
F. McMullen	- Director, Human Resources, Toronto

G. Swanson - District Manager, Quality Improvement

And on behalf of the Union:

H. Caley - Counsel, Toronto
Jack. J. Boyce - General Chairman, Toronto
Jack. J. Crabb - Vice-General Chairman, Toronto
R. Moore - Witness
D. Crawford - Grievor

AWARD OF THE ARBITRATOR

The grievor commenced work as a driver with the Company in Vancouver on June 3, 1987. In September of 1987 the Company established a performance standard for deliveries on the grievor's route, which was 10.9 stops per hour each day. On September 25, 1987 Mr. Crawford was notified that he was to meet escalating standards of efficiency which would take him to that productivity level by October 13, 1987.

While the evidence before the Arbitrator is extensive respecting the grievor's performance over a period of several months, it is sufficient to note for the purposes of this grievance that the grievor's average productivity rate in both September and October was 9.2 stops per hour, that in November of 1987 it was 9.3 stops per hour, declining to 7.9 in December, 7.7 in January, 1988, 7.2 in February, 6.9 in March and 8.5 in April. Productivity records are also available for the period of time prior to the establishment of the standard applied to the grievor's route. In June of 1987, as a new hire, his productivity rate was 8.4, in July it was 9.0 and in August it peaked at 10.4 stops per hour, on average.

The material establishes beyond dispute that the Company operates ninety-five terminals. The employees in all of those terminals comprise the bargaining unit under the instant Collective Agreement. Productivity standards have been established in all of the terminals. It is not controverted, however, that it is only in Vancouver that employees have been subjected to discipline as a means of enforcing productivity standards. According to counsel for the Company that course was followed because of what the Company considered to be the particularly low productivity performance of the employees in the Vancouver terminal.

The grievor was clearly affected by that policy. The record reveals that between November 4, 1987 and April 27, 1988 he was disciplined on some nine separate occasions for his failure to meet the productivity standard established for his route. In some instances the discipline assessed was five demerits, although in the last three cases it rose to nine and ten demerits. The demerits so accumulated caused the grievor's disciplinary record to rise to a level of sixty-nine demerits effective April 27, 1988, resulting in the grievor's discharge.

The Union attacks the treatment of the grievor, and by means of a separate policy grievance (see CROA 1861) the treatment of all of the employees in the Vancouver terminal for disciplinary purposes, as a

violation of the just cause provisions of the Collective Agreement. It maintains that the productivity standards established by the Company were arrived at arbitrarily, in disregard of many variables that can affect an employee's productivity. It maintains that the system established is contrary to generally accepted norms of industrial engineering respecting the measurement of work, the establishment of objective productivity standards and the proper orientation of employees to such a system.

In support of its position the Union called as a witness Mr. Robert F. Moore, a professional industrial engineer whose qualifications and expertise are not in dispute. Mr. Moore testified that the establishment of productivity standards in a parcel delivery operation is extremely complex. He related that a very high number of variables may come to bear in the context of any particular delivery route. In his opinion these variables must be clearly identified, measured and factored into the establishment of any productivity standard for such a route. Based on his understanding of productivity standards developed by professional industrial engineers for another large parcel delivery company in Canada, fair and objective productivity standards can only by established by doing a professional study of each particular route, an exercise which in his estimate would require days of work. In Mr. Moore's opinion the method used to establish the productivity standard for Mr. Crawford's route, described below, does not meet what he would describe as generally accepted standards for the establishment of productivity levels in the field of industrial engineering.

It is not disputed that the Company did not resort to the expert opinion of industrial engineers or consultants in establishing productivity standards within its terminals, or the standard for Mr. Crawford's route in particular. On the material before the Arbitrator it appears that the Company used the following factors to establish productivity standards:

(a) The demonstrated ability of the employee to perform the work while under direct supervisions;

(b) The demonstrated ability of supervisors to perform the route;

(c) The assessment of supervisors who have observed the employee performing the route;

(d) The demonstrated ability of the employee to perform the route without supervision;

(e) The demonstrated ability of other employees to perform the route.

In the case of Mr. Crawford, the Company considered the fact that on August 26, 1988, while working under the direction of a supervisor, he achieved a productivity level of 11.2 stops per hour on his route. On September 24, 1987 another supervisor, with the grievor observing, did the grievor's route and achieved a productivity level of 10.9 stops per hour. The supervisor who observed on August 26th formed

the opinion that the rate of 12.5 to 13 stops per hour was achievable. Lastly the Company adverted to the fact that during a one week period in August Mr. Crawford achieved an average productivity level of 10.8 stops per hour.

It appears that much weight was placed by the Company on the assessment made on August 26, 1987 when Supervisor Richard Johnson rode with the grievor on his route. On a form entitled "Driver Appraisal Report" Mr. Johnson made notations respecting the quality of job performance by the grievor. A review of that document reveals that it is not an assessment of the grievor's route or assignment, but rather an evaluation of the quality of his work. Headings include such items as "Starting Engine", "Backing", "Steering", "Parking", "Customer Contact", "Area Knowledge" and "Paper Work", to name a few. The report includes fairly extensive notations by the supervisor, generally intended to identify for the driver areas in which he is pursuing inefficient work methods, and suggestions on how he can improve his efficiency. It does not appear disputed that the establishment of productivity standards for all of the routes in the Vancouver, and indeed across the Company's system, was accomplished in this way.

In the instant case it is not disputed that the Company has a right to establish productivity standards for the drivers operating out of its terminals. Nor is it suggested that properly established productivity standards cannot be enforced through the use of discipline. The issue to be resolved is whether in the instant case the system developed by the Company, and applied to Mr. Crawford, constitutes a reasonable standard so that an employee can be justly disciplined for failing to adhere to it.

The Company relies on the following passage from the decision of Arbitrator Johnston in Re United Automobile Workers, Local 112 and De Havilland Aircraft of Canada Limited (1970) 22, L.A.C. 13 at pp 17-18:

> The Company is entitled to determine what is a reasonable production time for a particular job without necessarily using established industrial engineering techniques such as time studies and evaluation of component tasks. Nor is it necessary to move to an incentive or piece-work rate payment system of compensation before the company can justifiably expect a reasonable production time for a job. To be able to quote prices and delivery times for its products the company must make some determination of what are reasonable amounts of time for completion of the various component operations in manufacturing its product and ensure reasonable compliance with those times. The controlling factor on the company in such a determination is what is reasonable.
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> An appropriate test for establishing a time standard could be the time required for the completion of a particular assignment by a reasonably able, skilful and efficient workman of the same classification in similar circumstances. In determining the appropriate reasonable time, the company should be entitled to take into account the time taken by predecessor employees in

> that job assignment providing that those predecessor employees were not unusually able, efficient or skilful which, of course, would result in an abnormal standard being established, impossible for a successor employee of more average abilities to meet. Equally the circumstances under which predecessors were working on the assignment must be reasonably similar to those under which the successor is working.

The Arbitrator has no difficulty accepting the merit of the above observations by Arbitrator Johnston. Such comments must, however, be viewed in their context. In that case the board of arbitration was concerned with the productivity standards of a bench and structural assembler assigned to work on the assembly of a component in an aircraft manufacturing plant. The work in question was stationary, repetitious and consistent from day to day. To the extent that conditions remained unchanged from one period of time to another, comparisons with respect to the performance of different employees over time are a reasonably compelling basis for productivity comparisons.

As noted in the evidence of Mr. Moore, substantially different considerations apply to the delivery routes of a mobile parcel service. Such factors as the type of vehicle utilized, distances travelled in the vehicle or on foot, parking, the type of buildings serviced, the size and number of packages picked up or delivered, and a myriad of other factors, both foreseeable and unforeseeable, mark the differences among the various routes as well as within a single route from day to day and underscore the complexity of fairly establishing productivity standards.

As a general matter the Arbitrator accepts the position of the Company that the establishment of a fair productivity standard that can subsequently be enforced through discipline does not necessarily require recourse to professional engineers or consultants. Where, as in the De Havilland case, verifiable objective standards can be gleaned from established work records in a steady-state environment, reliable judgements may indeed be made in establishing productivity standards whose fairness can be defended in subsequent disciplinary proceedings.

Has such a standard been demonstrated in this case? Bearing in mind that the burden of proof with respect to the application of discipline is upon the employer, I am compelled to the conclusion that it has not. The evidence plainly demonstrates that, in purporting to set a productivity standard, what the Company's supervisors did was not to assess the work, but rather to assess the employee. As noted above, the report compiled by Mr. Johnson, and subsequently relied upon by the Company in establishing the productivity standard of 10.9 stops per hour, makes virtually no reference to the route itself. There is no attempt to assess such factors as traffic patterns, distances driven or walked, the volume or type of packages, the nature of customers' premises and operations or any other similar factors. Putting it at its highest, it appears that the productivity standard was derived by assessing the performance of a single supervisor in the completion of the work, coupled with the observations of a second supervisor in an appraisal of the grievor's work methods. In the Arbitrator's view, in this

employment context, that does not constitute an acceptable method of establishing a productivity standard upon which the job security of employees is to depend. I accept the observations of Mr. Moore with respect to the unreliability of the method used by the Company, and find that I cannot, on the balance of probabilities, rely on the productivity standard set for Mr. Crawford's route as a considered and accurate measure of the work level which he should be expected to achieve.

Concern also arises with respect to the way in which the productivity standard was utilized for disciplinary purposes. On several occasions the grievor was assessed five demerits for failing to meet the productivity standard on a single day. The Arbitrator must accept the evidence of Mr. Moore that, even assuming a properly established productivity rate, day-to-day fluctuations in performance will be inevitable for reasons both within and without the control of an employee. In the context of a parcel delivery service, where working variables can and do fluctuate from day to day, generally a productivity standard is better applied, at least for disciplinary purposes, if it is used as a standard to measure an employee's performance over a reasonably representative period of time, be it on a weekly or monthly basis. The notion that an employee can be disciplined for failing to adhere to a fixed productivity standard on any given day is arguably inconsistent with the very concept of averaging that underlies the entire system.

If, in the instant case, the Company had been able to point to a productivity standard that took into account the variables that can affect a driver's performance standard from day to day, whether through engineering studies or by reference to the historic performance of identical work by other employees, the Company's case might be more compelling. For the reasons related above, however, it is impossible on the material before me to conclude that the productivity standard applied to Mr. Crawford was a fair or accurate measure of the quantity of work that could reasonably be performed by an employee assigned to his route over a sufficiently extended period of time. The observations of two separate supervisors made in the space of two single days falls short of establishing a thoroughly researched productivity standard that can be defended in disciplinary proceedings.

In the Arbitrator's view this case must also succeed on an alternative basis. It is a fundamental precept of discipline in a collective bargaining setting that a just cause provision must be administered with a degree of consistency and fairness from case to case. Discrimination inconsistent with the fair administration of a collective agreement results when just cause for penalizing one employee is not viewed as just cause for disciplining another whose circumstances are virtually identical. In the case before the Arbitrator it is not disputed that the Company's productivity standards have been implemented in all ninety-five of its terminals in Canada. It is only in the Vancouver terminal, however, that the Company has attached disciplinary consequences to the failure on the part of employees to meet the productivity standard established for their routes. Employees in other terminals whose slippage in productivity may be comparable to that of their peers in Vancouver have not been assessed demerits in the very circumstances that have

resulted in discipline for the Vancouver employees.

In the Arbitrator's view the assertion by the Company that the Vancouver terminal has a particularly low productivity performance does not justify the obvious discrimination that this practice represents. Firstly, at best, such an approach would represent the imposition of a double standard to employees within the bargaining unit. A Vancouver driver with a general level of productivity that is superior to that of a co-worker in another terminal may nevertheless find himself assessed demerits when he slips to a lower standard, even though that lower standard may still be above the performance standard of the non-Vancouver employee who remains immune from discipline. That result is clearly arbitrary and discriminatory. Secondly, the evidence before the Arbitrator gives some reason to question the Company's assertion that productivity rates are particularly low in Vancouver. The evidence confirms that productivity standards system wide are derived from the subjective input of individual local supervisors who are not trained in setting productivity standards. In a system so fashioned there is cause to wonder whether the productivity standards are indeed uniform from location to location. Mr. Moore expressed the opinion that standards imposed according to the judgement of different individuals are, in all likelihood, not consistent. Absent any expert testimony to the contrary, the Arbitrator is inclined to agree.

For the foregoing reasons the grievance must be allowed. All demerits assessed against Mr. Crawford between November 4, 1987 and April 27, 1988 relating to his productivity shall be removed from his record, and he shall be reinstated forthwith, with full compensation for wages and benefits lost and without loss of seniority. For the purposes of clarity, nothing in this award should be taken as limiting the right of the Company to establish fair productivity standards by an appropriate means, and to enforce them by the application of progressive discipline. Nor should anything herein be construed as a comment, either negative or positive, on the quality of the grievor's work performance.

I retain jurisdiction in the event of any dispute between the parties with respect to the interpretation or implementation of this award.

December 16, 1988 (Sgd.) MICHEL G. PICHER
ARBITRATOR