

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2103

Heard at Montreal, Tuesday, 12 February 1991

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

DISPUTE:

The appeal of the discipline and subsequent discharge assessed the record of Bus Driver D. Higgins of St. John's, Newfoundland.

JOINT STATEMENT OF ISSUE:

On December 22, 1989, Mr. Higgins was the bus driver on Run 520-02 from Gambo to St. John's. Mr. Higgins allegedly mishandled Roadpac 200967 which he picked up at Gambo and was destined for St. John's. Following an investigation into this incident, Mr. Higgin's record was assessed 10 demerit marks which resulted in his discharge for accumulation of 69 demerit marks effective January 5, 1990.

The Union contends that the discipline and discharge are not warranted.

The Company disagrees.

FOR THE UNION:

(SGD.) B. MARCOLINI
PRESIDENT, UTU--CANADA

FOR THE COMPANY:

(SGD.) W. W. WILSON
FOR: ASSISTANT VICE-PRESIDENT
LABOUR RELATIONS

There appeared on behalf of the Company:

R. Lecavalier	-- Counsel, Montreal
B. R. O'Neill	-- System Labour Relations Officer, Montreal
B. Everard	-- Manager, Newfoundland, St. John's
J. G. Harding	-- Superintendent Roadcruiser, St. John's
J. Dysart	-- System Labour Relations Officer, Montreal
B. Granter	-- Witness, Gambo

And on behalf of the Union:

H. Caley	-- Counsel, Toronto
B. Marcolini	-- President, UTU--Canada, Ottawa
P. Barker	-- General Chairman, St. John's

D. Higgins

-- Grievor

AWARD OF THE ARBITRATOR

In this matter the Company bears the burden of proof. It must establish, on the balance of probabilities, that the grievor mishandled a package on December 22, 1989, as a result of which it was lost. That is the accusation made against Mr. Higgins in the notice delivered to him on January 8, 1990. While during the course of the hearing Counsel for the Company sought to characterize the allegation as otherwise, stating that the grievor was terminated because he could not recall the package in question and, in a general sense, did not know what he was doing, the Arbitrator cannot accept that amended characterization of the discipline imposed. Mr. Higgins, like any employee, is entitled to know the allegation against him and to bring forward a defense against that specific allegation at the time of arbitration. The issue, therefore, is whether the Company has established that there was any mishandling by Mr. Higgins of RoadPac 200967 on Run 520-02 on December 22, 1989, resulting in the loss of the parcel and a customer complaint, as stated in the notice of discipline delivered to the grievor.

The evidence tendered by the employer is entirely circumstantial. In the Company's view of the case nine parcels were delivered to the grievor at Gambo for delivery to St. John's. One of the packages was an envelope contained in a sealed paper bag. According to the Company that parcel was handed to Mr. Higgins by Ms. Bev Granter, who is employed in a convenience store in Gambo which serves as a Commission Agency for the Company's Roadcruiser service. As she recalls, Mr. Higgins placed the parcel in the pocket of his jacket when she gave it to him, apparently inside the convenience store. Thereafter Mr. Higgins signed the manifest indicating the receipt of nine parcels. It does not appear disputed that a package of the type given to him would have been placed in a basket located in the luggage compartment beneath the passenger section of his bus. The only other evidence, which is beyond dispute, is that the package was missing when its consignee sought to retrieve it when the grievor's bus arrived in St. John's. It is not clear, however, whether it was missing from the baggage section of the bus, or went missing during the period of time it might have been unloaded from the bus and moved inside the terminal at St. John's.

The evidence further establishes that the RoadPac parcels collected by the grievor, which numbered in excess of fifty on the day in question, were stored in an undifferentiated fashion among the luggage of passengers in some six compartments in the lower section of the bus in accordance with Company practice. As there were some ten stops between Gambo and St. John's there were a number of occasions when the compartment containing RoadPac items might have been opened, in circumstances, it appears, where passengers and other persons might have had unsupervised access to the luggage compartments. Additionally, the unchallenged representation of the Union is that there was a relatively strong wind blowing that day. For the Company to succeed it must establish that the allegation which it treats as a culminating incident in fact occurred and was

deserving of some discipline. On the material before me, however, I cannot conclude, on the balance of probabilities, that any error or negligence on the part of the grievor has been established which would give cause for the assessment of any discipline whatever. All that the evidence discloses is that the grievor received a package, signed for it, and that subsequently it could not be found. Between the first and last events he did not have exclusive custody of or access to the package. There is no evidence to suggest other than that, in accordance with Company policy, it was carried in a manner which gave passengers and other persons access to it, and which left it potentially exposed to the elements. There is nothing in the evidence before me to establish that there was carelessness on the part of Mr. Higgins which resulted in the loss of the parcel in question, a loss which would have been the first in his more than ten years' involvement in RoadPac Service. Whatever suspicion the Company may entertain, an arbitrator cannot conclude from the mere fact that a package has gone missing that there was necessarily a mishandling of the package by the driver of the bus which was carrying it. It is, of course, unnecessary to comment for the purposes of this case on whether adverse inferences could be drawn against a driver in circumstances where repeated package losses could be established. A case of that kind must necessarily turn on its own particular merits.

For the foregoing reasons the Arbitrator cannot conclude that there was any cause for discipline against Mr. Higgins. He shall therefore be reinstated into his employment, with compensation for all wages and benefits lost, and without loss of seniority.

February 15, 1991

(Sgd.)MICHEL G. PICHER
ARBITRATOR