

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2178

Heard at Montreal, Wednesday, 11 September 1991

concerning

CANPAR  
(CP EXPRESS & TRANSPORT)

and

TRANSPORTATION COMMUNICATIONS UNION

DISPUTE:

On or about April 9th, 1991, the Company, by letter, terminated employee K. Butcher of Vancouver, British Columbia for "accumulation of more than 60 demerits".

JOINT STATEMENT OF ISSUE:

The Union grieved the termination stating that the Company was clearly unreasonable in their issuance of 15 demerits to the grievor for this latest incident.

The Union contends that the grievor was accident and injury free for three (3) consecutive years (per the employee work record) and that recently the grievor had two (2) driving accidents in the past few months which has lead, by the Company's actions, to his termination. The Union maintains that the grievor is "redeemable" and therein has suggested to the Company that the grievor be removed from driving privileges for no less than six months, followed by remedial driver training and subsequent testing before being allowed to return to driving duties. During this six months the grievor would be assigned to the warehouse performing dockman duties. Further, the Union contends that the grievor has genuine rehabilitative potential.

To date, the Company has rejected the Union's offer and has continued to maintain that the termination is justified.

FOR THE UNION:

(SGD.) M. FLYNN  
for: SYSTEM GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) P. D. MacLEOD  
DIRECTOR, LINEHAUL & SAFETY

There appeared on behalf of the Company:

A. Hamilton	- Counsel, Vancouver
P. D. MacLeod	- Director, Linehaul & Safety, Toronto
R. Wettstein	- Regional Manager, British Columbia
D. Dobson	- Senior Driver Supervisor, Vancouver

And on behalf of the Union:

D. McKee	- Counsel, Toronto
J. Crabb	- General Chairman, Toronto
M. Gauthier	- Vice-General Chairman, Montreal
K. Butcher	- Grievor

#### AWARD OF THE ARBITRATOR

On a review of the evidence the Arbitrator is satisfied that there was a degree of culpable conduct on the part of the grievor resulting in an accident during the course of the backing of Mr. Butcher's van on March 26, 1991. The evidence reflects that while attempting to park his vehicle in a covered parking space located in an alley, he failed to get out of his van and visually inspect the area being backed into. As a result, his van struck and damaged an overhead sprinkler valve.

It appears to the Arbitrator however that there are mitigating circumstances, both in relation to the incident itself, and in respect of Mr. Butcher's overall record. Firstly, it is not disputed that the overhead clearance into the parking area was sufficient for Mr. Butcher's van. In accordance with normal building norms, he expected the interior ceiling surface to be no lower than the entrance clearance, as is the case in loading docks, and had no reason to expect that the sprinkler head would protrude below the level of the overhead entranceway clearance. While that does not, of itself, excuse his conduct and in particular his failure to do a thorough visual inspection before backing, it does suggest an element of misperception which is as consistent with an error of judgement as with carelessness on his part.

Secondly, the Arbitrator is impressed by the fact that Mr. Butcher maintained an accident free driving record for all of his employment, which is a period approaching four years prior to his first preventable accident on March 17, 1991, only nine days prior the accident of March 26 which resulted in his discharge. Because the grievor failed to report the first accident, which he believed to have been benign and without damage to the other vehicle, he was assessed forty demerits, which brought his accumulation of demerits to fifty-five points prior to the culminating accident. In the result, as a result of two incidents within the space of nine days he went from an accident free employee with fifteen demerits on his record to a discharged employee with an accumulation of seventy demerits.

While the Arbitrator acknowledges, as argued by Counsel for the Company, that the Brown system of discipline is "bloodless" in its application, it is well established that it does not eliminate the overall analysis of mitigating factors in the assessment of just cause, nor can it oust the jurisdiction of an arbitrator to reduce the penalty of discharge where it is appropriate to do so, as contemplated under the Canada Labour Code. In the Arbitrator's view, in this case it is appropriate to apply a reduction of penalty. On the whole, while I am compelled to conclude that there was fault on the part of Mr. Butcher which justified the imposition of some discipline, I remain impressed by his overall driving record, but for two mistakes made in a fateful nine day period prior to his

discharge. On the basis of that record I am not persuaded that he has demonstrated an inability to be restored to his previous pattern of safe and reliable service to the Company. On the other hand, given the fact that Mr. Butcher had fifty-five demerits against his record at the time of the culminating incident, I do not view this as an appropriate case for the awarding of compensation.

For the foregoing reasons the grievor shall be reinstated into his employment, without loss of seniority and without compensation, with his record to stand at fifty-five demerits.

September 13, 1991

(Sgd.) MICHEL G. PICHER  
ARBITRATOR