CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 2250
Heard at Montreal, Tuesday, 14 April 1992
concerning
CANADIAN PACIFIC EXPRESS & TRANSPORT
and
TRANSPORTATION COMMUNICATIONS UNION
EX PARTE
DISPUTE:
The assessment of 60 demerits and dismissal of employee M. Hannon, CP Express & Transport, Obico Terminal.
UNION'S STATEMENT OF ISSUE:
On October 11, 1991, employee M. Hannon had an accident while operating a tow motor.
By letter dated October 18, 1991, employee M. Hannon was advised 60 demerits were being issued and his employment with CP Express & Transport was terminated immediately.
The Union filed a grievance asserting the penalty was too severe and requesting employee Hannon be reinstated with benefits and paid for all time lost.
The Company refused the Union's request.
FOR THE UNION:
(SGD.) J. CRABB
EXECUTIVE VICE-PRESIDENT
There appeared on behalf of the Company:
M. D. Failes
Counsel, Toronto
B. F. Weinert
Director, Labour Relations, Toronto
M. Arsenault
Shift Manager (AM) Dock, Obico Terminal
A. Khamisa
Warehouseman, Obico Terminal
A. Mory
Warehouseman, Obico Terminal
And on behalf of the Union:
H. Caley
Counsel, Toronto
J. Crabb
Executive Vice-President, Toronto
M. Gauthier
Assistant Vice-President, Montreal
L. Ryan
Warehouseman, Obico Terminal
M. Hannon
Grievor

AWARD OF THE ARBITRATOR

The Company maintains that on October 11, 1991 the grievor, Mr. Mark Hannon, deliberately and maliciously drove his tow motor three times, repeatedly, into the tow motor being operated in the Obico Terminal by fellow employee Amor Mory. Mr. Mory relates that as he was driving his tow motor from an external dock area through the doorway into the warehouse he was struck hard from behind by Mr. Hannon's tow motor. He submits that he turned and saw Mr. Hannon's vehicle immediately behind his, moving in a reverse direction, and that the grievor's vehicle continued to push his forward for approximately a foot or so. It is common ground that Mr. Mory's tow motor was then being driven forward.

Mr. Mory states that he immediately shouted ``What the hell are you doing?'' to Mr. Hannon, then turned and resumed driving his tow motor. He states that seconds later he was struck yet again. On that occasion he stopped without turning around and when he again resumed, he was struck for a third time. By Mr. Mory's estimate all three bumps between the vehicles occurred within the space of approximately twenty feet. By his recollection, which appears accepted by all witnesses, the first blow was the hardest of the three.

Mr. Hannon relates the events differently. He admits that he was driving behind the grievor towards the doorway to the warehouse. According to his evidence it was a sudden braking movement by Mr. Mory which caused the collision, as he was unable to stop his own vehicle in time. He disputes that Mr. Mory turned around or said anything to him, and relates that when Mr. Mory began to advance again, he immediately put the brakes on, causing Mr. Hannon to drive into him a second time. This was repeated once more, according to Mr. Hannon, all three contacts taking place within a space which he estimates to be between four to six feet.

There is little independent evidence to corroborate or contradict the evidence given by Mr. Mory and Mr. Hannon. Mr. Ali Khamisa, a fellow employee who was present on the outside dock at the time, gives only limited insight into what occurred. According to his evidence, he heard nothing said at the time of the initial collision, although he turned to see the two vehicles in the doorway when he heard the noise of the collision. He states that he did not, however, see the next two collisions which occurred inside the warehouse area, although he heard a more faint noise on the occasion of the two subsequent bumps.

There is evidence, much of it contradictory and little of it probative, with respect to what was said between Mr. Hannon and Mr. Mory in the minutes and hours following the incident. There can be little doubt that Mr. Mory was disturbed by the collisions, and that he expressed his anger to Mr. Hannon, seconds after the collisions, when he got off his vehicle and, by his own account, slapped a support bar on Mr. Hannon's tow motor and shouted ``What the hell are you doing?'' When he was later approached by Mr. Hannon, who says that he inquired as to whether Mr. Mory was all right, Mr. Mory told him in strong language to stay away from him. According to Mr. Mory the grievor grinned at him on both occasions in an insulting fashion, and asked whether he had been scared. This the grievor denies, stating that he only wished to inquire as to whether the grievor was all right.

In the Arbitrator's view it is difficult to accept, without serious reservations, the account of either of the two employees involved. There are, as Counsel for the Union submits, clear contradictions within certain parts of the testimony of Mr. Mory, and in some respects between the testimony of Mr. Mory and that of Mr. Khamisa. Mr. Khamisa's evidence is consistent with that of Mr. Hannon both with respect to the initial placement of Mr. Mory's tow motor on the outside dock, and with respect to the fact that he heard nothing said after the initial impact, contrary to Mr. Mory's account. Also, the self-serving suggestion made by Mr. Mory at the hearing that he had some difficulty reading English is left in substantial question by his subsequently demonstrated ability to read aloud, without any apparent problem, the investigation reports which were put before him by Counsel. His evidence that the grievor might have had a racial motivation against him, as a Filipino, based on Mr. Mory's statement that Mr. Hannon had once said to him, some two months prior to the incident, that there should be no blacks and Filipinos working in the warehouse is also called into serious question by the undisputed fact that Mr. Hannon's closest personal friend is a black co-worker who attended the hearing in support of the grievor. In addition, there is no evidence to corroborate Mr. Mory's statement that Mr. Hannon once told him that he was going to have a date with Mr. Mory's wife. Mr. Hannon denies both statements alleged by Mr. Mory.

On the other hand, Mr. Hannon's evidence is also unduly self-serving in a number of respects. It is difficult to appreciate how he could have struck Mr. Mory's tow motor three times in rapid succession without some element of fault on his part. If, as he suggests, all three impacts occurred within the space of six feet, the Arbitrator cannot easily reject the suggestion of Counsel for the Company that the grievor was operating his tow motor at a clearly unsafe distance from Mr. Mory's tow motor, and that he made no reasonable attempt to avoid the dangerous circumstances which led to the collisions.

The burden of proof in this matter is upon the Company. It is clear that Mr. Hannon, an employee of some seven years' service whose disciplinary record was clear at the time, was discharged because, in the Company's view, he knowingly, deliberately and repeatedly struck the vehicle of Mr. Mory. For the reasons touched upon above, the Arbitrator cannot find that that conclusion is proved, on the balance of probabilities. What the evidence establishes, to my satisfaction, is that Mr. Hannon did engage in a single instance of reckless driving in which he followed Mr. Mory's vehicle far too closely and, because of the initial application of the brakes by Mr. Mory, struck the latter's tow motor hard from behind. The Arbitrator finds it implausible that Mr. Hannon deliberately impacted Mr. Mory's tow motor on the occasion of the first bump. However, it does appear that carelessness, indifference and anger on his part may have lead to the subsequent two impacts between the vehicles. The evidence further discloses that subsequently Mr. Hannon came to appreciate the degree to which his fellow worker was disturbed by the incident, and that he admitted his mistake and sought to apologize to him.

On the whole of the evidence the Arbitrator is satisfied that while Mr. Hannon was deserving of discipline for the reckless operation of his tow motor, the position of the Company to the effect that he deliberately assaulted Mr. Mory repeatedly with his tow motor is not sustained on the whole of the evidence. The fact remains, however, that the actions of Mr. Hannon are deserving of serious discipline. The Arbitrator deems it appropriate to substitute a lengthy suspension, without compensation, to bring home to Mr. Hannon the seriousness of his conduct. For the foregoing reasons the grievance is allowed, in part. Mr. Hannon shall be reinstated into his employment, without loss of seniority and without compensation.

April 16, 1992

(Sgd.) MICHEL G. PICHER

ARBITRATOR