

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2323

Heard at Montreal, Wednesday, 10 February 1993

concerning

ONTARIO NORTHLAND RAILWAY

and

TRANSPORTATION COMMUNICATIONS UNION

DISPUTE:

The assessment of 15 demerit marks against the record of General Audit Clerk, J. Rosseter.

JOINT_STATEMENT_OF_ISSUE:

A number of waybills containing confidential rate information were returned by Canada Post to Ontario Northland's Toronto Office as undeliverable.

Subsequent to an investigation into the matter, Clerk J. Rosseter was assessed 15 demerit marks for failure to ensure confidential rate information was removed from Rule 11 waybills prior to mailing to connecting carriers.

The Union appealed the discipline contending that there was no evidence that Mr. Rosseter had mailed out the waybills containing the confidential rate information and requested that Mr. Rosseter's record be cleared.

The Company declined the appeal. A resolution was not reached through the grievance procedure.

FOR THE UNION:

FOR THE COMPANY:

(SGD.)_E._FOLEY

(SGD.)_P._A._DYMENT

ASSISTANT DIVISION VICE-PRESIDENT

PRESIDENT

There appeared on behalf of the Company:

M. J. Restoule

Manager, Labour Relations, North Bay

L. A. Fortier

Supervisor, Freight Revenues, North Bay

And on behalf of the Union:

H. Caley

Counsel, Toronto

E. Foley

Vice-President, North Bay

J. Rosseter

Grievor

AWARD_OF_THE_ARBITRATOR

There does not appear to be any dispute that the Arbitrator has jurisdiction to deal with the objection raised by the Union with respect to the propriety of the investigation conducted by the Company. The essential issue of fact in the case at hand is whether Mr. Rosseter was responsible for mailing certain waybills which erroneously contained confidential rate information. There is no direct evidence to that effect. The evidence before the Arbitrator confirms that the mailing of waybills was his general responsibility. It also appears, however, that he was absent from work on certain days at or about the time the waybills might have been mailed.

The investigation of the grievor was conducted by his supervisor, Ms. Louise Fortier. Critical to the determination of Mr. Rosseter's responsibility was whether someone else might have sent the waybills in question. The only evidence relating to that issue, other than the grievor's statement that he has no knowledge as to whether anyone else might have done so, is a statement made by Ms. Fortier during the course of the investigation stating:

QQINDENT "The fact is that I know that no-one else has mailed out these waybills since I've been Supervisor."

Based on the overall content of the investigation the Company concluded that Mr. Rosseter was responsible for sending the waybills in question. The Union submits that it was impossible for Ms. Fortier to conduct a fair and impartial investigation in keeping with article 8.1(a) of the collective agreement. It provides as follows:

QQINDENT 8.1(a) QQINDENT An employee who has completed a probationary period of six months shall not be disciplined or dismissed until after a fair and impartial investigation has been held and the employee's responsibility is established. An employee may be held out of service for such investigation for a period of not more than five working days and he/she will be notified in writing of the charges against him/her.

The Arbitrator must agree with the Union. As a matter of general principle there is nothing inconsistent with the concept of a fair and impartial investigation merely by virtue of the fact that the investigation is conducted by an employee's immediate supervisor, even where that supervisor has prior information about the incident under investigation, provided by other individuals. In the case at hand, however, something more is disclosed. On a point of fact critical to the grievor's responsibility -- the very object of the investigation -- Ms. Fortier effectively became the sole witness whose evidence would eliminate responsibility on the part of any other employee. Prior decisions of this Office have made it clear that a supervisor whose own statement or evidence is critical to the determination of the responsibility of an employee under investigation cannot, absent clear language to the contrary in the collective agreement, serve as the presiding officer who conducts a fact finding investigation which must be fair and impartial, as required by the collective agreement. (QQBOLD_CROA_1826_&_2041_QQBOLD)

On the foregoing basis the Arbitrator must find that the discipline assessed is null and void. It might be noted that if I had come to a contrary conclusion, I would in any event have been inclined to find that in light of the grievor's prior service and record, the assessment of 15 demerits was in any event excessive in the circumstances. Had it been necessary to do so, I would have concluded that a written reprimand would have been the appropriate measure of discipline.

For the foregoing reasons the grievance is allowed and the grievor's record shall be amended by the removal of the 15 demerits assessed against him.

February 12, 1993

(Sgd.)_MICHEL_G._PICHER

ARBITRATOR