

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2352

Heard at Montreal, Tuesday, 13 April 1993

concerning

CANADIAN PACIFIC LIMITED

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

The assessment of 45 demerit marks on May 18, 1990 to Mr. J. Coda.

JOINT STATEMENT OF ISSUE:

On March 27, April 2, May 2 and May 3, 1990, the grievor refused, at the conclusion of the investigation proceedings, to sign the statements taken by the Company. Mr. Coda's record was debited with 45 demerit marks for "... unacceptable and willfully insubordinate conduct; unjustifiably repeatedly refusing to sign the statement given by you in a formal investigation on five separate occasions despite the fact that you were plainly directed to do so and clearly warned by the Company as to the consequences of your failure in this regard, Thunder Bay, Ontario, March 27, April 2, May 2 and May 3, 1990."

The Brotherhood contends that: 1. The grievor was not, pursuant to the wage agreement, required to sign the transcripts in question. 2. The grievor's refusal to sign the reports did not, in any way, adversely affect the Company's recourse to their contents for purposes designed by the investigation. 3. The assessment of 45 demerit marks was far too severe and unwarranted in the circumstances.

The Brotherhood requests that the 45 demerit marks assessed on May 18, 1990 be removed from the grievor's record and that he be reinstated forthwith without loss of seniority and with complete reimbursement for any and all wages, expenses and benefits lost as a result of this matter.

The Company denies the Brotherhood's contentions and has declined the Brotherhood's request.

FOR THE BROTHERHOOD:

FOR THE COMPANY:

(SGD.) J. J. KRUK

(SGD.) F. J. GREEN

SYSTEM FEDERATION

GENERAL MANAGER,

GENERAL CHAIRMAN

OPERATIONS & MAINTENANCE, HHS

There appeared on behalf of the Company:

M. E. Keiran

Manager, Labour Relations, Vancouver

R. M. Smith

Counsel, Montreal

D. T. Cooke

Labour Relations Officer, Montreal

R. H. Strelesky

Division Engineer, Gateway Division

R. M. Forsberg

Assistant Superintendent, Vancouver Division

O. R. Jones

Claims Agent, Winnipeg

And on behalf of the Brotherhood:

D. Brown

Senior Counsel, Ottawa
P. Davidson
Counsel, Ottawa
G. D. Housch
National Vice-President, Ottawa
D. McCracken
Federation General Chairman, Toronto

AWARD OF THE ARBITRATOR

At the conclusion of a disciplinary investigation which took place over fourteen days in March of 1990, the grievor refused to sign the transcript of the investigation presented to him by the Company. The Company alleges that the grievor was insubordinate in his refusal, stressing that he declined to do so five separate times, despite warnings from the investigating officer as to the possible consequences of his refusal. As a result, he was assessed forty-five demerits for this action.

Firstly, the Arbitrator has difficulty with the characterization of the events advanced by the Company. Upon a review of the material I am satisfied that what transpired was in effect a single refusal to sign the transcript, albeit expressed several times. Nor can I agree that the refusal was insubordinate in nature. Being faced with seventy-three pages of transcript taken over a month long investigation left the grievor with some concerns as to the accuracy of the document and, in his own words, "I did not feel comfortable signing it."

The more fundamental questions raised by the position argued by Counsel for the Brotherhood is whether the Company could, in any event, discipline the grievor for refusing to sign the transcript. It is common ground that the collective agreement contains no obligation on the part of an employee to sign such a transcript. In this regard, the agreement is to be distinguished from the collective agreement in CROA 720, which did contain such an obligation.

The Arbitrator appreciates the concerns of the Company. It plainly assists the grievance and arbitration process if the investigative procedure can result in a transcript whose contents are not challenged as to their accuracy, at least insofar as they reflect the statements recorded at the investigation. As a general rule, it is not unreasonable or inconsistent with the legitimate business interests of the employer to seek the agreement of the employee who is the subject of an investigation with respect to the accuracy and completeness of the transcript document. Similarly, it is fair to expect the employee to be relatively specific as to those parts of the document which he or she does not accept as accurate. However, each case must be judged on its own merits.

In the case at hand, the grievor was subjected to an extensive and wide ranging interrogation, much of it inquisitorial in tone. A number of the questions are argumentative, such as question 18 where the grievor is asked whether his restarting physiotherapy at the same time as the commencement of the investigation would not create the impression that he is attempting to stall the progress of the investigation. Equally puzzling are questions as to whether Mr. Coda collected Workers Compensation benefits as an employee of the Liquour Control Board, and questions concerning an automobile accident in which he was involved in 1977. At question 49 the employee is asked to explain discrepancies in observations recorded by a physician, Dr. Shariff. At question 53 he is asked whether his submitting himself to a general anaesthetic for examination would not have cured him and thus returned him to work as a trackman, a question to which he replied, understandably I think, that not being a doctor, he could not speculate. At question 214 he was asked if he understands that collecting Workers' Compensation benefits under false pretenses is a serious offense and, at question 216, why he doubted the abilities of an investigation and security company to make judgements as to whether he was experiencing pain while he was under covert observation. The overall tone of these questions lends some credence to the grievor's belief that the investigation bordered on harassment.

On the whole, the transcript of the investigation reflects a hostile tone on the part of the investigating officer. Not surprisingly, the grievor adopted a defensive posture, gave many evasive and curt replies and called for a number of adjournments, both short and long. At the conclusion of the fourteen half-day sessions he expressed the view that he was not satisfied with the manner in which the investigation had been conducted.

In all of the circumstances the Arbitrator is not persuaded that the refusal of Mr. Coda to sign the transcript of the investigation constituted a violation of his duty to the Company which would justify the assessment of discipline. Nor, in my view, did his refusal to sign the document adversely affect the Company's interest insofar as the purpose of the investigation is concerned. The investigation resulted in a conclusion by the employer that Mr. Coda had taken insufficient measures to rehabilitate his shoulder injury, in consequence of which he was assessed twenty demerits, which were not grieved.

As a general matter, an employee who refuses to sign a transcript while failing to identify any specific concerns does so at the risk of his or her credibility. In the case at hand, the Arbitrator finds the Company's conclusion that the grievor's refusal to sign the transcript of the investigation as meriting forty-five demerits is grossly disproportionate. Insofar as the evidence reveals, the grievor's refusal to sign the document did not violate the collective agreement or any provisions governing the investigation contained within it, did not result in any negative impact of the Company's interests and, in my view, cannot be said to have merited the assessment of any discipline.

For the foregoing reasons the grievance is allowed. The forty-five demerits assessed against Mr. Coda shall be removed from his record forthwith.

April 16, 1993

MICHEL G. PICHER

ARBITRATOR