CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2422

Heard in Montreal, Thursday, 11 November 1993
concerning
CANADIAN PACIFIC EXPRESS & TRANSPORT

and
TRANSPORTATION COMMUNICATIONS UNION

EX PARTE

DISPUTE:
The assessment of forty-five (45) demerits to CPET employee William Barker, Belleville, Ontario.
UNION'S STATEMENT OF ISSUE:
Employee William Barker was advised on March 16, 1993 in writing that forty-five (45) demerits were being assessed for a pushing incident between himself and employee Wayne Snider on or about February 25, 1993.
The Union contends that no evidence was presented at the interview confirming this and further as two employee's were involved only Mr. Barker was assessed discipline.
The Union requested the forty-five (45) demerits be removed from his record.
The Company declined the Union's request.
FOR THE UNION:
(SGD.) D. J. DUNSTER
EXECUTIVE VICE-PRESIDENT
There appeared on behalf of the Company:
M. D. Failes - Counsel, Toronto
B. F. Weinert - Director, Labour Relations, Toronto
W. Sharpe - Terminal Manager, Belleville
W. Snider - Witness
And on behalf of the Union:
D. W. Ellickson - Counsel, Toronto
D. J. Dunster - Executive Vice-President, Toronto
G. Rendell - Divisional Vice-President, Ottawa
A. Dubois - Divisional Vice-President, Quebec
Wm. Barker - Grievor

AWARD OF THE ARBITRATOR

Upon a careful review of the evidence the Arbitrator is satisfied that Mr. Barker was the clear instigator of the altercation between himself and employee Wayne Snider which occurred on or about February 25, 1993. I am satisfied that Mr. Barker initiated the confrontation between the two employees primarily because of his displeasure with the fact that Mr. Snider, the victim of the assault, had advised another employee, Mr. Gary Beebe, of an arguably negative report which Mr. Barker had made to Terminal Manager Wayne Sharpe about Mr. Beebe's use of his lunch and break period on the day prior. While the issue need not be fully resolved for the purposes of this grievance, it is clear that Mr. Snider and Mr. Beebe held a very different view

of Mr. Beebe's actions than did Mr. Barker.

The two employees involved give substantially different accounts of what occurred. According to Mr. Barker, when he approached Mr. Snider, purportedly to ask him for his account of Mr. Beebe's actions, Mr. Snider jammed his finger into Mr. Barker's stomach, saying "That's how its going to be.". This reference, according to Mr. Barker, would have been motivated by the resentment which he believed Mr. Snider felt because Mr. Barker was exercising his seniority to bump Mr. Snider from his position as lead hand. According to Mr. Barker's view of things, Mr. Beebe's failure to help in terminal loading operations at the conclusion of the day prior, when he took his lunch and coffee breaks, undermined his attempt to demonstrate that he could succeed as a lead hand.

Mr. Snider gives an entirely different account. According to his evidence on the day prior Mr. Beebe did not take an extended lunch and coffee break, as Mr. Barker reported to Mr. Sharpe, but in fact came on to the warehouse floor after only a fifteen minute break, and began operating a tow motor. He expressed concern that Mr. Barker would have communicated incorrect facts to Mr. Sharpe as he had done. It is common ground that after Mr. Snider advised Mr. Beebe of what Mr. Barker had reported, a verbal confrontation occurred between Mr. Barker and Mr. Beebe when the latter came to work on February 25, 1993.

According to Mr. Snider, shortly after that encounter Mr. Barker approached him, asking why he had told Mr. Beebe about the report he had made to Mr. Sharpe. Mr. Snider states that when he attempted to walk away from the confrontation Mr. Barker followed him down a flight of stairs, and that when Mr. Snider turned Mr. Barker grabbed him and threw him against a wall. He relates that the grievor's fist was clenched in a threatening fashion as he continued to hold him, until Mr. Snider used his arms to try to break free. No blows were exchanged, but considerable shouting between the two was overheard by another employee who emerged from a nearby office and broke up the scuffle.

On a review of the whole of the evidence the Arbitrator is satisfied that the account of events given by Mr. Snider is to be preferred to that given by Mr. Barker. During his testimony, in an obvious attempt to spread an equal degree of responsibility to Mr. Snider, Mr. Barker tried to make it appear that the two had grabbed each other mutually. Mr. Barker's evidence is, however, highly implausible in that regard. Firstly, it is Mr. Barker who sought out Mr. Snider. Secondly, by the grievor's own account, Mr. Barker pushed Mr. Snider away when he began to poke him. That explanation, however, is difficult to square with his next statement, which is that both men grappled together against the wall. As Counsel for the Company argues, if Mr. Barker's purpose was merely to avoid the poking movements of Mr. Snider's fingers, (which the Arbitrator is satisfied did not in fact occur) pushing Mr. Snider against the wall would have sufficed to do that. In fact, however, the two men remained in physical contact against the wall. They did so, in my view because, as Mr. Snider testified, Mr. Barker in fact grabbed him by the shirt at the outset, thrust him against the wall and continued to hold him in a threatening manner.

What the evidence discloses is a clear assault of one employee against another. Whatever anger may have motivated Mr. Barker, I

cannot find that the actions of Mr. Snider constituted provocation that can be pleaded in mitigation. For reasons which he must best understand, Mr. Barker simply lost control in a manner which is unacceptable, acting out his anger in a physical assault against a fellow employee. If the incident was short-lived, and no injury resulted, that may simply be because of the prompt intervention of a third party.

Counsel for the Union argues, in mitigation, that the grievor was motivated, in part, by the fact that he was being trained in the lead hand position by Mr. Snider, the very person he was bumping. This, Counsel argues, is contrary to article 7.3.1 of the collective agreement which mandates that

> "wherever possible the employee shall be trained by a qualified employee other than the employee being bumped."

It is not necessary, for the purposes of this grievance, to determine whether in fact there was a violation of article 7.3.1. Even if there was, it would not justify, or in my view mitigate, an act of assault of the kind disclosed in the evidence at hand. The assault of another employee is among the most serious of disciplinary infractions. As noted above, the Arbitrator is satisfied that in the case at hand the actions of Mr. Barker were unprovoked and unjustified by any mitigating factors disclosed in evidence. I am satisfied, on the balance of probabilities, that he attacked Mr. Snider simply because he had reported to Mr. Beebe what Mr. Barker said to Terminal Manager Sharpe about Mr. Beebe's performance the day prior.

The Arbitrator is satisfied that the forty-five demerits assessed against Mr. Barker was an appropriate measure, in all of the circumstances. The grievor's record of difficulties in interpersonal relationships with customers, supervisors and fellow employees was extensive. The parties are disagreed as to the status of his demerit points at the time of the incident in question. If the Union's view is adopted, in light of CROA 2418 and 2420, Mr. Barker would have had at least twenty-nine demerits against his record at the time of the assault of Mr. Snider. That number, combined with the forty-five demerits which I have found to be justified as a disciplinary response to the assault, would have placed the grievor in a clearly dismissable position, with an accumulation of seventy-four demerits. In the result, Mr. Barker's dismissal as of that date would have been justified, and the Arbitrator can see basis for relieving against that result.

For the foregoing reasons the grievance must be dismissed.

12 November 1993 (Sgd.) MICHEL G. PICHER
ARBITRATOR