Canadian Railway Office of Arbitration
Case No. 2615
Heard in Calgary, Tuesday, 9 May 1995
concerning
Canadian National Railway Company
and
National Automobile, Aerospace, Transportation and General Workers Union (CAW-Canada)
ex parte
Dispute:

The assessment of fifteen (15) demerit marks to Mr. B. Kehler for an alleged altercation with a truck driver from another company.

Ex Parte Statement of Issue

On October 4, 1993, a statement was taken into an alleged altercation which took place on August 18, 1993. Evidence into the matter was received by the Company on August 20, 1993 and August 25, 1993. It is the Union's position that the failure of the Company to hold an investigation into this alleged irregularity "as quickly as possible" was a violation of article 24.2 of agreement 5.1. The delay in holding an investigation was a denial of natural justice and based on the violation of article 24.2 the discipline assessed should be declared a nullity.

Notwithstanding the foregoing, it is further the Union's position that the discipline assessed is without merit. The Union contends that the driver of the truck for "Roy Legumex" was as much a perpetrator of the alleged altercation, and that the grievor acted responsibly in asking a fellow employee to deal with the driver rather than to allow the situation to escalate. Therefore, the discipline is excessive and unwarranted.

The Company denies any violation of the collective agreement and considers the discipline warranted.

for the Union:
(sgd.) D. Olshewski
for: National Coordinator

There appeared on behalf of the Company:
H. Koberinsky – Labour Relations Consultant, Toronto
R. Strickland – Manager, Intermodal Services, Winnipeg

And on behalf of the Union:
D. Olshewski– Regional Coordinator, Winnipeg
R. Storness-Bliss– Regional Coordinator, Vancouver

award of the Arbitrator

It is not disputed that a verbal confrontation occurred between the grievor and a truck driver from a customer company on August 18, 1993. On the merits, the Arbitrator is satisfied that the grievor's statements to the customer driver were unacceptably rude and unprofessional and would, on their face, justify the assessment of discipline. It is not without significance that the incident came to the Company's attention by the report of another employee who had concerns about the grievor's conduct, and hoped that he might receive counselling and assistance for what that employee perceived as a serious behavioural problem.

The Union raises two deficiencies in respect of the procedure followed by the Company in the investigation of the grievor's conduct. Firstly, it notes that the Company was first made aware of the events by the employee's letter of August 20, 1993, but did not hold its investigation until some seven weeks later, on

October 4, 1993. This, it submits, is in violation of the requirement to hold an investigation "... as quickly as possible" as required by article 24.2 of the collective agreement. Exception is also taken to the fact that the investigation was conducted by Terminal Manager R.G. Strickland, who is the same person who assessed discipline against the grievor, as well as to statements made by Mr. Strickland during the hearing.

Article 24 of the collective agreement provides, in part, as follows:

"24.1 Employees, who have completed their probationary period, will not be disciplined or discharged without a fair and impartial hearing."

"24.2 Investigations in connection with alleged irregularities will be held as quickly as possible. Employees may be held out of service for investigation (not exceeding three working days). They will be given at least twenty-four (24) hours' notice of the investigation and notified of the charges against them. (A copy of the notice for an investigation will be given to the Local Chairperson). This shall not be construed to mean that a proper officer of the Company, who may be on the ground when the cause of the investigation occurs, shall be prevented from making an immediate investigaiton."

"Employees may only, if they so desire, have the assistance at the investigation of one or two co-workers, which could include their local chairperson or authorized committee member of the Brotherhood who are employees of the Company."

"Upon request, employees being investigated shall be furnished with a copy of their own statements if they are made a matter of record at the investigation. The decision will be rendered within 21 calendar days from the date the statement is taken from the employee being investigated. Employees will not be held out of service pending the rendering of a decision, except in the case of a dismissible offence."

The Arbitrator finds some substance in the objections taken by the Union. Firstly, a statement made by Mr. Strickland, in his capacity as investigating officer, during the course of his questioning of the grievor is cause for some concern. It appears that following an answer given by the grievor to a question put by Mr. Strickland, the manager made the following statement for the record:

"As with almost all businesses the success of ours is dependent on our customers. Our customers should not have to be subjected to profane or vulgar language in order to receive the service they are entitled to and expect. Furthermore, this not only applies to customers but to anyone whether a customer, visitor or fellow employee. An attitude of this nature not only is contrary to Company policy, it flies in the face of common decency."

In the Arbitrator's view it is difficult to reconcile the above statement with the role of investigative officer in a process which is required, under article 24.1 of the collective agreement to be "a fair and impartial hearing." It is difficult to understand the statement of Mr. Strickland as other than reflecting his conclusion, well before the completion of the investigation, indeed after only seven questions, that the grievor lied in response to the sixth question when he denied swearing at the customer company's driver, and that Mr.

Strickland then formed an opinion that he should be disciplined. It is not possible to take the statement made by Mr. Strickland as a general or neutral statement of Company policy, particularly when it was immediately followed by the comment "... I would also like Mr. Kehler to know that if he feels that he may need some help in this area the Company has programs available that may be of assistance to him. He only has to let me know." These are not the words of a Company officer conducting a fair and impartial hearing prior to making a decision as to whether there is just cause for discipline.

Secondly, the Arbitrator must also accept the submission of the Union that the delay in the investigation of the grievor, being some seven weeks from the time the Company became aware of the incident, is beyond what is reasonable or contemplated by article 24.2. While it appears that the grievor immediately went on two weeks' vacation following the incident, there is no compelling reason why the investigation could not have been conducted immediately upon his return. Although it would appear that Mr. Strickland went on vacation a week following the grievor's return, that would not have prevented the investigation from taking place within a three week period. Alternatively, it is not clear that another Company officer could not have presided at the investigation.

For these reasons the Arbitrator must conclude that the Company did not comply with the requirement to conduct a fair and impartial hearing and to do so as quickly as possible, as mandated by article 24 of the collective agreement. On that basis, the discipline assessed against the grievor must be found to be a nullity. The Arbitrator therefore allows the grievance and directs the Company to remove the fifteen demerits assessed against Mr. Kehler.

May 18, 1995(sgd.) MICHEL G. PICHER
ARBITRATOR