Canadian Railway Office of Arbitration
Case No. 2654
Heard in Montreal, Wednesday, 13 September 1995
concerning
CanPar
and
Transportation Communications Union
ex parte
Dispute:

Burnaby employee G. Baron was alleged to have lost freight on or about April 27, 1995, for that alleged infraction he was assessed twenty demerits. The Company then terminated him effective May 29th, 1995 arguing that he had accumulation of seventy-five (75) demerits and that was sufficient cause for dismissal.

Ex Parte Statement of Issue

The Company alleged that on April 27, 1995, Mr. Baron did not secure the back door of his truck which opened and allowed two (2) pieces of freight to fall from it, that was later recovered. The Company held an investigative interview and assessed Mr. Baron twenty (20) demerits and terminated his employment.

The Union requested a copy of G. Baron's discipline file, which was compared to the information that had been previously supplied by the Company. The Union argues that based on the Company's records G. Baron had only had thirty (30) demerits in his discipline file. That when coupled with the twenty (20) demerits assessed May 29, 1995 would bring the total to fifty (50).

The Union requested Mr. Baron be returned to work without loss of seniority, and with compensation for any wages and benefits lost. In addition, the Union argued that the discipline assessed for the April 27th, 1995 incident was unwarranted and requested that it be removed from Mr. Baron's record.

The Company denied our request.

for the Union:
(sgd.) D. E. Graham
Division Vice-President

There appeared on behalf of the Company:
M. D. Failes– Counsel, Toronto
P. D. MacLeod – Director, Linehaul and Safety, Toronto
D. Dobson – Delivery Supervisor, Vancouver

And on behalf of the Union:
H. Caley – Counsel, Toronto
D. Dunster – Executive Vice-President,
A. Kane– Witness, Local Protective Chairman, Vancouver
R. Nadeau – Divisional Vice-President, Quebec Division
G. Baron – Grievor

award of the Arbitrator

The parties are agreed that on or about April 27, 1995 Mr. Baron was responsible for the loss of two pieces of freight off the back of his vehicle. It appears that he failed to secure the back door of his delivery truck, causing the doors to open and to allow the packages in question to fall out as he was driving between two delivery points. It is also common ground that the parcels in question were found and eventually recovered, without

any substantial difficulty to the customer which eventually received them. Mr. Baron was advised of the loss of the pieces during the course of the same tour of duty, by means of a telephone call from the terminal, which had been alerted by a motorist who had found them. On his next regular day of service Mr. Baron retrieved the parcels and delivered them to their destination.

The evidence involves some controversy as to whether the grievor's immediate supervisor, Mr. Dan Dobson, indicated to him that there would be no discipline flowing from the incident. It is not disputed that at the end of the day on which the two packages were lost, when the grievor had returned to the terminal, a conversation transpired between himself and Mr. Dobson during the course of which Mr. Dobson said to him "Don't worry", or words to that effect. Mr. Baron states that these words were uttered in response to his question as to whether he might be disciplined for what had happened. Mr. Dobson denies that that was his intention and, according to his recollection, he merely told Mr. Baron not to worry about the parcels, as they could be collected and delivered at a later time. In light of the disposition of this grievance on other grounds, the Arbitrator finds it unnecessary to resolve this evidentiary issue, although if it were necessary to do so I would have some difficulty accepting that the grievor could take an off-hand comment from his supervisor as full and final resolution of a matter which appeared so serious on its face as the failure to secure his truck and the loss of two packages.

The greater dispute in the instant case concerns the state of the grievor's disciplinary record. The Arbitrator does not propose to dwell on the details of the calculation of Mr. Baron's record, whether as proposed by the Company, or by the Union. It is not disputed that there were mathematical errors by the employer in the tabulation of Mr. Baron's record. Ultimately, the Company submits that he should be taken to have stood at fifty-five demerits prior to the culminating incident. It bases that position on the fact that the grievor received or was shown a written document dated October 11, 1994 indicating that his demerit total stood at fifty-five. Although the Company concedes that that total was not technically correct, its Counsel argues that the failure to grieve the figure then communicated to Mr. Baron, coupled with the mandatory time limits found within the collective agreement, effectively prevent the grievor from now asserting any different level of demerits for the purposes of his discipline.

The Union takes a different approach to the calculation of the grievor's disciplinary record. It stresses that the record is impacted significantly if the grievor is accorded a reduction of demerits for accident free service. It submits that the grievor's record prior to the culminating incident would have stood at thirty demerits, by the application of the Company's policy governing the clearance of demerits, so that the assessment of twenty demerits for the incident of April 27, 1995 should be viewed as placing the grievor in the final position of having fifty demerits, and, therefore, not being subject to dismissal.

A critical aspect of this case concerns the decision of Company to implement a new set of rules. It is common ground that a new "Driver and Warehouse Instruction Manual" was developed in

late 1993 and distributed among the employees in early 1994. That rule book made a substantial change in respect of the provisions governing the removal of demerits. Previously the rules allowed for the blanket removal of demerits, however acquired, for periods of demerit free service. For example, a notice form used under the old rules to communicate demerit status to employees, apparently still in use in Montreal, states, in part:

INDENT All demerits will be removed from the employee's record for one full year free from accidents, demerits and lost-time injuries.

It is common ground that under the new rules demerits for accidents are to be cleared only by periods of accident free service. Under the old rules the grievor would have had a greater benefit, as argued by the Union, as he could apply discipline free service that is not accident related. As an initial position, Counsel for the Union submits that the Company could not unilaterally change the rules governing the removal of demerits without negotiating the substance of the new rules with the Union. I have some difficulty with that submission. It is not disputed that the Brown System of discipline does not form a part of the collective agreement, nor that the contents of the Driver and Warehouse Instruction Manual, whether before or after their amendment, have ever been the subject of negotiation with the Union. Indeed the Union quite appropriately maintains that it has never agreed to those provisions. In the Arbitrator's view the instant case is best understood in light of the well accepted principles expressed in Re KVP (1965), 16 L.A.C. 73 (Robinson). Since that decision, it has been well settled that an employer may establish appropriate rules for the workplace from time to time, subject of course to any limitations in that regard which may be found in the collective agreement. A hallmark of such rules, however, is that they must be clearly communicated to the employees who are subject to them. It is, needless to say, unfair and inconsistent with well established principles of discipline to visit serious disciplinary consequences upon an employee who can assert that he or she was never made aware of the rules governing his or her circumstances. The unfairness is arguably greater when a change is made to a long established rule, without proper notification.

There can be little doubt that the Company itself has an appreciation of the importance of the above principle. It is not disputed that the previous Driver and Warehouse Instruction Manual was issued to each new employee, and that the employee was required to sign a form appended to the rule book acknowledging receipt of a copy of the rules. Significantly, a similar page for the acknowledgment of receipt is appended to the new Driver and Warehouse Instruction Manual. The evidence, however, leaves much to be desired as to the promulgation of the new instruction manual among the employees at the Burnaby Terminal.

The evidence of Mr. Baron is that he never received a copy of the new instruction manual. He was never made aware of the change in the system for clearing demerits, whereby driving related demerits would be cleared only by periods of service free of driving related infractions, with no weight attaching to periods free of other kinds of discipline. In other words, there is no evidence that he was ever made aware of the abolishing of the general rule which previously existed, to the effect that

discipline free service would apply for the removal of demerits for driving related offenses. The evidence of Mr. Dobson, as well as that of Mr. Al Kane, the Union's Local Protective Chairman at Vancouver, confirms that the new instruction manual was left on a table in the employees' cafeteria. There is, however, no evidence to establish that the issuing of the manual or the nature of its contents, to the extent that it was changed, was ever specifically communicated or explained to the employees by any representative of the Company. Indeed, the evidence confirms that employees other than Mr. Baron were required to come forward to request copies of the manual from Mr. Dobson, well after the events giving rise to this grievance. In the result, the Arbitrator is compelled to conclude that the grievor was never made aware of the change of rules. As a result, notwithstanding what was communicated to him in October of 1994, he could reasonably have concluded in April of 1995 that his demerit total was less precarious by reason of the application of the rules contained in the earlier version of the Driver and Warehouse Instruction Manual.

Counsel for the Company submits that the issue of the new rules should not be resolved in favour the grievor in the case at hand, as that matter was not raised by Mr. Baron or his Union in the early stages of the grievance. With respect, the Arbitrator cannot agree. The issue is not what Mr. Baron believed or did not believe as to the state of his prior disciplinary record, but what that prior disciplinary record must properly be taken to be for the purposes of assessing discipline against him at the time in question. The Company cannot convert the ignorance or misunderstanding of its own system by an individual employee into a conclusion that is binding upon him or her, or upon his or her union, in matters concerning the application of general rules. The Union is, quite properly, entitled to assert the general rules for the benefit of all employees in a manner consistent with well established arbitral principle.

In the result, the Arbitrator is compelled to conclude that the Union is correct in its assertion that the grievor should be entitled to the benefit of the rules governing the clearance of demerits which pre-existed the new Driver and Warehouse Instruction Manual, a document which I am satisfied he did not duly receive, and whose contents were not known to him. In the result, I must conclude that his disciplinary record prior to the culminating incident should, as the Union contends, be viewed as standing at thirty demerits prior to that incident. The assessment of twenty demerits would therefore bring the total of his disciplinary record to fifty, and would not have justified the employee's termination in the circumstances disclosed.

For the foregoing reasons the grievance is allowed, in part. The Arbitrator does not agree with the Union that twenty demerits was an inappropriate measure of discipline for the incident which transpired. Given the seriousness of the failure to secure his vehicle, and the actual loss of a customer's packages, the assessment of twenty demerits was, in my view, within the appropriate range of discipline. For the reasons discussed, however, that measure of discipline did not place the grievor in a dismissable position. The Arbitrator therefore directs that Mr. Baron be reinstated into his employment, with full compensation for all wages and benefits loss, and without lost of seniority,

with his disciplinary record to stand at fifty demerits.

September 15, 1995 (signed) MICHEL G. PICHER
ARBITRATOR