

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2667

Heard in Calgary, Tuesday, 14 November 1995

concerning

Canadian Pacific Limited

and

**Canadian Council of Railway Operating Unions
(United Transportation Union)**

DISPUTE:

Discipline assessed to Yardperson J.J. Kowalchuk, Regina, Saskatchewan.

Joint STATEMENT OF ISSUE:

Following a fair and impartial investigation, Yardperson Kowalchuk was assessed 15 demerit marks for failing to take the necessary action to comply with a specific switching request from a customer resulting in customer inconvenience, Regina Terminal, Mile 93.5, Indian Head Subdivision, February 4, 1993.

The Council has appealed the discipline on the basis of hearsay evidence and alleges that the burden of proof has not been met and have requested that the assessed discipline be removed.

The Company declined the Council's request.

FOR THE Council: FOR THE Company:

(SGD.) L. O. Schillaci

(SGD.) M. E. Keiran

General Chairperson for: General Manager, Operations & Maintenance, HHS

There appeared on behalf of the Company:

M. E. Keiran – Manager, Labour Relations, Vancouver

L. Guenther – Labour Relations Officer, Vancouver

And on behalf of the Council:

L. O. Schillaci – General Chairperson, Calgary

K. Jeffries – Vice-General Chairperson, Cranbrook

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AWARD OF THE ARBITRATOR

The sole issue in the case at hand is whether the grievor, Yardperson J.J. Kowalchuk, refused to perform a switching move as requested by a customer. It is not disputed that Mr. Kowalchuk and the representative of the customer, Federated Cooperative Ltd., had an exchange of words about the movement of an empty car at the customer's location during the 1900 yard assignment on February 4, 1993. According to Mr. Kowalchuk, he had been instructed by his yard foreman, Mr. R.S. Kullman to leave the empty car in question in place, for removal on another tour of duty, as the crew was then too busy to handle it. Mr. Kowalchuk states that while he was at the location he was asked by a Co-Op employee on the platform of the customer's facility whether he would be moving the empty car from the spur, to which he replied that it would not be pulled that evening. The Company maintains that the Co-Op employee, Night Foreman Bob Cook, in fact requested that Mr. Kowalchuk move the empty car and that Mr. Kowalchuk simply refused to move it. The incident resulted in a telephone call of complaint from the customer to the Company on the following day.

The thrust of the Union's case is that in the absence of any direct evidence from Mr. Cook, whether in the form of a verbal statement at the Company's investigation, or a written statement or letter, the entire case against Mr. Kowalchuk turns on hearsay evidence.

It is true, of course, that there is hearsay evidence relied upon by the Company in the instant case. That, however, is not uncommon, and it is within the jurisdiction of a board of arbitration to allow such evidence to be adduced, even though it might not be admitted in a court of law. There are a number of reasons for that exception to the general rules of evidence in labour arbitration, including the objectives of informality and expedition. Further, in the instant case it is obviously problematic for the employer to involve a customer and its employees in its own internal disciplinary proceedings.

In such circumstances it is not inappropriate for a board of arbitration to consider the degree of reliability of the hearsay which is offered. In the instant case there is some basis to rely upon the version of events offered by the Company. Before the Arbitrator is the written statement of Terminal Supervisor, D.R. Railton, dated March 12, 1993. He relates that he spoke directly to Mr. Cook on that date. According to Mr. Railton "... He [Mr. Cook] also indicated that he specifically requested the CP employee to pull the empty car and that this was not a statement of curiosity."

The record discloses that the memorandum signed by Mr. Railton was in fact provided to the grievor, as reflected in the record of his supplementary statement on March 30, 1993. In the face of that evidence it was, of course, open to the Union to speak to Mr. Cook to determine the accuracy of that statement, and to clarify the conversation which occurred between Mr. Cook and the grievor on the night in question. Further, it has always been available to the Union to subpoena Mr. Cook to the arbitration proceedings, should it feel it important to do so, to rebut the information contained in the Company's document.

When the entirety of the record is examined, it would appear that the Union was aware that Mr. Cook had provided to Mr. Railton a statement to the effect that he had expressly requested or directed that Mr. Kowalchuk move the empty rail car on the night in question. While it is true that the statement obtained from Mr. Cook is in the form of hearsay, it is no more nor less hearsay than the statements of Mr. Kowalchuk, which are also before the Arbitrator in document form, as part of the investigative record. On balance, I am satisfied that the statement attributed to Mr. Cook by Mr. Railton can be relied upon for the purposes of the instant case. In the result, the Arbitrator concludes, on the balance of probabilities, that Mr. Kowalchuk did decline to move a rail car when requested to do so by the customer's night foreman. In so doing Mr. Kowalchuk made himself liable to discipline, and I am satisfied that the fifteen demerits assessed are within the appropriate range of penalty.

For these reasons the grievance must be dismissed.

November 20, 1995 (signed) MICHEL G. PICHER

ARBITRATOR