

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2674

Heard in Calgary, Thursday, 16 November 1995

concerning

CANPAR

and

TRANSPORTATION COMMUNICATIONS UNION

EX PARTE

DISPUTE:

The Company alleges that on June 6, 1995 Mr. Cooper did not record the correct time into his scanner and assessed 30 demerits. On June 7th, 1995 they alleged he mishandled a C.O.D. when he allowed the consignee to deduct the cost of the goods damaged in transit from the settlement cheque. For that incident he was issued 15 demerits. These 45 demerits coupled with those in his file brought the total to 85 and he was terminated on June 27th, 1995.

UNION'S STATEMENT OF ISSUE:

Supervisor N. Javallas alleged that he checked Mr. Cooper, Mr. Boyd and N. Eby into the coffee shop at 09:24k and out at 09:51k. The drivers are adamant that the allegations are not factual and the time recorded into their scanners is the correct time.

The Union, upon receiving the grievance checked the terminal and bar-code scanners to see if they were synchronized. They found that the terminal clock was 5 minutes and 14 seconds slower than the scanners, which would explain the time Mr. Javallas alleged they arrived at the coffee shop.

During the investigative interview the Union requested that Mr. N. Javallas be available for questioning. That request was denied by the Company. Accordingly, the Union will argue that the Company is in non-compliance with article 6.2 and article 6.3 will now apply. In addition, the Union maintains its position that Mr. N. Javallas' allegations were not factual and as such the 30 demerits must be stricken from Mr. Cooper'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, Terminals, Toronto
D. Dobson	– Supervisor, Vancouver
N. Javallas	– Supervisor, Vancouver
B. Honsinger	– Supervisor, Vancouver

And on behalf of the Union:

D. Ellickson	– Counsel, Toronto
D. E. Graham	– Division Vice-President, Winnipeg

AWARD OF THE ARBITRATOR

On the basis of the evidence adduced the Arbitrator is satisfied that the grievor did commit a number of errors in the handling of a C.O.D. delivery on June 13, 1995. Upon close examination of the incident, however, the Arbitrator is not persuaded that the grievor's misconduct was such so grievous as to merit the assessment of fifteen demerits. Mitigating factors include his efforts to accommodate the customer through the expeditious handling of the return of a parcel of damaged goods and the fact that there was no inconvenience to the customer or harm done to the Employer's reputation. In the circumstances I am satisfied that the substitution of ten demerits as discipline for the incident is appropriate.

Thirty demerits were assessed against the grievor for his alleged fraudulent time-keeping on June 6, 1995. The evidence discloses that he was observed spending some twenty-seven minutes inside a restaurant on the morning of that date, by Mr. Nick Javallas, a driver supervisor. It is common ground, however, that the grievor entered fifteen minutes as the time for his morning coffee break on his scanner on the date in question. The Company also suggests that the times recorded for the travel from the terminal to the point of the grievor's first delivery are consistent with his having taken an unduly long coffee break at the restaurant. It appears that Mr. Javallas did a test drive over the same distances, taking approximately sixteen minutes less than the time recorded by the grievor.

The Union submits, in part, that the Company's investigation should be treated as a nullity in accordance with article 6 of the collective agreement. The Arbitrator is not persuaded that the Company's conduct of the disciplinary investigation was, in all of the circumstances, inconsistent with the standard of a fair and impartial investigation. While it is true that some questions put to Mr. Cooper might have been more accurately phrased, they do not, in my view, constitute entrapment as is suggested by Counsel for the Union.

However, great difficulty arises in the instant case by virtue of the fact that the investigation conducted by the Company was not held until June 27, some three weeks after the incident. While it is true that the grievor was shown his report for the day in question, as well as the statement of Mr. Javallas, it is not unreasonable to conclude that any employee might have some difficulty reconstructing with any precision his or her exact movements and activities at a precise point in time on a given day three weeks prior. The Company must appreciate that, as a general rule, it is important to conduct investigations of this kind in close proximity to the event, out of fairness to the employee.

The Arbitrator is not persuaded, however, that the delay in the instant case is sufficient to reject as unreliable all of the findings recorded by the Employer. The unchallenged fact remains that there was an abnormally long lapse of time between the grievor's departure from the terminal and a point at which he made his first delivery on June 6, 1995. In the circumstances, however, including the uncertainty which attaches to the delay in the Company's investigation, I am not prepared to conclude that what transpired was deliberate fraud on the part of Mr. Cooper. It is trite to say that an accusation so serious should be supported by clear and cogent evidence. That standard is not met in this case, insofar as proof of deliberate fraud is concerned. There is, however, ample basis to find that Mr. Cooper was careless, arguably to the point of negligence, in the pace at which he proceeded to commence his work on the morning of June 6, 1995. It cannot now be known with any certainty as to whether time expended inside the restaurant might have included working time on the telephone, a bathroom break or some other reasonable explanation for the grievor's activity. On the whole, however, the lapse of time prior to Mr. Cooper's first delivery does, on the balance of probabilities, support the inference that there was a lack of care and diligence on his part, for which he was liable to the assessment of discipline at a serious level.

In the circumstances the Arbitrator deems it appropriate to direct a substitution of penalty. Mr. Cooper shall be reinstated into his employment, without compensation or benefits, and without loss of seniority. In light of the Arbitrator's disposition of the assessment of discipline of the C.O.D. delivery incident, his record shall stand at fifty demerits.

November 20, 1995

(signed) MICHEL G. PICHER
ARBITRATOR