

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2736

Heard in Calgary, Wednesday, 15 May 1996

concerning

CANPAR

and

TRANSPORTATION COMMUNICATIONS UNION

EX PARTE

DISPUTE:

CanPar employee Mr. A. Kane discipline – fifteen (15) demerits for allegedly not completing assigned duties.

UNION'S STATEMENT OF ISSUE:

On April 4th, 1995, driver A. Kane was at GFG Distributors at 15:00k to make a pick-up. The pick-up wasn't ready so he phoned Mr. Javellas to advise of that fact. Mr. Javellas asked him if he had taken his lunch break. Mr. Kane replied he had not. He was told to take a meal break and go back later to get the pick-up. Mr. Kane explained that he had been on duty since 07:00k and he had an agreement with Mr. Dobson that he wouldn't take a lunch break so he could get to GFG Distributors on time. Mr. Javellas asked if it was in writing and when told it was verbal he then alleged that Mr. Kane stated that if he was forced to take a break he would not return to make the pick-up. The Union will argue that Mr. Javellas' statement is not factual. In addition, Mr. Kane having worked eight consecutive hours would not be required to take an unpaid meal break.

The Union provided the Company with a letter from Mr. Gus Wilson, President GFG Distributors, who stated, "On a personal note, Al has been a major help to both myself and my shipper. He assists us in many ways that you may not know. Quite frankly he is one of CanPar's best employees. So I find it very disturbing that Al is being hassled when there should be a lot more credit given for his efforts."

On the basis of Mr. Kane's explanation and Mr. G. Wilson's glowing letter the Union requested the demerits be removed from Mr. Kane's employment record.

The Company declined 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
R. Downs	– Regional Sales Manager, Western Canada

And on behalf of the Union:

R. Coleman	– Counsel,
D. E. Graham	– Assistant Division Vice-President, Regina
A. Kane	– Grievor

AWARD OF THE ARBITRATOR

The grievor was disciplined for “not completing assigned duties 4/4/95”. The burden is upon the Company to demonstrate that Mr. Kane failed in the completion of his duties in a way that justifies the assessment of discipline.

In the Arbitrator’s view the evidence falls substantially short of proving that Mr. Kane failed in his obligations to his employer, or to its customer on April 4, 1995, as alleged. The evidence establishes, on the balance of probabilities, that at the conclusion of his working day, as previously arranged with his supervisor Mr. Dobson, Mr. Kane attended at GFG Distributors to make a pick-up. Certain of the freight he was to pick up was not then ready, and it was apparent that he would have to wait. He then called to advise Supervisor Nick Javellas that he would have to wait, a development which would occasion the payment of overtime. When Mr. Javellas suggested he should take a lunch break at that point, Mr. Kane explained to him that he had a prior arrangement with Mr. Dobson whereby he commenced his working day earlier, on the understanding that he would work through lunch to be able to cover the GFG pick-up in a timely fashion. It appears that Mr. Javellas then indicated that he would try to send another truck.

The evidence before the Arbitrator confirms, both through the testimony of Mr. Kane and through documentary evidence signed by Mr. Gus Wilson, President of GFG Distributors, that Mr. Wilson, having overheard Mr. Kane’s end of the telephone conversation, told him that in fact the balance of the pick-up could be delayed until the next day, and that he was free to go. It appears that at that point Mr. Kane returned to the terminal.

The record is devoid of any direct statement by Mr. Javellas who, it appears, in fact conducted the disciplinary investigation of Mr. Kane. During the course of questioning, Mr. Javellas suggested to Mr. Kane that the pick-up in question was reassigned to a competitor, Loomis Transport, the following day. That suggestion is, however, squarely rebutted by the Union’s evidence. A letter from Mr. Wilson, of GFG Distributors Ltd., dated May 3, 1996, contains the following statement:

This letter is to confirm that no other courier company was called to move freight or moved any freight that would have been moved by CanPar Transport on the day in question.

I instructed Mr. Kane that he could leave as our shipping work was completed for the day.

The CanPar manifest for the day was finished. Any pending orders were filled, manifested and shipped through CanPar the following day.

During the course of cross-examination Counsel for the Company attempted to elicit from Mr. Kane that he had a social relationship with Mr. Wilson. While Mr. Kane conceded that the two had competed against each other in amateur golf tournaments, the Arbitrator is not impressed that that fact bears substantial weight in assessing the merits of this case. The un rebutted evidence before me is that the customer instructed Mr. Kane that he would not need the pick-up completed, and that the work in question was in fact not lost to the Company. No direct statement by Mr. Javellas, and certainly no direct testimony at the hearing, was presented by the Company to give any substance to his suggestion that the work was directed to a competitor.

When the evidence is reviewed as a whole, the only error of judgment on the part of the grievor would appear to be that he failed to call Mr. Javellas to advise him that the pick-up would, by the customer’s instruction, await the next day, and that it would not be necessary to send a truck. There is, however, no evidence that a truck was in fact sent or that there was any dislocation of operations as a result of what transpired. Most importantly, the Company has not proved that the grievor failed to pick-up freight which the customer wanted picked-up, as alleged. In the result, there was no basis to assess discipline against Mr. Kane, and the grievance must be allowed.

The Arbitrator directs that the fifteen demerits registered against Mr. Kane’s record be removed forthwith.

May 17, 1996

(signed) MICHEL G. PICHER
ARBITRATOR