CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2911

Heard in Calgary, Thursday, 13 November 1997

concerning

CANPAR

and

Transportation Communications Union

EX PARTE

DISPUTE:

Mr. Hartmann was dismissed, effective June 24, 1997, for alleged "work and time reporting infractions", which occurred on or about May 29-30, 1997. These incidents involved the combining of breaks and improper time recording.

JOINT STATEMENT OF ISSUE:

Mr. Hartmann was disciplined in part for combining breaks and unrecorded down time on the days in question. He does not deny that he combined breaks and was forthright during the investigative interview regarding this issue. He has denied the allegation that he mislead the Company or deliberately extended his breaks. He has clearly indicated in the interview that he was not aware of the policy of how much time was required between breaks. He left the terminal on both days with a regular amount of work and in fact completed all his pick ups and deliveries, which were known to his supervisor prior to leaving the terminal.

The Union argued that the Company was in violation of article 6.2, and further argued that dismissal was excessive discipline given the circumstances, discriminatory and unwarranted. Particularly, in light of Mr. Hartmann's excellent work and discipline record. The Union requested immediate reinstatement with full compensation for all lost wages and benefits.

The Company denied the Union's request.

FOR THE UNION:

(SGD.) D. J. DUNSTER

EXECUTIVE VICE-PRESIDENT

There appeared on behalf of the Company:

M. D. Failes – Counsel, Toronto

P. D. MacLeod – Vice-President, Operations, Toronto

N. Javalles – Supervisor, Vancouver

E. Donnelly – Regional Manager, Vancouver

And on behalf of the Union:

M. Church – Counsel, Toronto

D. J. Bujold – National President, Ottawa

A. Kane – Local Chairman, Vancouver

B. Plante – Local Chairman, Calgary

R. Hartmann – Grievor

AWARD OF THE ARBITRATOR

The facts established in evidence by the Company do not, in the Arbitrator's opinion, disclose that the grievor knowingly or consciously sought to mislead the Company by creating false entries with respect to his time worked for the purpose of gaining overtime. While it is true that Mr. Hartmann did create incorrect entries with respect to the time he took lunch and a break, I am satisfied that he did so because he did not understand the procedure he was supposed to follow in the recording and scanning of his time. In particular, he was not aware that he should call the terminal when he had short periods of idle time prior to the time at which he was scheduled to commence his afternoon pickups.

The Union further challenges the discipline assessed against Mr. Hartmann on the basis of an alleged violation of the procedural requirements of article 6.2 of the collective agreement which governs dismissals and discipline. It provides, in part:

> The employee to be interviewed shall be notified in writing, no less than twenty-four hours prior to the scheduled interview time. This notice shall include the reason the interview is being held.

The notice provided to Mr. Hartmann prior to his disciplinary investigation simply stated that he was to be interviewed in respect of his "…work and time reporting." No specific allegation was brought to his attention and no dates, times or locations were referred to. In fact the Company was concerned with the grievor's reporting of his working times on May 29 and 30, 1997. However, the interview was conducted almost two weeks later, on June 10, 1997. In the result, the grievor presented himself at an investigation with no real notice of the specific incident or incidents which were the subject of the investigation, and obviously no ability to prepare, whether by making attempts at better recollection, or seeking documentation which would assist in that regard.

In the Arbitrator's view, the circumstances disclose a course of Company action which goes beyond the minimal requirement for notice provided in article 6.2 of the collective agreement. It is clear that the process contemplated under that article is something less that the more elaborate protections of a fair and impartial investigation found typically within collective agreements in the railway industry. However, the Arbitrator cannot conclude that the requirement that an employee be given written notice of the reason for an interview is as empty of content or meaning as the Company's position would suggest. If the concept of a written notice is to have any value, as I believe the parties intended, it must be construed, at a minimum, to give the employee some advance indication of the incident or conduct being investigated. Needless to say, a phrase as cryptic as "employer concern" could be advanced as a "reason" for any investigative interview. It would, however, scarcely give an employee any indication of what was to be dealt with. Similarly, in the case at hand, the failure to communicate to the grievor that the reason for the investigation was his actions on two specific dates, some thirteen days prior to the investigation, is, in the Arbitrator's view, a departure from the minimal protection of the requirement to give him meaningful notice of the reason for the interview.

If the facts ended there, the Arbitrator would allow this grievance on the alternative basis that the discipline must be viewed as null and void, in accordance with the intention of article 6.3 of the collective agreement which provides as follows:

> **6.3** Failure to comply with article 6.2 shall render any conclusion null and void, and any statements at such interview inadmissible in any subsequent proceedings.

There is, however, a factor which would lead to a contrary result. It is not disputed that in the case at hand neither the grievor nor his union representative made any clear and formal objection to the lack of meaningful notice at the time of the disciplinary interview. In the circumstances, I am compelled to conclude that by failing to put the Company on notice of its intention to challenge the validity of the proceedings, the Union must now be taken to have waived its right to do so. There is obvious prejudice to the employer if a procedural objection of this kind is first raised at the arbitration stage, months after the assessment of discipline. On that basis the Union's objection cannot succeed. Hopefully, however, the Company will appreciate the need to give proper notice of the reasons for a disciplinary interview in future, particularly where the precise facts which prompt the interview are well known to the employer.

Additionally, even if it could be found that the grievor did engage in a degree of negligence or deliberate misrepresentation in the manner he recorded his working time on the two days in question, from the standpoint of the consistency of discipline the Arbitrator would have further difficulty with the decision of the employer. The Union has drawn to the Arbitrator's attention a number of incidents, some of which involved grievances heard in this Office, where false or inaccurate times in respect of the taking of breaks were dealt with by the same employer through the assessment of penalties in the range of fifteen to twenty demerit marks (**CROA 2308, 2309**). In other cases, although the demerits assessed were higher, discipline stopped short of discharge (**CROA 2465, 2674**). In the instant case Mr. Hartmann, who has a positive work record, had never previously been disciplined for false or erroneous timekeeping. In the circumstances, I would be compelled to sustain the submission of the Union that, even assuming some culpability on his part, this first incident would merit something less than outright discharge, on an application of normal principles of progressive discipline.

For the foregoing reasons the grievance is allowed. The Arbitrator directs that the grievor be reinstated into his employment forthwith, with compensation for wages and benefits lost, and without loss of seniority.

November 25, 1997 **(signed) MICHEL G. PICHER**

ARBITRATOR