

**CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 2972**

Heard in Montreal, Tuesday, 8 September 1998
concerning

CANPAR

and

TRANSPORTATION COMMUNICATIONS UNION

DISPUTE:

CanPar employee Raymond Brossard was issued discipline for two alleged breaches of Company procedures on March 26, 1998. He was issued fifteen (15) demerits for the first incident and received for (4) demerits for the second incident plus a three (3) day suspension.

JOINT STATEMENT OF ISSUE:

On March 26, 1998 an unscanned and unrecorded piece of freight was found in his vehicle and subsequently delivered on March 27, 1998. Following an investigation, where Mr. Brossard claimed no knowledge of that piece of freight, on March 26, 1998 he was issued fifteen (15) demerits for a service failure. The Union argued that Mr. Brossard did not commit any service failure and in any event the discipline was excessively harsh.

On March 26, 1998 Mr. Brossard left a piece of freight at a customer and signed for the delivery himself as the receiver was not at his station. The area where it was left was secured and no freight was missing. He was subsequently issued for (4) demerits and given a three (3) day suspension. The Union argued that this discipline was excessively harsh given the nature of the offence.

The Union maintains that this discipline in the first incident was not warranted and should be removed from his record. The Union further argued that the discipline in the second incident was excessive and that it be reduced to a written warning and that he be reimbursed for the three (3) day suspension.

FOR THE UNION:

(SGD.) D. NEALE

DIVISION VICE-PRESIDENT

FOR THE COMPANY:

(SGD.) P. D. MACLEOD

VICE-PRESIDENT, OPERATIONS

There appeared on behalf of the Company:

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

R. Dupuis - Regional Director, Montreal

And on behalf of the Union:

D. Dunster - Executive Vice-President, Ottawa

D. Neale - Division Vice-President, Hamilton

AWARD OF THE ARBITRATOR

The grievor was disciplined for two separate infractions which occurred on the same day. As in any matter of discipline, the burden of proof is upon the Company. The first incident causes question in the Arbitrator's mind as to whether the Company has in fact discharged that burden, whereas there is no doubt that the elements of a disciplinable offence are established in respect of the second incident.

The first incident giving rise to the grievance concerns the alleged non-attempt to deliver a parcel intended for the Canadian Museum of Contemporary Photography, adjacent to the Chateau Laurier in Ottawa. The

record discloses that in fact the grievor apparently delivered all of the parcels on his truck on the day in question, albeit that the undelivered parcel was found on his vehicle after he had returned to the terminal and apparently left for home. The Union's representatives submit that there are a number of possible explanations for the appearance of the parcel on the grievor's truck, including that it might have been placed there by another driver or a warehouseman, intending that it eventually be delivered in the normal course by Mr. Brossard.

When the evidence is examined closely, there are three possibilities. The first, which appears to the Arbitrator to be implausible, is that the grievor deliberately decided not to deliver the parcel in question. A second possibility is that he simply missed the parcel, and that it remained undetected among the parcels which he picked up. The third possibility, argued by the Union, is that the parcel was in fact added to his vehicle after he returned to the terminal at the end of his working day.

The Arbitrator finds both the first and last possibilities to be less probable than the second. In my view what the evidence discloses, on the balance of probabilities, is not a deliberate non-attempt at delivery. Nor am I prepared to conclude that the parcel mysteriously appeared in the grievor's truck for unexplained reasons, in the very brief period of time when that might have occurred at or about 5 p.m. on the 26th of March. Rather, it seems to me that the grievor made an error in judgement in handling his parcels, and failed to deliver the freight in question by inadvertent oversight. In my view that should be viewed as impacting the appropriate measure of discipline in the circumstances. I therefore determine that the discipline for the incident of March 26, 1998 with respect to the nondelivery of the single piece of freight should be reduced to five demerits.

The second incident clearly involved an infraction by Mr. Brossard. He signed himself for the receipt of two parcels for the CBC Radio facilities in the Chateau Laurier. This was plainly contrary to all policy and practice and could have caused the Company to pay a claim for non-delivery of a lost parcel, but for the identification of the package through the consignee records available to the Company. While it is true that the grievor did not intend any deception by his actions, he clearly departed from the appropriate practice, in a manner deserving of discipline. In my view, however, the assessment of four demerits, coupled with a three day suspension tends to be excessive. As a general rule, demerits are assessed precisely for the purpose of avoiding suspensions as a means of conveying to an employee the need to correct his or her conduct or working habits. I am satisfied that the assessment of a three day suspension was appropriate in the case at hand, given the grievor's record, and that the additional awarding of four demerits was excessive. The Arbitrator therefore directs that the grievor's record be amended to reflect the assessment of a three day suspension for signing for the delivery on March 26, 1998, and that the four demerits assessed against him be removed from his record.