CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 493

Heard at Montreal, Tuesday, January 14, 1975

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

DISPUTE:

The Brotherhood alleges that the Company violated Agreement 5.1 in carrying out the investigation of Mr. J.E. Brousseau and in his disqualification as a chauffeur. It seeks his return to work as a chauffeur with compensation for financial loss.

JOINT STATEMENT OF ISSUE:

On April 3, 1974, Mr. J.E. Brousseau, in his capacity of a chauffeur was involved in fire damage to a Company crew vehicle that he was driving. An investigation was held on April 5, 1974, and Mr. Brousseau was held out of service pending the rendering of the Company s decision. Subsequently the Company took a statement from another employee who witnessed the events of April 3. On April 10 the Company advised Mr. Brousseau to report for a supplementary statement on April 11, but he did not appear for the statement taking.

The grievor subsequently advised the Company that he had not appeared to give a supplementary statement on the advice of the Brotherhood. The Company then advised the grievor that a supplementary statement would be taken on April 19 and Mr. Brousseau appeared on that date and the statement was taken. On April 22 the Company permanently restricted Mr. Brousseau from operating Company vehicles. The Company also communicated with Mr. Brousseau on two separate occasions in regard to his having a Company medical to clarify whether or not a previous medical restriction in regard to lifting continued, in order to identify which types of work he could not physically perform. Mr. Brousseau did not respond to these Company initiatives and continued to absent himself from the Company.

On July 2, 1974 the Company wrote to Mr. Brousseau advising him to appear for an investigation in regard to his unauthorized leave of absence, failure to report for a Company medical examination and failure to seek work under the provisions of Article 12.19 of the Agreement. Mr. Brousseau attended that investigation on July 17, 1974 and gave a statement but continued to absent himself from the Company. On August 30, 1974 the Company again wrote to Mr. Brousseau explaining the various aspects of the situation and Mr. Brousseau responded on September 4, 1974. The grievor continued to absent himself from the Company.

The Brotherhood alleges that the Company violated Article 24.2 in the manner in which the investigation of Mr. Brousseau was carried out and that he should not have been disqualified as a chauffeur. The grievance seeks Mr. Brousseau's return to service as a chauffeur and compensation for all financial loss he suffered from April 8, 1974. The Company denies that Mr. Brousseau was disqualified as a chauffeur without just cause or that it violated the provisions of Article 24.2 in the manner the investigation was held. The Company also maintains that the length of Mr. Brousseau's absence from work was the result of the grievor's own decision based on advice from the Brotherhood. This dispute has been processed through the various steps of the grievance procedure and ultimately to arbitration:

FOR THE EMPLOYEE: FOR THE COMPANY:

(SGD.) J. A. Pelletier (SGD.) S. T. COOKE

National Vice-President ASSISTANT Vice-President, LABOUR RELATIONS

There appeared on behalf of the Company:

P. A. McDiarmid – System Labour Relations Officer, Montreal

W. W. Wilson – Labour Relations Assistant, Toronto

J. Czechowski – Automotive Equipment Inspector-Express, Belleville

R. J. Mawdsley – Service Representative-Transportation, Belleville

And on behalf of the Brotherhood.

P. E. Jutras – Regional Vice-President, Montreal

J. A. Pelletier – National Vice-President,

J. Thomas – Local President, Belleville

L. St.Pierre – Representative, Ottawa

W. Reynolds – Local Chairman, Belleville

J. E. Brousseau – Grievor

AWARD OF THE ARBITRATOR

On April 3, 1974, the grievor, a qualified chauffeur, drove a Company vehicle, containing Company personnel, to a restaurant in Belleville. The grievor stated that on approaching the restaurant he entered the driveway and turned to get onto the parking lot, but then realized he was on the lawn and was stuck. From the other material it would appear that he turned short against the advice of his passenger. In any event, it is not denied that the grievor was in error in driving onto the private lawn. Being stuck, he attempted to drive or rock the vehicle out of the mud, and the passenger attempted to push the vehicle in order to help get it out. These efforts did not succeed. The grievor continued to rock the vehicle, and it would seem that he revved the engine excessively in his attempts to free the vehicle. Eventually there was a noise in the motor, smoke appeared and the passenger shouted that the engine was on fire. The grievor shut off the ignition and the fire department was called. The fire was extinguished, but the vehicle was very severely damaged.

While the precise cause of the fire is subject to some doubt, the clear probability is that it resulted in some way (whether or not also related to some possible defect in the equipment itself) from the grievor's efforts to free it. The evidence suggests the most probable cause as an overheated transmission caused by the excessive revving of the motor. In my view, the proper conclusion to be reached is that the grievor, having carelessly driven onto the private lawn, then made rather frantic and, again, careless efforts to remove his vehicle. I think these matters went beyond the realm of acceptable human error and into that of careless work for which discipline might be imposed. In the instant case the Company did not impose one of the usual forms of discipline, such as a suspension, or the assessment of demerits but rather demoted the grievor – or rather determined that he was no longer qualified to carry out the work of his regular classification. One issue in this case is whether that was proper.

The other issue to be determined is whether there was compliance with Article 24 of the collective agreement, which deals with the discipline and grievance procedure and in particular the requirement of an investigation. An investigation was held on April 5, 1974, and that investigation would appear to have been in compliance with the requirements of the agreement. At the end of that investigation the grievor was held out of service pending the Company's decision. Whether this was proper or not, having in mind the nature of the offence, is not a question I need determine here, since, for the reasons I shall give below, the grievor is not entitled to recover his loss of earnings for this period in any event.

Statements were taken from other persons, and the grievor was requested to attend a further investigation on April 11, but refused to do so This refusal was based on the advice of his Union representative, but in my view it was not proper. The further investigation would give the grievor the opportunity to comment on the reports which had then been made, and would permit a more informed decision by the Company. There may well be cases where a proper and full investigation of the sort contemplated by Article 24 cannot be achieved by the taking of one brief statement. In any event, the grievor was again requested to appear for investigation, and did so April 19.

By the provisions of Article 24.2, the Company had a period of 21 calendar days in which to render its decision in the grievor's case. This period dates, in my view, from "The date the statement is taken from the employee", which means the date of the first such statement, but its effect I think, is not necessarily to prevent the assessment of discipline after that time has elapsed, as to limit the period during which the employee may be held out of service: see **CROA Case No. 202**.

On April 22 – within the time limit of Article 24 – the Company prepared a notice purporting to restrict the grievor "from operating all Company owned and leased self-propelled automotive equipment and machines of any description", and to count his time out of service as suspension. The restriction, it seems clear to me (and this was acknowledged by the Company at the hearing) relates only to the operation of vehicles. It would seem that it was not until April 22 that this notice was actually given to the grievor (or rather to his Union representatives). The delay would have no practical effect since the intervening days were not working days, but it would be my view that the grievor was, in accordance with what has been said above, entitled to return to work as of April 29.

Because of the restriction which the Company purported to impose on the grievor, which had the effect of a demotion, there was no work, available for him on that day. Indeed, the grievor's rights, if the Company's action was proper, were simply to apply for jobs that might become open. In order to permit prompt action in this regard in the future the Company arranged for the grievor to undergo a medical examination, since it was aware there were certain physical limitations on the work the grievor might do. Now if the Company's action in demoting the grievor had been justified, then its arranging for a medical examination was quite proper. The grievor refused to take this examination, and in my view he not only ran a certain risk (in case the Company was upheld), but he thereby made it impossible for him to mitigate his losses (in case his grievance was upheld). The grievor, although expected to report for work, refused to do so, taking, as it were, an "all or nothing" view of the matter. This was clearly wrong, and it subjected him to a very serious risk of discharge. The Company (quite properly, given the grievor's forty years' seniority) did not take that sort of view of the latter, fortunately.

There was in fact a fair investigation held, and no violation of Article 24. In view of what I have said above as to the time when the Company's decision was rendered, I conclude that he would be entitled to return to work (or to be considered for possible positions) as of April 29.

To return to the merits of the discipline imposed on the grievor I have no doubt that this was in fact a case of discipline, and not one where a determination is made that an employee is no longer competent or qualified to perform the work of his classification. Now the sort of careless driving and vehicle handling of which the grievor was, as I find, guilty on April 3, 1974 does indeed raise a suspicion as to his competence. But it takes more than one instance of improper work to establish an incapacity to do that work. The Company might, indeed, have been justified in requiring the grievor to undergo driving tests, but that was not done. While the grievor did not have a clear record, it is not suggested that what occurred on April 3 was the sort of thing which finally proved incompetence. It was a case of a job done badly, but it did not show that the employee could no longer be expected to do the job well. What he did called for discipline, as I have said, it did not demonstrate incompetence.

As a disciplinary measure, demotion is not, in general, appropriate: in this respect, I would refer to the cases cited by the Union: **Gabriel of Canada Ltd.**, 19 LAC 22 (Christie), **Allied Tube and Conduit**, 48 LAC 454 (Kelliher), **Tecumseh Products of Canada Ltd**., 19 LAC 180 (Weatherill), and **Canadian Pacific Railway Co**., 22 LAC 312 (Weatherill), and there are many other cases to the same effect. In the instant case, I find that there was not proper justification for the imposition of a restriction on the grievor which would prevent him from carrying out the work of his classification. There was justification for the imposition of discipline. It appears the grievor had 5 demerit points at the time. The Company imposed a suspension equal to his time out of service, which amounted to some three weeks' working time. This constitutes a relatively severe penalty, but having regard to the circumstances I would not find that it went beyond the range of reasonable disciplinary responses to the situation.

Since, as I find, there was no proper ground for the demotion of the grievor, and since, as I have indicated above, he was entitled to return to work as of April 29, 1974, it is my conclusion that the grievor is entitled to reinstatement forthwith in his position of chauffeur, without loss of seniority or other benefits, together with compensation for loss of earnings, and I so award. In assessing the compensation payable to the grievor, however it is to be borne in mind that because of the position taken by him and on his behalf, there appears to have been no step taken towards mitigating his loss of earnings. Clearly it was his duty to accept whatever work was available to him, all the while continuing to press his grievance for restoration to his classification and for loss of earnings. The Company expected him to be available for some sort of work, but he refused to apply for or accept whatever work there might be. Accordingly, the grievor's compensation under this award should be calculated as follows, a determination should be made as to the gross amount the grievor would have made in his classification of chauffeur from April 29, 1974 until the date of his actual reinstatement; from that should be deducted an amount equal to the amount it can be shown the grievor would have earned in a job which would have become available to him in the interval, for which he was qualified (the costs of any necessary medical assessments being borne by the Company); the balance, less any deductions required by law, is to be paid over to the grievor forthwith. In the event the parties are unable to agree as to the amount payable to the grievor, I retain jurisdiction to deal with that matter and to complete the award.

(signed) J. F. W. WEATHERILL

ARBITRATOR