CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 696

Heard at Montreal, Tuesday, February 13, 1979

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

DISPUTE:

Discipline assessed Mr. D.R. Nelson, Motorman, Edmonton,

JOINT STATEMENT OF ISSUE:

The Company assessed 40 demerit marks and suspended Mr. D.R. Nelson for 30 days for refusing to carry out instructions, making defamatory remarks and insubordinate behaviour at Edmonton, Alberta, on 28, 29 and 30 March 1978. The Brotherhood contends that no discipline was warranted and requested that Mr. Nelson be paid for all time held out of service and that the forty demerit marks be erased from his record forthwith.

The Company declined the Brotherhood's request.

FOR THE EMPLOYEES:	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:

C. L. LaRoche	– System Labour Relations Officer, Montreal
R. Monette	– Attorney, Montreal
M. M. Bebee	– Manager, Express, Edmonton
D. J. Stewart	– General Fleet Supervisor, Edmonton
D. Ponto	– Terminal Supervisor, Edmonton
J. Ahlstrom	– Vehicle dispatch Clerk, Edmonton

And on behalf of the Brotherhood:

R. Henham	– Regional Vice President, Vancouver
H. L. Critchley	– Representative, Edmonton
D. R. Nelson	– Grievor

AWARD OF THE ARBITRATOR

The evidence is that on March 28, 1978, the grievor was instructed by the Vehicle Service Clerk (in effect, the Dispatcher), to take an empty container from the Express Terminal to the piggyback ramp, and then to proceed to a customer's premises (N.K. Seeds Ltd.) to pick up a trailer, and to drop it off at the Northern Alberta Railway terminal. The grievor did not follow these instructions. He did not take the empty container from the Express terminal to the piggyback ramp, instead, he proceeded directly to N.K. Seeds Ltd., where he picked up the trailer and delivered it as instructed. He refused to perform the first move on the ground that he did not have time.

The evidence is, further, that on March 29, 1978, the grievor was instructed to take a loaded trailer from the Express terminal to the Northern Alberta Railway terminal, and then to pick up an empty trailer there and deliver it to the No. 7 Supply Depot. The grievor refused to carry out this second move, on the ground that he would not have time to do so without working overtime, and that he did not work overtime. After the grievor had carried out the first move, he was again instructed to carry out the second, and he again refused. The Vehicle Service Clerk then reported the matter to the General Fleet Supervisor, who contacted the grievor and repeated the instruction. The grievor again refused, saying he would contact the Local Chairman. Both the grievor and the General Fleet Supervisor then contacted the Local Chairman who (quite properly) advised the grievor that he should carry out the instruction. Shortly thereafter, the General Fleet Supervisor was asked to contact the grievor again, which he did. The grievor sought to demonstrate that the move in question would involve overtime. The General Fleet Supervisor advised him that it was his responsibility to carry out the move. This conversation was by radio, and the grievor announced, publicly, "all you guys, listen to this". He did not carry out the move.

The evidence is, again, that on March 30, 1978, the grievor was instructed to take a trailer to Camrose to pick up a load, and return. The grievor advised that he would not make the trip unless he were given a letter guaranteeing that he would not have to work overtime. The Vehicle Service Clerk would not issue such a letter, but contacted the Relief Vehicle Supervisor, who went, with the grievor, to the office of the General Fleet Supervisor. There, the grievor re-stated his position, that he would not make the trip to Camrose without a guarantee that no overtime would be involved. The Supervisor replied that no such letter would be issued. In responding to this, the grievor referred to the Supervisor as a "nazi", a "fascist" and a "Company stooge". When the Terminal Supervisor, who was present, intervened to say that the grievor should get about his business and do the job, the grievor then said that he too was a "nazi" and a "fascist". The grievor persisting in his refusal to accept his assignment unless he received a written guarantee that there would be no overtime, he was told by the General Fleet Supervisor to turn in his keys, that he was out of service. At that, the grievor left the supervisor's office, saying that the supervisor could not put him out of service and that he would not turn in his keys. Subsequently, at the request of the Terminal Manager, the grievor did turn in his key and leave, but not before demanding, and receiving, a letter to the effect that he was being taken out of service.

There is no substantial dispute as to the foregoing. It is clear, and I find, that the grievor did, on the three successive days referred to, refuse to carry out an assignment. On March 30, and to a lesser extent on March 29, this was done in such a fashion as to make it clear that a defiance of managerial authority was involved. On March 30, this defiance was expressed in very improper, and indeed obscene language. There can be no doubt that on each of these occasions the grievor became subject to discipline and that in respect of March 30, even without regard to the previous day's events, severe discipline would be justified.

There was no justification for the grievor's conduct. It does not appear probable that any overtime would in fact have been involved on any of the occasions referred to, and that probability (or lack of it) is particularly clear with respect to March 30. The Company could not reasonably be expected to "guarantee" that there would be no overtime, and for the grievor to advance that as a condition of his doing his job was obviously improper. There is no evidence whatever that the Company had anything against the grievor or that there was the least shred of explanation for his description of the Company officers in the abusive terms which the grievor used.

From my reading of the collective agreement, there appears to be no justification for the belief that the grievor might properly have refused any overtime that might have been involved in the assignments referred to (although I have indicated my view that no overtime would in fact have arisen). I do not, however, make any definite determination as to the overtime provisions in this case. Even if it were concluded that overtime was purely voluntary, that would not have justified the grievor in his refusal to accept the directions in question. Clearly, no substantial overtime would have been involved in any event. Any other employee improperly deprived of work

would be entitled to grieve, as would the grievor. There are present here none of the exceptional circumstances which would justify any departure from the general and well-established rule that an employee should carry out the instructions given him, and protest then, if he wishes, through the grievance procedure.

The major thrust of the Union's argument in this matter is that a proper investigation, as required by Article 24.2 of the collective agreement was not held. That article is as follows:

> **24.2** Investigations in connection with the alleged irregularities will be held as quickly as possible. An employee may be held out of service for investigation (not exceeding three working days). He will be given at least one day's notice of the investigation and notified of the charges against him. This shall not be construed to mean that a proper officer of the Company, who may be on the ground when the cause for investigation occurs, shall be prevented from making an immediate investigation. An employee may, if he so desires, have the assistance of one or two fellow employees, or accredited representatives of the Brotherhood, at the investigation. Upon request, the employee being investigated shall be furnished with a copy of his own statement, if it is made a matter of record at the investigation. The decision will be rendered within 21 calendar days from the date the statement is taken from the employee being investigated. An employee will not be held out of service pending the rendering of a decision, except in the case of a dismissable offence.

In particular, it is said that the grievor was improperly denied a right to cross-examine persons called by the Company, and that he was denied the right to recess at times of his choosing. As to the first point, I have, in **Case No. 628**, indicated my view that this particular provision does not create a right, advisable as it might be for the Company to allow it, at least in most cases. It must be remembered that in a discharge case the onus is on the Company, at arbitration, to establish just cause for the action it has taken. The failure of the Company to permit all the facts to come out at an investigation could well tell against it at least in the matter of penalty, even if it were later held that there had been just cause for discharge. In the instant case, there is, as I have noted, no real dispute as to the facts. The investigation of this matter was not a summary or arbitrary proceeding (whatever its shortcomings), but was carried on over a number of days due, in large part, to what can only be called the disputatious approach taken by the grievor. For example, the first substantial question put to the grievor was whether he proceeded to N.K. Seeds, on March 28. Before answering this the grievor requested, and was given, certain documents relating to his work that day, including his tach card, his productivity card, the name and classification of the person who issued the instruction, and the dispatcher's call sheet. He then said, "We call a recess to consider an answer to this question".

Throughout the investigation, both parties called a number of recesses. Often so that the grievor and his advisers could "consider" answers to what were straightforward questions of fact. On the last day of the investigation, the grievor was asked whether, on March 30, he made the pick up at Camrose which has been referred to above. There is, of course, no doubt in the matter: the grievor did not in fact make that pick up, nor does he contend that he did. The answer to the question, clearly enough, was "no". It may be, of course, that the grievor would want to explain why he did not make the pick up, and indeed that explanation (it is not a satisfactory one), is before me. At the investigation, however, the grievor's reply was "Mr. Bebee, your question is deceptive. We therefore call a recess to consider our course of action". There was no justification for a reply of this nature and no occasion for the calling of a recess. The Company denied the recess and repeated the question. The grievor left the room, as he did so Mr. Bebee, who was conducting the investigation, stated that if the grievor refused to continue, the statement would be closed.

Whether or not the grievor heard Mr. Bebee's last statement is, I think, immaterial. The conduct of the investigation was up to the Company, and it was not, in the circumstances, improper to deny the grievor a recess at that point. It was the grievor's own misconduct which brought the proceedings (already unduly protracted) to an end. It may be observed that the grievor did in fact cross-examine (often by irrelevant questions, as Mr. Bebee quite properly ruled), Mr. Stewart, the General Fleet Supervisor. The record of the investigation does not show that the grievor was denied any proper opportunity which he might have sought to explain or account for his actions, or fairly to put his case forward for consideration.

There was, therefore, just cause for the imposition of discipline on the grievor, and the Company has not, through any failure to comply with the requirements of the collective agreement, lost the right to make its case. That case is properly before me, and it establishes just cause for discipline. As to the severity of the penalty imposed, the grievor was, at the material time, an employee of some six years' seniority. There is no complaint as to his work.

While he had been disciplined on unrelated matters some years previously, I think he must be regarded as having a clear record at the time. Notwithstanding that clear record, it is apparent that the grievor persistently and deliberately refused to accept proper instructions on three successive days, that he accompanied this refusal, at least on the third day, with virulent and unprovoked abuse of Company officers and that, accordingly, severe discipline was warranted. In considering the penalty, it is appropriate to consider that, following the conclusion of the investigation, the grievor (that he was responsible is supported by the evidence) caused to be distributed a tract scurrilously characterizing the Company's officials along the lines referred to earlier in this award. In all of the circumstances, it is my view that the discipline imposed on the grievor did not go beyond the range of reasonable disciplinary responses to the situation.

For the foregoing reasons, the grievance is dismissed.

(signed) J. F. W. WEATHERILL
ARBITRATOR