

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 883

Heard at Montreal, Tuesday, November 10, 1981

Concerning

ONTARIO NORTHLAND RAILWAY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Discipline assessed Track Maintainer J.S. Nickerson.

JOINT STATEMENT OF ISSUE:

On February 11, 1981, Assistant Roadmaster L. Comtois asked Mr. Nickerson and another maintainer, who were idle in the tool house at Rouyn, to assist him with some maintenance work. The other man obliged, however, Mr. Nickerson refused, remaining in the tool house for the rest of the morning.

At a hearing held on February 23, 1981, conducted by Assistant Roadmaster Comtois, Mr. Nickerson refused to answer questions in connection with the incident and walked out of the investigation.

Mr. Nickerson was subsequently assessed 20 demerit marks and suspended from the service for two weeks. The assessment of discipline was appealed. The union contended that Mr. Nickerson was unjustly dealt with and requested that he be reimbursed for all time lost and the demerits reduced.

FOR THE BROTHERHOOD:

(SGD.) A. F. CURRIE
SYSTEM FEDERATION GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) R. O. BEATTY
GENERAL MANAGER

There appeared on behalf of the Company:

A. Rotondo – Manager Labour Relations, North Bay
J. M. Driehuis – Chief Engineer Facilities Maintenance, North Bay

And on behalf of the Brotherhood:

F. L. Stoppler – Vice-President, Ottawa
A. F. Currie – System Federation General Chairman, Winnipeg,
M. W. Trekofski – Federation General Chairman, Winnipeg

AWARD OF THE ARBITRATOR

Discipline was assessed against the grievor on two counts: first, that he refused to perform certain work and second, that he refused to answer questions at the investigation of the first offence.

As to the first count, there seems to be no doubt that the grievor did refuse to perform work which he had been asked to do by the Assistant Roadmaster. There was no valid excuse for such refusal, and the grievor would certainly be subject to discipline on that account.

The investigation of the charge of refusal to perform work was proper. The grievor had proper notice of the investigation, and was advised of his right to union representation. He objected to the investigation being conducted by the Assistant Roadmaster, whose report on the incident would be central to the investigation. In my view, this objection was not well taken. The Assistant Roadmaster's role was that of conducting the investigation, that is, of putting questions, ruling on questions sought to be put, and recording answers. The Assistant Roadmaster did not himself impose discipline. It has been held in other cases that it is not improper for an officer who may have knowledge of the situation involved to preside at the investigation. The "investigation" contemplated by the Collective Agreement is not a trial before a neutral tribunal, it is an "in-house" proceeding, the essence of which is that the employee concerned have the opportunity to know the case against him, and to put forward his side of the matter, before any disciplinary decision is taken. The grievor had that opportunity but decided, for his own reasons, not to take advantage of it, and left the hearing.

There was, as I find, no procedural irregularity which would affect the validity of the Company's decision to take disciplinary action against the grievor for his refusal to follow instructions.

As to the second count, there was indeed no investigation with respect to the grievor's conduct at the first investigation. Whether or not such conduct (had it been the subject of investigation) would properly have subjected the grievor to discipline or not is a question which need not be answered in this case, since the failure to conduct an investigation as required by Article 18.1 renders the discipline imposed under that head nugatory. Such is the effect of Article 18.1.

Thus, while the grievor was properly subject to discipline for his refusal to follow instructions, the Company has not established proper justification for the imposition of discipline in respect of the grievor's refusal to answer questions at the investigation. It is to be presumed that the penalty assessed was determined on the basis of both counts, and since one has not been established, the penalty should be reduced. Considering only the matter of the refusal to follow instructions, that is a serious offence, and would call for a substantial penalty. Having regard to the circumstances relating to that incident, it is my view that the penalty imposed on the grievor be reduced to an assessment of fifteen demerits, but that the suspension should stand. It is accordingly my award that five demerits be removed from the grievor's record, as of March 16, 1981. An assessment of fifteen demerits as of that date is upheld, as is the grievor's suspension.

(signed) J. F. W. WEATHERILL
ARBITRATOR