

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1131

Heard at Toronto, Wednesday, August 17, 1983

Concerning

CANADIAN PACIFIC EXPRESS LIMITED (CANADIAN PARCEL DELIVERY)

and

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES

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DISPUTE:

Appeal of discipline assessed employee, P. Hesse, Kitchener, Ontario, dated October 8, 1982.

BROTHERHOOD STATEMENT OF ISSUE:

On October 8, 1982, following completion of his scheduled work day and while proceeding to his car, employee, P. Hesse, was approached by J. Bennett, Company Manager. J. Bennett advised employee, P. Hesse, that he wished to discuss with employee P. Hesse, Company overtime policy. Inasmuch as Company overtime policy formed the subject matter of a grievance filed by employee, P. Hesse, employee, P. Hesse, requested Union representation. J. Bennett denied employee, P. Hesse's request. Employee, P. Hesse, refused to discuss the matter and proceeded to leave the premises and while doing so clutched at his genital area. The incident occurred after work in an area removed from the public. Employee, P. Hesse, was later on requested to attend a question and answer session with Company Officers. At the time, of the aforementioned session, no charges had been made against P. Hesse, nor was P. Hesse advised in writing of the subject matter of the session.

Following therefrom, employee, P. Hesse, was assessed fifteen demerit marks for:

"Your conduct at CanPar, Kitchener, at approximately 5:00 p.m. Tuesday, September 28, 1982".

The Union appealed the assessment of fifteen demerit marks on the grounds that employee, P. Hesse, had been dealt with unjustly and that the Company had failed to comply with the provisions of Article 6 of the Collective Agreement. In addition, the discipline was excessive.

The Company declined the appeal.

FOR THE BROTHERHOOD:

(SGD.) J. J. BOYCE
SYSTEM GENERAL CHAIRMAN

There appeared on behalf of the Company:

D. W. Flicker	– Counsel, CP Ltd., Montreal
D. R. Smith	– Director, Industrial Relations, Personnel and Administration, CP Express, Toronto
B. D. Neill	– Manager, Labour Relations, CP Express, Toronto

A. D. Salis – Area Manager, Ontario, CP Express, Toronto
J. N. Bennett – District Manager, Southwestern Ontario, CP Express, London

And on behalf of the Brotherhood:

D. Watson – Counsel, Toronto
J. J. Boyce – General Chairman, Toronto
J. Crabb – General Secretary-Treasurer, Toronto
M. Gauthier – Vice-General Chairman, Toronto
J. Bechtel – Local Chairman, Cambridge
P. Hesse – Grievor

AWARD OF THE ARBITRATOR

From all of the material before me, I am satisfied that when the grievor "clutched at his genital area", as the Brotherhood's statement of issue puts it, he was in fact making an obscene gesture towards his Company manager. There was, in the circumstances, no justification for this. While there was, in general, no love lost between the grievor and the Company manager and while it seems clear that a very lax atmosphere had obtained at the terminal earlier in the year (when the supervisor had permitted drinking on the premises and had even indulged therein himself), that situation had been the subject of complaint (by the grievor – and quite properly) in April, 1982, and the laxity in that respect at least had been brought to an end. While those events no doubt had an effect on the attitudes of the Company manager and of his fellow employees toward the grievor, they certainly did not amount to any sort of provocation of his behaviour on the occasion here in question, which occurred in October, 1982.

It was the grievor's position that he was not required to engage in a discussion with the Company manager on the matter of overtime policy because that matter was the subject of a grievance which he had filed, and he did not wish to discuss the matter in the absence of a union representative, although the grievor was himself a union steward. I do not here make any determination as to the rightness or wrongness of the grievor's position in that regard. What is in issue here is the grievor's conduct subsequent to his refusal to engage in discussion with the Company manager. That conduct – the obscene gesture, directed, as I have found, at the Company manager – was improper and the grievor was subject to discipline therefor.

It was contended that the Company failed to comply with the provisions of Article 6 of the Collective Agreement in connection with the investigation of this matter. On the material before me, however, it is clear that those provisions were complied with. The grievor was properly notified of the investigation, and attended with union representation. The questions put to the grievor were proper although his answers were, for the most part, unresponsive.

Obscenities addressed to supervisors (as opposed, to use the well-known distinction, to obscenities simply uttered in their presence – where it will depend on the circumstances whether or not discipline is justified) are improper and will generally justify the imposition of discipline. See, for example, **CR0A 978**, where a penalty of twenty demerits was upheld. In the circumstances of the instant case, discipline was justified, and I do not consider that the assessment of fifteen demerits was excessive. Prior to the incident in question, or at least to the matters giving rise to this series of cases (**CROA 1131 – 1136**), the grievor's disciplinary record stood at 35 demerits. That record had not been altered by way of the grievance procedure or otherwise, and it is not now open to the parties to go behind it. The effect of the discipline imposed in the instant case is that the grievor's record stands at 50 demerits.

For all of the foregoing reasons, the grievance is dismissed.

(signed) J. F. W. WEATHERILL
ARBITRATOR