

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1241

Heard at Montreal, Tuesday, May 8, 1984

Concerning

CP EXPRESS & TRANSPORT

and

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

DISPUTE:

The dismissal of employee N. Brigido, Obico Terminal, Toronto, Ontario.

JOINT STATEMENT OF ISSUE:

Employee N. Brigido was dismissed from service June 27, 1983 for allegedly striking a supervisor on June 3, 1983.

The Brotherhood contends the evidence adduced at the investigation does not sustain the charges, and requested he be reinstated with full seniority and reimbursed all monies lost while held out of service.

The Company declined the Brotherhood's request.

FOR THE BROTHERHOOD:

(SGD.) J. CRABB

FOR: SYSTEM GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) N. W. FOSBERY

DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Company:

D. Wakely – Counsel, Toronto
N. W. Fosbery – Director, Labour Relations, Toronto

And on behalf of the Brotherhood:

D. Watson – Counsel, Toronto
J. J. Boyce – General Chairman, Toronto
G. Moore – Vice-General Chairman, Moose Jaw
E. Hannon – Local Chairman, Toronto
N. Brigido – Grievor

AWARD OF THE ARBITRATOR

The grievor, N. Brigido, was dismissed from his position as warehouseman at the Company's Obico terminal in Toronto for allegedly striking his supervisor.

The grievor's regular shift on June 3, 1983 was from 1630 to 0100 hrs. The following day he was to take a scheduled vacation leave. At the commencement of his shift the grievor asked both J. Durant, Dock Co-ordinator and J. O'Brien, his immediate supervisor, if he could leave work at 2030 hrs. to get an early start on his vacation. The grievor was advised that he might leave early if work demands permitted. On that evening the grievor was assigned loading functions on the North Bay run.

The grievor worked diligently for the first part of his shift. As the evening progressed it appeared that work exigencies were not about to permit him to leave work early. At approximately 2130 hrs a second tractor ("Pup") was docked at the North Bay dock. The grievor at this point realized that his request was definitely not going to be granted.

At that time the "Pup" the grievor was working on was 95% loaded. Mr. O'Brien told him at 2200 hrs that he would have to commence loading the second "Pup" to North Bay. Between 2200 hrs and midnight the grievor failed to finish loading his first "Pup" and had not commenced working on the second. When Mr. O'Brien asked him why he had not proceeded to load the trailers as directed, he was given a sarcastic reply. Mr. O'Brien perceived the grievor was upset because he couldn't leave the premises early. The grievor complained to his supervisor that because of the busy work load he had no "tow motor" to assist him. When Mr. O'Brien became critical of his work habits the grievor became abusive and directed an obscenity towards him.

Indeed, the evidence appears to suggest that profanities were exchanged between Mr. O'Brien and Mr. Brigido. Mr. O'Brien then implored him to finish his duties of loading the trailers. Again an obscenity was directed in Mr. O'Brien's direction. Mr. O'Brien then ordered the grievor to go to Mr. Durant's office. The grievor asked for his Shop Steward. Mr. O'Brien undertook to secure one.

The two antagonists were "boxed in" by a skid and a tow motor that was impeding their passage to Mr. Durant's office. Mr. O'Brien beckoned Mr. Brigido to follow him. At this point they were approximately two inches apart from each other. Again the grievor directed another obscenity and "lunged forward striking Mr. O'Brien with his fist on his face and arm".

Mr. O'Brien, although upset, held his ground and insisted the grievor proceed to Mr. Durant's office. The grievor was screaming uncontrollably. When the grievor finally reached the office he was suspended.

Mr. M. Dowhy, a warehouseman, witnessed the assault. His statement indicated that, "I see Jeb (O'Brien) there and Neil (Brigido) screaming and swearing at him. And then Neil hit Jeb in the face and then walked away and said to Jeb let's go to the office". Mr. H. Skinner, warehouseman, did not observe the assault but stated "I heard sort of screaming coming from the North Bay area and when I looked over all I could see was the top of Neil's head and they were standing face to face" And D. McCann, warehouseman, overheard "a lot of foul language being used" between the supervisor and the grievor.

Mr. Brigido insisted he was not upset by his failure to secure permission to leave work early. He was disappointed but not upset His failure to perform any work loading the trailers for North Bay was attributable to a lack of a tow motor. He was doing other duties in the interim. As far as he was concerned Mr. O'Brien provoked the incident. At 2030 hrs. Mr. O'Brien inquired as to why the trailer to North Bay was not loaded. The grievor advised that he needed some help. At that moment Mr. O'Brien started swearing at him. The grievor said he simply ignored his insults. Then Mr. O'Brien requested that they proceed to Mr. Durant's office. As there way was impeded by a tow motor the grievor (in his June 14th statement) said he bumped into the "tow motor" lost his balance and "my arm came up and hit O'Brien's arm ...". And again (in his June 22 statement) the grievor said "I was bumped into the tow motor by Mr. O'Brien when I lost my balance, I reached back to grab whatever I could and at that point struck Mr. O'Brien's elbow with an open hand unintentionally."

Under oath the grievor testified before me that he was walking side by side with Mr. O'Brien on their way to the office. A tow motor apparently sideswiped him forcing him to stop. Mr. O'Brien continued walking and inadvertently bumped into him. He then fell grabbing on to the bar of the tow motor with one hand and grabbing at some freight with the other. At no time did he recall making physical contact with Mr. O'Brien.

After this rather "trivial" incident Mr. Brigido then alleged that Mr. O'Brien tried to "sucker" him into a fight. "I heard him screaming hit me again, hit me again for about thirty seconds". Not one witness was called by the grievor to support his version of the events.

Based on the diametrically opposed stories adduced above I have no hesitation in expressing my preference for the version of the events recited by the Company's witnesses. The grievor was clearly upset and frustrated because of his supervisor's refusal to grant him his request for an early departure from work. He then engaged in infantile petulance by refusing to work. When provoked further by Mr. O'Brien's direction to perform the job for which he was being paid he began to hurl obscenities at him that culminated in a physical assault. The Employer provided a statement of one witness (Mr. Dowhy) who observed the altercation and of two witnesses (Mr. Skinner and Mr. McCann) who overheard the exchange of obscenities. In short, based on the consistent, logical pattern of events that were described in the Company's submission I find no reason to question the allegation that the grievor had assaulted his supervisor. Moreover, in the absence of an admission on his part of any wrongdoing that may have given rise to an apology, I have no intention of exercising my discretion to mitigate the discharge penalty.

The major issue that arose in this case (as far as I was concerned) was whether the Company's case should be given any credence whatsoever. As I understood the Trade Union's argument the Company was obliged under article 8.4 of the collective agreement to give the grievor the opportunity to be present during the investigation of Messrs. O'Brien and Dowhy and the other employees whose statements were relied upon by the Company. In failing to give him that opportunity the grievor was alleged to have been deprived of an opportunity to cross-examine their statements. There is no dispute that pursuant to article 8.4 the grievor was given a copy of the Company's witnesses' statements and was allowed the opportunity "to offer rebuttal thereto". Article 8.4 reads as follows:

8.4 An employee is entitled to be present during the examination of any witness whose testimony may have a bearing on his responsibility or to read the evidence of such witness, and offer rebuttal thereto.

The Trade Union argued that merely offering the grievor the opportunity to rebut these statements does not suffice to meet the exigencies of article 8.4. He should have been in attendance at the investigation for purposes, as aforesaid, of cross-examining those witnesses. As I perceived the record, a union official (Mr. G. Sargeant) was present at the investigations where statements were taken on behalf of the bargaining unit members (i.e., Messrs. Dowhy, Skinner, McCann) but not the witnesses from the managerial ranks (i.e., Messrs. O'Brien and Durant). At no time either during the taking of the bargaining unit employees' statements did Mr. Sargeant insist on the grievor's presence. Nor does it appear that Mr. Sargeant exercised on the grievor's behalf the right to cross-examine those witnesses whose statements he observed being taken. Accordingly, the sole area of real concern pertains to the statements of Mr. O'Brien and Mr. Durant. And in their cases, at no time did the Trade Union request, indeed, demand the opportunity to cross-examine.

In the absence of any such request or demand, I am satisfied that the Employer in offering the grievor or his Trade Union representative, the opportunity to provide rebuttal evidence to their statements, discharged its responsibilities under article 8.4. Unlike the CROA cases relied upon by the Trade Union in its brief, article 8.4 provides no guarantee concerning a grievor's attendance at investigations of witnesses unless a request is expressly made. And, if after the event, the Trade Union feels prejudiced by the lack of notification it is still incumbent on it to request the Company to provide the opportunity to cross-examine the statements of those witnesses. Otherwise it is quite appropriate for the Employer to conclude that the Trade Union is content with copies of the witnesses' statements.

I have no difficulty with the rather trite proposition that cross-examined evidence has greater probative value (particularly when taken under oath) than uncontested statements taken during the course of an interview. Moreover when those unchecked statements are challenged by *viva voce* evidence at a hearing then the conflict in appropriate circumstances may very well be resolved in the favour of the sworn evidence. But the Trade Union cannot "wait in the bushes" to entrap the Employer.

If the Trade Union is unsatisfied with the manner the Employer has conducted the investigation of witnesses, it must protest immediately. It must request and demand the right to cross-examine the Employer's witnesses. Moreover, if such a request is refused, it may then put the Company on notice that at arbitration it operates at its peril in refusing such right. Indeed, the Company then fails to adduce *viva voce* evidence at arbitration at the risk of losing its case.

In all the circumstances adduced herein the Company has not violated article 8.4. Accordingly the evidence adduced through the Employer's statements suffices to sustain the cause cited by the Company for the grievor's discharge.

The grievance is denied.

(signed) DAVID H. KATES
ARBITRATOR