

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1351

Heard at Montreal, Tuesday, May 14, 1985

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

DISPUTE:

Appeal of thirty demerits assessed the personal record of Tractor Trailer Operator J.D. Riley of Moncton, New Brunswick.

JOINT STATEMENT OF ISSUE:

On 13 September 1984 Tractor Trailer Operator Riley was required to deliver a load to a customer in Saint John, New Brunswick. At approximately 15:30 hours he attempted to make a left turn from Main Street to Portland Street in Saint John. He was stopped while entering the intersection by oncoming traffic. While attempting to start his vehicle moving again the pinion gear in the rear of the rear-end differential of Tractor D149816 broke.

The Company subsequently assessed 30 demerits to Tractor Trailer Operator Riley's personal record and restricted him from operating Tractor Trailers for "responsibility for failure of pinion in rear of rear-end differential in Tractor D149816 at Saint John, New Brunswick, 13 September 1984".

The Brotherhood contends that Tractor Trailer Operator Riley bears no responsibility for this pinion gear failure and requests removal of the discipline. The Company denies the Brotherhood contention and has refused to remove the discipline.

FOR THE BROTHERHOOD:

(SGD.) TOM MCGRATH
NATIONAL VICE-PRESIDENT

FOR THE COMPANY:

(SGD.) D. C. FRALEIGH
ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

W. W. Wilson	– Manager Labour Relations, Montreal
S. A. MacDougald	– Labour Relations Officer, Montreal
H. J. Koberinski	– Manager Labour Relations, Moncton
A. Heft	– Labour Relations Officer, Toronto
T. Kovacs	– Manager Automotive Services, Moncton
E. J. McGuire	– Manager Intermodal Services, Moncton
J. C. Warren	– Driver Training Supervisor, Moncton
G. Kanevsky	– Metallurgist, Montreal

And on behalf of the Brotherhood:

G. T. Murray	– Representative, Moncton
J. Morrell	– Witness, Moncton
H. Perrin	– Witness, Saint John

AWARD OF THE ARBITRATOR

The grievor, Tractor Trailer Operator J.D. Riley, was assessed thirty demerit marks for his alleged abuse of his tractor trailer causing the pinion gear in the rear of the rear-end differential of the tractor to break. Should the disciplinary action taken against the grievor be sustained Mr. Riley would have attained sixty demerit marks thereby warranting his dismissal.

The employer's case is based on circumstantial evidence. It can adduce no direct evidence to substantiate its theory that the grievor improperly applied the lever brake on the tractor in order to enable him to achieve the necessary torque power to propel the vehicle forward so as he could complete his left hand turn at the intersection in question. The employer adduced evidence to demonstrate that the grievor's vehicle was in good operating condition at the time of the incident and that another truck driver operating the same vehicle could make the turn at the same intersection without difficulty and that the vehicle was capable of carrying the heavy load at the intersection where the incident occurred. Moreover, empirical evidence was adduced in order to substantiate that the vehicle's failure to move backwards while on the incline of the street would substantiate its theory that the lever brake had been improperly used.

The grievor denied he had improperly applied the lever brake. Rather he indicated that the foot peddle brake was used to prevent his sliding backwards. Mr. Riley surmised that his continuous attempts to complete the left hand turn caused his foot to slip off the tractor's clutch thereby resulting in the broken pinion gear. In other words, he caused the clutch "to pop" thereby creating the increased torque pressure on the pinion gear.

Although the grievor accepted responsibility for the incident he stated that the damage caused the vehicle was due to an unfortunate accident as opposed to the employer's contention of his abuse of the tractor.

The employer's burden in discipline cases where proof of misconduct is based on circumstantial evidence is to show that an employee's alleged misconduct is not only consistent with all the material facts adduced but that it is also inconsistent with any other credible or reasonable explanation. Given the complexity of the circumstances that resulted in the damage to the grievor's vehicle it is my view, in the absence of direct evidence, that the employer has assumed an almost insurmountable task. The grievor has adduced one credible explanation for the incident other than his alleged abuse of the vehicle. Other explanations may also have been available. The grievor, however, even assuming the validity of the employer's theory, need only suggest one credible reason that is inconsistent with the employer's explanation to be exonerated. In other words, since the employer has failed to discharge the onus of proof of establishing a circumstantial case for cause for the discipline imposed, the grievance must be sustained.

Accordingly, the employer is directed to expunge the thirty demerits imposed for the incident from the grievor's record. I shall remain seized for purposes of implementation.

(signed) DAVID H. KATES
ARBITRATOR