

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1442

Heard at Montreal, Tuesday, December 10, 1985

Concerning

CP EXPRESS AND TRANSPORT LTD.

and

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

DISPUTE:

Concerns the removal of ten (10) demerit marks from the work record of Mr. G. Whiteside, Edmonton, Alberta, for alleged "causing damage to tires on unit 3606 while operating this unit on January 28, 1985".

JOINT STATEMENT OF ISSUE:

The Company's position is that on the balance of probability that the evidence points to G. Whiteside who was the only employee who drove this vehicle during these times.

The Brotherhood's position is that nowhere throughout the Questions and Answers, which should be a hearing to get at the facts is it in any way proven that the damage caused to unit 3606 on January 28, 1985, happened while being operated by this employee.

The relief requested is for the removal of ten (10) demerit marks from the work record of Mr. G. Whiteside.

FOR THE BROTHERHOOD:

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

FOR THE COMPANY:

(SGD.) N. W. FOSBERY
DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Company:

N. W. Fosbery – Director Labour Relations, Willowdale

And on behalf of the Brotherhood:

J. J. Boyce – General Chairman, Toronto
G. Moore – Vice-General Chairman, Moose Jaw
M. Flynn – Vice-General Chairman, Vancouver

AWARD OF THE ARBITRATOR

The grievor is charged with having caused his vehicle, Unit #3606, damage by virtue of his misuse of the metal chock block that is normally used to ensure that the vehicle is secure while parked.

The Company's case is based purely on circumstantial evidence. That is to say, because the grievor was last seen to have had control of Unit #3606 between 1700 hours, January 28, 1985 and the morning of January 29, 1985, I was asked to infer that Mr. Whiteside was solely responsible for the damage.

It is trite law to say that the onus of proof in such cases is on the Employer to show, on a balance of probabilities, that not only were the facts adduced consistent with the grievor's culpability but inconsistent with any other reasonable conclusion.

And, in this regard, the Company could not satisfy me with the required certainty that no other driver during the period in question could have been responsible for the mishap. For example, had written records of the vehicle's use been maintained by the Company it might have readily been demonstrated that an alleged unidentified driver could not have had access to the vehicle without the Company's knowledge.

Because I have not been satisfied of the grievor's misconduct the Company has not proven just cause for the discipline that was assessed. Accordingly, the ten demerit marks are to be removed from the grievor's record.

(signed) DAVID H. KATES
ARBITRATOR