

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1751

Heard at Montreal, Tuesday, 9 February 1988

Concerning

CANADIAN PACIFIC LIMITED

And

TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION

DISPUTE:

Mr. M. McKye was assessed 30 demerit marks, for violation of Item No. 15 of the Safety Procedures, and dismissed from service account accumulation of demerit marks.

The Union contends the assessment of 30 demerit marks, which resulted in Mr. McKye's dismissal, was excessive.

The Union requested the demerits be reduced, with Mr. McKye being returned to work with full restitution.

The Company contends the discipline and dismissal was warranted.

JOINT STATEMENT OF ISSUE:

Mr. M. McKye left his machine unattended with a container affixed to the spreader above the cab height and with the engine running on April 29, 1987, in violation of Safety Rule No. 15.

FOR THE UNION:

(SGD.) J. MANCHIP
FOR: GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) W. A. HAND
GENERAL MANAGER, INTERMODAL SERVICES

There appeared on behalf of the Company:

P. E. Timpson	– Labour Relations Officer, Montreal
E. P. Wahl	– Manager, Operations, Toronto
M. Kennedy	– Acting Terminal Manager, Toronto
C. Lohan	– Director, Accident Prevention, Montreal

And on behalf of the Union:

J. Manchip	– Vice-General Chairman, GST, Toronto
J. H. Germain	– General Chairman, Montreal
C. Pinard	– Vice-General Chairman,
G. B. Gonzales	– Local Chairman, Toronto
F. Devine	– Local Chairman, Toronto
M. McKye	– Grievor

AWARD OF THE ARBITRATOR

On April 29, 1987 the grievor was working as a Toplifter Operator in the Company's terminal in Etobicoke. The Toplifter is a piece of heavy equipment used to lift and transport freight cargo containers.

At approximately 1108 hours, at a location near the terminal office, the grievor left his unit unattended with a container affixed to it above cab height, with the engine running. It appears that he left the machine in that condition while he made a two or three minute visit to the adjacent lunch room. It is not disputed that his actions in that regard were in violation of Rule 15 of the Company's Safety Procedures which states the following:

- 15) When an operator leaves a machine unattended, he must first ensure that the brakes are set, the mast and spreader fully lowered, and controls brought to their neutral position. Engine is to be shut off unless specified by the Supervisor.

The evidence of the grievor is that he was aware of the content of Rule 15. He further testified, however, that it was relatively common practice for employees to leave their Toplifter Machines idling, both with and without containers aboard, while leaving their machine for a short period. Mr. McKye gave evidence of at least two occasions when supervisors summoned him off his own machine in precisely that circumstance, to speak with him briefly, without any suggestion on their part that his actions were improper. The thrust of the Union's evidence is that for a number of years supervision has allowed violations of Rule 15 to occur without imposing any disciplinary action.

The material advanced by the Company does little to dispel that impression. Its representatives at the hearing, including Mr. M. Kennedy, Acting Terminal Manager, could recall no instance where an employee was disciplined for an infraction of Rule 15 prior to the imposition of thirty demerits. No Company witness was able to rebut the Union's evidence that Rule 15 was widely disregarded in the workplace. The fact that Mr. McKye left his machine running as he did near the terminal office in full view of management tends to support his evidence that the practice was not one which could be expected to attract discipline. In these circumstances the Arbitrator is persuaded by the argument advanced on behalf of the Union that, given the course of apparent acquiescence by the Company over the years, it is inequitable for it to now assert against the grievor a serious degree of disciplinary penalty without any forewarning. The impact on the grievor is particularly serious since, in light of a prior incident, that measure of discipline could result in his termination.

The Union further argues that Mr. McKye was singled out as a result of anti-union sentiment directed against him because of his activities as a union representative and co-chairman on the joint Health and Safety Committee at the Etobicoke terminal. That is a serious allegation. If it is to be proved, it should be supported by *viva voce* evidence at the arbitration hearing, rather than by employee petitions and statements filed, without notice, at the hearing, as the Union attempted to do. In any event, given the Arbitrator's view of the merits of the grievance and the pattern of acquiescence in previous incidents of disregard for Rule 15, it is unnecessary to make any determination on the issue of the alleged anti-union discrimination directed at the grievor.

The sole issue is the appropriate measure of discipline in the circumstances. Because I accept the grievor's evidence that violations of Rule 15 were commonplace, a written warning to the grievor would have been the appropriate measure of discipline in the circumstances. That response could have been coupled with a notice to all employees that Rule 15 would thenceforth be strictly enforced. The imposition of the thirty demerits was clearly excessive, given the Company's prior tolerance of this practice. For these reasons the thirty demerits assessed against Mr. McKye shall be removed from his record, a written warning substituted, and he shall be reinstated in his employment with compensation for all wages and benefits lost. I retain jurisdiction in the event of any dispute between the parties respecting the interpretation or implementation of this award.

(signed) MICHEL G. PICHER
ARBITRATOR