CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1795

Heard at Montreal, Wednesday, June 15, 1988

Concerning

CP EXPRESS & TRANSPORT

And

TRANSPORTATION COMMUNICATIONS UNION

EX PARTE

DISPUTE:

The discipline issued to Cranbrook driving employee G. Engstrom for the alleged non-reporting of incident (accident) on or about September 17, 1987.

JOINT STATEMENT OF ISSUE:

On or abour September 17, 1987, this said employee was involved in an incident at the Cranbrook Golf Course while making a delivery. The customer noted what had occurred and further, indicated to the driver not to be concerned about the damage to the gate post. The following morning before starting his regular shift, Mr. Engstrom reported the incident to the Terminal Manager.

The Union's position is that the employee did not report the incident on the date of occurrence because there was the absence of the Terminal Manager. The very next morning, before his shift started, this employee (upon the return of the Terminal Manager) did fully report the incident to the Company.

To date, the Company maintains that the discipline was warranted and progressive and therefore, to date, has declined the Union's request to have the 20 demerits removed and a letter of caution be substituted.

FOR THE UNION:

(SGD.) J. J. BOYCE
GENERAL CHAIRMAN

There appeared on behalf of the Company:

P. Thorup	– Counsel, Toronto
B. F.. Weinert	– Labour Relations Officer,Toronto
W. Smith	– Terminal Manager, Cranbrook
D. Bennett	– Labour Relations Officer, CanPar, Toronto

And on behalf of the Union:

D. Wray	– Counsel, Toronto
J. J. Boyce	– General Chairman, Toronto
J. Crabb	– Secretary/Treasurer, Toronto

AWARD OF THE ARBITRATOR

The material establishes beyond dispute that the grievor was involved in a preventable accident and that he did not report it to the Company until after he was advised by a member of management that the customer whose property had been damaged had called to complain. The Union does not dispute the assessment of fifteen demerits for the accident itself. It maintains, however, that the grievor did not intend to conceal the accident, that he did not report it on the same day because the terminal manager was absent, that in any event fifteen demerits is excessive for the failure to report, and that a reprimand would be appropriate in the circumstances.

The Union raised a preliminary issue with respect to the standing of the grievor's prior disciplinary record. It is common ground that in September of 1986 Mr. Engstrom was discharged for operating a Company vehicle while impaired. Under the terms of a letter from the Company dated September 29, 1986 he was subsequently reinstated without compensation, on condition that he attend an alcohol counselling program, with his disciplinary record to stand at fifty-five demerits. The letter establishing the foregoing conditions was provided to the Union's representative and, according to the terms of the reinstatement the grievor himself was required to sign a reinstatement form, dated January 15, 1987 which reflected his demerits as then totalling fifty-five.

It appears beyond dispute that there were errors in the Company's calculation of the grievor's demerit standing at the time of Mr. Engstrom's reinstatement. If, as purportedly occurred, the Company imposed twenty-five demerits for the impairment incident, his record would have in fact then totalled thirty demerits. The Union argues that this error should be taken into account in the assessment of the instant grievance, arguing that it substantially changes his prior record for the purposes of the culminating incident.

After a careful review of the material the Arbitrator cannot sustain that position. I am satisfied that the Company was at fault in the manner in which the merits and demerits credited to the grievor's record were computed. That, however, does not alter the essence of the bargain struck at the time the parties agreed to reinstate Mr. Engstrom after what was obviously a serious dismissable offense involving impairment while operating a Company vehicle. Clearly the Company's agreement to reinstating Mr. Engstrom was predicated on its stated understanding that he would return to work with fifty-five demerits against his record. Such settlements are not uncommon under the Brown System as a means of providing an employee with a last chance to redeem himself or herself. It is far from clear that reinstatement would have been agreed to had the Company known that the grievor's record would stand at thirty demerits. Significantly, in the Arbitrator's view, both the grievor and his Union received written notification of the Company's understanding that his reinstatement was conditioned on his coming back to work with a fifty-five demerit record. No objection was taken by either of them at that time. In the Arbitrator's view, whatever error may have been subsequently discovered in the Company's records, it is highly inequitable for the Union to now assert that Mr. Engstrom's record stood at something less than fifty-five demerits at the time he was reinstated. The material before the Arbitrator establishes, on the balance of probabilities, that the Company's decision to reinstate him would not have been taken but for its understanding that his record would stand at fifty-five demerits as a condition of returning to work. For the Union to now insist on the strict calculation of his demerits, going back in time prior to his reinstatement, would clearly prejudice the position of the Company which relied on the terms of the reinstatement which were communicated to the grievor and to the Union at the time. For these reasons I must accept the argument of counsel for the Company that the grievor's prior record for the purposes of the instant grievance is to be tabulated on the basis that at the time of the accident of September 17, 1987 Mr. Engstrom's record stood at forty demerits, fifteen demerits having been removed from his record since the time of his reinstatement.

As noted above there is no dispute with respect to the appropriateness of fifteen demerits for the preventable accident in which the grievor was involved. The sole remaining issue, therefore, is whether fifteen demerits constitutes an appropriate disciplinary response to the failure of Mr. Engstrom to report the accident. With respect to this issue the Arbitrator accepts the position of the Company that the grievor could have complied with that obligation by informing a number of persons at the terminal other than the terminal manager, and should have done so as soon as possible after the accident. The record reveals that on at least one occasion in the past he did report an accident to a company officer other than the terminal manager.

The Company's own guidelines, which are obviously not binding on the arbitrator, suggest that fifteen demerits is an appropriate disciplinary measure for an employee's failure to advise management when he or she has been involved in an accident with a Company vehicle. It does appear, however, that discipline for an infraction of this kind is dealt with on that basis.

Mr. Engstrom is an employee of eight years' service who, at the time of the culminating incident did not have a good disciplinary record. As noted above, his reinstatement following the impairment incident was clearly in the nature of a "last chance" settlement. In these circumstances the Arbitrator is not persuaded that the assessment of fifteen demerits for the grievor's failure to report the accident was unreasonable. Even if five demerits had been assessed for that infraction Mr. Engstrom's demerits still would have stood at the dismissable level of sixty.

For the foregoing reasons the grievance must be dismissed.

June 16, 1988

(signed) MICHEL G. PICHER
ARBITRATOR