

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1831

Heard at Montreal, Tuesday, 11 October 1988

Concerning

CANADIAN PARCEL DELIVERY (CP EXPRESS AND TRANSPORT)

And

TRANSPORTATION COMMUNICATIONS UNION

DISPUTE:

The assessing of 60 demerits and dismissal of employee G. Mathieu, for an alleged altercation with a fellow employee at the CanPar Terminal, Montreal, Quebec.

JOINT STATEMENT OF ISSUE:

On April 7, 1988, this employee was alleged to have initiated an altercation with a fellow employee, namely A. Roach.

The Union requested the demerits be expunged from his record, that he be reinstated and also reimbursed all monies lost while held out of service, or whatever relief the arbitrator deems appropriate.

The Company denied the Union's request.

FOR THE UNION:

(SGD.) J. J. BOYCE
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) D. J. BENNETT
MANAGER, LABOUR RELATIONS

There appeared on behalf of the Company:

M. D. Failes	– Counsel, Toronto
D. J. Bennett	– Labour Relations Officer, Toronto
J. Taylor	– Regional Manager, Montreal
C. Beausoleil	- Witness
J. Bordeleau	– Driver Supervisor, Montreal

And on behalf of the Union:

L. Chahley	– Counsel, Toronto
J. J. Boyce	– General Chairman, Toronto
M. Gauthier	– Vice-General Chairman, Montreal
G. Mathieu	– Grievor

AWARD OF THE ARBITRATOR

The Company assessed 60 demerits against the grievor for his involvement in an altercation with fellow employee A. Roach on or about April 7, 1988. The grievor asserts that he is completely innocent of any wrongdoing, that he was assaulted without provocation by Mr. Roach and that his involvement in an ensuing physical struggle was purely a matter of self-defense.

According to the grievor's evidence, at approximately 8:15 a.m. on the morning of April 7 he was walking past Mr. Roach's van while proceeding to his work station. Mr. Roach was then engaged in conversation with employee Claude Beausoleil who was standing by Mr. Roach's truck, speaking to the latter through the open window of his van. It is not disputed that at that point Mr. Roach was relating something to Mr. Beausoleil concerning the grievor and used his name, which Mr. Mathieu overheard. According to Mr. Mathieu he approached the truck and asked him why he was using his name. According to Mr. Mathieu Mr. Roach replied by uttering a Caribbean patois equivalent to "fuck you". The grievor states that he took Mr. Roach's comment to be made in jest, and simply waved his left hand at the grievor as though to dismiss his comment and walked on.

There is no conflict as to what ensued. The evidence of Mr. Beausoleil, as well as the evidence of the grievor himself, confirms that Mr. Roach immediately got out of his truck and the two men proceeded to have a brief physical altercation in the dock area immediately behind the vehicle. It appears that no blows were exchanged, as each of the two men grabbed each other and they pushed and pulled until they were finally separated by Mr. Beausoleil and Supervisor Joanne Bordeleau.

Mr. Beausoleil gives a differing account of what transpired. He confirms that the grievor was walking past Mr. Roach's truck at a point in time when his name was mentioned during their conversation, and that he came to the truck to ask Mr. Roach why his name was being used. According to Mr. Beausoleil, a fellow bargaining unit employee, Mr. Roach made no reply while he himself attempted to explain that nothing untoward was intended. At that point, according to Mr. Beausoleil, Mr. Mathieu struck at Mr. Roach through the window of the van with the fist of his left hand. The blow struck Mr. Roach, although by Mr. Beausoleil's recollection it is unclear whether Mr. Roach was struck on the left side of the head or whether, because he moved to protect himself, the blow struck him on the shoulder. In any event, Mr. Beausoleil relates that both Roach and the grievor proceeded to the rear end of the van, where Mr. Mathieu climbed up on to the platform and encountered Mr. Roach as he exited his vehicle from the rear door, there apparently being no door on the driver's side of the truck. According to Mr. Beausoleil the two men then began their physical struggle, each holding on to the other, no blows being exchanged, until they were verbally warned to stop it, and finally physically separated by Ms. Bordeleau and Mr. Beausoleil.

As a result of this incident the grievor was assessed sixty demerits, which, coupled with ten demerits previously on his record, resulted in his discharge. Mr. Roach was assessed forty-five demerits which he apparently did not grieve, although it appears that he has since left the employment of the Company. The Company justifies the distinction between the treatment of Mr. Roach and of the grievor by virtue of the fact that the grievor provoked the altercation by first taking a swing at Mr. Roach. The Union argues that the grievor's evidence should be accepted, that he did nothing to provoke the fight, and that at most he was simply acting in self-defense when he was accosted by Mr. Roach. It further submits that in light of an incident involving two employees a week prior, in which one or more packages were hurled from one employee to another in anger, and where no discipline was imposed by the Company, the assessment of sixty demerits in the grievor's case is excessive.

Before dealing with the appropriate measure of discipline, it is necessary to establish the facts upon which discipline must be based. The Arbitrator has substantial difficulty with the credibility of the grievor. In my view it defies all plausibility that Mr. Mathieu could have simply walked by Mr. Roach's truck, have casually inquired as to why his name was mentioned, waved his left arm in a gesture of response to what he thought was a joking use of profanity aimed at him by Mr. Roach, and then walked away only to be assaulted without apparent provocation by the employee who had been sitting in the truck. I accept the argument of counsel for the Company that Mr. Beausoleil, a bargaining unit employee, has no reason to lie about what he saw. Whatever may have been the prior relationship between Mr. Roach and Mr. Mathieu, I am satisfied, on the balance of probabilities, that Mr. Mathieu did initiate the altercation by first approaching the vehicle to inquire as to why his name was being used, and then striking Mr. Roach with his left hand through the open window of the truck, causing the latter to come after him.

What is the appropriate measure of discipline in these circumstances? While it is true that the Arbitrator has a discretion to mitigate against the severity of a particular penalty, substantial mitigating grounds must be established.

In many discipline cases an employee's candour, the realization that he has made a mistake, and some evidence on his or her part of an intention to improve in the future may weigh in an employee's favour. Conversely, when an employee comes before a board of arbitration denying any wrongdoing, and the board is driven to the reluctant conclusion that he or she has attempted to mislead the board, on what basis should an arbitrator opt for the substitution of a lesser penalty?

In the instant case the grievor is relatively junior, having only some three years' service. During the course of the hearing his credibility was undermined in two collateral respects. Firstly, he denies having been assessed ten demerits on a prior occasion, notwithstanding the contrary evidence of Supervisor Joanne Bordeleau who testified that she was present when he was served with a copy of his notice of discipline. Secondly, with respect to the earlier incident involving two other employees when a parcel was thrown, the grievor's account of what happened is the throwing of a number of parcels back and forth and, finally, a stick fight between the two employees. That evidence is totally rebutted by the account of Ms. Bordeleau who was also present and observed a heated exchange of words and one parcel being thrown.

Regrettably, on the whole of the evidence, the Arbitrator is compelled to conclude that Mr. Mathieu has been less than forthcoming in virtually every aspect of his evidence in these proceedings. Whatever result might have commended itself if he had proved more candid, I cannot in these circumstances see any valid grounds for exercising my discretion to alter the measure of discipline assessed by the Company.

For these reasons the grievance must be dismissed.

OCTOBER 14, 1988

(Sgd.) MICHEL G. PICHER
ARBITRATOR