

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2035

Heard at Montreal, Wednesday, 13 June 1990

Concerning

BULK SYSTEMS (CP EXPRESS & TRANSPORT)

And

TRANSPORTATION COMMUNICATIONS UNION

DISPUTE:

The issuing of 60 demerits to employee C. Shea, Bulk Systems, Oakville, Ontario, for deliberate disobedience of authorized personnel.

JOINT STATEMENT OF ISSUE:

On January 18, 1990, employee C. Shea was assessed 60 demerits for deliberate disobedience of authorized personnel. Employee Charles Shea was not notified as per Article 15-8-A of a change in his regular shift.

The Union requested he be reinstated and the 60 demerits be expunged from his record, with full compensation plus interest, and benefits.

The Company rejected the Union's request.

FOR THE UNION:

(SGD) J. J. BOYCE
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD) G.E.D. LLOYD
VICE-PRESIDENT & GENERAL MANAGER

There appeared on behalf of the Company:

C. Peterson – Counsel, Toronto
R. McQueen – Area Terminal Manager, Oakville
R. Seymour – Operations Manager, Oakville
G. Lyster – Director of Operations, Burnaby

And on behalf of the Union:

D. Wray – Counsel, Toronto
J. J. Boyce – General Chairman, Toronto
C. Shea – Grievor

AWARD OF THE ARBITRATOR

The material before the Arbitrator establishes beyond controversy that on January 8, 1990 Mr. Shea deliberately and repeatedly refused to obey several directions to come to work given to him by telephone from his supervisor, Mr. Rob McQueen. While it appears that Mr. Shea objected to working a night shift, as scheduled, and entertained some belief that his seniority rights were being disregarded, it is clear that he was under an obligation to respond to the direction of his supervisor, and acted in violation of the "obey now - grieve later" rule.

The Company conducted an investigation with respect to the events in question, and took into account the grievor's prior record in coming to its own decision that sixty demerits should be assessed against him for the incident, resulting in his discharge. Although his record previously stood at only five demerits, it ascribed substantial weight to two prior written notations of incidents of disobedience, as well as a third which had resulted in the assessment of demerits.

Counsel for the Union objects to any reference being made to the two prior incidents which involved the grievor disobeying orders, each involving fifteen demerits, and those demerits subsequently being removed in what was characterized as good will gestures by the Company. The Arbitrator has some difficulty with that position. As letters of November 9, and November 17, 1989 from the Company's Director of Operations disclose, the grievor was recorded as having been wrongly absent from work on one occasion, and having refused to follow orders on another. In my view, on a fair reading of those documents it appears clear that the Company's intention was to retain a written notation of the incidents for the purposes of Mr. Shea's work record, and that this was known and understood by the Union. While I appreciate that care must be taken in assessing the weight of such documents, I consider it unduly technical to argue, as Counsel does, that the incidents can no longer be looked to for any disciplinary purpose.

What, then, does the material disclose? Mr. Shea refused to work his scheduled shift on January 8, 1990 notwithstanding repeated direct instructions to that effect by his supervisor. He did so with a discipline record that discloses prior incidents of both failing to come to work, and refusing to obey directions. The Arbitrator accepts the characterization of the grievor's misconduct by Counsel for the Company. It was serious, and intolerable in the context of a service-oriented enterprise which must be responsive to the needs of its customers. To meet its obligations, the Company must be able to rely on employees respecting the working schedules assigned to them.

On the other side of the ledger, however, is the fact that Mr Shea is an employee of fifteen years' service, having been employed in the enterprise since well before its takeover by the Company in 1986. Moreover, notwithstanding his prior incidents of disobedience to Company directives, Mr. Shea's record stood at only five demerits on the date of the incident in question. On the whole I am satisfied that this is an appropriate case for the substitution of a lesser penalty. I am also satisfied that the Company knew, or reasonably should have known, that sixty demerits and the outright discharge of the grievor was an excessive penalty in the circumstances, notwithstanding the seriousness of the offense.

More particularly, it was not entitled, as it appears to have done, to give substantial weight to some three prior instances of discipline against Mr. Shea, when by the normal operation of the Brown System, as well as the Company's own voluntary gestures of good will, the disciplinary impact of that history had been reduced to a mere five demerits. As a general matter, it appears to the Arbitrator that under the Brown System an employee is entitled to look to his present standing in respect of demerits to know what "record" will be examined in the event of further discipline. Without deciding whether the notations of misconduct registered in 1987 could appropriately be looked to in the circumstances, I am persuaded that it was inequitable to assess sixty demerits against a fifteen year employee for a single day's refusal to attend at work.

A lesser penalty in the nature of the assessment a substantial measure of demerits would, in the circumstances, have sufficed to convey to Mr. Shea the gravity of his misconduct and would, I believe, have achieved the desired corrective effect. In my view the assessment of thirty demerits would have accomplished that purpose in the circumstances, and should be substituted as the appropriate measure of penalty, in the exercise of the Arbitrator's discretion.

For the foregoing reasons the grievance is allowed, in part. Mr. Shea shall be reinstated into his employment, without loss of wages or benefits, and without loss of seniority, with his record to reflect the assessment of thirty demerits for his refusal to comply with a direction to work a night shift on June 8, 1989. For the purposes of clarity, in light of the prior award of the Arbitrator in **CROA 2034**, Mr. Shea's record will stand at forty-five demerits upon reinstatement.

June 15, 1990

(Sgd.) MICHEL G. PICHER
ARBITRATOR