

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2737

Heard in Calgary, Wednesday, 15 May 1996

concerning

CANPAR

and

TRANSPORTATION COMMUNICATIONS UNION

EX PARTE

DISPUTE:

Local Protective Chairman Mr. A. Kane [was] disciplined for allegedly being insubordinate to salesman Mr. R. Downs, on or about April 13th, 1995, after he requested Mr. R. Downs' stop handling freight.

UNION'S STATEMENT OF ISSUE:

On April 13th, 1995 the Company alleges that Mr. Al Kane, a Burnaby driver who is the Local Protective Chairperson of Transportation Communications Lodge 862, was rude and confrontational when he spoke to Mr. Downs after he was observed handling freight which is contrary to the collective agreement. Further, the Union argues that A. Kane was only fulfilling his obligation of his union office. In addition, Appendix "E" provides that a supervisor may work in an emergency situation or for training purposes, which was not the case in this instance.

The Company on April 21, 1995 held an investigative interview. While Mr. R. Downs was not at the interview, they relied on his version of what transpired to make their case against Mr. Kane. The Union argues that Mr. Downs' testimony is hearsay, as such doesn't comply with article 6.2 and article 6.3 now applies.

The Union requested that the discipline be deleted from Mr. Kane's' employment record.

The Company denied our request.

FOR THE UNION:

(SGD.) D. E. GRAHAM
DIVISION VICE-PRESIDENT

There appeared on behalf of the Company:

M. D. Failes	– Counsel, Toronto
P. D. MacLeod	– Director, Terminals, Toronto
R. Downs	– Regional Sales Manager, Western Canada

And on behalf of the Union:

R. Coleman	– Counsel, Vancouver
D. E. Graham	– Assistant Division Vice-President, Regina
A. Kane	– Grievor

AWARD OF THE ARBITRATOR

The grievor was assessed ten demerits for alleged insubordinate conduct in his dealing with Sales Manager R. Downs.

Certain of the evidence pertinent to this grievance is not disputed. On the morning of April 13, 1995 the grievor, who holds office as the Union's Local Protective Chairperson, emerged from a disciplinary meeting and proceeded towards his truck. In so doing he was advised by another employee that a new salesperson was loading freight onto a truck. The Arbitrator accepts that Mr. Kane in good faith believed that the person's actions, if true, would have been in violation of Appendix E of the collective agreement which provides, in part, as follows:

CanPar Transport Ltd. Supervisors

The subject of CanPar Supervisors performing work normally done by members of the bargaining unit was discussed at the recently concluded negotiations.

Please be advised that your role as a Supervisor does not include the performance of these duties except in the case of emergency or for training purposes.

J.G. (John) Cyopek
President and Chief Executive Officer

As Mr. Kane proceeded towards his vehicle he came upon the truck of bargaining unit driver Vald Freitas. Mr. Freitas was then observed inside his truck, being assisted in loading it by Mr. Rod Downs.

Mr. Downs was the newly appointed Regional Sales Manager. His evidence, which the Arbitrator accepts as given fairly and honestly, confirms that he was then on his fourth day of work, and that he was to spend the working day with Mr. Freitas to gain a better sense of the Company's operations and services to its customers. He was dressed in working clothes, and was then assisting Mr. Freitas in loading his truck, something to which the driver had not objected. Mr. Downs relates that he heard someone call from behind what he believed to be "Hey you!" or words to a similar effect. He turned and saw the grievor pointing in his general direction whereupon he advanced towards him until the two were some four feet apart, separated by the loading conveyor.

There is only minor difference between the evidence of Mr. Downs and the evidence of Mr. Kane as to what was said between them. Mr. Downs relates that he asked Mr. Kane if there was a problem, to which Mr. Kane replied that employees were on layoff and that he should not be doing bargaining unit work. According to Mr. Downs, whose evidence the Arbitrator accepts, he briefly explained to Mr. Kane that he was the new sales manager, that he was spending a day to become familiarized with delivery operations, and that he had no intention of doing bargaining unit work on a daily basis. He states that Mr. Kane nevertheless indicated to him that he was not to do the work in question, at which point Mr. Kane walked away. Mr. Downs felt somewhat embarrassed, as a number of the other drivers who were loading their trucks in the same area had stopped working to watch the exchange between the two. Mr. Downs then left the loading area to confer with the terminal supervisor, following which he decided to await the completion of the loading before returning to Mr. Freitas' truck to accompany him on his route.

Mr. Kane's evidence differs very little from that of Mr. Downs. He cannot recall, however, that Mr. Downs explained to him that he was the sales manager. On balance, I am satisfied that Mr. Downs' evidence is to be preferred in this regard, although I am not persuaded that much turns on it in the end.

The issue at hand is whether the grievor was insubordinate, so as to merit the assessment of ten demerits. Without attempting to be exhaustive as to the definition of insubordination, it is generally recognized that insubordination involves some improper disrespect or defiance of authority. In the Arbitrator's view the evidence of Mr. Kane's actions in the instant case falls short of that standard.

As the local protective chairman Mr. Kane is charged with ensuring that the terms of the collective agreement are respected in the workplace. While it is debatable that it might have been more appropriate for him to first take his concerns about Mr. Downs' activities to the terminal supervisor, his attempt to immediately communicate his protest with Mr. Downs must fairly be seen as something less than officious meddling. By Mr. Downs' own account there was no rudeness, undue raising of voices or disrespect in the tone or content of what Mr. Kane said to him. While the Arbitrator accepts that Mr. Downs felt some embarrassment, and would have preferred what he described as a less

confrontational communication. Without condoning Mr. Kane's blunt style of communication, not necessarily conducive to good labour relations, the Arbitrator cannot conclude that the actions of Mr. Kane were insubordinate.

That is the more so when some latitude is given, as it must, for the office and responsibilities which he held as the Union's chief representative in the terminal (**Re Firestone Steel Products** (1975) 8 L.A.C. (2d) 164 (Brandt); **Burns Meats** (1980) 26 L.A.C. (2d) 379 (M.G. Picher)). Mr. Kane was exercising his obligations as the Union's chief representative, to the best of his judgment, on the information available to him. In the Arbitrator's view he did not do so in a way that was disrespectful, provocative or, in the end, insubordinate, as the Company alleges. On that basis the Arbitrator cannot sustain the assessment of discipline against the grievor registered by the Company. For these reasons the grievance must be allowed.

In light of the foregoing conclusions, it is unnecessary for the Arbitrator to deal with the procedural issues, including alleged violations of article 6.2 and 6.3 raised by the Union. If it is necessary to comment upon it, however, the Arbitrator has some doubt that the Union could succeed on an alleged violation of article 6.5 of the collective agreement, as that matter is not raised within the framework of the *ex parte* statement of issue filed by the Union.

For the foregoing reasons is allowed. The Arbitrator directs that the ten demerits assessed against Mr. Kane be struck from his record.

May 17, 1996

(signed) MICHEL G. PICHER
ARBITRATOR