CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2898

Heard in Montreal, Thursday, 16 October and Thursday, 11 December 1997

concerning

CANPAR

and

TRANSPORTATION COMMUNICATIONS UNIONS

DISPUTE:

CanPar employee Marc Whittaker (Trader's Blvd. Mississauga, ON) dismissed on or about April 23, 1997 for accumulation of demerits. Total accumulation of demerits at time of termination is seventy-five (75).

JOINT STATEMENT OF ISSUE:

On April 14, 1997, Mr. Whittaker was making a delivery and a pick-up at approximately 10:50 a.m. when an On Road Inspection was done by CanPar supervisor Mr. Russ Nowlan.

From Mr. Nowlan's report the vehicle (truck number 847188) had the rear door padlocked, the engine was turned off, windows were rolled up and the passenger door was not locked. The Company states the vehicle was unsecured at that point.

The Union contends that the discipline issued is harsh.

The Union further contends that the demerit system should be used as an educational tool to learn from one's mistakes and such punishment of twenty (20) demerits for this infraction is not within the realm of positive learning.

The Union had requested the grievor take alternative punishment, the Company declined.

The Union maintains the discipline is harsh and requests the demerits be withdrawn from his record and reinstatement be imposed without loss of wage or benefits to him.

The Company has declined our request.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) D. NEALE	(SGD.) P. D. MACLEOD
ASSISTANT DIVISION VICE-PRESIDENT	VICE-PRESIDENT, OPERATIONS

There appeared on behalf of the Company:

M. D. Failes	– Counsel, Toronto
P. D. MacLeod	– Vice-President, Operations, Toronto

And on behalf of the Union:

P. Sadik	– Counsel, Toronto
D. Dunster	– Executive Vice-President, Ottawa
D. Neale	– Division Vice-President, Hamilton
M. Whittaker	– Grievor

On Thursday, 11 December 1997, there appeared on behalf of the Company:

M. D. Failes	– Counsel, Toronto
P. D. MacLeod	– Vice-President, Operations, Toronto
R. Nowlan	– Delivery Supervisor, Mississauga

And on behalf of the Union:

P. Sadik	– Counsel, Toronto
D. Neale	– Division Vice-President, Hamilton
R. Nadeau	– Division Vice-President, Quebec
D. Byfield	– Local Protective Chairperson, Mississauga
M. Whittaker	– Grievor

AWARD OF THE ARBITRATOR

The material before the Arbitrator establishes, beyond dispute, that the grievor's disciplinary record stood at fifty-five demerits in April of 1997. Those demerits were amassed over a period of short service, since the grievor's commencement of employment with the Company in August of 1995.

On April 14, 1997 Supervisor Russ Nowlan did an observation of the grievor in the course of his parcel delivery and pick-up route. On that occasion Mr. Nowlan observed the grievor leaving his truck unlocked while he performed deliveries in two buildings, over what he estimated to be a ten minute period of time.

It is not disputed that the Company's rules require all drivers to lock their trucks while they are away from the vehicle on a pick-up or delivery. The thrust of the grievor's case is that Company representatives, and in particular Mr. Nowlan, had acquiesced in the past to a certain laxity in the enforcement of that rule. Mr. Whittaker testified that while Mr. Nowlan was riding in his truck with him, on a number of occasions, the vehicle was left unlocked while both men performed deliveries, without any comment or criticism from Mr. Nowlan. He also relates that on one occasion, in January of 1996, Mr. Nowlan observed the grievor's truck on Collins Street in Brampton, when a speed bump caused the unlocked rear door of his vehicle to open. According to the grievor's account Mr. Nowlan simply pulled up in his car and alerted the grievor to the situation, reminding him that Company inspectors could be observing his movements at any time, and that in respect of the locked door rule his advice was: "Don't get caught."

Mr. Nowlan denies that account strenuously. According to his evidence there was never any occasion upon which he condoned the leaving of a door open on the part of the grievor during deliveries or pick-ups. He notes that he reminded Mr. Whittaker of that rule on a number of occasions, as would be normal, and states that in respect of the incident in Brampton he simply told Mr. Whittaker that he should keep a padlock on the rear door of his truck at all times.

The instant case resolves itself on an issue of credibility. Upon a careful review of the evidence, and of the demeanour of both the grievor and Mr. Nowlan as witnesses, the Arbitrator is compelled to doubt the version of events given by Mr. Whittaker. Among other things, he testified that shortly before the second arbitration hearing he happened to observe Mr. Nowlan himself making a delivery at a private residence. According to his testimony, Mr. Nowlan left both the rear door and side door of his vehicle open while he absented himself, entering the customer's home. He relates that he attempted to video-tape the incident, but that it was too dark to do so successfully. While Mr. Nowlan acknowledges the delivery in question, he denies having left both doors of his vehicle open.

The Arbitrator views the grievor's testimony as unduly facile, self-serving and implausible. His suggestion that it is virtually impossible to make the deliveries assigned to him while holding to the rule of locking his vehicle, and his evidence of blatant condonation on the part of Mr. Nowlan, are unsupported by the evidence of any other witness. Even by his own account, the remark "Don't get caught" can reasonably be construed as a verbal warning. On the other hand, the evidence of Mr. Nowlan, particularly with respect to the occasions when he rode together with the grievor, is supported by documentation which records that in fact Mr. Whittaker did properly secure his vehicle during the course of those rides. Very simply, I find Mr. Nowlan to be a more credible witness, and I am not persuaded by the testimony of Mr. Whittaker.

The evidence further discloses that the Company has been consistent in assessing twenty demerits against employees for leaving their vehicle unsecured. This is not a circumstance where the Arbitrator can find employer acquiescence or condonation in the evidence, or any disparate treatment of employees in like circumstances.

The question then becomes whether the measure of discipline assessed is appropriate. I am satisfied that it is, particularly in light of the consistent practice followed in other cases by the employer. Moreover, even if a lesser amount of demerits were assessed, to as few as five, the grievor would nevertheless remain in a dismissable position. From the standpoint of mitigating factors, Mr. Whittaker is a short service employee with a less than exemplary

record over some two years of service. There is, in the circumstances, no compelling basis for a substitution of penalty.

For all of the foregoing reasons the grievance must be dismissed.

December 15, 1997

(signed) MICHEL G. PICHER
ARBITRATOR