

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3037

Heard in Montreal, Tuesday, March 9, 1999

concerning

CANPAR

and

TRANSPORTATION COMMUNICATIONS UNION

DISPUTE:

Appeal of discipline assessed to Mr. René Pichette regarding the incident that occurred on December 5, 1997 at approximately 6:30 a.m. in the cafeteria.

JOINT STATEMENT OF ISSUE:

The Union contends that at or about 6:30 a.m. Mr. Dean Cardi was taking down letters off the Union information board. The Local Chairman, René Pichette, was passing by and saw Mr. Cardi taking down the letters off the board. Mr. Pichette told Mr. Cardi that letters on the Union board was for members and asked to given back. Mr. Cardi refused.

Mr. Cardi took the letters and started walking away. Mr Pichette walked quickly over to Mr. Cardi and again requested the document and again Mr. Cardi refused.

The Company assessed 15 demerits to Mr. Pichette for this incident that happened on December 5, 1997. This incident was as follows: the Company claims Mr. Pichette grabbed Mr. Cardi's arm to retrieve the letters.

The Union contends that is not the case and that the discipline issued to the grievor was unjustified and unwarranted.

The Union requests that the discipline assessed be removed from the grievor's record.

The Company declined the Union's request.

FOR THE UNION:

(SGD.) R. NADEAU
DIVISION VICE-PRESIDENT

FOR THE COMPANY:

(SGD.) P. D. MACLEOD
VICE-PRESIDENT, OPERATIONS

There appeared on behalf of the Company:

P. D. MacLeod	– Vice-President, Operations, Toronto
R. Dupuis	– Terminal Manager, Montreal
D. Cardi	– P&D Manager, Montreal

And on behalf of the Union:

D. Dunster	– Executive Vice-President, Ottawa
R. Nadeau	– Divisional Representative, Quebec
F. Scrivo	– Witness
J. Scrivo	– Witness
R. Martin	– Witness
R. Pichette	– Grievor

AWARD OF THE ARBITRATOR

The principal facts relating to this grievance are not in dispute. On December 5, 1997 Montreal Terminal Manager D. Cardi removed two letters posted on the Union's bulletin board in the terminal cafeteria. While the collective agreement makes no provision for a union bulletin board, it is common ground that the board has been provided for the Union's communications in the terminal for some time. The first letter which Mr. Cardi removed was addressed to the Company's president by a P&D driver complaining of certain management practices, with specific negative reference to a particular supervisor named in the letter. The second letter, by the same author, also addressed to the Company's president, gave further elaboration of the author's own personal experience with the supervisor in question, who was again identified by name. The letters also indicated that they were copied to the Terminal Manager as well as to Union officers at the local, regional and national level.

The grievor, Mr. Pichette, is the Union's local chairman and a P&D driver of some twenty years' service. He observed Mr. Cardi removing the correspondence from the Union bulletin board and immediately protested. It is not disputed that he demanded that Mr. Cardi give him the letters which Mr. Cardi had removed, a request which Mr. Cardi refused. While different witnesses' accounts of their confrontation vary slightly, it appears that Mr. Cardi placed his hands behind his body, out of the reach of Mr. Pichette who was attempting to snatch the letters away from him. It would appear that Mr. Pichette made it clear to Mr. Cardi that he felt that the Company had no right to remove the letters, and certainly no right to retain correspondence which belonged to the Union and was on a bulletin board reserved for Union business. Mr. Cardi asserts that during his attempts to recover the letters Mr. Pichette grabbed him by the arm. Mr. Pichette, supported by several witnesses, denies any such physical contact. Following an investigation, the grievor was assessed fifteen demerits for the incident in question.

A preliminary issue arose at the hearing. The Union takes issue with the Company's calculation of the grievor's prior disciplinary record. Specifically, it submits that Mr. Pichette should be credited with the removal of ten demerits for one year of accident free driving. As agreed at the hearing, the Arbitrator makes no determination at this time, refers that issue back to the parties and retains jurisdiction in the event that they cannot agree upon its resolution.

Turning to the merits of the dispute, the Arbitrator has some difficulty with the case presented by the Company. While Mr. Cardi, supported by one witness, claims that the grievor grabbed his arm some three times, without success in his effort to recover the letters, several other witnesses support the grievor's account that there was no such physical gesture on his part. In assessing an incident of this kind, all relevant facts must be taken into account. Firstly, there is no dispute before the Arbitrator that the letters appropriated by Mr. Cardi were not his property, and that they properly belonged to the Union, to the extent that they were displayed, whether correctly or not, on the Union's bulletin board. That much appears to have been subsequently acknowledged by Mr. Cardi himself, who returned the letters to another local union officer, Mr. Jerry Scivo, approximately five minutes after the incident involving Mr. Pichette. While there appears to be little dispute that Mr. Pichette was somewhat agitated, the Arbitrator is satisfied that he was provoked into a state of strong reaction, firstly by Mr. Cardi's unilateral removal of the posted letters, without any consultation with him or any other Union officer, and that his initial reaction was only aggravated by Mr. Cardi's refusal to surrender to Mr. Pichette what was obviously Union property.

Boards of arbitration have long recognized that union officers and shop stewards must have a degree of protection in the discharge of their duties, as they are compelled by their office to occasionally become involved in confrontational encounters with members of management. It is well established that the day to day resolution of disputes and the proper airing of differences may require that a certain degree of latitude of expression be granted to shop stewards and local union officers, who may themselves be employees, in their dealings with management on legitimate union business. As is stated in *Brown and Beatty*, **Canadian Labour Arbitration** at 9:1530:

... union officers who direct abusive and profane language against a member of management in the course of discharging their union responsibilities may be sheltered from the usual tenets of industrial discipline.

(See, generally, **Workers Compensation Board of British Columbia** (1990), 15 L.A.C. (4th) 332 (Ladner); **Plaza Fibreglas Mfg. Ltd.** (1988), 33 L.A.C. (3rd) 193 (Aggarwal); **Burns Meats Ltd.** (1980), 26 L.A.C. (2d) 372 (M.G. Picher); **St. Lawrence Seaway Authority** (1978), 20 L.A.C. (2d) 24 (H.D. Brown); **CROA 2979**.) While Arbitrators have been careful to note that union officials cannot abuse their office to shelter deliberately false or malicious utterances, there must be some protection for candid and sometimes strongly worded communications,

which might otherwise qualify as insubordination, if only to prevent an undue chill on the free flow of argument sometimes essential to the resolution of day to day industrial relations disputes.

The records of this Office confirm that Mr. Pichette has been noted as a responsible and conscientious Union representative in the past. In **CROA 2937** this Office dealt with discipline assessed to a number of employees, including Mr. Pichette, on the occasion of a brief illegal work stoppage. The award in that case reflects the following observations:

... On the evidence before me it is amply evident that Mr. Pichette used his best efforts to prevent the work stoppage from happening, both by counselling employees with serious discipline to proceed to work, and by directing the employees to go to work when it was clear that Mr. Dupuis was coming to the terminal. It must be appreciated that in such a circumstance a Union Protective Chairman is in a difficult position, and may, as in the case of Mr. Pichette, be compelled to remain on the scene to function as a facilitator and problem solver. Given what occurred, it is not, in the Arbitrator's view, appropriate that Mr. Pichette receive any discipline for what transpired.

The Union also draws to the Arbitrator's attention a letter of commendation to Mr. Pichette from Company President John Cyopeck dated February 22, 1990 thanking Mr. Pichette for a supportive speech which he gave to the Montreal drivers.

Reviewing the objective facts of the incident, I have difficulty sustaining any discipline against Mr. Pichette. The Arbitrator readily appreciates the concerns that Mr. Cardi and the Company generally might have had with the letters which were posted. It may well be that they merited removal. However, the critical issue was the way of proceeding. By summarily removing Union property from the Union bulletin board without any consultation with Mr. Pichette, or any other Union officer, Mr. Cardi engaged in what he reasonably should have known was a provocative course of conduct. That provocation was, if anything, aggravated by his refusal to return the Union property to Mr. Pichette, who had every right to demand that it be given to him immediately. In that circumstance, even if there was a grabbing of Mr. Cardi's arm, a conclusion which I am not satisfied is established on the balance of probabilities, the incident would not justify discipline against Mr. Pichette. If, as appears evident, Mr. Cardi's intention was to photocopy the letters or show them to his own supervisor before surrendering them to the Union, he could have explained his intention to Mr. Pichette, thereby possibly taking the heat out of an incident which need not have occurred at all.

With respect, in the Arbitrator's view it was Mr. Cardi's own errors of judgement which caused what should have been an otherwise benign event to escalate unnecessarily. And, for the reasons related, even if I were to accept Mr. Cardi's account of what transpired, given Mr. Pichette's responsibilities as the Local Union Chairman, I could not find that his reaction was excessive or deserving of discipline in the circumstances. Without fully reviewing the technicalities of the law, it appears to the Arbitrator arguable that an employee who sees his or her property being wrongfully appropriated by a supervisor may in some cases be justified to take reasonable steps to protect or recover it, as a possible exception to the "work now grieve later" rule. The principle should be no less applicable to a union representative concerned with the protection or recovery of union property.

For all of the foregoing reasons the Arbitrator allows the grievance, and directs that the fifteen demerits assessed against Mr. Pichette be struck from his record.

March 15, 1999

(signed) MICHEL G. PICHER
ARBITRATOR