CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3108

Heard in Calgary, Tuesday 9 May 2000

concerning

CANPAR

and

TRANSPORTATION COMMUNICATIONS UNION

DISPUTE:

Twenty (20) demerits issued to K.D. for insubordination on December 10, 1999.

JOINT STATEMENT OF ISSUE:

The Union filed a grievance regarding the above mentioned matter on December 10, 1999. The Company denied the Union's request to settle the matter on January 10, 2000. To date the Company has denied the Union's request to settle the matter.

The Union contends that the grievor was provoked by his lead hand when the lead hand choose to ignore the grievor's doctor's recommendation to exclude overtime from the grievor's workday. The Union has grieved that the Company has acted in a discriminatory manner and violated article 8.6 of the collective agreement. The Union has also grieved that the discipline issued is unwarranted and is in violation of article 6.1 of the collective agreement.

The Company contends that the grievor's actions should be considered as insubordinate and that the discipline was warranted and assessed accordingly without any violation of articles 6.1 and 8.6 of the collective agreement.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) A. KANE	(SGD.) P. D. MACLEOD
CHIEF STEWARD, WESTERN CANADA	VICE-PRESIDENT OF OPERATIONS

P. D. MacLeod – Vice-president, Operations, Toronto

And on behalf of the Union:
A. Kane – Chief Steward, Western Canada, Vancouver
J. Smits – President, Local Unit, Calgary

AWARD OF THE ARBITRATOR

It is common ground that the grievor did become involved in a heated verbal exchange with Lead Hand Dave Reid on the morning of December 10, 1999. The Arbitrator is satisfied that on that occasion Mr. Reid noticed that the grievor had failed to load a certain amount of freight onto his truck, and communicated his displeasure to The grievor. While there is some dispute between the parties as to whether Mr. Reid specifically directed The grievor to load and deliver the freight in question, I am satisfied that there was no real doubt between the two participants in the conversation. Clearly Mr. Reid wanted The grievor to load and deliver the freight in question, and The grievor was determined that he would not do so, as in his opinion it would involve working overtime. It appears that during the conversation the lead hand may have told the grievor that if he was not able to do the work he should quit his

job. Whatever words were used by Mr. Reid, it is not disputed that an angry four-letter response came from The grievor, within the hearing of other employees.

The Company submits that in fact the extra freight in question, which would have involved some seven stops, would not have forced The grievor into an excessive overtime burden. Examining his work sheet for the day, it notes that in fact he finished slightly early, and could reasonably have accommodated the freight which was the subject of debate between himself and his lead hand on the morning of that day.

The Union draws to the Arbitrator's attention the fact that since December of 1999 The grievor had been subject to a medical directive from his physician, whereby he was excused from performing overtime work. It appears that his own physician's opinion in that regard was confirmed by the Company's doctor, both being of the view that neck and shoulder difficulties being experienced by The grievor would be aggravated by performing excessive overtime. Although a letter from the Company's Health and Safety Coordinator, Ms. Lynne Pothier, to the grievor's physician dated December 30, 1999 indicates that the grievor was to be relieved from overtime for a period of three months, there is no explanation as to the three month limitation. In any event, the incident in question clearly fell within the period designated as requiring accommodation of the grievor.

The Arbitrator can appreciate the concerns which motivated the Company's decision to issue discipline against The grievor. The open use of profanity against a lead hand concerning a workload assignment is a form of conduct which cannot be tolerated in an ordered workplace. If in fact the grievor believed that the amount of overtime which was being asked of him went beyond the medical restrictions placed upon him by his physician, it was open to him to assert that concern to his lead hand, or to a higher ranking supervisor, and to grieve if necessary. It is also arguable that an exception to the "work now, grieve later" rule might apply if it could be shown that physical damage might result. However the course of action taken by the grievor, including an insulting and insubordinate comment directed to his lead hand, went beyond the legitimate available options, and clearly did merit a degree of discipline.

The real issue in dispute is the appropriate measure of discipline in the circumstances. In the Arbitrator's view there are compelling mitigating factors to be taken into account. Firstly it is not disputed that the grievor suffered a physical disability at the time of the incident, and that he was under a medical directive, properly communicated to the Company, to the effect that he should not have excessive overtime. While he may have been incorrect in his assessment on the morning in question, it is clear that The grievor entertained a good faith belief that he was being given an excessive load of freight to deliver. While the Union does not dispute that he could handle a short amount of overtime work, as is typical in normal assignments, it suggests that, depending on volume, the assignment being given to him could have been beyond that limit. The Union also stresses the provocative nature of the comment by the lead hand, to the effect that if the grievor could not do the work he should quit his job.

Also of importance in weighing the appropriate measure of penalty is the representation by the Union, unchallenged by the Company, to the effect that the grievor has never before been disciplined in some twelve years of service. When that record, and the extenuating circumstances of the grievor's medical limitations, are taken into account, the Arbitrator is of the view that it is appropriate in the circumstances of this case to exercise his discretion to reduce the penalty. Twenty demerits is a severe measure of discipline in respect of a first offence, although it might well be appropriate in a case of unmitigated insubordination. For the reasons touched upon above, I am satisfied that there were significant mitigating factors operating at the time of the incident in question. Nor does the Arbitrator believe that it is appropriate to make any comment about the operation of article 8.6 of the collective agreement in the circumstances, as the grievor did not invoke his rights under that article, in any event.

For all of the foregoing reasons the grievance is allowed, in part. The Arbitrator directs that the twenty demerits be removed from the grievor's record, and that written reprimand be substituted for his insubordinate language toward the lead hand on December 10, 1999.

May 12, 2000

(signed) MICHEL G. PICHER
ARBITRATOR