

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3188

Heard in Montreal, Tuesday, 13 March 2001

concerning

CANPAR

and

**UNITED STEELWORKERS OF AMERICA (LOCAL 1976)
(TRANSPORTATION COMMUNICATIONS UNION)**

DISPUTE:

The Union, on behalf of Mr. Tom Preston, grieves the three (3) day suspension imposed on him for the alleged offence of "Failure to report for duty August 16, 2000."

JOINT STATEMENT OF ISSUE:

Mr. Preston was called by the Company on August 16, 2000 inquiring if he could report for duty on Augusts 16, 2000 one (1) hour prior to the start of his shift to assist in doing an extra pick up.

The Union contends that Mr. Preston never agreed to come in for the early start but told the Company official he would see what he could do. The Company contends that Mr. Preston refused to begin his shift prior to the actual bulletin start time because the Company would not withdraw scheduled interviews regarding other matters, an allegation the Union says Mr. Preston flatly denies.

On September 15, 2000 Mr. Preston received a three (3) day suspension for this incident. The Union believes that the suspension given for this incident extreme and without merit. The Union requested Mr. Preston be reimbursed for all lost wages, benefits and seniority for time lost due to this suspension.

The Company denied our request. The Union's position remains the same.

FOR THE UNION:

(SGD.) D. NEALE
VICE-PRESIDENT / FST

FOR THE COMPANY:

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

There appeared on behalf of the Company:

P. D. MacLeod – Vice-President, Operations, Mississauga
P. Kitchener – Supervisor, Hamilton

And on behalf of the Union:

D. Dunster – Staff Representative, Ottawa

AWARD OF THE ARBITRATOR

As reflected in the initial representations of the parties at the hearing, there was some disagreement between them as to the facts giving rise to the discipline assessed against Mr. Preston. The Union's representative was under the impression that the Company assessed discipline for insubordination. In fact, both the notice of investigation and the letter of discipline sent to the grievor are clear that his three day suspension was "... a result of your refusal to report for work as instructed on August 16/00." A second point of disagreement concerns whether in fact the Company's supervisor communicated to Mr. Preston a clear directive that he must attend at work one hour early. The Union's representative was under the view that the evidence would suggest that he was merely canvassed or asked whether he would come. On a careful review of the material filed, and the evidence of the supervisor adduced at the hearing, the Arbitrator is compelled to resolve that issue against the Union.

In the result, the facts for the purposes of this grievance are as follows. The grievor is a linehaul driver employed at the Company's Hamilton terminal. On August 16, 2000 he was scheduled to start at his regular time, 18:30. However, the events of that day created the need for a substantial pick-up of freight that could best be accomplished by the use of the grievor's tractor trailer. His supervisor, Mr. Patrick Kitchener, then telephoned the grievor at home during the course of the afternoon to ask him to come into work one hour early, commencing at 17:30. It appears that Mr. Kitchener was aware that the grievor's son occasionally made use of his vehicle, and that his ability to come to work early would depend on Mr. Preston being able to secure the use of his car in time. It does not appear disputed that during an initial telephone conversation between Mr. Kitchener and Mr. Preston the grievor indicated that he would have to get back to Mr. Kitchener when he would have better information on the availability of his car.

The evidence of Mr. Kitchener, which is the only *viva voce* evidence called at the hearing, and which the Arbitrator accepts as effectively unchallenged, is that when the grievor called him back he advised him that his car was available. However, there ensued a discussion between the two individuals with respect to the status of two disciplinary investigations pending against Mr. Preston. According to the supervisor's evidence Mr. Preston asked if, in exchange for his coming to work early, his supervisor would agree to forego pursuing the disciplinary investigations. It may be noted that at the time Mr. Preston's disciplinary record stood at a relatively precarious fifty-four demerits. When Mr. Kitchener declined to make such an exchange, the grievor verbally refused to come to work early. According to the supervisor's evidence, which is unchallenged by any counter evidence on behalf of the Union, Mr. Kitchener then told the grievor that he would have to investigate his refusal to come to work should he persist in his position. The grievor nevertheless declined, and came to work at the commencement of his regular scheduled tour of duty at 18:30.

On the basis of the evidence so presented, the Arbitrator cannot accept the submission of the Union's representative to the effect that the Company has failed to show that there was a clear directive issued to Mr. Preston to come in to work early. The only other issue outstanding is whether the Company was entitled to issue the directive which it did. Article 8.6 of the collective agreement bears on that issue, and provides, in part, as follows:

8.6 ... Overtime shall be allocated on the basis of seniority wherever possible, in a voluntary manner, within the work classification and shifts, provided the employee is capable of performing the duties; however, upon reaching the bottom of the seniority list in that classification and shift, the junior employee(s) will be required, in reverse order, to work the overtime.

The material before the Arbitrator confirms that in the past, at various times, the kind of work which was the subject the overtime requested of Mr. Preston was variously assigned to both P&D operators and to linehaul drivers. On the balance of the evidence, I am satisfied that what arose on the day in question can fairly be characterized as a "one off" situation. It was then within the prerogative of the Company to decide that the work should be performed within the classification of linehaul operators. That being so, the Company was entitled to force Mr. Preston to perform the work in question. In the circumstances, therefore, his refusal to do so did leave him liable to discipline.

The next issue becomes the appropriate measure of discipline. Unfortunately, Mr. Preston presents with a dubious disciplinary record. He has attracted discipline consistently throughout the history of his employment, and was disciplined on some eight separate occasions prior to the incident of August 16, 2000. In addition, as noted above, he was at that time subject to additional disciplinary investigations. One of those resulted in the assessment of a two day suspension for his unauthorized absence for the period of one week. In that circumstance, also taking into consideration the fifty-four demerits outstanding on his record, the Arbitrator is satisfied that a three day suspension

was in keeping with principles of progressive discipline, fell within the appropriate range of discipline, and therefore should not be disturbed.

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

March 16, 2001

(signed) MICHEL G. PICHER
ARBITRATOR