

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 3886

Heard in Montreal, Tuesday, 13 April 2010

Concerning

CANPAR TRANSPORT LTD.

and

UNITED STEEL WORKERS (LOCAL 1976)

DISPUTE:

The dismissal of Mr. Alfred O'Leary.

JOINT STATEMENT OF ISSUE:

On February 05, 2009, Mr. O'Leary had an incident with a third party while attempting to drive down a roadway. On February 06, 2009, Mr. O'Leary had an incident with his supervisor at the Canpar Terminal in Toronto.

On February 09 and 10, 2009, interviews were held to determine Mr. O'Leary's involvement in both of the above matters. On February 13, 2009, Mr. O'Leary received 15 demerits for the incident on February 05, 2009 plus 40 demerits for the incident on February 06, 2009. On February 13, 2009, Mr. O'Leary was terminated from his employment for the accumulation of demerits.

The Union grieved the discipline assessed on March 04, 2009, stating the discipline received was excessive, unjust and that mitigating factors were not taken into consideration.

The Union requested payment of loss of wages, benefits and that Mr. O'Leary be reinstated to his former position without loss of seniority and substitute the dismissal by a suspension.

The Company denied the Union's request March 17, 2009.

FOR THE UNION:
(SGD.) D. NEALE
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, Mississauga
L. Fuaco	– Vice-President, Operations, Mississauga
R. Savatin	– Supervisor, Toronto

And on behalf of the Union:

- R. Marleau – Vice-President, District 6, North Bay
- N. Lapointe – President, Montreal
- A. O'Leary – Grievor

AWARD OF THE ARBITRATOR

This arbitration involves two heads of discipline, the first relating to an on-road incident which occurred on February 5, 2009 and the second the grievor's alleged refusal to perform extra work as was being asked of him.

Mr. O'Leary was assessed fifteen demerits for his conduct during an encounter with another vehicle on a snow-clogged street on February 5, 2009. It does not appear disputed that his vehicle came face-to-face with a passenger car in a relatively narrow space when the street they were on was reduced to one lane by reason of snow banks on either side. It is not disputed that the automobile could have moved into a space on the side to allow the grievor's truck to pass. Conversely, while the grievor could have backed down the street, there was no lateral space into which he could move his truck, and he would have been required to back to end of the block. The Company maintains that that option was available to him, although it does not appear disputed that it was less than optimal.

It would seem that the two vehicles stood without moving, face-to-face, for close to ten minutes. The people in the automobile were apparently gesturing and shouting at the grievor that he should remove his truck from the way. The account of the grievor, which does not appear challenged, is that he called the dispatcher. At the arbitration he relates that the dispatcher told him to exit his truck and ask the driver of the car to back

up into a space to allow him to pass. It appears that he proceeded to do that when the male passenger in the car got out to meet him and, it would appear, spat at him and pushed him, causing the grievor to respond physically. It seems that Mr. O'Leary restrained the male passenger, pinning him to the hood of the car, telling him that he should leave the matter alone and it had now become one for the police to handle. It seems that the passenger was then released by Mr. O'Leary and returned to his vehicle, turning and saying something to the effect that he had a gun and that he would kill the grievor. In fact, the automobile then did move to the side to allow the grievor's delivery van to pass. Upon investigating an account of the incident, the Company assessed fifteen demerits against the grievor.

The Company's representative submits that in fact the grievor should not have become engaged in the confrontation, should not have stood idle for ten minutes waiting for the car to move and should have backed his truck rather than risk escalating the confrontation. The Union's representative argues that the grievor did nothing wrong, that it was perilous for him to back his delivery van on a street narrowed by snow banks with parked cars, and that it was not improper for him to follow the instructions of the dispatcher and ask the driver of the automobile to move her car.

On a review of this incident, the Arbitrator is inclined to agree to some extent with the Union, although I am not persuaded that there was not some degree of error on the part of the grievor. I must agree with the Company's representative that waiting ten minutes before resolving the problem was not the appropriate course of action. That

said, however, the grievor did speak to the dispatcher, a fact which emerged from the Company's interview and, as was explained at the arbitration hearing, she advised him to ask the driver of the automobile to move her vehicle. The fact that the grievor followed the direction that was given to him by the dispatcher is, in my view, at a minimum a mitigating factor. Nor is there anything in the record to suggest that the grievor was himself rude or provocative towards the driver and passenger of the automobile.

In the Arbitrator's view a written reprimand would have been sufficient to remind the grievor of the importance of avoiding confrontation, making him appreciate that it was not appropriate to simply sit still for ten minutes in the face of the vehicle in front of him, which obviously refused to move. I therefore direct that the fifteen demerits assessed against the grievor be removed from his record and that a written reprimand be substituted.

The second incident concerns a request by the grievor's supervisor, Mr. Ray Sabatin, made the day following the incident just reviewed, that he carry some extra parcels for additional delivery during the course of his working day. It appears that the grievor then indicated to Mr. Sabatin that he was not feeling well and that he would not take the extra load. While there is some dispute between the parties as to what precisely was said by both the grievor and his supervisor, including whether there was some discussion as to the order in which the additional freight should be delivered, I am satisfied that on the whole the grievor was insubordinate towards his supervisor and

that he effectively took the position that he would not deliver the freight as he was being asked to do. There was, in that circumstance, grounds for the assessment of discipline against Mr. O'Leary.

An aggravating factor in this matter is the fact that the grievor does have a relatively heavy prior record of discipline. The material before the Arbitrator confirms that he was assessed ten demerits in 2008 for insubordination and that in 2004 he was assessed a week's suspension for abusive language towards a Company official. I am satisfied, therefore, that the Company is correct in its position that the grievor's actions on the 6th of February 2009 did merit a severe measure of discipline. The issue is whether that incident, coupled with his prior record, should be viewed as justifying his discharge. In considering that question there is a significant mitigating factor which must be weighed. That is the grievor's prior service. Hired in February of 1982, Mr. O'Leary has a record of twenty-seven years' employment. While it is true that he did have relatively heavy discipline over the years, he did also register meaningful times of discipline-free service, notably in 2006 and 2008. While the Arbitrator appreciates the Company's perspective and greatly respects the experience of its spokesperson, in my view the substitution of a suspension which exceeds a year in duration is nevertheless an appropriate measure of discipline and one which should bring home to the grievor that he is being given a last chance.

On the foregoing basis, therefore, the grievance is allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without

compensation for any wages and benefits lost, and without loss of seniority. A reprimand shall be substituted for the fifteen demerits assessed against him for the events of February 5, 2009. The forty demerits assessed for the incident of February 6, 2009 shall be removed from his record and a suspension shall be recorded for that incident. His record shall be returned to the level of forty-five demerits upon his reinstatement. As indicated above, the grievor must appreciate that, in light of his past record, this award represents a last chance opportunity to demonstrate that he can be a productive and respectful employee.

April 19, 2010

(signed) MICHEL G. PICHER
ARBITRATOR