

CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4333

Heard in Montreal October 14, 2014

Concerning

CANPAR TRANSPORT L.P.

And

UNITED STEELWORKERS – LOCAL 1976

DISPUTE:

The assessment of 115 demerits to Canpar Ottawa employee Mr. Michael Coire resulting in his dismissal on November 18, 2013 and a claim for payment of 4 days unpaid wages as the Grievor was held out of service for the period November 13 - 18, 2013,

JOINT STATEMENT OF ISSUE:

On August 22, 2013, Mr. Coire was interviewed in connection with "not following Canpar Procedure, non-attempts supposed to call before 2:30 pm". On September 5, 2013, the Company assessed Mr. Coire twenty (20) demerits to his Employee Discipline Record.

On August 9, 2013 Mr. Coire was given a Notice of Interview from the Company to appear at an interview scheduled for August 26, 2013 on a matter of "non-attempts" on Arvisais and Cousineau Run". An extension on time request was agreed by the parties and on September 05, 2013 the Grievor was interviewed in connection with the aforementioned alleged Infraction. On September 10, 2013 the Company assessed Mr. Coire ten (10) demerits to his Employee Discipline Record.

On October 29, 2013 a Notice of Interview for the alleged offense of "not following proper scanning" was issued to the Grievor. The interview took place on November 4th and the Company assessed twenty (20) demerits to Mr. Coire for this incident on November 13, 2013,

On November 4, 2013 the Grievor was given a Notice of Interview for "Not calling before 2:30 pm for Non-Attempt on October 28, On November 13th, the Company assessed twenty five (25) demerits to Mr. Coire for this Infraction.

On November 13, 2013 a Notice of Interview was issued to Mr. Coire to attend an interview on November 18, 2013 in connection with a customer complaint. The interview conducted on November 18th and later that day, the Company assessed forty (40) demerits to the Grievor for this infraction. The grievor was also advised by way of letter on November 13, 2013 that his demerit total was at 50 demerits and that he is now at 95 demerits and that pending grievances on his 2 previous investigations Canpar is holding him out of service until further notice.

The Union grieved the assessment of the twenty (20) demerits for the alleged infraction as unsubstantiated, unwarranted, and not given under the principles of progressive discipline. Further, that the Company violated Articles 6.1, 6.3, 6.4, 6.6 and 6.8 of the Collective

Agreement and requests that the discipline be removed from the Grievor's record. The Union grieved the assessment of the ten (10) demerits for the alleged infraction as unsubstantiated, unwarranted, and not given under the principles of progressive discipline. Further, that the Company violated Articles 5,21.4, 6.1, 6.3, 6.4, 6,6 and 6,8 of the Collective Agreement and requests that the discipline be removed.

The Union filed a Step 2 grievance regarding the issuance of the twenty (20) demerits stating the Company was in Violation of Article 6.3 of the Collective Agreement as the Notice of Investigation was improper as it did not specify the date of the alleged infraction; further the union believed the discipline on this matter extreme, unsubstantiated by the company as well as not being given under the principles of the progressive discipline process. The Union also requested Mr. Coire be immediately reinstated with all lost wages and benefits including seniority payable to him at his applicable hourly rate from the date of dismissal to the date of his return thus making his record whole.

The Union contends that the grievor has been disciplined twice for the same infraction as the matter had been dealt with previously through the assessment of demerits on August 22, 2013 (Item 8) and that the discipline should be declared void ab initio The Union also considers that if the discipline is not nullified it is unwarranted, extreme and not given within the spirit of progressive discipline and requests that the twenty five (25) demerits be removed from the grievor's record, The Union also requested Mr. Coire be immediately reinstated with all lost wages and benefits including seniority payable to him at his applicable hourly rate from the date of dismissal to the date of his return thus making his record whole.

The Union grieved the assessment of the forty (40) demerits on the basis that the Interview Notice did not meet the requirements of Article 6.3 and the discipline should be declared void ab initio, the document presented during the Investigation did not clearly establish the complaint was in fact against the grievor, and that the Company has failed to meet the burden of proof that Mr. Coire did anything wrong at this customer's place of business. Further the Union contends that if the discipline is not nullified, it is unwarranted, extreme and not given within the spirit of progressive discipline and requests that the forty (40) demerits be removed from the grievor's record and that the employee be reinstated with full seniority, all lost wages, including the time held out of service for the period November 13-48, 2013, and that the Grievor's benefits be reinstated retroactive to the date of his termination on November 18, 2013

The Company denied each of the grievances stating that there had been no violations of the Collective Agreement and that the discipline assessed was warranted.

FOR THE UNION:

(SGD.) D.Neale

Vice President USW Local 1976

FOR THE COMPANY:

(SGD.) B. Neill

Vice President Human Resources

There appeared on behalf of the Company:

B. Neill	– Vice President Human Resources, Toronto
Y. Heroux	– Terminal Manager, Ottawa
N. Nicolai	– District Manager, Montreal

There appeared on behalf of the Union:

D. Neale	– Vice President, Montreal
G. Claude	– Chair Unit 2347, Montreal
N. Lapointe	– Recording Secretary, Montreal
M. Coire	- Grievor, Ottawa

AWARD OF THE ARBITRATOR

As can be ascertained from the consolidated Dispute and Joint Statement of Issue, this arbitration concerns five separate assessments of discipline imposed for conduct that took place over a period of approximately four months in the fall of 2013.

Mr. Michael Coire (“the grievor”) was hired by the Company in April 2003 as a warehouse employee and moved into the position of driver in November 2006.

I address each separate incident, as presented at the hearing. I deal with the quantum of discipline at the end of the award considering the totality of the circumstances before me.

Incident 1 – Assessment of 20 demerits for not following Canpar procedure, non-attempt, supposed to call before 2:30 p.m.

On August 7, 2013, the grievor was given notice of an investigative meeting to be convened on August 22, 2013, surrounding the grievor’s failure to call before 2:30 p.m. for non-attempts.

The Union’s position is that the discipline is properly null and void since the notice of interview did not include the date of the infraction, which was August 6, 2013. (In fact, the union raised exactly the same argument concerning the notices of interview in Incidents 2 through 5 as well.) The parties agree that neither the grievor nor his Union made any objection to the lack of meaningful notice at the time of the disciplinary interview in each of the Incidents.

With respect to the merits of the imposition of discipline for this incident, the parties are agreed that the grievor did not call his supervisor on August 6, 2013 before 2:30 p.m. Further, there is no dispute that it is the Company's expectation, of which the grievor was well aware, that a driver is to contact his supervisor when he realizes that he may not be able to complete his or her deliveries on any given day. The rule requiring this communication allows the supervisor to make alternate arrangements to assist with the work, if at all possible, thereby ensuring obligations to clients are met.

On August 6, 2013, the grievor had eight non-attempts, which means that he did not attend for eight deliveries (pick ups or drop offs at different locations) for which he was scheduled that day. The number of non-attempts is significant. The grievor's only excuse for not contacting his supervisor before 2:30 p.m. was that he thought he had enough time to finish them.

The Union contends that because the grievor honestly believed that he would be able to finish the deliveries, the discipline issued against him was unwarranted. I have difficulty with the Union's submission. It gives primacy to the subjective state of mind of the driver. The standard must by necessity be an objective one. If a driver knows or reasonably should know that he may not be in a position to complete his deliveries by 2:30 p.m., and does not contact the supervisor, the Company is justified in imposing a disciplinary sanction for such conduct.

In the face of so many non-attempts it was incumbent on the grievor to provide an explanation as to why he did not call by 2:30 p.m. beyond stating: "I thought I would have enough time to finish it all." The grievor's explanation, for which he offered no basis in support, in the face of so many non-attempts, rendered him liable to discipline. The record reveals that the grievor did in fact call in to his supervisor, albeit approximately an hour and fifteen minutes late.

The Company relies on **CROA 1554** to support of its position that the imposition of 20 demerits for this infraction was appropriate. Due to the mitigating circumstances surrounding the specific details of the grievor's failure to attempt to deliver freight in that case, the Company's assessment of 20 demerits against the grievor was reduced to 10 demerits.

Incident 2 – Assessment of 10 demerits for non-attempts on Arvisias and Cousineau runs

On August 9, 2013, the grievor was given notice of an investigative meeting to be convened on August 26, 2013 surrounding the grievor's non-attempts on the Arvisias and Cousineau runs. The investigative meeting was held on September 5, 2013, to allow for Union representation.

The alleged infractions took place on the Arvisais run on August 7, 2013 and the Cousineau run on August 9, 2013, respectively. Neither run was the grievor's normal

route. The grievor had, however, covered both routes on numerous occasions in the past.

With respect to the Arvisais run, the grievor failed to make over 25% (11 of 42) of the deliveries that day. The grievor's explanation for his 11 non-attempts was that he had been taken off the "Bayshore" route that day, that he was stressed, and that he did not have a map of "Carleton Place." However, he did not ask for a map. The grievor also suggested that there were 50 deliveries on the day in question rather than 42, which was not the case.

The record reveals that, as a result of the Union's intervention in relation to his removal from the Bayshore route, he was returned to that route on August 12, 2013.

With respect to the Cousineau run on August 9, 2013, which had 70 normal daily assignments, the grievor was dispatched to complete 53 deliveries. Notwithstanding this, he only made 43 deliveries.

The Union argued that the grievor did not willfully fail to make the 10 deliveries, and that therefore the discipline imposed by the Company was unwarranted. I disagree. It would be a rare occasion that a driver would deliberately not complete his deliveries. No such "wilfulness" is necessary for the imposition of the disciplinary sanction for non-attempts.

Incident 3 - Assessment of 20 demerits for “not following procedure improper scanning.”

On October 29, 2013, the grievor was given notice of an investigative meeting to be convened on November 4, 2013 surrounding the grievor's alleged failure to follow the scanning procedure. The day before providing the grievor with the notice, the grievor returned to the terminal with 14 packages from 8 delivery stops, which he had coded “misroutes.” The latter term refers to packages that have been improperly loaded onto a drivers' truck by warehouse staff.

With respect to merits of this incident, there is no dispute that the grievor had eight non-attempts on October 28, 2013. The grievor acknowledges in the interview that since he had not called his supervisor as required before 14:30 p.m. hours to tell him that he would not complete his deliveries he coded the packages as misroutes.

The Union suggested that somehow the fact that the grievor did not deliberately set out to have non-attempts excuses his conduct in knowingly scanning the non-attempts as misroutes. That submission is entirely without merit. The deliberate misrepresentation by the grievor to the Company in fact warrants a significant disciplinary sanction.

Incident 4 - Assessment of 25 demerits for “not calling in before 2:30 for non-attempts on October 28, 2013”

On October 29, 2013, the grievor was also given notice of an investigative meeting to be convened on November 4, 2013 surrounding his failure to call before 2:30 p.m. for non-attempts. The imposition of 25 demerits relates to the grievor's failure to have contacted his supervisor by 2:30 PM on the same day that he decided to scan the 14 packages from the eight non-attempts as misroutes.

In respect of this incident, I appreciate that the grievor did not call his supervisor before 2:30 p.m., which is a separate and distinct obligation required of the grievor – one that is different from his misconduct in misrepresenting the 14 packages referenced above as misroutes.

At the hearing, the Company explained that it is not unusual for the Company to double the assessment of discipline in the case of a second repeat infraction, and that the Company had previously assessed the grievor with 20 demerits for failing to call his supervisor by 2:30 p.m. with respect to incident 1. The Company submits that it exercised restraint in not imposing 40 demerits and instead imposing 25 demerits for this repeat of Incident 1. The Union contends that by imposing 25 demerits against the grievor for the same infraction as incident 3, the grievor was placed in “double jeopardy,” and for that reason the discipline for Incident 4 cannot stand.

Incident 5 – Assessment of 40 demerits stemming from customer complaint.

The imposition of discipline for incidents 3 and 4 brought the grievor's demerit total from 50 to 70 and then 95 points. The discipline for incidents 3 and 4 was imposed on November 13, 2013. Just prior to that date, on November 12, 2013, the Company received a letter of complaint from the manager of a retail store customer complaining about one of the Company's drivers named Michael.

Without going into all of the details of the complaint, the allegations are serious. The alleged misconduct was ongoing and raised both concerns about the grievor's performance of his duties, and more particularly about the behaviour and attitude exhibited by the grievor in carrying them out. The culminating concern, which prompted the detailed complaint letter was that many boxes had not been delivered to the store and the grievor responded inappropriately when the customer raised the concern with him.

The Union takes the position that the Company has failed to meet its burden in demonstrating that the grievor did anything wrong. In support of its position, the Union directs me to a criminal case, one involving a murder from 1838, where the jury was directed that it must be satisfied "not only that those circumstances were consistent with his having committed the act [murder], but they [the jury] must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person."

The criminal case provided has no application to the circumstances before me. This proceeding has nothing to do with a criminal matter and does not involve the application of the same burden of proof as in a criminal prosecution.

I have carefully reviewed the detailed complaint and the grievor's response to the specific allegations raised therein. The record reveals that while it had been anticipated that the grievor would go over every accusation, and there were many, he did not do so meaningfully. He denied the customer's allegations of swearing. In response to the customer's allegation that, in response to the customer's query about missing packages, the grievor initially denied that he told the client to go pick them up at the store where he had left them, but later admitted he may have said it.

A careful review of the grievor's responses to the detailed allegations leads me to believe that, on a balance of probabilities, which is the standard of proof in this case, the grievor displayed highly inappropriate conduct towards the client – behaviour that warranted a significant disciplinary response. It seems highly unlikely to me that the customer simply fabricated the complaint. Customers do not usually complain for the purpose of making mischief. I do not believe the grievor's denials.

Quantum of discipline assessed by the Company for Incidents 1-5

As mentioned at the outset of this decision, the grievor has worked for the Company since 2003, and he has been a driver with the Company since 2006. He has over 10 years of service with the Company. Ten years of service is not insignificant.

With respect to the Union's position is that the discipline is properly null and void where the notices of interview did not include the date of the infractions, neither the grievor nor his Union made any objection to the meaningful notice of interview at the time of the disciplinary interview in any of the incidents. **CROA 2911** is directly on point, and the Union essentially agreed that that was the case at the hearing. By failing to put the Company on notice of its objection at the time of the disciplinary interview, the Union waived its right to do so.

In assessing whether the quantum of discipline imposed for the various infractions should be disturbed, I have carefully reviewed each incident in the context of the grievor's disciplinary record.

The grievor's record revealed that he had 20 demerits at the time of Incident 1. In fact, those 20 demerits were subsequently removed from his record. For my purposes, therefore, the grievor's disciplinary record stood at zero demerits when Incident 1 occurred.

Moreover, the grievor had been disciplined free for well over a year, the previous discipline recorded being in April 2011, when he failed to attend for a scheduled interview with the Company. This is a considerable period of time. During no other year, since 2006 has the grievor been discipline free.

With these circumstances in mind, I turn to each of the incidents recounted above.

With respect to Incident 1 above, I have reviewed **CROA 1554**, provided by the Company to support its position that the imposition of 20 demerits was appropriate. In contrast to the mitigating detailed factual circumstances in that case, there are no such mitigating circumstances here. However, this is the first time the grievor has been disciplined for this infraction and he did in fact call his supervisor on August 6, 2013, albeit well beyond the 2:30 p.m. deadline. In all the circumstances, I exercise my discretion to reduce the quantum of demerits imposed to 10 demerits.

With respect to Incident 2, it would appear that the Company took into consideration the fact that the runs were not the grievor's regular route (albeit he was somewhat familiar with them), together with the circumstances of his removal and return to the Bayshore route. My view is that because the mitigating circumstances have already been factored into the Company's assessment of 10 demerits I am disinclined to disturb the penalty imposed by the Company.

With respect to Incident 3, the grievor's deliberate misrepresentation warranted a significant disciplinary sanction and I am therefore not inclined to disturb the Company's assessment of 20 demerits for this misconduct.

Despite being the grievor's rationale for his misconduct with respect to Incident 3, his failure to call in by 2:30 p.m. on October 28, 2013 was an obligation, which was quite separate from the misconduct associated with Incident 3. The assessment of a total 45 demerits the grievor's conduct on October 28, 2013, however, strikes me as excessive having regard to the totality of the circumstances. I therefore exercise my discretion to reduce the quantum of demerits imposed to 10 demerits.

Finally, with respect to the customer complaint, since I have determined that the grievor displayed highly inappropriate conduct towards the client – one which the grievor must understand is completely at odds with the expectation of a driver whose interactions with clients are an integral part of his regular duties – a significant disciplinary response was warranted. Moreover, the grievor's supervisor had spoken to him previously about its concern about his "lack of professionalism" in dealing with customers.

Considering the manner in which I have exercised my discretion to substitute certain of the penalties imposed by the Company, the grievor's record now stands at 50 demerits. I would have to reduce the Company's imposition of 40 demerits to less than 10 for the grievor to avoid dismissal for the accumulation of 60 demerits.

On the entirety of the record before me, it is appropriate that the 40 demerits imposed be substituted with a suspension.

The grievor is to be reinstated into his position with the Company, albeit without compensation and without loss of seniority. His record is to be amended to reflect the substitutions to the Companies penalties as set out above. His disciplinary record will stand at 50 demerits.

October 30, 2014

CHRISTINE SCHMIDT
ARBITRATOR