CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1398

Heard at Montreal, Thursday, July 11, 1985

Concerning

CANPAR

and

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES

EX PARTE

DISPUTE:

The assessing of twenty demerits to employee A. Goffoy, CAN PAR, Montreal, Quebec.

BROTHERHOOD'S STATEMENT OF ISSUE:

February 22, 1983, employee A. Goffoy, telephoned his place of employment advising them he would not report to work this day (February 22, 1983), due to illness.

Employee A. Goffoy was assessed twenty demerits by the Company for his alleged involvement in a concerted book off of February 22, 1983.

The Brotherhood grieved the discipline maintaining the employee complied with the Agreement and the Company Rules as set out in both manuals, requesting the removal of the demerits from his record.

The Company declined the Brotherhood's request.

FOR THE BROTHERHOOD:

(SGD.) J. J. BOYCE
GENERAL CHAIRMAN, SYSTEM BOARD OF ADJUSTMENT NO. 517

There appeared on behalf of the Company:

N. W. Fosbery	– Director Labour Relations, Toronto

And on behalf of the Brotherhood:

J. J. Boyce	– General Chairman, Toronto
J. Crabb	– General Secretary-Treasurer, Toronto
G. Moore	– Vice-General Chairman, Moose Jaw
M. Gauthier	– Vice-General Chairman, Montreal
D. Wray	– Counsel, Toronto

PRELIMINARY AWARD OF THE ARBITRATOR

The arbitrability issue raised with respect to both grievances, **CROA Cases #1397** and **#1398**, will be determined on the same facts and I shall deal with them in the one decision.

Step 4 of the grievance procedure provides as follows:

> **Step 4** If the grievance is not settled at Step 3, it may then be referred by either party to the Canadian Railway Office of Arbitration for final and binding settlement without stoppage of work in accordance with the rules and procedures of that office. The party requesting arbitration must notify the other party in writing within 42 calendar days following receipt of the decision in Step 3, or the due date of such decision if not received.

Clause 7 of the CROA Memorandum of Agreement provides:

> **7** ... Failing final disposition under the said procedure a request for arbitration may be made but only in the manner and within the period provided for that purpose in the applicable collective agreement in effect from time to time or, if no such period is fixed in the applicable collective agreement in respect to disputes of the nature set forth in Section (A) of Clause 4, within the period of 60 days from the date decision was rendered in the last step of the Grievance Procedure.

And, finally, Clause 4 of the CROA Memorandum of Agreement provides in part as follows:

> **4** ... but such jurisdiction shall be conditioned always upon the submission of the dispute to the Office of Arbitration in strict accordance with the terms of this Agreement.

The company argued that the two grievances were submitted to CROA in excess of the mandatory time limit of sixty days required by Clause 7 of the CROA Memorandum of Agreement and, therefore, should be declined for want of arbitrability. There is no dispute on the basis which the company has made its challenge. Rather, this case must be disposed of on the validity of the legal arguments advanced by the trade union's counsel with respect to the interpretation and the application of the relevant provisions of the collective agreement and the CROA Memorandum of Agreement to those facts.

Firstly, Counsel argued that the collective agreement provides for only one time limit for the referral of a grievance to CROA. In having regard to Step 4 of the grievance procedure it is argued that so long as the trade union advises the company in writing of its intention to refer a grievance to CROA "within 42 calendar days following the receipt of the decision at Step 3" it has complied with the requirement for the submission of a timely grievance. And, in this case the evidence indicated that the company was advised within the 42 calendar day time limit of the trade union's intentions.

Accordingly, if the trade union's position is sound then the sixty day time limit contained in Clause 7 of the CROA Memorandum has no relevance to the presentation of a timely grievance to arbitration. The only relevance of the phrase contained in Step 4 to the effect that a referral to CROA must be made "in accordance with the rules and procedures of that office" pertains to other procedural requirements contained in the CROA Memorandum of Agreement that still must be followed. The time limits for a reference is limited to the 42 calendar day period required for the purpose of advising the company of the trade union's intentions.

I find no merit in Counsel's argument. As indicated at the hearing distinct purposes are served by the two time limits contained in Step 4 of the grievance procedure. The first requirement is that, in the absence of a provision to the contrary contained in the collective agreement a sixty day time period is mandatorily imposed for the reference to CROA of a grievance that has not been settled at the previous step of the grievance procedure. Nothing further need be said with respect to that requirement. The 42 calendar day time limit is designed to advise the employee of the trade union's intention to submit an unsettled grievance to CROA so that it may, amongst other things, prepare a Joint Statement of Issue prior to the expiry of the sixty day time limit. Should Counsel's interpretation prevail, then after the employer is advised of the trade union's intention within 42 days then absolutely no time limit results for the purpose of an actual referral of the grievance to CROA. Or, more precisely years may elapse before the referral is made and this office would be duty bound to hear it. I have no misgiving in rejecting any argument that would lead to such a result.

Counsel's second submission is more compelling. The evidence appeared to demonstrate that, notwithstanding the mandatory language of the collective agreement, both parties treated those time limits contained in the grievance procedure for their mutual purposes in a leisurely manner. For whatever practical purposes that were served the trade union did not require the employer to respond to grievances within the prescribed time limits; and, with rare exception, the employer did not require a zealous adherence to the time limits for the processing of grievances at

each step of the grievance procedure and, particularly, with respect to referrals to CROA. Indeed, most times the trade union deferred referring grievances to CROA until the parties settled the Joint Statement of Issue. At that time as the CROA records might confirm, grievances were referred to arbitration that were technically well in excess of the mandatory time limits. This *modus vivendi* represented the procedure the parties adopted for their mutual benefit with respect to their treatment of grievances. Indeed, given the demands made upon both company and trade union representatives in servicing their principals a tacit understanding developed that time limit objections would not be raised.

Most recently, this understanding has been undermined by the company. In a letter dated January 25, 1985 to Mr. J. J. Boyce, General Chairman, Mr. Fosbery, Director Labour Relations, makes it clear that in dismissal cases the company intends to rely strictly on the mandatory time limits contained in Clause 7 of the CROA Memorandum of Agreement with respect to the referral of those grievances to arbitration. Incidentally, in the light of the recent objections made to the arbitrability of grievances referred by the trade union it appears that Mr. Fosbery intends to apply the same standard to all cases. In any event, it is clear that the company has been prejudiced in the past by the lax attitude of both parties their adherence to the mandatory time limits of the collective agreement and has placed the trade union on notice of its changed approach.

In this case, of course, the trade union's Counsel argued that the notice came too late for purposes of these grievances. It is argued that up until Mr. Fosbery's letter the company should be "estopped" from relying on the strict language of the collective agreement with respect to the 60 day time limit. Indeed, Mr. Fosbery's letter serves as reference of as confirmation of a practice that had hitherto preceded these grievances to CROA and I should thereby determine them, despite the mandatory language to the contrary, to be timely.

Mr. Fosbery did not deny the existence of the parties' practice with respect to their adherence to the mandatory time limits.

In this light I am of the view that based on that practice the company should be restrained from relying on the strict language of the collective agreement. Effective the date of Mr. Fosbery's letter I am satisfied that the practice of waiving time limits was sufficiently widespread that it lulled the trade union into the notion that such time limits would not be imposed. Or, more precisely, it would be unfair and inequitable, to allow the employer to rely on them in this case to defeat the arbitrability of these particular grievances.

Because this case represents a "classic" example where the doctrine of promissory estoppel should apply, I have concluded that the grievances are arbitrable.

For purposes of clarity, I wish to emphasize that for future cases the trade union now has been placed on notice of the company' approach to the mandatory time limits with respect to the processing of all grievances. Therefore, there is no guarantee that a like estoppel argument will find success in like circumstances in the future.

These disputes shall be scheduled for hearing at a later date.

(signed) DAVID H. KATES
ARBITRATOR

On Thursday, May 15th, 1986, there appeared on behalf of the Company:

D. Bennett	– Human Resources Officer, Toronto
B. D. Neill	– Director Human Resources, CP Trucks, Toronto
N. W. Fosbery	– Director Labour Relations, CPE&T, Toronto
D. R. Smith	– Witness (retired)

And on behalf of the Brotherhood:

M. Gauthier	– Vice-General Chairman, Montreal
J. J. Boyce	– General Chairman, Toronto
M. Flynn	– Vice-General Chairman, Vancouver

AWARD OF THE ARBITRATOR

The parties agreed that the grievance with respect to Mr. A. Goffoy (**Case #1398**) should be heard together with the grievance pertaining to the assessment of discipline with respect to 28 employees who allegedly engaged in an unlawful work stoppage on February 22, 1983 (**Case #1397**). It is common ground that each of the driver

representatives were assessed twenty demerit marks for his alleged misconduct. Because Mr. Goffoy accumulated more than 60 demerit marks for that incident he was discharged.

The uncontradicted evidence established that on February 22, 1983 approximately 65% of the employer's work force booked off work claiming sickness as the excuse. No supervisory or clerical staff were absent for that reason. The company's normal absentee record for reasons of sickness is 4%.

The "sick out" occurred at a time when the trade union and the company were engaged in protracted negotiations for a renewed collective agreement. Moreover, the incident occurred shortly after a conflict between a Manager and a Driver Representative resulting in the latter's "temporary" suspension.

Save for those employees who could provide medical support for their alleged sickness the company concluded that the coincidental booking off work of its driver representatives constituted an unlawful work stoppage.

On the basis of the evidence that was adduced I am satisfied that the company established a *prima facie* case for the conclusion that those employees who could not provide evidence of sickness formed a common understanding or acted in concert with a view of depriving the employer of their services.

The onus then shifted to the employees to establish that the excuse that ostensibly warranted their absences was *bona fide*. The company extended these employees that opportunity immediately after the incident and of course, such opportunity was also afforded the trade union for that purpose during the course of these proceedings. And, because the onus of proof that had shifted to the employees through their trade union was not met the *prima facie* inference concluded by the company that the employees had engaged in the impugned work stoppage must prevail. In other words, I am satisfied that the grievors engaged in the misconduct as alleged and therefore discipline was warranted.

Moreover, given the seriousness of such misconduct I am not disposed, in the absence of proof of a mitigating circumstance, such as provocation, to interfere with the 20 demerit mark penalty that was assessed.

In Mr. Goffoy's particular case he was assessed the same twenty demerit mark penalty and because of his record was discharged for the accumulation of more than sixty demerit marks. There was no evidence adduced, or indeed any allegation made, that Mr. Goffoy led or provoked or incited the work stoppage. His wrongdoing, along with his colleagues, was a part of the "herd" instinct that is peculiar to misconduct of this type. In such circumstances it requires a person with a strong personality to resist the compulsive force of his colleagues to engage in such obviously unacceptable conduct.

For that reason I am prepared to extend Mr. Goffoy the benefit of reinstatement because of the unusual circumstance that culminated in his termination. He is to be reinstated without compensation for the period between his termination and the receipt of this decision. That period is to be treated as suspension without pay.

Except with respect to my direction pertaining to Mr. Goffoy the grievances are denied. I shall remain seized with respect to the implementation to my decision

(signed) DAVID H. KATES
ARBITRATOR