

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1255

Heard at Montreal, Wednesday, June 13, 1984

Concerning

CANADIAN PACIFIC LIMITED

and

UNITED TRANSPORTATION UNION

DISPUTE:

Dismissal of Trainman R. J. Couture account being unavailable for duty as a result of incarceration following conviction for a criminal offence.

JOINT STATEMENT OF ISSUE:

Trainman R. J. Couture was dismissed from service April 29, 1983 for not being available for duty as a result of incarceration. The Union appealed the dismissal of Trainman Couture requesting that he be reinstated in Company service with full seniority and compensation on the grounds that the Company had improperly calculated Mr. Couture's leave of absence; that the investigation was not fair and impartial and was conducted improperly without sufficient notice; and that the discipline awarded was too severe in the circumstances.

It is the Company's position that Mr. Couture was not available for duty and that the dismissal was appropriate.

FOR THE UNION:

(SGD.) B. MARCOLINI
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) G. A. SWANSON
GENERAL MANAGER, OPERATION AND MAINTENANCE

There appeared on behalf of the Company:

P. A. Pender – Supervisor, Labour Relations, Toronto
R. J. Pelland – Labour Relations Officer, Montreal
B. P. Scott – Labour Relations Officer, Montreal

And on behalf of the Union:

B. Marcolini – General Chairman, Toronto
M. Hone – Research Director, Ottawa
A. Verner – Vice-General Chairman, Montreal
R. Couture – Grievor

AWARD OF THE ARBITRATOR

The grievor, Mr. R. J. Couture, was dismissed from service on April 29, 1983, for not being available for duty as a result of his incarceration after his conviction of manslaughter. The Trade Union has challenged the propriety of the Employer's recourse to the discharge penalty.

Several issues were raised in the parties' briefs with respect to the disposition of this case. For present purposes I wish to focus on the propriety of the Employer's procedures for the investigation of the grievor's infraction. In this regard article 33 reads, in part, as follows:

INVESTIGATIONS - DISCIPLINE

- (a) When an investigation is to be held each employee whose presence is desired will be notified as to the time, place and subject matter.
- (b) An employee, if he so desires, may have an accredited representative of the Union assist him, the employee will sign his statement and be given a carbon copy of it.
- (c) If the employee is involved with responsibility in a disciplinary offence, he shall be accorded the right on request for himself or an accredited representative of the Union, or both, to be present during the examination of any witness whose evidence may have a bearing on the employee's responsibility, to offer rebuttal thereto and to receive a copy of the statement of such witness.
- (d) An employee will not be disciplined or dismissed until after investigation has been held and until the employee's responsibility is established by assessing the evidence produced and no employee will be required to assume this responsibility in his statement or statements. The employee shall be advised in writing of the decision within 20 days of the date the investigation is completed, i.e., the date the last statement in connection with the investigation is taken except as otherwise mutually agreed.

At all material times when the investigation of the grievor's infraction was scheduled the Company knew the grievor had been incarcerated at the Warkworth Institution, Cambellford, Ontario. If the grievor wanted to exercise his entitlement to appear at the investigation scheduled for April 14, 1983 he would require the permission of the Institution for his release. The evidence appeared to indicate that approximately three weeks would be required to arrange such leave.

By registered letter dated April 6, 1983, the Company notified Mr. A. Timiuk, the grievor's Power of Attorney and Mr. Couture of the scheduled investigation for April 14, 1983. The evidence showed that Mr. Timiuk received notification of the investigation on April 7. He neither communicated with the Company nor consulted with the grievor with respect to the grievor's intentions to attend. Mr. Couture did not receive notification of the scheduled investigation until April 13. Apparently the Company's letter was misdirected to another inmate with the same name. Nonetheless, as soon as the grievor learned of the scheduled investigation he contacted his wife. The grievor's wife immediately retained a solicitor, Mr. E. J. McGrath to represent the grievor's interests at the investigation.

The Company's brief states at page 16:

As of the commencement of Mr. Couture's investigation on April 14, 1983, no prior objection had been received from Mr. Couture, Mrs. Couture, or Mr. Timiuk concerning the time or date of the investigation.

The transcript of the grievor's investigation indicates the following:

- Q. Is it correct that you, Mr. E. J. McGrath, are acting on behalf of and answering questions for Mr. R. J. Couture, CP Rail employee previously under investigation?
- A. Yes, under protest. I think that it would be better to have Mr. Couture here and if given a reasonable length of time he could apply to be before you. I have knowledge that he is aware of this meeting.
- Q. What is a reasonable length of time and do you positively know that Mr. Couture could be present here at the expiration of that time?

A. A reasonable length of time would be three weeks and Mr. Couture has such a good performance record at Warkworth Correctional Facility that I suspect there would be a strong likelihood of Mr. Couture's ability to come to the investigation. The final decision rests with the supervisors at that institution."

It is clear and indisputable that as soon as the grievor became aware of his investigation he acted with dispatch in his efforts to attend the investigation. Moreover, the Employer did nothing to facilitate the grievor's entitlement to appear at the investigation. Indeed, the notification of the scheduled investigation presupposed that the grievor might not attend in that a representative is suggested might appear on his behalf. It became patently clear, however, at the commencement of the investigation that the grievor's lawyer required his attendance in order to take instruction from him. Accordingly, an adjournment was requested of Mr. Pelland, the presiding officer, to allow the grievor to appear once his release could be arranged.

By Memorandum dated May 2, 1983, 1500 Hs., Mr. R. J. Pelland, Assistant Superintendent, who presided over the investigation writes:

I talked to Bob Burnett today, Warkworth Institute, Visit and Correspondence Department (705-924-2210). He told me that Couture received and signed for the mail advising him of the investigation on April 13th, 1983. The letter was sent on April 7th.

He noted however that in the event of a need for a telephone call as a result of this letter, Mr. Couture would be granted this request. As of April 14th, the day of the investigation, no communication had been received from Mr. Couture.

I simply cannot appreciate how the Company can say that "as of April 14, 1983, the day of the investigation no communication had been received from Mr. Couture". Surely, his lawyer advised Mr. Pelland that the grievor desired to attend the investigation and an adjournment for that purpose was requested. Moreover, Mr. McGrath, upon Mr. Pelland's denial of the adjournment, participated in the investigation "under protest". That is to say, he represented the grievor's interests at the investigation but "without prejudice" to a later objection with respect to the Company's refusal to allow the grievor's attendance in contravention of article 33 of the collective agreement.

The evidence clearly and undisputedly demonstrated that the grievor's entitlements under article 33 to be present during the course of his investigation of the infraction was improperly denied. The Company had no right to presume that a representative would suffice to meet the requirements of article 33. That was a prerogative that resided with the grievor. If Mr. Couture was satisfied that Mr. McGrath's presence would represent his interests sufficiently in his absence then that would have ended the issue. But, that is not what happened.

When the grievor ultimately learned of the investigation he contacted his wife who retained counsel. Counsel then requested an adjournment to arrange for the grievor's attendance. The Company has simply turned "a blind eye" to the grievor's clear desire to appear at his own investigation.

Indeed, at no time did the Company take into account the grievor's special circumstance when it extended him and his representative notice of the investigation. Surely, a reasonable opportunity should have been extended the grievor, in its scheduling of the investigation, to allow him to arrange for his release from the Institution for that purpose. The Company simply refused to address itself to the grievor's predicament in scheduling his investigation. In fact, it appears that no weight at all was attached to the importance of the investigation and the requirement for the grievor's presence in resolving to dispense with Mr. Couture's services. For that reason, I am constrained to the conclusion that article 33 has been violated.

Accordingly, I am satisfied that the grievor's discharge should be nullified and his reinstatement should be directed as an employee on a leave of absence without pay for the period of his incarceration. I also direct compensation be given at the appropriate rate of pay for the period since his release from incarceration on November 19, 1983. This directive is without prejudice to the Company's right to direct an appropriate investigation should it be deemed appropriate, (see **CROA 550**).

In the interim this Board shall remain seized of all matters in dispute.

(signed) DAVID H. KATES
ARBITRATOR