CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1440

Heard at Montreal, Tuesday, December 10, 1985

Concerning

CANADIAN PACIFIC LIMITED

and

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

DISPUTE:

Dismissal of Mr. Come Pratte on December 10, 1984.

JOINT STATEMENT OF ISSUE:

On December 10, 1984 the Company dismissed Mr. C. Pratte as a result of being found in possession of merchandise which was part of a shipment at Outremont Freight Terminal on November 13, 1984.

The Brotherhood maintains that Mr. C. Pratte was unjustly dismissed. It is obvious that the Company was aware of the nature of the incident, but maintained the relationship between employee and Employer during the following days. It is only after a threat of "Walk out" for November 16, 1984 that the management of Outremont Freight Terminal decided to suspend Mr. C. Pratte on November 16, 1984, he was then ordered to a disciplinary investigation which resulted in his dismissal.

The Company maintains that based upon the results produced in the investigation procedure, Mr. Pratte was properly dismissed from Company service for attempted theft.

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD.) P. VERMETTE	(SGD.) G. A. SWANSON
FOR: GENERAL CHAIRMAN	GENERAL MANAGER, OPERATION AND MAINTENANCE

There appeared on behalf of the Company:

P. A. Pender	– Supervisor, Labour Relations, Toronto
J. H. Blotsky	– Assistant Supervisor, Labour Relations, Toronto
P. E. Timpson	– Labour Relations Officer, Montreal
K. H. James	– Superintendent, Investigation Dept. Montreal
C. D. Kavanagh	– Superintendent, Outremont, Freight Terminal, Montreal
M. Doré	– Investigator (Retired), Investigation Dept. Montreal
R. Lefebvre	– Constable, Investigation Dept., Montreal

And on behalf of the Brotherhood:

P. Vermette	– Vice-General Chairman, , Montreal
A. Bois	– Local Chairman, , Montreal
C. Pratte	– Grievor

AWARD OF THE ARBITRATOR

Mr. C. Pratte was employed as a "Stower" at the Company's Outremont Freight Terminal.

During the course of his shift on November 13, 1984, two CP Police Constables, R. Lefebvre and L'Ecuyer, observed the grievor place a plastic bag containing three pairs of jeans behind the front seat of an unlocked automobile in the employees' parking lot. The automobile was owned by a fellow employee with whom the grievor usually obtained a ride to and from work.

It is important to note that when the grievor was first confronted by Constables Lefebvre and L'Ecuyer with respect to the plastic bag and its contents the grievor denied any knowledge of the incident. It was only after he was informed that he was observed placing the plastic bag, as aforesaid, in the vehicle that Mr. Pratte admitted his having done so.

Constable Lefebvre gave *viva voce* evidence of his observations and the grievor's reactions thereto. Mr. Pratte did not provide like oral testimony in order to contradict the statements made by the Constable.

The issue in this case is whether the grievor intended to steal the jeans from the Company's premises. It seems that the arbitral jurisprudence requires an employee, when found with goods in his possession without authorization he is required to provide his Employer with a reasonable explanation (see **CROA 1436**).

Again, it is important to note that the Trade Union did not challenge the Company's case by claiming the goods were not Company property or the property of its customers. In this regard the grievor, if not Company property, did not produce a receipt or other proof of purchase to show that the jeans were properly obtained.

Rather, the grievor's explanation is that he was continuing a role that he had played in the past. That is to say, he was assuming the posture of an "informant" of an alleged attempted theft by another employee, namely, M. Dufresne, who was the actual culprit involved in the theft. In undertaking this role, albeit voluntarily and without the Company's request, he was providing a service that the Company had taken advantage of in the past in dismissing employees for their alleged theft.

In this case, it was argued that the grievor's misfortune was to have been apprehended by the two Constables while he was about to advise them of Mr. Dufresne's alleged wrongdoing.

The evidence indicated that the Company conducted the necessary investigation and was satisfied that Mr. Dufresne had not participated in any act of theft.

The transparency of the grievor's explanation was exhibited by his omission to declare his participation in his alleged ruse upon being confronted by Constables L'Ecuyer and Lefebvre. Quite clearly, that was a most opportune moment to disclose his efforts on the Company's behalf to entrap the real thief. Instead, as the uncontradicted evidence disclosed, the grievor lied. And, the only explanation that I can attribute for his having lied is that Mr. Pratte intended to misappropriate the jeans which were not his own for purposes that are not necessarily germane to this case.

The Trade Union argued, in the alternative, that the Company would have been disposed to condone the grievor's act of theft and only had recourse to discharge upon being confronted with the tactic of his fellow employees who threatened "a walk out" if Mr. Pratte was not terminated. Presumably, this threatened "walk out" was made because of the employees' concern that the Company would not act consistently in its dealings with Mr. Pratte as it had with the employees who were victimized in the past by the grievor's revelations. In short, the charge is made that the Company, but for the threatened walk out, was about to forgive the grievor for his misconduct in payment of his previous contributions.

I am satisfied that there is no merit to this particular allegation. Indeed, I find it to be silly. Surely the Company's enterprise is based on the integrity of the service it provides. It cannot afford to condone theft because such forbearance, if true, would prejudice the very business service it provides its customers. Although I am satisfied some delay did take place before the Company resorted to disciplinary action during which time the grievor continued to work, I have not been persuaded that the employees' threat of a walk out at all contributed to the Company's ultimate finding of employee theft and the consequent penalty.

I also note for the record that the Trade Union raised several procedural irregularities committed by the Company prior to the grievor's discharge involving alleged violations of articles 27.1, 27.3 and 27.4 of the collective

agreement. In this regard the Trade Union conceded that these irregularities were not raised in the Joint Statement of Issue and thereby the allegations with respect thereto had not complied with article 12 of the Rules and Regulations establishing CROA. In **CROA 1430**, I dismissed a like alleged procedural irregularity on the Company's part in effecting a discharge for theft in the following manner:

> The Trade Union alleges that because the particulars of theft for which the grievor was ultimately discharged did not pertain to the alleged misappropriation of gasoline in January 1985, but to an infraction that had occurred some seven months before (which was only brought to the grievor's attention at the disciplinary investigation), there existed a fundamental defect in the notice. And that defect constituted a violation of article 18.1 and article 18.2 of the collective agreement.
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> Accordingly, it was argued that the grievor's discharge should be vitiated on that basis.
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> The Company referred me to the Joint Statement of Issue which is set out in the preface to this decision. It is clear no mention of the allegation with respect to any defect in the notice of disciplinary investigation or the conduct of the investigation is expressed in the Joint Statement. Indeed, there is no reference to any allegation that the Company has violated articles 18.1 and 18.2 of the collective agreement.
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> Article 12 of the Rules and Regulations establishing CROA dated the 7th day of January 1965 (as amended) provides:
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> > 12. The decision of the Arbitrator shall be limited to the disputes or questions contained in the joint statement submitted to him by the parties or in the separate statement or statements as the case may be, or, where the applicable collective agreement itself defines and restricts the issues, conditions or questions which may be arbitrated, to such issues, conditions or questions ...
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> On the basis of article 12, the Company objected to the Trade Union's attempt to advance an argument that was not included in the Joint Statement. Because the Company had not been given advance notice of these allegations as contemplated by article 12, the Company was at a decided prejudice with respect to advancing a reply to the Trade Union's submissions. In short, the Company was deprived of the opportunity to prepare a defence in its brief to the Trade Union's submissions.
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> This Arbitrator is duty bound to comply with the mandatory prerequisites of article 12 of the CROA rules as recited by the Company. Because the issues included in the Joint Statement are the only matters I have jurisdiction to deal with at arbitration, I have no choice but to rule that the Trade Union must be restrained from advancing its allegations with respect to the Company's omission to comply with article 18.1 and article 18.2 of the collective agreement. Accordingly, those submissions must be set aside.

For all the foregoing reasons because I have been satisfied of the grievor's act of theft his grievance must be denied.

(signed) DAVID H. KATES
ARBITRATOR