

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1445

Heard at Montreal, Wednesday, December 11, 1985

Concerning

CANADIAN PACIFIC LIMITED

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Mr. R.L. Pongracz, Track Maintenance Foreman, was dismissed for giving away Company material and delivering it by Company vehicle while on duty without authorization on May 7, 1984.

JOINT STATEMENT OF ISSUE:

The Union contends that: (1.) The discipline is too severe and that Mr. Pongracz be reinstated to his former position in accordance with Section 18.4, Wage Agreement 41. (2.) Mr. Pongracz have all his seniority rights restored, paid for all benefits and wages from date he was held out of service until reinstated.

The Company denies the Union's contention and declines payment.

FOR THE BROTHERHOOD:

(SGD.) H. J. THIESSEN
SYSTEM FEDERATION GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) J. D. CHAMPION
FOR: GENERAL MANAGER, OPERATION & MAINTENANCE

There appeared on behalf of the Company:

J. D. Champion – Supervisor, Labour Relations, Winnipeg
R. E. Noseworthy – Assistant Supervisor, Labour Relations, Winnipeg
R. A. Colquhoun – Labour Relations Officer, Montreal

And on behalf of the Brotherhood:

H. J. Thiessen – System Federation General Chairman, Ottawa
L. M. DiMassimo – Federation General Chairman, Montreal
R. Y. Gaudreau – Vice President, BMW, Ottawa

AWARD OF THE ARBITRATOR

Rule 179 reads as follows:

Foremen are responsible for all tools, material and equipment in their charge and must see that they are properly and economically used and cared for. They must report loss or theft and must not give away any tools, material or equipment, or lend them without authority. (emphasis added)

There is no dispute that the grievor violated Rule 179 when on May 7, 1984, he gave his brother-in-law, Mr. Leonard Mattson, several Company fence posts allegedly for past favours performed on the grievor's behalf during the course of the latter's employment. It is common ground that Mr. Mattson is a farmer in the geographic region where Mr. Pongracz works and thereby would have had practical use for the fence posts.

The grievor has not denied giving Mr. Mattson the fence posts without first securing the necessary authorization from his superiors. Nor has the grievor claimed to have ever been authorized to give Company materials away in return for services provided him by persons during the course of employment.

In this particular case the grievor indicated that he was merely compensating his brother-in-law for his assistance in providing towing services and for the use of his farm as a right of way during the previous winter.

It is clear that the Company has encountered (for good reason) serious suspicions as to the reliability and truth of the grievor's explanation. As a result, the Company, without necessarily alleging theft, has treated the grievor's admitted infraction of Rule 179 as tantamount to theft. And, accordingly, the Company has had recourse to the discharge penalty for the grievor's serious act of misconduct.

It should be made perfectly clear that the issue before me is not whether "payment in kind" (i.e., bartering) is an acceptable practice for compensating third parties for services provided Company employees when they are found in difficult circumstances. Surely, for the practice to be considered "acceptable" it should have the approval of a Company official who is authorized to endorse that practice as a means to compensation. The grievor was duty bound, as he readily admitted, to have secured such authorization particularly in the circumstances where a family relation was to be, the beneficiary of the payment.

Yet, just as it is impossible to be "a little bit pregnant" it is also difficult for the Company to allege the grievor is "a little bit of a thief" without charging that he is a thief.

It is clear to everyone concerned, including the grievor's Trade Union representatives, that the grievor committed a serious infraction by virtue of his violation of Rule 179. That does not, as the Trade Union urged, necessarily mean the grievor is a thief. In that regard I have no misgiving in saying I share the very same suspicion as the Company with respect to the grievor's real intentions.

Nonetheless, I cannot in good conscience support the discharge penalty for a "suspicion" that the grievor has engaged in an act of theft. That remedy should only be applied, unless clearly contained as a provision in Rule 179, to actual and proven acts of theft. What I am permitted to do, however, is to fashion an appropriate remedy that reflect the serious nature of the grievor's admitted infraction.

Accordingly, I am of the view that the grievor's discharge penalty should be removed and that a suspension be replaced for the period between October 23, 1984 when he was dismissed and the date of his reinstatement as provided herein. Moreover, the grievor's file is to show that another infraction of this nature will result in his termination. I shall remain seized for purposes of implementation.

(signed) DAVID H. KATES
ARBITRATOR