

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1688

Heard at Montreal, Wednesday, September 9, 1987

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Appeal against the discipline of "discharge" assessed to Mr. J.C. Flett, effective August 12, 1986.

BROTHERHOOD'S STATEMENT OF ISSUE:

Mr. J.C. Flett was discharged from the Company effective August 12, 1986, for his unprovoked physical attack on a Company Officer at approximately 1300 hours on July 23, 1986, at Mile 128.9, Sprague Subdivision, as per Form 780-B, dated August 12, 1986.

The Brotherhood contends that the discipline assessed Mr. Flett was too severe in light of Mr. Flett's long service and clean record with the Company, and due to the fact that Mr. Flett had been provoked by a Company Officer's use of foul and degrading language to him.

The Company disagrees with the Brotherhood's contention.

FOR THE BROTHERHOOD:

(SGD.) G. SCHNEIDER
SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

J. Glazer	– Counsel, Montreal
T. D. Ferens	– Manager Labour Relations, Montreal
M. Vaillancourt	– Engineering Coordinator, Montreal
A. Posyniak	– Program Supervisor, Winnipeg
R. V. Collins	– Program Supervisor, Thunder Bay
D. A. Watson	– Labour Relations Trainee, Montreal

And on behalf of the Brotherhood:

M. Gottheil	– Counsel, Assistant to the Vice-President, Ottawa
G. Schneider	– System Federation General Chairman, Winnipeg
R. F. Liberty	– Secretary/Treasurer, General Chairman, Winnipeg
J. C. Flett	– Grievor

AWARD OF THE ARBITRATOR

The evidence establishes that the grievor was employed as part of a gang performing repairs following a derailment on July 23, 1986. Following a particularly heavy task Mr. Flett and a number of other employees were taking a break, pursuant to their foreman's instructions. At that time the salvage operation was under the direction of Program Supervisor A. Posyniak, who was touring the site with Program Supervisor R.V. Collins, who was about to relieve him.

It was then approximately 1230 hours and Mr. Posyniak had been on site directing operations for close to 20 hours. It is common ground that when he saw Mr. Flett's crew sitting down he told them to go back to work. This they did, save that Mr. Flett remained seated, still smoking a cigarette. There is substantial conflict in the evidence as to what was said by Mr. Posyniak to Mr. Flett at that point. What is not in dispute is that Mr. Flett stood up and struck Mr. Posyniak on the left side of his face with a closed fist. The Supervisor was knocked down and Mr. Flett stood over him in an agitated posture shouting at him not to swear at him any more.

Mr. Posyniak denies having sworn at the grievor. Mr. Flett and four other employees maintain that the Supervisor did swear at him, using a number of four-letter words.

The Union accepts that the grievor's action was a serious offence. It maintains, however, that the grievor's prior service of 13 years, his disciplinary record which was clear at the time and the element of provocation on the part of his supervisor are all mitigating factors that would justify a penalty less severe than discharge. The critical issue, therefore, is whether the grievor's actions were provoked by Mr. Posyniak.

On a careful review of the evidence, the Arbitrator must conclude that they were. The evidence of Mr. Collins, the Supervisor who was also present, supports the conclusion that Mr. Posyniak is a rough-hewed individual who speaks in a loud tone of voice and directs employees in no uncertain terms. He also speaks in a fairly heavy accent. At the time in question he had been working 20 hours in a stressful circumstance and was plainly not pleased at Mr. Flett's apparent refusal to get back to work when told to do so. Supervisor Collins, whom the Arbitrator judges to be a fair witness, and who was standing immediately beside Mr. Posyniak at the time, testified that whatever Mr. Posyniak may have said, he could well understand that Mr. Flett honestly believed that his Supervisor had sworn at him. Bearing in mind that the event took but a few seconds, within the heat of the moment, the Arbitrator accepts that a misunderstanding of that kind was not improbable.

The Arbitrator does not believe that Mr. Posyniak attempted to mislead the hearing. On the whole, however, I am inclined to conclude that his manner and tone of voice in addressing Mr. Flett caused the employee to believe that he was being verbally abused and insulted. While that may not have been the Supervisor's intention, in a case such as this it is the state of mind of the employee that is of primary significance. If he believed, in good faith, that he was the object of an insult by his Supervisor, while that would not justify physical retaliation, it would qualify his act as something less than irrational and random violence in the face of the Employer's authority. In coming to this conclusion the Arbitrator relies heavily on the evidence of Supervisor Collins, who was the closest person present at the time of the altercation, and who expressed his own belief that Mr. Flett did in fact believe he had been verbally abused and sworn at. This is plainly confirmed by the grievor's own words after he struck his Supervisor. I am satisfied that provocation, insofar as it existed in the mind of Mr. Flett, is made out in the evidence.

It should be stressed, however, that the grievor's response remains a serious infraction which merits a substantial measure of discipline. In light of the fact that Mr. Flett's actions were provoked, and were highly uncharacteristic, with no similar occurrences in his 13 years prior service, and further taking into account that his disciplinary record was without blemish at the time, I am satisfied that discharge is not justified in the circumstances. For the foregoing reasons the grievor shall be reinstated into his employment, without compensation, and without loss of seniority. I remain seized of this matter in the event of any dispute between the parties respecting the implementation of this award.

(signed) MICHEL G. PICHER
ARBITRATOR