

# CANADIAN RAILWAY OFFICE OF ARBITRATION

## CASE NO. 1727

Heard at Montreal, Wednesday December 9, 1987

Concerning

### CANADIAN PACIFIC EXPRESS (EXPRESS AIRBORNE )

And

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

#### EX PARTE

#### **DISPUTE:**

The dismissal of employee F. Giovinazzo for alleged theft of \$100.00 from the bank deposit.

#### **BROTHERHOOD'S STATEMENT OF ISSUE:**

On December 22, 1986, employee F. Giovinazzo was assigned to make the bank deposit, which was prepared by another employee. When advised by the teller at the bank that the deposit was short, she immediately telephoned the Company to advise them. On December 23, 1986, an investigation was held, and from this investigation the Company dismissed employee Giovinazzo for theft of company funds.

The Brotherhood maintains the investigation held was not fair and impartial and the charges were not sustained. The Brotherhood requested employee F. Giovinazzo be reinstated with full seniority and benefits, and reimbursed with interest, lost wages for all time held out of service.

The Company declined the Brotherhood's request.

#### **COMPANY'S STATEMENT OF ISSUE:**

On December 22nd, 1986, employee F. Giovinazzo was assigned to make the bank deposit, which had been prepared by another employee. When advised by the teller at the bank that the deposit was short, Ms. Giovinazzo advised the Company by telephone.

Investigations into the missing funds were conducted on December 23rd, 1986 and, based on the evidence, the grievor was dismissed for theft of Company funds.

The Company maintains that the investigation held was fair and impartial and the dismissal appropriate. The Company, therefore, declined the Brotherhood's request.

**FOR THE BROTHERHOOD:**

**(SGD) J. J. BOYCE**

**GENERAL CHAIRMAN  
SYSTEM BOARD OF ADJUSTMENT 517**

**FOR THE COMPANY:**

**(SGD) B. D. NEILL**

**DIRECTOR, LABOUR RELATIONS**

There appeared on behalf of the Company:

- D. Wakely - Counsel, Toronto
- D. Bennett - Labour Relations Officer, Toronto
- F. Berlingieri - Witness, Toronto
- S. Petitti - Witness, Toronto
- O. Crawford - Witness, Toronto
- K. Burrough - Witness, Toronto

And on behalf of the Brotherhood:

- D. Wray - Counsel, Toronto
- J. Crabb - General Secretary/Treasurer, Toronto
- F. Giovinazzo - Grievor

**AWARD OF THE ARBITRATOR**

The Company alleges that the grievor stole one hundred dollars in cash from an envelope which formed part of a bank deposit which she was assigned to take to the bank at approximately 2:50 p.m. on December 22, 1986. While there is some dispute as to how many times the grievor may have handled bank deposits in the past, it is clear that she had done so on a number of occasions, principally during a period which ended some two to three months prior to the date of the incident in question. On that date the Company's bank deposit was prepared by Ms. Stephanie Petitti. It was the first time Ms. Petitti had handled the bank deposit, being assigned to do so in the absence of the person who normally discharged that responsibility

Ms. Petitti's evidence establishes that the deposit that day consisted of a large bundle of cheques, as well as a single envelope containing two cheques and one hundred and fifty-seven dollars and seventy-two cents in cash. Earlier in the day, after an adjustment in the contents in the envelope was made, a new deposit slip was given to her. Ms. Petitti stapled the envelope shut and kept it at her work station.

At or about 2:30 p.m. Ms. Olga Crawford, a clerk/ lead hand responsible for overseeing the bank deposit, approached Ms. Petitti. She inquired whether the two cheques inside the envelope had been stamped according to normal procedure. Ms. Petitti responded that they had not, and proceeded to open the envelope by removing the staples, depositing its contents on her desk. While she did that, and stamped the cheques, Ms. Crawford observed at least one twenty dollar bill on the top of the cash which had been in the envelope. Satisfied that the cheques had been properly stamped, Ms. Crawford returned to her work station in another room. Ms. Petitti's evidence is that she then placed the cash and the two cheques back into the envelope, closing it this time by the use of two paper clips. The envelope remained in her possession, being placed on the top of her desk, for the next fifteen to twenty minutes, at which point it was given to the grievor.

The evidence confirms that the cash envelope was in Ms. Petitti's sole custody, without interruption, until it was given to Ms. Giovinazzo. Her work station is immediately behind Ms. Petitti's. As she was putting her coat on to leave for the bank she noticed that the bundle of cheques, with the envelope on the top of it, all bound by an elastic, was extremely bulky. Pursuant to her request, Ms. Petitti placed the bundle inside a large plastic Express Airborne courier bag. The grievor then proceeded with the package to the bank, some two or three blocks away, by means of her car. There was clearly some haste as the bank closed at 3:00 p.m. and she left the office at or about ten minutes before that time.

When the bank teller opened the envelope she immediately noticed a discrepancy between the amount of cash that was in it and the cash listed on the deposit slip. The slip indicated that there were two \$10.00 bills and four \$20.00 bills. These, however, were missing. When she so informed the grievor Ms. Giovinazzo immediately telephoned her supervisor, Mr. Frank Berlingieri, who instructed her to return to the office with the deposit slip and the cash remaining in the envelope.

Mr. Berlingieri immediately obtained written statements from Ms. Petitti, Ms. Crawford and the grievor respecting their knowledge of what had transpired. Their statements essentially correspond with their evidence given at the hearing, as related above. The following day, December 23, 1986, Mr. Berlingieri conducted a Question and Answer investigation of both Ms. Petitti and the grievor. The Arbitrator is satisfied that either the grievor or Ms. Petitti must be responsible for the missing money. It is beyond dispute that between 2:30 p.m., when Ms. Crawford confirmed seeing at least one \$20.00 bill among the cash, and approximately 3:05 p.m. when the bank teller discovered that the money was missing, they had exclusive and uninterrupted custody of the envelope. It was in the possession of Ms. Petitti from 2:30 to 2:50 and of Ms. Giovinazzo from that time until shortly after 3 o'clock.

In this grievance the burden of proof is upon the Company to establish, on the balance of probabilities, that the grievor stole \$100.00 from the bank deposit envelope. Theft in that circumstance is a serious charge, the gravity of which should require clear and cogent evidence (*Bernstein and College of Surgeons and Physicians of Ontario (1977) 15 OR (2d) 447 (Ontario Div. Ct.)*; *Teamsters' Union, Local 938 and Strathdee Transport Ltd. (1967) 18 L.A.C. 264*; and *Indusmin Ltd. and United Cement, Lime and Gypsum Workers International Union, Local 488, (1978) 20 L.A.C. (2d) 87*).

On the evidence in the instant case the money must have been taken either by the grievor or by Ms. Petitti. Absent evidence that they acted in concert, of which there is no suggestion here, the Company could not discipline them both on the basis that one of them must have done it. It must prove, on the balance of probabilities, that one of them took the money and, implicitly, and that the other did not.

In assessing discipline against the grievor, the Company relied on the fact that when Ms. Crawford saw the money in Ms. Petitti's possession at 2:30 p.m. it contained at least one \$20.00 bill. It also relied on the statements of both the grievor and Ms. Petitti taken during the course of the investigation.

The Arbitrator has considerably more difficulty in preferring the evidence of Ms. Petitti to that of Ms. Giovinazzo than did by the Company's investigating officers. During the course of her interrogation Ms. Petitti offered the following answer when asked if there was anything she wished to add to her statement:

I know only that I'm innocent and when I counted the money it was all there and from my hands it went to Fab's. Why would I want to sit in front of everyone and take money. Also, I lent her \$400.00 on Friday (Dec. 19/86) so she would be in need of money. I don't need to steal it. ...

The foregoing statement would suggest that the grievor was in such need of money that she had come to Ms. Petitti for a loan on the last working day prior to the theft. That, however, is not true. During the course of the arbitration hearing it emerged that in fact some weeks prior Ms. Petitti was in need of money to purchase a VCR as a gift for her parents. The grievor then agreed to let the purchase, costing \$510.00, be made by the use of her credit card, on the understanding that Ms. Petitti would repay her later. What Ms. Giovinazzo did on Friday December 19, 1986 was to ask Ms. Petitti for some repayment on account of that arrangement, whereupon the latter paid her \$400.00. At the hearing, when confronted with this fact, Ms. Petitti insisted that the grievor did ask for a loan of \$400.00 on the understanding that she would later repay Ms. Petitti that amount, and Ms. Petitti would in turn, at some time in January of 1987, repay her in full the amount of \$510.00 so that she would have the necessary cash when the credit purchase came due. I find that convoluted arrangement curious, to say the least. It is plainly not sustained by the evidence of the grievor. She maintains that she simply asked for some payment of the money owing to her by Ms. Petitti, and would have no reason to be "borrowing" cash from someone who is in debt to her.

There are two further aspects of the evidence that cause concern. During the course of the questions put to her by her supervisor Ms. Petitti related that she was in possession of the envelope of cash for no more than five or ten minutes between the time that she dealt with Ms. Crawford and when she gave it to the grievor. The evidence of Ms. Crawford does not sustain that assertion. She confirms, as does the grievor, that Ms. Giovinazzo did not leave for the bank until 2:50 p.m. The envelope would, therefore, have been on Ms. Petitti's desk for something closer to twenty minutes.

Secondly, during that time it was not sealed, as it had been earlier in the day. The evidence establishes that after the deposit was corrected late in the morning Ms. Petitti had stapled the envelope shut and placed it in a drawer of her desk. After reopening it to stamp the two cheques as requested by Ms. Crawford, she did not seal the envelope again by the use of staples, but closed it instead with two paper clips. When asked why she did not staple the envelope shut a second time, she stated that she was in a hurry and it was quicker to use the paper clips. It is not

disputed, however, that she did have a stapler on her desk. The Arbitrator has some difficulty understanding how it would be more time consuming to use a stapler than two paper clips. In any event, the consequence is that the envelope remained susceptible to being reopened from the time that it was last seen by Ms. Crawford until it reached the bank teller, a substantial portion of which it was in the sole possession of Ms. Petitti, whose decision to use paper clips left it that way.

Counsel for the Company challenges the grievor's credibility on the basis that some six years ago, as a teenager, she was involved in the fraudulent use of a credit card, apparently taken by her friend from her friend's mother. She then pleaded guilty to a criminal charge of using a stolen credit card, in consequence of which she received a suspended sentence. While that evidence is admissible to impugn the grievor's credibility, it cannot, in accordance with the rules of evidence, be used to ground an inference that because she once committed a dishonest act the grievor must have stolen the money that went missing on December 22, 1986. Her prior conviction is but one piece of evidence, among others, to be considered in assessing the overall credibility of Ms. Giovinazzo.

Her prior record can be no more probative of her guilt than the prior uneventful deposits which she faithfully made can be probative of her innocence.

On a careful review of the evidence, I find the grievor's testimony to be credible. She relates that when the bank deposit was given to her she was not aware that it contained any cash whatever. It is clear that she had very little time between leaving the office at 2:50 p.m. and arriving at the bank, which she drove to in her car, within the next ten minutes. In comparison, I find the evidence of Ms. Petitti less credible. Ms. Petitti's self serving statement to her employer that she had lent money to the grievor on the previous Friday and that "she would be in need of money" was extremely misleading and prejudicial in the context in which it was made. In my view, for the reasons related above, there is no plausible way Ms. Petitti's account of that transaction can be understood, unless it is to deliberately cast suspicion upon Ms. Giovinazzo. I conclude, on the balance of probabilities, that Ms. Petitti's statement that she had loaned money to the grievor and that the grievor, and not she, was the person in need of financial assistance was a deliberate falsehood. In these circumstances Ms. Petitti's obvious willingness to plead her own innocence while incriminating the grievor by speculation is, at a minimum, disturbing, and attracts equal, if not greater, suspicion to her.

For the foregoing reasons the Arbitrator prefers the evidence of Ms. Giovinazzo to that of Ms. Petitti. I must conclude that the Company has not established, on the balance of probabilities, that the \$100.00 stolen on December 22, 1986 was taken by the grievor. The preponderance of the evidence in these proceedings is to the contrary. The grievance must therefore be allowed. The grievor shall be reinstated into her employment with compensation for all wages and benefits lost. I remain seized of this matter in the event of any dispute between the parties respecting the interpretation or implementation of this award.

**(sgd.) MICHEL G. PICHER**  
**ARBITRATOR**