

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1953

Heard at Montreal, Tuesday, 10 October 1989

Concerning

CANADIAN PACIFIC LIMITED

And

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

DISPUTE:

Appeal of forty-five (45) demerits assessed the record of Locomotive Engineer R.J. Dryden, Smiths Falls, Ontario, August 23, 1988.

JOINT STATEMENT OF ISSUE:

On August 11, 1988, all Company-provided lockers were opened at the St. Luc Resthouse facility in Montreal, Quebec.

When this operation took place a full can of Budweiser beer was found in locker No. 24. (Trainman's side - new section of Resthouse).

Following an investigation Locomotive Engineer Dryden was assessed forty-five (45) demerits "for possession of alcoholic beverages on Company property, as found in Company-provided locker assigned to your responsibility and control, St. Luc Resthouse, August 11, 1988."

The Brotherhood contends that the discipline assessed was unwarranted, and should be removed from Engineer Dryden's record, and that he should be compensated for lost wages as a result of being held out of service during the investigation.

The Company contends the discipline is appropriate and has declined the grievance.

FOR THE BROTHERHOOD:

(SGD) G. D. WYNNE
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD) E. S. CAVANAUGH
GENERAL MANAGER, IFS

There appeared on behalf of the Company:

G. McBurney – Supervisor, Labour Relations, Toronto
F. O. Peters – Labour Relations Officer, Montreal
H. B. Butterworth – Assistant Supervisor, Labour Relations, Toronto

And on behalf of the Brotherhood:

G. N. Wynne – General Chairman, Smiths Falls
B. Suffel – Local Chairman, Smiths Falls
R. J. Dryden – Grievor

AWARD OF THE ARBITRATOR

As this is a matter of discipline the burden of proof is upon the Company. It is common ground that the grievor, Locomotive Engineer Dryden, had two clothing lockers, in addition to a food locker, at the St. Luc Yard Rest House. For a substantial period, described by the grievor as "several years", the locker which he held on the trainmen's side of the rest house was not used as his primary locker. According to Mr. Dryden, the combination lock which was on it was in fact broken. Although it could be closed, it did not lock.

On August 11, 1988, in order to facilitate fumigation of the premises, all lockers at the St. Luc Rest House facility were opened by Company representatives, and their contents removed. During that operation a single unopened can of beer was found in the locker on the trainmen's side of the rest house assigned to Mr. Dryden. Based on that fact the Company assessed forty-five demerits against the grievor for the possession of alcoholic beverages on Company premises

Mr. Dryden denies having placed or kept the can of beer or any alcoholic beverage in his locker at any time. He states that there were a number of items in the locker, including the can of beer, a sweater and some underwear, which did not belong to him. Further, his Union stresses the undisputed fact that Mr. Dryden is an employee of good service, with a clear record at the time of the incident, who, over the years, has been particularly outspoken about problems of alcohol and drug abuse in the Company's workplace.

The evidence upon which the Company drew its conclusion is purely circumstantial. The general approach to such evidence is that where circumstantial evidence is the only evidence relied upon to establish culpability, it should be viewed as compelling only to the extent that it supports inferences of guilt, and cannot be viewed as supporting alternative inferences of innocence. Needless to say, each case must be determined on its own factual merits, in accordance with the standard of proof on the balance of probabilities.

In the instant case, the Arbitrator cannot find that the burden of proof is discharged by the Company. While it is true that the grievor may be said to have been in possession of the locker, to the extent that it had been assigned to him for a number of years, it does not follow that anything found within it must be said to have been within his possession, particularly if it can be demonstrated that he did not have exclusive control over access to it, or knowledge of its contents at any given time. The unchallenged evidence of Mr. Dryden is that the lock which was on the locker did not in fact secure it from entry by other persons. He had not himself used the locker for some years, other than as an occasional backup to his main locker on the locomotive engineers' side of the rest house facility. Items in the nature of clothing not belonging to him were found in the locker.

On the whole the Arbitrator is satisfied that the Company has not established a sufficient degree of exclusive use and custody of the locker in question on the part of Mr. Dryden from which inferences may reliably be drawn that the can of beer found within it was in fact placed there by him, with his knowledge, or that it could be said to have been in his possession. In this regard, to sustain discipline possession must clearly impart a degree of knowledge. I am not satisfied, on the balance of probabilities, that Mr. Dryden had knowledge of the can of beer found in the locker by the Company.

For the foregoing reasons the grievance must be allowed. The grievor shall be compensated for any time held out of service and the demerits assessed to his personal file shall be expunged.

October 12, 1989

(Sgd.) MICHEL G. PICHER
ARBITRATOR