

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1974

Heard at Montreal, Thursday, 16 November 1989

Concerning

CANADIAN PACIFIC LIMITED

And

RAIL CANADA TRAFFIC CONTROLLERS

DISPUTE:

Discipline assessed Operator D. Andrews, Montreal, Quebec, and his subsequent dismissal for accumulation of demerit marks.

JOINT STATEMENT OF ISSUE:

On June 6, 1988 Mr. Andrews was working the third trick (0001 - 0800) Operator position at Dorion Street. During the course of this shift, at approximately 0400, Mr. Andrews was required to make photocopies of train orders to be given to the commuter trains in the early morning hours. At approximately 0425, after attempting to photocopy these orders for some 25 minutes without success, Mr. Andrews became frustrated with the malfunctioning photocopier and kicked the bottom righthand corner of the plastic panel cover.

On June 17, 1988 Mr. Andrews appeared at a Company investigation in connection with "damages caused to Xerox photocopier Model 1045 at Dorion Station on June 6, 1988".

Following this Company investigation, Mr. Andrews was assessed 45 demerit marks for damaging Company property. He was also dismissed from Company service as a result of accumulation of demerit marks.

The Union contends that the assessment of 45 demerit marks for this incident is inappropriate and should be removed. The Union further contends that the dismissal of Mr. Andrews for accumulation of demerit marks is unjust.

The Company contends that the assessment of 45 demerit marks and subsequent dismissal of Mr. Andrews is appropriate.

FOR THE UNION:

(SGD) D. H. ARNOLD
SYSTEM GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD) N. R. FOOT
FOR: GENERAL MANAGER, OPERATIONS & MAINTENANCE, IFS

There appeared on behalf of the Company:

G. W. McBurney – Supervisor, Labour Relations, Toronto
F. O. Peters – Labour Relations Officer, Montreal

And on behalf of the Union:

D. Arnold – System General Chairman, Winnipeg
G. Rodi – Local Chairman, Montreal

AWARD OF THE ARBITRATOR

The material confirms that in a fit of frustration Mr. Andrews kicked and damaged a photocopy machine at the Dorion location where he was working as an operator on the midnight shift of June 6, 1988. This resulted in damage

to the machine amounting to \$973.44. It is not disputed that the grievor was deserving of discipline for his uncontrolled reaction in the circumstances, the only issue being the appropriate measure of penalty in the circumstances.

The grievor is an employee of some fourteen years' service. At the time of the incident his disciplinary record stood at fifty-five demerits. It is not disputed that the bulk of those points were acquired as a result of problems in punctuality and attendance at work.

The Arbitrator has some difficulty with the Company's characterization of the grievor's prior disciplinary record. In its brief it states that Mr. Andrews was previously dismissed on January 22, 1980 for accumulation of demerit marks, although he was subsequently reinstated by an arbitration award of this Office (**CROA 781**). The Company goes on to state, "a review of Mr. Andrews' full employment history cannot support the Union's request that he be again reinstated into service. This would, in fact, amount to his being given a "third chance"." With respect, the Arbitrator cannot agree with the Company's view of what it calls the grievor's prior dismissal and the impact of his reinstatement. A careful review of the decision of Arbitrator Weatherill in CROA 781 discloses that, in his view, the Company was plainly in error in discharging Mr. Andrews by assessing twenty demerit marks for a late arrival for duty. By substituting a reduced penalty and ordering the reinstatement of Mr. Andrews without loss of seniority and with full compensation for his loss of regular earnings, the arbitrator decided that the grievor was not dismissable and granted a remedy to effectively erase that prior discipline.

In this Arbitrator's view it is important to appreciate the thrust of the arbitrator's award in **CROA 781**. As that decision reads the Arbitrator clearly found that the Company was in error and cannot be viewed as having agreed with the employer that Mr. Andrews was then dismissable, but that he should be given a second chance. On the contrary, the finding of the award is that he did nothing to merit dismissal, and indeed was deserving of full compensation for the loss of his earnings over a period of some eight months. I cannot, therefore, agree that reinstating Mr. Andrews into service in the instant case would, as the Company suggests, amount to his being given a "third chance". It must be accepted that he comes before this Arbitrator as an employee who has never previously been dismissed. While different considerations might obtain if the award in **CROA 781** indicated that the arbitrator viewed the grievor as deserving of a "second chance", perhaps with a reinstatement without compensation, the Company's position might have more merit. In the circumstances, however, it does not.

What, then, does the material disclose? At the time of the incident giving rise to this grievance, Mr. Andrews had a serious disciplinary record, standing at fifty-five demerits. He did, however, have relatively lengthy years of service with the Company. His record discloses a number of incidents of discipline generally related to attendance, with little discipline relating to UCOR infractions.

The account of the incident in question leaves little doubt that Mr. Andrews faced a substantial degree of personal frustration with the photocopier machine, which he attempted for a period of some twenty minutes to operate without success. It appears undisputed that he was under an obligation to copy documents for a dispatcher, the delay of which could result in a delay in train movements, and that he did feel a certain degree of pressure. By his own admission, he finally lashed out in anger, kicking the machine, causing a hole to be perforated through a lower panel, which resulted in damage to a switch. Clearly that response was not acceptable and left the grievor susceptible to a serious measure of discipline.

In the Arbitrator's view, however, the events in the instant case are to be distinguished from those in another arbitration award, between Canadian National Railway Co. and a Shopcraft Union, dated May 30, 1980. In that case the Arbitrator sustained the assessment of discipline against an employee who, with no evidence of apparent provocation, proceeded to the tool crib in the Point St. Charles Motive Power Shop, obtained a sledge hammer and went to the punch clock, which he systematically destroyed, with sufficient force as to break the handle of the sledge hammer. In that award the arbitrator notes that there was substantial reason to doubt the sincerity of the grievor's purported expression of regret at his actions, evidenced in part by his refusal to pursue psychiatric assistance, even though he asserted that he had not been conscious of what was taking place.

While the case in that award and the instant grievance are similar insofar as they relate to a degree of deliberate damage to Company property, there are also differences of significance. There was, in the circumstance of Mr. Andrews, a measure of frustration, if not provocation, and his action was more of a lashing out in the heat of the moment than a systematic course of conduct as evidenced in the 'punch clock' case. There is, moreover, no reason to

doubt the sincerity of the grievor's remorse in the case at hand. He has openly expressed regret for his action and has offered to pay for the damages caused.

For all of the foregoing reasons the Arbitrator is satisfied that, while a serious degree of discipline is warranted, the substitution of a penalty short of discharge is appropriate in the instant case. Given the grievor's long service, the fact that what transpired was a heat of the moment response to a frustrating circumstance, and what the Arbitrator accepts as his sincere statement of remorse, I am satisfied that the substitution of a lengthy suspension, and reinstatement on condition of repayment of the damages caused will have the necessary rehabilitative effect. I am persuaded on balance that he should, on this occasion, be given the benefit of the doubt and a second chance.

The grievor shall therefore be reinstated into his employment forthwith, without compensation of benefits, and without loss of seniority. Mr. Andrews' reinstatement is, however, conditional upon his repayment in full of the monetary damages caused to the Company's equipment, the time and method of repayment to be negotiated between the parties. The grievor's disciplinary record will stand at fifty-five demerits, in consequence of which he must fully appreciate the seriousness of any similar conduct in the future.

November 17, 1989

(Sgd.) MICHEL G. PICHER
ARBITRATOR