

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2064

Heard at Montreal, Thursday, 11 October 1990

Concerning

PHOENIX TRANSPORTATION (CP EXPRESS & TRANSPORT)

And

TRANSPORTATION COMMUNICATIONS UNION

DISPUTE:

The suspension and termination of employee Mike Shymko, Regina, Saskatchewan.

JOINT STATEMENT OF ISSUE:

Mike Shymko was suspended on September 12, 1989, and terminated on September 20, 1989, for allegedly deliberate damaging of a shipment on September 10, 1989.

The grievor was subject to an investigative interview, however, the Union asserts at no time was he confronted with the statement from D. Matyas or the unloading exception report. The Union asserts there was a failure to comply with Article 8.2, 8.5, and 8.7 of the Collective Agreement and that the discharge is null and void.

The grievor denies that he committed the offence and the Union puts the Company to the strict proof thereof. In fact, if any freight was damaged, other employees were responsible for the damage. The Union contends there was no just cause for dismissal and that Article 8.1 was violated.

In the alternative, the penalty of dismissal was excessive.

The Company contends that just cause exists for the dismissal of employee Mike Shymko.

The relief requested is that Mike Shymko be reinstated with full compensation, benefits and seniority.

FOR THE UNION:

(SGD.) J. J. BOYCE
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) B. F. WEINERT
MANAGER, LABOUR RELATIONS

There appeared on behalf of the Company:

D. Francis	– Counsel, Toronto
B. F. Weinert	– Director, Labour Relations, CPE&T, Toronto
K. William	– Terminal Operations Supervisor, Regina
D. Matyas	– Witness

And on behalf of the Union:

M. Church	– Counsel, Toronto
J. J. Boyce	– General Chairman, Toronto
M. Shymko	– Grievor

AWARD OF THE ARBITRATOR

The first issue to be resolved is whether the grievor was responsible for the willful damage of freight on September 10, 1989. The burden of proof in respect of that question is upon the Company. It must establish, on the balance of probabilities, that Mr. Shymko did deliberately abuse a shipment of fragile goods on that date.

The Company's case rests entirely on the evidence of employee Darryl Matyas. He states that on the afternoon of September 10, 1989 he was working along with the grievor, loading a trailer at the Company's warehouse in Regina. According to Mr. Matyas, Mr. Shymko took some ten to fifteen cases of books, weighing approximately fifty pounds each, raised them to shoulder height and slammed them down on top of a fragile load which was already stacked on one side of the trailer. He states that he asked the grievor why he was doing that, to which the grievor made a response indicating contempt for the Company.

It is not disputed that there was some damage to the fragile goods on the trailer loaded by the grievor and Mr. Matyas. The grievor, however, denies having handled any freight in the manner described by Mr. Matyas, and professes no knowledge as to how the damage might have been done. The evidence establishes that for a time Mr. Matyas worked alone loading the trailer, as he states that the grievor left for some ten or fifteen minutes.

The merit of this grievance turns entirely on the credibility of the two witnesses. In the Arbitrator's view there is substantial doubt surrounding the evidence of Mr. Matyas. It is common ground that Mr. Matyas is an employee who has previously been disciplined, and that his discipline includes prior warnings about careless damage to customers' freight. It is also undisputed that in the past the grievor has himself warned Mr. Matyas when he found him pilfering peanuts from packages being shipped by a customer. Under cross-examination Mr. Matyas admitted to having engaged in the alleged theft, and to having been warned against it by Mr. Shymko. The grievor's evidence discloses that in fact he had reported Mr. Matyas' pilfering to a warehouse supervisor, approximately a month prior to the incident giving rise to his own discharge. While Mr. Matyas denies having any knowledge of that report, at a minimum it confirms that the two employees were on less than good terms. That is further confirmed by the fact that Mr. Shymko admittedly teased Mr. Matyas on several occasions about a speech impediment. Lastly, the evidence discloses that Mr. Matyas did not advise any member of management of wrongdoing by the grievor during the shift when it occurred. For reasons that are less than clear to the Arbitrator, it was only the next day, incidentally during the course of a conversation with a plant manager, that Mr. Matyas related his accusation against Mr. Shymko, which resulted in his subsequent investigation and discharge.

When the evidence of Mr. Matyas is weighed against that of the grievor, the Arbitrator is left with lingering doubt about the merit of Mr. Matyas' account of the events of September 10, 1989. The grievor is an employee senior to Mr. Matyas, with no discipline whatsoever on his record. Mr. Matyas, on the other hand, has previously been disciplined for damaging freight and has, by his own admission, engaged in the dishonest practice of pilfering, an act for which he was both admonished and reported by the grievor.

There is, moreover, a degree of implausibility in the account related by Mr. Matyas. It is common ground that the task of Mr. Shymko was to pass the cases of books up from a truck on the floor of the trailer to the top of a stack of skids where Mr. Matyas was located. There was no reason for Mr. Shymko to place the cases of books on top of the fragile freight in the process of that operation, and still less reason for him to raise it to shoulder height, as alleged by Mr. Matyas, if indeed he wished to place it on the boxes of fragile goods, which were stacked to a height of some three to four feet. On the whole the Arbitrator is driven to the conclusion that there are more reasons to doubt than to accept Mr. Matyas' account of what occurred.

For these reasons I cannot find that the Company has established, on the balance of probabilities, that Mr. Shymko deliberately damaged part of a shipment of goods on September 10, 1989, as alleged. The grievance must therefore be allowed. Mr. Shymko shall be reinstated into his employment with compensation for all wages and benefits lost, and without loss of seniority. In view of this conclusion it is unnecessary for the Arbitrator to deal with the alternative issue of the application of Article 8.7 in the circumstances of this case.

12 October 1990

(Sgd.) MICHEL G. PICHER
ARBITRATOR