

# CANADIAN RAILWAY OFFICE OF ARBITRATION

## CASE NO. 2205

Heard at Montreal, Wednesday, 13 November 1991

concerning

**CANPAR**

and

**TRANSPORTATION COMMUNICATIONS UNION**

### **DISPUTE:**

Employee John Benjamin was dismissed by the Company on or about August 7, 1991.

### **JOINT STATEMENT OF ISSUE:**

The Company asserts that the employee was dismissed for attempted theft. The grievor denies the allegation and seeks reinstatement with full compensation and seniority and in the alternative such remedy as may be appropriate.

The Union alleges a violation of Article 6 of the collective agreement and any other relevant article.

The Company asserts the grievance ought to be dismissed.

### **FOR THE UNION:**

**(SGD.) J. CRABB**  
**EXECUTIVE VICE-PRESIDENT**

### **FOR THE COMPANY:**

**(SGD.) P. D. MACLEOD**  
**DIRECTOR, HUMAN RESOURCES**

There appeared on behalf of the Company:

M. D. Failes	– Counsel, Toronto
P. D. MacLeod	– Director, Labour Relations, Toronto
K. Lake	– Witness

And on behalf of the Union:

M. McBride	– Counsel, Toronto
J. Crabb	– Executive Vice-President, Toronto
M. Gauthier	– Vice-President, Montreal
J. Benjamin	– Grievor

### AWARD OF THE ARBITRATOR

The instant case resolves itself largely on the issue of credibility. Employee Kevin Lake states that on August 1, 1991 he noticed the grievor standing inside a delivery van with his back towards him, and that when he called out to him he appeared startled and made a movement which Mr. Lake took to be the placing of a parcel on a shelf. When Mr. Lake entered the van he saw an open parcel, the contents of which had been removed. The content of the parcel was a gray plastic box, which had also been opened to reveal two items of jewelry. According to Mr. Lake's testimony, he accused the grievor of attempting to steal the jewelry, which Mr. Benjamin immediately denied. According to Mr. Lake he told the grievor to leave the package and contents on the shelf as they were, but that Mr. Benjamin proceeded to restore the jewelry and its container to the package. Mr. Lake then took the package from him and proceeded to report the incident to a supervisor.

The account of the incident related by Mr. Benjamin is impossible to reconcile with the evidence of Mr. Lake. The grievor states that Mr. Lake entered the van while he was in the process of unloading it, and that he spent some time inspecting the shelves on the left side of the van before turning and drawing the grievor's attention to the open package which was on a shelf in the right rear section of the vehicle. Mr. Benjamin, who had been working alone unloading the van for some five to ten minutes, testified that he had not previously noticed the package or its contents. According to his evidence an argument then ensued between himself and Mr. Lake and he advised Mr. Lake that the best thing to do was to turn the matter over to a supervisor.

The whole of the evidence reveals substantial contradictions in the account of events rendered by Mr. Benjamin. Firstly, immediately following the incident, when he was questioned in the presence of his Union representative by Mr. Robert Kalinowski, manager of the afternoon shift, Mr. Benjamin maintained that he himself had just found the open parcel when Mr. Lake entered the van. This statement, however, was not reflected in his subsequent formal interview with the Company held on August 6, 1991. At that time, as at the arbitration hearing, the grievor maintained that he was totally unaware of the package, and that it was Mr. Lake who drew his attention to it.

There is a second inconsistency in the account of events made by Mr. Benjamin. During the course of cross-examination by Counsel for the Company Mr. Benjamin conceded that the parcel and its contents were open on the shelf inside the van when he first saw them. However, during the course of his formal interview, when asked whether the package was visible on the shelf when Mr. Lake picked it up the grievor replied "I don't know, my back was turned. Then I saw him take it out."

On the whole the Arbitrator finds the evidence of Mr. Lake to be preferable to that of the grievor with respect to the incident which took place. The fact that Mr. Benjamin denies any prior knowledge of the open parcel being on the shelf of the vehicle which he was unloading, over a period of five to ten minutes, is highly implausible. The evidence of Mr. Lake, himself an employee with no apparent reason to fabricate evidence injurious to the grievor, is more clear, consistent and, in the end, compelling than the vague and contradictory account given by Mr. Benjamin.

On the whole, the evidence discloses that Mr. Benjamin was found inside a van, working alone, standing immediately next to an open parcel of jewelry which he appeared to be attempting to conceal as he was approached by Mr. Lake. His subsequent explanation and actions are, on the balance of probabilities, more consistent with guilt on his part than with innocence. Accepting, as I do, the evidence of Mr. Lake, I am forced to the conclusion that Mr. Benjamin has deliberately falsified his account of the encounter between himself and Mr. Lake. In that circumstance, his denials of any knowledge or involvement with the package cannot be accepted, and contrary inferences as to his actions can fairly be drawn. In the absence of any credible explanation on the part of the grievor, the Arbitrator must find that Mr. Benjamin was attempting to steal the jewelry which Mr. Lake found opened in the van which Mr. Benjamin was in the process of unloading. Nor can the Arbitrator find any violation of the rights of the grievor under the procedural provisions of article 6 of the collective agreement.

In the result, the Company had just cause for the assessment of discipline, and the discharge of the grievor was an appropriate response in the circumstances. In the absence of any mitigating factors, there is no reason to substitute a lesser penalty. For these reasons the grievance must be dismissed.

November 15, 1991

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