

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2560

Heard in Montreal, Wednesday, 14 December 1994

concerning

CANADIAN PACIFIC LIMITED

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Dismissal of Mr. J. Waldner.

BROTHERHOOD'S STATEMENT OF ISSUE:

On May 25, 1994, the grievor was dismissed from Company service for alleged theft of Company property.

The Brotherhood contends that the discipline assessed was, in the circumstances, unwarranted and excessive.

The Brotherhood requests that the discipline assessed the grievor be rescinded, that he be reinstated into his former position forthwith, and that he be compensated for all wages and benefits lost as a result of this matter.

The Company denies the Brotherhood's contentions and declines the Brotherhood's requests.

FOR THE BROTHERHOOD:

(SGD.) J. J. KRUK
SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

R. M. Andrew	– Labour Relations Officer, Vancouver
R. L. Michel	– Deputy Roadmaster Bredenburg & Minnedosa Suidivision,
R. J. Martel	– Labour Relations Officer, Toronto
G. W. Churchill	– Manager, Work Equipment Shops

And on behalf of the Brotherhood:

D. Brown	– Senior Counsel, Ottawa
J. J. Kruk	– System Federation General Chairman, Ottawa
D. McCracken	– Federation General Chairman, Ottawa
P. Davidson	– Counsel, Ottawa

AWARD OF THE ARBITRATOR

On a review of the material filed the Arbitrator is satisfied that the Company has discharged the burden of proving, on the balance of probabilities, that Mr. Waldner did knowingly engage in the theft of a quantity of gasoline and a gasoline container which is the property of the Company. The evidence discloses that Mr. Waldner was apprehended by a Brandon Police Service constable at 22:30 hours on March 31, 1994, when the grievor was off duty, at a location near Company property where he works. The police officer observed Mr. Waldner stop his vehicle, disappear from view for a short period and then reappear from the general direction of the CP rail yard carrying a dark bag which he placed in the trunk of his car. Upon investigating the officer caused Mr. Waldner to open the trunk of his car, whereupon he found a full five gallon gas can inside the trunk, contained in the dark bag.

Mr. Waldner sought to explain his actions, however a careful review of his statements of explanation gives rise to substantial doubt as to the credibility of his story. Firstly, it is common ground that Mr. Waldner had access to a nearby tool shed where gasoline and containers such as the one found in his trunk were stored. His first explanation given to the police was that he had found the gas can beneath the First Street bridge and had removed it to prevent the possibility of children becoming involved with it. Later, however, in his statement to the Company, he stated that he was driving to a car wash when he saw the gas can next to a building as he was driving by.

The account given by Mr. Waldner during the course of the disciplinary investigation substantially undermines the plausibility of his actions. Mr. Waldner states that he went to the car wash to determine its hours of operation. He admits, however, during the course of his statement, that he was aware of a large sign displayed at the car wash indicating that it is open from 8:00 a.m. to 10:00 p.m. daily. As noted above, he was apprehended at 10:30 p.m. Mr. Waldner also relates that he was in the process of driving home when he saw the gas can. He states that this caused him to stop at a doughnut shop to help him to make up his mind as to whether he should go back and "clean it up or just forget about it". In a passage which the Arbitrator finds barely explicable, in answer to a question as to why he decided to recover the gas can himself rather than tell the police he states: "Just to bypass the commotion that might have accumulated. The city cops would have sized up the gas can and they might have called in the fire department." When asked why the involvement of the fire department would be a complicating factor he elaborated: "I can't see no problem in that. Where the problem comes in, if the fire department's called in, will I be stuck with the bill? Who would foot the bill on that one, that's what I was wondering about."

The Arbitrator has great difficulty with the plausibility of the grievor's account of what he was thinking and doing immediately before and at the time he was apprehended by the police officer. His actions, and in particular the manner in which the gas can was recovered, are far more consistent with a deliberate act of theft than with a chance finding. The Arbitrator has no reason to doubt the reliability of the police officer's account, which is that Mr. Waldner disappeared from view when he proceeded to recover the gas can. Moreover, it is difficult to appreciate why he would have proceeded to the can carrying a bag which concealed it as he returned to place it in the trunk of his car.

In the result, all of the circumstances, including the origins of the gas and container, the grievor's access to the place of origin, the method of recovery and the unlikely and near incomprehensible explanations given by Mr. Waldner, lead to the conclusion, on the balance of probabilities, that he knowingly engaged in the theft of Company property.

It is well settled that theft is, *prima facie*, cause for the discharge of an employee, given the importance of the bond of trust so fundamental to the employment relationship (see **CROA 806** and **SHP-274**). In the case at hand the grievor has not been forthright and candid in explaining his actions, and sought to mislead the employer. In the circumstances, notwithstanding the length of the grievor's service, the Arbitrator is satisfied that the decision of the Company to terminate the grievor's employment should not be disturbed.

16 December 1994

(signed) MICHEL G. PICHER
ARBITRATOR