CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2884

Heard in Montreal, Wednesday, 10 September 1997

concerning

CANPAR

and

TRANSPORTATION COMMUNICATIONS UNION

DISPUTE:

Termination of driver representative Mr. P. Nelson on March 17, 1997.

JOINT STATEMENT OF ISSUE:

The Company terminated Mr. P. Nelson's employment for an incident involving a customer's wallet that occurred at Whistler, B.C. on March 11, 1997.

The Union maintains that the indiscretion was a spur of the moment thing which was totally out of character for Mr. Nelson.

The Union believes that because of Mr. P. Nelson's excellent discipline record, the discipline given was much too harsh. Accordingly, we requested that Mr. P. Nelson be reinstated without loss of seniority and with compensation for wages and benefits lost.

The Company denied our request.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) D. E. GRAHAM	(SGD.) P. D. MACLEOD
DIVISION VICE-PRESIDENT	VICE-PRESIDENT, OPERATIONS

There appeared on behalf of the Company:

M. D. Failes	– Counsel, Toronto
P. D. MacLeod	– Vice-President, Operations, Toronto
N. Javallas	– Supervisor, Vancouver

And on behalf of the Union Brotherhood:

H. F. Caley	– Counsel, Toronto
D. Dunster	– Executive President, Ottawa
D. Neale	– Division Vice-President, Hamilton
P. Nelson	– Grievor

AWARD OF THE ARBITRATOR

The facts in the case at hand are not substantially disputed. On March 11, 1997 the grievor was in the course of making a delivery to the home of a customer in Whistler, B.C. when he saw a lady's wallet on the ground near the door to her home. He took the wallet, believing it to belong to either the customer or to a person of her acquaintance, and went on to transact the delivery before proceeding on his way. Within a few short hours, after receiving a call from the supervisor of the Vancouver terminal advising that the police wished to speak with him about a missing wallet, Mr. Nelson returned to the customer's home, admitted fully to her what he had done and apologized, returning the wallet to her. He relates that she volunteered not to pursue the matter further, and simply to inform the police that she had found her wallet.

The evidence discloses that during the course of a subsequent disciplinary investigation conducted by the Company's supervisors, Mr. Nelson admitted fully that he had taken the wallet, knowing that he should not have done so, and that he had returned it, as described above. Indeed, it appears that on the afternoon of the 11th of March Supervisor Nick Javallas was directly advised by the owner of the wallet that the grievor had returned it, and had apologized. Understandably, the Company viewed with some gravity the grievor's taking of a wallet which he knew, or reasonably should have known, belonged to a customer. Following the disciplinary investigation, the grievor was discharged from service.

The Company's position is understandable, given the established jurisprudence with respect to the importance of the relationship of trust so fundamental to the bond between employer and employee. In considering such a case, however, boards of arbitration have regard to a number of factors, including mitigating factors which should be taken into account in determining the appropriate measure of discipline. In Brown & Beatty, **Canadian Labour Arbitration** at para. 7:3314, the following comment appears:

> As noted above, it is now widely accepted by a majority of arbitrators that a person cannot automatically be terminated from his employment because he has engaged in one or more acts of theft. The factors which have inclined arbitrators to reject the conclusion that an act of theft, by itself and without more, justifies the discharge of an employee, are numerous and varied. For example, arbitrators have modified the termination of a person found to have engaged in an act of theft and substituted some period of suspension: where the stolen property was of nominal value; where the grievor had such a long and exemplary record of employment that the misconduct before the board could be perceived as an isolated incident; where the grievor's actions were irrational and/or undertaken on the spur of the moment; where the grievor had shown remorse and/or had admitted to his misconduct …

Such factors have consistently been taken into account in the awards of this Office (see, e.g., **CROA 989, 1402, 1617** and **1814**). In **CROA 1814**, where an employee was discharged for pilferage of small amounts of cash to help feed his family was reinstated, the following comments appear:

> The sole issue in this case is the appropriate discipline. It is well established that the presumptive penalty for theft is discharge. That has been consistently reflected in the decisions of this Office (*see* ***CROA 796, 806, 861, 899, 1030, 1162, 1165, 1279, 1402, 1440, 1467, 1474, 1538, 1558*** *and* ***1631***). It is equally true, however, that dismissal is not automatic in such cases, and a number of factors must be considered in assessing whether an Arbitrator ought to exercise his or her discretion to impose a penalty other than discharge in a given case. For example, in **CROA 989**, even where it was established that employees engaged in theft, taking obvious steps to deliberately conceal their actions, where what transpired was judged to be an "aberrant episode" a penalty short of discharge was substituted by the Arbitrator.
>
> The preponderant view among Canadian arbitrators is that a number of factors may be taken into account in determining whether in all of the circumstances an employee found to have engaged in theft merits discharge. These may include the length of the grievor's service, his or her past record, any compelling personal or medical circumstances that may be linked to the conduct in question and the value of the goods stolen. (*See* **CROA 1402, 1617** *and* **re Northwood Pulp and Timber Ltd. and Canadian Paper Workers' Union, Local 603**, *(1974) 7 L.A.C. (2d) 244 (Wilson) and* **re East General Hospital and Service Employees' Union**, *(1975) 9 L.A.C. (2d) 311 (Beatty), and cases cited therein.*)

In dealing with this issue Professor Palmer in **Collective Agreement Arbitration in Canada** (2d) at p. 368 made the following observations about a perceived shift from the draconian view of earlier arbitration awards:

> ... The new approach has developed out of cases where the acts depended on are more appropriately characterized as "pilfering" than theft or can be treated as a momentary aberration. Factors tending to show a momentary aberration where reinstatement can be considered are: a single offence which is promptly and frankly acknowledged; diligence; a clean record and good general character on the part of the employee. However, there is a heavy onus in this regard.
>
> Thus, by attributing incorrectly to this earlier line of cases that discharge is the only appropriate penalty, it is then argued that this, like the position of Jean Valjean in Les Miserables, is patently wrong. Of course, this assumption is incorrect; all cases leave open the possibility of lesser discipline. ... More recent cases suggest that an act of theft does not of itself always demand the penalty of discharge. The amount stolen, the issue of premeditation, the nature of the employee's job, his seniority and work record and all other relevant facts must be considered. Retribution is not appropriate in a labour relations context.
>
> ...

In considering whether, following an admitted act of theft, reinstatement of the employee is possible, a board of arbitration must be satisfied that, having regard to all of the facts, there are compelling reasons to believe that the all-important relationship of trust can be re-established, and that the ongoing employment of the grievor can fairly be viewed as a viable option.

In the instant case there are compelling mitigating factors to consider. The grievor is an employee of some fifteen years' service. In all of that time he has had only two minor disciplinary infractions. In May of 1996 he received a safe driving award certificate from the Company in recognition of his having operated a Company vehicle for fifteen years without incurring a preventable traffic accident. Mr. Nelson is one of the most senior and, it is fair to say, exemplary employees to be found either in the Vancouver establishment or in the national bargaining unit, generally.

There is no hint of dishonesty or similar incidents at any time in the grievor's extensive years of service to the Company. By Mr. Nelson's own admission, which the Arbitrator accepts without reservation, his taking of the wallet on the day in question was an impulsive, spur of the moment gesture which he quickly realised was a grave error of judgement. As counsel for the Union suggests, he might, faced with the possibility of a police investigation, have simply discarded the wallet and denied any knowledge of it. Rather, as occurred, he admitted what he had done and immediately returned the property to its owner. Further, both in a written statement to the Company and at the hearing, he expressed what the Arbitrator accepts is sincere remorse for his mistake.

In the Arbitrator's view the instant case reflects a text book example of an exemplary long-service employee who engages in a spur of the moment act of dishonesty, for which he has made amends and shown genuine remorse. In these circumstances it is neither realistic nor reasonable to conclude that the continued employment of Mr. Nelson is not a viable option. There is every reason to believe that the pre-existing bond of trust between himself and the Company can be fully restored. In the circumstances, however, noting the argument of counsel for the Company that the grievor's decision to return the wallet came only after his telephone conversation with his supervisor the same afternoon, I am not persuaded that this is an appropriate case for an order of compensation.

For the foregoing reasons the grievance is allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment, without loss of seniority and without compensation.

September 15, 1997

(signed) MICHEL G. PICHER
ARBITRATOR