CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3099

Heard in Montreal, Tuesday, 14 March 2000

concerning

CANPAR

and

TRANSPORTATION COMMUNICATIONS UNION

DISPUTE:

Dismissal of Mr. Donato Cellucci.

JOINT STATEMENT OF ISSUE:

On September 22, 1999, Mr. Cellucci was advised verbally that he was out of service pending investigation. On September 22, 1999, the Company advised Mr. Cellucci that, on September 23, 1999, he was to attend an interview in connection with suspicion of theft of merchandise from a vending machine.

On September 23, 1999 the Company held an interview. In the interview the evidence showed that Mr. Cellucci shook a vending machine, that three cookies fell, that he ate two and put the other in his locker.

At the end of his shift, Mr. Cellucci was asked to meet with his supervisor who questioned him regarding the incident. Mr. Cellucci admitted to taking the 3 cookies and offered to pay for them. The supervisor refused.

On September 27, 1999, the Company advised Mr. Cellucci that he was dismissed for taking merchandise from a vending machine without paying.

The Union considers that the discipline was excessive and grieved the dismissal.

The Company denied the grievance.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) R. G. PAGÉ	(SGD.) P. D. MACLEOD
EXECUTIVE VICE-PRESIDENT	VICE-PRESIDENT, OPERATIONS

There appeared on behalf of the Company:

M. D. Failes	– Counsel, Toronto
P. D. MacLeod	– Vice-President, Operations, Toronto
R. Dupuis	– Regional Manager, Lachine
S. Charbonneau	– Supervisor, Lachine
M. Schiavi	– Witness
D. Schiavi	– Witness

And on behalf of the Union:

M. Russel	– Counsel, Montreal
R. Pagé	– Executive Vice-President, Montreal
R. Pichette	– Local Chairperson, Lachine
D. Cellucci	– Grievor

AWARD OF THE ARBITRATOR

It is not disputed that on September 22, 1999 the grievor shook a vending machine, causing three packages of cookies to fall out without payment, and that the grievor took the cookies for his own consumption. It appears that Mr. Cellucci stole from the vending machine in the cafeteria shortly after he had observed an employee receive food products from the vending machine by tilting it. It does not appear disputed that the employee in question returned the cookies which fell out of the machine to a supervisor. Shortly thereafter Mr. Cellucci took advantage of the obvious malfunctioning of the machine to obtain three packages of cookies for himself, by tilting the machine in the same fashion.

Unfortunately, Mr. Cellucci was not honest with his employer when confronted with the report of another employee to the effect that he had effectively stolen from the vending machine. When initially questioned by Supervisor Sylvain Charbonneau, Mr. Cellucci responded that he had paid for the food products. Later during the same shift when he was again asked if he had paid for the items in his possession, he responded that he had put a dollar into the machine for a bag of potato chips, that nothing had come out and that he had tilted it, thereby freeing three packages of cookies.

At the subsequent disciplinary interview conducted by the Company Mr. Cellucci continued to insist that he had put some money into the vending machine. Two co-workers, also interviewed during the same investigation, related that they observed the grievor and that he had not placed any money into the machine. Based on the findings of the investigation, and the grievor's prior record, which involved another incident which the employer viewed as relating to trust, the Company terminated his employment.

The matter proceeded through the grievance process and finally to arbitration. It appears that only shortly prior to the arbitration hearing did the grievor finally concede that in fact he did not place any money into the vending machine, but rather had simply tilted it to effectively steal from it. As the grievor's denial came at such a late stage, the Company was put to the necessity of retaining counsel, preparing for the arbitration hearing and obtaining the attendance by subpoena of the two persons who observed the grievor, who apparently are no longer employees of the Company.

Counsel for the Company submits that discharge is appropriate in the circumstances disclosed. He stresses that the grievor is an employee of six years' service whose record includes a prior serious incident of what he characterizes as honesty related misconduct. It is not disputed that in September of 1996 the grievor was discharged for tampering with customer freight. The discharge was subsequently reduced to the assessment of forty demerits. Afterwards an arrangement was agreed to whereby the Company undertook that if Mr. Cellucci would remain discipline free for a certain period, the demerits would be removed from his record and replaced with a warning letter. However, a condition of that undertaking was: "Should Mr. Cellucci in the future have cause to be disciplined for a similar matter it will be considered that forty demerits were assessed in this instance, for the purposes of determining an appropriate measure of discipline only." That arrangement was obviously assented to by the Union. On the basis of all of the foregoing counsel for the Company submits that the grievor has once again brought into question his honesty, and given that he was not forthcoming or candid in admitting his wrongdoing until the arbitration hearing, the employer's decision with respect to discharge should not be interfered with.

Counsel for the Union submits that although this case does admittedly involve petty theft and an initial wrongful denial on the part of the grievor, a denial motivated by fear for his own employment security, there are mitigating factors which should be taken into account to justify a reduction of penalty. Firstly he stresses that the grievor is fifty years old, and is the principal provider for his family, including three children. As he is functionally illiterate in both French and English, his job prospects are extremely bleak. Additionally, counsel takes issue with the employer's characterization of the prior tampering incident as being, on its face, honesty related. In his view the incident involving the theft from the vending machine does not in fact constitute "a similar matter" such as to re-open the record of forty demerits for the purposes of determining the appropriate measure of discipline in the instant case.

In support of his submissions counsel for the Union refers the Arbitrator to two awards: **Re CanPar and Transportation Communications Union** (1997) 66 L.A.C. (4th) 1 (M.G. Picher) and **Re Newfoundland Farm Products Corp. and Newfoundland Association of Public Employees** (1992) 26 L.A.C. (4th) 299 (D. M. Browne). Counsel submits that on the whole the grievor should be viewed as having a reasonably positive prior disciplinary record, that at the arbitration hearing he has fully admitted his wrongdoing and, in light of the relatively

minor value of the products which the grievor took from the vending machine, estimated at approximately $3.00, the equities would suggest that it is appropriate to substitute a lesser penalty.

I turn to consider the submissions of the parties in this obviously difficult matter. Clearly, as reflected in the reported case involving these parties, by the same arbitrator, discharge should not be viewed as the only and automatic penalty appropriate to an incident of theft or other dishonesty. In that case an employee who had wrongfully taken the wallet of a customer which he discovered on the ground near the door of her home owned up to his actions during the course of the same tour of duty, and returned it to the customer, with an apology. The approach which arbitrators take to the assessment of mitigating factors is, to some extent, reflected in the decision cited above. At pp. 3-4 the following appears:

> 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.
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> 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.
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> 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.
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> 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. …

Similarly, in the **Newfoundland Farm Products** case, where the theft involved the taking of two chicken breasts, the employee made an immediate and full admission of his wrongdoing when confronted by the employer. That factor, coupled with the absence of any similar misconduct on the grievor's record and the minimal value of the stolen goods, led the arbitrator to direct the employee's reinstatement, subject to a six month suspension.

It is trite to say that in matters such as this each case must be determined on its own merits. This case is particularly difficult, in light of the grievor's age, weak prospects for other employment and his family responsibilities. However, an arbitrator cannot be moved by compassion alone, without due regard to the legitimate interests of an employer in assessing whether a viable employment relationship can be restored.

In the instant case, if the theft had been immediately admitted by Mr. Cellucci, and if his record was devoid of any questionable conduct relating to honesty, the equities would strongly support a direction of reinstatement. Regretably, the case has not unfolded in such a positive way. Firstly, for reasons which he best appreciates, Mr. Cellucci compounded the theft by attempting to cover up his actions. This he did to the point of compelling the matter to proceed to arbitration, where it was anticipated that issues of credibility would have to be handled by counsel and the evidence of subpoenaed witnesses. His eventual admission of wrongdoing, in the sense of acknowledging that he put no money into the vending machine, came virtually at the hearing room door. Even on that basis there might be some compelling argument for forgiveness of his transgression, given the relatively small value of what was taken.

Unfortunately, the Arbitrator is obliged to agree with the Company that the prior discipline of Mr. Cellucci for tampering with freight cannot be disregarded in the context of this dispute. Although counsel for the Union is correct in stressing that the tampering infraction does not, on its face, disclose prior involvement with theft of freight, it does raise substantial questions as to the trustworthiness of the grievor. Concerns for the grievor's trustworthiness were obviously sufficient for the employer to initially discharge him at the time of the tampering infraction, and to subsequently reduce the penalty to the nevertheless serious level of forty demerits. As a warehouseman of some six years' service, Mr. Cellucci works in an unsupervised environment, entrusted with handling the parcels and property of the Company's customers. Tampering with a parcel, whether by opening it to examine its contents or otherwise, is clearly, in the Arbitrator's view, conduct which, on its face, does go to the honesty and integrity of the employee who engages in that activity. It clearly violates the bond of understanding between the Company and a customer who entrusts valuable freight into the hands of a carrier. In the result, and with great regret, I cannot share the characterization which counsel for the Union seeks to put upon the prior incident of tampering, as relates to a fair assessment of the grievor's prior record for the purposes of determining the appropriate measure of discipline in this case.

When all of the evidence is considered, Mr. Cellucci cannot invoke the mitigating factor of long service, being employed only some six years. His actions also foreclose the argument that he was immediately candid and forthcoming with his employer. His denials obviously added to the time and expense of the grievance and arbitration process. Finally, and most importantly, for the reasons touched upon above, Mr. Cellucci cannot argue a record devoid of disciplinary infractions relating to his employability in a position of relative trust in an unsupervised context. Given the prior assessment of forty demerits for inappropriate tampering with the property of a customer, coupled with the grievor's failure to admit his wrongdoing with respect to the theft of goods from the vending machine until the last possible moment, the Arbitrator is unable to find that the Company's position, which is that the bond of trust implicit in the grievor's employment relationship has irrevocably been broken is incorrect, or that the assessment of a lesser penalty in the circumstances is appropriate.

For all of the foregoing reasons the grievance must be dismissed.

March 17, 2000

(signed) MICHEL G. PICHER
ARBITRATOR