

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3116

Heard in Montreal, Tuesday, 13 June 2000

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Claim on behalf of Mr. K. Clarke.

BROTHERHOOD'S STATEMENT OF ISSUE:

On June 8, 1999, the grievor was suspended from Company service for an alleged theft. The grievor, who was until then working in British Columbia, had no choice but to return home to Newfoundland. About one month later, in July 1999, the Company notified the grievor to appear for a formal investigation in Kamloops, B.C. the grievor's financial situation did not permit him to attend at the investigation in B.C. Furthermore, the Company refused to reimburse the grievor for expenses incurred in this regard. Because of this the grievor did not attend the scheduled investigation and he was subsequently dismissed. The Brotherhood grieved.

The Union contends that: **1.)** By refusing to reimburse the grievor for expenses incurred to attend the investigation, the Company violated article 18.2 of agreement no. 41. **2.)** In view of the absence of a formal investigation, the dismissal of the grievor must be found to be illegitimate and must be stricken from his record. **3.)** By dismissing the grievor without benefit of a formal investigation, the Company violated article 18.1 of agreement no. 41.

The Union requests that: **1.)** The grievor be reinstated forthwith without loss of seniority and with full compensation for all financial losses incurred as a result of this matter.

The Company denies the Union's contentions and declines the Union's request.

FOR THE BROTHERHOOD:

(SGD.)J. J. KRUK

SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

R. M. Andrews	– Manager, Labour Relations, Calgary
E. J. MacIsaac	– Labour Relations Officer, Calgary
D. E. Freeborn	– Labour Relations Officer, Calgary
T. Miller	– Supervisor

And on behalf of the Brotherhood:

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

AWARD OF THE ARBITRATOR

The evidence discloses that the grievor, Mr. K. Clarke, was found to be in possession of a box of sundries which were missing from a storage car at the boarding car location where he was assigned as part of Pacific Steel Gang No. 3 near Lytton, British Columbia. It does not appear disputed that the grievor was in possession of a box which had been taken from the storage car, that the box contained various sundries also taken from that location, and that it was sealed and labelled for shipping to his home in Newfoundland. At 0110 hours on June 8, 1999 CP constables attended at the grievor's boarding car and spoke with him, at which time they seized the box in question and took the grievor into custody for questioning. After being questioned during his detention at the Lytton Section building office, during which time the box was opened and found to contain the stolen sundries, Mr. Clarke was served an appearance notice charging him with theft under \$5,000 contrary to section 334(b) of the **Criminal Code of Canada**, returnable before the Provincial Court at Lytton on July 21, 1999. He was released from custody at 0325 hours on June 8 and was told to stay in the area of the gang cars to be spoken to by his supervisor.

However, the grievor did not do as he was told. It is not disputed that he packed his personal belongings and immediately left the work camp without a word, and could not be located by the Company's supervisors in the days that followed. According to the Company's evidence, which the Arbitrator accepts, it is only upon telephoning the grievor's home in Newfoundland on June 18, some ten days later, that it was discovered that he had travelled back to Newfoundland immediately after the incident. It should be noted that the Company sought to conduct an investigation into two aspects of possible discipline for the grievor, one relating to the stolen sundries and the other to information it had received with respect to his claiming travel expenses for weekend mileage between Cambie, B.C., and Medicine Hat, Alberta when in fact Mr. Clarke had remained on the boarding cars on the weekends in question.

It appears that the Company indicated to the grievor that it would schedule his investigation for July 6, 1999. There is no suggestion that that date was not convenient for the grievor. However, through his bargaining agent he took the position that he need not attend the investigation unless his expenses to do so were paid for by the Company. In other words, he required that the Company pay for his flight from Newfoundland back to British Columbia as a condition of attending the investigation. It appears that in the initial stages the Company contemplated that Mr. Clarke would, in any event, be compelled to return to British Columbia to deal with the criminal charges against him. At some point, however, it appears that the Brotherhood indicated to the Company that the grievor might not in fact appear in Provincial Court to deal with the charges. That in fact is what occurred. Mr. Clarke ultimately failed to appear at the Lytton Provincial Court on July 21, 1999, resulting in the issuing of a bench warrant for his arrest, which warrant is apparently still outstanding. He obviously did not attend the investigation which the Company had then re-scheduled for July 22, 1999. When the Company next offered to the Brotherhood to reschedule the investigation to December 1, 1999 that offer was declined, the Brotherhood taking the position that the Company was compelled to pay for the grievor's travel costs to the investigation. Ultimately, on October 21, 1999 the Company discharged the grievor based on the evidence which was then available to it through its investigation.

The Brotherhood asserts that the grievor should have been provided with expenses to travel to British Columbia from Newfoundland, in accordance with article 18.2, which contains a provision newly negotiated into the collective agreement at the last round of bargaining which reads:

18.2 ... Reasonable expenses will be provided when an investigation cannot be held within a reasonable commute. ...

In the Arbitrator's view it is important that the foregoing provision, newly negotiated into the collective agreement, be given careful arbitral consideration in cases in which its scope and application can be seriously debated. In my view, on the facts touched upon above, this is not such a case. At a minimum, it would appear to me that the article would apply to an employee who has properly removed himself or herself to a location some distance from the place at which an investigation is to be held. When that location exceeds what may be characterized as a reasonable commuting distance, the employee concerned may claim transportation expenses. There is no basis to conclude, however, that the article should have any reasonable application in the circumstance of an employee who is AWOL. That is what Mr. Clarke's status was from the time he left the boarding cars on the morning of June 8, 1999, arguably until the moment of his discharge several months later, after repeated refusals to return to the work site to participate in the Company's investigation.

On June 8, 1999 Mr. Clarke was expressly directed to stay at the boarding car area until his supervisor could speak to him. Whether he would, as he supposedly surmised, be removed from service, and might have to await an investigation in some other local housing, within or outside a reasonable commuting distance, was a matter to be determined by the Company, and upon which no communication had been made. He then knew, or reasonably should have known, that the Company would conduct an investigation into the circumstances involving his detention by the CP Police earlier that day, and that he should remain reasonably available for any such investigation. For reasons he best appreciates, however, the grievor removed himself thousands of miles away without obtaining leave from any Company supervisor, and without advising anyone within the Company as to his departure or his eventual whereabouts. The fact that the grievor failed to return to British Columbia even in response to outstanding criminal charges against him also calls into question, in the Arbitrator's view, whether he in good faith would have responded to the request of the Company to attend a disciplinary investigation.

I am satisfied, on the balance of probabilities, that Mr. Clarke knowingly and deliberately abandoned his employment with the Company by his abrupt departure in the face of criminal charges on June 8, 1999. The suggestion that the Company is contractually obliged to pay for his return from his AWOL venture to Newfoundland to attend the investigation, which he knew or reasonably should have known would take place at or near Lytton, British Columbia within a reasonable time of the events, is more audacious than persuasive. Whatever the merits for a claim for transportation had the grievor not gone AWOL, this case must be decided on its own facts. In the Arbitrator's view it is not unreasonable for the Company to expect the grievor to remain present at the place he was last under Company direction. When he left without any authorization by the employer, or any advice to it as to his whereabouts, he did so at his own peril.

For all of the foregoing reasons the Arbitrator is satisfied that the Company did not have any obligation to pay the grievor's transportation costs from Newfoundland to British Columbia to attend his disciplinary investigation. The grievor was not dismissed without a fair and impartial investigation, which was conducted appropriately by the Company in the circumstances, after fair notice to Mr. Clarke. Acting on such information as was available to it, the Company had cause to terminate the grievor's employment and no compelling basis has been shown for the Arbitrator to reverse that outcome.

The grievance must therefore be dismissed.

June 16, 2000

(signed) MICHEL G. PICHER
ARBITRATOR