

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3127

Heard in Montreal, Wednesday, 12 July 2000

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS (UNITED TRANSPORTATION UNION)

DISPUTE:

Discipline of 45 demerit marks assessed Yard Foreman H.J. Pura of Coquitlam, B.C., on March 11, 1999.

JOINT STATEMENT OF ISSUE:

On March 11, 1999, Mr. Pura was assessed discipline for conduct unbecoming an employee of Canadian Pacific Railway, for failing to protect the theft of property belonging to a customer of the Company, for failing to advise Company Officers when he became aware of the theft of property belonging to a customer of the Company and for stating an intention to share in the distribution of property stolen from a customer of the Company.

The Council contends that the Crew in question believed that they were receiving a gratuity for a job well done, not stealing from a customer of the Company. They feel that the evidence produced throughout the investigation process indicates that a misunderstanding about the product which was in the possession of the Crew took place and no intent or act of theft occurred. Without theft, there can be no reason for discipline and the Council has requested that the discipline be removed from Yard Foreman H.J. Pura's record.

The Company has declined the Council's request to remove the discipline assessed.

FOR THE COUNCIL:

(SGD.) L. O. SCHILLACI
GENERAL CHAIRPERSON

FOR THE COMPANY:

(SGD.) C. M. GRAHAM
FOR: GENERAL MANAGER, FIELD OPERATIONS,

There appeared on behalf of the Company:

C. M. Graham	– Labour Relations Officer, Calgary
M. E. Keiran	– Director, Labour Relations, Calgary
R. P. Zeglinski	– Manager, Yard Operations, Port Coquitlam

And on behalf of the Council:

L. O. Schillaci	– General Chairman, Calgary
M. L. Douglas	– Local Chairman, Vancouver

AWARD OF THE ARBITRATOR

The facts pertinent to this grievance are not in dispute. On February 17, 1999 the grievor and his crew were performing switching operations at Western Grocers, a customer located on the Marpole Spur in Vancouver. It appears that during the course of the tour of duty Yard Helper Jeff Thompson saw a carton of toilet paper which had apparently fallen or had been placed near the switching track. He apparently formed the opinion that the carton was intended as a gratuity for the switching crew, and loaded it onto the locomotive. The customer's supervisors noticed that the carton was missing, and made a telephone inquiry with the Company's Industrial Clerk in the Transportation Service Centre (TSC) at Winnipeg, relating the customer's belief that the box of toilet paper may have been taken by the grievor's crew. When an inquiry was immediately relayed to Coquitlam Yard Service Representative C. Roy, and on to Yard Manager F. Herbold, Mr. Herbold contacted the grievor by telephone advising of the missing box. It appears that Mr. Herbold indicated to Mr. Pura that if the box was with the crew it should be returned immediately to the customer. That is in fact what was done.

Following an investigation Mr. Thompson was dismissed and Mr. Pura as well as Locomotive Engineer R. Schwabe were assessed forty-five demerit marks respectively. The Company formed the conclusion that Mr. Thompson was the active participant in the theft of the box, while the grievor and locomotive engineer failed in their obligation to stop him or report his wrongdoing. It is common ground that subsequently Mr. Thompson was reinstated into his employment, by agreement, subject to a three year restriction to yard service. In mitigation the Council adduces evidence to the effect that there have been a number of occasions when switching crews have been treated to a gratuity by a customer as thanks for good work performed. Several examples were cited, supported by written statements from a number of employees. The Company does not deny that such practices may have occurred, but it questions whether there was any real colour of right which could be invoked by the grievor's crew. In response to that position the Council notes the testimony of the members of the grievor's crew to the effect that another employee had told them, sometime earlier, that he had heard that they would receive a gratuity from the customer in the form of a carton of toilet paper.

The Arbitrator finds that account to be highly implausible. It is difficult to imagine upon what basis a customer would convey to one crew that it had some general future intention to provide a gratuity to another crew, and to state specifically that it would take the form of a box of toilet paper. Absent confirmation from a credible witness employed by the customer, with direct knowledge of the alleged promise, the Arbitrator finds this aspect of the evidence to be highly doubtful, and not proved, on the balance of probabilities.

What the evidence leaves, therefore, is a scenario in which the grievor and his crew appropriated what appeared to be a stray or misplaced box of toilet paper in circumstances where they knew, or reasonably should have known, that it was not theirs to take. Fortunately there are mitigating circumstances. Firstly the grievor was not the person primarily involved, and was more in the nature of an unprotesting witness. Secondly, upon receiving the message from Mr. Herbold, Mr. Pura obviously took steps to ensure that the box of toilet paper was immediately returned to the customer.

The only real issue of substance is the appropriate measure of discipline. Clearly, theft, or the knowing tolerance of theft by others, is a serious infraction which goes to the bond of trust which is at the root of the employment relationship of persons who, like the grievor, are employed in a largely unsupervised setting and who, in the service of a common carrier, come into direct contact with the property and goods of customers. In assessing discipline, however, all factors must be considered, including the mitigating factors which are touched upon above. It is also pertinent to consider that the grievor has been employed by the Company for some twenty-two years, and has never previously been disciplined for any misconduct involving dishonesty. His record was clear for more than six years prior to the incident in question. In all of the circumstances I am satisfied that a somewhat lesser degree of discipline would have been appropriate to bring home to the grievor the importance of vigilance in preventing an act of theft by another employee, and that thirty demerits would have been sufficient for that purpose.

The grievance is therefore allowed, in part. The Arbitrator directs that the grievor's record be amended to reflect the assessment of thirty demerits for the incident of February 17, 1999.

July 14, 2000

(signed) MICHEL G. PICHER
ARBITRATOR