

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3385

Heard in Montreal, Tuesday, 9 December 2003

concerning

CANPAR

and

UNITED STEELWORKERS OF AMERICA (LOCAL 1976)

DISPUTE:

The dismissal of Mr. Karim Villafana.

JOINT STATEMENT OF ISSUE:

On September 29, 2003, Mr. Villafana attended an interview for: "Sleeping in truck on Friday September 26, 2003."

On October 6th, 2003, Mr. Villafana's employment was terminated for: "After reviewing all the facts of the incident of September 26th, where you have been found malingering on the job, it has been decided to terminate your employment with Canpar Transport Ltd. effective immediately."

The Union grieved that the dismissal does not meet the standards of just cause and claimed that Mr. Villafana be reinstated into his employment and be reimbursed for all salary and benefits list since October 6th, 2003.

The Company declined the grievance.

FOR THE UNION:

(SGD.) R. PAGÉ
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) P. D. MACLEOD
VICE-PRESIDENT, OPERATIONS

There appeared on behalf of the Company:

P. D. MacLeod – Vice-President, Operations, Mississauga
R. Dupuis – Regional Manager, Quebec & Ottawa

And on behalf of the Union:

R. Summerside – Chief Steward, TC Local 1976
D. Neale – EVP/FST. TC Local 1976
R. Pagé – Staff Representative, USWA

AWARD OF THE ARBITRATOR

The facts of this grievance are not in dispute. The grievor, a part-time warehouseman who was also a lead hand, concealed himself in a trailer rather than return to work at the conclusion of the scheduled break at 21:00 on September 26, 2003. As lead hand he was responsible for the handling of incompatibles. Hub Manager Dominic Morin, noting that some incompatible shipments needed to be dealt with, went looking for Mr. Villafana and ultimately found him in the Chicoutimi trailer, lying on a long carton with his eyes closed. It is common ground that two other employees were then doing parcel sortation in the trailer.

The grievor denies that he was sleeping, and indeed there is no conclusive evidence that he was. He maintains that he was simply resting, as he considered that his work was then fully caught up. The Company submits that it is irrelevant whether the grievor was asleep at the time, stressing its view that his actions amounted to deception of the employer tantamount to the theft of working time for which the grievor was being paid. Following an investigation of the incident Mr. Villafana, whose record then stood at fifteen demerits and a warning letter, was dismissed for “milingering [sic] on the job”.

The Arbitrator can readily understand the perception of the Company. Mr. Villafana was not a long service employee, having been hired in March of 2000. As a lead hand he did have a degree of leadership responsibility. Moreover, given that many of the Company’s operations in Canada are largely unsupervised, lead hands operate under a substantial degree of trust.

This Office has had prior occasion to consider the disciplinary treatment of persons alleged to have been sleeping on the job. In **CROA 2847**, a case cited by the Union's representative, the Arbitrator found that the Company failed to prove that an individual who sat for an extended period of time with his head on his desk was in fact sleeping on the job. In contrast, in **CROA 1573**, a different conclusion was reached. That case concerned a security guard employed by Canadian Pacific Ltd. at the port of Montreal. The individual in question locked the door of his guard house, turned out the lights and slept, seated in his chair, for a period of over an hour and a half, while the security gate for which he was responsible remained in the open position. In sustaining discharge in that case the arbitrator commented, in part, as follows:

The Arbitrator finds it difficult to dismiss the submission of the Company that Mr. Boisvert locked his Gatehouse, extinguished the lights and raised the traffic barrier so as to deliberately create the conditions to enable him to sleep uninterrupted while on duty. The gravity of that offence cannot be understated. It is not disputed that on the docks of the Racine Terminal there are, typically, between seven hundred and one thousand containers of valuable merchandise in the care and custody of the Company. On the night in question the grievor effectively abandoned his duty as the individual primarily responsible for safeguarding those goods as well as the Company's property.

It is trite to say that each case must be decided on its own particular facts. In my view the facts reviewed in **CROA 1573** are substantially more serious than those which appear in the case at hand. The characterization of the grievor's actions as deception tantamount to theft is, I think, somewhat excessive, in the circumstances disclosed. The unrebutted representation of the Union's representative is that the grievor went into the trailer with a bag of potato chips and a soft drink, generally intent on extending his break for a period of time. While it is obvious that he did seek to conceal his actions, the thrust

of his offence might better be characterized as absenting himself from his workplace and engaging in an unauthorized break from his duties.

The Arbitrator agrees with the Company that the grievor's actions were plainly incompatible with the greater responsibilities of a lead hand. The evidence establishes, however, that shortly after the incident giving rise to this grievance Mr. Villafana was removed from lead hand responsibilities, apparently by virtue of his inability to work five days a week. In other words, as of the date of his termination, he no longer had lead hand responsibilities.

In the Arbitrator's view, it is not inappropriate in the instant case to consider a substitution of penalty, albeit a severe disciplinary measure given the deliberate concealment of the grievor's actions disclosed in the case at hand. I am therefore satisfied that it is not inappropriate to return the grievor to his employment without loss of seniority, but that his return should also be without compensation, and that it be scheduled for January 6, 2004, with the three month period between his termination and reinstatement to be registered as a suspension for his deliberate dereliction of duty. As noted above, the grievor is also not to return to work in the capacity of a lead hand, subject to any contrary decision of the Company.

December 15, 2003

(signed) MICHEL G. PICHER
ARBITRATOR