

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 3916

Heard in Edmonton, 10 June 2010

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

**TEAMSTERS CANADA RAIL CONFERENCE
MAINTENANCE OF WAY EMPLOYEES DIVISION**

DISPUTE:

Dismissal of Mr. R. Baker.

JOINT STATEMENT OF ISSUE:

On December 17, 2009, the grievor, Mr. Ray Baker, was served with a Form 104 which provided that he was being dismissed from Company service for (1) his alleged removal and/or attempted removal of Company property without permission as indicated by the formal criminal charges filed against him, and (2) his insubordination when he failed to properly answer questions during the formal investigation held on November 30, 2009. A grievance was filed.

The Union contends that the grievor was not insubordinate when he failed to answer certain questions during the investigation. He had been criminally charged and refused to answer on the advice of Union counsel. During the investigation the grievor repeatedly requested a 72 hour postponement to permit him to confer with a criminal lawyer. The Company refused this short postponement and thus violated section 15.1 of the collective agreement by failing to conduct a fair and impartial hearing before dismissing him.

The Union contends that the dismissal of the grievor was excessive and unwarranted in the circumstances.

The Union requests that the grievor be reinstated into Company service immediately without loss of seniority and with full compensation for all wages lost.

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

FOR THE UNION:
(SGD.) WM. BREHL
PRESIDENT

FOR THE COMPANY:
(SGD.) K. HEIN
LABOUR RELATIONS OFFICER

There appeared on behalf of the Company:

M. Thompson – Labour Relations Officer, Calgary
R. Hampel – Counsel, Calgary

T. Yamashita	– Service Area Manager
J. Drader	– CP Police Constable
L. Parsons	– CP Police Constable
K. Hein	– Manager, Labour Relations, Calgary

And on behalf of the Union:

Wm. Brehl	– President, Ottawa
D. W. Brown	– Workers' Advocate, Ottawa
A. R. Terry	– Assistant Vice-President,
S. Brighton	– Local Representative, Revelstoke
F. Tooke	– Observer

AWARD OF THE ARBITRATOR

The material before the Arbitrator confirms that the grievor was arrested on or about November 8, 2009 for his alleged involvement in a plan to steal a Company generator. That day Engineering Service Area Manager Tim Yamashita was advised by CP Police that it would be advisable to remove the grievor from service. The following day that was done.

Some nine days later, according to an unchallenged memorandum of Mr. Yamashita, he received a telephone call from Mr. Baker. He relates that Mr. Baker indicated that his lawyer had advised him to call and provide the information which he was then giving. He then advised the supervisor that he had stolen a snow blower and a compressor from the Company, and that no one else was involved in that theft. He apparently added that employee Frank Tooke, who was his landlord living upstairs, had attempted to retrieve the stolen property and that he had been threatened by the persons then holding it. He concluded his comments by saying to Mr. Yamashita "I got mixed up in some bad stuff and I owed people money, which is why I stole from the Company." He added that he had some concerns because he thought the police were

attempting to implicate persons who were not involved, and that he was concerned about his family members, including his daughter.

On November 27, 2009 the grievor was advised that he would be required to attend a formal investigation into the circumstances of his having been arrested and criminally charged with breaking and entering with intent to commit an indictable offence. When he attended at the investigation the following Monday, November 30, 2009 he repeatedly invoked the advice of his Union lawyer that he should not answer questions of substance, and requested a 72 hour postponement of the investigation to consult with his criminal lawyer. That request was declined.

In the result the only material of substance before the investigation was the grievor's admission to Mr. Yamashita that he had stolen from the Company. It is not disputed that in 1998 Mr. Baker was assessed forty demerits for the theft of Company property totalling some \$4,885 in value.

The Union submits that the grievor was denied a fair and impartial investigation by reason of the Company's refusal to postpone the investigation as he requested. The Arbitrator cannot agree. At the time of the investigation Mr. Baker had been criminally charged and had been removed from service for some twenty-three days. He obviously had ample time to reflect on his circumstances and knew, or reasonably should have known, that the Company would be investigating his actions. He had ample opportunity to consult with a criminal lawyer. I am satisfied that the declination of his request for a

further postponement at the time of the investigation did not deprive him of a fair and impartial investigation as contemplated under the provisions of the collective agreement.

Following the investigation the grievor was discharged “for your involvement in the removal and/or attempted removal, of Company property without permission as indicated in the formal criminal charges against you on November 7, 2009, and failing to properly answer any questions related to this subject during a formal investigation on November 30, 2009 (insubordination) ...”.

The Arbitrator must agree with the Union’s submission to the effect that the grievor’s refusal, in the circumstances, to answer question did not constitute insubordination. The grievor was at all times respectful to the investigating officer and was clear in expressing his concern that he should avoid making statements which might be used against him, and that he wished to consult with a lawyer. I am satisfied that the grievor’s decision to exercise his lawful right to protect information which might otherwise be used against him in criminal proceedings, as well explained to the Company, did not constitute insubordination.

I have more difficulty with the suggestion of the Union that there was no meaningful evidence before the Company at the time of the investigation with respect to theft or attempted theft on the part of Mr. Baker. While I agree that the information available to the Company with respect to the events surrounding his arrest was less

than clear and complete at the time of the investigation, the unchallenged fact remains that the Company had at the investigation the statement of Mr. Yamashita which involved the grievor's admission that he had stolen Company property, a statement which was provided to him at the outset of the investigative proceeding. The grievor offered no rebuttal to that statement, no withdrawal of what he had said to his supervisor nor any explanation. In the circumstances I am satisfied that the Company did have grounds to conclude that Mr. Baker was involved in the removal of Company property, and that it has just cause for his termination.

In light of his prior disciplinary record, which includes a previous incident of substantial theft, I am satisfied that this is not a case which involves mitigating factors that would justify any reduction of the grievor's penalty, notwithstanding his service of some thirty years.

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

June 18, 2010

(signed) MICHEL G. PICHER
ARBITRATOR