

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

CASE NO. 4767

Heard in Calgary with Video Conferencing, November 12, 2020

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

UNIFOR COUNCIL 4000

DISPUTE:

The discharge of Intermodal Heavy Equipment Operator B. Vestrocy.

JOINT STATEMENT OF ISSUE:

The grievor was investigated on November 28, 2019, for 1) violation of CN Productivity Expectations Notice; 2) completion of Union business during his assigned work hours from 23:00 November 14, 2019 to 07:00 November 15, 2019; and 3), the involvement in the disappearance of Company property on November 9, 2019 and the subsequent reappearance of this property on November 15, 2019. On December 3, 2019, the grievor was notified that he was being discharged.

The Union contends that the Company violated article 23.2 of the collective agreement by holding the grievor out of service in excess of three working day pending the investigation the Union further contends that the Company failed to meet the burden of proof to sustain its imposition of discipline as it relates to Mr. Vestrocy's involvement with the disappearance and subsequent reappearance of Company property. The Union requests that the discipline be removed in its entirety, and that the grievor be made whole for all losses associated with this case, plus interest and damages as requested in the final stage grievance.

Preliminary Objection: The Company maintains that the matter is not arbitrable as the Union has failed to abide by the mandatory provisions of the collective agreement. The grievance was not submitted to be heard at arbitration within 60 days following receipt of the decision rendered at Step II of the grievance procedure, as provided for in Article 5.11 of the Supplemental Collective Agreement, and thus is considered withdrawn by the Union in accordance with Article 5.13 of the Supplemental Agreement.

The Company asks that the Arbitrator decline jurisdiction. In the alternative, the Company also submits that the Union's contentions are without merit.

FOR THE UNION:
(SGD.) B. W. Kennedy
National Representative

FOR THE COMPANY:
(SGD.) S. Blackmore
Senior Manager Labour Relations

There appeared on behalf of the Company:

V. Paquet – Manager Labour Relations, Toronto
S. Blackmore – Sr. Manager Labour Relations, Edmonton

L. Williams	– Human Resources Business Partner, Toronto
T. O'Reilly	– Terminal Coordinator, Brampton
M. Hornak	– Terminal Sr. Manager, Brampton
J. Garrett	– Garage Supervisor, Toronto
J. A. Smith	– Human Resources Business Partner, Toronto

And on behalf of the Union:

B. Kennedy	– National Representative, Edmonton
K. Montrose	– Regional Representative, Brampton
K. Boisvert	– Local Chairperson, Brampton
D. Kissack	– Council 4000 President, Winnipeg
B. Vestroy	– Grievor, Brampton

AWARD OF THE ARBITRATOR

PRELIMINARY OBJECTION

The Company raised a preliminary objection claiming that the Union breached Article 5.11 of the Supplemental Collective Agreement by failing to submit the grievance to arbitration within 60 days following receipt of the decision rendered at Step II of the grievance procedure. The parties agreed to seek an oral ruling at the outset of the arbitration hearing on the alleged time limits breach. The Arbitrator heard submissions from the parties and dismissed the preliminary objection. I agreed to provide brief written reasons for my decision.

Prior to scheduling a dispute with CROA, the parties normally meet in a Joint Conference to discuss outstanding grievances with the aim of attaining mutually acceptable settlements and avoid having to advance disputes to arbitration. The parties had scheduled a Joint Conference meeting in Toronto on March 16, 2020 to discuss this and other cases, but the meeting was postponed due to the COVID-19 pandemic crisis. That postponement in my view crystallized the understanding at that time between the parties that the grievance would, as had been the practice in the past, proceed to be

discussed at a Joint Conference at a future date once the COVID crisis was being managed and, if necessary, to arbitration. In short, I find there was an implicit understanding once the March 16, 2020 meeting was postponed that the time lines would not be strictly enforced given the uncertainties involving the COVID crisis.

I would also add, upon further reflection, that this is an appropriate case to exercise my authority to extend the time limits pursuant to section 60(1.1) of the **Canada Labour Code**, given the extenuating circumstances resulting from the COVID crisis as well as the fact that this is a termination grievance where the very livelihood of the employee is at stake. See: **CROA 3824, 4201**.

MERITS

The Grievor is 36 years old and has been employed as a Helper, Equipment Operator (EO) and Heavy Equipment Operator (HEO) since September 26, 2005 at the Brampton Intermodal Terminal (“BIT”). The grievor was working as an HEO at BIT on November 14, 2019 from 23:00 to 07:00 November 15, 2019. The events in this case took place at the Intermodal Garage (“Garage”) located within the Company property.

On November 11, 2019, an employee from Lottridge Tire, a supplier to the Company, advised that four winter tires mounted on rims for a Ford truck were missing from the Tire Bay where the Lottridge storage containers are located at the BIT. After the Company conducted an investigation into the missing tires, one of the Lottridge employees confirmed on November 11, 2019 that Lead Hand Joey Rahal had requested the tires on November 9, 2016. The Lottridge employee confirmed that he had assisted

Mr. Rahal on November 9, 2019, at Mr. Rahal's request, to roll the tires from inside the storage container to outside the storage container.

The Company made repeated but unsuccessful searches at the BIT for the four tires from November 11, 2015 through to November 15, 2015.

The four tires reappeared outside the storage container next to the Tire Bay sometime during the early hours of the grievor's shift on November 15, 2019.

A review of surveillance videos, GPS and individual interviews with employees indicated to the Company that the tires were stolen by Mr. Rahal on November 9, 2019. A formal investigation with Mr. Rahal was scheduled for November 15, 2019. The grievor, a Union officer in his own right, was one of the Union's representatives scheduled to be in attendance at Mr. Rahal's investigation on November 15, 2019.

The video camera evidence confirmed that the grievor took several breaks during the course of his shift. The video camera captured the grievor's movements when he was on his first break between 01:30 and 01:45 in the Garage area of the BIT, except for 8 minutes. The video camera evidence revealed two unidentified individuals moving around the tire bay area between 01:36 and 01:39. The Tire Bay area is near the Garage where the grievor was parked at the time.

There is a 3 minute overlap between the grievor's absence from the video camera of 8 minutes and the arrival and departure of a pick-up truck from the Tire Bay area.

The grievor indicated at his investigation that he entered the Garage Area at the BIT in order to speak to the mechanic on duty. He wanted to know whether the mechanic could shed any light on the upcoming investigation of the tire incident because he was on days off at the time of the tires disappearance. He also wanted to obtain washer fluid for his truck. He stated in that regard at his investigation:

Q 19. Refer to statement provided by Garage Lead Hand Orley Kellar. Specifically:

I met Brian Vestroy coming out of the gradual as I was crossing the parking lot. He asked me if I had access to the security camera's. I said "No I didn't". He asked who does. I told him he needed to talk to James Garrett or Terry Hamilton.

Indicating that upon meeting with the Garage Lead hand your first interaction was to establish who had access to camera footage at the garage. Can you explain why you were talking about camera systems in the garage?

A: As I explained in my previous answer I was looking for information on an upcoming investigation as the work was all caught up in the yard. I then asked him for washer fluid which was my main purpose for going down there.

In reference to the time between 01:30 and 01:45, and the 8-minute gap during that time that he was off camera, the grievor stated:

Q 24: Referred to Memo to File submitted by Supervisor James Garrett, dated November 26, 2019, indicating that after arrival at the garage at 01:30 on November 15, 2019 he observed your movements in camera system and noted an approximate 8 minute gap where you are not visible. Can you comment on your activities during this noted time gap in your exact whereabouts between 01:30 and 01:44 on November 15, 2019?

A: Yes that is when I had walked and met Mr. Kellar who was south of the garage service truck which was parked out back on the West side, where the old mobile bay is. So that would explain why I am not seen maybe. I am not sure what that garage camera can see.

Q 25: Referencing the footage from Camera 1, Outgate Camera 1 and 2, taken between 01:30 and 01:45, verified with snapshots taken in evidence. It appears that during the time period of 01:36 and 01:39 on November 15, 2019 a non CN vehicle enters the terminal through the outgate and proceeds to the tire bay area. It appears there is movement of 2 individuals around the vehicle which immediately exits through the same route of entry. Can you comment on the time period of this activity coinciding with the time you are not visible to garage cameras?

A: I cannot speak to the alleged vehicle entering property as I had no knowledge of this until today. When you showed me this footage. As far as not being seen on camera that is covered [b]y Mr. Keller's statement when I'm speaking to him for approximately 10 minutes. And furthermore if I had knowledge of a non-CN vehicle on property I would have had to immediately report the vehicle to CN police or immediate Supervisor as we would have a trespasser.

Mr. Kellar, for his part, stated in his handwritten statement:

On November 15 at approximately 1:30 AM to 1:45 AM I met Brian Vestroy coming out of the garage as I was crossing the parking lot. He asked me if I had access to the security cameras. I said "No I didn't". He asked me who does. I told him he needed to talk to James Garrett or Terry Hamilton. He then asked for Washer Fluid for his Hitch Truck which I obtain from Parts. We met for approximately 5-10 minutes. This is to the best of my recall from memory.

The grievor's assertion that his discussion with Lead Hand Kellar was outside the view of the camera is inconsistent with the evidence. Lead Hand Kellar was specific in his statement that he encountered the grievor as he was crossing the parking lot on the west side of the building. It was only after his 8-minute absence from the camera's view, between 01:30 and 01:45, that the grievor met up outside in the parking lot area with Lead Hand Kellar.

Mr. Garrett described the grievor's movements at this time from his review of the video camera recording:

Mr. Brian Vestrocy is not seen on any Camera after that for approximately 8 minutes, after approximately 8 Minutes he is seen again coming back on Camera from the east side of the Tractor Bay and heading out the North West door towards the Hitch Truck. He is then observed talking to Garage Lead Hand Orley Kellar outside the Garage on the West side of the building. Mr. Orley Kellar is then seen providing jug of Washer Fluid to the operator outside, Mr. Brian Vestrocy then fills the washer fluid in the presence of the Garage Lead Hand in the Hitch Truck, gets back into the Truck and then drives away out of the Garage Area at 01:45 hrs.

The grievor has been unable to provide a plausible explanation for his absence of 8 minutes between 01:30 and 01:45. His testimony at his investigation that he was speaking with Mr. Kellar and obtaining washer fluid during this 8-minute period conflicts with the video evidence. The video evidence has the grievor speaking with Mr. Kellar outside the garage, in full view of the camera, at which time Mr. Kellar provides the grievor with a jug of washer fluid.

It was during this time of the grievor's 8 minute absence from the video camera, between 01:36 and 01:39, that two individuals were observed at the tire bay area. Given the grievor's movements during his shift and proximity to the area where the four tires were returned; the fact that his explanation of being with Mr. Kellar during his absence of 8 minutes conflicts with the video evidence; the fact that he initially questioned Mr. Kellar about the location of the surveillance cameras; and, the fact that he did not want to provide the information on the identity of Mr. Rahal with whom he was about to attend an investigative meeting as his union representative, leads the Arbitrator to find on the

balance of probabilities that the grievor was one of the two individuals caught on video camera returning the four tires during his shift on November 15, 2020.

I am reinforced by my finding of the grievor's culpability given that it was the grievor who informed the Lottridge employees, shortly after 06:19 on November 15, 2019, that he had located the four missing tires in the exact same area outside the storage bins where they had first been discovered missing on November 11, 2020. The proximity in time between the recovery of the tires and the investigation of Mr. Rahal on November 15, 2019 also leads the Arbitrator to conclude that the grievor was making a last-ditch effort, by announcing the tires had been recovered, to deflect culpability from Mr. Rahal and ultimately attempt to salvage Mr. Rahal's employment.

The evidence on balance leads to the conclusion that the grievor acted dishonestly by assisting with the return of the stolen tires and then lying about his involvement with the incident. In doing so, he caused irreparable harm to the bond of trust which is fundamental to any employment relationship. The Company under the circumstances had just cause to discipline the grievor. There are no mitigating factors in the face of the grievor's actions which merit a reduction in the termination penalty.

The grievance is dismissed.

November 23, 2020



JOHN M. MOREAU
ARBITRATOR