CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 456

Heard at Montreal, Tuesday, September 10, 1974

Concerning

CANADIAN PACIFIC TRANSPORT COMPANY LIMITED
CP TRANSPORT (WESTERN DIVISION)

and

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES

DISPUTE:

The Union claim that Mr. Barnes was unjustly dealt with when he was dismissed and that he should be returned to service without loss of pay.

JOINT STATEMENT OF ISSUE:

On March 14, 1974, Terminal Manager Lanchbery, Thunder Bay, advised R. G. Barnes as follows.

> "This will confirm our discussion of today's date that you are withheld from service resulting from the incident of the morning of March 14. This incident is presently under action by the CP lnvestigation Department."

Subsequently, Mr. Barnes was issued Form CPT-660 which stated "Dismissed for cause".

The Union appealed the decision, claiming that Mr. Barnes be reinstated with full compensation.

The Company declined to reinstate Mr. Barnes.

FOR THE EMPLOYEES:	FOR THE COMPANY:
(SGD.) R. WELCH GENERAL CHAIRMAN	(SGD.) C.C. BAKER DIRECTOR, LABOUR RELATIONS AND PERSONNEL

There appeared on behalf of the Company:

C. C. Baker — Director, Labour Relations & Personnel, CP Transport -Vancouver

And on behalf of the Brotherhood:

R. Welch — General Chairman, B.R.A.C., Vancouver

AWARD OF THE ARBITRATOR

The grievor was discharged on March 20, 1974, following an investigation held on that day, because of alleged pilferage of a can of nuts, contained in a carton being part of a shipment which was unloaded by the grievor and others. The alleged pilfering is said to have occurred on March 14, 1974.

The same incident give rise to a charge of an offence under the Railway Act, but the charge was dismissed in Court after it was held that certain evidence proferred by the prosecution was inadmissible. The court proceedings occurred some time after the grievor's discharge. The dismissal of the charge does not imply any finding that the grievor had not in fact committed the act for which he was discharged. In any event, a different standard of proof applies. This is not a case of "double jeopardy"; the question of just cause for the grievor's dismissal is distinct from that arising in criminal proceedings and I deal here only with the matter of industrial discipline as it arises und the collective agreement.

On the day in question the grievor's foreman found on his desk an open carton containing twenty-three cans of mixed nuts. lt seems, from the material before me, that the carton flaps were open when the carton was unload and that the foreman had intended to reseal the flaps. After noticing that there was a can missing from the carton, the foreman looked in his desk drawer where he found an open can of nuts, and some of the nuts gone.

Shortly thereafter, a company investigator was advised by the grievor that he had placed the nuts there. The explanation advanced by the Union is that the grievor, in the course of unloading a box car, had noticed that a carton had been knocked over, that some cans had spilled out, and that one of the cans had lost the plastic cover which had been over the top. Apparently considering these to be damaged goods, he took the can which lacked the cover, opened the can, took some nuts, and placed the can in the desk drawer. Such a procedure is not, it is said, rare.

It seems clear to me that the grievor's action in opening property that was not his, was improper. Whether it should be characterized a theft, is not, I think, a matter which need be determined here. It is significant, in assessing the grievor's conduct for the purposes of a discipline case to bear in mind that he was dealing with what might appear to have been damage goods, that his action was not surreptitious, and that there seems to have been some precedent for it. None of these considerations excuses the grievor's action, but they may, I think, be considered in assessing the penalty imposed.

That the grievor was subject to discipline seems to me to be clear. lt has not been shown, however, that the grievor's action justified the penalty of discharge. In view of the grievor's slight seniority, I would not award compensation except for the period from the date of the hearing of this matter. On the material in this case, there does not appear to have been any violation by the Company of the provisions of Article 17 of the collective agreement, with respect to the investigation of this matter.

For the foregoing reasons it is my award that the grievor be reinstated in employment without loss of seniority or other benefits, save that any compensation for loss of earnings shall be only for the period from September 10, 1974, until the date of his actual reinstatement.

J. F. W. WEATHERILL
ARBITRATOR