

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 824

Heard at Montreal, Tuesday, April 14, 1981

Concerning

CANADIAN PACIFIC LIMITED (CP RAIL)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Claim for removal of discipline assessed Track Maintenance Foreman P.G. Roy with compensation for lost wages.

JOINT STATEMENT OF ISSUE:

On June 17, 1980, Company material was found on Mr. Roy's private property by the Company's Investigation Department. An investigation was held and it was established to the satisfaction of the Company that Mr. Roy had taken Company property without permission. Mr. Roy was subsequently dismissed for this offence.

The Union contends that the dismissal of Foreman Roy for "theft of Company property from West Saint John and Bay Shore" was without just and sufficient cause.

The Union further contends that the Company violated Section 18.3 of Wage Agreement No. 17 by not rendering a decision within twenty-eight (28) days from the date the investigation was completed, therefore Mr. Roy should be reinstated.

The Company contends that the discipline was justified and that the decision was rendered in accordance with Section 18.3 of Wage Agreement No. 17.

FOR THE EMPLOYEES:

(SGD.) H.J. THIESSEN
SYSTEM FEDERATION GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) J.B. CHABOT
GENERAL MANAGER,
OPERATION &
MAINTENANCE

There appeared on behalf of the Company:

J. Cuin -- Supervisor, Labour Relations, CP Rail,
Montreal
S.J. Samosinski -- Labour Relations Officer, CP Rail, Montreal
S.K. Chopra -- Division Engineer, Saint John Division, CP
Rail, Saint John

W. Jeffrey -- Roadmaster, CP Rail, Saint John
J.H. Blotsky -- Asst. Supervisor, Labour Relations, CP
Rail, Montreal

And on behalf of the Brotherhood:

H.J. Thiessen -- System Federation General Chairman, BMWE,
Ottawa
A. Passaretti -- Vice-President, BMWE, Ottawa
L. DiMassimo -- General Chairman, BMWE, Montreal

AWARD OF THE ARBITRATOR

The grievor, who entered the Company's service on October 15, 1951, was discharged on July 22, 1980, for theft of Company property. At the time of his discharge the grievor was working as a Track Maintenance Foreman.

On June 17, 1980, the Company's Investigation Department recovered approximately 77 railway ties from the grievor's property. The grievor subsequently stated that he had directed a payload operator to take the ties from the Company's premises to his property. As well, a search of the grievor's residence conducted by the police resulted in the discovery of a wheelbarrow, a shovel, a maul, a pick, a switch-lock and two radar lights all belonging to the Company and all of which (save for the shovel) the grievor admitted taking.

The grievor was charged under Section 294(b) of the Criminal Code with theft of the railway ties (but apparently not of the other items). He was tried for and acquitted of that offence. In the proceedings before me, of course, both the issue and the standard of proof are different. That the Court may have considered that proof beyond a reasonable doubt was not made does not affect my duty to decide whether or not, on the material before me, it is more probable than not that the grievor had improper possession of the Company's property, and that there was just cause for his discharge. In view of the seriousness of the matter and its consequences, the finding of just cause must be based on cogent and compelling evidence.

I have no doubt that the evidence meets that test. The grievor did take the ties, some of which at least were saleable and which it appears the grievor, directly or indirectly, attempted to sell. While the Company may in the past have been willing to give away or dump railway ties which it could no longer use, it had recently been selling those which were saleable, and the grievor himself had been present when arrangements were made to sell to another employee certain of the very ties which the grievor later took. The argument that the ties were scrap and that the grievor was saving the Company the trouble of taking them to the dump simply will not stand. Apart from this, there is no justification whatever for the grievor's possession of the other items of Company property which have been described.

It is my conclusion from the material before me that the grievor stole the Company's property. None of the considerations which might

support the reinstatement of an employee who has stolen his employer's property would appear to apply in this case. In my view, there was just cause for the discharge of the grievor. It is not necessary to underline his betrayal of his responsibilities as a Foreman.

It is contended that the Company was in violation of Article 18.3 of the Collective Agreement in that it did not render a decision in the matter within 28 days of the investigation being completed. The grievor's statement was taken on June 19, 1980. The actual discharge of the grievor was not effected until July 22nd (although a notice of discharge had been prepared dated June 20th). The early preparation of the notice has no particular significance; it was not until it was delivered, or attempted to be delivered to the grievor that it was effective.

The taking of the grievor's statement was not necessarily the conclusion of the investigation. On the same date, the Company took a statement from the payload operator, and on a review of the statements, it was felt necessary to take a further statement from the payload operator. That was done on July 7, 1980. In my view, it was proper to consider that the investigation concluded then. The taking of a second statement was not a "delaying" tactic (the Company had nothing to gain by "delay" except to assure itself that its proposed action was correct - that is, the "delay" might have operated to the grievor's benefit, had the case not been so clear), but was a reasonable precaution for purposes of clarification and a proper part of the investigation. Thus, in acting as it did on July 22nd, the Company was not in violation of Article 18.3, which it is not necessary to interpret for the purposes of this award.

For the foregoing reasons it is my conclusion that there was just cause for the discharge of the grievor, and that the discharge was not in violation of the provisions of the Collective Agreement. Accordingly, the grievance is dismissed.

J.F.W. Weatherill,
Arbitrator.