

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1222

Heard at Montreal, Thursday, March 8, 1984

Concerning

CANADIAN NATIONAL RAILWAY COMPANY  
(CN Rail Division)

and

CANADIAN BROTHERHOOD OF RAILWAY,  
TRANSPORT AND GENERAL WORKERS

DISPUTE:

Dismissal of Mr. F. Carere, classified labourer, Toronto, Ontario,  
effective September 4, 1982.

JOINT STATEMENT OF ISSUE:

Mr. Carere attended a Company investigation on July 28 and August 17,  
1982 concerning items found at his residence during searches by CN  
and Metro Toronto Police. Mr. Carere refused to answer questions  
concerning the matter under investigation on both occasions. He was  
subsequently dismissed by the Company.

The Brotherhood requested that Mr. Carere be returned to service  
without loss of wages, benefits or seniority. The Company denied the  
Brotherhood request.

FOR THE BROTHERHOOD:

(SGD.) TOM McGRATH  
National Vice-President

FOR THE COMPANY:

(SGD.) D. C. FRALEIGH  
Assistant Vice-President,  
Labour Relations

There appeared on behalf of the Company:

W. W. Wilson	- Manager Labour Relations, CNR, Montreal
S. A. MacDougald	- System Labour Relations Officer, CNR, Montreal
J. Bart	- Labour Relations Officer, CNR, Toronto
J. Dunn	- Labour Relations Officer, CNR, Toronto
M. Edwards	- Captain, CN Police, CNR, Toronto

And on behalf of the Brotherhood:

T. N. Stol	- Representative, CBRT&GW, Toronto
A. Miloff	- Local Chairman, CBRT&GW, Toronto
F. Carere	- Grievor, Toronto

AWARD OF THE ARBITRATOR

On September 4, 1982 the grievor was discharged "for being found in

unauthorized possession of company materials and goods stolen while in the company care".

At all material times the grievor was employed as a labourer at the MacMillan Yard Motive Power Shop in Toronto. On April 29, 1982 a Metropolitan Toronto police investigation of the grievor's residence resulted in the discovery of illicit drugs. In the course of that investigation CN Police were alerted that certain goods apparently belonging to the company were found at the grievor's premises. There is no dispute that most of the items found were the property of CN. These items amounted in value to \$113.50 and included the following:

1. One large box containing 20 bundles of Kimtowel industrial paper towels.
2. One carton containing 17 Union Carbide industrial flashlight batteries.
3. Two new flashlights.
4. One roll of paper towels with a CN logo.
5. One carton containing a hand pump with identifying CN express markings on the carton.

The grievor testified that all the above items save the box of Kimtowels were the property of CN. His father had purchased the cartons of Kimtowels for home use. The grievor stated that he had found the CN carton containing the hand pump and other items while driving home after his night shift was completed approximately a year prior to its discovery by the police. He had intended to return the goods but had inadvertently forgotten to do so.

He indicated that the flashlights are used in the course of his employment and he often takes them home with the intention of returning them when he reports for work. He stated the same with respect to the roll of paper toweling with the CN logo found on his premises. The flashlight batteries were all used. The grievor suggested he had developed the practice of saving used batteries.

The main issue in this proceeding is whether the grievor, as alleged, was found "in unauthorized possession of company materials and goods stolen while in the company care". It is of some importance to stress that the company had altered the allegation from simple theft on the grievor's part prior to the notice of investigation to the more elaborate allegation made in the letter of discharge. Much was made of this alteration by the trade union in its submissions. In my view the trade union's objection goes more to form than to substance.

It is clear that the essential ingredient of the company's case is the notion that the goods found at the grievor's residence were stolen. In such instances, once it is acknowledged, as the grievor has done in these proceedings, that the goods were in fact company property and were in his possession without the employer's authorization the onus rests upon him to provide a reasonable explanation. In the absence of such explanation the inference may be made that the grievor stole the goods. In other words, the essence of the charge against the grievor, notwithstanding the form in which it was expressed in his letter of discharge, is that he engaged in

theft.

On the principal theft issue the grievor's explanations for being in possession of each of the items may at first blush appear plausible. Nonetheless, the cumulative impression that results with respect to those explanations has created an indelible taint on his credibility. One may accept the explanation that the grievor simply forgot to return the hand pump upon its discovery in its original carton. Nonetheless, why was it just at the hearing of this matter that that particular explanation came to light? It is feasible that the grievor's father purchased the carton of Kimtowels. Nonetheless no explanation was forthcoming as to why his father would purchase these towels by the carton. Indeed, the grievor's explanation that he did not have access to the company's stores in order to misappropriate a carton of the Kimtowels was simply beyond belief. The discovery of a roll of towels with the CN logo would tend to undermine his story with respect to the purchases made by his father. The grievor indicated that he saves used batteries. But to what purpose? The company's explanation that the were ultimately returned to the warehouse for later use betrays the genuineness of the grievor's version. In light of the foregoing, serious doubt also has been cast on his stated intention of returning the flashlights found at his residence.

Indeed, on balance, the grievor has not satisfied the onus incumbent upon him to provide a reasonable explanation for his unauthorized possession of the goods in question. Accordingly, I am satisfied that the employer had cause, for the reasons alleged, particularly in light of his mediocre work record, to terminate his employment. It is common ground that the grievor had accumulated 30 demerit marks at the time of his termination.

Several procedural objections were made by the trade union with respect to the manner in which the company conducted its investigation of the allegations made against the grievor pursuant to Article 24 of Agreement 5.1. These issues were somewhat complicated by the concurrent criminal proceedings instituted at the instance of the company for theft under \$200.00. The evidence demonstrated that on two occasions the company attempted to conduct an interview with the grievor in accordance with Article 24.1 in that "an employee...will not be disciplined without an investigation". On each occasion the grievor, on advice of his counsel, refused to answer questions put to him by the company's representative on grounds that the answers might incriminate him with respect to the criminal matter. In support of this position, reliance was made on The Charter of Rights, Part 1, Section 11 which reads in part as follows:

"11. Any person charged with an offence has the right  
(c) not to be compelled to be a  
witness in proceedings against that  
person in respect to the offence."

Although the company may have been imprudent in insisting in proceeding with the investigation under Article 24.1 once the grievor's refusal, on advice of his counsel, to participate in the interview was made known, there is nothing to indicate in the

material before me that his wishes were not respected. Moreover, although the company may have appeared imprudent in its refusal to accept the trade union's offer to await the outcome of the criminal trial before proceeding with the Article 24 investigation it was under no obligation to do so. Once the grievor refused to participate in the proceedings, the company was thereby absolved of its responsibility under Article 24.1 and was free to proceed on the basis of the information in its possession to impose an appropriate disciplinary sanction. The grievor simply proceeded at his peril in foregoing the opportunity to participate in the investigation in order to provide the company with an explanation in answer to the theft allegation. In sum, no evidence was adduced to substantiate the charge that the grievor's rights were at all compromised thereby warranting the vitiation of the discharge penalty. I do not accept the notion that the grievor's Solicitor necessarily gave him sound advice in advising him not to participate in the investigation. Section 5 of The Canada Evidence Act is designed to afford the protection claimed by the grievor against self-incrimination and still allow a concurrent proceeding to go forward. Because the grievor's perceived rights were protected in any event I do not have to make any conclusive ruling on the relevance of The Canada Evidence Act.

Another trade union objection pertained to the company's irregularity under Article 24.2 in failing to hold the investigation "as soon as possible". Aside from the fact that any delay in the holding of the said investigation would not of itself give cause for vitiating the discharge, I find it inconsistent for the trade union to argue such delay when the grievor at no time was prepared to participate in the investigation. This allegation is simply without substance.

Another objection pertained to the alleged breached time limit for the imposition of discipline after the completion of the investigation in that more than 21 days elapsed before the grievor had been advised of his discharge. In this regard no prejudice to the grievor was demonstrated simply because he was never "out of service" pending the employer's decision to discipline. Had he been "out of service" then the employer would obviously have been required, pursuant to Article 24.2, to compensate the grievor for any loss of pay with respect to the delay in meting out discipline.

An objection was also made to the company's failure to allow the grievor to consult in private with his trade union representative during the course of the investigation. Although the record appears to show that the company acted with much imprudence in denying the grievor such access to private consultation, it equally shows that the grievor, owing to his refusal to participate in the investigation was not prejudiced by virtue of the company's lapse.

In short, none of the technical or procedural objections made by the trade union has persuaded me to vitiate the otherwise warranted recourse taken by the company to the grievor's termination for his alleged misconduct. For all the foregoing reasons the grievance is denied.

DAVID H. KATES,  
ARBITRATOR.