

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1402

Heard at Montreal, Wednesday, September 11, 1985

Concerning

CANADIAN NATIONAL RAILWAYS

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Appeal of dismissal of Track Maintainer
L. R. Hudson, 18 May 1984.

JOINT STATEMENT OF ISSUE:

On 16 November 1983, as a result of information gathered by a CN Police Officer and the local R.C.M.P. authorities, search warrants were obtained and executed at the residence of Mr. Hudson. Various pieces of CN material were seized at an estimated value of \$1,500.

Mr. Hudson was charged with theft under the Criminal Code of Canada and on 29 February 1984 he appeared in Court at which time he pleaded guilty as charged. On 4 April 1984 the grievor was fined \$500 on each of two charges, put on probation for one year and was ordered to make restitution in the amount of \$193.20 to the Court by 29 June 1984 for the value of twelve railway ties.

Following an investigation Mr. Hudson was discharged from the service of the Company effective 18 May 1984 for theft of Company material.

The Brotherhood contends that Mr. Hudson was unjustly dismissed.

The Company disagrees with the Brotherhood's contention.

FOR THE BROTHERHOOD:

(SGD.) PAUL A. LEGROS
System Federation
General Chairman

FOR THE COMPANY:

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

There appeared on behalf of the Company:

T. D. Ferens - Manager Labour Relations, CNR, Montreal
J. Russell - Labour Relations Officer, CNR, Montreal
Lieut. B.S. Pitcher - CN Police, Borden, PEI.

J. L. McNeill - Roadmaster, CNR, Summerside, PEI.
M. Cox O'Rourke - Secretary, Labour Relations, CNR, Montreal

And on behalf of the Brotherhood:

P. A. Legros - System Federation General Chairman, BMWWE,
 Ottawa
R. Y. Gaudreau - Vice-President, BMWWE, Ottawa
J. J. Roach - General Chairman, BMWWE, Moncton
A. Toupin - General Chairman, BMWWE, Montreal

- 2 -

AWARD OF THE ARBITRATOR

The grievor was terminated for theft of company property that allegedly took place in November, 1983. He was also charged with theft under the relevant provisions of the criminal code for the same incident and pleaded guilty to those charges. Following his conviction the grievor was called for an investigation with respect to his alleged theft and in due course was discharged.

Following the grievor's termination he was apprehended and charged once again for theft of company property. This allegation was made while the grievor's discharge grievance was being processed under the grievance procedure. It is common ground that the grievor admitted his unauthorized possession of company property.

The trade union does not contest the allegation that the grievor took company property without its permission. But despite the grievor's guilty plea for the incident in November, 1983 that resulted ultimately in his discharge the trade union insisted that the grievor did not have the necessary intent (mens rea) to steal. It submitted that the grievor at all material times was of diminished responsibility owing to alcohol and drug abuse. And, indeed, the source of his problem pertained to a work-related accident that caused him considerable pain and discomfort. In light of the grievor's situation I was asked to reverse the discharge penalty and reinstate him to the company's employ. In short it was requested that the grievor be treated as any other incapacitated employee who is beset by the trauma of illness.

The trade union's theory is faulty for several reasons. I do not doubt, owing to the medical evidence, that the grievor has an alcohol and drug abuse problem. But apart from the evidentiary difficulty of linking that medical problem to the notion of diminished responsibility, it was clearly established that the accident that gave rise to his drug abuse occurred in March, 1984, several months after he had been charged with theft. Moreover, the grievor, in any event, advised his trade union representative that he had consumed neither alcohol nor drugs since he began to attend "AA" meetings in

December, 1983. Or, more significantly, whether the grievor was on or off drugs or alcohol, his subsequent acts of theft confirmed that his problems had no bearing on his capacity to establish the necessary intent to steal.

Because I have rejected the trade union's defence of diminished responsibility, I am satisfied that the grievor ought to be held accountable for his acts of theft. The discharge is accordingly sustained and the grievor's grievance is rejected.

DAVID H. KATES,
ARBITRATOR.