

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1530

Heard at Montreal, Wednesday, June 11, 1986

Concerning

ONTARIO NORTHLAND RAILWAY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Appeal of discipline assessed Crane Operator J. N. Murray.

JOINT STATEMENT OF ISSUE:

The Union contends that Crane Operator Mr. J. N. Murray, employed at North Bay, Ontario, was awarded demerit marks for the alleged theft of a pump and other articles of Company property without just cause.

The Company disagrees with the Union's contention.

FOR THE BROTHERHOOD:

FOR THE COMPANY:

(SGD.) G. SCHNEIDER
System Federation General Chairman

(SGD.) P. A. DYMENT
General Manager

There appeared on behalf of the Company:

A. Rotondo - Manager Labour Relations, ONR, North Bay
W. R. Deacon - Trainmaster & Rules Instructor, ONR,
Englehart
J. H. Huisjes, P.Eng - Superintendent, Maintenance of Way, ONR,
North Bay

And on behalf of the Brotherhood:

G. Schneider - System Federation General Chairman, BMWE,
Winnipeg
R. Y. Gaudreau - Vice President, BMWE, Ottawa

AWARD OF THE ARBITRATOR

The company assessed the grievor a disciplinary penalty of thirty demerit marks and a thirty day suspension for his "having hidden in your assigned supply car of #1841 stolen portable water pump".

It is common ground that an essential ingredient of the charge of misconduct relates to the grievor being in possession of "stolen" property belonging to the company.

The company's case is based on circumstantial evidence. That is to say, the missing water pump was found in the grievor's supply car to

which only he had access. Once found, the water pump was hidden in a box covered with rags.

The one serious shortcoming in the company's circumstantial case was the fact that the grievor was charged when the allegedly "stolen" property was still on the company's premises. This shortcoming was highlighted by Constable How, the investigating officer, who in his report dated August 21, 1985 writes:

"The decision to proceed internally rather than criminally against Murray was influenced by several problems, one being that the pump unit, although stolen, was still on O.N.R. property in O.N.R. equipment and it appeared that a good defence lawyer could most likely use this to gain a dismissal of any charge. Also, the lack of a serial no. and other identifying marks in the event we let Murray transport the item off the property, then legally move in and seize it would have presented problems in obtaining a search warrant as well as the amount of time the unit could have been tied-up in a Police storage room somewhere."

For a like reason I have not been convinced that the water pump, although it may very well have been found in the grievor's supply car without company authority, was shown to have been a "stolen" property at the material time of the incident.

And because the company has failed to prove a significant component of its allegation of misconduct as set out in its disciplinary notice I must hold that just cause for discipline has not been established.

For all the foregoing reasons the company is directed to remove the disciplinary penalties assessed the grievor and to compensate him accordingly.

I shall remain seized.

DAVID H. KATES,
ARBITRATOR.