

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1558

Heard at Montreal, Tuesday, September 9, 1986

Concerning

VIA RAIL CANADA INC.

and

CANADIAN BROTHERHOOD OF RAILWAY,
TRANSPORT AND GENERAL WORKERS

DISPUTE:

Dismissal of Mr. I. Byard for misappropriation of Company's supplies.

JOINT STATEMENT OF ISSUE:

Following an investigation held on October 21, 1985, Mr. I. Byard, Stock Checker, was dismissed for the misappropriation of Company's supplies.

The Brotherhood appealed the dismissal on the basis that the investigation conducted by the Corporation was not "fair and impartial", and that the items found in Mr. Byard's possession were of nominal value.

The Brotherhood requested that Mr. Byard be reinstated with full seniority and that he be reimbursed for any loss of wages and benefits.

The Corporation rejected the Brotherhood's request.

FOR THE BROTHERHOOD:

(SGD.) TOM McGRATH
National Vice-President

FOR THE CORPORATION:

(SGD.) A. GAGNE
Director Labour Relations

There appeared on behalf of the Corporation:

Marcel St-Jules	- Manager, Labour Relations, VIA Rail Canada Inc. Montreal
C. O. White	- Officer, Labour Relations, VIA Rail Canada Inc. Montreal
C. A. B. Henery	- Human Resources Officer, VIA Rail Canada Inc. Toronto
J. Kish	- Officer, Personnel and Labour Relations, VIA Rail Canada Inc., Montreal

And on behalf of the Brotherhood:

R. Gee	- Representative, CBRT&GW, Toronto
T. N. Stol	- Regional Vice-President, CBRT&GW, Toronto

B. Prue - Witness
I. Byard - Grievor

AWARD OF THE ARBITRATOR

This is the arbitration of the grievance of Mr. I. Byard against his discharge for the alleged misappropriation of Corporation property. The Union maintains that the investigation conducted by the Corporation was not fair and impartial and that theft has not been established on the evidence.

The evidence establishes that in September of 1985 two members of the Canadian National Railway Police Force, prompted by information from an informant, were investigating the theft of goods from the Corporation's Service Centre at Union Station in Toronto. On one occasion, which is related as occurring on September 14, 1985, the grievor was observed in a suspicious act recorded on the police's video surveillance system. Shortly after 5:00 A.M. on the morning of that date Mr. Byard was observed removing a carton from the Employee Service Centre. Subsequently, when he was interviewed by CN Police Lieutenant D. Charles and Constable N. Meech, the grievor admitted that the carton contained twenty-four cans of beer stolen from the Corporation. During the course of the same interview he further related to the officers that he had misappropriated another twelve cans of beer on September 7, 1985. He further disclosed to the officers that he had been involved in other pilferage of Corporation property, signed a written statement to that effect.

Subsequently, the grievor voluntarily accompanied the officers to his home, where he produced for them a number of items of Corporation property. The items taken were generally of little value, including twenty-four plastic wine glasses, eighty-eight individual containers of Sanka coffee, thirty-two coffee cups, a package of serviettes and a packet of fifteen garbage bags. The total value of the goods taken is approximately \$135.00.

It is not disputed that during the course of the interview with the police officers Mr. Byard was denied the opportunity to have Union representation. The evidence establishes that the Officers are employed by CN, and not by VIA Rail Canada Inc., which contracts for their services. The Arbitrator is satisfied that the investigation which they were conducting was in the nature of a criminal investigation pursuant to their public authority as peace officers under the Railway Act. The purpose of the investigation and interview was the swearing of an information by the officers, to be prosecuted by the Office of the Crown Attorney, and not the internal administration of discipline for industrial relations purposes. Subsequent to the investigation, on September 25, 1985, the Corporation was, however, provided a written report outlining the investigation the grievor's admission and the inventory of the stolen goods in a letter signed by Inspector L. E. Reeks of the C.N. Police. On the strength of that information, which was the principal evidence in an investigation held by the Corporation at Toronto on October 21, 1985, the grievor was terminated for the misappropriation of Corporation property.

The evidence further establishes that although the grievor was

criminally charged, the charge against him was withdrawn on the agreement of the Crown Attorney. While the evidence in this regard is not complete, it appears that the manner in which the grievor was advised of his right to remain silent and retain a Counsel was deemed insufficient to support the prosecution of the charge.

The Union submits that the discharge cannot be sustained on a number of grounds. Its Representative argues that circumstances of the investigation are suspect, and call into question the grievor's right to obtain advice from a Union Representative. It maintains, moreover, that the evidences establishes that the goods removed by the grievor were in fact condemned waste materials of no value to the Corporation which were taken pursuant to a common practice well known to immediate supervisors. Lastly, its Representative stresses the evidence of the grievor denying both that he stole Corporation property or that he admitted doing so to the police officers.

There is substantial conflict between the evidence of the grievor and that of the two officers regarding his alleged admission of theft. According to Mr. Byard, he at no time confessed to stealing beer or any other property from the Corporation. He testified that on the occasion he was observed removing a carton of beer from the premises, he was merely exchanging his own beer which he had left over from a party, for the same number of cans of the Corporation's beer of his favorite brand. With respect to the numerous other items found in his home, Mr. Byard explained that these had all been removed from waste bins at work, or were taken with the permission of a Supervisor because they were no longer of any value to the Corporation.

The Arbitrator has substantial difficulty with the grievor's evidence. I find the explanation in respect of the exchange of beer implausible in the extreme. Nor can I accept his denial of a full admission of theft to the two Officers. Constable Meech adduced in evidence a written statement signed by the grievor expressly admitting that he had taken the beer, without any reference to an exchange, and had done so in such a way so as to avoid detection. The same document contains the grievor's admission without any qualification in respect of condemned goods that he similarly pilfered other items of the Corporation's property.

With regard to the evidence before me, I am satisfied that the grievor engaged in a sustained and repeated pattern of theft of his employer's property. I am forced to the conclusion that his conduct is not mitigated by the relatively small value of what was taken, that his was not an isolated instance of a single act of compulsive theft. Nor can I conclude that his misappropriations were known by or acquiesced in by management.

I likewise can find no violation of Mr. Byard's procedural rights under the Collective Agreement. Article 24 of the Collective Agreement gives employees subject to suspension or discharge the right to a hearing. At that point the employee is entitled to full representation by the Union. It is not disputed that that right was accorded to the grievor with respect to the meeting of October 21, 1985. On the basis of the material placed before me I cannot conclude that the investigation of the CN Police Officers, who

exercise public authority as peace officers, in a situation analogous to a municipal or provincial police force, involved any violation of a right of the grievor to Union representation under the Collective Agreement. Absent more ample argumentation of this issue the Arbitrator has no basis to depart from the reasoning in this regard reflected in an earlier arbitration emanating from this office in CROA Case #1538.

For the foregoing reasons the grievance is dismissed.

MICHEL G. PICHER
ARBITRATOR