

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1564

Heard at Montreal, Wednesday, September 10, 1986

Concerning

CANADIAN PACIFIC LIMITED (CP RAIL)  
(Eastern Region)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Messrs Y. Francoeur and A. Galvano, Track Maintenance Foreman and Leading Track Maintainer, Hochelaga Yard, Montreal Terminals, were dismissed from Company service for being found on September 12, 1985, in possession of merchandise and of company tools and supplies, in violation of U.C.O.R. General Rules E and L, of General Rule X of the Maintenance of Way Rules and Instructions and of paragraph 1 of Standard Practice Circular 5, Track.

JOINT STATEMENT OF ISSUE:

The Union contends that:

1. Messrs. Francoeur and Galvano were not in violation of General Rules E and L of the U.C.O.R., nor were they in violation of General Rule X of the Maintenance of Way Rules and Instructions.
2. The discipline is too severe and they be reinstated to their former positions without loss of seniority and compensated at their regular rate of pay while out of service.

The Company denies the Union's contention and declines payment.

FOR THE BROTHERHOOD:

(Sgd) L. M. DiMASSIMO  
FOR: System Federation  
General Chairman

FOR THE COMPANY:

(Sgd) G. A. SWANSON  
General Manager,  
Operation and Maintenance

There appeared on behalf of the Company:

J. H. Blotsky - Asst. Supervisor Labour Relations, CPR,  
Toronto

J. Favreau - Deputy Division Engineer, CPR, Quebec  
Division

R. A. Colquhoun - Labour Relations Officer, CPR, Montreal

And on behalf of the Brotherhood:

H. J. Thiessen	- System Federation General Chairman, BMW, Ottawa
L. M. DiMassimo	- Federation General Chairman, BMW, Montreal
V. Dolynchuk	- General Chairman, BMW, Edmonton
E. J. Smith	- General Chairman, BMW, London
M. L. McInnes	- General Chairman, BMW, Winnipeg
G. Valence	- General Chairman, BMW, Sherbrooke
R. DellaSerra	- Local Chairman, BMW, Montreal
Y. Francouer	- Grievor, Montreal

#### AWARD OF THE ARBITRATOR

The Arbitrator accepts the position of the Company that theft is, *prima facie*, a dismissable offence. In the instant case, however, bearing in mind that the burden of proof is upon the Company, I cannot conclude either that the General Rules or the Standard Practice Circular have been violated, or that theft has been established, on the balance of probabilities.

The material establishes that the grievors were in possession of several books and two solvent containers which they had found strewn upon the ground in the Company's rail yard during the course of their work. While it is not denied that the goods in question might have been stolen from the Company's freight containers by persons unknown, and the grievors did not deny that they might have been in possession of stolen material, there is no evidence to suggest that they removed the six books and the two cans of solvent from a freight container. When they discovered a substantial cache of this material behind a shed they immediately alerted the Company's police.

In the Arbitrator's view these are not the actions of persons who, as the Company alleges, participated in a deliberate conspiracy that involved the removal of goods from freight containers. While the grievors may have been negligent in not immediately disclosing to the constables that they were in possession of similar materials which they had found a few hours earlier, those goods had not been taken off the Company's property and could not, at that point, be considered stolen.

It is also alleged that the grievors pilfered tools and equipment. However, it is not disputed that the track and switch clearing tools and equipment later found by the police at Mr. Francoeur's home are of the kind which employees are typically authorized to keep in their vehicles to facilitate more efficient snow removal operations. The shovel found in Mr. Galvano's possession would generally fall into the same category. The Arbitrator accepts the explanation of Mr.

Francoeur that he had temporarily transferred the equipment into his home when he purchased a new vehicle. Likewise, I am not satisfied that Mr. Galvano meant to misappropriate Company property.

In both cases, however, the grievors demonstrated a serious error in judgement. By their delay in informing the police constables about the materials which they had found earlier, and their lack of immediate candour with the investigating officers, they attracted the understandable suspicion of the Company. Likewise, their failure to notify their supervisors, or to request their authorization to transfer their tool into their homes on a temporary basis -- an authorization which in all probability would have been granted -- they exceeded the bounds governing the normal external possession of tools by Company employees.

In the circumstances the Arbitrator is satisfied that both employees have been made acutely aware of their obligations in respect of the off-site possession of the Company's tools and the necessity to report promptly and fully on the finding of any goods on Company property. The Arbitrator therefore orders that they be reinstated without compensation or loss of seniority. I remain seized of this matter in the event of any dispute between the parties respecting the interpretation or implementation of this award.

MICHEL G. PICHER,  
ARBITRATOR.