CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1631

Heard at Montreal, Tuesday, March 10, 1987

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

The BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Dismissal of Mr. I. Casseri account fraudulent use of a Company credit card.

JOINT STATEMENT OF ISSUE:

Following an investigation, Mr. I. Casseri was discharged from the Company's service effective 18 April 1986 account his fraudulent use of CN Fleet Credit Card No. 006-547-040-3.

The Brotherhood contends that the Company violated Article 18.2(d) of Agreement 10.1 and that the discipline was too severe a punishment.

The Company disagrees with the Union's contention.

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD.) P.A. Legros	(SGD.) J.P. Green
System Federation	for Assistant Vice-President
General Chairman	Labour Relations

There appeared on behalf of the Company:

T.D. Ferens	- Manager Labour Relations, Montreal
J. Dunn	- Labour Relations Officer, Montreal
S.J. Williams	- Labour Relations Officer, Montreal
D.J. Anderson	- Witness-CN Police Constable, Toronto
G.J. Holdsworth	Witness, CN Police Constable, Toronto
G.F. McCarthy	- Roadmaster, Mimico, Witness

And on behalf of the Union:

J. Boland	- Federation General Chairman, London, Ont.
P.A. Legros	- System Federation General Chairman, Ottawa
G. Roach	- General Chairman, Moncton
W. Montgomery	- General Chairman, Belleville

AWARD OF THE ARBITRATOR

It is not disputed that the grievor wrongfully used a Company credit card to purchase gasoline for his own vehicle on March 7, 1986. As a Track Maintenance Foreman, employed in Mimico, at Toronto, he was authorized to purchase gasoline for a Company truck, by the use of a credit card which was normally to be kept in that vehicle. On the date in question, at 0630 A.M. the grievor attended a Petro Canada service station, purchasing some $30.00 in gasoline for his own automobile. The tank was filled, and based on the volume purchased the material discloses by deduction that Mr. Casseri's gas tank was approximately one-third full when he entered the gas station. When he provided the service station attendant a truck license plate number to enter on the credit card purchase slip, rather than the license number of his own vehicle, the attendant became suspicious, noted the grievor's license number and notified the Company's police.

A statement provided to the CN Police by the attendant showed that similar transactions had occured involving the grievor on number of occasions in months previous. This general allegation was made known to the grievor at the investigation conducted by the Company on April 3, 1986. He was then also confronted with direct evidence that he had fraudulently purchased the gasoline by use of a CN credit card on both March 7, 1986 and August 30, 1985.

The grievor professed to no recollection of the trans- action of August 30, 1985. With respect to the March 7th incident, he related that he had been called for work on an emergency basis at 0200 on that day, and that he worked until 1630 hours. He explain that he left work at around 0630 in the morning, once the emergency was under control, to purchase gasoline for his car, in the belief that he might be working late. According to Mr. Casseri's account he reached the gas station and, having left home in a hurry that morning found that he did not have sufficient money, and had not brought his own credit card with him. He explained that he always kept the Company credit card on his person since the card kept in the truck had been stolen a few months previous.

At the hearing the Company sought to adduce material confirming the purchase of gasoline for the grievor's car on some seven other occasions in 1985 and 1986 through the use of the Company credit card. It is common ground that the particulars of these instances were not provided to the grievor at the time of the investigation conducted on April 3, 1986 and were not, in fact, known to the Company at the time of his discharge. The Union objected to the introduction of that material, its representative arguing that the Union did not come to the arbitration hearing prepared to deal with it, having had no prior notice. I must conclude that the Union's objection is well founded. Article 18.2 of the Collective Agreement provides for a formal investigation to be held in the case of an employee committing an alleged dismissible offense. Sub-paragraph (d) of Article 18.2 provides as follows:

> (d) Where an employee so wishes an accredited representative may appear with him at the hearing. Prior to the commencement of the hearing, the employee will be provided with a copy of all of the written evidence as well as any oral evidence which has been recorded and which has a bearing on his involvement.

> The employee and his accredited representative will have the right to hear all of the evidence submitted and will be given an opportunity through the presiding officer to ask questions of the witnesses (including Company Officers where necessary) whose evidence may have a bearing on his involvement. The questions and answers will be recorded and the employee and his accredited representative will be furnished with a copy of the statement.

The Arbitrator has some difficulty with the submission of the Company that the foregoing provision has not been violated because everything known to the Company was available to the grievor at the time of the investigation. While that may be true, it would appear to the Arbitrator to depart from the spirit of the provision, if the Company can, subsequent to the investigation, before a board or arbitration, assert new and different grounds of discipline of which the grievor has been given no prior notice and no opportunity of rebuttal. Even if it could be said that sub-paragraph (d) was tech- nically complied with, it would, in my view, offend the most basic rules of procedural fairness to allow such material to be adduced in evidence at the arbitration hearing without some reasonable notice to the grievor. In the instant case no such notice was provided, and the grievor was not in attendence at the hearing to respond to the further allegations. In the circumstances, at best, the Company might have sought an adjournment of the proceedings to conduct a supplementary investigation respecting the additional charges, consistent with the requirements of Section 18.2 (d) of the Collective Agreement, if it insisted on relying upon those further instances. That might also be the most practical course, since nothing would prevent the Company from imposing further discipline upon the grievor for the newly disclosed incidents even if he were reinstated following the arbitration of the two incidents at hand. On the whole, given the specific procedural protections established in the Collective Agreement it is not open to the Company to take the position that if the initial charges against the grievor do not stand up, the discipline assessed him is nevertheless justified because of the other incidents. Absent adequate investigation and notice to the grievor, the Company cannot assert that all nine incidents should now be examined in the arbitration hearing. For these reasons the Arbitrator declines to entertain the submissions of the Company respecting the additional incidents, or to give any weight to them in the assessment of this grievance.

The grievor is described as a good employee of 23 years service. These are factors which should be given some weight in considering whether a reduction in the measure of discipline is appropriate. On the other hand, theft is, prima facie, a dismissible offense, in some cases even where the amount which an employee steals from his or her employer is not substantial. Since theft generally negates the fundamental trust that must exist between employer and employee, it is only in exceptional circumstances that an Arbitrator's discretion will be exercised to reduce the measure of discipline in such cases. As was noted in CROA case #806, "... the common ground of most of those cases is that the theft was an isolated, anomalous act in the career of a person who has otherwise shown himself to be a good employee and a good citizen". It may also be noted that this office has had previous occasion to sustain the discharge of an employee for

theft arising out of the refueling of his vehicle with Company gasoline (see CROA case #1060).

A careful review of the material leaves the Arbitrator with substantial concern. Firstly, two instances of misappropriation are disclosed within a period of eight months. No explanation of the incident of August 30, 1985 was offered at the investigation or at the arbitration hearing. The subsequent incident of March 7, 1986, cannot, therefore, be described as an isolated or anomalous incident.

The grievor's explanation of the events of March 7th also leaves much to be desired. Firstly, it is difficult to accept his explanation that urgency required the filling of his car's gas tank on that day. The unrebutted assertion of the Company is that based on the amount of gasoline purchased at the fill-up, and the known capacity of the grievor's gas tank, he had fully one-third of a tank at the time he entered the gas station to use the Company's credit card for his own purchase. While Mr. Casseri claims that he intended to notify his supervisor and subsequently forgot, it appears that he nevertheless filled out a "fuel summary sheet" noting the purchase of gasoline for the Company truck on the occasion in question, without any notation or explanation of the true circumstances. Moreover, while the grievor maintained that he had the Company credit card on his person because a card had been stolen from the truck some months prior, the Company's records show no indication of a new card being issued for the vehicle in question. On the contrary, the same credit card number appears on the invoice dated August 30, 1985 and that of March 7, 1986. Lastly, the grievor could offer no explanation for the purchase of gas for his personal use on August 30, 1985. The incident in question cannot be described as isolated, and much of the material raises grave doubts about the grievor's candor.

In all the circumstances, the Arbitrator can see no reason to disturb the conclusion of the Company that the material in evidence discloses just cause for the grievor's discharge. For the foregoing reasons the grievance must be dismissed.

MICHEL G. PICHER
ARBITRATOR