CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1814

Heard at Montreal, Wednesday, July 13, 1988

Concerning

CANADIAN PACIFIC LIMITED

And

TRANSPORTATION COMMUNICATIONS UNION

DISPUTE:

Dismissal of employee F. Roper for theft of Company funds.

JOINT STATEMENT OF ISSUE:

Mr. F. Roper was employed as a Cashier at Windsor Station, Montreal, Quebec.

On February 8, 1988, he was removed from service, pending a hearing in accordance with Article 27.1 of the BRAC Collective Agreement, which was subsequently held on February 20, 1988.

Prior to the hearing of February 20, 1988 Mr. Roper was the subject of an investigation and questioning conducted by CP Rail Investigation Department.

Mr. Roper was dismissed on March 1st for "theft of Company funds and bus tickets during the period from December 1987 to February 1988 while employed as a Cashier at Windsor Station, Montreal."

The Union contends dismissal is excessive in this instance and requests Mr. Roper be reinstated with full compensation for wages and benefits.

The Company contends that dismissal for theft in this instance was required and warranted.

FOR THE UNION:	FOR THE COMPANY:
(Sgd) J. GERMAIN General Chairman	(Sgd) J. A. LINN General Manager Operation & Maintenance, I.F.S.

There appeared on behalf of the Company:

M. K. Couse	- Assistant Supervisor, Labour Relations, Toronto
P. E. Timpson	- Labour Relations Officer, Montreal

M. Carrier - General Agent, Windsor Station, Montreal

And on behalf of the Union:

J. H. Germain - General Chairman, Montreal
C. Pinard - Vice-General Chairman, Montreal
H. McDade - Local Chairman, Montreal
F. Roper - Grievor

AWARD OF THE ARBITRATOR

The material establishes that over a number of weeks the grievor engaged in the petty theft of cash and municipal transit bus tickets. The cash, totalling approximately $120.00 and the bus tickets, estimated at sixty in number, were taken by the grievor while they were being handled by him in the course of his duties as the sole cashier at Windsor Station in Montreal, where he is responsible for collecting, storing and making bank deposits of cash and tickets received by ticket clerks from commuters making use of the local train service operated out of Windsor Station by the Company pursuant to an arrangement with provincial and municipal transportation authorities. Mr. Roper's actions were disclosed following an investigation prompted by an apparent shortage in receipts in the Windsor Station operation. Although the Company did not appear to have evidence to establish the full extent of pilferage engaged in by Mr. Roper over the period of weeks concerned, when confronted with the charge against him he readily admitted the full facts of his wrong-doing.

The sole issue in this case is the appropriate discipline. It is well established that the presumptive penalty for theft is discharge. That has been consistently reflected in the decisions of this Office (see CROA 796, 806, 861, 899, 1030, 1162, 1165, 1279, 1402, 1440, 1467, 1474, 1538, 1558 and 1631). It is equally true, however, that dismissal is not automatic in such cases, and a number of factors must be considered in assessing whether an Arbitrator ought to exercise his or her discretion to impose a penalty other than discharge in a given case. For example, in C.R.O.A. No. 989, even where it was established that employees engaged in theft, taking obvious steps to deliberately conceal their actions, where what transpired was judged to be an "aberrant episode" a penalty short of discharge was substituted by the Arbitrator.

The preponderant view among Canadian arbitrators is that a number of factors may be taken into account in determining whether in all of the circumstances an employee found to have engaged in theft merits discharge. These may include the length of the grievor's service, his or her past record, any compelling personal or medical circumstances that may be linked to the conduct in question and the value of the goods stolen. (See CROA 1402, 1617 and re Northwood Pulp and Timber Ltd. and Canadian Paper Workers' Union, Local 603, (1974) 7 L.A.C. (2d) 244 (Wilson) and re East General Hospital and Service Employees' Union, (1975) 9 L.A.C. (2d) 311 (Beatty), and cases cited therein.)

In dealing with this issue Professor Palmer in Collective Agreement Arbitration in Canada (2d) at p. 368 made the following observations about a perceived shift from the draconian view of earlier arbitration awards:

> ... The new approach has developed out of cases where the acts depended on are more appropriately characterized as "pilfering" than theft or can be treated as a momentary aberration. Factors tending to show a momentary aberration where reinstatement can be considered are: a single offence which is promptly and frankly acknowledged; diligence; a clean record and good general character on the part of the employee. However, there is a heavy onus in this regard.
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> Thus, by attributing incorrectly to this earlier line of cases that discharge is the only appropriate penalty, it is then argued that this, like the position of Jean Valjean in Les Miserables, is patently wrong. Of course, this assumption is incorrect; all cases leave open the possibility of lesser discipline. ...
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> More recent cases suggest that an act of theft does not of itself always demand the penalty of discharge. The amount stolen, the issue of premeditation, the nature of the employee's job, his seniority and work record and all other relevant facts must be considered. Retribution is not appropriate in a labour relations context.
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> ...

How do the foregoing principles apply to the facts of the instant case? In the Arbitrator's view, after careful consideration, there are clearly exceptional and compelling grounds for the exercise of discretion to substitute a penalty less severe than discharge. The undisputed evidence is that Mr. Roper has been employed by the Company for thirty-two years, having commenced at the age of sixteen in 1955. Remarkably, during that entire period he has never once attracted a single demerit or other form of discipline whatsoever. It is uncontroverted that prior to the events disclosed in February of 1988 he was a good and trustworthy employee for more than three decades.

In the Arbitrator's view the motive for theft is a consideration that can be looked to, among others, in assessing an employee's conduct and the likelihood of his or her rehabilitation. The material in this case discloses, again without dispute, that commencing in November of 1986 Mr. Roper was met with a period of considerable personal economic hardship. He has a wife and an adoptive daughter to support. His spouse, who has suffered two heart operations in recent years, is unable to work or otherwise contribute to his family's income. In November of 1986 a garnishee order was placed by a bank against Mr. Roper's earnings in an amount totalling close to $10,000.00. In consequence of that order his wages were continuously

reduced by an amount of $550.00 each month. In light of a further deduction of $300.00 in each two-week pay period for a credit union mortgage loan, Mr. Roper was left with a take-home pay of little over $100.00 per two-week pay period. It was, needless to say, extremely difficult for him to care for himself, his wife and their daughter on not much over $50.00 a week.

Driven to this extreme, and with no further prospect of obtaining credit, Mr. Roper removed small amounts of cash, usually $2.00 daily, and in the latter stages of his pilferage, two bus tickets daily, to assist him in getting to and from work and, by his own uncontroverted explanation, to buy bread and milk for his family.

It should be stressed that the essential truth of this tragic account is in no way questioned by the Company. To the contrary, the material further discloses that following the investigation into Mr. Roper's conduct, the supervisory officer who conducted the investigation, an individual with whom he has worked for years, visited his home and personally gave him money to assist with the purchase of fuel oil and groceries. There is little doubt that this case involves a unique case of hardship and the grievor's desperate struggle to provide the necessities of life for his family.

In support of its decision to terminate the grievor, the Company's representative stresses that he was involved in more than one act of misappropriation. While it is true than his daily removal of amounts of $2.00 and two bus tickets over a period of weeks can be so construed, the Arbitrator is satisfied that what is disclosed in the instant case is an aberrant and clearly uncharacteristic course of conduct precipitated by unusual circumstances over a short period of time. While Mr. Roper's actions may be fairly described as more desperate than compulsive, they are not, in the Arbitrator's view, comparable to the acts of self-interested and wanton theft disclosed in the cases cited above. Mr. Roper pilfered cash and bus tickets for the sole purpose of enabling him to continue to hold his job by commuting, to provide his family with the barest necessities of food and to contribute to that part of his wife's medication that was not covered by his insurance plan. While these facts do not alter the strict characterization of his actions as theft, they are factors that must be taken into account in assessing whether his employment relationship must be viewed as irretrievably destroyed.

A further factor is the longevity and quality of Mr. Roper's prior service to the Company. For thirty-two years prior to this incident he was an exemplary employee who, extraordinarily, was never once disciplined by the Company. In the Arbitrator's view if an employee's negative record can properly be looked to to justify a greater measure of discipline, so too can a positive record be given weight in mitigating discipline, particularly where, as in the instant case, there are compelling circumstances to do so.

The material further establishes that in the grievor's case discharge has a particularly devastating impact. As one nearing fifty years' of age with no other employment background, his prospects for further work are dim. Moreover, should Mr. Roper be compelled by circumstances to draw on his pension at the age of fifty-five when he would first be entitled to do so, his pension benefits for life will

be cut in half by virtue of the fact that he was involuntarily discharged.

While none of the above factors, standing alone, might automatically tip the scales in favour of the grievor, taken together they are a formidable set of factors which, in the Arbitrator's view, establish an exceptional case for substituting another penalty for the grievor's termination after thirty-two years of employment. The longevity of his service, the irreproachable quality of his prior record, the tragic circumstances that motivated his actions in a single episode over a relatively short period of time, the clearly uncharacteristic nature of his acts in that period, combined with his frank admission of wrongdoing, including the volunteering of information not known to the Company, and, lastly Mr. Roper's clear understanding of the error of his actions, all militate compellingly in favour of a substitution of a lesser penalty in this exceptional case.

For the foregoing reasons the grievor shall be reinstated into his employment, in such position within the bargaining unit as the Company deems appropriate, without compensation or benefits and without loss of seniority. While the Arbitrator makes no order in this regard, this would appear to be a case in which the Company and the Union might usefully consider making some form of personal counselling available to the grievor, whether through the Employee's Assistance Plan or otherwise, with respect to budgeting and the management of his personal finances. I retain jurisdiction in the event of any dispute between the parties respecting the interpretation or implementation of this award.

July 15, 1988 (SGD) MICHEL G. PICHER
ARBITRATOR