

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2179

Heard at Montreal, Wednesday, 11 September 1991

concerning

CANPAR
(CP EXPRESS & TRANSPORT)

and

TRANSPORTATION COMMUNICATIONS UNION

EX PARTE

DISPUTE:

On or about March 18, 1991, the Company, by letter, dismissed employee Mr. R. Morris for "using CanPar credit card to purchase fuel for your private vehicle."

UNION'S STATEMENT OF ISSUE:

The Company interviewed Mr. Morris for "theft of Company fuel" on March 15, 1991.

The Union maintains that the Company, in review of the interview transcripts, did not establish a prima facie case of theft against this named employee.

The Company based on its own conclusions, having no real evidence to support the position, felt that the grievor's statements, as contained in the interview transcripts, were not valid, not truthful. The Union maintains that the Company has not to date established or produced any evidence that conclusively, or in the alternative, reasonably concludes that the grievor was in fact involved in "theft of Company fuel."

The second issue the Union is disputing relates to the employee's work record and the Company's inability to accurately administer the work record.

The Union maintains that the employee work record of the grievor should have reflected zero (0) demerits before this incident was placed on the work record, whereas the Company contends the grievor's work record showed twenty (20) demerits.

Since the Union maintains that the Company has not established a prima facie case of theft against the grievor, the Union is seeking the reinstatement of the employee with full compensation for lost wages, as well as employee benefits and no seniority loss.

To date, the Company feels the dismissal of Mr. Morris was justified and will not return the grievor to its employ.

FOR THE UNION:

(SGD.) J. J. BOYCE
SYSTEM GENERAL CHAIRMAN

There appeared on behalf of the Company:

A. Hamilton	- Counsel, Vancouver
P. D. MacLeod	- Director, Linehaul & Safety, Toronto
R. Wettstein	- Regional Manager, British Columbia
D. Dobson	- Senior Driver Supervisor, Vancouver

And on behalf of the Union:

D. McKee	- Counsel, Toronto
J. Crabb	- General Chairman, Toronto
M. Gauthier	- Vice-General Chairman, Montreal
R. Morris	- Grievor

AWARD OF THE ARBITRATOR

The evidence establishes, beyond contradiction, that a credit card issued to the grievor by the Company for the purchase of gasoline for his delivery van was used for the unauthorized purchase of fuel in the early morning hours of March 2, 1991. It is common ground that the use of the card in that manner constituted the theft of Company property.

When confronted with the fact that his card had been improperly used, a fact which was revealed by a random examination of Company invoices, the grievor denied any knowledge of its use. He states that to the best of his recollection he lent the card to another employee at the fuel station where the cards are used during the course of the last week of February. Mr. Morris maintains that he subsequently reported to Supervisor Dan Dobson that his card was lost, an event which he estimates to have occurred on Friday, March 1, 1991. Although the Union's written submission filed at the hearing states that both the loan of the card to another employee and the report of its loss to Mr. Dobson occurred on the same day, with the grievor relating to his supervisor that he had forgotten to whom he had loaned the card, a different account was given during the course of the grievor's evidence at the hearing. According to Mr. Morris it was sometime during the last week of February, perhaps two to four days before he reported the problem to Mr. Dobson, that the loan of the card in fact occurred.

The evidence of Mr. Dobson stands in stark contradiction to that of the grievor. He denies any recollection of a report of a lost card made to him by Mr. Morris at any time. Mr. Dobson confirms that on or about March 8, shortly after he came to work in the morning he found the grievor's gasoline credit card on the top of his out basket, on his desk. According to Mr. Dobson when he sought to return it to Mr. Morris the latter responded that he did not need it as he was then driving a propane fueled truck.

On a careful consideration of the entirety of the evidence, the Arbitrator is unable to accept the account of events related by Mr. Morris. The best evidence with respect to the use of his gasoline purchase card is drawn from the Company's own records. They reveal, without contradiction, that only two gasoline purchases were made using Mr. Morris' card during February of 1991, while he was assigned to gasoline fueled Truck 215. Those purchases were made on February 8 and February 25, respectively. Each of them involved the fueling of a single truck. If, as Mr. Morris contends, he lent his credit card to another employee, it could be reasonably expected that the records would reflect two gasoline purchases on a single day in the last week of February. The fact that a single purchase is disclosed by the records casts a degree of doubt on the events as related by Mr. Morris.

That doubt is compounded by the evidence of Mr. Dobson, which the Arbitrator takes to have been given candidly, and with some care. According to his testimony, the report of a loss or theft of a gasoline credit card is a relatively unusual event, which he estimates to have occurred no more than four to six times over the two years of his experience. On the whole, it would appear to the Arbitrator that the disclosure by an employee that his or her gasoline credit card was lost, stolen or otherwise went missing would be an event of some importance to Mr. Dobson, which would not go unremembered. That is particularly so if one were to accept the account of Mr. Morris to the effect that when he disclosed the loss of the card to Mr. Dobson, the supervisor took the time to go through his own records to identify the card number before purportedly advising him to make discreet inquiries among other drivers as to its whereabouts.

The cumulative impact of the evidence, viewed from the employer's perspective, is in my view compelling. The credit card issued to the grievor was used for an unauthorized purchase of gasoline in the early morning hours of a Saturday. Prior to that time, contrary to the grievor's evidence, the card had not been reported stolen or missing by Mr. Morris. The fact that the grievor reports that he had lent the card to another employee, whose identity he could not recall, is on its face highly implausible. The unchallenged evidence of Mr. Dobson is that while the use of one driver's card by another is discouraged, when it does occur it is in circumstances where the driver allowing another employee to use his card remains at the pump while it is being used, and does not part with it. Lastly, the general reliability of Mr. Morris' evidence is further brought into question by his account of the most elemental parts of his evidence. According to his evidence in chief he was switched from a gasoline powered van to a propane van in early February, and that it was only occasionally thereafter that he was assigned to a gasoline vehicle. The records filed at the conclusion of the hearing establish that the contrary is true. The earliest assignment of a propane fueled vehicle to Mr. Morris was on February 21, 1991. On all but three working days in the period surveyed, from February 1 to March 1, inclusive, he drove a gasoline powered van. While the apparent contradiction between the documented record and Mr. Morris' recollection is not of itself conclusive of the credibility of his evidence, it must be seen as one of a number of elements which, in their totality, fail to support his evidence and his overall

credibility.

On the whole, the Arbitrator is satisfied that the account of events and explanations advanced by Mr. Morris cannot be believed. While the accusation against him is based on circumstantial evidence, the testimony before the Arbitrator leads to the conclusion that the credibility of Mr. Morris' testimony cannot be relied on, and that the hypothesis advanced by the Company is the only reasonably supportable one in the circumstances. I am therefore satisfied, on the balance of probabilities, that the grievor did misappropriate gasoline for his personal use without authorization, by utilizing the gasoline credit card issued to him by the Company, on or about March 2, 1991. In the circumstances, there are no mitigating factors which would justify a reduction of the penalty imposed. The grievance must therefore be dismissed.

September 13, 1991

(Sgd.) MICHEL G. PICHER
ARBITRATOR