

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2183

Heard at Montreal, Wednesday, 11 September 1991

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Grievance against the discharge of Mr. Andr, DiStaulo.

JOINT STATEMENT OF ISSUE:

On January 12, 1989, Mr. Andr, DiStaulo was removed from service and ultimately discharged on January 31, 1989, for several acts of theft.

The Brotherhood contends that discharge was inappropriate. The acts of theft are admitted. The Brotherhood states, however, that discharge is inappropriate in this case. The Brotherhood contends that Mr. DiStaulo's acts of theft sprang not from a basic untrustworthiness or dishonesty, but from a deep seated emotional maladjustment which manifested itself in acts of theft. The Brotherhood also contends that Mr. DiStaulo has been in therapy and has overcome his psychological problem. The Brotherhood contends that reinstatement on conditions is appropriate in this case.

The Company disagrees.

FOR THE BROTHERHOOD:

(SGD.) R. A. BOWDEN

SYSTEM FEDERATION GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) W. W. WILSON

for: ASSISTANT VICE-PRESIDENT,  
LABOUR RELATIONS

There appeared on behalf of the Company:

D. Claude St. Cyr	- Manager, Labour Relations, Montreal
R. Lacavalier	- Counsel, Montreal

And on behalf of the Brotherhood:

D. Brown	- Counsel, Ottawa
R. A. Bowden	- System Federation General Chairman, Ottawa
A. Trudel	- General Chairman, Chomedy

#### AWARD OF THE ARBITRATOR

The material discloses, without controversy, that the grievor, an employee of some twenty years' good service employed as a foreman in the Bridge & Building Department was charged and convicted of the the Company property following a police investigation in January of 1989. A variety of items stolen by the grievor were retrieved from his home and cottage while others, such as building materials used in the construction of his cottage, could not be. In the result, the grievor was convicted of a criminal charge of theft, resulting in a fine of \$700.00 or a sentence of three months in jail, and a further order for the restitution of \$216.00 to the Company.

This is not a case where the act of theft committed by the grievor can be mitigated on the basis of it being a single impulsive act out of character with the behaviour of an otherwise reliable employee. The theft and misappropriation engaged in by the grievor, which extended to the repair of his own vehicle by Company employees on Company time, as well as the extensive pilferage of items such as blankets, shovels, a chemical toilet and building materials, are indicative of an extended pattern of premeditated theft over a considerable period of time. Standing alone, the facts as disclosed would clearly justify the decision of the Company to terminate the grievor's services on the basis that the relationship of trust between himself and his employer could no longer be sustained. The case, on that basis, would fall within the principles well established in the prior jurisprudence of this Office (see CROA 806, 1165 and 1631).

The sole basis of mitigation advanced by the Brotherhood, and ably articulated by its Counsel, is that the grievor's acts of theft were motivated by emotional problems which can be psychologically traced to his childhood. In support of that position it points to the fact that following his discharge the grievor committed himself to a program of psychological therapy in the care of psychologist Jean-Guy Bonin, commencing at the Maisonneuve-Rosemont Hospital in February of 1989 and extending through August of 1990. According to reports from Mr. Bonin filed in evidence, the grievor attended a substantial number of group and individual therapy sessions which identified a number of emotional and psychological disorders which are said to be at the root of Mr. DiStaulo's pattern of theft. Counsel for the Brotherhood stresses that the course of therapy followed by the grievor, which was paid for at his own expense, both explains his aberrant conduct and reflects his own good-faith resolve to correct his problem.

The Arbitrator is not without sympathy for the position advanced by the Brotherhood. If the evidence were limited to an unchallenged diagnosis on the part of Mr. Bonin, coupled with a sufficiently positive prognosis for the future improvement of the grievor's behaviour, which also stood unrebutted, the case for his reinstatement would be compelling. That, however, is not the state of the evidence before me. Firstly, there is nowhere to be found in the reports of Mr. Bonin a statement of professional opinion to the effect that Mr. DiStaulo's emotional and psychological problems are fully under control, or that it can be reliably predicted that his

prior patterns of conduct would not reassert themselves. At most, Mr. Bonin's reports state that the grievor has attained a greater sense of self-reliance and improved judgement and that he "dares to hope for better things for him and his family."

On the opposite side of the ledger, the Company has tendered letters of opinion from two doctors, including a psychiatrist, which seriously question the methodology and diagnosis advanced by Mr. Bonin. Dr. T.V. Luu, that Assistant Director of Occupational Medicine of the Company relates in a letter dated September 9, 1991 that the psychologist's analysis reflects a life-time condition and that "... we cannot expect him to be cured after a short time treatment." In further support of that opinion is a letter dated September 5, 1991 from psychiatrist Dr. Michšle B, langer stating that in her opinion the clinical evaluation made by the psychologist is "superficial" and is not realistic with respect to the potential for a program of psychological therapy to achieve profound personality changes.

On the whole, the Arbitrator is left with disparate professional opinions, and at best with no professional opinion which can confirm a clear and substantial correction of the emotional problems which are said to have caused the grievor's conduct. While it is to be hoped that the course of therapy followed by Mr. DiStaulo has had a positive impact that will benefit his life in the future, it cannot be found on the basis of the inconclusive, if not contradictory, evidence before me that sufficient grounds are made out which can be viewed as a reliable basis for the mitigation of his discharge and his reinstatement into employment.

For the foregoing reasons the grievance must be dismissed

September 13, 1991

(Sgd.) MICHEL G. PICHER  
ARBITRATOR