

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2216

Heard at Montreal, Wednesday, 12 December 1991

concerning

VIA RAIL CANADA INC.

and

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

DISPUTE:

The discharge of Mr. K.J. Fleming for theft.

JOINT STATEMENT OF ISSUE:

Following an investigation into theft from the Halifax Station Baggage Room, Mr. K.J. Fleming was discharged.

The Brotherhood concedes that Mr. Fleming is guilty of theft of a package of cigarettes from luggage. The Brotherhood argues that Mr. Fleming's long service and personal circumstances should be considered in the determination of an appropriate penalty. The Brotherhood believes that if given a second change, Mr. Fleming is capable of restoring the confidence required for a normal employment relationship. The Brotherhood seeks the grievor's reinstatement based on his state of mind at the time and his honesty at the investigation.

The Corporation contends that the essential bond [of] trust has been broken. The Corporation contends that it has an obligation to protect itself and its passengers from the risk of theft or invasion of privacy.

The Corporation contends that the discipline assessed was appropriate and not excessive in the circumstances, and is in line with its past responses in similar circumstances. The Corporation declined the grievance at all steps of the grievance procedure.

FOR THE BROTHERHOOD:

FOR THE CORPORATION:

(SGD.) T. N. STOL

(SGD.) C. C. MUGGERIDGE

NATIONAL VICE-PRESIDENT

DEPARTMENT DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Corporation:

D. Fisher

Senior Officer, Labour Relations, Montreal

M. St-Jules

Senior Negotiator & Advisor, Labour Relations, Montreal

J. Kish

Senior Advisor, Customer Services, Montreal

C. Pollock

Senior Officer, Labour Relations, Montreal

And on behalf of the Brotherhood:

G. Murray

Regional Vice-President, Moncton

T. N. Stol

National Vice-President, Ottawa

R. Dennis

Representative

W. Coolen

Local Chairperson

K. J. Fleming

Grievor

#### AWARD OF THE ARBITRATOR

The material establishes, beyond controversy, that on June 20, 1991, the grievor, Mr. K. Fleming, removed a single package of cigarettes from a piece of luggage from the storage area where he was working. Standing alone, that action might have justified the grievor's termination for reasons touched upon in prior decisions of this Office (see CROA 1823).

The sole issue in this case is whether the Arbitrator's discretion should be exercised to reduce the penalty. It is well established that even in a case of theft, there may be mitigating circumstances which can justify the reinstatement of an employee into service notwithstanding that there has been a theft or pilferage. (See CROA 1814.) Among the factors to be considered are the length and quality of the employee's service, and whether the act of theft can be characterized as a compulsive and uncharacteristic act which is in the nature of an isolated incident. Additionally, regard may be had to personal circumstances which may have influenced an employee to behave in an uncharacteristic manner.

In the instant case all of the above factors operate in mitigation of the conduct of Mr. Fleming. The material discloses that he is an employee of twenty years' service with a near impeccable disciplinary record. At the time that he stole the cigarettes Mr. Fleming was suffering a period of great personal crisis in respect of family and financial problems. The material before the Arbitrator documents the fact that he was the subject of extensive court orders with respect to support payments from two prior marriages and that he was discharged in personal bankruptcy in the year prior to the events leading to his discharge. From February of 1991 he had been receiving professional counselling for his personal problems through the Corporation's Employee Assistance Program. The Arbitrator accepts the evidence of the grievor that he was not involved in any other acts of theft or pilferage, and that he sincerely regrets his actions of June 20, 1991.

In all of the circumstances, I am satisfied that this is an appropriate case for a substitution of penalty. The length and quality of Mr. Fleming's service to the Corporation, the isolated and uncharacteristic nature of his behaviour and the extreme personal and family circumstances which placed him under stress at the time, as well as his contriteness, are all factors that lead me to conclude that it is appropriate that he be given a second chance to function as a trustworthy and productive employee.

For the foregoing reasons the Arbitrator directs that the grievor be reinstated into his employment, without compensation or benefits, and without loss of seniority.

December 13, 1991

(Sgd.) MICHEL G. PICHER

ARBITRATOR