

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2532

Heard in Montreal, Tuesday, 11 October 1994
concerning
CANADIAN PACIFIC LIMITED

and
TRANSPORTATION COMMUNICATIONS UNION

DISPUTE:

THE DISMISSAL OF EMPLOYEE MR. A. VARGA, EMPLOYEE #499048, ETO STOREPERSON, ALYTH DIESEL STORE (CALGARY), FOR BEING UNAVAILABLE FOR WORK.

JOINT STATEMENT OF FACT:

Mr. Varga was incarcerated at the Calgary Correctional Centre from September 3, 1992 to December 18, 1992.

On September 4, 1992, Mr. Varga verbally requested a leave of absence, which was subsequently confirmed in writing on September 26, 1992.

On October 5, 1992, the Company acceded to Mr. Varga's LOA request and sought confirmation by the General Chairman in accordance with Article 26 of the collective agreement.

On January 27, 1993, the Union approved Mr. Varga's request for an LOA from September 3, 1992 to May 3, 1993.

On May 5, 1993, Mr. Varga requested, in writing, a renewal of his LOA.

The Company denied Mr. Varga's request for additional leave of absence.

Subsequent to the completion of a formal investigation, Mr. Varga was dismissed on July 12, 1993, account his unavailability for service.

JOINT STATEMENT OF ISSUE:

The Union maintains that the Company unjustly dismissed Mr. Varga and unreasonably denied his additional request for a leave of absence and as such has submitted a claim for loss of earnings, benefits and reinstatement without loss of seniority.

The Company has declined the Union's grievance.

FOR THE UNION:

(SGD.) D. J. KENT

FOR THE COMPANY:

(SGD.) R. A. MICHAUD

FOR: EXECUTIVE VICE-PRESIDENT DIRECTOR, MATERIAL MANAGEMENT - OPERATIONS

There appeared on behalf of the Company:

C. M. Graham - Labour Relations Officer, Industrial Relations, Montreal

D. J. David - Labour Relations Officer, Industrial Relations, Montreal

And on behalf of the Union:

D. J. Kent - Divisional Vice-President

D. Deveau - Executive Vice-President, Montreal

AWARD OF THE ARBITRATOR

The record before the Arbitrator discloses that the grievor

was incarcerated, pursuant to a sentence of two years less a day, following his plea of guilty to the offence of sexually molesting a minor under the age of fourteen, contrary to Section 151 of the Criminal Code of Canada. It is not disputed that the nature of the offence committed by the grievor is disturbing. However, the details of it cannot be reviewed by reason of an order of the trial judge prohibiting publication of the proceedings, to protect the identity of the victim.

The record further discloses that the Company granted the grievor an initial leave of absence, upon a first request, when it learned initially that he was subject to criminal charges. It did not, however, know the details of the charges nor certain other facts which were revealed later at the sentencing of Mr. Varga. In particular, following the sentencing, the Company became aware that the grievor had a previously undisclosed criminal record which included a conviction for theft in 1988.

The grievance turns on the application of article 26.1 of the collective agreement which provides as follows:

26.2 When the requirements of the service permit, employees, on request, will be granted leave of absence for periods of up to three months with privilege of renewal. Leave of absence of more than three months shall be subject to the approval of the General Chairman, except in cases of leave being granted for medical reasons in which case the General Chairman will be informed but his approval not required.

Mr. Varga was granted an initial leave of absence to cover the period September 3, 1992 to May 3, 1993. It appears that Mr. Varga anticipated being released on or about May 3. That, however, did not transpire and he remained incarcerated until December 18, 1993. Following an investigation held on June 22, 1993 in respect of the grievor's unauthorized absence from work

Mr. Varga was discharged on July 12, 1993 for his continuing unavailability. The Union argues that the grievor should have been granted an extension to his leave of absence, and that in any event the Company did not have just cause to terminate his employment.

The Arbitrator can sustain neither position. The principles to be applied in respect of the employability of an individual absent from work by reason of incarceration were reviewed in CROA 1645. Among the factors which may be taken into consideration with respect to the merits of requests for leaves of absence to serve jail sentences are the nature and circumstances of the offence and the employee's prior criminal record. In the case at hand the period of incarceration was substantial, depriving the employer of the grievor's services for a period of months well beyond the initial eight month leave of absence. More importantly, following the Company's decision to grant the grievor a leave of absence to May 3, 1993, it became aware that the grievor, who works in a position of trust as a storeperson in the Alyth Diesel Store, was previously convicted of theft. In these circumstances the Arbitrator is not inclined to find that the Company was under an obligation either to extend the grievor's leave of absence or to forebear from investigating the circumstances of his absence by conducting a disciplinary investigation which led to his discharge. Nor, in the circumstances, can I conclude that the decision taken by the Employer to terminate the grievor's services should be qualified or reversed by the exercise of the Arbitrator's discretion under the terms of the Canada Labour Code.

For all of the foregoing reasons the grievance must be

dismissed.

14 October 1994

MICHEL G. PICHER
ARBITRATOR