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Canadian Railway Office of Arbitration

Case No. 2561

Heard in Montreal, Wednesday, 14 December 1994

concerning

Canadian Pacific Limited

and

Brotherhood of Maintenance of Way Employees

ex parte

Dispute:

Appeal on behalf of Mr. V.M. Ritchie.

Ex Parte Statement of Issue:

On June 6, 1994, the grievor was assessed 10 demerits for allegedly failing to exercise caution while driving a Company vehicle. The assessment of this discipline resulted in the grievor's dismissal for accumulation of demerits.

The Brotherhood contends that: 1.) the Company has not been able to prove absolutely the grievor's responsibility in this matter; 2.) the keys were left in the vehicle all day and therefore could have been operated by another employee; 3.) the discipline assessed was excessive and unwarranted in the circumstances.

The Brotherhood requests that the grievor be reinstated forthwith without loss of seniority and with compensation for all wages and benefits lost.

The Company denies the Brotherhood's contentions and declines the Brotherhood's request.

for the Brotherhood:

(sgd.) J. J. Kruk

System Federation General Chairman

There appeared on behalf of the Company:

R. M. Andrew- Labour Relations Officer, Vancouver

R. L. Michel- Deputy Roadmaster Bredenburg & Minnedosa Suddivision,

R. J. Martel- Labour Relations Officer, Toronto

G. W. Churchill - Manager, Work Equipment Shops

And on behalf of the Brotherhood:

D. Brown - Senior Counsel, Ottawa

J.J. Kruk - System Federation General Chairman, Ottawa

D. McCracken- Federation General Chairman, Ottawa

P. Davidson - Counsel, Ottawa

award of the Arbitrator

In the instant case the Company formed the opinion that the grievor, Mr. V.M. Ritchie, was responsible for damage to a company truck, which appears to have rubbed against a structure surrounding a fire hydrant at the Logan Equipment Repair Shop in Winnipeg on April 8, 1994. There are no eyewitnesses to the incident which caused damage to the truck and the grievor denies any involvement in it. It seems beyond dispute that at a certain point during the course of the afternoon the truck was observed to be without damage. Sometime later, when the truck was delivered to the main shop by another employee, Mr. Nelson Bird, the damage was discovered. In the result, all that can be known with certainty is that Mr. Ritchie and Mr. Bird both drove the truck during the time period between when it was last seen without the damage and when the damage was first observed.

The Brotherhood submits that the case turns on the application of the rules of evidence relating to circumstantial evidence. The Arbitrator must agree. In a prior unreported award in Sunnybrook Hospital in 1986 the following comment appears:

In the Arbitrator's view, where the evidence is principally circumstantial, it must be determined whether, in balancing the probabilities, there are other reasonable explanations equally probable or more probable than the proposition which is advanced by the party that bears the burden of proof. If there are no reasonable alternative possibilities of equal or greater probability, it may be concluded, as a matter of evidence, that the allegation advanced is established on the balance of probabilities.

It is also instructive to reflect on the comments of Arbitrator Swan in *Re the Crown in Right of Ontario (Ministry of Attorney General) and Ontario Public Service Employees Union (Kahn)*, (1989) 18 L.A.C. (4th) 260, at p. 269 to the effect that it is not enough, in the case of wholly circumstantial evidence, to identify "... the most probable suspect".

That is what the Company has done in the instant case, for reasons that are perhaps understandable. It does not appear disputed that at some point during the course of the afternoon Mr. Ritchie did drive the truck in the vicinity of the fire hydrant. While that fact would tend to heighten suspicion where he is concerned, it does not, of itself, suffice to rule out the reasonable possibility, or arguably equal probability, that another person such as Mr. Bird was driving the truck when the damage occurred. Both employees drove the truck for a period of time during which they went unobserved by anyone. A board of arbitration cannot convert suspicion into legal conclusions. In the result, whatever the degree of suspicion may be, absent any direct evidence it is difficult to find that the damage to the truck might not have resulted on the equally probable theory that it was caused by a driver other than Mr. Ritchie, such as Mr. Bird.

The Arbitrator concludes that the Company has not established, on the balance of probabilities, in light of the purely circumstantial evidence, that the damage to the truck was caused by Mr. Ritchie. For these reasons the grievance must be allowed. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without loss of seniority, with compensation for all wages and benefits lost and with the removal of the ten demerits from his record.

16 December 1994 (sgd.) MICHEL G. PICHER

ARBITRATOR