Canadian Railway Office of Arbitration
Case No. 2562
Heard in Montreal, Wednesday, 14 December 1994
concerning
Canadian National Railway Company
and
Brotherhood of Maintenance of Way Employees
ex parte
Dispute:
Brotherhood:
Dismissal of Mr. R. Martin for conduct unbecoming.
Company:
Dismissal of Mr. Martin for obtaining and possessing illegally imported liquor for the purpose of resale while on Company property.
Ex parte Statement of Issue
Brotherhood:
On May 2, 1994 the grievor was dismissed from Company service for the alleged possession of illegally imported liquor for the purpose of resale on Company property.
The Union contends that: 1.) The grievor was not on duty at the time of the alleged incident. 2.) The Company's investigation of the grievor's conduct was procedurally irregular and in violation of article 18.2 of Agreement 10.1. 3.) The employees who allegedly sold the liquor in question to the grievor were dismissed for violating Rule G and subsequently reinstated. 4.) The grievor has a clear service record and has worked for the Company for more than 20 years. 5.) The Company's dismissal of the grievor was an excessive disciplinary response and by its actions it has dealt with the grievor in an unjust manner contrary to article 18.6 of Agreement 10.1.
The Union requests that the grievor be reinstated into his position as TMF in St. Thomas with full compensation for all lost wages and benefits, including those outlined in the ESIMP, retroactive to the date of his dismissal.
The Company denies the Union's contentions and declines the Union's request.
Company:
As a result of a Company investigation, it was determined that on 26 February 1994, the grievor obtained and possessed, while on Company property, illegally imported liquor - eighteen 60-ounce bottles of alcohol - for the purpose of resale. On May 2, 1994, the grievor was dismissed from Company service for obtaining and possessing, while on Company property, illegally imported liquor for the purpose of resale.
The Union contends that: 1.) The grievor was not on duty at the time of the alleged incident. 2.) The Company's investigation of the grievor's conduct was procedurally irregular and in violation of article 18.2 of Agreement 10.1. 3.) The employees who allegedly sold the liquor in question to the grievor were dismissed for violating Rule G and subsequently reinstated. 4.) The grievor has a clear service record and has worked for the Company for more than 20 years. 5.) The Company's dismissal of the grievor is an excessive disciplinary response and by its actions it has dealt with the grievor in an unjust manner contrary to article 18.6 of Agreement 10.1.
The Union requests that the grievor be reinstated into his position as TMF in St. Thomas with full compensation for all lost wages and benefits, including those outlined in the ESIMP, retroactive to the date of his dismissal.
The Company declines the Brotherhood's request.
for the Brotherhood: for the Company:
(sgd.) R. A. Bowden (sgd.) A. E. Heft
System Federation General Chairman for: Vice-President, Great Lakes Region
There appeared on behalf of the Company:
J. C. McDonnell - Counsel, Toronto

A. E. Heft - Manager, Labour Relations, Toronto
C. Morgan - Labour Relations Officer,
R. Meggett - Track Officer, S.O.D.
And on behalf of the Brotherhood:
D. Brown - Senior Counsel, Ottawa
R. A. Bowden - System Federation General Chairman, Ottawa
G. Schneider - Sysem Federation General Chairman, Winnipeg
P. Davidson - Counsel, Ottawa
A. Trudel - General Chairman, Montreal
C. McGuiness - General Chairman, Moncton
R. Phillips - General Chairman, Ontario
J. J. Kruk - System Federation General Chairman, CP Lines, Ottawa
D. McCracken - Federation General Chairman, CP Lines, Ottawa

award of the Arbitrator

The evidence discloses that the grievor, Mr. R. Martin, was involved in the systematic purchasing and bootlegging of liquor illegally smuggled from the United States. By an arrangement made between himself and a locomotive engineer employed by the Norfolk Southern Railway, Mr. Martin would receive smuggled liquor, often on Company property near the yard office in St. Thomas, in quantities as large as eighteen 60-ounce bottles. For example, on February 26, 1994, when Mr. Martin was called on duty to line switches, during a brief off duty period he met the locomotive engineer of the Norfolk Southern Railway and took delivery two duffel bags containing four bottles of vodka, four bottles of rum and ten bottles of rye, near the yard office. He placed the duffel bags in his truck and subsequently took them home. A statement given to the CN police by Mr. Martin contains admissions that he had been involved in similar transactions previously, buying liquor from the locomotive engineer "usually once a week, sometimes twice", for a period of approximately eight or nine months. Mr. Martin further admitted that on occasion the liquor was left in a locker at the yard office and that Mr. Martin left cash in an envelope for the purchase in the same locker.

The evidence therefore discloses, beyond controversy, that Mr. Martin used his position as an employee in furtherance of a scheme to purchase and sell substantial quantities of contraband liquor for personal gain. That such conduct is incompatible with his duties as an employee, and undermines the interests of the Company is, in the Arbitrator's view, beyond debate. The importance to a public carrier of maintaining credibility with respect to the integrity of its employees and their observance of such laws as the Customs Act of Canada was discussed at some length in a prior award of this Office and need not be repeated here (see CROA 2511).

The Arbitrator cannot accept the suggestion of Counsel for the Brotherhood that the grievor's activities can be compared to those of individual consumers who might purchase smuggled cigarettes for their own consumption. Mr. Martin was involved in paying for the importation of smuggled liquor in substantial quantities, and its resale, solely for the purpose of personal profit. His actions were plainly illegal, and were uncovered by reason of a police investigation initiated by the RCMP. His activities were in knowing abuse of his position as a railway employee, even if they did occur during off duty time, and were obviously contrary to the legitimate business interests and good reputation of the Company. I have no difficulty in concluding that discharge is the appropriate measure of discipline for such conduct, notwithstanding the grievor's prior service and record.

Nor can the Arbitrator sustain the suggestion of the Brotherhood that the grievor's procedural rights under article 18.2 of the collective agreement were violated during the course of the Company's disciplinary investigation. At the initial investigation the Company did not have in its possession a police report dated February 28, 1994. Rather, it had a summary of the contents of that

report, which it provided to the grievor and his union representative. The Arbitrator cannot find in that circumstance any violation of article 18.2(d) of the collective agreement which provides, in part, that the employee is to be given a copy "of all the written evidence ... which has been recorded and which has a bearing on his involvement." The suggestion that the employee is entitled to written evidence which is not in the possession of the employer, to the extent that it is retained by a police authority, including railway police, is not persuasive. For well established reasons of law and policy, the "knowledge" of a statutorily established police force, including a railway police force, is not necessarily to be treated as knowledge in the possession of the Employer for labour relations purposes. In Re Canadian Pacific Express & Transport and Transportation Communications Union, an unreported award of Arbitrator M.G. Picher, dated September 17, 1990, it was argued that police interrogation procedures and non-disclosure violated the disciplinary investigation procedures of the collective agreement. At pp. 3-6 the following discussion appears:

The dismissal of Mr. Champagne was the result of a secret police investigation carried out by CP Police without the specific knowledge of the Company's managers and supervisors. The only general knowledge of the employer was that of Mr. Scott, Director of the Lachine Terminal. In June 1989, he was advised that, following various reports of illegal activities in the warehouse, the CP Police wanted to carry out an undercover investigation at the warehouse. Mr. Scott therefore gave permission for the hiring of three police officers at the warehouse who were, to all appearances, regular employees.

The evidence establishes that the police officers did not furnish any information to the Company's management personnel, neither relative to the development of the investigation nor to the activities observed. It was not until August 18, following a massive raid by CP Police and the arrest of fourteen employees on the night of August 17, that the Company's supervisors became aware of the identities of the employees arrested and the accusations made against them. On August 23, 1989, Mr. Carl McSween, Regional Director and Manager in Chief of the Lachine Terminal, received from the Police Superintendent an Occurrence Report which divulged in a precise way the incidents which had resulted in the arrests of August 17. It must be specified that in view of his general knowledge to the effect that this was a matter of accusations of theft, drug use and the sale of illegal drugs, Mr. McSween suspended the implicated employees on August 18 pending his own investigation. On August 25, Mr. McSween questioned individually each of the employees identified in the police report in the presence of a Union representative. That investigation and the conclusions drawn by Mr. McSween resulted in the discharge of twelve employees, including Mr. Champagne, on August 25, 1989.

Mr. Marceau, who represents the grievor and eight other unionized employees, and Mr. Mercier, who is Counsel for three of the dismissed employees, Mr. Daniel Mongeon, Mr. Yvon Gagné and Mr. Wilbrod Paquette, raise a preliminary objection to the dismissal of the employees. As stated in the Joint Statement of Issue, they claim that the disciplinary treatment of all of the dismissed employees was not in conformance with the mandatory procedures concerning disciplinary investigations in the Collective Agreement. According to their argument, the police investigation, and in particular the interrogation of the employees in the offices of the CP Police at Windsor Station, constituted a disciplinary investigation by the Company for the purposes of the Collective Agreement. According to Counsel for the Union, that procedure and the discipline which resulted are null and void in as much as there was no Union representative present and the time limits set out in the Collective Agreement were violated. The first thrust of Counsel's argument is that the CP Police and the Company share an indivisible legal identity for the purposes of the Collective Agreement. In other words, it is their claim that the acts and knowledge of the Police are the acts and knowledge of the Company. Secondly, they submit that if

the police officers and the Company are not a single legal entity, there exists between the two a relationship so close that for all practical purposes the police had become agents of the employer. According to this second theory, the CP Police acted, in effect, as the right arm of the Company and it must be held accountable for their acts as well as their knowledge at the time of the arrests and police interviews of August 17 and 18, 1989. In support of this position, Counsel for the Union argues arbitral jurisprudence, and in particular Re Motor Transport Industrial Relations Bureau of Ontario and General Truck Drivers' Union, Local 938 (1973), 4 L.A.C. (2d) 362 (Brown). In that award the Board came to the conclusion that the knowledge of the private investigator hired by the Company became, as he was its agent, the knowledge of the employer for the purposes of the disciplinary procedures contained in the collective agreement. Counsel submits that the evidence justifies the conclusion that the employer and the railway police acted in concert, or at least in an client-agent relationship. To this effect it underlines the evidence of Mr. John Donovan, the CP Police Detective Sergeant who was in charge of the investigation in the Lachine warehouse. According to Mr. Donovan, in as much as he was the investigating officer, he had full access to the files and dossiers of CP Express and Transport without, it appears, having to ask anyone's permission. Furthermore, he exercised the discretion to order Mr. Réjean Morin, one of the employees arrested, to return to work the day after August 17 without any subsequent discipline. The evidence establishes that Mr. Donovan counted on Mr. Morin's cooperation and that the report made to Mr. McSween by Mr. Donovan exonerated Mr. Morin without explanation.

According to Counsel for the employees, the relationship between Detective Sergeant Donovan and the Company's supervisors went beyond that of a public, independent police force and a private enterprise. In their view, the access of Mr. Donovan to the employer's files and the power that he exercised in regard to Mr. Morin vis-à-vis Mr. McSween demonstrate that the police and the employer was certainly indivisible for the purposes of the Collective Agreement or at least in a client-agent relationship within the sense of the Motor Transport award.

The Arbitrator cannot accept these arguments. It is true that the relationship between the employer and the CP Police is not the same as that which exists between a provincial or municipal police force and a private enterprise. However, the distinction which is disclosed includes that particular law which extends to the railways the extraordinary right to establish their own police force. According to the Railway Act, the Canadian Pacific Police exercise all of the rights of a peace officer on Company property. As indicated in the evidence in the instant case, the senior police officers, as well as the officers in the field, work independently of the Company and its supervisors, who could themselves be the subject of their investigations. The supervisors, such as Mr. McSween in the present case, possess only such knowledge of the investigation as the police judge proper to reveal to them.

[translation]

(See also, CROA 669, 1538, 1558, Re Canadian National Railway Company and National Automobile, Aerospace and Agricultural Implement Workers Union of Canada, an award dated February 8, 1993.) The Arbitrator is satisfied that the principles canvassed in the CPET-TCU award, although raised in relation to a different issue in that case, nevertheless apply in the case at hand to the claim of the Brotherhood in respect of the "missing" police report which was not in the possession of the Company at the inception of its disciplinary investigation of the grievor. The Company did not posses the text of the police report at the time which is material to the objection. Plainly, the purpose of article 18.2(d) is to ensure that the employee is in possession of such written evidence or documentation as the employer possesses. That was done in the case at hand. Further, when the grievor's supervisor eventually obtained a copy of the CN Police report it immediately provided it to the Brotherhood.

In the circumstances the Arbitrator can find no violation of the provisions of article 18.2. Nor can the Arbitrator find that the discharge of the grievor for concerted unlawful activity for profit over a substantial period of time can be said to involve the treatment of the grievor in an unjust manner contrary to article 18.6 of the collective agreement, assuming that that issue is arbitrable.

Finally, the Arbitrator cannot sustain the suggestion of the Brotherhood that the investigation process is somehow flawed because the initial notice to the grievor in respect of a supplementary statement to be taken on April 8, 1994 stated that it was in connection with obtaining illegally imported liquor "while on duty and on Company property". The fact that the investigation disclosed Mr. Martin receiving smuggled alcohol on February 26, 1994 on Company property, when he was not on duty, changes nothing to the substance of the case. The Company was entitled to rely on the facts that emerged from the investigation, insofar as those facts were disclosed pursuant to a process consistent with the procedures established within the collective agreement. Clearly, the notice gave the grievor sufficient particularity as to the nature of the employer's concerns and the general matter to be investigated. There was no prejudice to Mr. Martin in the circumstances, nor any departure from the procedural protections of the collective agreement.

For all of the foregoing reasons the grievance must be dismissed.

December 21, 1994 (signed) MICHEL G. PICHER

ARBITRATOR