

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2888

Heard in Montreal, Thursday, 11 September 1997

concerning

VIA RAIL CANADA INC.

and

**NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND
GENERAL WORKERS UNION OF CANADA (CAW-CANADA)**

EX PARTE

DISPUTE:

The dismissal of Counter Sales Agent Gary Baldwin at Kingston, Ontario.

EX PARTE STATEMENT OF ISSUE:

Mr. Baldwin, an employee of 22 years with VIA Rail, was investigated on two occasions (December 19, 1996 and January 6, 1997) for "your alleged misappropriation of Company funds and alleged failure to follow proper accounting procedures, between April 1996 and September 1996", which resulted in Mr. Baldwin's dismissal.

The Union's position is that the discipline is too severe under the circumstances.

The Corporation maintains their decision.

FOR THE UNION:

(SGD.) A. S. WEPRUK
NATIONAL COORDINATOR

There appeared on behalf of the Corporation:

E. J. Houlihan	– Senior Officer, Labour Contracts, Montreal
C. Pollock	– Senior Officer, Labour Relations, Montreal
B. Leblanc	– Manager, Customer Services, Montreal

And on behalf of the Union:

A. S. Wepruk	– National Coordinator, Montreal
G. Seymour	– Senior Counter Sales Agent, Kingston
G. Baldwin	– Grievor

AWARD OF THE ARBITRATOR

The material before the Arbitrator establishes, without controversy, that the grievor, Mr. G. Baldwin, engaged systematically, over a substantial period of time, in the misappropriation of funds during the course of his duties as a ticket agent at the Corporation's Kingston, Ontario station. The evidence discloses that in the period between April and July of 1996, by various means, Mr. Baldwin pocketed cash receipts which were plainly not his. It appears that on some nineteen occasions in April he overcharged customers, nevertheless balancing his cash receipts at the end of each day, to avoid detection. On one occasion in the same month he failed to make a refund of \$43.00 to a customer, while omitting the sum from his cash receipts for that day. He also failed to report or remit certain service charges and GST amounts, again pocketing the money to his own advantage. Further, he manipulated credit card and debit card purchases of tickets, over-charging and later claiming, during the course of the Corporation's investigation, that he had provided the customer with a cash advance. He eventually admitted that those monies were also kept by him.

This case is a text book example of a workplace tragedy. By all accounts Mr. Baldwin, an employee of twenty-three years' service without any prior discipline, has been a productive and respected employee of the Corporation, as attested by letters from fellow employees and customers filed in evidence by the Union. In mitigation, the grievor relates that during the course of the events leading to his discharge he was subject to stress in his personal life caused by a temporary marital break-up which gave him sole custody of his three children, as well as by the stresses of a number of physical ailments, including arthritis, asthma and high blood pressure. A note from Mr. Baldwin's personal physician states that he has been under his care for the past year and has suffered "a great deal of physical and emotional stress over this period of time."

Difficult at this case may be, the Arbitrator cannot, in the end, find sufficient grounds to reverse the decision of the Corporation. To be sure, factors such as the length and quality of the grievor's prior service must be weighed carefully in assessing the appropriateness of the penalty in a matter such as this. Evidence of mental or emotional stress can also be a significant factor, if it is sufficiently documented. Regrettably, in the instant case the medical certificate is relatively minimal in the information which it provides, and is devoid of any medical opinion to suggest that the grievor's judgement was impaired or diminished by reason of his medical condition or personal circumstances. As prior awards indicate, it is not uncommon for boards of arbitration to demand reasonably persuasive medical evidence in such circumstances, particularly in a case of theft which goes to the root of the relationship of trust between employer and employee (*see, e.g., Canada Post Corp. (1992), 29 L.A.C. (4th) 143 (M.G. Picher)*).

The evidence reveals that the theft committed by Mr. Baldwin was not the result of a single impulsive spur-of-the-moment action. On the contrary, the misappropriation which he committed was done repeatedly over a substantial period of months, bringing gains to be estimated in the hundreds of dollars. While there is no doubt that the grievor is now remorseful for what happened, it is equally clear that he was not fully forthcoming with the truth during the course of the Corporation's investigation, and indeed until the very latest stages of the grievance procedure, during which time he was apparently under medical care. As a counter sales agent, the grievor occupies a position of trust, which involves the handling of monies belonging to the Corporation in a largely unsupervised setting. In light of the evidence, I cannot responsibly direct that the employer reinstate the grievor into such a position of trust. The fact that the medical evidence before me is less than conclusive, coupled with the grievor's efforts, over a substantial period of time, to conceal substantial parts of the truth from the Corporation, leaves the Arbitrator little alternative.

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

September 15, 1997

(signed) MICHEL G. PICHER
ARBITRATOR