

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3046

Heard in Calgary, Tuesday, 11 May 1999
concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Claim on behalf of Mr. T. Tinordi.

EX PARTE STATEMENT OF ISSUE:

On March 24, 1997, the grievor was assessed with 20 demerits for his alleged "improper and unacceptable personal conduct as evidenced by the blatant exposure of your genitals to fellow employees at the Lethbridge Maintenance of Way Shop on February 14, 1997". The Brotherhood grieved the assessment of this discipline.

The Union contends that the discipline assessed the grievor was unwarranted and too severe in the circumstances.

The Union requests that the discipline assessed be removed from the grievor's record.

The Company denies the Union's contention and declines the Union's request.

FOR THE BROTHERHOOD:

(SGD.) J. J. KRUK

SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

J. Dragani	- Labour Relations Officer, Calgary
R. M. Andrews	- Manager, Labour Relations, Calgary
D. E. Freeborn	- Labour Relations Officer, Calgary
E. J. MacIsaac	- Labour Relations Officer, Calgary
D. McIntyre	- Track Maintenance Supervisor, Lethbridge
H. Roberts	- Track Maintenance Foreman, Lethbridge

And on behalf of the Brotherhood:

P. Davidson	- Counsel, Ottawa
D. W. Brown	- Sr. Counsel, Ottawa
K. Deptuck	- Vice-President, Ottawa
J. J. Kruk	- System Federation General Chairman, Ottawa
D. McCracken	- Federation General Chairman, Ottawa
W. Brehl	- General Chairman - Pacific Region, Revelstoke
R. Terry	- Local Chairman, Lethbridge

AWARD OF THE ARBITRATOR

It is not disputed that the grievor, then a leading track maintainer at Lethbridge, exposed his genitals to two fellow employees in the Lethbridge Maintenance of Way shop on February 14, 1997. The unchallenged account of events is that on that day, which was Valentine's Day, Mr. Tinordi approached fellow employee Robert Kinney asking whether he had received a Valentine's card from Supervisor Doug McIntyre. When Mr. Kinney replied in the negative the grievor lowered the front of his coveralls, exposing his penis which protruded through a hole cut into a Valentine's card. He explained that the card was intended for Supervisor McIntyre and asked whether Mr. Kinney would like to sign it, apparently eliciting considerable laughter from Mr. Kinney. When a second employee approached and asked what was the cause of the laughter, Mr. Tinordi displayed his version of greeting card humour to that employee as well, although the second individual, Richard Branden, relates that he did not clearly see what was protruding through the card, expressing his own impression that it might have been a finger.

It is clear that the grievor's intention was to pursue his own view of locker room humour among employees, at the expense of their supervisor. While he obviously did not intend the matter to come to the attention of Mr. McIntyre, unfortunately it did. It appears that Mr. Kinney related the incident to another member of management, apparently with the innocent intention of allowing him to share in the humour, without anticipating that the grievor's gesture might not be viewed as funny by members of management.

The grievor was subsequently confronted by two supervisors, including Mr. McIntyre, as to what had occurred. Although he initially denied it, he ultimately admitted what he had done. A disciplinary investigation ensued as a result of which Mr. Tinordi was assessed twenty demerits.

It is difficult to reject the submission of the Company that the grievor's actions constituted inappropriate conduct within the workplace. However, without excusing the grievor's act which, in his own words is aptly described as "a sick gesture", I have some reservations about the Company's characterization of the incident as constituting open insubordination towards a supervisor. Whatever one may think of the tasteless act of Mr. Tinordi, it was clearly in the nature of a private communication among employees, not intended to be communicated to Mr. McIntyre. While the grievor's gesture in exposing himself is conduct that should be out of bounds within a workshop, it's underlying intent can be likened to the kind of negative comment or joke which employees or supervisors might be expected to share, from time to time, about another employee or supervisor in their workplace. I am satisfied that the "sick gesture" of Mr. Tinordi was not intended to be, nor can it be viewed as, an act tantamount to the communication of open insubordination towards a supervisor. If negative statements or jokes about others made privately among employees are to become the subject of discipline, the workplace would risk being run on the model of a totalitarian state. On the other hand, freedom of expression is not a license to hurt others. Gestures or

comments calculated to harass another individual or to destroy his or her reputation in the workplace bring entirely different considerations to bear, and may well justify serious discipline or discharge. Those considerations, however, do not apply in this case. (See, e.g., *Re Canadian Pacific Limited and Brotherhood of Maintenance of Way Employees* (1996), 57 L.A. C. (4th), 89 (M. G. Picher) (CROA 2751) and **CROA 2878.**)

In the result, I am satisfied that the action of the grievor in exposing himself was deserving of discipline, but not to the degree of severity assessed by the Company. Bearing in mind that the grievor is an employee of eighteen years' service with no similar misconduct on his record, and that his actions involved an isolated incident intended to be in the nature of confidential locker room humour, I am satisfied that the assessment of ten demerits is sufficient in the circumstances to convey to Mr. Tinordi the impropriety of his actions.

The grievance is therefore allowed in part. The Arbitrator directs that the grievor's record be assessed ten demerits for the incident of February 14, 1997.

May 14, 1999

MICHEL G. PICKER
ARBITRATOR