

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3187

Heard in Montreal, Thursday, 15 February 2001

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Dismissal of Mr. G. Walther.

BROTHERHOOD'S STATEMENT OF ISSUE:

By way of a form 104 dated March 30, 2001. the grievor was "dismissed from the service of the Company for the theft of track jacks". This alleged theft took place some ten years prior to the grievor's dismissal. The Brotherhood grieved.

The Union contends that: (11.) The grievor did not steal the jacks. Rather, he took them from a scrap pile in 1989 or 1990 with permission of a Company supervisor. (2.) The grievor at the time of his dismissal, was an employee of the Company for twelve years and, during all that time had never been the recipient of discipline of any kind; (3.) The discipline assessed was, in the circumstances, excessive and unwarranted.

The Union requests that the grievor be reinstated into Company service forthwith without loss of seniority and with full compensation for all financial losses (including POT) incurred as a result of this matter.

The Company denies the Union's contentions 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

D. Freeborn Labour Relations Officer, Calgary
E. Williamson Structures Supervisor, Calgary
C. Rutledge F. Pittman
- CP Constable, Calgary
- Operations Management Trainee, Calgary (observer)
And on behalf of the Brotherhood:
D. W. Brown - General Counsel, Ottawa
P. Davidson - Counsel, Ottawa
J. J. Kruk - System Federation General Chairman, Ottawa

AWARD OF THE ARBITRATOR

It is not disputed that the grievor, Mr. G. Walther, was in possession of three track jacks which had belonged to the Company. The evidence discloses that five track jacks, including the three in the possession of the grievor, were seen displayed for sale in a consignment store dealing in second-hand goods, located in Deroche, B.C. Upon learning through a CPR police investigation that the owners of the store received track jacks from Mr. Walther with a view to having them sold in exchange for other goods, the Company undertook a disciplinary investigation into the circumstances of the grievor's possession of them.

The grievor acknowledged that he brought three of the jacks to the store. He relates that he had been in possession of them for approximately ten years. By his account the three jacks were part of scrap tools and materials and that in 1989 or 1990 then Roadmaster R. Greenfield gave him permission to take them for his own use. It appears that he intended to use them to jack his house. He also indicated that Deputy Roadmaster Lewis Azevedo could vouch for him.

Unfortunately, former Roadmaster Greenfield is no longer in the service of the Company, having been discharged for theft. Nevertheless, when reached at his home in Mississippi he returned a faxed memo to the Company denying that he gave the grievor permission "... to take any items belonging to CP Rail while I was employed as a roadmaster." When separately approached, Mr. Azevedo apparently expressed his belief that the roadmaster would not have had the authority to give away scrap material and responded, in part, "I don't think he got letter from nobody." There also appears to be a suggestion on the part of Foreman Aujla that one of the five jacks recovered may have been removed from his tool shed. It is common ground that the mechanical jacks here in question have in fact not been used for some years, as in recent times the Company has converted to the use of pneumatic jacks.

Theft of company property is among the most serious of allegations which can be brought against an employee and one, if proved, which will generally result in termination. The Company bears the burden of proof to establish theft on the part of the grievor. It is also well settled that the proof of so serious an accusation generally requires a commensurate high standard of evidence.

What is the totality of the evidence against the grievor,⁷ His own account is that he was given permission to take three used jacks from the Company's scrap by Roadmaster Greenfield some ten years earlier. Mr. Greenfield, as the Brotherhood stresses, is a less than reliable witness to the extent that he was himself discharged by the Company for dishonesty in the form of theft. Mr. Alzevedo is also less than a compelling witness. His belief that a roadmaster would not have had the authority to give away to scrap material is contradicted by witnesses from both sides at the arbitration hearing. In addition, the Company's reliance on the evidence of Mr. Joe Aujla who said that he recognized one of the jacks as coming from his own section by reason of paint markings, and that he appears to have been missing a jack is called into substantial question. In his further statement of February 1, 2000 he seemed in fact uncertain as to how many jacks are normally stored in the tool house.

While the Arbitrator can appreciate the suspicion which the Company attaches to the circumstances surrounding the jacks which were in the grievor's possession, it remains the employees obligation to prove the elements of deliberate theft, on the balance of probabilities. While inferences may certainly be drawn from circumstantial evidence, the evidence as a whole must be of a sufficient reliability to sustain a finding of wrongdoing on the preponderance of the evidence. Regrettably, the evidence before the Arbitrator in the instant case does not meet that standard. There is, for example, no differentiation as between which of the five jacks recovered from the store were in fact those previously possessed by Mr. Walther, including the one purportedly identified by Mr. Aujla. As noted above, both Mr. Greenfield and Mr. Azovedo are less than compelling as witnesses. By contrast, the grievor's account of his possession and use of the jacks has been relatively candid and consistent.

For the foregoing reasons the grievance must be allowed. The Arbitrator cannot find that the Company has established, on the balance of probabilities, that Mr. Walther was in possession of three jacks which he stole from the Company. There was therefore no just cause for discipline. The Arbitrator directs that the grievor be reinstated into his employment forthwith, with compensation for all wages and benefits lost, and without loss of seniority.

February 19, 2001
MICHEL G. PICHER
ARBITRATOR