CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE No. 872

Heard at Montreal, Wednesday, October 14, 1981

Concerning

CANADIAN PACIFIC LIMITED (CP RAIL)

ATLANTIC REGION

And
RAIL CANADA TRAFFIC CONTROLLERS

DISPUTE:

Dismissal of Operator W. F. Clark of Windsor, N.S. for pilfering of gasoline.

JOINT STATEMENT OF ISSUE:
Mr. W. F. Clark of Windsor, N.S. was dismissed for the unauthorized removal for personal use of a small quantity of gasoline from a Company vehicle on March 2, 1981.

It is the Union's position that the removal of the gasoline is explicable and in view of Mr. Clark's length of service, dismissal is unwarranted and unjust.

The Company contends that there was just cause for discharge in the circumstances of this case.

FOR THE EMPLOYEES: FOR THE COMPANY:
(Sgd.) D. C. DUQUETTE (Sgd.) J. B. CHABOT
GENERAL CHAIRMAN (RAIL) GENERAL MANAGER
OPERATION AND MAINTENANCE
There appeared on behalf of the Company:

B. A. Demers - Supervisor, Labour Relations, Atlantic Region, Montreal, Quebec

E. F. Purssell - Manager, D.A.R. Kentville, N.S.

1. J. Waddell - Labour Relations Officer, Montreal, Quebec

And on behalf of the Brotherhood:

E. J. Yerex - National Chairman, R.C.T.C., Winnipeg

D. H. Arnold - C.P. System Chairman, R.C.T.C., Calgary

AWARD OF THE ARBITRATOR

On the day in question the grievor was Night Operator at Windsor, N.S., and worked on the 1400 - 2200 shift. At the time his shift ended he would appear to have been alone in the terminal except for his replacement (or at least, he would have thought he was alone), although he could have communicated easily with the Train Dispatcher at St. John or (perhaps less readily), with the Night Chief Dispatcher at St. John.

At the conclusion of his shift on the day in question the grievor left the Company's premises in his automobile, intending, no doubt to drive to his home in Stanley. He had driven, according to his statement, about one-quarter of a mile when he noticed that his gas tank registered "empty". He then returned to the station and, without seeking any authorization, siphoned off "about three quarts" of gasoline from a Company vehicle. For this purpose, he used some plastic hose and an empty container which he carried in his own car. He was then apprehended by a Company Investigator who, unknown to the grievor, had been observing the area as a result of a number of incidents of theft. The grievor has not been known to have had any connection with these.

The grievor states that it was his intention to account for the gasoline to the Track Maintenance Foreman in charge of the Company vehicle on the following day. If that is true, then the grievor's offence is less serious than would be one of deliberate and outright theft which, even of a small quantity of gasoline, would usually justify discharge. The fact in issue being the subjective one of the grievor's intention, it is difficult to establish, and self-serving statements maybe viewed with some skepticism.

InCaseNo.860, for example, the grievor's statement that he was afraid his car would run out of gas was not accepted. There, however, the evidence established a deliberately planned scheme of theft, carried out in concert with another employee (see Case No. 859). Here, the only evidence suggestive of deliberate planning was the presence of the plastic tubing and the container in the grievor's car. The presence of such equipment, however, is also perfectly consistent with quite proper purposes, and cannot be said to be so unusual as to be evidence in itself of an improper motive. The fuel indicator in the grievor's car did read "empty", and if that be thought to suggest preparation for theft, I should consider

it a very risky preparation. In my view, that fact, with that of the grievor's first leaving the station, tends to corroborate the grievor's story. As well, from all the material before me, I think it cannot properly be concluded that the grievor intended taking more gas than he actually did.

It has been held that in cases of this sort, bearing the consequences they do, Arbitrator's must have "clear and cogent" evidence of wrongdoing, although the standard of proof is of course that of the balance of probabilities. In the instant case, while it is certainly not free from doubt, it has not been shown to be more probable than not that the grievor in fact intended to steal the Company's property. I find, on all the material before me, that the grievor did not steal, or "pilfer" the Company's property, and that he was not subject to discipline on that account. He was, nevertheless, guilty of a serious impropriety in taking the gasoline as he did, and is subject to discipline therefor. It is to be noted that the grievor made a prompt and frank acknowledgement of his actions.

In my view, the appropriate award in this case is as follows: that the grievor be reinstated in employment without loss of seniority or other benefits save only that his compensation for loss of earnings shall be in respect of the period from and after April 20th, 1981.

J.F.W. Weatherill

ARBITRTOR