

IN THE MATTER OF AN ARBITRATION
BETWEEN
TEAMSTERS CANADA RAIL CONFERENCE
MAINTENANCE OF WAY EMPLOYEES DIVISION
(the Union)
And
CANADIAN PACIFIC RAILWAY COMPANY
(the Company)

AH 764

DISPUTE:

Dismissal of Mr. Michael Thornitt (Union file 122792; Company file 14289).

JOINT STATEMENT OF ISSUE:

By way of a Form 104 dated April 7, 2020 the Grievor, Mr. Michael Thornitt, was dismissed by the Company service for the following reason(s):

“Conduct unbecoming offence on account of theft and unauthorized removal of company property from Canadian Pacific Railway on March 17, 2020.

A violation of :

SPC 41 M/W Rules and Instructions item 2.6 a

SPC 41 M/W Rules and Instructions item 2.6 d

SPC 41 M/W Rules and Instructions item 3.2 ii

SPC 41 M/W Rules and Instructions item 3.6 a.ii”

The Union objected and a step 2 grievance was filed on April 20, 2020. The Company responded on April 30, 2020.

The Union contends that:

1. No deliberate theft occurred. The Grievor’s explanation for why he was in possession of Company property was perfectly understandable and acceptable in the circumstances;
2. At the time of his dismissal the Grievor had some sixteen years of Company service and had only been assessed discipline on two prior occasions, the most recent being 10 demerits in 2008;
3. The Company’s investigation of the Grievor was not fair and impartial and was in violation of section 15.2 of the collective agreement;
4. 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 losses incurred as a result of this matter.

Company Position:

1. The Company denies the Union's contentions and declines the Union's request.
2. The Grievor was afforded a fair and impartial investigation and the Company maintains that no violation of section 15.2 of the collective agreement has occurred.
3. In March 18, 2020, a Company officer asked the Grievor if he had taken a welding helmet home and he denied doing so. CP Police recovered Company property, which included the aforementioned welding helmet, from the Grievor's personal residence on March 20, 2020. The Company maintains that the Grievor did not have authorization to take these items and that removing these items without permission is theft and a violation of SPC 41.
4. Theft of Company property is particularly egregious as it adversely effects the employment relationship, as such the Company maintains that the Grievor's actions destroyed the foundation of trust essential to continued employment.
5. The Company maintains that culpability was established, discipline was warranted, and that dismissal was appropriate given the circumstances.

FOR THE UNION:


Wade Phillips
President
TCRC MWED

FOR THE COMPANY:


Francine Billings
Assistant Director Labour Relations
Canadian Pacific

Hearing: February 9, 2022 - By Videoconference

APPEARING FOR THE UNION:

David Brown, Counsel
Wade Phillips, President, TCRC MWED
Michael Thornitt, Grievor

APPEARING FOR THE COMPANY:

Diana Zurbuchen, Manager Labour Relations
Francine Billings, Assistant Director Labour Relations

AWARD OF THE ARBITRATOR**JURISDICTION**

1. This is an Ad Hoc Expedited Railway Arbitration pursuant an agreement between the parties. The parties provided for submission of detailed briefs filed and exchanged in advance of the hearing. At the hearing the parties reviewed the documentary evidence and made final argument. The parties agree I have all the powers of an Arbitrator pursuant to Section 60 of the *Canada Labour Code*.

BACKGROUND

2. This is the second of two dismissal cases heard on February 9, 2022. The cases involved two co-workers on the same shift of March 16, 2020 and were subsequently dismissed for theft. The background facts are largely similar relating to the events of that night. This case, like that of the co-worker, will address the specific facts and circumstance relating to this Grievor.

3. On March 13, 2020, CP Police Service Officer Hugh Beechy received a complaint from a CP manager at Brandon that a number of minor thefts had been occurring in recent weeks. They had not been reported and he felt it may have been two night shift employees involved. There had been some indicators surrounding accessing the management office and from the employee locker room. It was reported that these two employees were on nights and their last shift before leaving to new positions within CP outside the area was March 16th. The manager identified the Grievor as one of the employees suspected of the minor thefts.

4. As a result of the March 13 complaint Officer Beechy conducted surveillance of the Grievor and his co-worker on March 16, the night of their last shift on their Brandon assignments.

5. The surveillance was followed by taking statements from the employees during searches at their homes. The Grievor's home was searched March 19 and CP Police Service Officer Hugh Beechy addressed his involvement providing:

To: Whom it may concern
 From: Hugh Beechy
 CC:
 Date: March 25, 2020
 Re: Internal Thefts – Brandon

- March 13th, a complaint from a CP manager reports a number of minor thefts have been occurring in recent weeks they had not reported and feels it may be his two night shift employees who are involved. There had been some indicators surrounding accessing the management office and from the employee locker room. It was reported these two employees are on nights and their last shift before leaving to new positions within CP but outside the area is March 16th.
- The two employees have been identified as:
 - Travis BARTRAM, Extra Gang Foreman - 5 year employee
 - Michael (Mike) THORNITT, Welder, Brandon Section, Driver - 16 year employee
- March 16th, Surveillance conducted by CPPS of the two employees during their night shift.
- March 17th, CP management report the suspicious disappearance of a thermite welding helmet valued at an estimated \$3500.00.
- The helmet was observed in the employee locker room on March 13th by the reporting management and was issued to THORNITT.
- March 18th, CP manager asks THORNITT if he took the mask home when cleaning out his locker and he denies he did.
- March 19th, Cst Beechy obtained a warned statement from BARTRAM

- where he confessed to stealing property from CP and
- BARTRAM further provided that THORNITT was also engaged in some thefts and confirms THORNITT was likely in possession of a welding mask as he had observed THORNITT in possession of a welding mask bag when he was leaving with other welding gear.
- An informed and signed 'Consent Search' of BARTRAM's property in the town of Cypress River MB. was carried out.
- Cst Beechy completed the search of BARTRAM's property where he was found to be in possession of about \$250 worth of suspected stolen CP property.
 - CP Police recovered and seized the following CP property from BARTRAM:
 - (2x) Berry Plastics - Degradable rolls of industrial black garbage bags - taken from the Mechanical March 17th
 - (1x) WypAll Waterless Cleaning Wipes - container of 75x 9.5" x 12" cloth wipes - taken from the Mechanical shop March 17th
 - (1x) Dynamic - Orange Hard Hat still in plastic - taken from the Road Master's office March 17th
 - (1x) Deep Creep - Spray Can of metal cleaning fluid - taken out of the Mechanical shop March 17th
 - (1x) Tamco (CP approved brand) - 10 lb Sledge Hammer - stated it was given to him by unidentified person several years ago
 - (1x) WypAll Wiper X80 Jumbo Roll - large 4 ply roll of Chem Wipe towel - taken in 2019
- March 20th, Cst Beechy and Cst Ross attended to Kenton MB and after a period of time located and met with THORNITT.
- Upon interviewing THORNITT a warned statement was obtained where THORNITT confessed to the thefts of various items and also being in possession of the welding mask and a welding smock.
- THORNITT stated that he had kept the welding equipment because he didn't want the hassle of cleaning them after someone else used them. Further stating that he didn't know why he lied to the manager when asked if he had taken the items.
 - In addition to the welding protection, THORNITT did confess to stealing other property which included a Stihl leaf style blower and other property owned by CP as listed below;
 - (1x) Stihl - Magnum BR600 Backpack Blower (admitted to taking without permission about two years ago)
 - (1x) Berry Plastics - Degradable rolls of industrial black garbage bags – taken from the Mechanical shop March 17th
 - (1x) Tamco (CP approved brand) - 10 lb Sledge Hammer - Taken

years ago as stated had a broken handle
 (1x) 3M 'Speedglass' - Thermite Welding Mask and carrying bag -
 removed from CP Engineering building March 17th
 (1x) Kevlar lined grey Leather Welding mitts inside Welding
 carrying bag - removed from CP Engineering building March 17th
 (1x) Welders Supplies - Leather Welders Smock - removed from CP
 Engineering building March 17th

- Estimated value of the recovered items total approximately \$4800.00

6. As in the case of the co-worker, the Union objected to the fact that warned statements were not provided as evidence at the investigation. The Union maintained that it has never seen a copy of the "warned statement." It was neither provided at the investigation nor after. Furthermore, the Grievor was not asked about the statement during his investigation on March 30, 2020. During the investigation, the Grievor was not even asked to respond to Constable Beechy's allegation that he had "confessed to the thefts" as set out in the investigation transcript. In view of this, the Union takes the position that the so-called "warned statement" played no part in the investigation, constitutes hearsay, and is therefore to be properly ignored by the Arbitrator.

7. At the hearing, I reserved on the Union's objection but, with the agreement of the parties, proceeded to hear the case to satisfy myself of the relevance given the admissions of the Grievor in the disciplinary investigation. Having fully heard and considered the submissions of the parties, I find that some discipline is warranted. I find Officer Beechy's memo relevant for the purpose that it can assist in determining the appropriate quantum of discipline to be assessed.

8. On March 27, 2020 the Grievor, Michael Thornitt and a CP co-worker at Brandon Manitoba were given notices from Ryan Holmes, CP Roadmaster to appear for investigations on March 30, 2020. The notices were identical except for the Grievor's name and that he was to appear at 13:00 while his co-worker was to appear at 9:00 that day. The notices both provided:

Please be governed accordingly.

In accordance with the provisions of the collective agreement between your Organization and the Company, you are hereby notified to present yourself for an investigation in Brandon, Manitoba at 355 Pacific Ave. At 0900 on March 30, 2020 or at a mutually agreed upon alternate time and location.

This will be an investigation in connection with your alleged theft a Stihl Backpack blower, 3M welding helmet, Welding Smock, welding gloves and a roll of garbage bags, Sledge hammers Wypall shop towel and Wypall waterless wipes on or about March 17, 2020

Should you require assistance at the investigation as provided in the Collective Agreement (TCRC MWED Wage Agreement Nos. 41 & 42), please arrange for their presence at the above mentioned time, date and location.

Ryan Holmes

9. Officer Beechy's memo did not state that Sledge Hammers, Wypall shop towel and Wypall waterless wipes were found at the Grievor's home during the search as alleged in the notice of hearing and the purpose of investigation. The Company officers issuing the notice and conducting

the investigation knew that those items were found at the co-worker's home on March 19, 2020. Objections were made at the investigation and rebuttals were made without responses from the Officer conducting the investigation or responses Officer in the Grievance process.

10. The Stihl Backpack blower, 3M welding helmet and a single 10 lb. sledge hammer with a broken handle were found at the Grievor's home. The search was clearly conducted on March 20 as set out in March 25 memo. However, items not found were included in the notice and purpose of the investigation despite the objection of the Grievor's Union Representative.

11. The Company argued at the hearing that the Grievor's investigation statement and the questions therein were limited to the items specifically recovered from the Grievor's residence all of which he confirmed he had in his possession at his residence without authority. Given that position, the question remains as to why the items wrongly placed in the notice and purpose of investigation were not removed following objection of the union.

12. It is not clear that the amount of discipline was based on a detailed review of the investigation questions and answers or the prominently positioned inaccurate information. Of greater concern, is that the issue of the wrong information was raised at Step 2 of the grievance process without response.

13. Following the Investigations of March 30, 2020, the Grievor and his co-worker received letters of dismissals from Kelly Hamilton, Director of Track and Structures, Brandon. Again, the letters were identical except for the names and titles of the Employees. The letters provided:

Please be advised that you have been dismissed from company service
account the following reason(s):
For conduct unbecoming offence on account of theft and unauthorized
removal of company property from Canadian Pacific on March 17, 2020.
A violation of:
SPC 41 M/W Rules and Instructions item 2.6 a
SPC 41 M/W Rules and Instructions item 2.6 d
SPC 41 M/W Rules and Instructions item 3.2 ii
SPC 41 M/W Rules and Instructions item 3.6 a.ii
Kelly Hamilton
Director Track & Structures Brandon

14. The items alleged to be stolen were particularized in the notice of investigation and at the outset of the investigation. However, they were not particularized in the dismissal letter. The dismissal letter sets out the reason(s) as: For conduct unbecoming offence account of theft and unauthorized removal. Items stolen were not specified. Nor were items alleged to have been removed without authorization.

15. On April 20, 2020, Gary McDougall, Union Officer wrote to Brent Szafron at Step 2 of the Grievance process outlining the Union's position including the wrong information, objections and rebuttal of the Union regarding the accusations of theft. Mr. Szafron responded without any response to the objection or other facts stated in the Union's letter.

16. As in Ad Hoc case 765 heard earlier on the same day, both parties relied on largely the same authorities. I have reviewed all of the submissions and authorities as they apply to the specific

facts of each case.

17. The Union maintains its argument that no deliberate theft occurred. The Grievor's explanation for why he was in possession of Company property was perfectly understandable and acceptable given the circumstances. It relies on Brown and Beatty (in *Canadian Labour Arbitration* (5th ed) para 7:23) providing:

Unless the collective agreement provides otherwise, to justify disciplining an employee for theft an employer must prove, on clear, cogent and compelling evidence, both that the person misappropriated property or money that did not belong to her, and that she did so with a dishonest intent.

18. The Union maintains that the discipline assessed was, in the circumstances, excessive and unwarranted. The Union argues at the time of his dismissal, the Grievor had some five years of Company service and had never been the recipient of discipline of any kind.

19. The Company relies on CROA 4500 in which a Via Rail employee had committed theft by misusing a customers' credit card. Arbitrator Clarke dismissed the two grievances stating:

Despite the amounts involved being small, the circumstances of this case do not satisfy the arbitrator that intervention would be appropriate for either grievance. Ms. Beebejuan is a short service employee. The incidents involved Ms. Beebejuan modifying VIA's customers' credit card receipts to give herself tips. This impacts not only VIA's relationship with Ms. Beebejuan, but also the vital relationship it has with its customers. Ms. Beebejuan did not demonstrate any remorse for these incidents, a factor which can be relevant if the theft relates to a single, isolated incident.

20. The case before Arbitrator Clarke involved two investigations over three months involving specific details of one employee's theft from customers' credit cards. The theft occurred by adding tips to credit card slips. I agree with the decision based on the facts of CROA 4500. It sets out that the undisputed detail and facts were determined from extensive investigation.

21. In the facts of this case the Company argued that the Grievor confirmed that he knew and understood SPC 41 Maintenance of Way Rules and Instructions which state:

2.6(a): Tools and supplies provided by CPR remain the property of CPR.
2.6(b): When not in use, tools must be collected and protected from weather and theft.

22. I agree that he did acknowledge knowing the rule. However, he also stated that he felt he complied with the rule and that answer was not challenged. In this case, the Grievor was moving equipment he used from his current work location to a new work location in a manner the Union asserts as accepted practice. All of the equipment except the Stihl Back Pack blower were part of the move. Rule 2.6 does not clearly state how assigned equipment is to be moved in such cases.

23. The Company points me to the words of Arbitrator G. Adams in Phillips Cables LTD. and U.E., Local (510) (1974), 6 L.A.C. (2d) 35 (Adams) wherein the Arbitrator states:

Moreover, in a general sense, honesty is a touchstone to viable employer-employee relationships. If employees must be constantly watched to ensure that they honestly report their comings and goings, or to ensure that valuable tools, material and equipment are not stolen, the industrial enterprise will

soon be operated on the model of a penal institution. In other words, employee good faith and honesty is one important ingredient to both industrial democracy and the fostering of a more co-operative labour relations climate.

24. In reviewing *Phillips supra*, I note that as in this case, Arbitrator Adams was considering discipline assessed to multiple Grievors with various facts and circumstances stating:

Each Grievor should be considered in turn. But just before doing so the board wishes to respond to Mr. Goudge's claim that management must discipline its employees in a consistent manner and that past incidences at Phillips render the discipline in this case inconsistent. While there is strong arbitral authority for the proposition of equality of treatment, these cases make it clear that the equal treatment is only required in similar circumstances.

25. Arbitrator Adams then went on to provide mitigating factors and details for each Grievor in that case base on individual and specific circumstances.

26. The Union argued that no deliberate theft occurred and that the Grievor's explanation for why he was in possession of Company property was understandable and acceptable in the circumstances. The Company disagreed. It stated in its submissions that throughout the investigation statement, the Grievor claimed that he brought Company property home so that he could respond faster to incidents or for use on an upcoming job. The Company maintains that this response is not credible in part because it is not logical. In reviewing the investigation statement, I do not find he repeated that explanation. The Grievor did give that specific answer once at Q&A 21 regarding the Back Pack Blower. He also provided specific answers to each item when he was asked.

27. The Company argued that he knew that taking Company property without permission was wrong. Otherwise, why would he have lied to Company Officer Sam Parish, when directly asked if he had taken the welding helmet? The Grievor stated during his testimony that Sam Parish's message came to him as an unidentified phone text to which he replied "nope". Mr. Parish was to be his supervisor at his next job. He would not have lied if he knew it was Mr. Parish. His response was a quick and poorly considered response to an unidentified call.

28. Disciplinary investigations are recognized as the foundation for assessing discipline under this collective agreement. Section 15.2 of the agreement provides that the Grievor was to be provided with all the evidence. Officer Beechy's memo stated that he took a warned statement which was not produced at the hearing. Warned statements would normally be considered as increasing the veracity of the statement and allegations.

29. At the hearing, the Grievor gave evidence under affirmation. He presented as a credible and believable witness who answered questions, on balance, in a direct and straightforward manner. He gave reasons for his removal of the items in his possession both generally and specific during the investigation and under affirmation at the hearing. He acknowledged he should have obtained permission to move the items from one job site to the other but he had no intent to steal company property.

30. The Grievor stated at the investigation and testified at the hearing that he had the Stihl Back Pac blower in his possession for when he was called out to blow snow in cleaning switches during his off-duty hours. It was at his home to avoid going all the way to his start location to get the

blower only to head back towards his house to use it clearing snow from switches. The Company challenged the explanation at the hearing as not logical. However, his specific Virdin explanation at Q&A 21, made during the investigation was not challenged.

31. Like the Company, I have difficulty with that explanation. Any long service employee should understand the need for clear authorization to possess that piece of equipment at his home. It was not in any way needed at his next assignment. However, he gave an unchallenged example in the investigation and hearing of when he had in fact used it for the purpose he described.

32. I also have difficulty with his testimony regarding the Welding helmet. He gave unchallenged testimony that he had been using the Company helmet for 2 to 3 years. He was going to a new assignment where he may have needed a welding helmet. He would be coming back to this assignment and given the COVID-19 situation at the time he did not want others using the helmet. Again, a long service employee would know that given the value of the helmet, proper authorization was required.

33. The Grievor testified that Officer Beechy was writing while he was questioning him in the Officer's truck. Officer Beechy did not provide any notes and did not appear at the disciplinary investigation or hearing. The warned statement he said was taken was not provided as evidence. He did not provide notes or communications relating to his communications with the manager. He did not state in writing that all matters contained in his memo were true to his knowledge and belief or that his memo is deemed to be a statement made under oath. There was no evidence to establish any reason for suspecting the Grievor of theft as suggested initially by the unnamed manager or following the investigation.

34. While arbitrators are entitled to admit and consider hearsay evidence. It is true that arbitrators are often reluctant to place much weight on hearsay evidence, particularly where it is the only evidence relied on by the Company. More caution is required on the part of an arbitrator where, as the case is here, the Grievor gives testimony under affirmation and subject to cross examination denying the hearsay evidence that is offered against him.

35. Officer Beechy's memo conflated separate issues involving two employees. In doing so, allegations regarding items taken at both residences were wrongly stated in the notice and purpose of the investigations. The incorrect items were not removed from the purpose of investigation. The Grievor responses during the investigation and testimony at the hearing limit the evidentiary value of the memo. Neither, Officer Beechy's memo, or the results of the investigation confirm theft or intent to steal. Mr. Szafron did not respond to any of the specific issues raised in the April 20, 2020, step 2 grievance letter from Gary McDougall.

36. Based on all of the above, and recognizing the onus on the Company, I am not satisfied that it established that dismissal was a reasonable penalty for the Grievor's conduct. Given the weakness of the Company's evidence, I do not believe that it proved on the preponderance of the evidence that the Grievor intended theft.

37. The Grievor gave reasons for possession of the items which I have considered. The Grievor recognized he was wrong in not obtaining clear permission to be in possession of the items found in his home. While the process for employees moving their assigned equipment is not clear a long service employee ought to have known clear permission was required in the circumstance regarding the Welding Helmet and Back Pack Blower. Given all of the facts I find that the bond of trust can be restored. While the conduct was deserving of discipline, I have set out compelling

reasons which to set aside the dismissal.

38. In view of all of the foregoing, the grievance is allowed in part. The Grievor will be reinstated into his employment forthwith, without compensation for lost wages or benefits and without loss of seniority.

39. I remain seized should there be any dispute with respect to any aspect of the interpretation or implementation of this award.

Dated this 2nd, day of March 2022.

A handwritten signature in black ink, appearing to read "Tom Hodges". The signature is written in a cursive, flowing style.

Tom Hodges
Arbitrator