

**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 765**

**DISPUTE:**

Dismissal of Mr. Travis Bartram (Union file 122791; Company file 14288).

**JOINT STATEMENT OF ISSUE:**

By way of a Form 104 dated April 7, 2020 the Grievor, Mr. Travis Bartram, was dismissed from 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 given the circumstances;
2. 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;
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.

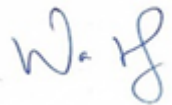
**The Union requests that:**

The Grievor be reinstated into Company service forth with 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. CP Police recovered Company property from the Grievor’s personal residence on March 19, 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:**



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Wade Phillips  
 President  
 TCRC MWED

**FOR THE COMPANY:**



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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  
Travis Bartram, Grievor

**APPEARING FOR THE COMPANY:**

Francine Billings, Assistant Director Labour Relations  
Diana Zurbuchen, Manager 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 the above Joint Statement of Issue. The parties also submitted detailed briefs and books of documents which were filed with me and exchanged in advance of the hearing. At the hearing the parties reviewed their submissions, 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. 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 previously reported and he felt it may have been two night shift employees involved. There had been some indicators which involved accessing the management office from the employee locker room. It was reported that these two employees were on nights and their last shift before leaving to a 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.

3. 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.

4. 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 in a memo 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

5. The Union withdrew its position stated in the in the Joint Statement of Issue that the investigation was unfair. However, instead it argues that the Company has referred to and relied on Officer Beechy’s Memo and the warned statements referred to in his memo from the Grievor and his co-worker. The Union objected to the fact that warned statements were not provided as evidence at the investigation as required under Section 15.2 of the collective agreement and ignore the hearsay evidence of Officer Beechy.

6. 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.

7. On March 27, 2020, the Grievor, Travis Bartram and Michael Thornitt, 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 09:00 while his co-worker was to appear at 13:00 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

8. Although Officer Beechy's memo stated that a Stihl Backpack blower and a 3M welding helmet were found at Mr. Thornitt's home, the items were included in the Grievor's notice of investigation. Also an objection made at the March 30 investigation it was not corrected and again stated:

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

9. 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

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

### **ANALYSIS AND DECISION**

11. The evidence established that on March 16, 2020, the Grievor had assembled with other employees at the start and end of his workday in accordance with the collective agreement. In this case, it was at a Brandon, Manitoba designated tool house or shop where a locker was provided for him. For his next shift, after days off, the Grievor was moving to a new work location where he would be provided motel or hotel accommodation in accordance with the collective agreement. He would travel using his own vehicle in accordance with the agreement.

12. Employees under this agreement work with different types of equipment and supplies provided by CP in accordance with Regulation 2.6. Employees also provide their own safety footwear with support from a monetary allowance provided by the collective agreement. In this incident, the types of equipment primarily involved four types of equipment at the worksite locker room:

- hard hats, safety glasses gloves and personal protective gear

- safety footwear
- cleaning and sanitary products
- specific tools required by the employees

13. Employees under this agreement may also be required to purchase their own tools in order to carry out a certain task related to their job as set out in Appendix 5 and accepted practice. The Grievor had previously purchased his own specific tools necessary for an assignment at CP which he worked a year and a half earlier. As he was not required to use his own tools for his most recent position at Brandon, they were stored by him at his home. However, his new position would again require the use of the tools stored at his home when reporting for his next shift.

14. In contrast to the notice of investigation, the evidence established that Grievor was in possession of:

A roll of garbage bags, half a container of cleaning wipes, a new hard hat, a CP approved hammer, a Chem wipe towel and a Wypall shop towel.

15. The evidence also established that the Grievor was in possession of his own tools that he intended to clean for his new assignment.

16. Following an investigation, the Grievor was dismissed. The Company relies on *Wm. Scott and Co. Ltd. And Canadian Food & Allied Workers Union, Local P-162, [1977] 1 Can L.R.B.R. 1* (“Wm. Scott”).

Was there just and reasonable cause for some form of discipline by the employer?

Was the employer’s decision to dismiss the employee an excessive response in all of the circumstances of the case?

If the arbitrator does consider discharge excessive, what alternative measure should be substituted as just and equitable?

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* (5<sup>th</sup> 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. In this case, only two questions set out in *Wm. Scott* should be considered, namely:

- Was the discipline imposed an excessive response in all the circumstances of the case?
- If so, what alternative measure should be substituted as just and equitable?

19. While not exhaustive, in assessing the appropriateness of the penalty, the arbitrators often consider several factors:

1. The previous good record of the Grievor.
2. Whether the penalty imposed has created a special economic hardship for the Grievor in light of his particular circumstances.

3. Evidence that the company rules of conduct, either unwritten or posted, have not been uniformly enforced, thus constituting a form of discrimination.
8. Circumstances negating intent, e.g. likelihood that the Grievor misunderstood the nature or intent of an order given to him, and as a result disobeyed it.
9. The seriousness of the offence in terms of company policy and company obligations.
10. Any other circumstances which should properly take into consideration.

20. The Union argues 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. 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. It maintains that the discipline assessed was, in the circumstances, excessive and unwarranted.

21. The Company maintains that CP Police recovered Company property from the Grievor's personal residence on March 19, 2020. 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. Theft of Company property is particularly egregious as it adversely affects the employment relationship. As such, the Company maintains that the Grievor's actions destroyed the foundation of trust essential to continued employment. The Company maintains that culpability was established, discipline was warranted, and that dismissal was appropriate given the circumstances. Given the admissions of the Grievor, which I will address further in this award, I agree that the first issue before the Arbitrator is to determine if the discipline assessed was appropriate given the evidence and circumstances in this case.

22. Disciplinary Investigations are recognized as the foundation for assessing discipline under this collective agreement. The Collective agreement provides:

**SECTION 15  
INVESTIGATIONS, GRIEVANCES AND FINAL DISPUTE  
RESOLUTION**

15.2

.....

**The employee will be provided a copy of the evidence with the notice of the hearing. The employee will have the opportunity to review all evidence taken, immediately prior to the commencement of the hearing, and he shall be furnished with a copy of the statement, and, on request, copies of all evidence taken.** Investigations will be held during regular hours to the extent practicable. Where it can be demonstrated that an investigation could have been held within regular hours, the employee will be compensated for a maximum of three (3) hours pay at straight time rates. Electronic copies of the notice, evidence and investigation transcripts will be provided to the Union's Regional Director upon request and if available. When electronic copies of audio or video files are to be provided, the Union's Regional Director will be required to confirm in writing or by email that such files will not be provided to any other individuals and that such files are for the exclusive purpose of grievance and arbitration.

Note: Company agrees that initial investigations (phone calls without Union



representation) will be memorialized in a memorandum and entered as evidence in the investigation. The Company further agrees that in the event that an initial investigation (phone call without Union representation) is not memorialized in a memorandum, the contents of the initial investigation shall not be used or relied upon as evidence in any disciplinary investigation, during the grievance procedure or at arbitration. **Emphasis Added**

23. Following the investigation, the Grievor was notified of his dismissal by letter:  
For conduct unbecoming offence on account of theft and unauthorized removal of company property from Canadian Pacific on March 17, 2020.

24. The Company maintained that the Grievor violated the following rules:

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

25. I now turn to consider the discipline assessed in light of the argument and evidence. At the outset, I note that Officer Beechy's memo particularized what was found at the Grievor's home. The items were again particularized in the notice of investigation and purpose of investigation. The investigation addressed items alleged to be stolen. The dismissal letter did not set out any item particularized in the notice or purpose of the investigation as being stolen.

26. It is trite to say that theft and unauthorized access of management offices are both among the most serious of offences that can result in dismissal. The employee's duty of fidelity and good faith is regarded by arbitrators as falling under the collective agreement inferentially, if not expressly. I also find that there is a greater duty for employees in safety sensitive positions in which forthrightness and accountability are of significant importance.

27. Officer Beechy's report stated that an unnamed CP manager reported a number of minor thefts that had been occurring in recent weeks which had not been reported and feels it may be two night shift employees who were involved. There had been some indicators surrounding accessing the management office from the employee locker room. The manager identified the Grievor as one of two suspects. There was no evidence as to why serious issues of theft or accessing of management offices had not been reported or why the Grievor became a suspect. The items stolen in the past were not particularized.

28. In my opinion, it is generally recognized that activities such as theft and unauthorized access to offices are best addressed promptly. Indeed, CP's M/W Rules make repeated reference to the words properly, promptly and immediately regarding potentially serious events that managers and employees may face. The Company relied on M/W 2.6 a and d that:

- a. Tools and supplies provided by CPR remain the property of CPR
- d. When not in use, tools must be collected and protected from the weather and theft.

29. The Union argued that in this case the Grievor was engaged in moving his assigned tools and equipment from Brandon to his new assignment at a different location on the Brandt Truck. It maintained that the Grievor's actions were consistent with accepted practice in such situations.

30. The Company evidence is that an unnamed manager had concerns of theft and unauthorized entry to management offices on March 13. The Manager knew that the Grievor was leaving for a new position on March 17 and chose to notify CP Police. There is no evidence that an effort was made by any manager to bring the concern to the Grievor who had a perfect work record.

31. The Company did not refer to M/W 2.6 b. which sets out that:

Employees will be provided with proper tools and instructed on their use.

32. The words in 2.6 b are consistent with those that are generally required to be clear, brought to the attention of the employee, and consistently enforced. In this case, the Manager appeared to know that the Grievor was leaving Brandon for a new assignment. Again, there is no indication that he brought any of his concerns to the attention of the Grievor.

33. CP is also generally consistent in documenting serious incidents from the outset. Incident reports are an effective tool in determining initial facts related to serious rule violations. Section 15.2 of the collective agreement provides that an employee will be provided with all the evidence. It provides for initial investigation to be memorialized.

34. In discipline cases providing all evidence contributes to the completeness of the disciplinary investigation. Evidence included with the investigation, such as incident reports are an important part of the investigation package that is reviewed in the grievance process by senior management and union officers. The completeness is also considered as part of the evidence reviewed by arbitrators.

35. In this case, no incident report, memo or communications document were provided by the manager making the complaint to Officer Beechy. No information was provided by the manager regarding how he determined that the Grievor was a suspect. The manager was also not present at the investigation.

36. Officer Beechy's did not appear at the disciplinary investigation. His memo was provided as evidence. He did not provide any notes or communications relating to his communications with the manager. He did not provide a copy of the warned statement of the Grievor. 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.

37. The Grievor's notice of investigation included the allegations of theft of the Welding Helmet. It was also included in the investigation as the purpose of the investigation specifically referencing items know to be found in possession of a co-worker:

This will be an investigation in connection with your alleged theft a Stihl Backpack blower, 3M welding helmet, Welding Smock, welding gloves

38. The Union representative objected at the outset of the investigation, but it was not removed. The Grievor also note in QA 1 that he was not given proper notice. That was also ignored.

39. The Investigating Officer refused to recognize that an allegation of theft of a Stihl Backpack blower and 3M welding helmet could be wrong. At that time, the Investigating Officer provided Officer Beechy's memo which clearly stated that the Stihl Backpack blower, 3M welding helmet were recovered at the home of a co-worker.

40. The Investigating Officer was also in possession of a memo from CP Manager Samuel

Parish, relating to the co-worker's possession of the welding helmet. He did not provide that memo for the Grievor's investigation although he did later in the day for the co-workers investigation. That memo was not provided to the Grievor even though he was entitled to all evidence in accordance with Section 15.2.

41. Officer Beechy had conflated a number of issues into one memo without any other supporting documents. The Parish memo went straight to the issue of the welding helmet but was not given to the Grievor. In my opinion, relevant evidence that is not properly provided or considered, while a violation of 15.2 can also negatively impact reviews conducted by Company and Union officers throughout the grievance process.

42. The evidence is that the Grievor was under surveillance on the night of March 16, 2020, by CP Police. No notes of that surveillance were provided.

43. At the time of the incident, many employees who were required to continue working and performing their normal duties during the COVID epidemic were particularly concerned. Cleaning wipes at that time were in short supply. Concern for supplies by managers at the time may have been well founded. However, there is no evidence that any concern was brought to the attention of the Grievor or any employees from the manager or the Officers who were concerned with minor theft, Rule violations or unauthorized access to Company offices.

44. CP Police Officer Beechy's memo of March 25, 2020, addressed to "Whom it may concern" indicated that on March 13<sup>th</sup>, an unnamed CP manager reported a number of minor thefts occurring in recent weeks that had not reported and feels it may be two night shift employees involved. Anonymizing the name of the manager who requested the report and who made the complaint may be appropriate in cases of concern for privacy and safety. However, manager Samuel Parish's name was not anonymized and no reasoning was given for depriving the Grievor and Union of that information.

45. Officer Beechy may have been under no obligation to refer to every piece of evidence or information he considered. However, the more significant a piece of evidence that is inconsistent with his memo, the more willing an arbitrator may be to conclude that the absence of a reference to that evidence undermines the credibility of the memo. The minor items taken, on or before March 13, were not particularized. Issues regarding access to management offices at Brandon prior to March 13 were also not particularized.

46. The complaint and his surveillance of the Grievor were initiating factors in Officer Beechy's meeting with the Grievor was on March 19. His memo was typewritten a week later, on March 25. If Officer Beechy took and completed notes regarding the complaint during or immediately after the interview, they were not provided at the investigation or the arbitration. He maintained that he had taken a warned statement from the Grievor. That was also not provided at any time in the process under consideration.

47. Warned statements taken by police officers are generally taken from the person after warning the person of their rights in a given situation. The Grievor's testimony is that he did consent to the search of his residence as indicated by Officer Beechy as he had no concerns about what he would find. Regarding Officer Beechy's memo, that he provided a warned statement in which he confessed to multiple offences, the Grievor strongly disagreed.

48. The Grievor's testimony was that the Officer did not advise him of any rights. He advised the Officer of the reasons why each of the items were properly in his possession and did not confess

to theft. Notwithstanding his examinations, he said the CP Officer told him that he should get a lawyer.

49. In my opinion, Officer Beechy's memo clearly conflated a complaint from an unnamed manager with information obtained from the Grievor and a co-worker who were subject to separate and distinct disciplinary investigations. His memo appears to have led to confusion on which facts applied to which employee. The conflation in his memo may have directly contributed to a number of errors in the disciplinary investigation of the Grievor.

50. As a result of Officer Beechy's memo, Company officers proceeded with notices of investigations, investigations, and termination letters for two Grievors with distinctly different facts but used the same information in a clear cut and paste electronic transfer of information. The file repeated the same information in the notice to appear for investigation and the purpose of the hearing. Each included reference to:

..... your alleged theft a Stihl Backpack blower, 3M welding helmet ....

51. The Company made submissions that the Grievor had the opportunity to rebut Officer Beechy's evidence but did not. A review of the investigation shows that his Union representative made the first attempt at the outset of the investigation. The Grievor specifically rebutted the Officer's evidence again at Q&A 4 and 5.

52. As noted above, Officer Beechy conflated three issues into one memo. The Manager's complaints, the facts relating to his investigation of this Grievor and the facts relating to his investigation of a co-worker. That conflation resulted in what appears to be a clear cut and paste of identical wording in both the Grievor's and his co-workers:

Notice of investigation

Purpose of investigation

Termination letter

Responses at step 2 of the Grievance process

53. Although the difference was pointed out at each step of the way by the Grievor or his Union representative, the objections were ignored. The issue raised in Q&A 4 was again raised at Step 2 of the Grievance process by Gary MacDougal in his letter of April 20, 2020. The letter was a near identical letter on behalf of the Grievor's co-worker regarding his termination on the same day.

54. The facts of the Grievor were clearly and significantly different from his co-worker but the objections were the same in both cases. However, on April 30, 2020, Chief Engineer Brent Szafron would respond with identical cut and paste letters to address both grievances. The only change was the Grievor's names and the file numbers. The errors in accusations, objections and rebuttal were not addressed in either case.

55. Accusations of theft of a Stihl Backpack blower and a 3M welding helmet valued at approximately \$4,000.00 are significant. However, they appear at the outset of the Grievor's file. Only a careful reading of the investigation and the Union's objections is it revealed that what was established is the unauthorized taking of a roll of garbage bags, half a container of cleaning wipes, a new hard hat, a CP approved hammer, a Chem wipe Wypall shop towel.

56. While minor theft can be the cause of termination, this is a case where a Grievor with a clear record was immediately accountable and forthright. He provided legitimate reasons for

wanting to clean his own tools which had been in storage. His own tools would be wrongly regarded as CP property. Objections to Officer Beechy's findings were made repeatedly and ignored. Rebuttals were made and ignored with cut and paste responses.

57. To be clear, in my opinion, copying or "cut and paste" is not sufficient to reject an outcome of termination. What is of concern is if there is reason to conclude that those involved in each step in the disciplinary and grievance process turned their mind to the specific facts and detail. Wrong facts can make for wrong decisions. It can give rise to a concern for matters that have not been decided in an impartial fashion. Writing a response to a Union's appeal of a termination is not like writing information notices to several different bargaining units. Readers of the Company response at Step 2 must question the reasoning for failing to consider the Union's legitimate reasoning.

58. While the repeated practice of cut and paste repetition of documents may be alarming it should not lead to the conclusion that a dismissal decision would be overturned on that basis alone. In this case, however, the objection to Officer Beechy's memo and rebuttal of its contents were raised repeatedly throughout the investigation and grievance process at each Step. It was ignored by the Investigating Officer and the Responding Officer at Step 2 of the grievance process.

59. It is clear that Officer Beech conflated three sets of facts into one memo. Two very different cases were investigated on the same day with the same notices and purpose. Different facts were treated as the same. Repeated objections were ignored. The same termination letters were used.

60. The Grievor stated the reasons for his possession at the investigation which were in stark contrast to the theft alleged. He also testified under a solemn affirmation at the arbitration that the one CP sledge hammer was provided by a supervisor to use to install flags required at locations on his way to work. No effort was made to verify that explanation and it remained unchallenged.

61. In this case, the Grievor had tools at home that were mistaken by some Company officers as Company tools as a result of Officer Beechy's memo. The other tools in question were tools he was previously required to purchase for performed duties on an assignment over one and a half years earlier. He would now be required to use his tools on his new assignment. The tools had been stored and now required cleaning.

62. The fact that they were his own tools purchased for work at CP in accordance with the collective agreement was not reflected clearly in Officer Beechy's memo or addressed in the investigation. The lack of clarity resulted in the position that the tools referred to at home for 1 & ½ years were CP tools was maintained throughout the grievance process. The fact that the tools were his own was clearly established at the hearing.

63. The Company argued in its written submissions that the Grievor's explanation as to why he took the items home is not reasonable. At Q&A 25, it notes that he took wipes home to clean his work tools before he took them to the Brandt truck for work. Further, at Q&A 26 and 27, he confirms that he took tools from work home and that he had them in his possession for a year and a half. The Company emphasized that either way, the Grievor either took cleaning wipes without permission which constitutes theft, or he used them to clean Company tools he had at his personal residence for a year and half, which also constitutes theft.

64. The allegation the Grievor had "Company tools at his personal residence for a year and half, which also constitutes theft" were wrong. The tools in question were his own and only paid for by the Company if they needed to be replaced.

65. Given the rules and circumstances, it is difficult to believe that the Grievor would have

been dismissed if he had taken the items directly from his old location to the new location without taking them to his home. As I noted, he was not cautioned by the manager who was aware of the fact that he was leaving for a new assignment after his days off at home.

66. The investigation undertaken by Officer Beechy was triggered by a manager's complaint. It was for industrial relations purposes in coordination with local management at multiple steps. The Grievor was identified as one of the potential thieves. The management investigation was conducted under the collective agreement.

67. As often noted by this and other arbitrators, disciplinary investigations under Section 15 of the collective agreement are not intended to elevate the investigation, they are intended to facilitate an informal and expeditious process. In the transportation industry, it is a widely recognized means to afford the Employee to know the accusation against him, the identity of his accusers, as well as the content of the evidence or statements. They should be given a fair opportunity to provide rebuttal of evidence in their own defence and have wrong accusations removed when identified. These elements are essential prior to the assessment of discipline if it is to be upheld on review.

68. After the assessment of discipline, the investigation is the foundation for effective review by the Union in assessing their obligation for appropriate consideration of representation in the Grievance process and arbitration. It is also the basis for effective review by Company Officers as a decision on appropriateness of the discipline assessed made at each step of the process. Providing wrong information to senior Company Officers for review can lead to wrong decisions. The disciplinary investigation and file are the key elements for review by an arbitrator when reviewing the positions of the parties. Repeated cut and paste errors give rise for concern.

69. In this case, the Union acknowledges that some discipline may have been appropriate. However, Union Counsel argues that while a minor technical and inadvertent theft of cleaning items and personal protective equipment may have taken place, it did not warrant the level of discipline assessed to an employee with a perfect discipline record.

70. The Company maintains that it has met the three part test of *William Scott & Co. v. C.F.A.W., Local P-162 (1976) [1977] 1 C.L.R.B.R. 1 (B.C.L.R.B)*. It relies on CROA 4438, 3735,4500, 4735, 4445, 4500, and *PowerStream Inc. v. Power Workers Union (2012) [Davie]*.

71. 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.

72. Reviewing *Phillips supra*, I note that Arbitrator Adams was addressing 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.

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

74. The Union argues that the warned statement of March 19, 2020, taken by Officer Beechy was never provide the Union or the Grievor. In view of this, the Union took the position that the warned statement played no part in the investigation, constitutes hearsay, and is therefore to be properly ignored by the Arbitrator. The Grievor was never charged for the alleged thefts and denies that any theft ever occurred. During the March 30, 2020, investigation, the Grievor provided the Company with a fully plausible and coherent explanation for why he was in possession of the Company property. Despite this, he was dismissed on April 7, 2020.

75. During the arbitration, the Grievor testified that he did not confess to theft during the March 30, 2020, investigation. He repeated his explanation for why he was in possession of the Company property. It is submitted that as described by the Grievor, the cleaning products were used by the Grievor to clean his tools and for use in the Brandt truck he'd be operating at his next position.

76. The Union submitted that there is nothing particularly unusual or even suspicious about any of what the Grievor described. It all has to do with the nature of the job. Other than the sledge hammer and hard hat, the disputed property consists entirely of cleaning products. It is submitted that as described by the Grievor, the cleaning products were used by the Grievor to clean his tools and for use in the Brandt truck he would be assigned to at his next position.

77. Concerning the sledge hammer, the Grievor, during his investigation, was not asked to explain why he had one in his possession. At Q&A 18, he merely described it as being "CP approved" and nothing more was said about it. In other words, CP neither challenged the Grievor's assertion nor asked for further clarification. From this, it is submitted that the Company must be viewed as having accepted Grievor's assertion as accurate and that it was not stolen.

78. The Union relies on Brown and Beatty in *Canadian Labour Arbitration* (5<sup>th</sup> ed) para 7:23) stating put it like this:

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.

79. The Union argue that there was no dishonest intent and also pointed me to CROA 2119, 4225, 1063 1564, 2287 SHP 716, 444, 489 in support of its positions.

80. The Union relied on CROA 4225 in which Arbitrator Picher stated:

The issue in this grievance is whether the grievor acted in a deliberate and calculated way to claim overtime to which he was not entitled or whether, as the Union submits, he was simply careless in filling out the time sheets for June 20, 2012. Upon a close examination of the evidence I am inclined to accept the Union's submission that there was no deliberate intent to defraud on the part of Mr. Boileau. There is no prior record of any such incident in his previous eighteen years of service, and while his disciplinary status was precarious at the

time of this incident, nothing on his record involved acts of dishonesty. I am satisfied that what the instant case discloses is an isolated lapse in judgement on the part of the grievor, and not a deliberate attempt at theft.

81. The Union pointed me to *Sobeys Capital Incorporated v United Food and Commercial Workers, Local 401*, 2017 CanLII 34408 (AB GAA) in which Arbitrator Francis Price stated:

In this case, provision of all the videos requested and review of them by the Grievor and Union, might have resulted in a resolution of the issue between the Employer, the Union and the Grievor. Resolution in that fashion would have met the objective of Employer and Union to work together for the betterment of the Employer, the Union and the Employees.

82. The Union summarize, that this is a situation in which no theft occurred or was even contemplated. Rather, the Grievor, like a great many maintenance of way workers, merely took possession of certain Company property that was needed in order to permit him to perform the duties of his position. During his investigation, the Grievor's readily acknowledged that he did not ask permission to take the garbage bags (Q&A 21), waterless wipes (Q&A 23) or the lubricant (Q&A 30).

83. The Union argued that while this may have constituted an unauthorized removal of Company property, it certainly did not, as discussed above, constitute theft. It maintains that the Grievor, like a great many maintenance of way workers, merely took possession of certain Company property that was needed in order to permit him to perform the duties of his position. During his investigation, the Grievor readily acknowledged that he did not ask permission to take the garbage bags, waterless wipes or the lubricant.

84. At the hearing, the testimony of the Grievor was consistent with the argument put forward by the Union. There is nothing in his work record or the tone and content of his testimony to suggest that he is of dishonest character. His claim and the position of the Union that the work tools he had at home for over a year were his own was found to be correct. He emphasized that he did not confess to theft as stated by Officer Beechy. He testified that Officer Beechy told him that what he had done was theft and he should get a lawyer. He was not warned in any way or that what he said could be used against him. There was no evidence to establish any reasoning for suspecting that the Grievor performed unauthorized access to management offices. He was not questioned about the allegation.

85. After carefully reviewing the submissions of the parties, there are mitigating factors which must be taken into consideration. The evidence shows that the items taken by the Grievor were not those indicated in the purpose of the investigation. There was no evidence at any attempt at concealment. Incorrect information was contained repeatedly in the Company file and provided to senior officers for review. The issues raised and objected to were not addressed.

86. Employees in safety sensitive positions are held to a higher level of accountability. I agree that deterrence of theft is a legitimate purpose for the Company and minor theft may be reason for termination under certain circumstances. However, given all the facts, the discipline assessed was excessive.

87. Considering the Grievor's combined service and his clear discipline record, I find that the grievance will be allowed in part. The dismissal will be changed to a 30-day suspension. He will



be reinstated into his employment, without compensation for wages and benefits lost subject to mitigation.

88. I will retain jurisdiction in the event there are any difficulties in the interpretation, application or implementation of this Award.

Dated this 2<sup>nd</sup>, 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