CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1961

Heard at Montreal, Wednesday, 11 October 1989

Concerning

CANADIAN PARCEL DELIVERY

And

TRANSPORTATION COMMUNICATIONS UNION

DISPUTE:

The assessment of 60 demerits and dismissal of CanPar employee A. McCleary, Toronto, Ontario, for allegedly willfully damaging a customer's package and consuming its contents.

JOINT STATEMENT OF ISSUE:

On June 7, 1989, at approximately 6 p.m., the employee was grabbed by the arm, by Supervisor Furtado, and taken up to the office and accused of willfully damaging a package and eating the contents, by Mr. Furtado, with Supervisor E. Nulle and another employee present.

The employee was then questioned by the supervisors present.

After questioning the employee, the two supervisors left the office along with the other employee. Supervisor Nulle then returned to the office and advised the employee he had called the Toronto Metro Police.

When the Police Officer left, the employee was given a notice advising he was suspended and to report June 8, 1989, at 6:30 p.m. for an interview.

The interview was held on June 16, 1989, when upon its completion, the employee was advised 60 demerits were being assessed and his employment was being terminated.

The Union contends the Company has violated Articles 6.2 and 6.3 of the Collective Agreement, and further contends the Company has not sustained the charges against the employee.

The Union requested the employee be reinstated with full seniority, all benefits, and paid for all time held out of service.

The Company denied the Union's request on the basis of the supervisor's statement, and there was no violation of Articles 6.2 and 6.3.

FOR THE UNION:

(SGD) J. J. BOYCE
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD) J. G. CYOPECK
VICE-PRESIDENT & ASSISTANT GENERAL MANAGER

There appeared on behalf of the Company:
P. A. Young – Counsel, Toronto
J. Cyopeck – Vice-President & Assistant General Manager Toronto

And on behalf of the Union:
H. Caley – Counsel, Toronto
J. J. Boyce – General Chairman, Toronto

J. Crabb – Secretary/Treasurer, Toronto
M. Gauthier – Vice-General Chairman, Toronto
A. McCleary – Grievor

On Thursday, 11 January 1990, there appeared before the Arbitrator

On behalf of the Company:
P. A. Young – Counsel, Toronto
J. Cyopeck – Vice-President & Assistant General Manager Toronto
A. Furtado – Witness

And on behalf of the Union:
H. Caley – Counsel, Toronto
J. J. Boyce – General Chairman, Toronto
J. Crabb – Secretary/Treasurer, Toronto
R. McArthur – Witness
P. Bolkovic – Witness
A. McCleary – Grievor

AWARD OF THE ARBITRATOR

At the hearing the Union did not pursue its original allegation of violations of Articles 6.2 and 6.3 of the Collective Agreement. The case is therefore confined to the issue of whether the Company had just cause to discharge Mr. McCleary.

Allan McCleary has worked for the Company at its Queens Quay Terminal in Toronto since August of 1985. On June 7, 1989 he was performing modified duties on the afternoon shift, between 2:30 p.m. and 11:00 p.m. when the incident giving rise to this grievance occurred. His assignment was to tape and repair parcels which were broken, torn or otherwise partially open. For that purpose he was stationed in an open area on the south side of the plant where parcels were proceeding along a conveyor belt after coming down a sortation slide.

Mr. Altino Furtado was the senior supervisor working in the terminal on the afternoon shift in question. According to his evidence, following a complaint from a supervisor about errors in sortations, he was inspecting operations in the part of the plant where Mr. McCleary was working. Mr. Furtado relates that he climbed to the top of the sortation slide, where he had a clear view of Mr. McCleary, some eight to ten feet away. He relates that because of the noise in the plant he could not be heard, nor did he think that he had been observed by the grievor.

According to Mr. Furtado's evidence he observed Mr. McCleary removing a box from the conveyor belt, scoring it with his tape gun to open its lid. He says that the grievor then reached in and placed some of its contents, which was chewing gum balls, into his mouth. The supervisor further testified that he then saw Mr. Richard McArthur, a probationary employee who was working next to the grievor, also reach into the box, take some of the gum from it and put it into his own mouth. Mr. Furtado relates that he then jumped down from the slide and proceeded immediately to where the men were working, and instructed them to come with him to the Hub Manager's office.

Mr. Edwin Nulle, Hub Manager, and Union Steward Peter Bolkovic were summoned to the office by Mr. Furtado. The evidence establishes that at the meeting which followed Mr. McCleary made no statement about his actions and indicated that he wanted representation by Union Steward Ricardo Duncan. As a result he was immediately suspended pending an investigation which was held on June 16, 1989. As a result of the investigation 60 demerits were assessed against Mr. McCleary and he was discharged effective the same day.

Mr. McCleary denies having opened the parcel or having consumed any of its contents. According to his evidence he was standing on the catwalk in front of the sortation slide when he saw an open box coming down the slide. He states that when he first saw the box the lid was closed but not sealed. Mr. McCleary states that he opened the lid to look inside to see if the packing slip was there, as he did not see it on the outside of the package. Mr. McCleary categorically denies that he opened the box for the purpose of having access to its contents or that he in any way took or consumed the gumballs inside it. He further testified that he has no recollection of Mr. McArthur taking anything from the parcel. According to his estimate the box was in his possession for no more that 10 to 15 seconds before he was apprehended by Mr. Furtado.

Further evidence was called with respect to the actions and subsequent statements of Mr. McArthur, the employee working next to the grievor. It is common ground that he was then a probationary employee of some two weeks' service. As noted above, Mr. Furtado testifies that he saw Mr. McArthur reach into the box and put some of its contents into his mouth. Hub Manager Edwin Nulle testifies that when the two employees were brought to his office he took Mr. McArthur into a separate office, along with Shop Steward Bolkovic. According to Mr. Nulle during the brief conversation that then took place he asked Mr. McArthur whether it was true that he was chewing gum which he had taken from the parcel, which by then had been brought to the office. According to the manager, Mr. McArthur admitted that it was. Mr. Nulle then advised Mr. McArthur that his employment was terminated and sent him home. Mr. Bolkovic, who was present throughout the exchange, testified that he cannot recall whether Mr. McArthur did or did not admit to taking some of the chewing gum. He does recall that the employee was dismissed on the spot, and that neither he nor the employee made any statement of protest to Mr. Nulle.

Mr. McArthur also testified. He denies that he took any chewing gum from the open parcel or that he ever admitted to Mr. Nulle that he had done so. According to his evidence, while he was working next to the grievor Mr. McCleary showed him the open package saying words to the effect of "Check this out." Mr. McArthur says that he extended his hand onto the lid of the box, but did not reach inside it or take out any of its contents.

As presented, this case turns entirely on credibility. Mr. Furtado states under oath that he saw both employees consuming chewing gum from a package which he observed the grievor opening. Mr. Nulle testifies that one of the employees admitted to him that he had taken and consumed some of the gum. Both Mr. McCleary and Mr. McArthur deny all of the material accusations and statements of their supervisors.

In my view the case must be resolved having regard to the most probable facts that are sustainable on the preponderance of the evidence before me. Firstly, it may be noted that there are no inconsistencies in the evidence of Mr. Furtado. His testimony was given in a relatively straightforward and careful manner. The same can be said of Mr. Nulle's evidence.

I am not persuaded that the evidence of either Mr. McCleary or that of Mr. McArthur is so persuasive. In my view certain objective facts raise important doubts about the credibility of the evidence given by both employees. Perhaps the greatest doubt is raised by Mr. McCleary's assertion that he needed to open the package, and tear apart the plastic liner which contained the gumballs, because he had to search for a packing slip. As a photograph of the parcel tendered in evidence plainly reveals, the packing slip was prominently displayed on the outside of the parcel, occupying roughly one third of an entire surface of one of the ends of the box. While its precise dimensions are not before me, it appears to be approximately from five to six inches square. In light of that evidence I have substantial difficulty accepting the statement of Mr. McCleary that he felt compelled to open the lid and tear open the plastic liner in an effort to find a packing slip. It does not appear disputed that it is common for packing slips to be affixed to the outside of a parcel, a fact which would be known to an employee of Mr. McCleary's experience. If he were concerned about finding a packing slip it would seem to the Arbitrator that his first endeavour would be to check the outside of the parcel, an exercise which would have promptly satisfied his concern.

Secondly, the doubt raised by the foregoing evidence is to some degree compounded by the apparent exchange which took place between Mr. McCleary and Mr. McArthur. It does not appear disputed that it is common for packages of gumballs to be processed through the terminal, to the knowledge of the employees. Given that reality it is less than clear to the Arbitrator why Mr. McCleary, who was supposedly busy looking for a packing slip, would have turned to his fellow worker saying "Check this out." It is equally unclear why Mr. McArthur would be prompted to reach out and place his hand on the lid of the parcel being handled by Mr. McCleary.

On the whole I find the evidence of the two employees to be highly implausible. When their explanations are coupled with the straightforward eye-witness account given by Mr. Furtado, bolstered by the evidence of Mr. Nulle, whose testimony is not rebutted by any recollection of Mr. Bolkovic, I am compelled to conclude that the balance of probability tilts decidedly in favour of the Company's case. On the evidence before me I am compelled to conclude that Mr. McCleary knew that the parcel he was handling contained gumballs, which was plainly evident from the label on the packing slip, and that he did open the parcel for the sole purpose of pilfering its contents, in the manner related by Supervisor Furtado. By so doing he violated a most fundamental obligation of trust to his employer, an action which is deserving of the most serious discipline.

The grievor's prior service is not impressive. Over the course of a year and a half, between February of 1987 and July of 1988 he incurred discipline on some seven separate occasions, logging a total of 59 demerits. One incident

involved falsifying Company documents and a second, which resulted in forty demerits, falsifying an injury. There are, it would appear, in the grievor's record reasons to be concerned about issues of integrity, and whether he has been rehabilitated in that regard. Even if the incident giving rise to his discharge can be characterized as petty pilferage, it is difficult, in light of the grievor's prior record, to describe what occurred as an isolated incident of uncharacteristic conduct. Moreover, given his prior accumulation of 59 demerits, there is little, if any basis for providing equitable relief or a substitution of penalty in mitigation. On the contrary, the material before the Arbitrator discloses a deliberate act of willful damage to a customer's property, for the purpose of pilfering its contents, committed on the part of an employee with a record that does nothing to assist his case. In the circumstances I must find that the Company was justified in its decision to discharge Mr. McCleary.

For the foregoing reasons the grievance must be dismissed.

January 12, 1990

(Sgd.) MICHEL G. PICHER
ARBITRATOR