CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2511

Heard in Montreal, Wednesday, 13 July 1994

concerning

CANADIAN PACIFIC LIMITED

and

CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS [UNITED TRANSPORTATION UNION]

DISPUTE:

The refusal of the Company to reinstate Conductor G.W. Andrews who was dismissed September 9, 1992.

JOINT STATEMENT OF ISSUE:

On August 20th, 1992, Extra 4719 East, train number 516/20, was ordered at 16:00 hours in Detroit destined for London, Ontario. The train was stopped for a Canadian Customs inspection west of Dougall Avenue Mileage 110.34, Windsor Subdivision, at 18:15 hours.

In Conductor Andrews' possession Customs officers found some 22 cartons of cigarettes and 1.2 kilograms of tobacco. These goods were confiscated and a conveyance penalty was levied against Conductor Andrews by the Customs Officer which he paid immediately.

The Union appealed the discipline on the premise that the Company had failed to sufficiently impress upon employees their policy about bringing goods across the border. Furthermore, the Union appealed the decision of the Company stating the penalty of dismissal was too severe.

The Union requested that Mr. Andrews be reinstated with lost wages, benefits and seniority.

The Company has declined the Union's request.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) D. A. WARREN	(SGD.) R. WILSON
GENERAL CHAIRMAN	for: GENERAL MANAGER, OPERATIONS & MAINTENANCE

There appeared on behalf of the Company:

R. Wilson	– Manager, Labour Relations, Toronto
H. B. Butterworth	– Labour Relations Officer, IFS
G. E. Johnson	– Manager, Operations, Medicine Hat, Alberta

And on behalf of the Union:

S. Keene	– Vice-General Chairperson, London
D. A. Warren	– General Chairperson, Toronto
J. N. deTilly	– Vice-General Chairperson, Montreal
V. Hamilton	– Secretary, GCA, Toronto
T. G. Hucker	– National Vice-President, BofLE, Ottawa
R. S. McKenna	– General Chairman, BofLE, Calgary
D. C. Curtis	– General Chairman, BofLE, Ottawa
Wm. Foster	– Vice-General Chairman, BofLE, London

S. Reed – Provincial Legislative Chairman, BofLE, Moose Jaw
G. Andrews – Grievor

AWARD OF THE ARBITRATOR

The evidence before the Arbitrator establishes that Conductor Andrews and his crew, comprised of Locomotive Engineer F.J. Renaud and Trainman D.R. Kennedy, deadheaded by taxi from London, Ontario to Detroit, Michigan on August 19, 1992. Enroute to Detroit by taxi they made a stop at the Sarnia Duty Free Shop. In Detroit they were subject to a substantial period of layover prior to entering service. During the layover in Detroit Mr. Andrews purchased twenty-two cartons of cigarettes of various brands as well as two tins of tobacco. According to the grievor the cigarettes in question would have been valued at approximately $20.00 U.S. per carton, and would have cost $40.00 per carton in Canada.

Mr. Andrews then proceeded to smuggle the tobacco which he had purchased into Canada by concealing it in his duffle bag which he hid under the floor boards of the engine of CP Extra 4719 East, the train which he was assigned to work towards his home terminal on August 20, 1992. The train was stopped in Windsor for a customs inspection, an event which is acknowledged to be relatively unusual. The inspection revealed the contraband cigarettes and tobacco in the possession of Mr. Andrews, as well as a few bottles of liquor and smaller quantities of tobacco in the possession of the other members of the crew. Locomotive Engineer Renaud was found to have one carton of cigarettes, a tin of tobacco and a 40 oz. bottle of rum in his possession while Trainman Kennedy had a carton of cigarettes and four bottles of liquor.

Following a disciplinary investigation, by a Form 104 dated September 9, 1992, Mr. Andrews was discharged from Company service for conduct unbecoming an employee and contravention of Canada Customs regulations, for utilizing his position as an employee of the Company and conductor in charge of his train to facilitate an improper and illegal operation and for compromising the position of the Company in respect of its international traffic business. The notice of discharge cites the violation of General Operating Instructions, CS-44, Section 6, Items 1.1, 1.2 and 1.3 (a) and (b), 1.4 and 1.5: General Notice, CROR General Rule A (i), (iii), (viii), CROR Rule 106A(d) and a violation of General Rule G. There can be little doubt that the grievor did violate rules pertaining to the prohibition of contraband including, for example, CS-44 Section 6, Item 1.1, which provides:

> **1.1** Everyone who, by means of a false or misleading representation, knowingly obtains or attempts to obtain the carriage of anything by any person into a country, province, district or other place, whether or not within Canada, where the importation or transportation of it is, in the circumstances of the case, unlawful is guilty of an offence punishable on summary conviction.

It is also not disputed that CS-44, Section 6, Item 1.3 directs the attention of employees to sections 159 and 160 of the **Customs Act of Canada** which prohibit the smuggling or attempted smuggling into Canada of goods subject to duties, as an offence punishable either upon summary conviction or indictment.

On the evidence, the Arbitrator cannot find that the Company has discharged the burden of establishing that there was a violation of Rule G committed by the grievor. There is no evidence to rebut his assertion that he was unaware that his crew members were in possession of several bottles of alcohol during the course of the operation of Extra 4719 East. It would seem that Locomotive Engineer Renaud purchased a bottle of rum at the duty free shop in Sarnia enroute to Detroit by taxi, and that Trainperson Kennedy purchased his four bottles of liquor during his layover in Detroit. There is no evidence to establish that Mr. Andrews was aware of the purchases made by his fellow crew members, and it is not disputed that the bottles of liquor were carried by Mr. Renaud and Mr. Kennedy in enclosed bags containing their personal belongings. In the result the Arbitrator cannot find a violation of Rule G, or a knowing acquiescence in a violation of Rule G, by Conductor Andrews.

The substance of the grievance at hand involves the employee's deliberate involvement in cigarette smuggling. As an international carrier the Company is dependent upon the good will of customs authorities for the efficient movement of its trains across international borders. It does not appear disputed that a working relationship has evolved between the Company and customs authorities which involves a substantial element of trust, whereby employees are expected to declare any goods which are subject to duty. Because of this trust the stopping and searching of trains by customs inspectors is kept at a minimum, on a random and very occasional basis.

Obviously, the possibility of large scale smuggling by its employees during the course of its operations would undermine the Company's relations with customs authorities and pose substantial risks for the integrity of its operations, as well as its reputation as an international carrier. The employer draws to the Arbitrator's attention the contents of Bill C-59, passed by the Government of Canada on November 7, 1985 entitled **An Act Respecting Customs**. Part 110 of the **Act** gives to a customs officer the authority to seize any conveyance which he or she believes on reasonable grounds has been utilized to effect a contravention of the Act. Simply put, the Act gives Canada Customs the discretion to impound a train should it be of the view that it is or has been utilized for an unlawful purpose in relation to contraband. In such a circumstance the Company might also be subject to fines, as well as the loss of equipment.

The prior awards of this Office are devoid of any examples of discipline for violations of the **Canada Customs Act**. The matter is therefore one of first impression for the purposes of assessing the appropriateness of the disciplinary penalty. In the Arbitrator's view, the Company is correct in asserting that smuggling during the course of company service must be viewed as a serious offence which may be deserving of commensurately serious discipline, up to and including dismissal. As in any matter of discipline, however, all of the factors involved must be considered, including the conduct alleged, as well as any mitigating circumstances disclosed either in relation to the event, or relating to factors such as an employee's prior service, disciplinary record and whether, for example, the incident involved is minor in nature or can be characterized as an isolated and uncharacteristic incident. As a general rule, it would not be unreasonable to expect that different consequences might flow from facts disclosing an isolated incident of petty smuggling, involving the concealment of goods of relatively small value intended for one's personal use, as opposed to the larger scale smuggling of goods in quantities or values which suggest a more serious level of unlawful activity for gain.

In the instant case Conductor Andrews was found in possession of a substantial quantity of cigarettes which, by his own estimate, would have totalled approximately 176 packages, representing a gain to him in cash value of several hundreds of dollars. While Conductor Andrews sought to explain the volume of his importation by stating that he intended to provide the cigarettes only to members of his family, the Arbitrator is left in substantial doubt with respect to the plausibility of that explanation. Moreover, even if it were accepted, he plainly placed the Company in an invidious position, to the extent that Customs authorities, and potentially the public, could reasonably draw the inference that a Company employee was involved in the large scale and systematic smuggling of cigarettes for profit. In my view there is little distinction to be drawn whether the profit is the employee's or his family's, when the volumes are as substantial as those disclosed in the case at hand. Significantly, Mr. Andrews' activities involve considerably more than the petty smuggling of a single package, or even a single carton of cigarettes for his own personal consumption. In the result, I am compelled to conclude that the activity in which he was involved must be viewed as aggravated, in light of the nature, quantity and value of the goods which he attempted to conceal and smuggle into Canada. The Arbitrator fully accepts the submission of the Company that the grievor's actions posed a real threat to the level of trust which has been an important part of its relationship with Canada Customs authorities, an aspect of good business relations inherent to the efficiency and integrity of its operations as an international carrier.

The grievor is thirty-nine years of age and had some eighteen years' service at the time of his dismissal. While he was assessed discipline for various infractions over the years, it appears that his record was clear at the time of the incident which is the subject of this grievance. The mitigating weight of these factors, however, are, in the Arbitrator's view, more than counter-balanced by the aggravating nature of the grievor's deliberate and calculated unlawful activity, in respect of which he was required to pay a conveyance penalty fine in excess of $1,000.00. On the whole, having particular regard to the scale of smuggling in which Mr. Andrews was unfortunately involved, the Arbitrator is compelled to accept the submission of the Company that his actions have undermined the relationship of trust between himself and his employer, and that in the circumstances the substitution of a lesser penalty is not appropriate.

For all of the foregoing reasons the grievance must be dismissed.

15 July 1994

(signed) MICHEL G. PICHER
ARBITRATOR