CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3249

Heard in Montreal, Thursday, 11 April 2001

concerning

CANPAR

and

UNITED STEELWORKERS OF AMERICA (LOCAL 1976)
(TRANSPORTATION COMMUNICATIONS UNION)

DISPUTE:

Discharge of Mr. Sylvain Lamarche.

JOINT STATEMENT OF ISSUE:

January 8, 2002 Mr. Lamarche received a notice to attend an interview concerning "the incident of January in truck 877140 and your involvement in the open parcels". On January 9, 2002 Mr. Lamarche attended the interview. On January 18, 2002 Mr Lamarche was discharged.

The Union filed a grievance claiming the reinstatement of Mr. Lamarche with full compensation for wages and benefits lost. The Union considers that the discharge is unjust. The Union also considers that the Company has not discharged its burden of proof.

The Company refused the grievance.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) D. NEALE	(SGD.) P. D. MACLEOD
GENERAL CHAIRMAN	VICE-PRESIDENT – EXPLOITATION

There appeared on behalf of the Company:

C. Lecorre	– Counsel
R. Dupuis	– Regional Manager, Lachine
N. Nicolai	– Supervisor
R. Gloutnay	– Supervisor, Loss Prevention

And on behalf of the Union:

R. Pagé	– President, Montreal
N. Lapointe	– President, Local 1976, Montreal
R. Pichette	– Union Representative, Montreal
S. Lamarche	– Grievor

AWARD OF THE ARBITRATOR

The grievor, Mr. Sylvain Lamarche, was discharged from his employment as a shunter at the Company's warehouse at Montreal, for attempted theft.

The evidence establishes that Kanuk, one of the employer's clients, which makes winter coats at Montreal complained in December 2001 that its coats were stolen while they were consigned to the Company for delivery. As these boxes of coats were found partially burgled when they were received at their commercial destinations in various cities in Quebec, the Company came to the conclusion that in all probability the thefts were committed at the Lachine Terminal in Montreal. It was therefore to this place that it asked a loss prevention supervisor, Mr. Rolland Gloutnay, to conduct a special surveillance of Kanuk's products as they passed through the terminal.

A report filed by Mr. Gloutnay as well as his evidence in a disciplinary interview establishes that at about 4:45 p.m. on January 7, 2002 he verified the contents of truck 877140 parked at door no. 32 of the warehouse. The truck contained many boxes of Kanuk products which, according to Mr. Gloutnay, were then in good condition. Later, at about 6:30 p.m., he saw the same truck parked in the middle of the terminal's north side yard with all of its lights off. When he approached the vehicle to inspect it, he saw the grievor who was leaving the box of the truck, towards the driver's cab, with a coat and a scarf in his hands. Mr. Lamarche then told him that he came to discover coats and scarves scattered on the floor of the box of the truck. It appears that Mr. Lamarche then illuminated the interior of the truck where was found, among other things, many boxes of Kanuk products. They had been meticulously opened with a sharp knife, and re-closed with tape, but with a single coat inside. All the boxes had a normal appearance which would not raise any suspicion concerning their condition.

Following an inquiry, the Company discharged Mr. Lamarche for attempted theft. Having examined closely the evidence in this case, the Arbitrator is of the opinion that the decision of the Company was justified.

It is true, as stressed by the Union, that the burden of proof falls on the company when it concerns a discharge for disciplinary reasons. It is also well established that the standard of proof is higher in the case where the alleged conduct of the employee could involve a criminal or quasi-criminal aspect (see **CROA 3227**). But, on the other hand, it is equally incumbent upon an employee who finds himself in a compromising position to give a clear and convincing explanation to dispel a reasonably conclusion of his culpability.

Unfortunately, the explanation of the grievor leaves much to be desired. Firstly, his declaration that he took the truck from door 32 to fill it with gas, and then parked it in the yard, is most curious. It is agreed that if there were a small number of parcels in the truck the routine would have been that Mr. Lamarche take out the parcels before pulling away from door 32 to get gas and then would have parked it in the yard for the night. But by his own evidence, the grievor did not even verify the contents of the back of the truck before leaving the warehouse.

He states that his intention was to verify the contents of the truck once parked, and then transfer the contents to another truck in order to empty the contents later in the evening. He claims that he did not wish to take the time to empty the truck at door 32 in order to free up that door for the return of two other trucks which usually occupied that door at the end of the day. But the Arbitrator finds it difficult to understand why he did not go to the trouble of opening the connecting door between the cab and the box of the truck to at least take note of how many packages were involved. According to his evidence, it was highly probable that the number of packages in the interior would be very small, which would have occasioned a delay of a few minutes only. On the contrary, the operation which he adopted was, in the final analysis, clearly less efficient.

Secondly, the evidence raises doubts with respect to the explanation of Mr. Lamarche concerning the filling of the gas tank of the truck. It is agreed that the two shunters on the evening shift use a scanner to register the number of litres of gasoline pumped into each truck. But the documentation printed from the scanners used for the truck in question gives no indication of its receiving any gas the evening of January 7, 2002. Mr. Lamarche claims that he had difficulty with the scanner and in the circumstances simply noted the filling of the gas tank on a piece of paper in the filling station. But according to the evidence of the supervisor, Mr. Nino Nicolai, who is responsible for the data on gas usage, there was no paper system to register the transfer of gas. According to him, if a scanner was defective, as can happen, the shunters obtain another from the office, which would take less than one minute. He insists that in the files of the Company, there is no other way to register the transfer of gas.

Furthermore, the data drawn from the scanners for the period in question, being between 5:37 p.m. and 6:33 p.m. January 7, tends to confirm that the scanner in the kiosk at the filling station was functioning. According to the

scanners, the pumps were used regularly, at intervals averaging seven minutes between trucks. In these circumstances, the Arbitrator finds it difficult to believe that there was a problem with the scanner which could not be corrected immediately by the substitution of another scanner. Given the fact that two shunters used the gas pump, and that certain of the intervals were of more than 10 minutes, it is plausible that the grievor could absent himself for fifteen minutes, the time necessary to rifle and re-close the boxes of coats and scarves. On the other hand, it is very less probable that the attempted theft in the truck took place while the truck was stationed at door 32 where there was not only a supervisor but also a substantial number of employees working or passing regularly. Mr. Lamarche was the only one who had legitimate access to the vehicle during all of the period in question.

The last suspect factor is the circumstance in which the truck in the possession of Mr. Lamarche was found at the time of the second inspection by Mr. Gloutnay. It is not contradicted that when the supervisor approached the truck it was parked in the middle of the parking lot, immobile and without any of its lights on. Mr. Gloutnay and Mr. Lamarche both jumped when the supervisor surprised the grievor in the back of the truck in the dark. It is difficult to understand why the truck was sitting unlit and to all appearances unoccupied during all the time Mr. Gloutnay was approaching, and why Mr. Lamarche was found in the interior of the truck, in full darkness, if not to facilitate some improper activity.

In light of the totality of the evidence, and of what the Arbitrator considers to be a clearly inadequate explanation on the part of Mr. Lamarche, I am of the opinion that the employer had reason to conclude that the grievor was responsible for an attempted theft. As a shunter he was able to circulate as he wished outside the warehouse. He had free access to the parking place of his own vehicle situated in the same enclosure, as well as to the darkest areas of the enclosure which surrounded the workplace. The most probable conclusion would be that he was discovered by Mr. Gloutnay, by pure chance, in a blatant attempt at theft. As such an act is clearly incompatible with the bond of trust fundamental to the relationship between employer and employee, despite Mr. Lamarche's twenty years of service, his discharge was justified and ought not to be disturbed by an arbitrator.

Furthermore, the Arbitrator cannot accept the objection of the Union relative to the claim of a violation of the terms of article 6.2 of the collective agreement concerning the disciplinary investigation. It is true that the written report of Mr. Gloutnay was not provided to the Union before the investigation. But the report itself was not essential to the investigation, as the company agreed to accord to the Union that Mr. Gloutnay be present at the investigation to verbally repeat the same report. The Union then had the full advantage of the article given that the Union's representatives had the change to pose their questions. In these circumstances, it appears to the Arbitrator that in the end the grievor had the full benefit of the rights provided for in article 6.2 of the collective agreement.

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

April 15, 2002

(signed) MICHEL G. PICHER
ARBITRATOR