

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2087

Heard at Montreal, Wednesday, 12 December 1990

concerning

CANADIAN PACIFIC LIMITED

and

TRANSPORTATION COMMUNICATIONS UNION

DISPUTE:

The dismissal of Mr. J. Osmulski of Thunder Bay for “breach of trust and dishonest conduct; failing to notify your Supervisor that your driver’s license had been suspended in March of 1989 and then willfully continuing to operate a Company vehicle and chauffeur other employees on and off Company property subsequent to that date without a valid driver’s license; and for falsely declaring to Company Officers that you possessed a valid driver’s license when questioned in this regard on November 10 and November 11, 1989, Thunder Bay, Ontario.”

JOINT STATEMENT OF ISSUE:

As a result of a mishap involving a Company vehicle, the Company conducted an investigation in connection with Mr. Osmulski’s operation of Company vehicles.

The investigation disclosed that Mr. Osmulski had withheld information of his driver’s license suspension from the Company and had continued to operate Company vehicles while disqualified from driving.

The Company dismissed Mr. Osmulski as noted above.

The Union has appealed the discipline stating that discharge was too harsh a penalty.

The Company has declined the appeal.

FOR THE UNION:

(SGD.) D. DEVEAU
SYSTEM GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) J. M. WHITE
GENERAL MANAGER, OPERATION & MAINTENANCE WEST, HHS

There appeared on behalf of the Company:

M. E. Keiran – Assistant Unit Manager, Labour Relations, Vancouver
L. G. Winslow – Labour Relations Officer, Montreal

And on behalf of the Union:

D. Deveau – System General Chairman, Calgary
J. Manchip – General Chairman, Montreal
C. Pinard – Vice-General Chairman, Montreal

AWARD OF THE ARBITRATOR

The material before the Arbitrator establishes that in March of 1989 the grievor's driver's licence was suspended pursuant to the Highway Traffic Act of Ontario. Notwithstanding that fact, he applied for a bulletined position as a checker, a position which requires the employee to hold a valid driver's licence, and concealed the truth from his employer. He succeeded in the job bulletin application on May 23, 1989 and proceeded to work in that position, driving a Company vehicle without a valid licence, until November 10, 1989 when the truth respecting his driver's status emerged as a result of a minor accident. It is not disputed that the grievor even then continued to attempt to conceal the facts from his supervisors, twice denying that he did not have a valid licence, and admitted the truth only when he had no alternative.

The Arbitrator must accept the argument of the Company that the grievor's actions reflect a degree of dishonesty and a breach of trust which strikes at the most fundamental element of the employment relationship. In my view the circumstances of this case are not substantially different from those which involve persons who gain employment on the basis of false or suppressed information, a condition which arbitrators have repeatedly found to justify termination. The principles in the cases were fairly summarized by Arbitrator Simmons in the following passage from **Douglas Aircraft Company of Canada Ltd. and United Auto Workers, Local 1967**, (1973) 2 L.A.C. (2d) 147 at p.153:

From the foregoing arbitration decisions, including the American ones, there appears to be at least four possible results that may arise whenever an applicant falsifies his employment application form to which a statement is attached signifying that the information which he is giving is the truth. One, is the information which is withheld or wrongly given, is innocently withheld or given. Then, if that information is not material to the job performance, the employee will in all likelihood not be dismissed from employment when this error is subsequently discovered. Secondly, if the information is material to the performance of the job, then, notwithstanding the fact that it has been innocently withheld or given, the employee may indeed be dismissed. Thirdly, in instances where the information is deliberately withheld or knowingly falsely given in an attempt to gain employment then, when subsequently discovered, the false misrepresentation will be sufficient grounds to terminate the employment relationship. The fourth and final possible result may involve a waiver of the right in the employer to terminate the employment relationship if his conduct clearly indicates that he condones that which the applicant has done.

(See also **Re McKenna and the Crown in Right of Ontario (Ministry of Transportation and Communications) 1980** 28 L.A.C. (2d) 410 (Swan).)

Are there any mitigating factors in the instant case which suggest that discharge is not appropriate? I think not. Mr. Osmulski's eleven years of service and his discipline record of ten demerit marks at the time of the incident are neither particularly positive nor negative. However, in assessing his overall character and reliability, the undisputed fact that in the summer of 1988 the grievor was convicted of a criminal charge of breaking and entering, gives little reason to doubt the employer's reappraisal of his overall character and trustworthiness. As the Company's representative suggests, if the criminal penalty given to the grievor in 1988 did not deter him from the fraud which he subsequently committed upon the Company in the spring of 1989, there is little reason to believe that a reduced penalty, with a view to rehabilitation, will have any greater success. The facts of this case do not support the exercise of the Arbitrator's discretion to substitute a measure of discipline short of discharge.

For the foregoing reason the grievance must be dismissed.

December 14, 1990

(Sgd.) MICHEL G. PICHER
ARBITRATOR