

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2185

Heard at Montreal, Thursday, 12 September 1991

concerning

CANADIAN PACIFIC LIMITED

and

UNITED TRANSPORTATION UNION

DISPUTE:

The dismissal of Trainman C.A. Carter, Cranbrook, B.C.

JOINT STATEMENT OF ISSUE:

Trainman Carter allegedly injured his back at home on February 21, 1989. As the result he applied for and received both a leave and weekly indemnity sickness benefits from February 22 to June 10, 1989.

On September 26, 1989, Trainperson C.A. Carter was dismissed for "... misrepresenting yourself as being physically incapacitated and unable to perform your normal duties as an employee of the Company during a period of time in which you were engaged in physically demanding activities relating to your own outside business and personal interest and for obtaining sickness (weekly indemnity) benefits from the Company during a period of time in which you were operating a personal business for financial gain, violating the provisions of the Company Medical Plan and defrauding the Company of compensation to which you were not entitled on various dates February to August, 1989".

The Union appealed the dismissal stating that the dismissal is unjust, or in the alternative that dismissal is an inappropriate penalty in this case.

The Company has denied the appeal.

FOR THE UNION:

(SGD.) L. O. SCHILLACI  
GENERAL CHAIRPERSON

FOR THE COMPANY:

(SGD.) C. E. MINTO  
GENERAL MANAGER, OPERATIONS &  
MAINTENANCE

There appeared on behalf of the Company:

D. A. Lypka	- Unit Manager, Labour Relations, HHS, Vancouver
R. LaRue	- Counsel, Montreal
R. M. Smith	- Counsel, Montreal
J. H. McFarlane	- Deputy Superintendent, Revelstoke

R. E. Wilson	- Labour Relations Officer, Vancouver
B. P. Scott	- Labour Relations Officer, Montreal
G. Chehowy	- Labour Relations Officer, Montreal

And on behalf of the Union:

D. McKee	- Counsel, Toronto
L. Schillaci	- General Chairman, Calgary
N. Nightingale	- Witness
C. A. Carter	- Grievor

#### AWARD OF THE ARBITRATOR

It is common ground that the grievor was authorized by his doctors to be absent from work from February 23 to August 8, 1989, because of what they diagnosed as a lower back ailment. During part of that period, to June 10, 1989, he received weekly indemnity sickness benefits under the Company medical plan. He was dismissed following an investigation from which the Company concluded that he had falsified his medical condition over an extended period during which he was doing heavy physical labour in his own personal business. On a careful review of the entirety of the evidence, the Arbitrator has difficulty concluding that the Company has established its case. During the course of the investigation conducted by the Company Mr. Carter revealed that he is the sole proprietor of a logging operation under the name "C&S Logging". He explained to the Company he himself did no physical work for his enterprise, which commenced logging in the summer season of 1989, and that the felling, skidding and bucking of trees which was done on his woodlot, using his skidder, was accomplished entirely by use of a hired man. The Company did not inquire as to the identity of the hired person, nor seek to examine him or any business or accounting records to substantiate the grievor's explanation. Additionally, during the course of the investigation, Mr. Carter provided the Company with the name and location of his physiotherapist in Cranbrook. Again, it appears that the Company did not avail itself of that information to verify the truth of Mr. Carter's statement, nor seek any documentary support for it.

Nowhere in the material provided by the Company is there direct eye-witness evidence to establish that during the time that he was drawing indemnity sickness benefits, or indeed during any of the period examined, that he was performing work inconsistent with the medical condition for which he was on leave and under a doctor's care. Whether or not it can be said that the Company had reasonable grounds for concern about the grievor's action, its position, and its decision to terminate Mr. Carter are entirely based on pieces of indirect and circumstantial evidence. These include the records of his logging contracts with Crestbrook Forest Industries Ltd. of Cranbrook and the report of a private investigator who spoke with the grievor at his father-in-law's farm on or about August 11, 1989. At the arbitration hearing the grievor produced income statements which substantiate his account of his business' earnings during the logging season of 1989. Specifically, the volume of timber cut and the amount paid to his hired hand, supplemented by a relatively smaller amount paid to three casual employees, does support his

explanation of the manner in which his logging enterprise operated. According to Mr. Carter's evidence, his only physical involvement was to proceed to the woodlot in his pick-up truck to fuel and grease the skidder which was operated by his hired hand. His evidence in that regard is confirmed by the evidence of his helper, Mr. Neil Nightingale who testified at the arbitration hearing. The only additional fact revealed by Mr. Nightingale is that Mr. Carter occasionally walked the woodlot to demarcate cutting areas by the use of ribbons which he attached to trees. In the Arbitrator's view Mr. Nightingale's evidence establishes beyond any doubt that the volume of logs during the 1989 season corresponds to an amount which he would have produced, based on the volume of timber taken, the rate paid to him and his own explanation as to the amount of wood that he could fell, skid and buck during an average six hour period. In the result, the financial records of C&S Logging filed in evidence Mr. Carter, supported by the documentary evidence of his contracts with Crestbrook Forest Industries Ltd., as well as a report as to the volume of wood cut on his woodlot prepared by the Ministry of Forests of the province of British Columbia, in addition to the viva voce evidence of Mr. Nightingale, all confirm the accuracy of the grievor's account that he had no involvement in the performing of heavy physical labour in relation to his logging operation during the period in question. Moreover, the report of the Company's own private investigator contains a statement which corroborates that Mr. Carter did not operate his skidder or involve himself in logging operations on days when Mr. Nightingale was not available.

A subsidiary part of the Company's allegation against the grievor is that he performed heavy work on his father-in-law's farm. Again, there is no direct evidence to support that allegation. While the report of the investigator contains a statement by Mr. Carter made on August 11th that he would be lifting heavy bales of hay that day, it is not disputed that he had been cleared for heavy work by his doctor some three days prior, even though he had not yet returned to work, a transgression for which he was separately disciplined. No weight can therefore be attached to that evidence.

On the whole, therefore, the Arbitrator is satisfied, on the balance of probabilities, that the grievor did not misrepresent his physical condition during the period of time in question, nor did he engage in physically demanding activities relating to his own outside business and personal interests. In the result, the employer has not established that it had just cause for his discharge.

The Company submits that a lack of candour on the part of the grievor during the course of the investigation deprived it of the full facts of the case until the arbitration hearing, which occurred many months later. Upon a close examination of the record of the investigation, I do not find that position to be fairly made out. It appears that the Company drew some incorrect and unsubstantiated conclusions from the documentary record of Mr. Carter's logging contracts. Further, it did not seek to ask the identity of his hired helper or insist that he provide any documentary records to support his statements. Additionally, while it did ask the identity and location of his physical therapist, it appears to have made no further investigation following upon his answer. In all of the circumstances, I am not persuaded that the Company should have

expected Mr. Carter, who was plainly disturbed by the Company's use of a private investigator and business records which he considered to be privileged, to have been under any obligation beyond answering the Company's questions in a truthful way.

For the foregoing reasons the grievance must be allowed. The grievor shall be reinstated into his employment, with compensation for all wages and benefits lost, and without loss of seniority.

September 13, 1991

(Sgd.) MICHEL G. PICHER  
ARBITRATOR