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Re Air Canada and International Association of Machinists and Aerospace Workers

Innis Christie

RE AIR CANADA AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS

I. Christie. (Nova Scotia) *May 8 and 9, 1978. (Hearing dates)*

EMPLOYEE GRIEVANCE alleging unjust discharge.

C. Schmidt and others, for the union.
P. Mercier and others, for the employer.

AWARD

Facts

The grievor, Darvill Hamshaw, has been employed by Air Canada since August 18, 1973. Until the events which are the subject-matter of these proceedings his record was without blemish. At relevant times he was working as a station attendant in the baggage delivery area, off-loading the baggage carts on which passenger luggage is carried from incoming aircraft. On September 22, 1977, the grievor received written notice from B. K. Jensen, aircraft services manager at the Halifax Airport, that he was suspended pending dismissal because of pilferage from a piece of passenger luggage which had occurred while he was on duty and which, because a cap believed to belong to him had been found in the pilfered luggage, was believed to have been committed by him. The grievor appealed in accordance with art. 17 of the collective agreement and the matter went through the various stages of the grievance procedure set out there, resulting in a final decision at the third level that Mr. Hamshaw be discharged effective February 25, 1978.

The employer first learned of the pilferage here in question on September 16, 1977, when a complaint was received from a passenger who had been on a September 14th flight from Sydney to Toronto through Halifax. The passenger claimed that his suitcases had been opened and six bottles of Newfoundland Screech and two other bottles of liquor (hereafter referred to as "the Screech") had been stolen. The flight had, in fact, stopped over in Halifax for several hours. The passenger was called as a witness at the hearing in this matter and proved highly credible. He testified that his luggage was handled by a porter and by the taxi-driver so that it did not come to his attention until September 15th that his "gifts for old Newfie pals and relatives in Toronto" had been stolen. When his wife opened the suitcase to get a bottle for one happy relative

she discovered no liquor, but an orange cap rather smudged with grease, which was introduced as an exhibit at the hearing.

Some days after making his complaint the passenger sent the cap in to Air Canada. Eventually the cap got sent back to Halifax and on December 5th it was placed in the ramp supervisor's office to see if anybody would claim it. The grievor, Darvill Hamshaw, claimed the cap as his and wore it periodically until he was confronted by Joseph Cormier, Air Canada's security manager for Atlantic Canada, on the whole question of the theft. In the presence of the union committee member and two other members of management, Mr. Cormier took a statement from the grievor in which he acknowledged the cap as being his.

Evidence was introduced in the course of the hearing that at least one other employee at the Halifax Airport wore a similar cap and it was suggested that the cap found in the passenger's luggage might not have been Mr. Hamshaw's. However, based on the circumstantial evidence, including his having claimed the cap, and on the grievor's demeanour and testimony in that connection there is no real doubt in my mind that the cap in question was his.

In his statement of December 17th the grievor acknowledged that he was working as station attendant in the baggage delivery area when the suitcase in question was unloaded. Apart from the grievor's statement, evidence of flight schedules and the like introduced at the hearing leaves no doubt that he was working in the baggage delivery at the critical time.

The employer introduced evidence tending to show that the grievor would have been alone in the baggage delivery area at some times during the shift in question and the union introduced evidence tending to show that there is considerable coming and going in the baggage delivery area. In sum I am satisfied that while there might have been opportunities for someone else to steal the Screech there might well also have been opportunities for the grievor to do so. Indeed, in response to my direct question the grievor testified that to his direct knowledge pilferage does occur in the baggage delivery area.

It was also suggested on behalf of the grievor that pilferage of the Screech might have occurred in Sydney or in Toronto. However, the facts that the suitcase had passed through Halifax during the shift when the grievor was working and that his cap was found in it leave little doubt that the theft occurred in Halifax. The only question is whether the grievor stole the Screech and accidentally left his cap in the suitacse or someone else committed the theft and left his cap there.

Throughout the investigation of this matter and the various stages of the grievance procedure the grievor has simply denied that he committed the theft. At the second level of the grievance

procedure he volunteered to take a polygraph test and it was subsequently agreed by the union and the employer that such a test would be administered and that its outcome would govern the disposition of this matter.

On January 13th the grievor was flown to Toronto where he met with one Jack M. MacDonald who, in his letter of report to Mr. Cormier, the employer's security manager, signs himself as "audio stress analyst". MacDonald's letter states that:

> During the pre-test interview, Hamshaw became extremely nervous and kept looking at the instrument on the table beside him. He eventually stated to me that he did not wish the test. No reason was given.

MacDonald, the writer of that letter, was not at the hearing to testify. The grievor testified that during the "pre-test interview" he was told that if he knew who had stolen the Screech it would show up on the reading and the fact that he knew would make him an accessory to the theft. The grievor stated that while he had not seen the liquor stolen he felt sure he knew who had stolen it and therefore became very nervous and refused to take the test. I am very well aware that the letter from Jack M. MacDonald, the "audio stress analyst", in which he states that no reason was given for Hamshaw's refusal to continue with the test, was unsupported by direct testimony. However, Hamshaw's explanation at the hearing of why he refused to go through with the polygraph test was the first time the employer had heard him suggest that he knew who had stolen the Screech. He was not prepared to name a name because, he said, he had not actually seen the theft taking place.

Issues

The issue is one of fact: Did the grievor steal the Screech? The answer I must give to that question may depend on the standard of proof to be applied in a case such as this and on whether the rule in *Hodge's Case* (1838), 2 Lewin 227, 168 E.R. 1136, applies. In that famous criminal case Baron Alderson [at p. 228] instructed the jury that before they could find the accused guilty on circumstantial evidence alone they must be satisfied:

> . . . not only that those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person.

If I must conclude that the grievor did commit the theft the further issue arises whether I should exercise the authority given by art. 18.10 of the collective agreement to the arbitrator to "render such intermediate decision as he considers just and equitable" and order the grievor reinstated with some period of suspension.

Decision

It was not seriously argued that because the grievor was dis-

charged for conduct that amounted to a criminal offence the employer had to meet the criminal standard of proof in this arbitration proceeding. Brown and Beatty in *Canadian Labour Arbitration* (1977), para. 7:2500, at p. 290, succinctly state the general arbitral view:

> Although at one time, where the alleged misconduct might have involved a criminal offence, some arbitrators required the employer to prove beyond a reasonable doubt, that is, on the criminal burden of proof, that the employee had engaged in such activities, that is clearly no longer the prevailing principle. Rather, the issue which now divides arbitrators is whether even in those circumstances the burden of proof borne by the employer is simply the civil burden, or whether some more rigorous burden, though less than the criminal burden, is required to be satisfied. One school of thought holds that even in this context the employer is only obliged to prove its case in the balance of probabilities. On the other hand, a significant number of recent decisions appear to require the employer to prove its case on some standard which falls between the criminal and civil burdens of proof. This school of thought subscribes and holds to the view that the more serious or reprehensible the alleged misconduct, the more stringent the standard of proof that is required to be satisfied.

My view, as expressed in *Re Canadian Broadcasting Corp. and Assoc. of Radio & Television Employees* (1968), 19 L.A.C. 295 at p. 296, is that because of the seriousness of discharge the arbitrator must require "clear and convincing proof of the facts alleged by the employer to justify the discharge, but this is not a criminal burden of proof." Moreover, as I went on to state in the *Canadian Broadcasting Corp.* decision [at p. 296]:

> Since the burden is not a criminal one the rule in *Hodge's Case* (1838), 2 Lewin 227, 168 E.R. 1136, has no application, even where the evidence is entirely circumstantial. To say that a discharge cannot be upheld where the facts in evidence are capable of any rational inference other than one indicating that the grievor was at fault is to say that the reasons for discharge must be established beyond all reasonable doubt. It is another way of stating the criminal burden of proof.

Mr. Schmidt, counsel for the union and the grievor, took issue with the correctness of this statement but I remain satisfied that it is accurate. In *Re Spruce Falls Power & Paper Co. Ltd. and Lumber & Sawmill Workers, Local 2995* (1971), 22 L.A.C. 406 (Johnston), the majority of the board of arbitration, after careful consideration of the authorities, reached what is essentially the same conclusion. The board quoted the statement of Ritchie, J., in the Supreme Court of Canada in *Hanes v. Wawanesa Mutual Ins. Co.* (1963), 36 D.L.R. (2d) 718 at p. 734, [1963] S.C.R. 154, [1963] 1 C.C.C. 321, where His Lordship stated that an earlier Supreme Court of Canada decision applying *Hodge's Case* in a civil context,

> . . . must be read as meaning that when a right or defence rests upon the suggestion that conduct is criminal or *quasi*-criminal the Court must be satisfied not only that the circumstances are consistent with the commission of the criminal act but that the facts are such as to make it reasonably probable, having due regard to the gravity of the suggestion, that the act was in fact committed.

As I have already suggested, I am satisfied that the theft occurred in Halifax and that the cap found in the suitcase from which the Screech had been stolen was the grievor's. These circumstances point to the grievor as having committed the theft although it is somewhat difficult to picture just how he came to leave his cap in the suitcase. I must assume, however, that if he did steal the liquor he was hurried, and perhaps even flustered, to the extent that he made, from his point of view, a very serious blunder. If the grievor is not the thief then it is at least equally difficult to see how anybody else would come to leave his cap in the suitcase unless it was put there purposely. It seems unlikely that it would have been put there to throw the security people off the track because the effect would only be to narrow the search to Halifax and exclude the possibility that the theft occurred in Sydney or Toronto. If, therefore, the cap was put in the suitcase purposely at all it must have been put there to implicate the grievor. Yet at no time has the grievor suggested any reason why any person in the airport might wish to "set him up". Even at the hearing before me, where for the first time he suggested that he knew who had stolen the Screech, he declined to suggest any possible explanation for his cap having been put in the suitcase.

With regard to this belated suggestion by the grievor that he knows who stole the Screech, I can only echo the thoughts of the arbitration board in *Re Polymer Corp. Ltd. and Oil, Chemical & Atomic Workers, Local 9-14* (1973), 4 L.A.C. (2d) 148 (Palmer). Like the majority in that case [at p. 151] I do not see,

> . . . how such a self-serving statement can be accepted, unless [the grievor] is willing to identify the person in order that the veracity of his statement may be checked out. A person cannot refuse to give testimony relevant to an item in dispute and then request that the difficulties in that area be resolved in his favour.

At one level we may sympathize with one who wishes to protect his workmate but every employee has an obligation to report dishonest behaviour adversely affecting his employer and his refusal to do so cannot be allowed to be at once a shelter for the guilty party and a barrier to the truth in a serious matter such as is before me now.

Having considered all the evidence I am satisfied not only that the circumstances proved by the employer are consistent with the grievor having stolen the liquor, also that the facts proven make it very probable, having due regard to the gravity of the matter, that the grievor in fact stole the liquor.

Article 18.10 of the collective agreement provides:

> In the case of disciplinary or discharge appeals, the Arbitrator may either uphold the Company's final decision, fully exonerate and reinstate the employee with pay for all time lost, or render such intermediate decision as he considers just and equitable.

In my view these words place a duty upon me to assess the penalty imposed by the employer and, if in all the circumstances, including the grievor's length of service and past record, I consider it just and equitable to do so, to substitute some lesser penalty. Theft of the employer's property has generally been found to merit discharge of the grievor on the ground that such misconduct demonstrates untrustworthiness incompatible with continued employment (see Brown and Beatty, *Canadian Labour Arbitration* (1977), para. 7:3310) but in some recent awards arbitrators have questioned whether the sanction of discharge is justified by petty pilferage of a kind widely practised and seemingly found acceptable at all levels on the employment ladder: see *Re Toronto East General Hospital Inc. and Service Employees Int'l Union* (1975), 9 L.A.C. (2d) 311 (Beatty).

In the case before me the theft was more than petty pilferage, it was the theft of liquor approaching a value of $100. This cannot, in my view, be equated with unauthorized use of paper clips or stationery and, in any event, was not a theft from the employer. It was theft from a customer who is not in a position to write off such a loss as a cost of business. If air travel as we know it is to be reliable, passengers must be able to count on reasonable security for their personal luggage and if Air Canada is to retain credibility as a carrier it must be able to ensure such security. In my view the fact that this was theft from a customer rather than from the employer makes it much more serious. Not only does the employer suffer a direct financial loss, he also stands to suffer a significant business loss if such thefts occur with any frequency.

Notwithstanding the grievor's good employment record, because of the seriousness of the misconduct which led to his discharge I do not consider it just and equitable in all the circumstances to render any "intermediate decision". The company's final decision is upheld and the grievance is dismissed.