CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 159

Heard at Montreal, Tuesday, July 8th, 1969

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANLERS, EXPRESS AND STATION EMPLOYEES

THIS CASE WAS SUBSEQUENTLY WITHDRAWN FROM THE JURISDICTION OF THE ARBITRATOR AND CONSEQUENTLY NO AWARD OF THE ARBITRATOR WAS ISSUED.

However certain aspects of the presentation made on July 8th, 1969 were considered by the Arbitrator to have interest for all parties who might in the future be engaged in the presentation of cases of a like nature for adjudication by the Arbitrator.

The comments of the Arbitrator which follow are therefore directed to both railway companies and labour organizations which are party to the Canadian Railway office of Arbitration.

The grievor, a freight trucker with some eight years' service with the company was discharged for alleged pilferage from a shipment of beer being carried in the hold of one of the Company's vessels. As a general matter, conduct of this sort would justify an employee's discharge. In cases such as this, of course, the onus is upon the company to show, on the balance of probabilities, that the company's allegation is true.

At the hearing of this matter, the parties presented their cases in the manner in which cases are usually prsented in the Canadian Railway Office of Aribtration, that is by the presentation of briefs containing statements of fact and arguments together with certain exhibits, and supplemented by oral representations. The facts as stated by the company in its brief were derived from statements taken by the company's officers in the course of investigating the grievor's conduct and at interviews conducted in the course of the usual formal investigation. These statements, made by the grievor, his foreman, and certain fellow employees, were included as exhibits. These persons were not present at the hearing and no *viva voce* evidence was called.

It is the union's position that the statements relied on by the company ought not to be admitted as evidence in this case. The company, while maintaining that the statements are admissible, requests the right to present *viva voce* evidence at an ajourned hearing if the statements are not admitted.

Statements such as those presented here would not be admitted in court in the absence of the witnesses themselves. In arbitration proceedings, arbitrators generally have a wide latitude with respect to the reception of evidence and this is expressly so under the agreement establishing the Canadian Railway Office of Arbitration. The arbitrator may accept evidence even though it might not be accepted in court. Such latitude is essential if the method of proceeding on stated facts, on which the parties have relied, is to succeed. In many cases, signed statements of witnesses may be admitted for this reason. Likewise it is my view that the record of the examination of an employee by an investigating officer may be considered, where the employee has had the opportunity of union representation.

Whether or not such documents may be admitted is a different question from that of the weight to be given to them. Where there is a contested issue of fact, there is no doubt that the most reliable way to reslove it is to hear the evidence of witnesses who are subject to examination and cross-examination in front of the arbitrator. Thus their demeanour, the circumstances in which their observations were made, the reliability of their memories and the consistency or otherwise of their stories can all be assessed. In **Case No. 125** it was alleged that a sleeping car porter

had made an improper suggestion to a female passenger. The evidence in that case consisted of the statements of the complainant female passenger and her companion and the transcript of the company's investigation of the porter. On that evidence there was no doubt that the porter had spoken to the lady, but there was a vital difference between his recollection of the words spoken, and hers. The material before me could not support a finding that one of them had given a more accurate account than the other, and the only conclusion to be drawn in that case was that it had not been shown to be more probable that the words spoken by the grievor were as reported by the young lady.

In **Case No. 127**, a yard conductor was assessed demerit marks for moving a train at an unreasonable slow speed. The yard crew had been observed by a party including the Chairman of the Board and other officers of the company. The case differs from the instant case not only in the sort of circumstances involved, but also in that there were there no statements such as I have indicated might be admitted, and the company had failed to carry out the investigation required by the collective agreement. What is of relevance here is the point that no assumptions as to credibility can be made where a particular allegation has been denied. The award reads in part:

> The material before me consists, in effect, of nothing more than a charge and a denial. The company disciplined the grievor because it naturally believed the statements of its officers; but by the same token it disbelieved the statement of its employee. There was no hearing at which any evidence was presented, and there was no opportunity for the grievor to question or test the statements which were acted on. Because of this, it is impossible for me to determine whether the alleged observations of the company's officers are to be preferred to those of the grievor. It should be clear that I do not in any way question the statements of the company's officers: it is simply the case that there is nothing in the way of admissible evidence before me which would permit me to decide the question of fact one way or the other. I cannot make any assumptions of credibility as between the parties, whatever the rank, high or low of the persons involved.

In some cases, even though a general allegation is denied. it may nevertheless be possible to decide the question where there are sufficient uncontroverted statements to allow reasonable inferences to be drawn. Thus in **Case No. 126** the material before me, in the form of statements and transcripts, permitted a number of conclusions to be drawn as to matters about which there was no dispute, and from these a reasonable inference concerning the issue in the case could be drawn. Again, in **Case No. 128**, the evidence was described as follows:

> The material which is before me consist in the main of statements of the grievor and others taken at the enquiry conducted by the company. No witnesses were called at the hearing before me' I cannot assume that any of the "witnesses" is dishonest, I can merely draw whatever inferences are supported by the uncontested material before me. On the basis of such material, I must decide whether or not the company has established, on the balance of probabilities, that the grievor was guilty of a violation of Rule G. In its submission, the company states that its investigating officers concluded that Mr. Ross "had not succeeded in establishing that he was not impaired". With respect, however, the question was, as I have indicated, whether the company had succeeded in establishing that Mr. Ross was impaired.

In that case, as in **Case No. 126**, the material did permit certain inferences to be drawn without assessing the credibility of the witnesses on particular points.

In the instant case the statements of the grievor plainly contradict the statements of the other "witnesses", not merely in that he denies the general allegation, but more importantly in that he denies having done the particular acts which were attributed to him. There is here no common ground from which reasonable inferences can be drawn. It is rather a question of believing or disbelieving one or another account of a particular incident. It is a matter of reliability and credibility of eye-witness accounts, and such a matter cannot be resolved on the material before me. It is no doubt true that the accuracy of the grievor's statements may be questioned in the light of his admitted drinking during the day in question, but his general credibility is not necessarily suspect on this account.

Since the onus is on the company to make out its case on the balance of probabilities, and since the material before me does not permit resolution of the particular issues of facts, it could be said that the company has failed to make out its case. The company has, however, requested an adjournement so that witnesses may be heard. In the normal course, such a request would not be granted, since the parties must, in general be prepared to put forward their whole case on the day set for the hearing. In the particular circumstances of this case, however, it is my view that the matter should be ajourned. The question of the necessity of witnesses was raised well before the hearing, and

the company raised the matter again at the outset of the hearing. The statements on which the company relies include those of fellow employees of the grievor, of which the union was aware. Having regard to the practice which has existed as to the presentation of cases, and to the circumstances of this case, it is my view that fairness requires that the parties be permitted to present *viva voce* evidence at an adourned hearing in this matter. This ruling is made having regard to the special circumstances of this case: in general, the parties must be prepared to present their entire cases in the manner they think best on the day set for the hearing.

Accordingly, the matter is adjourned to the next day for hearings.

(signed) J. F. W. WEATHERILL
ARBITRATOR