CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 557

Heard at Ottawa, Tuesday, July 13th, 1976

Concerning

CANADIAN PACIFIC LIMITED

and

UNITED TRANSPORTATION UNION (T)

DISPUTE:

Dismissal of Conductor E. Williams, Trainmen R.J. Cole and R.B. Cunningham for violation of Rule G, Uniform Code of Operating Rules, and for consuming intoxicants in the caboose on Company property, and dismissal of Trainman B.C. Moorcroft for violation of Rule G, Uniform Code of Operating Rules, at Assiniboia, Saskatchewan on September 29th and 30th, 1975.

JOINT STATEMENT OF ISSUE:

Conductor E. Williams and Trainman B.C. Moorcroft were in unassigned service with the home terminal at Assiniboia. They arrived in Assiniboia and went off duty at 20:30 on the evening of September 29th, 1975. Trainmen R.J. Cole and R.B. Cunningham were working in unassigned pool freight service with Weyburn as their home terminal. They arrived in Assiniboia and went off duty at 20:15 on the evening of September 29th, 1975.

An investigation was held as to the conduct of the above mentioned employees on the night of September 29th-30th, 1975. Following the investigation the Company dismissed Conductor E. Williams, Trainmen R. J. Cole and R B. Cunningham for consuming intoxicants while subject to duty, entering Company property while under the influence of intoxicants and for consuming intoxicants in caboose, in company with other employees, violation of General Rule G, Uniform Code of Operating Rules, and dismissed Trainman B. C. Moorcroft for consuming intoxicants while subject to duty, violation of General Rule G, Uniform Code of Operating Rules.

The Union appealed the dismissal of these employees requesting that they be reinstated in the Company's service and be paid for all time lost on the grounds that there was no proof of a rule violation. The Union contends that these employees were not subject to duty during their off duty hours at Assiniboia on September 29th and 30th, 1975, but were only subject to call.

FOR THE EMPLOYEES:	FOR THE COMPANY:
(SGD.) P. P. BURKE	**(SGD.) R. J. SHEPP**
GENERAL CHAIRMAN	**GENERAL MANAGER, OPERATION & MAINTENANCE**

There appeared on behalf of the Company:

D. W. Flicker – Counsel, Montreal
R. Colosimo – Manager, Labour Relations, Montreal

And on behalf of the Brotherhood:

M. W. Wright, Q.C. – Counsel, Ottawa
P. P. Burke – General Chairman, Calgary

AWARD OF THE ARBITRATOR

The grievors arrived at Assiniboia on the evening of September 29, going off duty at the times set out in the Joint Statement. None of them booked rest or not fit for duty. Each expected to be called for duty in the morning. After checking into their hotel, however, the grievors and another employee, a Mr. Kemp, had several beers at the hotel and then moved to another hotel for more beers or other drinks. At about 1:30 a.m. on September 30 one of the grievors, Mr. Moorcroft, had something to eat and went to bed. The others had already gone to a caboose which was in the yard, where they drank some beer which Mr. Kemp had bought. Messrs. Williams, Cole and Cunningham returned to their hotel and went to bed at about 1:30 a.m. or shortly thereafter.

After the others had left, Mr. Kemp used the engine to move certain cars in the yard, and in this movement hit the caboose, in which a fire was started. Later that morning, after the fire had been extinguished and an investigation had begun, Mr. Kemp booked unfit and went home to Moose Jaw. He was subsequently discharged. There can be no doubt that he was discharged for just cause, and he is not one of the grievors in this case.

Of the four employees who are grievors, three of them, Williams, Cole and Cunningham are in much the same position: they all did considerable drinking during the evening; they were all present in the caboose and drank a beer there; they all subsequently accepted their call and worked on the following day without incident. The question whether discipline was proper would be the same in each case. As to the propriety of the penalty imposed, the only special case is Mr. Williams, who had some twenty-seven years' seniority. There is no indication that any of the grievors had any disciplinary record.

Mr. Moorcroft's case differs in that he did not go to the caboose While he was not, then, guilty of drinking on Company property, he did, by reason of his drinking, render himself unfit for service and did not carry out his assignment the next day. On the question of the propriety of the penalty imposed, there is, in the result, no real distinction between Mr. Moorcroft's case and those of the other grievors.

The Union has raised a number of questions relating to the propriety of the Company's action. One of these relates to certain questions put to the grievors during their investigation. Another raises an issue of discrimination. There is also, of course, the major question whether or not there were indeed grounds for the imposition of discipline on the grievors.

The objection to the investigation procedure is that certain leading questions were put to the grievors, asking them to conclude that they were indeed "subject to duty" at the material times. I do not consider that the same rules which would apply to the examination of a witness in a judicial or quasi-judicial proceedings should be applied with respect to the company's conduct of its investigative procedure. In this case, the grievors' acknowledgment that they were subject to duty is not determinative of that question, which is one of substance in these proceedings. In my view, the investigation which was carried out in this case satisfied the requirements of the collective agreement.

As to the matter of discrimination, that allegation is based on the fact that there were certain other railroad employees staying over in Assiniboia that evening who also had a beer with their dinner and who were not penalized. These other employees, however, did not participate in the fairly heavy drinking in which the grievors were engaged and did not go to the caboose. Their conduct did not affect in any way their ability to present themselves for work the next day. There was nothing improper, from my point of view, in their taking a drink as they did. They committed no offence, and their case has no substantial resemblance to that of the grievors.

It is clear that grievors Williams, Cole and Cunningham did commit the offence of drinking on Company premises. It takes no express provision to establish this as an offence, and the grievors recognized it as such. They would be subject to discipline on this ground alone. Mr. Moorcroft, as I have indicated above, made himself unfit for service and this too is a proper ground for the imposition of discipline.

The major question is whether there was a violation of Rule G, which is as follows:

> **G.** The use of intoxicants or narcotics by employees subject to duty, or their possession or use while on duty, is prohibited.

The question whether or not the grievors were "subject to duty" is a difficult one. The expression does not appear to be defined in the Uniform Code. The grievors might, as they acknowledged, have received a call at any time, and in this sense they were "subject to duty". On the other hand, their status was certainly one of being "off

duty" at the material times. Once they had received and accepted a call, then I think it is clear they would be "subject to duty". But it is by no means clear that, having gone off duty, and having no reason to expect a call before the morning, they should be considered as subject to duty and thus prohibited from drinking.

The cases on this question in the Canadian Railway Office of Arbitration do not set out any definition of the phrase "subject to duty". In a number of cases there has been held to be a violation of Rule G by employees actually on duty. In **Case No. 128** a yard foreman reported for work under the influence of alcohol, clearly it can be said that he had been using intoxicants while subject to duty, but that does not suggest what limits there may be to the proper use of the term. In **Case No. 269** an employee did not report because he was in a drunken sleep. There too it seems clear that he had been using intoxicants at a time when he was subject to duty on any reasonable interpretation of the phrase. In **Case No. 58** a claim was made for holiday pay, and a question arose whether the grievor was "available for duty" on the holiday. The Arbitrator indicated that even if the grievor had booked rest, he might nevertheless be "subject to call" in certain circumstances. That is, he could not be said to have been "unavailable" merely because he had booked rest. It does not follow, however, that because the Company might be entitled to call the grievor he was therefore "subject to duty", and I see nothing in **Case No. 58** which would bear on the interpretation that expression should have for purposes of Rule G.

There have been certain American cases dealing with provisions analogous to our Rule G. In **Award No. 1761** it is said that "it is well established that drinking by railroad employees on the job or on Company property or in such a manner that they are under the influence of alcohol when they are supposed to be working or available for work is a safety hazard which cannot be tolerated". In that case the board held that the evidence was insufficient to establish that the grievor had been drinking. There, the grievor had booked off work shortly after midnight, had been called at 7:30 p.m. for 9:30, which call was subsequently cancelled, and then advised he would be going out at about 4.00 the next morning. The Company's evidence as to his condition related to the time of about 9.20 p.m. As to this, the board said, "He stated at the investigation that he was due to go out at 4 a.m. and there is no other evidence to the contrary. If that is so and he had been drinking prior to 9 p.m. but had retired, there is a serious question whether under those circumstances he was guilty of the use of alcoholic beverages while subject to duty".

N.R.A.B. First Division Award No. 16570, after referring to the conflicting opinions which have been expressed about Rule G in its American form (which is not identical) set out the view that even employees who are off duty were under an obligation to keep themselves fit to take out their runs. As I have indicated earlier in this award, I believe that employees are under such an obligation, even if it is not one created by the strict terms of Rule G. That case, however, does not deal with the expression "subject to duty" which did not appear in that version of Rule G. **Award No. 1579** upholds the discharge of an employee who was arrested for drunkenness while "subject to duty". That was the grievor's third offence in five months service. He would clearly be subject to discharge in the circumstances. The case does not describe the circumstances by which the grievor could be considered "subject to duty", and accordingly is not helpful.

In my view the four grievors were not "subject to duty" within the meaning of Rule G. While a definitive interpretation of that phrase should not be expected in a single case, it is my view that it should be read in view of the obvious purpose of the rule as a whole, namely to protect persons and property from the dangers of the operation of railway equipment by those not in a fit condition to do so. Thus employees who are on duty, or who may be expected to be on duty within the period during which they might be affected thereby, must not consume intoxicants or narcotics. An employee who had accepted a call would, in my view, clearly be "subject to duty" and there may well be other circumstances where that status would apply. The mere fact, however, that an unanticipated call might be made at any time would not, of itself, make an employee subject to duty within the meaning of Rule G. Here I find that the grievors were not subject to duty in that sense, and that they were not in fact in violation of Rule G.

It remains that the grievors did commit the very serious offence I have mentioned: in the case of Mr. Moorcroft he booked sick and went home largely, I have no doubt, because of the condition he had brought on himself in the case of the others, they consumed beer, albeit a small amount, on Company premises. I do not think they can be held responsible for the subsequent actions of Mr. Kemp, but the very occurrence of those events serves to underline the seriousness of the grievors' offence. since Mr. Kemp's misconduct might not have occurred had the others not joined him in the caboose.

I find, therefore, that Messrs. Williams, Cole and Cunningham were not guilty of a violation of Rule G. They did in fact present themselves for their assignment and carried it out without incident. There is no evidence to the effect

that they were under the influence of alcohol while on duty. I further find that while Mr. Moorcroft may not have been guilty of a violation of Rule G strictly construed, he did, by his voluntary intoxication, obtain his release from his assigned run. This is the sort of conduct which was held in **N.R.A.B. Case No. 16570**, referred to above, to constitute a violation of Rule G. The offence of which Mr. Moorcroft was guilty was at least analogous to a violation of Rule G, and comes within the ambit of the charge against him. The other grievors, as I have noted, were guilty of drinking on Company property.

Since the grievors did not, in the result, put themselves in a position where they were operating Company equipment while under the influence it is my view that, since no disciplinary records were referred to, discharge was too severe a penalty in the circumstances. It remains, of course, that the grievors were each guilty of a very serious offence. In the circumstances, I see no reason to draw any fine distinctions among the several cases. A prolonged period of suspension was called for. Having considered the matter, is my view that the four grievors should each be reinstated in employment forthwith, without loss of seniority, but that they should receive no compensation for loss of earnings, and I so award.

(sgd.) J.F.W. WEATHERILL
ARBITRATOR