

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 624

Heard at Montreal, Tuesday, July. 12th, 1977

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION (T)

DISPUTE:

Dismissal of J.M. Curry, Trainman, Belleville, Ontario, 15 January 1976.

JOINT STATEMENT OF ISSUE:

Effective 15 January 1976 Mr. J.M. Curry was discharged for violation of Uniform Code of Operating Rule G while employed as Trainman, Extra 5065 East (396), Kingston Subdivision, Belleville, Ontario.

The Union appealed the discipline on the grounds that: (1) The investigation was not conducted in a fair and impartial manner in keeping with the provisions of article 153 of Agreement 4.16. (2) Notwithstanding (1) above, the statements did not establish the fact that a violation of UCOR G occurred.

Accordingly the Union position is that Mr. J. M. Curry should be returned to service with payment for all time lost.

The appeal was denied by the Company.

FOR THE EMPLOYEE:

(Sgd.) F. R. OLIVER
ASSISTANT GENERAL CHAIRMAN

FOR THE COMPANY:

(Sgd.) S. T. COOKE
ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

G. E. Morgan	– System Labour Relations Officer, Montreal
A. J. DelTorto	– Senior System Labour Relations Officer, Montreal
H. E. Young	– Assistant Superintendent Belleville
W. R. Radcliffe	– Trainmaster, Belleville
G. A. Carra	– System Labour Relations Officer, Montreal
R. N. Gunter	– Carload Supervisor, Belleville
J. F. Boucher	– Carload Manager, Belleville
L. J. Flory	– Trainmaster, Belleville
D. Lawless	– Master Mechanic, Belleville
M. E. Gibson	– Master Mechanic, Belleville

And on behalf of the Brotherhood:

F. R. Oliver	– Assistant General Chairman, Toronto
R. A. Bennett	– Secretary, GCA, Sarnia
N. Levia	– Vice-General Chairman, Montreal
R. Belanger	– Local Chairman, Montreal
J. M. Curry	– Grievor

AWARD OF THE ARBITRATOR

Rule G of the Uniform Code of Operating Rules, to which the grievor was subject, 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.

There is no suggestion that the grievor used or had in his possession any intoxicants or narcotics while he was on duty. The allegation is that he used intoxicants while he was subject to duty on January 15, 1976. On that day, the grievor had arrived at Belleville, on his regular run from Montreal. He was due to return on Extra 5065 east, reporting for duty at 17:45. It appears that he was called at approximately 1600. He was thereafter, if not before, "subject to duty".

The company's evidence is to the effect that a number of company officers observed the grievor, at about 17:30 on that day, to have a flushed face and somewhat slurred speech and, more significantly, to smell of alcohol. This evidence, while it certainly supports the conclusion that the grievor had been drinking, does not lend any very persuasive support to the conclusion that the grievor had been drinking between 16:00 and 17:30, and there is other evidence to the effect that he had not been drinking during that period.

The union contends that the investigation of the matter was not proper, that the conclusion at which the company arrived on the facts is not justified, and that in any event the penalty imposed was too severe.

As the investigation, article 153 of the collective agreement provides, in its material provisions, as follows:

- 153.1** No employee will be disciplined or dismissed until the charges against him have been investigated; the investigation to be presided over by the man's superior officers. He may, however, be held off for investigation not exceeding 3 days, and will be properly notified of the charges against him.
- 153.2** The employee may select a fellow employee to appear with him at the investigation, and he and such fellow employee will have the right to hear all of the evidence submitted, and will be given an opportunity through the presiding officer to ask questions of witnesses whose evidence may have a bearing on his responsibility, questions and answers will be recorded. The employee will be furnished with a copy of his statement taken at the investigation.

The union contended that the investigation was not proper in a number of respects. A number of these contentions have been dealt with in other awards and it is not necessary to go into them in this case. It is sufficient to note my view that the investigation of the grievor himself was not in violation of article 153. The company did, however, rely on the statements of certain officers who had observed the grievor and had spoken to him. These statements clearly had a bearing on the grievor's responsibility, and were considered by the company in determining that the grievor was subject to discipline. The grievor and his fellow employee were not, however, given the right to ask questions of these persons. That right, set out in article 153.2, is a part of the investigation procedure itself, and where it is not accorded, the investigation does not meet the requirements of the article. It is not enough to say that such persons may be cross-examined at the arbitration hearing: the collective agreement contemplates the completion of the investigation (which I have noted would include the exercise of this right), before an employee is disciplined. In the instant case the grievor was given the statements of the company officers, but they were not called as witnesses.

Apart from the foregoing defect in the investigation which the company conducted, it is to be noted that the material before me (even accepting the statements of the company officers) does not lend any firm support to the conclusion that the grievor had been drinking during the period when he was subject to call. It is the case, however, that on the grievor's own admission he had consumed a great deal of liquor the previous day. He had reported for duty in Montreal at 0730 on the morning of January 15. It is not clear when he had been called, and it does not appear that he had been drinking while "subject to duty" on that occasion either. It does seem proper to conclude, however, that from his copious drinking earlier on January 14, the grievor had seriously affected his ability to perform his work effectively on the 15th. Nevertheless, there is no evidence of improper or inadequate behaviour on his part during the time he was on duty that day.

While, on the material before me, I do not conclude that the grievor had been guilty of a violation of the terms of Rule G strictly construed – that is, it has not been shown that he was drinking after 1600 hours on January 16 –

nevertheless the grievor had been drinking very heavily at a time when he knew he would be subject to duty very soon. This may not be a violation of Rule G but it is obviously a closely-related offence, and in the case of an employee involved in the operation of trains, it is obviously a serious one.

It is my conclusion that the grievor was subject to severe discipline, but that there was not just cause for discharge. It is my award that he be reinstated in employment forthwith, without loss of seniority, but that his compensation for loss of earnings (subject to deduction of amounts actually earned) be only for the period from and after June 1, 1976. His compensation is to be calculated in accordance with article 153.4 of the collective agreement.

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