CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 896

Heard at Montreal, Tuesday, December 8, 1981

Concerning

CANADIAN NATIONAL RAILWAYS

and

UNITED TRANSPORTATION UNION

DISPUTE:

Dismissal of Baggageman A.A.J. Grannary of Montreal, Quebec.

JOINT STATEMENT OF ISSUE:

Effective September 20, 1980, Mr. A.A.J. Grannary was discharged for violation of General Rule G, Uniform Code of Operating Rules, as modified by Section 2.2, CN Rail General Operating Instructions, while employed as a Train Baggageman assigned to Train No. 58 on September 20, 1980 at Union Station, Toronto.

The Union appealed the discipline on the grounds the Company did not substantiate their decision that the employee violated Rule G. The Union has requested reinstatement of the employee in his former position with full compensation for time out of service.

The Company declined the request.

FOR THE EMPLOYEE:	FOR THE COMPANY:
(SGD.) F. R. OLIVER	(SGD.) G. E. MORGAN
GENERAL CHAIRMAN	FOR VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

R. Birch	– Manager, Labour Relations, Montreal
M. Delgreco	– Regional Labour Relations Officer, Toronto
P. L. Ross	– Coordinator Transportation – Special Projects, Montreal
M. Fisher	– Trainmaster, Toronto
R. Robinson	– Administrative Officer, Transportation, Toronto

And on behalf of the Employee:

F. R. Oliver	– General Chairman, Toronto
R. Bennett	– Vice-Chairman, Sarnia
M. Horn	– Secretary, G.C.A., Ottawa
G. Jamieson	– Local Chairman, Montreal
P. Concoran	– Vice-General Chairman, Yard, Toronto
P. Burke	– General Chairman, Calgary

AWARD OF THE ARBITRATOR

General Rule G of the Uniform Code of Operating Rules 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.

That rule is not, in my view, "modified" but rather "amplified" by Section 2.2 of the Company's General Operating Instructions, which sets out a restriction on the use of drugs or medication and which repeats the prohibition on the use of intoxicants, by prohibiting "being under the influence". In the instant case, it is of no moment whether the grievor be charged under Rule G or Section 2.2: the question is whether or not the grievor was drinking while subject to duty on September 20, 1980.

If the grievor did drink an alcoholic beverage or beverages during that time then he would be subject to discipline. As a member of a train crew (even as a baggageman, although there may be distinctions to be drawn as between the various positions in the crew), the grievor would be subject to relatively severe discipline. In the instant case, the grievor's disciplinary record stood at 40 demerits at the material time. If the grievor was drinking, I have no doubt that a penalty of at least 20 demerits would be appropriate. In the instant case, therefore, it is not necessary to deal with the question of the severity of penalty, that is, with the appropriateness of discharge as a penalty in every case of Rule G violation by a train crew member. Here, if the grievor was drinking, even the assessment of 20 demerits would be such as to lead to his discharge.

The question simply is, therefore, whether or not the grievor was drinking while subject to duty on September 20, 1980. This question is to be determined on the balance of probabilities, but the nature and consequences of the charge are such that the probabilities are to be demonstrated by clear and cogent evidence, and the onus of doing this is on the Company.

The matter arose when the grievor was seen arriving late for work, shortly after another employee, brakeman on the same crew, had also arrived late. The other employee, who had admittedly been drinking, was being taken to an office by the Trainmaster when the grievor appeared. He was taken to the office as well. The Trainmaster considered that both employees had been drinking. In order to verify this, the Stationmaster, the Commuter Services Supervisor and two CN Police Officers were called into the office with the grievors.

The Trainmaster probably observed the grievor for the longest time. He states that the grievor's eyes "had a redness in them" and that his face was flushed. These symptoms, however, were also recognized by the Trainmaster at the grievor's investigation, and it was not suggested that he had been drinking then. Those symptoms are, I conclude, of no probative value. The Trainmaster stated that the grievor refused to remove the gum he was chewing, so that he could smell his breath. That statement, however, must refer to the latter part of the interview, when the grievor, realizing he was being charged with an offence, did make such a refusal. He had, however, previously removed the gum and allowed others to smell his breath. That is clear from the report of P.C. Holdsworth. Finally the Stationmaster restrained the grievor from leaving: that was not because the grievor was belligerent; he sought to go to the train to advise his wife, who was travelling with him, that there was a problem. The grievor remained in the office when he was assured the train would be held.

In my view, none of the matters reported by the Trainmaster, whether considered separately or taken as a whole, supports the conclusion that the grievor had been drinking.

The Stationmaster stated that the grievor was "glassy-eyed" and had an unsteady or "forced" walk. Although he was five or six feet away from the grievor, he could smell no alcohol. In the light of all the circumstances, I do not consider this evidence to be more than (at the most) slightly suggestive. P. C. Holdsworth, in his report, stated that "there appeared to be a slight alcoholic odour" on the grievor's breath. This was detected "even though he was chewing flavoured gum prior to giving the sample". This evidence, which is the strongest part of the case against the grievor, has obvious weaknesses, in that there "appeared to be" an odour of alcohol, which was in any event "slight" and which may have been affected by, masked by or possibly even created (for all we know) by the flavoured gum. This evidence shows that there was reason to suspect the grievor had been drinking, but it cannot be said to establish by clear and cogent proof that that suspicion was well-founded. P.C. Houghton did not report on the grievor at all. The Commuter Services Supervisor stated that the grievor's eyes were "bloodshot", and that he was looking at the floor and muttering, but these observations do not add substantially to what has been described.

It may be noted that the grievor's wife, who was with him at dinner, was not called. I do not infer from this that her evidence would have been harmful to the grievor, since I do not consider that a clear case, calling for an answer, was made out. On the other hand, I note that the Assistant Manager of the Royal York Hotel, who had, a few moments before the grievor reported for work, dealt with him because the lock to his room was broken (and with whom the Company verified this fact), was not called, although his observations might well have been of value.

From all of the material before me, I think it cannot properly be concluded (although the matter is not free from doubt) that the grievor had in fact been drinking while subject to duty on that day. He denies it, and there is no substantial reason to doubt his word. It is my conclusion, therefore, that there was no occasion for the imposition of discipline on the grievor. It is my award that the grievor be reinstated in employment forthwith, without loss of seniority or other benefits, and with compensation for loss of earnings. His discipline record should be as it was prior to the discharge.

(signed) J. F. W. WEATHERILL
ARBITRATOR