

# CANADIAN RAILWAY OFFICE OF ARBITRATION

## CASE NO. 1647

Heard at Montreal, Tuesday, May 12, 1987

Concerning

### CANADIAN NATIONAL RAILWAY COMPANY

and

### BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

#### EX PARTE

#### **DISPUTE:**

Appeal against discipline assessed Mr. T. Tychinski on October 8, 1985.

#### **BROTHERHOOD'S STATEMENT OF ISSUE:**

The Union contends that Mr. T. Tychinski, a Group II Machine Operator, was assessed thirty (30) demerit marks on October 8, 1985 without cause, which resulted in his dismissal on October 8, 1985.

The Company disagrees with the Union's contention.

#### **FOR THE BROTHERHOOD:**

#### **(SGD.) G. SCHNEIDER**

**SYSTEM FEDERATION GENERAL CHAIRMAN**

There appeared on behalf of the Company:

J. Dunn	– System Labour Relations Officer, Montreal
T. D. Ferens	– Manager Labour Relations, Montreal
G. Bailey	– Program Supervisor, Winnipeg
M. Vaillancourt	– Coordinator Engineering Special Projects, Montreal

And on behalf of the Brotherhood:

G. Schneider	– System Federation General Chairman, Winnipeg
T. A. Jasson	– Federation General Chairman, Winnipeg
M. A. Gottheil	– Assistant to the Vice-President, Ottawa

## AWARD OF THE ARBITRATOR

The evidence discloses that in August of 1985 the grievor was employed as an extra gang labourer on Gang 110, stationed at Lyddal, Mileage 148.7 on the Thicket Subdivision, in Manitoba. After working hours on the evening of Thursday, August 15, 1985, the grievor proceeded to Wabowden, some 12.3 miles distant from Lyddal, by means of a Company owned track motor car. The car was under the operation of extra gang Foreman V. Young, and served as transportation for other employees, some of whom were taken aboard at Medard. It is common ground that the employees had no telephone at either Lyddal or Medard, and were travelling to Wabowden for the purpose of telephoning home.

The 6 employees arrived in Wabowden at approximately 2130 hours, where they met 2 other employees from Gang 110 who had reached the town aboard a work train. During their stay in the town the employee spent several hours in a local hotel. The Arbitrator is satisfied that during that time each of them, including the grievor, consumed between four and six bottles of beer, part of the time being consumed by their placing telephone calls home in turn at the public telephone at the hotel.

At approximately 0115 hours on the morning of Friday, August 16th, the 8 employees boarded the track motor car for the return trip to Medard and Lyddal. At Mileage 137.05 the track motor vehicle struck an object on the track and was derailed, causing injury to three of the employees. The object struck was an adult male who was lying between the rails prior to impact. That person, not identified in the material before the Arbitrator, was fatally injured as a result of the collision. At the time of the accident the track motor car was being operated by Mr. W. V. Whitford, the acting assistant extra gang foreman on Gang 110.

As a result of the ensuing investigation, which disclosed that the use of the track motor vehicle was not authorized by the Company, that it did not have clearance to be on the road and that Mr. Young was not in possession of a line-up as required by the Uniform Code of Operating Rules both Mr. Young and Mr. Whitford were discharged. The other 6 employee passengers were each assessed 30 demerit marks, including the grievor, for his involvement in the unauthorized use of a track motor car while under the influence of alcohol, and his involvement in the accident.

The grievor's explanation, which the Arbitrator accepts, is that he was not aware that Foreman Young did not have authority to use the track motor vehicle, did not have clearance which would have protected the vehicle on the road and was not in possession of a valid line-up for the time period in question, all of which involved serious infractions of the Company's policies and the Operating Rules.

The Company makes a number of allegations of violations of the rules against the grievor including Rule G which reads as follows:

The use of intoxicants or narcotics by employees subject to duty, or the possession or use while on duty, is prohibited.

The Company maintains that the grievor violated Rule G in that he was under the influence of alcohol while "subject to duty". On the previous interpretations of Rule G interpreted by this office that assertion cannot be sustained. It has been previously established that when employees consume alcoholic beverages while they are off duty, even though they may be scheduled to work the next day, does not of itself amount to drinking while subject to duty. By the same token, it has been held that an employee deadheading on a freight train is considered 'on duty' for the purposes of General Rule 'G' and may be said to be subject to duty in the hours prior to such paid service. (See **CROA 557** and **1604**).

In the instant case, bearing in mind that the burden of proof is upon the Company, the Arbitrator cannot conclude on the balance of probabilities, that the grievor was in a state of intoxication while riding as a passenger on the track motor car. Nor is it established that he was aware, or had reason to be aware, that Mr. Young was not in possession of the necessary authorization to use the vehicle. On the other hand, it is not disputed that as a holder of a "D" card in the UCOR the grievor was aware or reasonably should have been aware that normal safety precautions in the operation of a track motor vehicle, including the assignment of lookout responsibility, were not being complied with by Mr. Young or Mr. Whitford. In the circumstances he can be said to have failed to meet the requirements of General Rule 'E' of the Uniform Code of Operating Rules, which requires employees to "render every assistance in their power in carrying out the rules".

In all the circumstances, while the grievor was to some degree at fault, the Arbitrator cannot accept the position of the Company that he should be fastened with responsibility for the fact that the use of the motor car was unauthorized and not in compliance with the rules respecting clearance and the possession of a valid line-up. Mr. Tychinski had no reason to believe that his Foreman did not have the proper authorization, clearance, and documentation, and no specific reason to question him with respect to those particulars. By the same token, the manner in which the track motor vehicle was operated by Mr. Young and Mr. Whitford did fall short of the standards required by the Uniform Code of Operating Rules. The grievor's failure to take any steps to ameliorate the situation, even though he may have been a passenger and off-duty, constitutes a failure in his ongoing obligation to the Company in respect to his involvement in the use of its equipment. For that some measure of discipline is warranted albeit something less than the 30 demerits which resulted in the grievor's discharge.

For the foregoing reasons, the Arbitrator deems it appropriate to substitute a lesser penalty, The grievor shall, therefore, be reinstated into his employment without compensation or benefits and without loss of seniority, with a substitution of 15 demerits for the 30 demerits originally assessed against him. His record will therefore stand at 50 demerits. I remain seized of this matter in the event of any dispute between the parties respecting the interpretation or implementation of this award.

**(signed) MICHEL G. PICHER**  
**ARBITRATOR**