

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1734

Heard at Montreal, Thursday December 10, 1987

Concerning

CANADIAN NATIONAL RAILWAY

And

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Dismissal of Extra Gang Labourer R.A. Weafer account violation of Rule "G".

JOINT STATEMENT OF ISSUE:

Following an investigation Mr. Weafer was discharged from the Company's service effective 1 August 1986 account violation of Rule "G" of CN Safety Rules Form 7355E.

The Brotherhood contends that the Company violated Articles 18.2(d), 18.2(e) and 18.2(g) of Agreement 10.1.

The Brotherhood also contends that the discipline was unjust and too severe in light of the circumstances.

The Company disagrees with the Brotherhood's contentions.

FOR THE BROTHERHOOD:

(SGD.) G. SCHNEIDER
SYSTEM FEDERATION GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) J. P. GREEN
FOR: ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

J. Glazer	– Counsel, Montreal
T. D. Ferens	– Manager Labour Relations, Montreal
G. C. Blundell	– System Labour Relations Officer, Montreal
G. Masciarelli	– Roadmaster, Jasper
S. Foldesi	– First Aid Attendant, Kamloops
A. Watson	– Labour Relations Trainee, Montreal

And on behalf of the Union:

M. Gottheil	– Assistant to the President, Ottawa
G. Schneider	– Federation General Chairman, Winnipeg
R. S. Dawson	– Federation General Chairman, Winnipeg

AWARD OF THE ARBITRATOR

The essential facts of this case are described in **CROA 1733**. It appears beyond dispute that Mr. Weafer violated Rule G both by returning to the Company's camp in an inebriated state, rendering himself unfit for duty, and continuing to consume alcohol in the form of beer through the better part of the night in the bunk car and elsewhere on Company premises. He was disruptive, insubordinate and plainly deserving of a serious measure of discipline.

Regrettably, however, the material discloses what the Arbitrator can only describe as a serious violation of Mr. Weafer's rights under Article 18.2(d) of the Collective Agreement. During the course of the investigation into Mr. Weafer's conduct, conducted by Program Supervisor Gino Masciarelli in Edmonton on August 8, 1986, Mr. Masciarelli had in his possession a statement obtained from another employee involved in the same incident, Mr. L.L. Finnigan. That statement was obtained the day previous, and neither Mr. Weafer nor his Union representative had a copy of it. During the course of Mr. Weafer's investigation Mr. Scott Dawson, Federation General Chairman, who was acting as the grievor's Union representative, observed Mr. Masciarelli, on more than one occasion, referring to the statement of Mr. Finnigan while formulating questions for the grievor. When Mr. Dawson asked to have a copy of the Finnigan statement Mr. Masciarelli denied his request, asserting that it was not evidence being used in respect of Mr. Weafer's case.

Article 18.2(d) of the Collective Agreement provides as follows:

Where an employee so wishes an accredited representative may appear with him at the hearing. **Prior to the commencement of the hearing, the employee will be provided with a copy of all the written evidence as well as any oral evidence which has been recorded and which has a bearing on his involvement.** The employee and his accredited representative 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 the witnesses (including Company officers where necessary) whose evidence may have a bearing on his involvement. The questions and the answers will be recorded and the employee and his accredited representative will be furnished with a copy of the statement. (emphasis added)

In the Arbitrator's view this case raises issues fundamental to the integrity of the process of expedited hearings that is vital to the operation of the Canadian Railway Office of Arbitration. By long established practice, this Office relies on written briefs, including the transcript of investigations conducted by the Company the content of which forms the basis of the decision to assess discipline against an employee. If the credibility of the expedited hearing process in this Office is to be preserved both the parties and the Arbitrator must be able to rely, without qualification, on a fair adherence to the minimal procedural requirements which the parties have placed into the Collective Agreement to facilitate the grievance and arbitration process in discipline cases. Needless to say, irregularities at the investigation stage, particularly those which depart from the standard of full and fair disclosure reflected in Article 18.2(d) have the inevitable effect of undermining the integrity of the entire grievance and arbitration process so vital to the interests of both parties.

Documentary material being used by a Company officer conducting an investigation is, *prima facie*, "oral evidence which has been recorded and which has a bearing on the involvement" of the employee being investigated. Fairness must be seen to be done, in the most objective sense. It is simply not enough for the investigating officer to read such material while not disclosing its contents to the Union representative saying, "Trust me, this is not evidence on which the Company relies." If Article 18.2(d) is to have any meaning, it must be presumed that recorded statements of other employees being referred to during the course of a grievor's investigation are viewed by the investigating officer as pertinent to the inquiry, and must be disclosed forthwith. Given the critical reliance of this Office on documentary evidence, including the result of such investigations, that approach must be seen as clearly unacceptable. It is plainly inconsistent with the intention of an Article such as 18.2(d) of the Collective Agreement.

On a review of the material before me I am constrained to conclude that the Company's officer erred grievously by refusing to provide to the Union representative a copy of the employee's statement which he himself was using during the course of the grievor's investigation. It is well established that a deficiency of that kind in the investigatory process renders null and void any discipline which issues from it (*see CROA 1475*).

For these reasons the grievance must be allowed. Mr. Weafer shall be reinstated in his employment with full compensation for all wages and benefits lost, and without loss of seniority. I retain jurisdiction in the event of any dispute regarding the interpretation or implementation of this award.

(signed) MICHEL G. PICHER
ARBITRATOR