

# CANADIAN RAILWAY OFFICE OF ARBITRATION

## CASE NO. 1758

Heard at Montreal, Tuesday 8 March 1988

Concerning

### CANADIAN NATIONAL RAILWAY

And

### UNITED TRANSPORTATION UNION

#### **DISPUTE:**

Dismissal of Trainman C.J. Kennedy, Toronto, Ontario for violation of UCOR Rule 'G'.

#### **JOINT STATEMENT OF ISSUE:**

Trainman C.J. Kennedy was dismissed from the Company's service effective 15 May 1987 for violation of Uniform Code of Operating Rules, General Rule 'G' on train 169 on Sunday, 29 March 1987.

The Union contends first, that the evidence submitted does not substantiate a violation of Rule 'G'; second, that the investigation into this incident was not conducted in a fair and impartial manner; and, third, if discipline was warranted, discharge was too severe.

The Union has requested that Trainman Kennedy be reinstated with compensation for all lost earnings.

The Company has declined the appeal.

#### **FOR THE UNION:**

**(SGD.) T. G. HODGES**  
GENERAL CHAIRMAN

#### **FOR THE COMPANY:**

**(SGD.) D. C. FRALEIGH**  
ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

J. Glazer	– Counsel, Montreal
J. B. Bart	– Manager, Labour Relations, Montreal
A. E. Heft	– Labour Relations Officer, Montreal
J. Pasteris	– Labour Relations Officer, Montreal
D. Lussier	– Coordinator, Special Projects, Montreal
A. Motuzas	– Trainmaster, Belleville
R. Killin	– Trainmaster, Toronto

And on behalf of the Union:

M. Church	– Counsel, Toronto
T. G. Hodges	– General Chairman, St. Catharines
B. Leclerc	– General Chairman, Montreal
D. Atkinson	– Local Chairman, Toronto
M. G. Bird	– Local Chairman, Montreal
N. Robinson	– Local Chairman, Toronto
C. J. Kennedy	– Grievor

## AWARD OF THE ARBITRATOR

At the hearing Trainman Kennedy admitted that he had consumed part of a can of beer while deadheading on a passenger train returning from Montreal to Toronto on Sunday March 29, 1987. It is common ground that he was then deadheading home, having completed an assignment as brakeman on Train No. 62 from Toronto to Montreal. Upon arrival in Toronto he would be off duty and eligible to take rest. While the Company suggests that he might have been pressed into service on an emergency basis while deadheading, the Union stresses that given the number of hours of duty completed by the grievor on the day in question, he could have asserted his right to take rest.

It appears that at the time of the incident, during the subsequent investigation, and indeed up to the day prior to the arbitration hearing the grievor did not admit to having consumed beer while deadheading. In the circumstances, although noting its reservations on the issue, the Union does not assert that Rule 'G' would not apply in the instant case because the grievor was deadheading on a passenger train, having completed active service. Its counsel does assert those facts, however, in mitigation of the discipline to be assessed against the grievor.

This Office has long recognized the importance of Rule 'G', and that its violation is, *prima facie*, a dismissable offense. Previous awards have, however, emphasized that each case must be assessed on its own merits having regard to such factors as the conduct of the grievor, the safety hazards involved, the grievor's candor and cooperation in dealing with the offense and the acknowledgment of its seriousness, as well as his or her prior disciplinary record.

At the time of the events of the instant case the grievor's record was clear. While he did not acknowledge his wrongdoing at the time he was first confronted, it is nevertheless to his credit that he fully admitted his mistake at the arbitration hearing. Bearing in mind that this is not a circumstance where the grievor was found out in a lie and forced to confess, his willingness to finally admit the facts, of his own volition, weighs in his favour. So too does the open apology that he made to both the Company and the Union at the hearing.

The Arbitrator is satisfied that there are a number of compelling mitigating circumstances in the instant case. It should be emphasized that nothing in this decision should be taken as condoning infractions of Rule 'G' by employees deadheading on a passenger train. In the Arbitrator's view it is nevertheless pertinent to the assessment of the grievor's conduct that he was not in a position where he was responsible for the operation of Company equipment, was scheduled to go off duty at the conclusion of his deadhead run, had consumed only a small quantity of beer and was not intoxicated. It may also be borne in mind, as noted in **CROA 666**, that to the extent that the grievor was neither an engineer nor a conductor there is greater room in his case for the exercise of discretion with respect to the appropriate penalty for a Rule 'G' violation. While in the strictest sense it is arguable that as a brakeman the grievor was subject to duty with some responsibility for train movements, both his lower rating and the fact that he was deadheading in contemplation of going off duty can be taken into account as mitigating factors (*see also CROA 1074 and 1660*).

For the foregoing reasons the grievance is allowed, in part. The grievor shall be reinstated into his employment without compensation or benefits, and without loss of seniority. That represents a lengthy, and in my view appropriate, period of suspension. While the Arbitrator recognizes the sincerity of the grievor's statement that he recognizes the seriousness of his conduct, it should be clear that any further infraction of this kind may result in the most serious of disciplinary consequences. I retain jurisdiction in the event of any dispute between the parties respecting the interpretation or implementation of this award.

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