CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1852

Heard at Montreal, Thursday, 10 November 1988

Concerning

CANADIAN PACIFIC LIMITED

And

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

DISPUTE:

Dismissal of Locomotive Engineer R. G. Chorley of Cranbrook, B.C. for "intentionally rendering yourself unfit for duty, when subject to duty, by consuming alcohol during mandated time off duty and voluntary rest; violation General Rule G UCOR at Nelson, B.C., May 3, 1987."

JOINT STATEMENT OF ISSUE:

Following the completion of an investigation conducted in connection with Locomotive Engineer Chorley booking unfit and his subsequent personal conduct and actions on Company property at Nelson, B.C. on May 3, 1987, Mr. Chorley was assessed the discipline noted in the Dispute.

The Brotherhood appealed the dismissal of Engineer Chorley, requesting to have him reinstated on the grounds that the Company had not conducted a fair and impartial hearing as envisioned in Article 19 of the Collective Agreement and that the evidence produced by the investigation had not substantiated the Company's claim that Engineer Chorley was in violation of Rule G.

The Company submits that the investigation conducted was fair and impartial. The Company further submits that the evidence adduced at the investigation has established Locomotive Engineer Chorley's responsibility for the offence and that the discipline assessed was warranted. The Company has declined to reinstate Mr. Chorley into its service.

FOR THE BROTHERHOOD:

(SGD.) T. G. HUCKER
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) J. M. WHITE
GENERAL MANAGER, OPERATIONS & MAINTENANCE, WEST

There appeared on behalf of the Company:

D. A. Lypka – Supervisor, Labour Relations, Vancouver
B. P. Scott – Labour Relations Officer, Montreal
L. J. Guenther – Assistant Supervisor, Labour Relations, Vancouver
F. Peters – Labour Relations Officer, Montreal

And on behalf of the Brotherhood:

T. G. Hucker – General Chairman, Calgary
D. C. Curtis – Vice-General Chairman, Calgary

AWARD OF THE ARBITRATOR

The material establishes that on May 3, 1987 Locomotive Engineer Chorley was called at Cranbrook for 03:00 on Train 981 from Cranbrook to Nelson. After completing the trip, the grievor went off duty at or about 11:00, booking eight hours rest until 19:00. At that time the grievor knew, based on the projected line-up, that in all likelihood he would be called to operate a return run to Cranbrook at or about 21:00.

The material establishes that the grievor spent virtually the entire period of his off-duty time between 11:00 and 16:30 drinking beer in two separate hotels in Nelson. From approximately 13:00 Mr. Chorley was in the beverage room of the Savoy Inn. At approximately 16:15 Assistant Terminal Supervisor J. Neville entered the beverage room with another employee after the completion of their shift, and sat at another table. While there is some conflict with respect to the evidence, I am satisfied, on the balance of probabilities, that the Assistant Terminal Supervisor's presence was noted at the grievor's table. At 16:30 Locomotive Engineer Chorley telephoned the yard office to book sick, claiming that he had a sore neck which would make it impossible for him to work the run from Nelson to Cranbrook anticipated for 21:00.

It is not disputed that following that call the grievor remained in the hotel, and continued to consume beer and play pool for the balance of the day, and that he was in a state of some intoxication when he returned to the dispatching office at Nelson at approximately 20:10 to obtain instructions about how he was to return to his home terminal. Assistant Superintendent McFarlane was then summoned to the station. Following a brief discussion with the grievor he arranged for him to return to Cranbrook by bus.

On June 9, 1987 Mr. Chorley was notified that he was dismissed from the Company's service for "intentionally rendering yourself unfit for duty, when subject to duty, by consuming alcohol during mandated time off duty and voluntary rest; violation General Rule G UCOR at Nelson, B.C., May 3, 1987."

Rule G is as follows:

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

The threshold issue is whether the grievor was subject to duty when he made use of intoxicants in the form of alcoholic beverages. The question of what constitutes being "subject to duty" within the meaning of Rule G has been extensively canvassed in prior decisions of this Office. The Arbitrator in CROA 557, in considering the case of grievors who were disciplined for drinking while off duty when they were scheduled to work the next morning made the following observations:

> The question whether or not the grievors were "subject to duty" is a difficult one. The expression does not appear to be defined in the Uniform Code. The grievors might, as they acknowledged, have received a call at any time, and in this sense they were "subject to duty". On the other hand, their status was certainly one of being "off duty" at the material times. Once they had received and accepted a call, then I think it is clear they would be "subject to duty". But it is by no means clear that, having gone off duty, and having no reason to expect a call before morning, they should be considered as subject to duty and thus prohibited from drinking.

In **CROA 878, 879** and **881** it was found that members of a crew who spent the day at a tavern prior to an anticipated call at 19:00 were subject to duty within the meaning of Rule G, and violated the rule notwithstanding their attempt to book sick at or about the time they were called. In those cases the discharges of all three members of the crew were sustained.

The facts of the instant case are close to those in **CROA 1074**. In that instance a baggageman on trains operating between Toronto and Sudbury went off duty at 07:00 in Sudbury, being scheduled to leave that terminal for Toronto at 23:00, with an anticipated call time of 20:45. After a rest in the course of the morning the grievor spent some hours in a beverage lounge consuming what the arbitrator estimated to be six beers. When he returned to the terminal he was judged to be unsteady due to intoxication and was removed from service. In that case the arbitrator concluded that the grievor was in violation of Rule G and stated:

> He did, I find, use intoxicants in the time immediately preceding that at which he expected to be called, to an extent which rendered him unfit for duty, and he reported for duty in an unfit

> condition. He drank a substantial quantity of beer, and was "expected to be on duty during the period during which (he) might be affected thereby", as was said in Case No. 557.

In considering the issue of mitigation the arbitrator in that case made the following observations:

> As to the matter of the severity of the penalty imposed, violations of Rule 'G' have been considered to be particularly serious offences in the cases of employees involved in the operation of trains. While discharge may not be an "automatic" penalty, it will usually be appropriate, where the violation is established. A distinction has been drawn between those with prime responsibility for train operation, such as an Engineman or a Conductor, and the other members of a train crew. While I think this distinction is proper, it is a narrow one: the other members of a train crew are indeed responsible for the safety of the train, and there is no doubt that severe discipline is appropriate in the case of a Rule 'G' violation by any crew member. In every case, however, all factors are to be considered. In the instant case the grievor had some sixteen years' service, and a clear discipline record. He appears to have been frank in acknowledging what had occurred. Even more important for the assessment of the penalty imposed in this case is the consideration that the grievor's violation of the rule was not an extreme one. There was a considerable lapse of time between his drinking and his actual reporting for duty. The purposive interpretation of Rule 'G' set out above, which leads me to conclude that the grievor was to be considered "subject to duty" involves the necessary implication that any violation of the rule is a matter of degree. In all of the circumstances, it is my view, as in Case No. 666 (perhaps the only significant comparable case of those cited), that the grievor should be reinstated, but without compensation.

In the instant case the evidence confirms that Locomotive Engineer Chorley did consume intoxicants for a substantial period of time when he knew, or reasonably expected, that he would be called for duty on a train departing Nelson at 21:00. Notwithstanding that knowledge, as late as 16:30, he continued to consume alcohol and had not booked sick. Even assuming, although for the reasons related below it appears to the Arbitrator that the matter is in great doubt, that Mr. Chorley did have a neck ailment, the inescapable fact is that within some four and one half hours of his anticipated active duty he had consumed a substantial quantity of alcohol. He was, to borrow the expression utilized in **CROA 557** and **1074**, expected to be on duty during the period during which he was likely be physically affected by his consumption of alcohol. That, standing alone, discloses a violation of Rule G, quite apart from whether the grievor did or did not properly and legitimately book sick at 16:30.

In the alternative, if it were necessary to resolve the issue, the Arbitrator cannot accept the grievor's claim that he did in fact book sick because of a sore neck. While the burden of proof is upon the Company, if the Company should adduce evidence which discloses a plausible basis for its judgement, the burden may shift to the employee to provide an explanation to rebut the inferences that flow most naturally from the facts disclosed. In this case the grievor maintains that he was suffering a sore neck from the time that he arrived in Nelson, that he had attempted to get some rest on a couch but was too uncomfortable to sleep, that he proceeded uptown to get some aspirin and that, for reasons entirely unrelated to his drinking, he decided to book off sick because of his sore neck at 16:30.

Careful scrutiny of the entirety of the evidence leaves the grievor's explanation in substantial doubt. The evidence discloses that Conductor J. O. Padze, who came off duty with Locomotive Engineer Chorley on the morning on May 3, 1987, drove with him directly to a beverage room in Nelson almost immediately after they went off duty at 11:00. According to Mr. Padze's statement Mr. Chorley made no mention of the fact that his neck was bothering him. A statement by Locomotive Engineer Ciarelli, who was seated at the table with Mr. Chorley in the beverage room when Assistant Terminal Supervisor Neville entered, gave the following answer to the question of whether Mr. Chorley had mentioned anything to him about booking sick or unfit:

> Yes, he did. For the simple reason that Mr. Neville had entered the room, Mr. Chorley said he didn't trust John Neville and he was going to book unfit. ... Just the fact that he was drinking while on rest and he was afraid Mr. Neville would turn him in.

During the course of his statement, Mr. Chorley could not recall where he had gone to obtain aspirin for his sore neck. No explanation was given as to why he did not report his purported ailment to the Company at some earlier point, or why he did not seek medical assistance or a medical opinion from someone in Nelson that day with respect to his fitness to work. What the evidence does disclose is that during the entire course of the day the grievor had no

meal, got no sleep and drank for a period of several hours. He did not book unfit for work until moments after the Assistant Superintendent entered the beverage room where he was drinking.

These factual circumstances, coupled with the evidence of Mr. Padze and Mr. Ciarelli require, at a minimum, some clear and cogent explanation on the part of the grievor with respect to his actions at the time in question. In the Arbitrator's view no such explanation has been forthcoming. For the purposes of clarity, I conclude that the grievor's statement with respect to a neck ailment, notwithstanding that it was supported by a doctor's note obtained some twenty-four hours later, is a fabrication, or at best an exaggeration, designed to mislead the Company and shield himself from the obvious consequences of being found consuming alcohol while subject to duty within the meaning of Rule G.

The Arbitrator is further satisfied that the investigation conducted by the Company was fair and impartial. The fact that a Company officer saw the grievor at a point later in the day when Mr. Chorley admits he had been drinking does not raise any issue of bias material to his case.

Are there any mitigating circumstances in this case that would serve to reduce the measure of discipline from discharge? While Rule G is of critical importance to all employees involved in the movement of trains, its purpose is arguably never more critical than applied to locomotive engineers whose duty it is to be at all times alert and vigilant in the control of their train. In this case natural concern arises as to what might have occurred if Mr. Neville had not entered the beverage room when he did. The evidence gives reason to believe that Locomotive Engineer Chorley might well have attempted to operate his return run to Cranbrook, unless he had otherwise been discovered. In the Arbitrator's view the consequences of such conduct by an engineman are serious, and can to some degree be distinguished from the violation of Rule G by a baggageman, as disclosed in **CROA 557**.

In that case the decision to reduce the penalty of discharge was based, in part, on the grievor's candour. Regrettably, in considering mitigation in the instant case, that is not a factor which can assist the grievor. For the reasons related above, I am compelled to conclude that he has been less than honest from the outset with respect to the facts of this case. Nor does the record disclose that Mr. Chorley is an employee of extraordinarily long service. In all of these circumstances I compelled to conclude that the Company had just cause to discharge the grievor. The grievance must therefore be dismissed.

November 10, 1988

(Sgd.) MICHEL G. PICHER
ARBITRATOR