

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1998

Heard at Montreal, Tuesday, 13 February 1990

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

DISPUTE:

The discharge of Mr. B.W. Iwaschuk, Hostler Helper, Diesel Shop, Edmonton.

JOINT STATEMENT OF ISSUE:

On September 8, 1988, Mr. Iwaschuk left Company premises while on duty without advising any supervisor that he was doing so. Shortly thereafter, he was observed by supervisors of the Diesel Shop sitting in the Beer Parlour of the Dover Hotel in Edmonton with a co-worker with partially consumed glasses of beer on the table in front of them.

Following an investigation, Mr. Iwaschuk was discharged, effective September 28, 1988, for violation of UCOR Rule G and Rule 26(a) of Company Rules and Regulations and being away from his work area without consent or knowledge of his immediate supervisor.

The Brotherhood has contended that the discipline assessed wa too severe and that the employee is not covered by UCOR Rule G, only Rule 26(a), and Mr. Iwaschuk should be returned to the service of the Company without any loss of earnings, seniority or benefits.

The Company disagrees.

FOR THE BROTHERHOOD:

(SGD) TOM MCGRATH
NATIONAL VICE-PRESIDENT

FOR THE COMPANY:

(SGD) W. W. WILSON
FOR ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

D. McMeekin	– Labour Relations Officer, Montreal
M. M. Boyle	– Manager, Labour Relations, Montreal
S. Grou	– Labour Relations Officer, Montreal
M. Becker	– Labour Relations Officer, Edmonton
D. LaHaie	– Technical Supervisor, Edmonton

And on behalf of the Brotherhood:

R. Storness-Bliss	– Regional Vice-President, Vancouver
H. Critchley	– Representative, Edmonton
T. R. Butz	– Witness
B. W. Iwaschuk	– Grievor

AWARD OF THE ARBITRATOR

The evidence of Mr. Iwaschuk, which is corroborated in substantial part by the testimony of his co-employee, Hostler T.R. Butz, is that he was instructed over the radio, by his supervisor D. LaHaie that there was no more work for him to perform as of approximately 22:00 on the evening of September 8, 1988. As he was then working on the 15:00-23:00 shift, he and his work mate, Hostler L. Hibert, returned to the locker area of the diesel shop. Mr. Iwaschuk relates that he then telephoned his wife at home, and that during the course of their conversation she informed him that she was then taking their ten month old child and leaving him. He states that this caused him to become very upset, and that he immediately left the premises, proceeding to his truck which was located in the parking lot of the Dover Hotel, across the street and not far from the diesel shop. He relates that when he reached his truck, in a state of considerable upset, he realized that he had forgotten his keys in his locker. According to his account he lashed out in anger, beating on the truck, with the intention of breaking a window to gain access to a set of keys which was inside it.

Mr. Butz states that he observed Mr. Iwaschuk leaving the diesel shop in what appeared to him to be a state of emotional distress. He relates that he followed him to the hotel parking lot, still carrying his hard hat, radio and belt, and encountered Mr. Iwaschuk beside his truck. According to both employees Mr. Butz then attempted to calm down the grievor, and they engaged in a heated exchange, which involved a certain amount of scuffling between them. Both of them state that Mr. Iwaschuk finally settled down and accepted Mr. Butz' suggestion that they go for a coffee to talk things over.

The employees relate that they then entered the Dover Hotel with the intention of using its coffee shop. They found the coffee shop to be closed and then proceeded to the quiet side of the beverage room, which apparently also serves food and coffee. They state that it was their intention to order coffee and that, with that purpose in mind, they sat at a table which had not yet been cleared of beer glasses.

It is not disputed that at approximately 22:23 the CN Police received information that two employees of the diesel shop were in the Dover Hotel beverage room. While the Company's brief suggests that the information given to the police was that the employees were consuming alcohol, no evidence is adduced before me to substantiate that fact. While the written report of the CN constable involved suggests that the report was to that effect, it is plainly hearsay before me, which must be viewed as being of limited weight for the purposes of proving the truth of its contents. In any event the information provided to the police constable was related to Supervisor LaHaie who, in the company of Supervisor R. Sim proceeded across the street and into the Dover Hotel beverage room at 22:30.

The evidence of Mr. LaHaie, given before the Arbitrator at the hearing, is that he saw the two employees seated at a table in the beverage room, and immediately approached them. As he did so, according to his recollection, he saw one beer mug which was one-quarter to one-third full on the table, closer to Mr. Butz. When he arrived at the table he placed his hand on Mr. Iwaschuk's shoulder, and told the employees that they were in trouble and should return to the shop. The uncontradicted evidence is that Mr. Iwaschuk rose quickly from the table and left the room first, by the back entrance, shortly followed by Mr. Butz. The two supervisors apparently exited by the front entrance which they had entered.

It is not disputed that Mr. Iwaschuk did return to the diesel shop.

He states that when he proceeded to the office there were a good number of people there, and that he was not comfortable with the prospect of relating his personal circumstances or explaining what had happened to Mr. LaHaie in that setting. Consequently he left without further discussion, at the end of his tour of duty.

Mr. Butz followed a different course. According to his account he left the beverage room a short time after Mr. Iwaschuk with concern about both Mr. Iwaschuk's whereabouts and his state of mind. According to his explanation when he did not see Mr. Iwaschuk immediately outside the Dover Hotel he assumed that he had left his truck and proceeded home on foot. Mr. Butz relates that he then walked directly to the grievor's home in an attempt to find him. He states that he found no one there and shortly after 23:00 he called Mr. LaHaie at the shop to tell him that he, like Mr. Iwaschuk, should be treated as having punched out at 22:30.

Shortly after midnight Mr. LaHaie phoned both employees to advise them that they were suspended from duty pending an investigation. Following their respective investigations, each of them was discharged effective September 28, 1988 for violations of UCOR Rule G, Rule 26(a) of Company Rules and Regulations and for being absent from work without leave.

This is a case of discipline which, by the Company's own admission, is grounded entirely in circumstantial evidence. As was stated in **CROA 1953**:

Where circumstantial evidence is the only evidence relied upon to establish culpability, it should be viewed as compelling only to the extent that it supports inferences of guilt, and cannot be viewed as supporting alternative inferences of innocence.

It is for the Company to establish, on the balance of probabilities, that the grievor consumed alcohol if his discipline is to stand in relation to the charges against him to that effect, including the alleged violation of Rule G and Rule 26(a) of the Company Rules and Regulations. It is not disputed, however, that the grievor was absent from the shop without leave, and was liable for discipline on that account.

There is no evidence before me of anyone having observed either the grievor or Mr. Butz consuming alcohol. While that conclusion might well be inferred from compelling circumstances, a further examination of the evidence offered by the Company falls short of establishing the case against the grievors in a convincing way. Bearing in mind that the probative quality of evidence against an employee should be commensurate with the gravity of the allegation made, there are a number of particulars in the Company's evidence which cause the Arbitrator concern.

The first is the obvious inconsistency as between Supervisor LaHaie and Supervisor Sim with respect to what they saw on the table in front of the two employees in the beverage room of the Dover Hotel. Mr. Sim, who was not called to testify before me, filed a report to the effect that he saw two glasses and a beer mug on the table. However, Mr. LaHaie, the only Company witness who did testify states that he saw only one partially filled beer mug, apparently in front of Mr. Butz. In my view that evidence is at least consistent with the evidence of the employees that they sat down to a table which had not yet been cleared off, and had not yet placed their order for coffee. Moreover, Mr. LaHaie, whom I judge to be a fair and careful witness, related in his written report of September 13, 1988, in part, "I did not see their CN radios or belts, as it was dim in the bar." He further relates that he could not tell whether the clothes the employees were wearing were their work clothes or street clothes.

That evidence, which is in essence the only evidence of the Company before me on the point, does not rebut the account of Mr. Butz to the effect that he went to the hotel parking lot, and into the beverage room, with his hard hat, radio and belt still in his possession. The likelihood that he did is, at the least, more consistent with his account of having left the workplace in pursuit of Mr. Iwaschuk, in circumstances which caused him concern for his co-worker's well-being. While the Arbitrator has some lingering concern as to why Mr. Butz did not return to the diesel shop and deposit his equipment after leaving the beverage room, his account in that regard is at least consistent with an ongoing concern for Mr. Iwaschuk.

The purpose of the burden of proof in arbitrations, as in any civil proceedings, is to give effect to the well established general principle that he who avers must prove. Where evidence is evenly balanced in respect of a particular issue of fact, that issue must be resolved against the party which bears the burden of proof.

While the instant case is not without some doubt, I am, on the whole, satisfied that the account provided by the two employees is as likely and plausible as the contrary inferences which the Company says should be drawn with respect to the issue of their consumption of alcohol. There is no evidence before me of anyone having seen the grievors consume alcohol, having smelled alcohol on their breath or detecting any outward signs that would evidence its consumption. It is not disputed that the hotel lounge in which they were found by Mr. LaHaie does serve food and coffee, and that the adjacent coffee shop was closed at the time. Moreover, the suggestion of the Company that if the two employees wanted coffee they could have obtained it at a restaurant across the street is substantially weakened by the further unchallenged evidence that that establishment also serves liquor. Additionally, the suggestion that a third party notified the CN Police that on-duty employees were in the hotel is to some extent consistent with the likelihood that they appeared to be on duty because Mr. Butz had his hard hat, radio and belt in his possession. Perhaps most importantly, if Mr. LaHaie's evidence is to be preferred, there was only one glass of beer on the table before the two employees, which was partly empty. That account is, in my view, more consistent with the employees' explanation that they intended to order coffee, and in any event had not yet been served. The whole of the evidence including the report of the CN Police further suggests that the employees had only been in the hotel for a few minutes prior to Mr. LaHaie's arrival. For all of these reasons I am compelled to conclude that the Company has not discharged the burden of establishing, on the balance of probabilities, that either Mr. Iwaschuk or Mr. Butz consumed alcohol during their tour of duty on the evening of September 8, 1988.

It is clear, however, on the evidence before me that they knowingly left the workplace without leave, and proceeded to a place which they knew, or reasonably should have known, would not have been an appropriate location in which to be found during their tour of duty. Moreover, given that Mr. Butz did not return to work when instructed to do so by Mr. LaHaie, and that Mr. Iwaschuk, upon returning to the diesel shop, offered no explanation of the obviously incriminating circumstances in which he had found himself, I am not persuaded that it is appropriate in this case to make an order of compensation. In coming to that conclusion I am additionally persuaded by the grievor's prior disciplinary record, which is not exemplary, as well as his relatively short period of service.

For the foregoing reasons the grievance is allowed in part. The grievor shall be reinstated into his position, without compensation or benefits, and without loss of seniority.

February 14, 1990

(Sgd.) MICHEL G. PICHER
ARBITRATOR