

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2041

Heard at Montreal, Tuesday, 10 July 1990

Concerning

CANADIAN PACIFIC LIMITED

And

UNITED TRANSPORTATION UNION

DISPUTE:

Reinstatement of Trainman/Yardman P.C. Hunter of Schreiber, Ontario who was dismissed for a violation of U.C.O.R. Rule "G" on April 14th, 1988.

JOINT STATEMENT OF ISSUE:

On April 14th, 1988, Trainman P.C. Hunter was called as trainman for train number 404, ordered at Schreiber, Ontario, for 08:45 hours.

After reporting for work and on the basis of concerns of the crew clerk and a Company Officer, it was concluded that he was under the influence of alcohol, and he was removed from service.

Following an ensuing investigation, Trainman Hunter on April 25th, 1988, was dismissed from C.P. Rail for violation of U.C.O.R. Rule "G".

The Union contends that: 1) the Company's investigation was not conducted in a fair and impartial manner; 2) the discipline was issued without just cause; and 3) the discipline assessed is too severe and that the penalty of discharge ought to be mitigated by the circumstances of the instant case.

The Union requests that the grievor be reinstated into service with a clear record and full seniority pursuant to the exception contained in the last sentence of Article 39(c) step 2 of the Collective Agreement.

The Company denies the Union's contentions and declines their request.

FOR THE UNION:

(SGD) J. R. AUSTIN
GENERAL CHAIRPERSON

FOR THE COMPANY:

(SGD) E. S. CAVANAUGH
GENERAL MANAGER, OPERATION & MAINTENANCE, IFS

There appeared on behalf of the Company:

J. H. Blotsky – Special Duties, Labour Relations, Toronto
B. P. Scott – Labour Relations Officer, Montreal
R. P. Egan – Assistant Supervisor Labour Relations, Toronto

And on behalf of the Union:

J. R. Austin – General Chairperson, Toronto
J. Shannon – Vice-General Chairperson, Montreal
R. Saranon – Local Chairperson, Schreiber
S. Keene – Secretary, G.C.A., London
P. C. Hunter – Grievor

AWARD OF THE ARBITRATOR

On the basis of the evidence presented the Arbitrator is left in some doubt as to the merits of the Union's position with regard to the grievor's conduct, and whether he reported for work under the influence of alcohol. Before the merits of that issue can be addressed, however, the position of the Union with respect to the regularity of the investigation process must be addressed. It is not contested that if the procedural requirements of the investigation process were not met the discipline cannot stand.

The evidence establishes that at 0915 hours on April 14, 1988 the grievor was taken out of duty by Assistant Superintendent Michael Sheahan because of Mr. Sheahan's belief, based on his own observations, that the grievor was under the influence of alcohol. In a memorandum report prepared by Mr. Sheahan on the same day he makes the following statement:

Mr. Hunter had bloodshot and glassy eyes and his complexion was very pale. His speech was slurred and his movements were unsteady. Mr. Hunter also had a distinct odour of alcohol on his breath. ...

I advised Mr. Hunter that I didn't think he was fit to go to work. I advised Mr. Hunter that he was out of service, and that I would be holding an investigation for suspected "Rule G" violation. ...

There can be little doubt that, on the basis of the above, Mr. Sheahan took the grievor out of service because of his own opinion that he was under the influence of alcohol. This, of course, as a supervisory officer he was entitled, if not obliged, to do. Subsequently, however, he became the officer who conducted the investigation in respect of Mr. Hunter's alleged violation of Rule G. The material before the Arbitrator establishes beyond controversy that other officers on location, and in particular the superintendent, could have conducted the investigation.

Article 33 of the Collective Agreement, which governs investigations prior to the imposition of discipline, provides, in part, as follows:

33(c) If the employee is involved with responsibility in a disciplinary offence, he shall be accorded the right on request for himself or an accredited representative of the Union, or both, to be present during the examination of any witness whose evidence may have a bearing on the employee's responsibility, to offer rebuttal thereto and to receive a copy of the statement of such witness.

33(d) An employee will not be disciplined or dismissed until after investigation has been held and until the employee's responsibility is established by assessing the evidence produced and no employee will be required to assume this responsibility in his statement or statements. The employee shall be advised in writing of the decision within 30 days of the date the investigation is completed, i.e., the date the last statement in connection with the investigation is taken except as otherwise mutually agreed.

It appears beyond discussion that the procedure contemplated under the foregoing articles requires that the investigation be conducted with a minimum of fairness and impartiality. That has been found to be an implied requirement of investigation provisions similar to Article 33 in a number of collective agreements in the railway industry, and is expressly provided in others. In the instant case no contrary position as to the implied standard of fairness and impartiality was taken by the Company, which in fact acknowledges that standard in paragraph 36 of its brief.

In the Arbitrator's view the facts of this case, as regards the investigation, are not substantially different from those disclosed in **CROA 720** and **CROA 1826**. In those cases it was concluded that where a supervisor himself was a witness to the alleged offence, and filed a report contrary to the employee's interests, the same individual could not thereafter preside at an investigation which must be, to all appearances, fair and impartial, particularly where other Company officers were available to fulfill that function.

In the instant case it is not disputed that Mr. Sheahan, who himself effectively gave evidence against the grievor, was the sole Company officer to directly hear the statements of the employees called to give evidence at the investigation, and that he made a recommendation to higher Company officers with respect to the conclusions to be drawn, and the ultimate decision to assess discipline. In the Arbitrator's view, absent clear language to the contrary in the Collective Agreement (and it may be noted that some agreements in the railway industry do make specific

allowance for the supervisory officer involved to conduct an investigation) I am not prepared to find that the implicit requirement of a fair and impartial investigation has been satisfied in the circumstances of this case. Moreover, for the purposes of clarity, it should be noted that if there is any difference in respect of the standard required in respect of investigation procedures as commented upon in **CROA 720**, on the one hand, and the more recent decisions cited above, with respect, the Arbitrator is of the view that the more recent jurisprudence must be preferred.

For the foregoing reasons the grievance is allowed. The grievor shall be reinstated forthwith into his employment without loss of seniority, and without any discipline registered in respect of the allegations giving rise to his termination. As the Union did not seek compensation on behalf of the grievor in the instant case, no order shall be made in that regard.

July 13, 1990

(Sgd.) MICHEL G. PICHER
ARBITRATOR