

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2466

Heard in Montreal, Tuesday, 12 April 1994

concerning

VIA RAIL CANADA INC.

and

**CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS
[UNITED TRANSPORTATION UNION]**

DISPUTE:

The discharge of Mr. R. Simard, effective 1 August 1992, for violation of CROR Rule G

JOINT STATEMENT OF ISSUE:

On August 1, Mr. Simard was Assistant Conductor on Train No. 27, between Montreal and Quebec. On reporting for work at the Palais Station, the Conductor, G. Arcand, judged that Mr. Simard was not in a fit condition to perform his duties.

After Mr. Simard's condition was confirmed by Company officers and Quebec City police officers, he was held out of service pending investigation.

The investigation was held 12 August 1992, following which Mr. Simard was discharged "for violation of CROR Rule G".

The Union requests that the Corporation reinstate Mr. Simard into his employment.

The Corporation maintains its decision.

FOR THE UNION:

(SGD.) R. LEBEL
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) C. C. MUGGERIDGE
DEPARTMENT DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Company:

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| D. A. Watson | – Senior Labour Relations Officer, Montreal |
| D. Fisher | – Senior Negotiator & Advisor, Labour Relations, Montreal |
| J. P. Maheux | – Supervisor, Railway Services |

And on behalf of the Union:

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| R. Cleary | – Counsel, Montreal |
| R. LeBel | – General Chairperson, Quebec |
| B. E. Wood | – General Chairman, BofLE, Halifax |
| V. Martin | – Local Chairperson, Quebec |
| P. Davis | – Local Chairperson, Quebec |
| H. Chenel | – Local Chairperson, Quebec |
| R. Naudeau | – Observer |
| R. Simard | – Grievor |

AWARD OF THE ARBITRATOR

The Union raised as a preliminary argument that the investigation procedures of the collective agreement were not followed, and that the discipline imposed by the Corporation is therefore null and void. The Arbitrator must reject that argument. The jurisdiction of the Board is limited to the dispute set out in the Joint Statement of Issue. The wording of that document refers only to the alleged violation by the grievor of Rule G, and contains no mention of a claim of improper procedure concerning the investigation. In these circumstances, the Arbitrator can neither receive nor accept the preliminary argument of the Union (*see CROA 1392, 1622, 1630, 1972*). Furthermore, the Arbitrator rejects the claims of the Union that the collective agreement is discriminatory in the treatment of Mr. Simard.

The evidence establishes that on 1 August 1992, when the grievor arrived at Palais Station in Quebec at about 17:25 hours to begin his tour of duty as Assistant Conductor aboard Train No. 27, Quebec to Montreal, he had several symptoms normally associated with inebriation. He was unsteady on his feet and spoke in an incoherent and rambling manner. His pupils were dilated and he had difficulty in expressing himself. It is not disputed, furthermore, that he was drooling a lot. In the opinion of four people, two of whom were Quebec City police officers who were called to the station, as well as Mr. J.P. Maheux, Coordinator of Trains for VIA and Mr. M. Lambert, Coordinator of Trains for CN at Joffre, Mr. Simard's breath smelled of alcohol. Following a disciplinary investigation conducted on August 10 and 12, 1992, the grievor was discharged for violation of Rule G.

The grievor states that he did not consume alcohol before reporting for work, and submits that his intoxication was due to an overdose of medication. He admits to having drunk a quantity of alcohol the night before, four bottles of beer and a half-bottle of wine, after his return home at about 23:30 hours, before going to bed at 00:30 hours. He claims that he slept until 07:30 hours, that he did not consume alcohol during the day of August 1, 1992, and that he had had nothing to eat before returning to work.

It is common ground that Mr. Simard was under medical care for a heart condition, following a major operation in April 1992, involving dilatation of certain arteries in the region of his heart. According to his evidence, he took several drugs every day, including Cardizemer and Isorbil for his heart, as well as Rivotril for treatment of a train phobia which he suffered following an accident at work. Mr. Simard claims that he had taken an overdose of Rivotril by mistake at about 15:00 hours on August 1, prior to going to work. According to him, he took the Rivotril instead of his Isorbil pill, which gave him a total of three Rivotril pills in a short period of time. His normal dose of Rivotril is two pills every 24 hours.

The medical evidence presented by the Union leaves no doubt that Rivotril, in excess amounts, can create a state of intoxication. The *Guide Pratique des Médicaments de l'Association Médicale Canadienne*, an extract from which was filed in evidence, reveals that an overdose of Rivotril produces symptoms of sleepiness, dizziness, confusion and increased salivation. It is also undisputed that the toxic effects of that medication are aggravated by the consumption of alcohol.

A letter from Dr. Gilles Leblanc, the doctor treating Mr. Simard, dated 7 August 1992, confirms Mr. Simard's prescription for Rivotril and the possible effects of an overdose. That letter reads as follows:

To whom it may concern,

Mr. René Simard does take Rivotril, 2 mg., 1 tablet B.I.D. [2 times a day], which he tolerates well and which does not affect his mental faculties at that dose.

I see Mr. Simard frequently for medical reasons re: post traumatic agoraphobia and psychotherapy. Mr. Simard has never appeared affected in my presence by this medication. It is definite that, either by forgetfulness or inadvertence, a more elevated dosage of this medication would give him a compartment which would greatly resemble alcohol intoxication but without the odour.

Hoping this is all to your satisfaction.

Yours,
Dr. Gilles Leblanc

Furthermore, it appears from the documentary evidence that Dr. P.A. Marquis, a psychiatrist in toxicology who saw the grievor in June of 1993, prescribed for him, among other things, "total abstinence from alcohol".

As in all disciplinary cases, the burden of proof rests with the Corporation. It must prove, on the balance of probabilities, that the grievor did violation the terms of Rule G. The grievor denies having consumed alcohol on August 1, and offers in explanation for his state of intoxication the possibility of an overdose of Rivotril. The documentary evidence leaves no doubt that an overdose would cause the symptoms which manifested themselves in Mr. Simard on August 1, except for his breath. In analyzing the facts, the Arbitrator finds interesting the evidence of the Corporation's witnesses to the effect that Mr. Simard drooled excessively when he arrived at work in a state of disorientation. To my knowledge, excessive salivation is not a symptom of inebriation. It is well established, however, that that symptom does result from an overdose of Rivotril.

As to the symptoms, the Employer's only evidence which tends to indicate that the grievor was in a state of inebriation, rather than under the influence of his medications, is the alleged smell of alcohol on his breath. However, in light of the documentation going to the medical state of the grievor, that part of the evidence is not convincing. The opinion that his breath smelled of alcohol is, of necessity, subjective. In case of doubt, that opinion could be influenced by the other more evident symptoms. In **CROA 2261** the Arbitrator declared that evidence based solely on the opinion of a witness concerning the breath of another is not the most convincing, above all when other elements of the evidence point to a contrary explanation.

In the instant case, the Arbitrator concludes that the Corporation has not demonstrated, on the balance of probabilities, that the grievor arrived at work on August 1, 1992, under the influence of alcohol. However, that conclusion, and the evidence giving rise to it, raises a second facet of the investigation.

The grievor was discharged "for violating Rule G of the CROR, August 1, 1992 ...". Rule G reads, in part, as follows:

G (d) Employees must know and understand the possible effects of drugs, medication or mood altering agents, including those prescribed by a doctor, which, in any way, will adversely affect their ability to work safely.

It appears to the Arbitrator that the rule noted above leaves no doubt that the employee is responsible for all that may result from taking medication. The meaning of the Rule is clear: the employee who takes medication and who arrives at work in a state of disorientation whereby his mental or physical capabilities are reduced because of the effect of a medication, to the point of adversely affecting his ability to fulfill his duties without danger, violates the terms of paragraph (d) of Rule G. In dealing with this rule, the Arbitrator squarely rejects the position of Counsel for the Union that an error in dosage is not a violation of the rule. The purpose of the rule is to ensure a safe operation in a transportation industry which can be dangerous both for employees and for the public. The rule prohibits all employees from reporting for work if their mental or physical capabilities have been impaired by the effect of medication, either by intention or by inadvertence. In the view of the Arbitrator, the facts that a violation of the requirement of that rule is the result of an error may be a factor in mitigation for the purposes of discipline. However, given the importance of the rule, one cannot plead either error or negligence as an absolute defense.

The Arbitrator judges that the evidence establishes the Mr. Simard did violate Rule G when he arrived for duty on August 1, 1992. I accept that his physical and mental state were the result of an overdose of Rivotril, taken in error. In the circumstances, even though the grievor's error is serious and deserving of a severe level of discipline, I believe that discharge is excessive. Therefore, the grievance is allowed, in part. The Arbitrator orders that the grievor be reinstated into his employment, without compensation for wages and benefits lost, and without loss of seniority.

15 April 1994

(sgd.) MICHEL G. PICHER
ARBITRATOR