CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2595

Heard in Montreal, Tuesday, 14 March 1995

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Discharge of Mr. M.S. Hilton.

BROTHERHOOD'S STATEMENT OF ISSUE:

The grievor was dismissed by the Company for having violated the conditions of his reinstatement letter dated November 10, 1992.

The Union contends that: **(1.)** The discipline assessed was excessive and unwarranted in the circumstances; and **(2.)** The Company is in violation of articles 18.2(b), 18.2(d) and 18.6 of agreement 10.1.

The Union requests that the grievor be reinstated to his former position forthwith with full compensation and without loss of seniority.

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

FOR THE BROTHERHOOD:

(SGD.) R. A. BOWDEN
SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

W. Agnew	– Regional Manager, Labour Relations, Moncton
J. C. McDonnell	– Counsel, Toronto
M. Hughes	– System Labour Relations Officer, Montreal
I. Steeves	– District Manager, Moncton

And on behalf of the Brotherhood:

D. Brown	– Senior Counsel, Ottawa
R. A. Bowden	– System Federation General Chairman, Ottawa
G. Schneider	– System Federation General Chairman, Winnipeg
P. Davidson	– Counsel, Ottawa

AWARD OF THE ARBITRATOR

The record discloses that the grievor, Mr. Michael Hilton, employed as a truck driver/track maintainer at Halifax, Nova Scotia, was first hired in December of 1966 and maintained a positive work and discipline record for many years. Unfortunately, alcohol addiction became a problem for Mr. Hilton. In 1991 he was charged for driving his company boom truck while impaired, as a result of which he was convicted, and his driving privileges revoked. Subsequently, on October 1, 1991 he was discharged from the Company for a violation of CROR Rule G.

The record discloses that following successful attempts at rehabilitation by Mr. Hilton over a period of months, the Brotherhood successfully petitioned the Company to reinstate him under its operations reinstatement policy. As a result, Mr. Hilton was returned to work in accordance with the terms of a letter of understanding executed on November 10, 1992.

The terms of the letter of understanding establishing the conditions of Mr. Hilton's reinstatement involve such requirements as periodic performance observations, drug and alcohol testing on a quarterly basis for two years, as well as further medical examinations as required and post treatment monitoring as prescribed by the Employee Assistance Program. Further, without apparent limitation in time, the Company remained entitled to test the grievor for drug or alcohol consumption in a "just cause" situation.

Unfortunately, the grievor was unsuccessful in maintaining his rehabilitation. On May 14, 1994 he was charged with impaired driving, apparently not during working time. He was convicted of that offence on July 18, 1994 and his driving privileges were then suspended for two years. The material before the Arbitrator discloses that the grievor did not advise the Company of those events. Notwithstanding his license suspension, he continued to drive to work and to operate the Company's boom truck during the course of his employment. While it is not clear on the material before me what led to the disclosure of the facts, it does not appear disputed that the Company became aware of what had transpired on or about August 30, 1994. The Company conducted disciplinary investigations on September 9 and 23, 1994, following which it notified Mr. Hilton, in a letter dated October 4, 1994 that he was discharged "… based upon the facts brought out in the employee statement", and that he had, in the result, failed to comply with the conditions of his prior reinstatement.

The Brotherhood submits that the grievor did not in fact violate the conditions of his original reinstatement, stressing that his conviction for impaired driving was unrelated to his work, and that the letter of reinstatement does not, on its face, contain a specific prohibition against the consumption of alcohol at any time. While that position may be technically correct, the Arbitrator is not persuaded that the Company was nevertheless without grounds to consider that it had just cause to terminate Mr. Hilton's employment. It is clear from the material before me that his return to work was entirely conditioned on his confirmed rehabilitation from alcohol addiction, a condition which must, implicitly, involve the expectation that he is to abstain entirely from the consumption of alcohol.

Mr. Hilton was employed in a safety sensitive position, as the operator of a boom truck, a large vehicle which moves both over rail and the public highway, and is also used to transport Company employees, in addition to performing heavy work. The Company must obviously have concern for the safety of its operations. The failure of the grievor to abstain from alcohol, resulting in his conviction for impaired driving, and the loss of his driver's licence were obvious grounds for concern. In the Arbitrator's view, grounds for still greater concern arose by reason of Mr. Hilton's attempt to conceal the facts from the Company, and his obvious willingness to operate a Company vehicle for a substantial period of time without a valid operator's licence, while under suspension by the Court. Even if the Arbitrator were to accept that the circumstances in May of 1994, involving his relapse, were an isolated event which would merit his receiving further consideration, the entire course of events surrounding his attempt to conceal the facts from the Company cannot be so excused. There is no evidence before me to suggest that the actions of Mr. Hilton between July 18, 1994, when his licence was suspended, and August 30, 1994 when the fact of the suspension became known to the Company, involved a course of conduct beyond his control by reason of his alcoholism. On the contrary, it appears that Mr. Hilton knowingly followed a course of deception over a sustained period of time, the obvious impact of which calls into question his trustworthiness in the eyes of his employer, quite apart from whether he can be said to have violated the conditions of his earlier reinstatement to work.

The instant case is unfortunate, as Mr. Hilton is described as a good employee of some twenty-eight years' service. The fact remains, however, that as an employee in a safety sensitive position, he violated the trust placed in him by the Company, and arguably placed it in a position of some jeopardy as regards potential liability in the event of an accident during the period of time he drove the boom truck without a valid operator's licence. Having regard to

the fact that Mr. Hilton had earlier been discharged for impaired driving during the course of his employment, and was given the fullest consideration by the Employer in the terms of his reinstatement in accordance with the letter of November 10, 1992, the Arbitrator is at a loss to find mitigating circumstances which would justify the substitution of a lesser penalty. Indeed, as noted above, the grievor's course of deception of his employer, over a substantial period of time, is, if anything, aggravating as regards the merits of his case. Very simply, there is a point at which the Company cannot be asked to take any further chances, and that point was reached in the case at hand.

As part of its case the Brotherhood further alleges that the Company violated the requirements of article 18 of the collective agreement, and in particular that the notice of disciplinary hearing provided to Mr. Hilton was improper. Specifically, objection is taken to the fact that he was called to disciplinary investigations "… in connection with alleged drunken driving charge", because during the course of the questioning the Company's inquiry went beyond the time of his offence and conviction, and included questions relating to his subsequent operating of a Company vehicle without a proper licence.

Can it be said that the Company's method of proceeding resulted in any unfairness to Mr. Hilton, or violated the standards of the formal investigation contemplated in article 18 of the collective agreement? I think not. Article 18.2(b) of the agreement provides that an employee is to receive 48 hours' notice of a formal investigation and that, "… the notice will include the date, time, place and subject matter of the hearing." In the instant case it was clear that the Company was aware, before the investigation, that Mr. Hilton had operated a Company vehicle while his licence was under suspension. That much had been admitted by him to his supervisor, Acting Track Supervisor A.M. Veinot, during the course of a telephone conversation on August 30, 1994. Clearly Mr. Hilton knew, or reasonably should have known, that his operation of the boom truck following the suspension of his driver's permit was part and parcel of the Company's concerns in investigating the loss of his licence by reason of his conviction for impaired driving. It is, in my view, unduly technical to suggest that the Company went beyond the scope of the notice to the grievor, or that it departed from the standards of fairness contemplated within the provisions of article 18 in the circumstances. In light of that conclusion the Arbitrator need not deal with the merits of a preliminary objection filed by the Company, to the effect that the Brotherhood should not be entitled, in any event, to plead the terms of article 18 of the collective agreement, as it had failed to specify any breach of that article when the grievance was filed, at Step 3 of the grievance procedure, or at any time prior to the filing of the *ex parte* statement of issue by the Brotherhood with this Office.

For all of the foregoing reasons the grievance must be dismissed.

17 March 1995

(signed) MICHEL G. PICHER
ARBITRATOR