

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2600

Heard in Montreal, Tuesday, 11 April 1995

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

15 demerits assessed to D.A. MacFarlane for alleged unauthorized use of a Company vehicle.

BROTHERHOOD'S STATEMENT OF ISSUE:

On June 2, 1994, the grievor used a Company vehicle to remove garbage from within the confines of Company property.

The Union contends that: **1.)** The grievor used the truck in question only and completely on Company property; **2.)** Both the grievor's foreman and his supervisor were aware that he was operating the truck in the manner that he did; **3.)** The grievor was investigated twice for the same incident in violation of the procedural aspects of article 18.2; **4)** The grievor was unjustly dealt with in violation of article 18.6 of agreement 10.1 and the discipline assessed was excessive and unwarranted in the circumstances.

The Union requests that: That the 15 demerits be removed from the grievor's record and that he be returned forthwith to his previous position without loss of seniority and with full compensation for all losses incurred.

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:

J. C. McDonnell	– Counsel, Toronto
N. Dionne	– Manager, System Labour Relations, Montreal
C. Morgan	– Labour Relations Officer, Toronto
N. Thomas	– Manager, Train Services, Toronto
R. Ditomaso	– Track Supervisor, Toronto
G. Rideout	– Assistant Track Supervisor, Toronto
T. Storey	– CN Special Agent, Toronto

And on behalf of the Brotherhood:

P. Davidson	– Counsel, Ottawa
R. Philips	– General Chairman, Toronto
A. Trudel	– General Chairman, Montreal

AWARD OF THE ARBITRATOR

The Company assessed fifteen demerits against the grievor for allegedly driving a Company truck to a beer store where he purchased a quantity of beer, which it alleges he possessed and consumed in violation of Rule G. The Rule G violation, which resulted in the grievor's discharge, is the subject of a separate award which reviews the evidence in greater detail (see **CROA 2601**). For reasons related in that award, the Arbitrator finds that the Company has satisfied the burden of proof, and that, on the balance of probabilities, Mr. MacFarlane did drive a Company vehicle to a beer store in the vicinity of King and Dufferin Streets in Toronto, on June 2, 1994. He plainly did so without authorization, and indeed while his driver's licence was under suspension. In the circumstances I am satisfied that the assessment of fifteen demerits is appropriate.

The Brotherhood further submits that the grievor was unfairly investigated. In this regard it submits that he was detained after work for questioning in relation to the alleged Rule G violation. The Brotherhood submits that Mr. MacFarlane was deprived of his rights under section 10 of the **Canadian Charter of Rights and Freedoms** in that he was denied the right, on arrest or detention, to retain and instruct counsel, and to be advised of his right to do so.

Assuming, without finding, that the **Charter** can be invoked in such a circumstance, the Arbitrator is unable to find that Mr. MacFarlane was ever detained or arrested within the contemplation of section 10 of the **Canadian Charter of Rights and Freedoms**. While it is true that he was instructed by his supervisor, Mr. Rideout, to remain at the work place after work to answer some questions, and that he was also questioned by three members of the CN Police who attended at the work place, there is no evidence on the record that Mr. MacFarlane was ever prevented from leaving, or indeed that he ever requested to do so. More fundamentally, if it were necessary to so decide, absent any judicial authority to the contrary, it would not appear to the Arbitrator that the **Charter** can extend to give to an employee the right to be told that he is entitled to retain the services of a lawyer during the course of questions being put to him by his or her work place supervisor. If the grievor had been arrested or detained by the CN Police **Charter** protection might well attach in relation to any criminal charges which might have ensued. No charges were laid, however, nor, for the reasons related above, can I find that the grievor was in fact arrested or detained in the sense contemplated by section 10 of the **Charter**. Finally, the Arbitrator cannot find that the general method of disciplinary investigation employed by the Company violated article 18 of the collective agreement, or that the grievor was unjustly dealt with contrary to the provisions of that article.

For these reasons the grievance must be dismissed.

April 20, 1995

(signed) MICHEL G. PICHER
ARBITRATOR