

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2601

Heard in Montreal, Tuesday, 11 April 1995

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Discharge of Track Maintainer D.A. MacFarlane for alleged violation of CROR Rule G.

BROTHERHOOD'S STATEMENT OF ISSUE:

On June 2, 1994, CN Police attended at the grievor's toolhouse to investigate a complaint. While there, the Police found evidence they believed could support an alleged Rule G violation.

The Union contends that: **1.)** Much of the evidence used against the grievor at the investigation was inadmissible having been illegally obtained from CN Police; **2.)** There is no incontrovertible evidence that the grievor did in fact violate Rule G on the day in question; **3.)** The grievor was never charged by the CN Police, nor was a breathalyzer test requested; **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 grievor 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 evidence establishes, beyond controversy, that two men in a truck belonging to the Company purchased a six pack of Upper Canada Pale Ale from the Upper Canada beer store at 2 Atlantic Avenue in Toronto shortly after 13:00 hours on June 2, 1994. The manager of the store formed the opinion that one of the men was intoxicated. She noted the identification number of the vehicle, as well as its licence plate and telephoned the Company's Public Affairs Department to advise of the circumstances.

Later the same afternoon, between 15:00 and 15:30 hours, the same person who previously drove the vehicle and had ordered the six pack earlier, which had been paid for by his companion, returned to the beer store with a third passenger in the same truck. When the driver and the third person attempted to purchase beer from the same clerk who had served the driver earlier, they were refused service based on the clerk's previously formed belief, shared by the manager, that the driver was intoxicated.

The evidence further discloses that in the interim the Company conducted internal inquiries to determine the identity of the truck in question, following the report made by the beer store manager. It does not appear disputed that the truck in question, bearing CN vehicle number 071559, was based at the Fort York shop where the grievor was one of six employees.

The statement which Maintenance Foreman A. Corderios made to CN Police on the day after the incident confirms that Mr. Corderios and three other employees returned to the Fort York location at approximately 3:00 o'clock in the afternoon. He states that there were then no CN vehicles parked in the yard and that he did not see Mr. MacFarlane. The only other employee at that location is Foreman Walter Zorko. Logic would suggest that either Mr. Zorko or Mr. MacFarlane had possession of the truck in question.

Upon being advised of the use of the CN truck to purchase beer at the Atlantic Avenue store, Assistant Supervisor Gary Rideout called Foreman Zorko and advised him that he was coming to the shop, instructing him to stay there and to keep the other employees there until he arrived. It appears that Mr. Zorko and Mr. MacFarlane were the only employees at the shop when Mr. Rideout called.

Mr. Rideout states that upon his arrival at the Fort York shop he found Mr. MacFarlane to be in an intoxicated state. He states that his eyes were glassy, his speech was slurred, his face was red and flushed and that there was a strong odour of alcohol on his breath. Mr. Rideout relates that he then spoke with Foreman Zorko in Mr. Rideout's truck, and that when he put to the foreman that either he or Mr. MacFarlane had to be driving the truck that afternoon, Mr. Zorko answered that the grievor had.

The evidence of Mr. Rideout respecting the condition of Mr. MacFarlane is corroborated by two Special Agents and a Constable of the CN Police who also attended at the shop at approximately 16:45 hours. Special Agent Terry Storey relates that the grievor's eyes were blurry and that an "alcohol-like odour" was on his breath. He also states that Mr. MacFarlane's demeanor was boisterous, and that he made aggressive statements towards Mr. Rideout including the comment "Your ass is grass and I'm the fucking lawnmower." According to Agent Storey, as the grievor was leaving the premises when the questioning was completed and Mr. Rideout had advised him he would be the subject of a disciplinary investigation he called out to Assistant Supervisor Rideout from the passenger side window of a pick-up truck shouting "Hey Gary, you see this? This is for you!" Mr. MacFarlane then lifted the brim of the baseball cap he was wearing to uncover the words "FUCK OFF" printed on the underside in large white letters.

In further support of its action to discharge the grievor for a violation of Rule G, the Company obtained statements from the clerk and manager of the beer store which give a description of the driver of the truck which corresponds generally to the description of Mr. MacFarlane. Also, five empty Upper Canada Pale Ale bottles were found on the premises, in a search conducted by the CN Police at the time of their interview with Mr. MacFarlane.

In the Arbitrator's view this grievance cannot succeed. While much of the evidence concerns the issue of whether Mr. MacFarlane did or did not drive the truck to the beer store and involve himself in the purchase of alcohol on the afternoon of June 2, 1994, a matter which rests on circumstantial evidence, the evidence concerning his condition when observed in the workplace by Mr. Rideout, and the CN police officers on the afternoon in question is direct evidence, which the Arbitrator finds to be clear and convincing. When the evidence of four witnesses respecting the grievor's physical condition and general bearing is further viewed in light of the

circumstantial evidence arising from the reports of the manager and clerk of the beer store, I am satisfied that the Company has established, on the balance of probabilities, that the grievor was in an intoxicated state, in violation of Rule G, while at work on the day in question, and that he did make unauthorized use the Company's truck to obtain a six pack of beer from the beer store at 2 Atlantic Avenue on the day in question. That conclusion is supportable having particular regard to the statement made by Foreman Zorko that Mr. MacFarlane was driving CN truck 071559 that afternoon, and the fact that no other employees were on the premises at the time the beer was purchased.

The grievor is not a long service employee, having first been hired as an extra gang labourer in March of 1984. For reasons amply related in prior awards, the violation of CROR Rule G by the consumption of alcohol while on duty is a serious matter which, in the absence of compelling mitigating circumstances, generally merits discharge. (See, e.g., CROA 309, 395, 586, 928, 949, 1386, 1687 and 1865.) In the instant case, the Arbitrator is compelled to conclude that the conduct of the grievor was a clear violation of Rule G, in that he possessed and consumed alcohol while on duty and that no mitigating circumstances are disclosed. The record reveals that the grievor was assessed demerits or made the subject of corrective interviews on some five occasions between October of 1990 and June 2, 1994. He is not a long service employee with a positive record, and there are few, if any, mitigating factors to support a reduction in penalty in the circumstances of his case.

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

April 20, 1995

(signed) MICHEL G. PICHER
ARBITRATOR