

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2839

Heard in Montreal, Thursday, 13 March 1997

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Appeal of discharge on behalf of Mr. S. Hambrook, PIN 819590.

EX PARTE STATEMENT OF ISSUE:

On August 19, 1996, Mr. Hambrook was discharged for his alleged violation of CROR Rule G while operating a Company vehicle.

The Union contends that: 1.) The grievor was not on duty on the date in question. 2.) The grievor has been unjustly dealt with by the Company. 3.) The discipline assessed was excessive and unwarranted in the circumstances.

The Union requests that the grievor be reinstated under the Rule G/Rule E Bypass Agreement and that he be made whole for any losses he may have sustained as a result of the Company's actions.

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

FOR THE BROTHERHOOD:

(SGD.) R. F. LIBERTY

SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

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| S. Blackmore | – Labour Relations Officer, Edmonton |
| J. Dixon | – Manager, Labour Relations, Edmonton |
| S. Michaud | – Assistant Manager, Labour Relations, Edmonton |
| J. Butterwick | – Assistant District Engineer - Pacific District, Vancouver |

And on behalf of the Brotherhood:

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| D. Brown | – Sr. Counsel, Ottawa |
| R. F. Liberty | – System Federation General Chairman, Winnipeg |
| K. M. Deptuck | – Vice-President, Ottawa |
| L. P. Gladish | – General Chairman & Secretary/Treasurer, Winnipeg |
| P. Davidson | – Counsel, Ottawa |
| S. Hambrook | – Grievor |

AWARD OF THE ARBITRATOR

It is not disputed that the grievor was in a state of intoxication while he had control of a Company truck at or about 01:55 hours on the morning of July 21, 1996. He was then apprehended by a CN Police Inspector at a Husky Service Station where, it is not disputed, he failed to pass an initial roadside blood alcohol screening test. The

primary issue to be resolved is whether the grievor was on duty at the time. The Company asserts that he was, and that he was in violation of Rule G, as a result of which his discharge was justified. The Brotherhood submits that in fact the grievor was not on duty, and that he was entitled to the benefits of the EAP By-Pass Agreement. Under the terms of that agreement, it is understood that if an employee is apprehended in a state of intoxication by a manager or CN police officer prior to the commencement of duty he is to be referred for EAP consultation under the terms of the By-Pass Agreement. However, if the employee is on duty, he is not entitled to that protection.

The only direct evidence with respect to the grievor's work obligations at the time of incident given at the hearing is the evidence of the grievor himself. He confirms that the starting time for his crew during the ten-day cycle in question was 02:00 hours, and that on some of the days during the cycle, as foreman he did in fact come in for work either one hour or one-half hour in advance of that time. He states, however, that on the date in question, as well as on several other days, he did not commence work until 02:00 hours.

The Company counters with a hearsay document, being a written declaration by the grievor's supervisor, Mr. Vince Pucci-Daniele. That statement contains the declaration that "Mr. Hambrook generally began work ½ hour prior to the start time of 02:00 ...". On balance the Arbitrator is unable to give substantial weight to the broad declaration of the supervisor, as regards the precise circumstance in which the grievor found himself in the early morning of July 21, 1996. On the basis of the material before me, I am satisfied that the grievor's evidence is to be preferred, and that he did not have any functions to perform, and was not scheduled to perform any work, prior to the commencement of his tour of duty at 02:00 hours. In the result, the Brotherhood's position is correct with respect to the grievor's entitlement to the benefits of the EAP By-Pass Agreement.

In the circumstances, however, the Arbitrator is not persuaded that that conclusion entirely disposes of the grievance. By his own acknowledgement, Mr. Hambrook did commit the serious offence of being in a state of intoxication while having the care and control of a Company vehicle, albeit off duty. Whatever his entitlement may be as regards the By-Pass Agreement and EAP participation, he remains liable to a serious degree of discipline for the related infraction above described. If the parties were drawn into a protracted dispute as to the actual characterization of the grievor's working status at the point of apprehension, with resulting hardship to Mr. Hambrook, he is to a great degree the author of his own misfortune in that regard. This is not, in my view, a case for the direction of the payment of any compensation to the grievor, although I am satisfied that, in light of the application of the EAP By-Pass Agreement, the grievor's discharge cannot stand.

The grievance is therefore allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment, without loss of seniority and without compensation for wages and benefits lost. The grievor's reinstatement is made on the understanding that he remains liable to referral into the EAP programme in accordance with the By-Pass Agreement, should the Company choose to pursue that option. Should there be any dispute between the parties in regard to that issue, the matter may be spoken to.

March 14, 1997

(signed) MICHEL G. PICHER
ARBITRATOR