

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2861

Heard in Calgary, Thursday, 15 May 1997

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

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

DISPUTE:

Appeal the discharge of Conductor T.V. Herbel of Brandon, Manitoba effective 26 September 1996.

JOINT STATEMENT OF ISSUE:

Effective 26 September 1996, Mr. T. Herbel was discharged for violation of CRO Rule G on 25 September 1996. CROR General Rule A(iv) on 26 September 1996 and fraudulent submission of time returns dated 24, 25 and 26, September 1996.

The Union's position is that the grievor was off-duty at 19:00 hours on 25 September 1996, was on mandatory rest and not subject to duty in accordance with CROR General Rule G. Further, the Union submits that the grievor was not in violation of General Rule A(iv). The Union also submits that the grievor did not submit false time claims to the Company based on an understanding he had with Assistant Superintendent H. Harapiak.

The Union requests that the grievor be reinstated with full compensation and that his record be made whole.

The Company does not agree.

FOR THE COUNCIL:

(SGD.) M. G. ELDRIDGE
FOR: GENERAL CHAIRPERSON

FOR THE COMPANY:

(SGD.) J. T. TORCHIA
FOR: SENIOR VICE-PRESIDENT

There appeared on behalf of the Company:

K. Morris	– Labour Relations Officer, Edmonton
J. T. Torchia	– Manager, Labour Relations, Edmonton
S. Michaud	– Assistant Manager, Labour Relations, Edmonton
J. Dixon	– Assistant Manager, Labour Relations, Edmonton
D. Lanthier	– Labour Relations Officer, Edmonton
S. Blackmore	– Labour Relations Officer, Edmonton
D. Van Cauwenbergh	– Labour Relations Officer, Edmonton
H. P. Harapiak	– Witness

And on behalf of the Council:

D. Ellickson	– Counsel, Toronto
M. G. Eldridge	– Vice-General Chairman, Edmonton
A. Lopez	– Witness
T. V. Herbel	– Grievor

AWARD OF THE ARBITRATOR

The facts in relation to this case are outlined in **CROA 2862**. Before the Arbitrator the grievor admitted that he did consume a small quantity of beer on the evening of September 25, 1996, following his return from the work site to the Beefeater Inn in Estevan, where his crew was being housed.

The case at hand is unusual, by any standard. The initial position of the Company was to the effect that the grievor was not in fact on duty, and that he had fraudulently claimed to be on duty to midnight that same evening. However, for the purposes of Rule G the Company accepts that the grievor was on duty after his return to the hotel on the evening in question. Mr. Herbel's evidence is that he considered that he was entitled to claim work time for his crew until midnight, in keeping with his understanding of an arrangement with Assistant Superintendent Harapiak.

There is no suggestion in the evidence that the grievor drank to the point of impairment, or was unfit for duty the following morning. Indeed, the Arbitrator accepts that he had some three beers with dinner, and went to bed at a reasonable hour. As related in **CROA 2862**, it is alleged that Locomotive Engineer Boucher drank to great excess, until 03:20, causing Assistant Superintendent Harapiak to attend at the hotel later that morning with a CN police constable. A breathalyzer test then administered to Conductor Herbel revealed no trace of alcohol.

The facts in relation to the alleged violation of Rule G resolve themselves to this. At the end of his physical day's work, upon returning to his hotel accommodation, the grievor consumed three beers with dinner. It does not appear disputed that he then had no physical duties to perform and no reason to believe that he would be called to work in any safety sensitive responsibilities until well into the next morning. While, by the grievor's own admission, he was technically guilty of violating Rule G, as he considered that he was still on duty until he called his crew in as off duty at midnight, it is not clear that he was engaged in a grievous violation of the intent or purpose of Rule G. The decisions of this Office have long reflected an appreciation that the application of Rule G must, to some extent, depend upon the facts of each particular case (*see CROA 557, 624, 638, 1004, 1097, 1604 and 1917*).

For reasons related in **CROA 2862** concerning a failure of communication between the grievor and his supervisor, I am satisfied that the grievor did not engage in the deliberate falsification of time claims. I must, however, conclude that he was in violation of Rule G, by his own admission. That violation, however, is qualified in its gravity, for the reasons discussed. In the circumstances the Arbitrator is satisfied that the discharge of the grievor is not appropriate, in the circumstances. Both the unusual circumstances in which the grievor found himself, being off duty in a physical sense, with no reasonable prospect to be called for active duty, coupled with the fact that his disciplinary record had been clear for some six years, justify a substitution of penalty. On the other hand, given the importance of Rule G, the grievor must appreciate that he was deserving of a serious measure of discipline. For the foregoing reasons the Arbitrator directs that the grievor be reinstated into his employment, without loss of seniority, and without compensation for wages and benefits lost, with the period out of service to be recorded on the grievor's record as a suspension for a violation of Rule G.

Dated at Montreal, May 30, 1997

(signed) MICHEL G. PICHER
ARBITRATOR