

# CANADIAN RAILWAY OFFICE OF ARBITRATION

## CASE NO. 2988

Heard in Montreal, Wednesday, 14 October 1998

concerning

**CANADIAN PACIFIC RAILWAY COMPANY**

and

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**EX PARTE**

### **DISPUTE:**

Dismissal of Mr. R. Fuerst.

### **BROTHERHOOD'S STATEMENT OF ISSUE:**

The grievor was dismissed by the Company for allegedly reporting for duty on March 28, 1998, while in a state of alcohol intoxication. The Brotherhood grieved.

The Union contends that: 1.) The grievor was not in violation of Rule G; 2.) In consequence, the discipline assessed the grievor was unwarranted and certainly excessive.

The Union requests that the grievor be reinstated into his former position forthwith without loss of seniority and with full compensation for all financial losses incurred as a result of this matter.

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

### **FOR THE BROTHERHOOD:**

**(SGD.) J. J. KRUK**

**SYSTEM FEDERATION GENERAL CHAIRMAN**

There appeared on behalf of the Company:

D. Freeborn	– Labour Relations Officer, Calgary
E. MacIsaac	– Labour Relations Officer, Calgary
H. Schoones	– Assistant Track Maintenance Supervisor
B. Gauld	– Assistant Track Maintenance Supervisor

And on behalf of the Brotherhood:

D. W. Brown	– Senior Counsel, Ottawa
J. J. Kruk	– System Federation General Chairman, Ottawa
P. Davidson	– Counsel, Ottawa
K. Deptuk	– Vice-President, Ottawa

### **AWARD OF THE ARBITRATOR**

Upon a careful review of the material submitted, the Arbitrator is compelled to the conclusion that the grievor, who occupied a safety sensitive position as a relieving track maintainer/truck driver did report for duty on March 26, 1998 while in a state of inebriation induced by the consumption of alcohol.

The material before the Arbitrator establishes that on the morning in question Mr. Fuerst was responsible for driving several employees to a safety meeting to be held in Kenora, Ontario. Three employees complained to

Assistant Track Maintenance Supervisor B. Gauld that enroute to the safety meeting they detected a strong odour of alcohol from the grievor, slurred speech, red eyes and a loud tone of voice. One of the employees related that Mr. Fuerst was driving erratically, and that at one point he drove onto the shoulder of the road. It does not appear disputed that during later stages of the trip two other employees took over the driving of the truck.

When the Company held a disciplinary investigation to inquire into the circumstances of the incident the employees in question, in varying degrees, changed their account of what they had observed. Even on the altered basis of their collective statements, however, there remains acknowledgement that the grievor smelled of alcohol, slurred his speech and had bloodshot or red eyes. Further, both Mr. Gauld, and Assistant Track Maintenance Supervisor H. Schoones directly observed the grievor's condition and detected a strong smell of alcohol from him.

Mr. Fuerst denies working under the influence of alcohol. He states that he had some three or four beers before 11 p.m. on the prior evening, and might have smelled of alcohol because he had not eaten an evening meal on March 25th or breakfast on March 26th. With respect to the quality of his driving, Mr. Fuerst relates that he drove slowly, and that his driving was made more difficult by foggy conditions on the morning of the 26th.

Upon a review of the evidence adduced, the Arbitrator is satisfied, on the balance of probabilities, that Mr. Fuerst was under the influence of alcohol when he commenced his duties driving the Company's truck, with employees as passengers, commencing at 5:00 a.m. on March 26, 1998. Needless to say, employees do not lightly complain about another employee's possible inebriation, and when they do so it is out of a serious concern for their own safety. The concerns expressed by the employees to Supervisor Gauld are perhaps the more understandable, to the extent that at least one employee indicated that in recent times the grievor had operated his truck in a state of inebriation on more than one occasion. While the employees involved may have tempered their initial accounts of March 26 when they realized that the matter had escalated to the risk of serious discipline to Mr. Fuerst, the overall evidence, including their initial statements to Supervisor Gauld confirms that several of them had very substantial concerns for their own safety in light of the grievor's physical state and conduct on the morning of the 26th.

The grievor has some sixteen years of service with the Company, during which time he has never been previously disciplined. Those factors can fairly be taken into account as mitigating, insofar as the appropriate measure of discipline is concerned. The Brotherhood further argues that the Company was under an obligation to refer the grievor to the EFAP procedures to determine whether he might in fact be an alcoholic in respect of whom a duty of reasonable accommodation might be owed. The Arbitrator has some difficulty with that submission. An individual's medical condition, including alcoholism, is generally a matter for that individual and his or her physician, and an employer cannot lightly insist on a mandatory medical examination, unless there is reasonable and probable cause to have concerns about the employee's general fitness to safely perform his or her duties. That situation was not apparent in the case at hand.

The evidence does, however, disclose that the grievor did seek his own medical assessment in respect of alcohol consumption. Following the events leading to his discharge Mr. Fuerst participated in the assessment program of the Addictions Foundation of Manitoba, a program designed to assess an individual's status in respect of alcohol consumption through the graduated stages of non-involvement, irregular involvement, regular involvement, harmful involvement, dependent involvement, transitional abstinence and stabilized abstinence. Documentation provided by the Foundation diagnosed the grievor as being at a level of "harmful involvement", in April of 1998, shortly after the events leading to his discharge. While he is not a dependent alcoholic, it is evident that the grievor did have problems with his degree of alcohol consumption at the time in question, sufficient to obtain professional assistance both in diagnosis and in his own subsequent efforts to bring his level of involvement under control. In all of the circumstances I am satisfied that the grievor's actions in that regard are also mitigating factors in respect of the ultimate penalty to be assessed in the case at hand. On the whole, I am satisfied that the grievor can be reinstated into his employment, subject to conditions fashioned to protect the employer's legitimate interests.

For the foregoing reasons the grievance is allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without loss of seniority and without compensation for wages and benefits lost. For the period of two years following his reinstatement the grievor shall be subject to such periodic and random testing as the Company may deem appropriate for the purposes of detecting alcohol consumption by the grievor. Should any such test, to be administered on a non-abusive basis, prove positive in terms of normal legal standards, the grievor shall be subject to discharge.

October 19, 1998

**(signed) MICHEL G. PICHER**  
**ARBITRATOR**

