CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3616

Heard in Edmonton, Tuesday, 12 June 2007

concerning

CANADIAN PACIFIC RAILWAY

and

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The dismissal of Conductor Brent Matyas of Moose Jaw, for conduct unbecoming an employee of CPR and a violation of CROR Rule G.

JOINT STATEMENT OF ISSUE:

Following a formal investigation on January 26, 2006, Conductor Matyas was dismissed February 15, 2006, for allegations of conduct unbecoming an employee of CPR and a violation of CROR Rule G related to his off duty hours in Swift Current, Saskatchewan.

The Union's position is that the Company has not met the burden of proof necessary to sustain formal discipline and, in any event, that dismissal is excessive given all of the circumstances.

The Union seeks reinstatement of Conductor Matyas without loss of seniority and benefits and with payment of lost wages resulting from his discharge. In the alternative, the Union seeks the grievor's reinstatement without loss of seniority on such terms as the arbitrator sees fit.

The Company has declined the grievance.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) D. W. OLSON	(SGD.) R. HAMPEL
GENERAL CHAIRMAN	FOR: ASSISTANT VICE-PRESIDENT

There appeared on behalf of the Company:

R. Hampel	– Manager, Labour Relations, Calgary
C. Ayotte	– Labour Relations Officer, Calgary
Constable M. Benjamin	– Royal Canadian Mounted Police, Swift Current

And on behalf of the Union:

M. S. Church	– Counsel, Toronto
D. Olson	– General Chairman, Calgary
D. S. Finnson	– National Vice-President, Calgary
G. Hiscock	– Vice-Local Chairman, Moose Jaw
B. Matyas	– Grievor

AWARD OF THE ARBITRATOR

The grievor was discharged as a result of an incident involving the consumption of alcohol in the late hours of November 19 and the early hours of November 20, 2005. The written notice of discharge, dated February 15, 2006, lists six alleged violations: (1) impaired driving, (2) driving while having a blood alcohol level in excess of .08, (3) possession of a narcotic, (4) offences relating to a public or peace officer, (5) uttering threats and (6) violation of CROR Rule G "… as evidenced by your subsequent conviction of being impaired while in control of a motor vehicle, prior to the start of your assignment on November 20, 2005". More precisely, the first five heads of misconduct are said, in the form 104 notice, to have contributed to his conduct unbecoming an employee of CPR, while the rule G violation stands as a separate reason for his termination.

The facts are not in substantial dispute. The grievor had five years of service at the time of the events leading to his discharge and had previously been disciplined on one occasion, although his record was discipline free at the time of the incident of November 20, 2005. On that date he was working on the K62 road switcher assignment at Swift Current, where he was being housed in rest facilities provided by the Company at the Comfort Inn. Mr. Matyas was scheduled to begin duty at 08:00 on the morning of November 20th, in accordance with his scheduled assignment. He was not then working on a spareboard or out of a pool in which he might be subject to call at any given time.

After the completion of his tour of duty on the evening of November 19, 2005, Conductor Matyas proceeded to consume alcohol at two separate drinking establishments in Swift Current. While according to his account he consumed some seven drinks, the Arbitrator is satisfied that, whatever the level of consumption, he did become impaired by reason of his alcohol consumption that evening. His unchallenged account is that he returned to the Comfort Inn shortly after 23:00, taking advantage of a ride. He became ill and vomited at approximately 01:00 hours on November 20, 2005 and then decided to go to smoke a cigarette in his vehicle which was in the hotel parking lot. The Arbitrator is satisfied that he subsequently fell asleep or passed out in his vehicle with the car running and the radio playing loudly. That resulted in a complaint to local police who shortly attended upon the scene.

It appears that when he was awakened and told by an RCMP constable of the Swift Current detachment to get out of his car he initially refused to do so, using abusive language with the police officer. When threatened with a tazer shock he changed his attitude and became more cooperative. He was then arrested and taken into custody where he remained until approximately 19:10 the following day. As a result he was unable to protect his assignment on November 20, 2005.

The report of the incident as provided by RCMP Constable Benjamin confirms that when Mr. Matyas was arrested two baggies with extremely small quantities of what appeared to be marijuana were found on the seat of his car. The grievor has denied any knowledge of the substance in question, indicating that his spouse occasionally used the vehicle and that others had access to it. In fact, the substance was never proved to be marijuana by the normal process of criminal certification. While he was in custody the grievor was subjected to two breathalyser tests, the first being taken at 06:00 and the second at 06:24, with readings of .19 and .18 respectively.

It appears that an initial court date was set for January 18, 2006 with five charges pending against the grievor. These included having care and control of a motor vehicle while impaired by alcohol, consuming alcohol in a quantity which caused a concentration of his personal blood alcohol content excess of 80 mg. of alcohol, possession of a narcotic, obstructing a police officer and uttering threats. The Company conducted a number of investigative interviews of the grievor commencing on November 23 and supplemented on December 19, 2005 and January 26, 2006. He then was dismissed effective February 15, 2006.

As a result of a plea bargain with the Crown, on February 1, 2006, the grievor pleaded guilty to being in the care and control of a motor vehicle while under the influence of alcohol. All of the other charges against him were dropped and during the course of the court proceedings the crown attorney advised the Court that the breathalyser readings could not be relied upon. The Court was advised that the grievor had had two previous driving offences involving impairment although they were in the somewhat distant past, in 1989 and 1991. The Court assessed a $600 fine and a one year suspension from driving, subject to the grievor being allowed to operate a vehicle after three months if the vehicle was equipped with an alcohol ignition interlock device and on condition that the grievor be approved for participation in that program. The grievor was also disqualified from operating a vessel or aircraft in Canada, but he was not prohibited with respect to the operation of trains or related equipment.

In this case the burden of proof is upon the Company. It must establish, on the balance of probabilities, that the grievor did engage in conduct unbecoming an employee as alleged, and that he did violate rule G.

The Arbitrator deals with the rule G allegation first. I have some difficulty with the evidence as presented by the Company. Rule G reads as follows:

> G. (a) The use of intoxicants or narcotics by employees subject to duty, or their possession or use while on duty, is prohibited.
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> (b) The use of mood altering agents by employees subject to duty, or their possession or use while on duty, is prohibited except as prescribed by a doctor.

On the evidence before me it is clear that at all material times the grievor was not on call or subject to being called, but that he was scheduled to commence work at 08:00 on November 20, 2005. I find it difficult to conclude that he could at any time prior to 08:00 on November 20 be fairly characterized as "subject to duty". The record indicates that by the Crown's own admission the breathalyser readings taken of the grievor at or about 06:00 were not such as could be relied upon. As a result, it is at best speculative as to whether the grievor might or might not have been under the influence of alcohol at the scheduled time of the commencement of his tour of duty at 08:00. From that standpoint, the evidence is simply not sufficient to establish a violation of rule G.

Nor is the evidence sufficient with respect to the alleged possession of marijuana by the grievor, assuming, without finding, that the parking lot of the Comfort Inn could be said to be Company premises for the purposes of rule G. As stressed by counsel for the Union, there is simply no proof as to the nature of the substance found in small quantities in two plastic bags on the seat of the grievor's car. Moreover, the only evidence with respect to that substance is that the grievor had no knowledge of it and disclaimed any meaningful or possession of it. While the circumstances may be suspicious and his explanation may reasonably be doubted, this is not a circumstance where the evidence is sufficient to discharge the standard of proof to confirm either the possession of a narcotic or to confirm the possession of a narcotic on Company premises.

What, then, does the case disclose? Unquestionably, the grievor was found in a state of advanced intoxication on premises provided by the Company in lieu of a bunkhouse at Swift Current. That intoxication and the resulting arrest of Mr. Matyas clearly caused him to be unavailable for his tour of duty on November 20, 2005. By any account he violated his duty to his employer by putting the Company's reputation at risk by reason of his gross misconduct in a public facility associated with the Company, his consequent incarceration and his resulting inability to attend at work. For that he rendered himself subject to a serious degree of discipline.

Notwithstanding the foregoing account of the facts, however, the Arbitrator considers that there are mitigating elements to consider. Firstly, the grievor's consumption of alcohol and intoxication are clearly not work related. They occurred off duty and off Company premises. As a five year employee with only one prior occasion of discipline and a fully clear record at the time, Mr. Matyas does not present as an employee with a notably negative disciplinary record. Nor does there appear to be any doubt as to his remorse for what occurred. There is no suggestion of habitual alcohol abuse by Mr. Matyas who was evaluated, on November 28, 2005 by the Employee & Family Assistance Program agent as a person with a low probability of having a substance dependent disorder. It fact he was cleared to work by the Company's Occupational Health Services, without restrictions, on December 8, 2005. In all of these circumstances the Arbitrator is satisfied that the grievor can reasonably be rehabilitated by the assessment of discipline at a serious level, but short of termination, subject to certain conditions.

The grievance is therefore allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without loss of seniority and without compensation for any wages and benefits lost. His disciplinary record shall be amended to reflect a period of suspension for conduct unbecoming from the date of his discharge to the date of his reinstatement. The grievor's reinstatement shall be conditioned on his accepting to be subject to random alcohol and drug testing, to be administered non-abusively, for a period of not less than two years. Should he unreasonably fail or refuse to undergo a test or should he test positive he will be subject to termination.

June 18, 2007

(signed) MICHEL G. PICHER
ARBITRATOR