

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 572

Heard at Montreal, Thursday, October 14th, 1976

Concerning

CANADIAN PACIFIC LIMITED (CP RAIL)

and

UNITED TRANSPORTATION UNION (T)

DISPUTE:

Dismissal of Trainman E. J. Bauer, Sutherland, for violation of General Rule "G", Uniform Code of Operating Rules, Regina, Train 971, November 11th, 1974 and for refusing to report for supplementary statement on November 19th, 1974.

JOINT STATEMENT OF ISSUE:

Trainman E. J. Bauer was employed as Rear-end Trainman on Train 971 and 972, running between Sutherland and Regina. He arrived at Regina on Train 972 and went off duty at 0720 the morning of November 11th, 1974.

An investigation was held in connection with Trainman Bauer reporting for duty on Train 971, November 11th, 1974 at Regina after consuming alcohol when subject to duty. Following the investigation, the Company dismissed Trainman Bauer for violation of General Rule "G", Uniform Code of Operating Rules, Regina, Train 971, November 11, 1974 and for refusing to report port for supplementary statement on November 19th, 1974.

The Union appealed the dismissal of Trainman E. J. Bauer, requesting that he be reinstated in the Company's service on the grounds that the Company did not establish Trainman Bauer's responsibility in respect of the charges against him.

FOR THE EMPLOYEE:

(SGD.) P. P. BURKE  
General Chairman

FOR THE COMPANY:

(SGD.) R. J. SHEPP  
General Manager, O & M

There appeared on behalf of the Company:

R. Colosimo, Manager, Labour Relations, CP Rail, Montreal  
J. Ramage, Special Representative, Industrial Relations, CP Rail,  
Montreal  
J. Sampson, Supervisor, Labour Relations, CP Rail, Winnipeg  
F. S. Baker, Assistant Superintendent, CP Rail, Winnipeg  
C. W. Phelps, Assistant Superintendent, CP Rail, Regina

And on behalf of the Brotherhood:

P. P. Burke, General Chairman, U.T.U.(T), Calgary  
F. D. Court, Local Chairman, Lo.422, U.T.U.(T), Vancouver

#### AWARD OF THE ARBITRATOR

The issues of substance in this case are whether the grievor did indeed violate Rule "G"; whether he improperly refused to report for investigation; and whether, if he was subject to discipline, the penalty imposed was too severe.

At the hearing of this matter, the union made certain submissions relating to the investigation procedure followed by the company. The company objected on the basis that that matter was not raised in the Joint Statement of Issue. The issue therein raised is, essentially, whether the company has established the grievor's responsibility in respect of the charges against him. This involves, at least in the present case, reliance on the statements taken from the grievor and others, and when such statements are proffered, it is my view that objection may be taken to them if they have been improperly obtained. In the instant case, it is clear that several of the questions put to the grievor were contrary to the injunction in article 32 (d) of the collective agreement that "no employee will be required to assume this responsibility in his statement or statements". In the instant case, however, while such questions were put, the grievor's responses were consistently such as to deny responsibility, so that the question of compliance with article 32 is largely academic.

The grievor, who had arrived at Regina at 0650 on the day in question and booked off at 0725, was in bed until 1330, when he got up and had a meal. He was to leave for Saskatoon at 2330, and was to report for duty at 2245. For the purposes of this decision, but without analysing the question, I shall assume that the grievor was subject to duty at all material times.

For approximately four hours during the period from 1500 until he reported for duty, the grievor was, along with another crew member, in the Royal Canadian Legion Club. There, one may safely assume, it would have been possible for him to have drunk some liquor. There is no direct evidence that he did so, and the grievor's statement is that he did not. In addition to this evidence of opportunity there is also evidence that he was, later in the evening, argumentative and a little shaky. Further, he did not telephone to find out the time for which he was ordered, nor did he read the bulletins at the shop when he reported for duty. There is no substantial evidence of any clinical symptoms which would indicate that the grievor had been drinking, and certainly nothing which would support the conclusion that he was impaired.

The company relies as well on what certain of its officers, who spoke to the grievor on the night in question, took to be an admission by him that he had indeed had some drinks. This evidence, which might have been conclusive, was not brought forward in accordance with the procedure set forth in article 32 (c) of the collective agreement, which provides as follows:

- (c) If the employee is involved with responsibility in a disciplinary offense, he shall be accorded the right on request for himself or an accredited representative of the Union or both, to be present during the examination of any witness whose evidence may have a bearing on the employee's responsibility, to offer rebuttal thereto and to receive a copy of the statement of such witness.

It does not appear from the material before me that the grievor was present when the company representatives statements were taken. Those statements of course would have a most direct bearing on his responsibility, and the importance of testing their accuracy is evident. Because of this lack of compliance with article 32 (c), it is my view that these statements cannot be given weight. The most that can be said is that there are contradictory statements, and the material properly before me does not permit a determination that one is more probably accurate than another. The onus being on the company to prove its case, my conclusion in this particular case is that that onus has not been met.

The grievor did not, it appears, attend at a second investigation, nor did he advise<sup>4</sup>that time of any inability to do so. For this offence at least, discipline would properly be imposed. In itself, however, that is not an offence for which discharge would be proper.

In all of the circumstances, it is my award that the grievor be reinstated in employment without loss of seniority. I make no award as to compensation.

J.F.W. WEATHERILL  
ARBITRATOR