CANADlAN RAILWAY OFFlCE OF ARBlTRATION

CASE NO. 575

Heard at Montreal, Tuesday, November 9th, 1976

Concerning

CANADlAN NATlONAL RAILWAY COMPANY

and

BROTHERHOOD OF LOCOMOTIVE ENGlNEERS

DlSPUTE:

Dismissal of Locomotive Engineer J.J. Stibbler of Capreol, for violation of Rule "G" of the Uniform Code of Operating Rules.

JOINT STATEMENT OF lSSUE:

On January 6, 1976, Locomotive Engineer J.J. Stibbler was called for Train 219, ordered for 0300 to operate from South Parry, Ontario, to Capreol, Ontario.

Upon reporting for duty Locomotive Engineer Stibbler was considered to be in violation of Rule "G" of the Uniform Code of Operating Rules by Company officers on duty.

Following investigation, Locomotive Engineer J.J. Stibbler was discharged from Company services effective January 7, 1976, for violation of Rule "G".

The Brotherhood appealed the discipline on the grounds Locomotive Engineer Stibbler was improperly dismissed from the service and that no violation of Rule "G" was proved.

The appeal was declined by the Company.

FOR THE EMPLOYEE:	FOR THE COMPANY:
(Sgd.) V. J. Downey Acting General Chairman	(Sgd.) S. T. Cooke Assistant Vice-President Labour Relations

There appeared on behalf of the Company:

E. Gagnon	Counsel, C.N.R., Montreal
D. C. Fraleigh	Manager, Labour Relations, C.N.R., Montreal
G. A. Carra	System Labour Relations Officer, C.N.R., Montreal
J. R. Church	Superintendent, C.N.R., Capreol
H. P. Lavoie	Trainmaster, C.N.R., Cochrane
J. H. Lazenby	Master Mechanic, C.U.R., Capreol
G. Morgan	System Labour Relations Officer, C.N.R., Montreal

And on behalf of the Brotherhood:

M. W. Wright, Q.C.	Counsel, Ottawa
J. B. Adair	General Chairman, B.L.E., St. Thomas, Ont.
E. J . Davies	Vice President, B.L.E., Montreal
J. J. Stibbler	(Grievor) - Local Chairman, B.L.E., Ottawa

AWARD OF THE ARBITRATOR

At the hearing of this matter it was the Union's contention that the evidence against the grievor did not sufficiently establish that he was guilty of a violation of Rule "G". Related to this contention was the allegation that the requirements of Article 88 relating to investigations and discipline had not been sufficiently complied with by the Company. To this second matter, the Company objected that it was not raised in the Joint Statement of lssue. On this point, it is my view that in a discipline case of this sort, there is an onus on the Company to establish, in the proper fashion, that it had just cause to take the action it did with respect to the grievor. When evidence is presented to meet this onus, that evidence must be such as may properly be relied on in the proceedings in this office. An objection to such evidence (which is the effect of the Union's allegation) is proper, even though the objection itself may not appear in the Joint Statement.

The Union alleged that the investigation procedure was inadequate in a number of respects. lt is perhaps not to much to say (although the matter was not put in these terms) that the requirement of Article 88.2 that there be a "fair and impartial hearing" was relied on almost to the point that it would elevate the Company's investigation procedure to a judicial proceeding. ln my view, subject to the requirements of the particular collective agreement, the investigation procedure has, historically, been conducted along certain lines, and an Arbitrator should be hesitant, absent clear language in the agreement, to impose new requirements. The mere fact, for example, that the investigation was, to a large extent, conducted by one of the men who made the charge against the grievor, does not of itself vitiate the proceedings.

It remains, however, that the "investigation" called for by Article 88 is something more than the enquiry an employer in some other industry might carry out before deciding to impose discipline. The procedure has been formalized to some extent, and the record of questions and answers is often relied on, in proceedings in the Canadian Railway Office of Arbitration, in discipline cases. ln this regard, the provisions of Article 88.6 are material here:

> "88.6 A locomotive engineer and his accredited representative shall have the right to be present during the examination of any witness whose evidence may have a bearing on the locomotive engineer's responsibility to offer rebuttal through the presiding officer by the accredited representative. The Local Chairman and/or the General Chairman to be given a copy of statements of such witnesses on request."

In the instant case the two Company officers who observed the grievor

on the night in question made rather formal, detailed reports, in one case to the assistant superintendent and in the other to the superintendent. They do not appear to have been orally examined, but their written statements constitute, in substance, the evidence against the grievor, and it is certainly evidence having a bearing on his responsibility. Neither the grievor nor any Union representative was present for their "examination", as contemplated by Article 88.6. This article would not necessarily prevent the introduction in evidence at an arbitration hearing of many sorts of reports which might be filed in the normal course and have a bearing on the responsibility of an employee, but in this case, it seems clear to me that the grievor and his representative had a right to be present during an exanination of the two officers and to offer rebuttal. That right not having been honoured, the evidence in question should not be received.

Without the evidence in question, it is my view that there is no substantial case against the grievor. If I am wrong with respect to the application of Article 88.6, nevertheless, on a review of the proferred statements as well as of those which are undoubtedly properly before me, it is my view that the Company has not satisfied the onus of showing a violation of Rule "G". Against the statements of the supervisors, which are to the effect that they could smell alcohol on the grievor's breath, and that he walked carefully and occassionally somewhat unsteadily (the latter observation being amply explained by the prevailing weather), are the statements of a number of fellow employees, some of whom had occasion for close observation of the grievor, to the contrary effect. The statements of the others were subjected to what was, in some cases, a vigorous cross-examination, and were not shaken.

In my view, the onus of proof has not been met and the grievance must be allowed. It is my award that the grievor be reinstated in employment without loss of seniority or other benefits, and with compensation for loss of earnings.

J.F.W. WEATHERILL
ARBITRATOR