CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1074

Heard at Montreal, Wednesday, April 13th, 1983

Concerning

CANADIAN NATIONAL RAILWAYS
(CN Rail Division)

and

UNITED TRANSPORTATION UNION

DISPUTE:

Dismissal of Baggageman M. J. Leonard of Toronto, Ontario.

JOINT STATEMENT OF ISSUE:

Effective April 23, 1982, Mr. M. J. Leonard was discharged for violation of Rule "G", Uniform Code of Operating Rules, April 20, 1982.

The Union appealed the discipline on the grounds that;

1. the investigation was not conducted in accordance with the Memorandum of Agreement effective June 1, 1978, appearing on Pages 379 to 385 of Agreement 4.16.

2. the Company did not substantiate their decision that the employee violated Rule "G".

3. the discipline assessed was too severe.

The Union has requested reinstatement of the employee in his former position with full compensation for time out of service.

The Company declined the request.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) R. A. BENNETT General Chairman	(SGD.) D. C. FRALEIGH Assistant Vice-President Labour Relations

There appeared on behalf of the Company:

H. J. Koberinski - Manager Labour Relations, CNR, Montreal
W. A. McLeish - Manager Labour Relations, CNR, Toronto
D. McMillan - Assistant Superintendent, CP Rail, Sudbury
W. J. Rupert - System Manager - Rules, CNR, Montreal
J. A. Sebesta - Co-ordinator Transportation - Special Projects, CNR, Montreal
G. Blundell - System Labour Relations Officer, CNR, Montreal

And on behalf of the Union:

R. A. Bennett - General Chairman, UTU, Toronto

G. Scarrow - General Chairman, UTU, Toronto
J. M. Hone - Vice General Chairman, UTU, Ottawa
T. Hodges - Secretary, G.C.A., UTU, Toronto
R. Byrnes - Local Chairman, UTU, Capreol
D. King - Accredited Representative, UTU, Toronto
G. Dumas - Local Chairman, UTU, Montreal

AWARD OF THE ARBITRATOR

The grievor, an employee of some sixteen years' service, and classified as a Baggageman (qualified as Conductor), was regularly-assigned Baggageman on Trains 1 and 2, operating between Toronto and Sudbury.

On the day in question the grievor arrived in Sudbury on Train No. 1 at about 0700. No issue arises as to the grievor's conduct or condition during the course of that trip, although it may be noted that the grievor acknowledged having participated in a fairly heavy drinking bout two days previously.

The grievor was scheduled to leave Sudbury for Toronto on Train No. 2 at 2300 on April 20, ordered for 2245 and for which he would be considered as called at 2045. The grievor was thus on layover from the time of booking off after arrival until 2045. Hotel accommod-ation was provided for him, as for other members of the crew. The grievor checked into the hotel, had breakfast, and then rested until noon. At noon he got up, washed and shaved, and then went down to the hotel lounge. In the lounge he watched television and, during the period from 1215 to 1330 consumed, according to his statement, some three bottles of beer.

At about 1330 the grievor telephoned a lady friend. The conversation turned into an argument, and when it ended the grievor returned to the lounge and drank three more bottles of beer, in the space of about one-half hour. It appears that the grievor then went back up to his room, where he remained until about 2210, when he joined other members of the crew to go to the station. At about 2040, when it appears he was called, the grievor was in the shower, after which he left his room briefly to get a ginger ale.

When he arrived at the station, the grievor enquired as to whether he would have enough time to go to a restaurant across the road to have a bowl of soup and some tea. The train was slightly late, and the grievor was able to do that. That would appear to have been his first meal since breakfast, as far as his statement reveals. When he returned to the station, the train was in, and the grievor hurried to relieve the incoming baggageman. It was then about 2310, and the grievor encountered Mr. Morrison, the Terminal Supervisor, who advised him that he was late. The grievor replied that he had been in a fight (referring to his argument over the telephone), although he later acknowledged that that was not the reason he was late. Mr. Morrison then advised the grievor that he would not be going to work, and he was directed to the Terminal Supervisor's office. He saw other members of the crew, one in the door of the coach, another standing outside, but did not speak to them. Mr. Morrison had advised the Conductor that the grievor was out of service, and the

Conductor had agreed to go as far as Parry Sound where a replacement from MacTier would be picked up.

Mr. Morrison's statement indicates that the grievor was unsteady on his feet (both inside and outside the terminal building), although he was not so the next day. His speech was slurred, and his answers to questions indicated that he was uncertain as to the time at which he had in fact reported. The grievor was also observed by Mr. Charbonneau, Assistant Terminal Supervisor, who stated that the grievor had, in his opinion, been drinking "some kind of alcohol", and by Mr. McMillan, Assistant Superintendent, who stated that the grievor was "not too steady", that his voice was slurred and that he could smell alcohol from him. A similar statement was made by Mr. Holson, another Assistant Terminal Supervisor.

Arrangements were made for the grievor to return to his hotel. He had at first agreed to undergo a blood test, but later changed his mind, referring to the fact that he had been drinking a couple of days before, and saying "you got me either way", and "You have me this time --- sixteen years down the drain".

The foregoing statements were given to the grievor and his Union Representative at the hearing, and the persons who made them were available for questioning. No substantial challenge was raised as to their accuracy. There is, in fact, no substantial dispute as to the facts of the matter.

It is the Union's contention first, that the investigation procedure was not proper; second, that there was no violation of Rule "G"; and third, that the penalty imposed was in any event too severe.

As to the investigation procedure, while the grievor was working on a VIA train, he was subject to the terms and conditions of the Collective Agreement between CNR and the UTU. At the material times, the grievor was working on CP Rail lines, and at the terminal in Sudbury was on CP property. He was, in my view, entitled to the benefit of the discipline and investigation provisions of the CN Agreement. While the investigation was conducted by a CP Officer, that person was experienced in conducting investigations,had familiarized himself with the terms of the CN Agreement, and was, in my view, acting as an agent of CN for that purpose. A CN Oificer' was present. In my view, the investigation was a proper one, and accorded the grievor a fair and impartial hearing within the meaning of the Collective Agreement. Statements by the other members of the train crew were proferred, but were rejected by the investigating officer since the persons who had made them were not present for examinati It might have been preferable to have received the statements, noting that the persons who had made them were not present. It may be observed that l many cases Unions have objected to the production of such statements from members of management not present at an investigation. In any event, I have considered the crew members' statements, which are to the effect that the grievor looked "0.K." to them, one of them saying that he "just seemed tired".

As to the violation of Rule "G", that rule is as follows:

> "The use of intoxicants or narcotics by employees subjcct to duty, or their possession or use while on duty, is prohibited."

There is no evidence, and indeed no suggestion that the grievor was in possession of or used intoxicants or narcotics while on duty. The question is whether or not he used any intoxicants while "subject to duty". If an employee is only "subject to duty" from the time he is called, then the grievor was not in violation of Rule "G" in this case, since it does not appear he drank anything but ginger ale and tea from the time the call (which he did not receive) was made at about 2040. Even if that conclusion were to be reached - that is, even if there were no violation of Rule "G" itself - it would be my view that the grievor would be subject to discipline for reporting to work unfit for duty, under the influence of alcohol. It would need no express rule for such obvious misconduct to be seen to be an offence.

In the instant case, however, it is my view that the grievor was in violation of Rule "G". He did, I find, use intoxicants in the time immediately preceding that at which he expected to be called, to an extent which rendered him unfit for duty, and he reported for duty in an unfit condition. He drank a substantial quantity of beer, and was "expected to be on duty during the period during which (he) might be affected thereby", as was said in Case No. 557.

As to the matter of the severity of the penalty imposed, violations of Rule "G" have been considered to be particularly serious offences in the cases of employees involved in the operation of trains. While discharge may not be an "automatic" penalty, it will usually be appropriate, where the violation is established. A distinction has been drawn between those with prime responsibility for train operation, such as an Engineman or a Conductor, and the other members of a train crew. While I think this distinction is proper, it is a narrow one: the other members of a train crew are indeed responsible for the safety of the train, and there is no doubt that severe discipline is appropriate in the case of a Rule "G" violation by any crew mem?er. In every case, however, all factors are to be considered. In the instant case the grievor had some sixteen years' service, and a clear discipline record. He appears to have been frank in acknowledging what had occurred. Even more important for the assessment of the penalty imposed in this case is the consideration that the grievor's violation of the rule was not an extreme one. There was a considerable lapse of time between his drinking and his actual reporting for duty. The purposive interpretation of Rule "G" set out above, which leads me to conclude that the grievor was to be considered "subject to duty" involves the necessary implication that any violation of the rule is a matter of degree. In all of the circumstances, it is my view, as in Case No. 666 (perhaps the only significantly comparable case of those cited), that the grievor should be reinstated, but without compensation.

For all of the foregoing reasons, it is my award that the grievor be reinstated in employment forthwith, without loss of seniority, but without compensation for loss of earnings.

J. F. W. WEATHERILL,
ARBITRATOR.