CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1097

Heard at Montreal, Tuesday, June 14, 1983

Concerning

CANADIAN NATIONAL RAILWAYS
(CN Rail Division)

and

UNITED TRANSPORTATION UNION

DISPUTE:

Dismissal of Brakeman A. J. Kenny, Mirror, Alberta.

JOINT STATEMENT OF ISSUE:

Effective April 22, 1982, Brakeman A. J. Kenny was dismissed from the service of the Company for violation of Uniform Code of Operating Rule "G" and Item 2.2 of the General Operating Instructions (CN Form 696) while on duty as a Brakeman on Train 484, Mirror, Alberta, April 22, 1982.

The Union appealed the discipline contending that:

(1) the Company did not substantiate their decision that the employee was in violation of Rule "G".

(2) the Company violated the provisions of paragraph 117.2 of Article 117, Agreement 4.3, in that the Local Chairman did not have the opportunity to question the Locomotive Engineer.

The Company denies the Union's contention and has declined the Union's appeal.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) D. J. MORGAN General Chairman	(SGD.) M. DELGRECO FOR: Assistant Vice-President Labour Relations

There appeared on behalf of the Company:

M. Delgreco	- Senior Manager, Labour Relations, CNR, Montreal
M. Healey	- System Labour Relations Officer, CNR, Montreal
J. A. Sebesta	- Coordinator Special Projects, Transportation, CNR, Montreal
K. Burton	- Labour Relations Officer, CNR, Edmonton
B. R. Shack	- Trainmaster, CNR, Hanna, Alberta
D. Fisher	- Trainmaster, CNR, Mirror, Alberta

And on behalf of the Union:

L. H. Manchester	- UTU, Winnipeg
R. T. O'Brien	- Vice-President, UTU, Ottawa
D. J. Morgan	- General Chairman, UTU, Winnipeg
L. H. Olson	- Local Chairman, 1233, UTU, Edmonton

AWARD OF THE ARBITRATOR

The evidence as to the grievor's violation is conflicting. At the hearing of this matter, the Company, as it was entitled to do (see Clause 11 of the Memorandum establishing the Canadian Railway Office of Arbitration), sought to call evidence in support of material put forward in its brief. The Union objected to such evidence being received, stating that it amounted to the establishment by the Company and the Arbitrator of some new form of procedure. When the Arbitrator's ruling was made, the Union repeated its objection, in vulgar language.

Several comments must be made with respect to this:

1. While most cases in the Canadian Railway are presented by way of brief and supporting material (thus making it possible for cases to be heard efficiently), a party has, in general, the right to present such evidence as it feels to be necessary to make out its case.

2. Where, in certain cases, parties have not been allowed to present certain evidence, that is because of clear Collective Agreement provisions preventing a party, for example, from coming forward later with evidence which ought properly to have been presented at an earlier stage. There is no such provision in this Collective Agreement (at least I was not referred to any), and in any event the evidence sought to be led was simply in support of what had been put forward at the investigation. There was nothing unfair in the Company's calling evidence in this case.

3. It would, in my view, have been a denial of natural justice to have allowed the Union's objection in this case.

4. It must be said to be unfortunate that in labour arbitration proceedings a party should seek, by narrow and unfounded legalisms, to prevent the other from adequate presentation of its case.

5. The Union has a duty of fair representation of its members, and while this may involve the vigorous presentation of arbitration cases, and the raising of proper objections, it does not

justify abuse of the tribunal or the resort to vulgar language in the presentation of a case.

The evidence which was heard was in support of statements the witness had made, and which had been presented at the investigation. The issue, which is one to be decided on the balance of probabilities, is whether or not the grievor had used intoxicants while subject to duty. There is no suggestion of his possession or use of intoxicants while on duty. The onus of establishing such violation is on the Company.

The grievor, called as rear end trainman for Train 484 at 1200 on April 22, 1982, reported for duty on time, carried out the usual preliminary duties and went out to the yard to make up his train. The crew commenced switching at 1230. In the course of that, at 1315, the engineman stationed the units in a yard track, entered the office and advised the Agent that he was booking sick. He indicated he would not work with the crew, one of whom he described as lazy and the other as drunk. He did not precisely define whom he meant.

The statements said to be those of the engineman are hearsay reports. He did not give a statement at the subsequent investigation. A replacement engineman, who worked with the crew, and thus with the grievor until he was taken out of service, did not notice any signs that the grievor had been drinking, nor did the Conductor or the other Trainman.

As a result of the first engineman's departure, two Trainmasters came to the yard and spoke to the grievor. It had, clearly, been suggested to them that the grievor was in violation of Rule "G". They quite quickly concluded that this was the case, although it was not suggested that the grievor was drunk. While the Trainmasters reported certain of the well-known clinical symptoms of intoxication, their evidence, while no doubt sincere, is not convincing. That a certain odour of alcohol was detected may well be so; the grievor had last consumed alcohol at about 2300 on the previous evening. That consumption does not appear to have been such as to place the grievor in violation of Rule "G" with respect to his tour of duty which began at 1200 on the day in question. The odour of alcohol was thought by the Trainmasters to be mingled with an odour of food and of mint, and the grievor points out that he was wearing a cologne which may have affected this collection of smells. As to the grievor's "deliberate" walk and "glazed" eyes, while the latter may or may not have been affected by drops he put in them, none of this evidence is clear or convincing enough to support the conclusion that the grievor was in violation of Rule "G". The onus of proving such violation has not been met.

Accordingly, it has not been established that there were grounds for discipline. The grievance is accordingly allowed.

J. F. W. WEATHERILL,
ARBITRATOR.