CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1604

Heard at Montreal, Tuesday, January 13, 1987

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

DISPUTE:

Discharge of Trainman J. J. Marr, Nakina, Ontario.

JOINT STATEMENT OF ISSUE:

Trainman Marr was discharged for the alleged violation of:

Uniform Code of Operating Rules, Rule "G", General Operating Instructions, Section 2, Item 2.2, while employed as Trainman at Nakina, 19 June 1985.

The Union has appealed the discharge on the grounds that the Company has not substantiated a violation of the rules cited; that the provisions of Addendum No. 49 of Agreement 4.16 applied at the material times; and that, in any event, discharge was too severe given all the circumstances and the grievor's seniority.

The Company has declined the Union's appeal.

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:

J. B. Bart	- Labour Relations Officer, CNR, Montreal
D. W. Coughlin	- Manager Labour Relations, CNR, Montreal
S. C. Thomas	- Trainmaster, CNR, Hamilton
E. M. Dove	- Lieutenant CN Police, CNR, Moncton

And on behalf of the Union:

R. A. Bennett	- General Chairman, UTU, Toronto
Tom Fleming	- Road Representative, UTU, Capreol
Bart Marcolini	- General Chairman, CP Lines East, Toronto
John Marr	- Grievor

AWARD OF THE ARBITRATOR

At or about midnight on the morning of June 19, 1985, Trainman J. J.

Marr reported for duty at Nakina to deadhead to Armstrong on Train 215. Along with other employees he was to operate Train 217 from Armstrong back to Nakina. While there is some conflict in the evidence, the Arbitrator is satisfied that Mr. Marr was in a state of intoxication due to the consumption of alcohol when he reported for duty at Nakina. Following an investigation he was discharged for a violation of Rule "G", General Operating Instructions, Section 2, Item 2.2. That Rule provides:

> GENERAL RULE G
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> In addition to the requirements of this rule, employees must adhere to the following: Employees must not use any drugs or medication while on duty or subject to duty which may produce drowsiness or any condition affecting their ability to work safely. It is the responsibility of the employee to know and understand the possible effects of any medication or drug prescribed or chosen for use.
>
> Being under the influence of intoxicants, alcoholic beverages or narcotics while on duty, or subject to duty is prohibited.

The Union questions whether, having accepted a call to report at midnight, the grievor was "subject to duty" in the hours immediately preceding, particularly given that he was scheduled to deadhead for several hours before assuming the active operation of a train. It argues that Mr. Marr was not "subject to duty" in the hours before he came to work within the meaning of General Rule G and would not have been "on duty" while deadheading.

The meaning of the phrase "subject to duty" was given prior consideration in CROA 557. In that Case a number of grievors were disciplined as a result of an incident which occurred when they were drinking while off duty, being scheduled to work the next day. The Arbitrator concluded that at the material time the employees were not "subject to duty", and that no violation of Rule "G" was disclosed. In so concluding, he reasoned in part, as follows:

> The major question is whether there was a violation of Rule "G", which is as follows:
>
> "The use of intoxicants or narcotics be employees subject to duty, or their possession or use while on duty, is prohibited."
>
> The question whether or not the grievors were "subject to duty" is a difficult one. The expression does not appear to be defined in the Uniform Code. The grievors might, as they acknowledged, have received a call at any time, and in this sense they were "subject to duty". On the other hand, their status was certainly one of being "off duty" at the material times. Once they had received and accepted a call, then I think it is clear they would be "subject to duty". But it is by no means clear that, having gone off duty, and having no reason to expect a call before the morning, they should be considered as subject to duty and thus prohibited from drinking.

> ...In my view the four grievors were not "subject to duty" within the meaning of Rule "G". While a definitive interpretation of that phrase should not be expected in a single case, it is my view that it should be read in view of the obvious purpose of the rule as a whole, namely to protect persons and property from the dangers of the operation of railway equipment by those not in a fit condition to do so. Thus employees who are on duty, or who may be expected to be on duty within the period during which they might be affected thereby, must not consume intoxicants or narcotics. An employee who had accepted a call would, in my view, clearly be "subject to duty" and there may well be other circumstances where that status would apply. The mere fact, however, that an unanticipated call might be made at any time would not, of itself, make an employee subject to duty within the meaning of Rule "G". Here, I find that the grievors were not subject to duty in that sense, and that they were not in fact in violation of Rule "G".

The different issue raised in this grievance is whether an employee who accepts a call for duty which involves an initial portion of deadheading is "subject to duty" within the meaning of General Rule "G", and therefore prohibited from being under the influence of alcohol. It is clear that in CROA 557 the Arbitrator did not purport to establish an exhaustive interpretation or definition of the term "subject to duty". It is noteworthy, however, that he did stress that an employee who had accepted a call should be viewed as subject to duty. Is there any reason why that view should be qualified because a call involves a segment of time during which an employee is deadheading on a freight train? I have difficulty seeing how it can.

It is not disputed that while deadheading an employee is under Company orders, discharges an obligation to the Company, and is paid for doing so. While deadheading may not involve active service in the operation of a train, it is difficult to conceive that the parties would have intended to countenance the attendance on a freight train of a deadheading employee in a state of intoxication. A purposive interpretation of General Rule "G" must surely contemplate that deadheading employees who board, move about inside and travel on a moving freight train cannot be taken to do so safely while in a state of intoxication. The hazard which they pose to themselves and to other employees who may be actively engaged in the operation of the train should need little elaboration. The interpretation which may govern an employee deadheading on a passenger train, particularly after his or her active service is complete, does not arise for consideration in this case. In light of these considerations, I am satisfied that an employee who has accepted a call such as the grievor did is "subject to duty", and while deadheading is "on duty", within the meaning of General Rule "G". On this aspect of the case the position of the Company must be sustained.

Further conflict surrounds the issue of whether the grievor had actually commenced his duties at the time his state of intoxication was detected by his Supervisor. It appears to be common ground that if he had not yet reported for duty at the time of detection, for a first offence (which this was) he might not be liable to dismissal, in accordance with Appendix A of the Collective Agreement governing

the Great Lakes Region. In this regard the Arbitrator must accept the evidence of Trainmaster S. C. Thomas, who spoke with the grievor and removed him from service on the occasion in question. The evidence establishes that during his interview of the grievor Mr. Thomas checked Mr. Marr's watch, noting that it was at six minutes past midnight, which was after his reporting time. In the Arbitrator's view it is significant that although the grievor attended the hearing, he was not called to give any evidence to the contrary. In the circumstances, therefore, I conclude that Appendix A referred to as Addendum No. 49, and the Note appended to it under Item 2, have no application.

There is, however, substantial evidence to consider in respect of the issue of mitigation, and the exercise of the Arbitrator's discretion in respect of the substitution of a penalty less severe than discharge. Following his termination the grievor came to the personal realization that he is an alcoholic. He sought professional help for his medical problem, undergoing a twenty-eight day in-patient treatment at the Renascent Centre in Toronto. Since then he has pursued a follow-up program under the auspices of Alcoholics Anonymous. The material before the Arbitrator confirms that he has to this point enjoyed a successful rehabilitation, and shows every sign of continuing on a course of responsible control over his medical condition. Close to a year has passed since he sought help for his problem, during which time he has made substantial personal strides. It is equally significant that the grievor is a long service employee whose record includes no prior incident of this kind.

For the foregoing reasons the Arbitrator deems it appropriate that a lesser penalty be substituted for that of discharge. The grievor shall be reinstated in his employment, without compensation or benefits, but without loss of seniority, with his disciplinary record to stand at 30 demerit marks. Mr. Marr's reinstatement is conditional upon his providing to the Company, on a quarterly basis, a written confirmation provided by Alcoholics Anonymous, or a similarly recognized agency, of his continuing participation in a follow-up program, for not less than two years from the date of his reinstatement. I retain jurisdiction in the event of any dispute between the parties respecting the interpretation or implementation of this award.

MICHEL G. PICHER,
ARBITRATOR.