

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1653

Heard at Montreal, Tuesday, June 9, 1987

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

THE BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Appeal of discharge of Plumber G.B. Lewis of Moncton, New Brunswick effective 3 December 1985.

JOINT STATEMENT OF ISSUE:

Following an investigation, B & S Plumber, G.B. Lewis, was discharged account misuse of a Company vehicle, absent from his place of work without authorization and violation of Rule 'G' of CN Safety Rules Form 7355-F.

The Brotherhood contends that discharge is too severe a penalty and that the Company violated Article 18.2(d) of Agreement 10.1.

The Company disagrees with the Brotherhood's contention.

FOR THE BROTHERHOOD:

FOR THE COMPANY:

(SGD.) PAUL A. LEGROS  
System Federation  
General Chairman

(SGD.) JUNE PATRICIA GREEN  
FOR: Assistant Vice President  
Labour Relations

There appeared on behalf of the Company:

T.D. Ferens	- Manager Labour Relations, Montreal
M. Vaillancourt	- Engineering Coordinator, Montreal
M. Thibault	- Witness, Fredericton
E. Colter	- Witness, Fredericton
H. Beaulieu	- Witness, Moncton

And on behalf of the Brotherhood:

J.J. Roach	- General Chairman, Moncton
P. Legros	- System Federation General Chairman, Ottawa
M. Gottheil	- Assistant to the Vice-President, Ottawa
A. Toupin	- General Chairman, Montreal

#### AWARD OF THE ARBITRATOR

The material facts are not in dispute. On November 19, 1985 the grievor absented himself from work without authorization, apparently intending to go to a work camp, some 40 miles distant, driving a Company three-quarter ton cargo van assigned to him in his work as a Plumber. According to Mr. Lewis' explanation he left work to pick up his personal belongings and to deliver the pint of rum to the camp.

The material establishes that during his unauthorized trip the grievor drove erratically and at a high rate of speed. At about 2:30 P.M. on the afternoon of that day the Company van driven by the grievor was totally destroyed in an accident which, fortunately involved no other vehicles. It appears that on a relatively straight stretch of road Mr. Lewis' van left the roadway, became airborne, sheering the top off a telephone pole, and came to rest in a tree. Eye witnesses on the scene saw the grievor produce a bottle of liquor which appeared to be whiskey, a quarter of which had been consumed, from the cab of the van, and to take a drink from it immediately after the accident. He then emptied the remainder of the contents of the bottle onto the ground, and gave it to another witness to dispose of it. He next moved about inside the van and threw out an empty can of beer. Photographs taken subsequently reveal that other empty beer containers were in the cab.

The Union does not dispute that the grievor's conduct was deserving of discipline, subject to its objection to the process of the Company's investigation under Article 18.2 (d) of the Collective Agreement. That provision reads as follows:

- (d) Where an employee so wishes an accredited representative may appear with him at the hearing. Prior to the commencement of the hearing, the employee will be provided with a copy of all of the written evidence as well as any oral evidence which has been recorded and which has a bearing on his involvement. The employee and his accredited representative will have the right to hear all of the evidence submitted and will be given an opportunity through the presiding officer to ask questions of the witnesses (including Company Officers where necessary) whose evidence may have a bearing on his involvement. The questions and answers will be recorded and the employee and his accredited representative will be furnished with a copy of the statement.

The Union alleges that the grievor, who was represented by a Union official at the investigation, was denied his right to have a copy of all previously recorded written and oral evidence in the Company's possession. It further submits that he was entitled to be present when the evidence of other witnesses was recorded or, in the alternative, that a record of such evidence must be provided to him so that, if the Union considered it necessary, it could request the Company to summon the adverse witnesses for the purpose of asking them questions.

There is a factual dispute between the parties respecting what transpired at the investigation. According to the Company's

spokesperson a copy of all of the recorded evidence was given to the grievor and his representative at the outset of the investigatory hearing. The Union maintains that it was not, but that the grievor was merely allowed to look over copies of that material. Neither party had anyone in attendance at the arbitration hearing who was present on the occasion of the investigation.

Insofar as the Union alleges a violation of Article 18.2 (d) of the Collective Agreement, the burden of proof of that issue is upon it. While a letter from the Company to the Union during the course of the grievance procedure refers to the material in question having been shown to the grievor and his Union representative, the statement in question is general in its terms, and cannot be construed as an admission that he was not provided with his own copy. In these circumstances the Arbitrator cannot conclude, on the balance of probabilities, that the Company violated Article 18.2 (d) by failing to provide Mr. Lewis with copies of all recorded evidence prior to the hearing at which his statement was made. Nor does it appear that either he or his representative, having read the evidentiary material in question, made any request to the investigating officer that other witnesses be recalled so that questions could be put to them by the Union. In these circumstances the Arbitrator can find no violation of Article 18.2 (d).

I turn to consider the merits of the grievance. It is trite to say that in assessing the appropriate measure of discipline a number of factors must be considered. These typically include the facts of the incident, the consequences of the grievor's conduct, including the degree of harm to persons or property, the candor of the grievor, (a factor which can bear on the potential for rehabilitation), and his or her prior disciplinary record.

In the instant case, based on the material before me, I am satisfied, on the balance of probabilities, that the grievor did consume liquor while on duty and prior to the accident. I find his explanation for the accident, namely that he was reaching for a lighter when he lost control of his vehicle, to be highly implausible. Notwithstanding the contrary evidence of at least three other witnesses, all of whom were present at the arbitration hearing, the grievor denied travelling at excessive speed. The evidence of those witnesses also establishes that he strayed extensively onto the wrong side of the road.

Overall, the evidence places the grievor's credibility greatly in question. During the Company's investigation he denied having any beer in the van. When asked to explain the photographs of the beer containers, he could give no response. His general conduct, moreover, is consistent with that of an individual seeking to hide his actions. Notwithstanding that the Company van was totally demolished, and that he had no serious injuries, Mr. Lewis immediately left the scene of the accident and did not report it to the police. While the collision occurred at approximately 2:30 P.M. on November 19th, 1985, he did not report what happened to his Supervisor until approximately 6:45 A.M. the following day.

It is difficult for the Arbitrator to characterize the foregoing events as anything less than gross misconduct. While the Union

maintains that the grievor's prior service of 13 years and his record should be taken into account, in the instant case these factors do not overcome the overwhelming weight that must be ascribed to the incident itself, and in particular the grievor's attempt to mislead both the Company and the Arbitrator as to what transpired. In all of the circumstances I can see no reason to alter the measure of discipline imposed by the Company. For the foregoing reasons the grievance must be dismissed.

MICHEL G. PICHER  
ARBITRATOR