CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1733

Heard at Montreal, Thursday December 10, 1987

Concerning

CANADIAN NATIONAL RAILWAY

And

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Dismissal of Extra Gang Labourer L. L. Finnigan account violation of Rule "G".

JOINT STATEMENT OF ISSUE:

Following an investigation Mr. Finnigan was discharged from the Company's service effective 1 August 1986 account violation of Rule "G" of CN Safety Rules Form 7355E.

The Brotherhood contends that the Company violated Articles 18.2(d), 18.2(e) and 18.2(g) of Agreement 10.1.

The Brotherhood also contends that the discipline was unjust and too severe in light of the circumstances.

The Company disagrees with the Brotherhood's contentions.

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD) G. SCHNEIDER	(SGD) J. P. GREEN
System Federation	for: Assistant Vice-President
General Chairman	Labour Relations

There appeared on behalf of the Company:

J. Glazer	- Counsel, Montreal
T. D. Ferens	- Manager Labour Relations, Montreal
G. C. Blundell	- System Labour Relations Officer, Montreal
G. Masciarelli	- Roadmaster, Jasper
S. Foldesi	- First Aid Attendant, Kamloops
A. Watson	- Labour Relations Trainee, Montreal

And on behalf of the Union:

M. Gottheil - Assistant to the President, Ottawa
G. Schneider - Federation General Chairman, Winnipeg
R. S. Dawson - Federation General Chairman, Winnipeg

AWARD OF THE ARBITRATOR

The Union does not dispute that Mr. Finnigan violated Rule G. The sole issues are whether the Company violated the grievor's rights under Article 18 of the Collective Agreement, and if it did not, whether the dismissal of Mr. Finnigan was excessive in the circumstances.

The Union no longer contests a violation of Article 18.2(d). It does, however, maintain, that Article 18.2.(e) and 18.2(g) were violated by the Company. Those provisions are as follows:

> (e) If corrective action is to be taken, the employee will be so notified in writing of the Company's decision within 28 days from the completion of the employee's investigation, unless otherwise mutually agreed. Such notification will be given at the same time or after the employee is personally interviewed by the appropriate Company officer(s) unless the employee is not available for such an interview within the time limit prescribed.
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> ...
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> (g) Except as otherwise mutually agreed, the investigating officer shall be an individual who is in the best position to develop all of the relevant facts, provided such individual is not emotionally involved with the incident.

Having regard of the decision of this Office in C.R.O.A. Case No. 1696, and the substantially comparable provisions of the instant Collective Agreement, the Arbitrator must find that the provisions of Article 18.2(e) are directory and not mandatory. Therefore, even though Mr. Finnigan received notice of the Company's decision on August 14, 1986 respecting the investigation held on July 7, the Company's action would not thereby be rendered null and void.

The material establishes that on the afternoon of June 28, 1986, while off duty, the grievor consumed a quantity of alcohol, described as seven or eight beers. He admits that he was under the influence of alcohol and was therefore unable to attend at work as scheduled that evening. Instead, he stayed in his bunk car, in the company of two other employees who had also gone drinking with him. While there is evidence that the two others, Extra Gang Labourer R. A. Weafer and Extra Gang Labourer R. Lafontaine continued to drink beer inside the bunk car, there is no evidence to establish that the grievor did so, or to disprove his evidence that he spent the better part of his time sleeping.

The two other employees involved caused several disturbances

during the course of the night, which required Program Supervisor Gino Masciarelli to attend at the bunk car on several occasions, at least three of which involved an R.C.M.P. Officer. It is clear from the evidence of Mr. Masciarelli that he did not consider Mr. Finnigan to be the cause of the disturbances, which were the fault of Mr. Weafer and Mr. Lafontaine. After the final episode of rowdiness, at 0615 hours on June 29, 1986 Mr. Masciarelli ordered Weafer and Lafontaine out of service and off the Company's premises. He made no such order in respect of the grievor, however, whom he instructed to remain on the gang to start the next shift. Indeed, during the course of the night, both Mr. Masciarelli and the R.C.M.P. Officer had requested that Mr. Finnigan drive Mr. Weafer from the camp to Edmonton, a distance of some sixty miles. The material therefore discloses a fairly mild degree of misconduct on the part of Mr. Finnigan, and no animosity or confrontation between himself and Mr. Masciarelli.

The Union objects that Mr. Masciarelli was, by virtue of his involvement in the incidents of that night, disqualified from acting as the investigating officer in the course of the investigation of Mr. Finnigan, as he did when the investigation was held at the camp site on July 7, 1987. It submits that Mr. Masciarelli, who himself filed a narrative report of the incident, could not have conducted, or been seen to conduct, a fair and impartial investigation.

I agree that prudence would have suggested that someone else should conduct the investigation. Whether the standard of fairness contemplated by the Collective Agreement was violated is, however, another matter. Having carefully reviewed the narrative statement of Mr. Masciarelli as well as the answers of Mr. Finnigan given at the investigation, the Arbitrator can see no substantial conflict between them in respect of the actions or conduct of Mr. Finnigan. The circumstances in this case are clearly distinguishable from those in C.R.O.A. Case No. 1720 where it was found that an investigation conducted by a supervisor whose own evidence was the sole basis of a complaint against an employee and which contradicted the account of all of the employees he questioned was inconsistent with the requirement for a fair and impartial investigation. There is, moreover, nothing in the material before me to establish that Mr. Masciarelli was "emotionally involved with the incident" in the sense contemplated by Article 18.2(g). At a minimum, that Article contemplates that the Company officer conducting the investigation must not be in an antagonistic or adversarial position in respect of the employee being investigated in so far as the factual content of the investigation is concerned. That standard is not violated in this case, and the Union's objection cannot, therefore, succeed.

I turn to consider the quantum of discipline. On this issue the Union's position is more compelling. While Mr. Finnigan did violate Rule G by rendering himself unfit for duty, it is clear that he recognized that he should not be at work, and he, therefore, voluntarily withdrew himself from service. The evidence establishes that he was not grossly inebriated, and was in fact relied on by the on-site supervisors to attempt to control the two employees whose state of drunkenness was the cause of the several disturbances that night. The fact that he was asked by his supervisor and the police officer to drive one of the intoxicated employees to Edmonton

indicates that he must have been sober at least at that point in time

Apart from ten demerits for absenteeism, the grievor's record was otherwise clear at the time. I must agree with Counsel for the Union that in the circumstances the grievor was, to some extent, unfairly tarred with the same brush as the two employees who were out of control. I am not convinced, however, that he was altogether candid with respect to the presence of alcohol within the bunk car after the three employees returned from the hotel. In the circumstances I deem it appropriate to substitute a lesser penalty, and order that the grievor be reinstated into his position, without compensation or benefits, and without loss of seniority. I remain seized of this matter in the event of any dispute between the parties in respect of implementation.

MICHEL G. PICHER
ARBITRATOR