CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1886

Heard at Montreal, Wednesday, 15 February 1989

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

UNITED TRANSPORTATION UNION

DISPUTE:

Dismissal of Trainman F.J. Travers, Hornepayne, Ontario effective July 20, 1987.

JOINT STATEMENT OF ISSUE:

Effective July 20, 1987, Mr. F.J. Travers was discharged for violation of Uniform Code of Operating Rule "G" and General Operating Instructions, Section 2, Item 2.2 while employed as a Conductor at Hornepayne, Ontario on 26 June 1987.

The Union appealed the discipline on the grounds that:

(a) the grievor did not receive a fair and impartial hearing;
(b) the Company did not establish a violation of Rule "G";
(c) Addendum 49, paragraph 2 of Agreement 4.16 is applicable;
(d) the discipline is too severe.

The Company declined the Union's appeal.

FOR THE UNION:	FOR THE COMPANY:
(SGD) T. G. HODGES	(SGD) M. DELGRECO
General Chairman	for: Assistant Vice-President Labour Relations

There appeared on behalf of the Company:

R. R. Paquette	- Labour Relations Officer, Montreal
J. B. Bart	- Manager, Labour Relations , Montreal
P. E. Morrisey	- Labour Relations Officer, Montreal
D. E. Lussier	- Co-Ordinator Transportation, Montreal
J. H. Hiel	- System Operations Control Officer, Montreal
J. H. Rousseau	- Assistant Superintendent, Hornepayne

And on behalf of the Union:

M. P. Gregotski	- Vice-General Chairman, St. Catharines
G. Binsfeld	- Secretary, G. C. of A., St. Catharines
R. Beatty	- Local Chairman, Hornepayne

F. J. Travers - Grievor

AWARD OF THE ARBITRATOR

The issue is whether Trainman Travers was intoxicated when he reported for work on June 26, 1987. The Arbitrator is satisfied that the Company has failed to discharge the onus of proving, on the balance of probabilities, that the grievor was under the influence of alcohol at the time. It is common ground that the grievor's speech was not slurred, that he had no difficulty maintaining a conversation, walking or otherwise functioning in a normal manner. While he was described as flushed, that is relatively consistent with his natural colouration. The fact that his eyes were bloodshot and his breath suspect is also in keeping with his admission that he was slightly hung over. On the foregoing evidentiary basis alone the grievance must succeed.

In the context of this case the Arbitrator believes that two further comments are appropriate. The Union disputes the conduct of the disciplinary investigation by the Company. The investigation into the state of Mr. Travers, which was required to be in compliance with Article 82.2 of the Collective Agreement, was conducted by Assistant Superintendent J.H. Hiel. Mr. Hiel was one of the Company representatives who questioned the grievor at the time he reported for work, and was the person who in fact removed him from service for being under the influence of alcohol. The comments of Mr. Hiel at the investigation, in which he also acted as a witness, confirm his own conviction from that time forward that the grievor was intoxicated. If the investigation had exonerated the grievor the decision to hold him out of service, taken by Mr. Hiel, would have been proved wrong, with compensation payable by the Company. The record of the proceedings further reveals that when he acted as both witness and chairman of the investigation, Mr. Hiel ruled certain questions put to him by the Union's representative to be irrelevant.

The Company does not dispute that Article 82.2, which governs the disciplinary investigation, implicitly requires that it be conducted in a fair and impartial manner. Mr. Hiel was centrally involved with the formulation of the charge against the grievor. As the investigating officer it was his responsibility to recommend whether the charge was correct and discipline should be imposed. In these circumstances I cannot see how the investigation could be said to have been conducted in a fair and impartial manner. There is nothing to suggest that the Company could not have utilized another supervisor, with no personal viewpoint to defend, to be the officer in charge of conducting the investigation and making the ultimate recommendation as to discipline. In the Arbitrator's view the facts at hand are in all material respects indistinguishable from those in CROA 1720, and the grievance would have succeeded on this separate ground alone.

The material also discloses that when the grievor was confronted at the time he reported for duty, the Company's supervisors offered him the opportunity to undergo a breathalizer test, which he declined. It is common ground that the grievor was told that the test was not obligatory. The Union itself concedes that much uncertainty would

have been avoided if a properly conducted breathalizer test had been done. In a prior case it has been found that where supervisors have reasonable and probable grounds to do so, an employee responsible for the operation of a train may be required to undergo a drug test (see CROA 1703). While the matter was not fully argued in this case, it appears to the Arbitrator less than clear that a different standard should apply with respect to the detection of alcohol, particularly among employees responsible for train movements. For the purposes of clarity, nothing in this award should be taken as conclusive endorsement by this Office of the position that a breathalizer test could not be required by the Company where reasonable and probable grounds for such a measure are disclosed.

For the reasons cited above, the grievance must be allowed. The grievor shall be reinstated forthwith, with compensation for all wages and benefits lost, and without loss of seniority. The Arbitrator remains seized of this matter in the event of any dispute in respect of the implementation of this award.

February 17, 1989 (Sgd.) MICHEL G. PICHER
ARBITRATOR