

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1917

Heard at Montreal, Thursday, 13 April 1989

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

UNITED TRANSPORTATION UNION

DISPUTE:

Dismissal of Conductor A.L. Mallinson and Brakeman J.H. Laidley, Toronto, Ontario effective 18 August 1987.

JOINT STATEMENT OF ISSUE:

On 8 July 1987, Conductor A.L. Mallinson and Brakeman J.H. Laidley were employed on Train 817. Following an investigation of an incident which occurred at Lindsay, Ontario, Conductor Mallinson was discharged for violation of Uniform Code of Operating Rule "G" and General Operating Instructions, Form 696, Section 2, Item 2.2; and, Brakeman Laidley was discharged for violation of Uniform Code of Operating Rule "G" and General Operating Instructions, Form 696, Section 2, Item 2.2 and abandoning his assignment.

The Union appealed the discharge on the grounds that:

- (1) the evidence submitted does not substantiate the violations cited;
- (2) the investigation was not conducted in a fair and impartial manner;
- (3) the penalty of discharge is too severe.

The Company declined the appeal.

FOR THE UNION:  
(SGD) T. G. HODGES  
General Chairman

FOR THE COMPANY:  
(SGD) M. DELGRECO  
for: Assistant Vice-President  
Labour Relations

There appeared on behalf of the Company:

P. E. Morrissey - Labour Relations Officer, Montreal  
J. B. Bart - Manager, Labour Relations, Montreal  
R. R. Paquette - Labour Relations Officer, Montreal  
K. F. Cooke - Track Maintenance Foreman, Lindsay  
D. N. Thomas - Trainmaster, Toronto

And on behalf of the Union:

G. Binsfeld - Secretary/Treasurer, GCA, St. Catharines  
T. G. Hodges - General Chairman, St. Catharines

E. A. Cairns - Local Chairman, Belleville  
A. L. Mallinson - Grievor

#### AWARD OF THE ARBITRATOR

The material establishes to the satisfaction of the Arbitrator that the grievor, while assigned as a conductor on Train 817 at Lindsay, Ontario on July 8, 1987, did consume alcohol while subject to duty, contrary to Rule G. At the hearing the parties notified the Arbitrator that the grievance of Brakeman J.H. Laidley was withdrawn as the result of a settlement between them. While the Union argued at the hearing that the grievor was denied a fair and impartial investigation, the Arbitrator cannot find any violation of Mr. Mallinson's rights in the material filed.

Mr. Mallinson had some thirteen years' service with the Company at the time of the incident, and his disciplinary record was clear. It appears that enroute from Toronto to Lindsay his crew encountered a washout on the Uxbridge Subdivision, which was duly reported to the Company. The crew members, who would normally have gone off duty in the expectation being recalled for duty within approximately ten hours had some doubt that the washout would be repaired within that time, and entertained the possibility that they might have to return to Toronto by taxi. It was admitted at the hearing that during the course of the afternoon Conductor Mallinson consumed a quantity of beer, both with his lunch and later by the pool of the motel where the crew was staying. It may be noted that the crew neither booked rest nor was it assigned rest at that time, in consequence of which its members were at all times subject to being called to duty.

When the crew was finally called to work and reported, at approximately 22:30 hours, Trainmaster D.N. Thomas detected the smell of liquor on the grievor's breath. It is common ground that he exhibited no other signs of having consumed alcohol, save that his eyes were slightly bloodshot. His speech was not slurred nor did he exhibit any difficulty in walking or otherwise functioning normally. In the circumstances, however, also with regard to the doubtful condition of Brakeman Laidley, the Trainmaster ordered the crew out of service. Following a lengthy investigation Conductor Mallinson was discharged for a violation of Rule G. The only issue of substance is the appropriate measure of discipline in the circumstances of this case. In the Arbitrator's view there are mitigating circumstances to be taken into account. Apart from the state of the grievor's prior disciplinary record, he is an admitted alcoholic. It is not disputed that he has participated in meetings of Alcoholics Anonymous since the time of his discharge and, as corroborated in documents tabled at the hearing, has been certified by his own physician as now being in control of his alcohol addiction. While the evidence discloses that Mr. Mallinson experienced substantial difficulties in 1984 and 1985, culminating in a leave of absence, including participation in the Company's Employee Assistance Program between January and May of 1985, he has made substantial progress.

The Company submits that its attempt to assist Mr. Mallinson in 1985 should be viewed as a sufficient effort on its part to accommodate

his medical condition, and that in light of the subsequent incident at Lindsay it should not be required to continue his employment. In assessing the merits of exercising my discretion to substitute a lesser penalty than discharge, I have some difficulty with that assertion by the Company in the circumstances of the instant case. It is generally accepted that alcoholism is a lifetime condition whose victims may experience a protracted struggle before achieving an enduring control over it. Medical opinion, well reflected within Canadian arbitral jurisprudence, recognizes that "falling off the wagon" even after an extensive treatment program is an occurrence that is not unknown in cases that subsequently do achieve successful rehabilitation.

Each case must obviously depend on its individual merits. While the responsibilities of a conductor raise cause for legitimate concern in a case of this kind, it appears to the Arbitrator that accommodation can be made to protect the interests of both the grievor and the Company in the fashioning of an alternative disciplinary sanction in the circumstances of this case. In so concluding the Arbitrator is particularly impressed with the candour of the grievor at the hearing and the relatively extensive documentary evidence confirming his successful rehabilitation in the period of close to two years since the incident giving rise to his termination. Further, bearing in mind the principle that like cases should attract like discipline, some weight may be given in mitigation to the fact that Brakeman Laidley, who was also found to have violated Rule G, was reinstated into his employment without compensation following a suspension, subject to certain conditions agreed upon between the Company and the Union.

For the foregoing reasons the grievor shall be reinstated subject to the conditions established herein. His reinstatement shall be to a position within the bargaining unit other than conductor (with the Company to exercise a discretion as to whether he should be restricted to yard service) on condition that for minimum of three years from the date of his reinstatement he provide to the Company both documentary medical evidence of his continued abstention from alcohol and documentary confirmation from an appropriate officer of Alcoholics Anonymous or any similar organization confirming his ongoing participation in its activities. The grievor's reinstatement is further conditioned on his acceptance of being subject to a urine test, blood test or breathalyzer test which may be administered randomly, in the discretion of the Company, albeit not with unreasonable or abusive frequency, for the period of not less than three years from the date of his reinstatement. Failure to observe any of the conditions of this order of reinstatement shall render the grievor liable to the most serious of disciplinary consequences. The reinstatement of Mr. Mallinson shall be without compensation for any wages or benefits lost and without any loss of seniority. I retain jurisdiction in respect of implementation.

April 14, 1989

(Sgd.) MICHEL G. PICHER  
ARBITRATOR