

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2054

Heard at Montreal, Tuesday, 9 October 1990

Concerning

CANADIAN PACIFIC LIMITED

And

UNITED TRANSPORTATION UNION

DISPUTE:

The dismissal of Trainman M.P. Shanahan, Cranbrook, B.C.

JOINT STATEMENT OF ISSUE:

Following an investigation, Trainman M.P. Shanahan was dismissed "for consuming alcohol while subject to duty and reporting for duty in an unfit condition, a violation of General Rule "G" of the U.C.O.R., Windermere, B.C., September 15, 1988".

The Union contends that Trainman Shanahan was not under the influence of alcohol when he reported for duty on the morning of September 15, 1988.

The Union was requested that Trainman Shanahan be reinstated with the Company without loss of seniority.

The Company has declined to accede to the Union's request.

FOR THE UNION:

(SGD.) J. S. CLEMENTS
for: GENERAL CHAIRPERSON

FOR THE COMPANY:

(SGD.) J. M. WHITE
GENERAL MANAGER
OPERATION & MAINTENANCE, WEST

There appeared on behalf of the Company:

J. D. Huxtable	Labour Relations Officer, Vancouver
B. Scott	Labour Relations Officer, Montreal

And on behalf of the Union:

I. Robb	Secretary, GCA, Calgary
B. Marcolini	President, UTU--Canada, Ottawa
J. M. Hone	Research Director, Ottawa
M. P. Shanahan	Grievor

AWARD OF THE ARBITRATOR

The material before the Arbitrator, including the grievor's own unchallenged evidence given at the arbitration hearing, is that he consumed alcoholic beverages over a period of some seven hours in the afternoon and evening of September 14, 1988 at the Invermere Inn in Windermere, B.C. The grievor's own estimate is that he had some ten drinks, including beer and hard liquor, over that period of time, and that he left the beverage room at approximately 2300, in anticipation of being picked up by Trainmaster W. Zmaeff at 0430 the following morning. It is also not disputed that a friend visited with the grievor in his room for some time before he went to sleep. By Mr. Shanahan's account at the hearing, he obtained approximately five hours of sleep before receiving a wake-up call at 0400 in anticipation of going on duty at 0500.

The record reveals that Trainmaster Zmaeff picked up the grievor and other crew members at the hotel at approximately 0440 on the morning of September 15, 1988 and drove them to the boarding car diner for breakfast. At the diner the grievor chose not to eat, and elected to stay in the back seat of the vehicle to catch some more sleep. Thereafter the crew were taken to their train at approximately 0520. Before departure, at about 0550, the grievor used the washroom facilities in the station adjacent to his train. He was then confronted by Trainmaster Zmaeff and Roadmaster Dubielewicz. Their reports indicate that they found the grievor's eyes to be bloodshot and that they could smell stale alcohol on his breath. According to the account given by Trainmaster Zmaeff, the grievor "... looked like he was suffering from a hangover." The Trainmaster relates that the grievor explained that he had been drinking the night before, but was not then under the influence of alcohol, and that he was tired because of the time he had spent in his room with his friend afterwards. Mr. Shanahan then declined the invitation of the supervisors that he take a breathalyzer or blood test, although he indicated that he was willing to undergo a sobriety test. Shortly thereafter the Trainmaster removed the grievor from service and advised him that he would be charged with a violation of UCOR Rule G. Following an investigation he was discharged for that offence.

The evidence before the Arbitrator indicates that the grievor had consumed a considerable amount of alcohol on the evening of September 14th. It is clear, however, that he did so over a substantial number of hours. By his own account, which is unrebutted by any evidence from the Company, he ceased drinking some seven hours prior to the time that he was scheduled to go on duty. There is some doubt about how much sleep he got, however, as his initial statement given at the time of his investigation was that he had about four hours' sleep. It also appears that he indicated to Trainmaster Zmaeff that the visit of his friend shortened his hours of sleep and left him tired.

The Company relies in part on the statement of the grievor in response to the request of Trainmaster Zmaeff that he take a breathalyzer or blood test. It appears that Mr. Shanahan then said that he did not wish to do so as he could probably not pass one. While the Arbitrator can appreciate the Company's perception that

that statement could be taken as an indication that the grievor considered that he would be shown to be impaired, that is not the only conclusion that may be drawn. At the hearing Mr. Shanahan explained that he was not familiar with the technicalities of a breathalyzer test or of a blood test, and believed that stale alcohol on his breath from the prior evening could still be detectable. This he seems to have distinguished from being intoxicated, which he says he did not believe he was, as evidenced by his stated willingness to undergo a "sobriety test".

There can be little doubt that if the evidence disclosed that the grievor was consuming alcohol in the knowledge that he was to commence work within a few short hours he could be properly chargeable with a violation of Rule G (see CROA 557, 629, 1074 and 1852). The issue of whether an employee has used intoxicants while subject to duty is, as noted in the above arbitrations, a difficult one. It seems clear from the cases, however, that an employee who consumes alcohol in circumstances where he or she is "expected to be on duty within the period during which (the employee) might be affected thereby" (CROA 557), violates the rule. In the instant case, if the grievor's evidence is accepted, he consumed liquor over a period of some seven hours, with a further seven hours' lapse between the time he ceased drinking and the time he was to commence his duties. In these circumstances the evidence is less than conclusive, in my view, and does not establish, on the balance of probabilities, that Mr. Shanahan consumed alcoholic intoxicants while subject to duty as that phrase has been defined in prior arbitral awards. There is, moreover, no evidence to establish that he was under the influence of alcohol when he reported for duty. Significantly, neither of the supervisors who observed Mr. Shanahan reported that he was intoxicated. The Arbitrator therefore concludes that the Company has not established a violation of Rule G in the circumstances of this case.

That, however, is not the end of the matter. It is not disputed that, as a running trades employee, the grievor is under an obligation to report for duty in a fit condition. The evidence is clear that he failed in that obligation on the morning of September 15, 1988. While there may be some question as to the residual after effects of his drinking on the night prior, there is no doubt that he was insufficiently rested. At the arbitration hearing the grievor sought to minimize his activities of the night before. Having regard to the totality of the evidence however, including his comments to Trainmaster Zmaeff when he was first questioned, I am inclined to conclude that, as a result of entertaining his friend in his room, he had no more than four hours' sleep, and perhaps as little as three. He was therefore not in a fit condition to report for work when he did. While the circumstances do not disclose a violation of Rule G, they do represent a serious disciplinary infraction, given the responsibilities of the grievor in respect of the safe movement of his train. In view of the grievor's relatively short service, I am satisfied that a severe measure of penalty is appropriate in the circumstances. In my view, however, a measure short of discharge should have the necessary rehabilitative effect in the case of Mr. Shanahan.

For the foregoing reasons the grievance is allowed, in part. The grievor shall be reinstated into his employment, without compensation or benefits, and without loss of seniority. Needless to say he must appreciate that in the future his obligation to appear at work in a state of rest suitable to the safe discharge of his duties will be of the utmost importance.

12 October 1990

(Sgd.) MICHEL G. PICHER
ARBITRATOR