CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2167

Heard at Montreal, Wednesday, 10 July 1991

concerning

CANADIAN PACIFIC LIMITED

and

UNITED TRANSPORTATION UNION

EX PARTE

DISPUTE:

The dismissal of Conductor I.M. Harris of London, Ontario

UNION'S STATEMENT OF ISSUE:

Following an investigation Conductor Harris was dismissed for consuming alcoholic beverages while subject to duty and for reporting for duty under the influence of Intoxicants, a violation of Rule G, U.C.O.R., at London, Ontario, May 24th, 1990.

The Union contends that Conductor Harris was not under the influence of alcohol when he reported for duty on May 24th, 1990.

The Union requests that Conductor Harris be reinstated with the Company without loss of earnings and seniority.

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

FOR THE UNION:

(SGD.) J. R. AUSTIN
GENERAL CHAIRPERSON

There appeared on behalf of the Company:

G. W. McBurney	-- Supervisor, Labour Relations, IFS, Toronto
B. P. Scott	-- Labour Relations Officer, Montreal
R. P. Egan	-- Assistant Supervisor, Labour Relations, IFS, Toronto
L. S. Wormsbecker	-- Labour Relations Officer, Montreal

And on behalf of the Union:

S. Keene	-- Local Chairperson, London
B. Marcolini	-- President, UTU--Canada, Ottawa
M. J. Hone	-- Research Director, UTU--Canada, Ottawa
C. Beaulieu	-- Local Chairperson, President Local 634, Montreal
H. Larocque	-- Yardmaster, St. Agathe

AWARD OF THE ARBITRATOR

The material before the Arbitrator discloses that Conductor Harris booked off duty at his home terminal of London, Ontario at 00:01 hours on May 23rd, 1990. Later, in the afternoon and evening of that day, he consumed alcohol in the form of a number of rum and cokes, as well some beer. By his own account, which is essentially uncontradicted before the Arbitrator, he consumed one beer and two rum and cokes during his supper between 16:00 and 18:00 hours, two rum and cokes between 19:30 and 21:00 hours and, finally, two bottles of beer between 22:00 and 23:00 hours.

It is not suggested that the grievor was precluded from drinking any alcoholic beverages during his time off between assignments. The reasons expressed in his discharge notice, given to him on June 26, 1990 are, in part,: ``... consuming alcoholic beverages while subject to duty and for reporting for duty while under the influence of intoxicants, violation Rule G ...''. The issues to be resolved in this grievance are, therefore, whether the Company has discharged the burden which it bears to establish that the grievor did consume alcoholic beverages while subject to duty, or that he was under the influence of alcohol when he reported for duty for Train 2/508 ordered for 05:10 at London, Ontario on May 24, 1990.

It is common ground that the grievor appeared for work late on the morning on the day in question. While he was awakened at 04:10 hours by a telephone call from the crew clerk, he went back to sleep and was next awakened at 05:20 hours, when he was advised that he was late for work. He arrived at the Quebec Street Yard Office at London at 05:50 hours, where he was spoken to by Assistant Terminal Supervisor R.J. Rizzuto. During the course of their conversation, in the booking in room, Mr. Rizzuto observed that the grievor's eyes were red, with his left eye appearing extremely bloodshot, and that there was an odour of alcohol on his breath. According to Mr. Rizzuto's report, when he asked the grievor if he had been drinking Mr. Harris responded ``I had a couple of beers around midnight and went to bed.'' It further appears that Mr. Harris explained to Mr. Rizzuto that his eyes were red because he had ridden to work on his motorcycle, and that his helmet face shield leaks and allows wind to enter the helmet. Mr. Rizzuto then made the decision to take the grievor out of service because, in his opinion, he was not fit for duty.

There is no evidence before the Arbitrator of any outward signs of motor impairment or intoxication. In other words, while Mr. Rizzuto concluded from the condition of the grievor's eyes and the smell of his breath that he had consumed alcohol, there is nothing in the report of Mr. Rizzuto, or of any other witness, to establish that the grievor was impaired in his speech or in his movements. The Assistant Terminal Supervisor's own report confirms that the grievor denied being in an unfit condition to work and that Mr. Harris asserted that the claim of impairment being made by Mr. Rizzuto was unfounded. For the purposes of clarity it should also be noted that, in subsequent statements, Mr. Harris' recall placed his consumption of beer at closer to 23:00 than to midnight.

The record reveals that shortly after he withdrew the grievor from service, Mr. Rizzuto offered to him the opportunity to provide a urine sample for analysis. Conductor Harris agreed, subject to a union representative being present. His request was allowed. Union representative Keene arrived on the property at 07:30 hours and, together with the grievor, requested of Mr. Rizzuto that for greater reliability Mr. Harris be permitted to take a breathalizer test immediately, as the clinic which would take a urine sample would not open until 09:00 hours. After some discussion this was agreed to by Mr. Rizzuto. This proposal was abandoned, however, when the local police department was contacted and indicated that it would not perform a breathalizer test under the circumstances disclosed. In the Arbitrator's view, given the present criminal and civil liability of a railway employee in respect of the use of alcohol and drugs, it should be hoped that police forces in Canada will reconsider the position taken by the local police force in this case.

At or about 09:00 hours the grievor attended at the Grand West Park Health Centre in London with Supervisor Rizzuto and Union representative Keene. Upon the completion of the appropriate documentation he provided a urine sample, and was advised that it would be sent to the Company's facilities in Montreal for analysis. The urine sample was never in fact utilized. In a letter dated June 28, 1990 Superintendent L.A. Clarke related to Mr. Keene that analysis of the urine sample in Montreal was not possible because, according to his explanation, ``... no test for alcohol content can be performed of urine after twenty-four hours, unless it is kept at 4 degrees Celsius, then tests can be conducted up to 72 hours.'' It would appear, in the result, that the grievor's urine sample was effectively mishandled by the Company, and that what might otherwise have been the best evidence of his alleged state of intoxication was rendered useless.

While it is not entirely clear from the material before the Arbitrator, it appears that notwithstanding that the Company became aware that the grievor's urine sample could not be utilized, the material discloses that the investigation into Conductor Harris' conduct was held over a period of several days between June 4 and June 12, 1990. The grievor being advised in writing of his termination on June 26, 1990.

I turn to consider the merits of the grievance. The evidence discloses that Mr. Harris did consume alcohol while off duty in the late afternoon and evening of May 23, 1990. It is common ground that he expected to be called for Train 2/508, scheduled to be ordered for approximately 05:00 hours the morning of May 24th. The only direct evidence as to the alcohol consumed by the grievor, and the time of its consumption, is his own testimony, which stands unrebutted. The issue to be resolved is whether the grievor either consumed alcoholic beverages while subject to duty or reported for duty under the influence of intoxicants, in violation of Rule G of the Uiform Code of Operating Rules, which is as follows:

G. The use of intoxicants or narcotics by employees subject to duty, or their possession or use while on duty, is prohibited.

The matter of whether an employee has consumed alcohol while subject to duty was described in the following terms in CROA 2054:

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. ...

The Company stresses that, given the grievor's place on the calling board, he could have been called for emergency or relief service as early as 02:00 or 03:00 on the morning of May 24th. On that basis, it argues that he would have violated Rule G by consuming alcohol as late on the evening of the 23rd as he did. In the Arbitrator's view the evidence in that regard is problematic. According to the grievor's account, his consumption of beer was in the order of two bottles, and may have been completed at or about 23:00 hours. The rate at which Mr. Harris might have metabolized the alcohol which he consumed earlier in the evening, or the beer which he finally consumed, is not clearly established in evidence. In other words, it is difficult to draw a conclusion, on the balance of probabilities, that he would, in any event, have been affected by a limited quantity of beer which he may have consumed some three or four hours prior to being called, assuming he could have been, on an emergency or relief basis.

The uncertainties are compounded by the objective evidence. Clearly the best evidence of Mr. Harris' physical state when he arrived at work would have been a breathalizer test or, alternatively, analysis of a blood or urine sample. The evidence reveals that a breathalizer test was in fact suggested by the grievor and his union representative when it appeared that access to a clinic which could take a urine sample would not be available for several hours. The fact that Mr. Harris willingly agreed to both a breathalizer test and a urine test is, at a minimum, consistent with his own assertion that he was not adversely affected by his prior consumption of alcohol at the time he appeared for work.

For the reasons related in CROA 1703, (see Canadian Pacific Ltd. and United Transportation Union (1987), 31 L.A.C. (3d) 179)M.G. Picher]) the right of the Company to require an employee to undergo an intervention as intrusive as a drug or alcohol test is extraordinary. It must, therefore, be exercised in a considered and responsible fashion. To the extent that the refusal of an employee to take a drug or alcohol screening test, where reasonable grounds exist for requiring one, can be used to draw adverse inferences against the employee, to some degree the converse must also be true. Where, as in the instant case, an employee expresses a willingness to undergo a breathalizer or alcohol screening test, it is not unfair to conclude that evidence of such willingness is, to some extent, corroborative of the employee's denial of impairment.

Moreover, subject to the facts of each particular case, where an employer requires a breath, blood or urine sample of an employee who is not visibly impaired and subsequently mishandles it so as to negate its evidentiary value in circumstances which are not fully known or influenced by the employee or his union, there may be still less reason for an arbitrator to discount the inferences which would otherwise favour the employee's denial of impairment. While the Arbitrator appreciates the need for something of an adjustment period in the drug and alcohol testing procedures of employers in he transportation industry, any legitimate considerations in that regard must be balanced against the equally legitimate interests of employees to be treated with fairness and efficiency.

In the instant case the Arbitrator finds, on the balance of probabilities, that the Company has not established that Mr. Harris consumed alcohol while subject to duty, in the sense that he knew or reasonably should have known that he would be affected by alcohol at a time at which he could expect to be called to work. Additionally, there is no evidence from which the Arbitrator can make a reliable finding that Mr. Harris was under the influence of alcohol when he did report for work at 05:50 on May 24, 1990.

For the foregoing reasons the grievance must be allowed. The grievor shall be reinstated into his employment, without loss of seniority, and with compensation for all wages and benefits lost.

July 13, 1991

(Sgd.) MICHEL G. PICHER
ARBITRATOR