CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 2255
Heard at Montreal, Wednesday, 13 May 1992
concerning
CANADIAN NATIONAL RAILWAY COMPANY
and
UNITED TRANSPORTATION UNION
DISPUTE:
Appeal of discharge of Conductor T.W. Fleming effective 8 November 1991.
JOINT STATEMENT OF ISSUE:
Effective 8 November 1991, Mr. T.W. Fleming was discharged for violation of Canadian Railway Operating Rules, General Rule G and for failure to comply with the directives of a Company officer resulting in the abandonment of his assignment on 23 September 1991.
The Union appealed the discharge of Mr. T.W. Fleming on the grounds that: 1) the grievor did not receive a fair and impartial investigation; 2) there were mitigating circumstances; and 3) the discipline assessed was excessive if not unwarranted.
The Company declined the Union's appeal.
FOR THE UNION:
FOR THE COMPANY:
(SGD.) M. P. GREGOTSKI
(SGD.) A. E. HEFT
GENERAL CHAIRMAN
for: VICE-PRESIDENT, GREAT LAKES REGION
There appeared on behalf of the Company:
A. E. Heft
Manager, Labour Relations, Toronto
J. Kelly
Senior Project Officer, Toronto
J. Runciman
Manager of Train Services, Capreol
S. Thomas
Assistant Superintendent, Capreol
M. S. Fisher
Coordinator Transportation, Montreal
J. B. Bart
Manager, Labour Relations, Montreal
D. L. Brodie
System Labour Relations Officer, Montreal
N. Dionne
System Labour Relations Officer, Montreal
And on behalf of the Union:
R. A. Beatty
Vice-General Chairman, Hornepayne
M. P. Gregotski
General Chairman, Fort Erie
G. E. Bird
Vice-General Chairman, Montreal
R. McDevitt
Local Chairman, Capreol
T. Fleming
Grievor

AWARD OF THE ARBITRATOR

The material before the Arbitrator establishes that the grievor was employed as one of three conductors in wrecking service at the site of a derailment on the Newmarket Subdivision of September 23, 1991. It appears that he worked a tour of duty upon arrival at the scene, shortly after the derailment which occurred on September 19, 1991. After his first tour of duty he had five hours' rest, which he spent in an on-site bunk car. It appears that Mr. Fleming then worked a shift of sixteen hours ending at 10:30 hours on September 23, 1991. At that time he was taken to a motel in Sturgeon Falls. The three crews working on the wreck site were then assigned in overlapping tours of approximately twelve hours each, with twelve hours off between shifts. In the result, the expectation of the Company's supervisors on site was that Mr. Fleming, and his crew mate Mr. MacDonald, would return to the work site late on the evening on the 23rd.

There is some divergence in the position of the parties with respect to the intentions of Mr. Fleming when he left the work site. He submits that he did not intend to go back, and that he attempted, by means of a phone call from the restaurant of the motel where he was staying, to contact the crew dispatcher to so advise the Company. Further, in support of that position, is the statement of Mr. Randy Prescott, a fellow conductor working on another crew at the same site. He states that upon leaving the site Mr. Fleming advised him that he would not be back later. That is to some extent corroborated by the separate statement of Locomotive Engineer A. Jordan who states that he understood that Mr. Fleming and Mr. MacDonald would not be returning to the work site.

There is no dispute that thereafter Mr. Fleming consumed a considerable amount of liquor in his motel room, and was in a state of some impairment when he was awakened by Manager of Train Services Runciman who intended to drive Mr. Fleming and Mr. MacDonald back to the work site. It is common ground that Mr. Fleming did not book off at any time prior to that encounter.

The Company submits that Mr. Fleming was, in fact, on duty at all material times, including the period of rest which he took at the motel. This, it submits, is so because the employees were paid on a continuous time basis while assigned to the wreck clearance project, even while on rest. I find it unnecessary to deal with that issue as I am satisfied that, for the reasons related below, Mr. Fleming was subject to duty within the meaning of Rule G.

General Rule G of the CROR is as follows:

G.
(a)
The use of intoxicants or narcotics by employees subject to duty, or their possession or use while on duty, is prohibited.
(b)
The use of mood altering agents by employees subject to duty, or their possession or use while on duty, is prohibited except as prescribed by a doctor.
(c)
The use of drugs, medication or mood altering agents, including those prescribed by a doctor, which, in any way, will adversely affect their ability to work safely, by employees subject to duty, or on duty, is prohibited.
(d)
Employees must know and understand the possible effects of drugs, medication or mood altering agents, including those prescribed by a doctor, which, in any way, will adversely affect their ability to work safely.
An early comment on the meaning of ``subject to duty'' was made in CROA 557 in the following terms:
In my view the four grievors were not "subject to duty" within the meaning of Rule G. While a definitive interpretation of that phrase should not be expected in a single case, it is my view that it should be read in view of the obvious purposes of the rule as a whole, namely to protect persons and property from the dangers of the operation of railway equipment by those not in a fit condition to do so. Thus employees who are on duty, or who may be expected to be on duty within the period during which they might be affected thereby, must not consume intoxicants or narcotics. An employee who had accepted a call, would, in my view clearly be "subject to duty" and there may well be other circumstances where that status would apply. The mere fact, however, that an unanticipated call might be made at any time would not, of itself, make an employee subject to duty within the meaning of Rule G. ...
[emphasis added]
(See also CROA 1074, 1660, 1852 and 2054.)

The burden of proof in this matter, respecting whether the grievor was intoxicated while subject to duty contrary to General Rule G is upon the Company. The evidence before the Arbitrator contains the grievor's own statement, corroborated by that of Mr. Prescott and, to a lesser degree, Locomotive Engineer Jordan, that he had no intention of returning to work after he left the work site on September 23rd. I accept the grievor's evidence in that regard. The fact remains, however, that, insofar as the Company was concerned, he was still ``expected to be on duty'' late on the evening of the same day. Mr. Fleming was plainly under an obligation to communicate his intention to remove himself from duty to the Company's dispatcher. Until he did so, he must, I think, have remained ``subject to duty'' for the purposes of General Rule G.

A violation of Rule G is a most serious offence, which will normally justify the discharge of a conductor or trainman, absent the most compelling mitigating factors. Each case must, nevertheless, be judged on its own particular facts (see CROA 638). In this case, the Arbitrator is satisfied that the subjective intention of Mr. Fleming can be looked to as a mitigating factor in all of the circumstances. The evidence discloses that he is an employee of twenty-three years' service with an exemplary record, and that he suffered considerable personal stress because of a serious incident of family illness shortly prior to the events in question. On the whole, while I am prepared to find that technically Mr. Fleming was in violation of Rule G, in that he had failed to communicate his intention, and therefore remained subject to duty at the time, I am of the view that in the unique circumstances of this case a disposition short of discharge is appropriate, although an order for compensation is not.

The Arbitrator cannot accept the submission of the Union that the disciplinary investigation conducted by Mr. Thomas was in violation of the procedural requirements for a fair and impartial investigation within the contemplation of article 82 of the collective agreement. In the Arbitrator's view the facts of the case at hand are clearly distinguishable from those disclosed in CROA 1886 where the investigating officer was the same person who had initially detected the grievor's state of alleged intoxication. Mr. Thomas was not in contact with Mr. Fleming on the day in question, and in the Arbitrator's view there in nothing inappropriate in his having obtained statements and information from others for use in the investigation, to the extent that those were all made available to Mr. Fleming and his union representative, in keeping with the requirements of article 82.

For the foregoing reasons the grievance is allowed, in part. Mr. Fleming shall be reinstated into his employment without compensation, and without loss of seniority.

May 15, 1992

(Sgd.) MICHEL G. PICHER

ARBITRATOR