CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 2602
Heard in Montreal, Tuesday, 11 April 1995
concerning
Canadian National Railway Company
and
Brotherhood of Maintenance of Way Employees

DISPUTE – Brotherhood:

10 demerits assessed to Foreman V. Zorko for alleged insubordination.

DISPUTE – Company:

Appeal the assessment of 10 demerits to Track Maintenance Foreman V. Zorko for his failure to follow instructions of a Company Officer, effective 3 June 1994.

Brotherhood's STATEMENT OF ISSUE:

On June 2, 1994, the grievor was instructed by his assistant supervisor not to leave after work so that the grievor could be questioned about the possible Rule G violation of another employee. Notwithstanding this, the grievor's wife arrived to pick him up and he left.

The Union contends that: 1.) The grievor had already worked some fifteen hours of overtime during the pay period in question; 2.) The assistant supervisor in question kept the grievor waiting after hours unnecessarily and without rational explanation; 3.) The grievor was unjustly dealt with in violation of article 18.6 of agreement 10.1 and the discipline assessed was excessive and unwarranted in the circumstances.

The Union requests that: The 10 demerits assessed to the grievor be removed from his record and that he be returned forthwith to his previous position without loss of seniority and with full compensation for all losses incurred.

The Company denies the Union's contentions and declines the Union's request.

Company's STATEMENT OF ISSUE:

On 2 June 1994, the Company received a call from a manager of an Upper Canada beer store, who indicated that an individual had just bought a six pack of Upper Canada Pale Ale and had driven off in a CN red truck #CN 071559, license #YF 5754.

Sine the truck was registered to the Fort York track section, it was determined that it would be necessary to question the employees at the Fort York section concerning the use of CN truck #071559. Upon arrival at the Fort York tool house, the grievor's supervisor briefly questioned the grievor, after which he was instructed to remain on site. Contrary to his Supervisor's instructions, the grievor left the premises without permission and in direct violation of a verbal order.

On the following day when the grievor returned to work, the grievor was notified by his supervisor that he was suspended pending an investigation into his insubordination for leaving work contrary to the instructions of his supervisor.

Following a formal investigation, the grievor was assessed 10 demerits for his failure to follow the instructions of a Company officer, effective 3 June 1994.

The Brotherhood's position is outlined as follows: (A) The grievor had already worked some fifteen hours of overtime during the two week pay period in question. (B) The grievor's supervisor

kept the grievor waiting after hours unnecessarily and without rational explanation. (C) The grievor was unjustly dealt with in violation of article 18.6 of agreement 10.1 and the discipline assessed was excessive and unwarranted in the circumstances.

The Brotherhood requests that: The ten demerits assessed to the grievor be removed from his record.

The Company declined the Brotherhood's appeal.

FOR THE BROTHERHOOD: FOR THE COMPANY:

(SGD.) R. A. Bowden (SGD.) A. E. Heft

System Federation General Chairman for: Senior Vice-President – East

There appeared on behalf of the Company:

J. C. McDonnell – Counsel, Toronto
N. Dionne – Manager, System Labour Relations, Montreal
C. Morgan – Labour Relations Officer, Toronto
N. Thomas – Manager, Train Services, Toronto
R. Ditomaso – Track Supervisor, Toronto
G. Rideout – Assistant Track Supervisor, Toronto
T. Storey – CN Special Agent, Toronto

And on behalf of the Brotherhood:

P. Davidson – Counsel, Ottawa
R. Philips – General Chairman, Toronto
A. Trudel – General Chairman, Montreal

AWARD OF THE ARBITRATOR

The material before the Arbitrator reveals that the grievor, Foreman V. Zorko, was assessed ten demerits for failing to remain at the workplace when instructed to do so by his supervisor, Mr. Gary H. Rideout.

The incident in question, related at greater length in CROA 2601 and 2603, occurred on June 2, 1994. At approximately 15:47 hours Supervisor Gary Rideout received a telephone call from the Company's Public Affairs Office indicating that a complaint had been received to the effect that a CN employee travelling in a Company truck had stopped and purchased beer at the beer outlet of the Upper Canada Brewery, located near King and Dufferin Streets in Toronto. Mr. Rideout immediately called Mr. Zorko at the tool house of the Fort York shop and advised him to hold the gang employees there until his arrival. According to Mr. Rideout's statement, Mr. Zorko replied "There is no one left, they're all gone. I'm the only one here." At that point Mr. Rideout overheard another employee, Mr. David MacFarlane, laughing in the background, and upon stating to Mr. Zorko that he had heard Mr. MacFarlane, the grievor admitted that he was there, and indicated to Mr. Rideout that they would both await his arrival.

According to Mr. Rideout's statement, upon reaching the Fort York shop, after a brief encounter with Mr. MacFarlane, he instructed Mr. Zorko to accompany him to the supervisor's truck, where the two engaged in a brief conversation. The supervisor states that he asked who had been driving the truck in question at approximately 2:00 o'clock that afternoon, indicating that it had to be either Mr. Zorko or Mr. MacFarlane. He states that after some hesitation Mr. Zorko stated that it had been Mr. MacFarlane. Mr. Rideout then said to the grievor "Walter, stick around because I might have to ask you some more questions. Don't go anywhere." It is common ground that at that point officers of the CN Police had been summoned, although it is not established

in evidence that Mr. Zorko was aware of the matter being investigated, or of the impending arrival of the Police. The evidence establishes that shortly after his conversation with Mr. Rideout Mr. Zorko left the premises, as he was apparently picked up by his wife and son.

In the Arbitrator's view the decision to assess discipline against Mr. Zorko was not unreasonable in the circumstances. The Arbitrator accepts the suggestion of Counsel for the Brotherhood that the gravity of his offence in disregarding his supervisor's instruction to remain at work would be diminished if in fact he was unaware of the seriousness of the inquiry then being conducted by Mr. Rideout. However, even allowing that he was not made aware of the beer store incident, there is reason to conclude that Mr. Zorko was nevertheless aware that something serious was being investigated, and that his supervisor's instruction to him was of some importance. Firstly, it is common ground that Mr. MacFarlane did not have a valid driver's licence at the time in question, and that Mr. Zorko was aware of that fact. In a statement made to CN Police on June 3, 1994 Mr. Zorko stated "MacFarlane has no driver's licence. The only CN vehicle he is authorized to operate at the present time is the tractor." In light of that evidence, and in the absence of any elaboration within any part of the statements of Mr. Zorko to indicate that he assigned truck driving duties to Mr. MacFarlane, I am satisfied, on the balance of probabilities, that Mr. Zorko knew, or reasonably should have known, that Mr. Rideout was investigating a matter of serious consequence, and that his instruction to Mr. Zorko to remain on the premises should be understood in that light.

On the other hand, the full seriousness of the matter being investigated was not explained to Mr. Zorko, his working day was then completed and it is not disputed that his wife and son arrived on the premises to pick him up. It appears that when he was on the point of leaving he attempted to speak with Mr. Rideout, but he was then in his truck speaking on the telephone. In light of these mitigating circumstances, I am not persuaded that the grievor's failure to remain on the premises was so serious as to merit the assessment of ten demerits. In my view the issuing of a reprimand would have been sufficient to respond to his actions, having particular regard to the fact that he was not made aware of the full nature of the incident being investigated, and that there is no evidence to establish that he had any independent knowledge of the beer store incident.

For the foregoing reasons the Arbitrator is satisfied that the grievance should be allowed, in part. The ten demerits assessed against the grievor shall be stricken from his record, with a written reprimand to be substituted.

The Arbitrator cannot sustain the position of the Brotherhood to the effect that the grievor was dealt with in violation of the procedural protections of article 18.6 of the collective agreement as regards the disciplinary investigation conducted by the Company, or that he was unjustly dealt with, assuming that that is an arbitrable issue.

April 20,1995 (original signed by)
MICHEL G. PICHER
ARBITRATOR