CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 2603
Heard in Montreal, Tuesday, 11 April 1995
concerning
Canadian National Railway Company
and
Brotherhood of Maintenance of Way Employees
DISPUTE – Brotherhood:
Discharge of Foreman V. Zorko for alleged violation of CROR Rule G.
DISPUTE – Company:
Appeal of the discharge of Track Maintenance Foreman V. Zorko for violation of CROR General Rule G, effective 3 June 1994.
Brotherhood's STATEMENT OF ISSUE:
On June 2, 1994, CN Police attended at the grievor's tool house to investigate a possible Rule G violation. While in the tool house, the CN Police seized six unopened bottles of alcohol belonging to the grievor.
The Union contends that: 1.) Much of the evidence used against the grievor at the investigation was inadmissible having been illegally obtained from CN Police; 2.) The grievor was suspended from service on June 3, 1994, for insubordination, NOT for violation of Rule G; 3.) The Company's actions during the investigation procedure were in violation of both the word and the spirit of the investigation provisions of article 18 of agreement 10.1; 4.) The grievor was unjustly dealt with in violation of article 18.6 of agreement 10.1 and that the discipline assessed was excessive and unwarranted in the circumstances.
The Union requests that: The grievor 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.
During the process of the investigation, CN Police conducted a search of the Fort York tool house on 2 June 1994 and amongst other items found were six full 60 ounce bottles of rum.
On the following day when the grievor returned to work, he was questioned by CN Police during which the grievor admitted that the 6 bottles of rum found in the tool house on 2 June 1994 belonged to him.
Following a formal investigation, the grievor was discharged for violation of CROR General Rule G, effective 3 June 1994.
The Brotherhood's positions is outlined as follows: (A) The statement of the grievor taken by CN Police and the statements of CN Police Special Agents Storey and Meech were inadmissible during the grievor's formal statement since CN Police are not allowed to release statements prior to any criminal charges laid against an individual. (B) The grievor was suspended from service on June 3, 1994, for insubordination not for violation of Rule G. (C) The Company's actions during the investigation procedure were

in violation of both the work and the spirit of the investigation provisions of article 18 of agreement 10.1 (D) 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 grievor be returned forthwith to his previous position without loss of seniority and with full compensation for all losses incurred.

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. Ridout – 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 establishes, beyond controversy, that the grievor was in possession of a substantial quantity of alcohol on Company premises, in clear violation of Rule G. By his own admission, he purchased and stored in the tool house six bottles of rum. The grievor's statement to the Company in explanation of the bottles found in his locker is that he had had them delivered there by a friend because he did not have the use of vehicle, and that he had purchased the liquor for a wedding within his family.

The possession of liquor while on duty on the part of any employee is a serious infraction, and it is no less so when the amounts in question are substantial. There is, in such a circumstance, a substantial onus upon the employee concerned to provide a clear and credible explanation in mitigation if the most serious of disciplinary consequences are to be avoided. Moreover, in the case at hand the particular concern of the Company with respect to the possession of liquor at work is not without some foundation. The evidence establishes that the rum belonging to Mr. Zorko was found as a result of an investigation conducted by the Company into the purchase of beer by another employee driving a Company truck based at the yard where Mr. Zorko was employed. A police search of the tool house uncovered the presence of seven empty beer bottles, one full can of beer, two empty wine bottles, a half full bottle of wine, as well as the six bottles of rum belonging to Mr. Zorko.

Unfortunately, the credibility of Mr. Zorko's account as to the origins and intended destination of the rum found in his locker is left very much in question. While he indicated to the Company that it originated in the United States and was provided to him by a friend who delivered it at work on the 2nd of June, Mr. Zorko gave a substantially different account to Employment and Immigration Canada in his application for unemployment

insurance. According to the record of that application, he advised the Unemployment Insurance authorities that he and four co-workers were travelling in a Company truck when they were stopped and asked if they were interested in buying liquor at half price. The individual who stopped them advised that he had six bottles of rum available, and according to the record of the proceedings, Mr. Zorko bought all six bottles, taking them to work with him. The record of the Unemployment Insurance officer states that the grievor went further to relate: "The claimant states the other four employees that were with him did not offer to buy any of the bottles because they are very close to retirement did not want to jeopardize their retirement." He told the Unemployment Insurance officer that he intended to keep some of the bottles "... for personal use and to sell the others to his friends at a small profit."

Counsel for the Brotherhood suggests that the circumstances of the instant case are comparable to those in CROA 890, 1953 and 1980. The Brotherhood argues that CROA 890, like the case at hand, relates to a technical violation of Rule G, in that the individual in question was in mere possession of liquor on Company premises during working time, with no intention to consume it. In fact, in CROA 890, the Arbitrator found that the grievor was unaware that a bottle of beer was stowed in his bag, found no violation of Rule G and reinstated the employee with compensation. In CROA 1953, it was similarly found that an employee was not in violation of Rule G when cans of beer were found in a supplementary locker which he used only occasionally, but which was unlocked and which contained other items not belonging to him. The Arbitrator found that the Company failed to prove knowledge of the alcohol or its possession by the employee, and directed his reinstatement with compensation. Similarly, in CROA 1980, it was found that no violation of Rule G was disclosed, apparently by agreement of the parties, having regard to the location of three cans of beer found in the grievor's locker in a rest house. Further, in that case the grievor was a twenty year employee who had never previously been assessed any discipline. On that basis the grievance was allowed, in part, with the penalty being reduced to the assessment of demerits.

In the case at hand the facts are different. Firstly, as the above account relates, it is far from clear that the grievor has been forthcoming and honest as to the facts surrounding his purchase of the liquor, or its intended use. If his account to the Unemployment Insurance authorities is to be believed, it was purchased, at least in part, with a profit motive in mind. For reasons related in a prior award, the obtaining and storing of liquor on Company property for the purpose of resale is a serious offence which can sustain discharge (see CROA 2562). At a minimum, the disparity of explanations given with respect to the origins and intended use of the liquor raises substantial concern as to Mr. Zorko's credibility.

On balance, the Arbitrator is compelled to conclude that the grievor knowingly possessed a substantial quantity of alcohol at work, during working hours, being fully aware of the possible consequences of his actions. The record further discloses that on at least one prior occasion Mr. Zorko was made the subject of the Company's Rule G by-pass policy. While that incident cannot be viewed as prior discipline, it deprives the grievor of any

argument that he was unaware of the risks of his conduct, or that the case at hand reflects an isolated and uncharacteristic incident. On balance, the Arbitrator cannot accept the submission of the Brotherhood that the grievor's conduct, in the circumstances, was "entirely innocent". Lastly, the Arbitrator can find nothing in the record which would support the submission that the Company violated the provisions of article 18 of the collective agreement in the conduct of its investigation, or that the grievor was unjustly dealt with, assuming that that is an arbitrable issue.

For the foregoing reasons the grievance must be dismissed.

April 20,1995 (original signed by)

MICHEL G. PICHER

ARBITRATOR