CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 2618
Heard in Calgary, Tuesday, 9 May 1995
concerning
Canadian National Railway Company
and
Brotherhood of Maintenance of Way Employees
DISPUTE:

Discharge of Assistant Extra Gang Foreman Wesley Scherger for the alleged possession of open liquor in a Company vehicle and the alleged consumption of liquor in a Company vehicle on June 16, 1994.

JOINT STATEMENT OF ISSUE:

The contention of the Brotherhood is that the grievor, Mr. W. Scherger, was unjustly dealt with by the Company when he was discharged on July 21, 1994 for allegedly having open liquor and consuming liquor in a Company vehicle on June 16, 1994.

The Brotherhood maintains that the discipline is too harsh and that the investigation into this matter did not prove anything other than that an open bottle liquor was found in the vehicle by the RCMP.

The Brotherhood has requested that the grievor be reinstated with full compensation.

The Company has denied the Brotherhood's contention and declined the Brotherhood's request.

FOR THE BROTHERHOOD: FOR THE COMPANY:
(SGD.) G. Schneider (SGD.) D. J. Noyes
System Federation General Chairman for: Senior Vice-President, Western Canada

There appeared on behalf of the Company:
D. Noyes – Labour Relations Officer, Edmonton
B. Laidlaw – Labour Relations Officer, Edmonton
G. Small – Assistant Manager, B&B
J. Barker – Foreman, B&B

And on behalf of the Brotherhood:
Robt. A. Philp – Counsel
G. Schneider– System Federation General Chairman, Winnipeg
R. Liberty – Secretary/Treasurer, Winnipeg

AWARD OF THE ARBITRATOR

Based on the evidence, on the balance of probabilities, the Arbitrator is satisfied that the grievor was involved in the consumption of alcohol from an open bottle, while he was travelling, off duty, in a Company vehicle from Edson to Edmonton, Alberta, on June 16, 1994.

The evidence discloses that attention was drawn to the vehicle in which Assistant Foreman Scherger was travelling when a motorist in another vehicle complained to the RCMP that he had observed cups being passed among the passengers of the vehicle which, in his judgment, was being driven erratically. When the vehicle was stopped by an RCMP constable, the driver, Extra Gang Labourer D. Anderson, successfully passed a breathalyzer test. However, a partially consumed bottle of whiskey was found inside the vehicle. The bottle was admittedly owned by the second passenger, Extra Gang Labourer D. Shaw. The evidence further includes the statement of Constable McKee which confirms that there was an odour of alcohol in the vehicle, and that it contained empty styrofoam cups as well as two partially full pop

bottles.

A number of aspects of the evidence give rise to concern. Foremost among them are issues of plausibility as to the explanation given by the grievor, and Mr. Shaw, who was also disciplined. It is admitted that upon being questioned about the bottle by Constable McKee, Mr. Scherger and Mr. Shaw admitted that they had been drinking from that bottle. This, naturally, caused the constable to believe that they had been drinking from it during the course of their road trip in the Company vehicle. Later, however, the employees took the position that they had meant to explain that they had been drinking from the bottle on the night previous. They deny having consumed any alcohol during the course of the trip in the Company's truck, after they had gone off duty. According to their account, the bottle was initially in the open rear box portion of the truck, packed among Mr. Shaw's personal effects. According to the account of the trip given by Mr. Scherger, as well as Mr. Shaw, they both fell asleep immediately upon departing Edson, and did not awake until the truck was stopped by the RCMP constable. They maintain that the bottle, which was initially in the back of the truck with Mr. Shaw's possessions, was transferred into the passenger section by Mr. Anderson who stopped the truck to make the transfer when it began to rain, so as to protect Mr. Shaw's luggage.

The account of the incident given through the report of the motorist is impossible to square with that of the grievor. He states that as he followed the Company truck he observed the passengers in the vehicle passing cups between them, and that "All the occupants were laughing and joking around." Further, the account given by the motorist is accurate as to the number of persons in the truck, and their relative positions inside it, with two being seated in the front and one in the back seat. Also, Constable McKee's statement indicates that all three occupants of the truck turned to look at his vehicle when he turned on his flashing lights from his position behind the truck.

On balance, I am satisfied that the account given of the incident by Foreman Scherger is not to be believed. The implausibility of the employees remaining asleep during the entire trip, contrary to the account of the motorist, failing to wake up when the driver stopped to transfer the luggage, coupled with the observations of Constable McKee and the smell of liquor which he detected in the vehicle, leads to the more probable conclusion that liquor was consumed in the vehicle by Mr. Scherger and Mr. Shaw during the course of the trip from Edson to Edmonton, as alleged.

In the result, the Arbitrator is satisfied that the Company had just cause for the assessment of discipline against Mr. Scherger, and that the infraction which he committed was such as to attract a serious degree of discipline. The mitigating factors of the employees being off duty, and the grievor's ten years' previous service are, unfortunately, outweighed by other aggravating factors. Firstly, as noted above, I am compelled to the conclusion that the grievor has not been honest and forthcoming with respect to the incident in question, as demonstrated by the contrast in his account of the incident and those of Constable McKee and the complaining motorist. Secondly, at the time of the incident in question the grievor's disciplinary record stood at fifty demerits, a position

perilously close to discharge. Further, as a person holding the rank of assistant foreman, the grievor can fairly be characterized as bearing a higher level of responsibility. If the grievor's record were more positive, and the Arbitrator could conclude that he had been honest and candid in respect of the incident, a different conclusion might be justified. In the circumstances, however, I can find no basis upon which to reduce the assessment of discipline decided upon by the Company.

For the foregoing reasons the grievance must be dismissed.

May 18, 1995(sgd.) MICHEL G. PICHER

ARBITRATOR