# CANADIAN RAILWAY OFFICE OF ARBITRATION

# CASE NO. 2704

Heard in Montreal, Wednesday, 14 February 1996

concerning

## CANADIAN NATIONAL RAILWAY COMPANY

and

## CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS [UNITED TRANSPORTATION UNION]

### DISPUTE:

Appeal of the discharge of J.I. Musselwhite of Edmonton, Alberta from Company service effective June 28, 1995 for violation of CROR General Rule G and failure to fulfill the terms of reinstatement agreement with CN dated December 3, 1994 while working as conductor on Train 585 on May 26, 1995.

### JOINT STATEMENT OF ISSUE:

On May 26, 1995, the Company alleged the grievor, James I. Musselwhite, to be in violation of CROR General Rule G, while working a tour of duty on Train 585. The Company conducted investigations into this allegation and discharged the grievor effective June 28, 1995 for: violation of CROR General Rule G and failure to fulfill the terms of reinstatement agreement with CN dated December 3, 1994 while working as conductor on Train 585 on May 26, 1995.

The Union's position is that the grievor was not in violation of Rule G, nor was he in violation of the terms set out in the reinstatement agreement dated December 3, 1993. In addition, the Union submits the Company has not proven a violation of Rule G on the part of the grievor.

The grievance was submitted to the Company at Step III of the Grievance Procedure on August 30, 1995. However, the Company has declined the Union's grievance.

The Union requests that the grievor be reinstated without loss of seniority and receive full compensation for all lost earnings from May 26, 1995 and that his record be made whole.

The Company maintains that the grievor was justly dismissed from Company service and has declined the Union's request.

**FOR THE COUNCIL:**

**(SGD.) M. G. ELDRIDGE**
**FOR: GENERAL CHAIRPERSON**

**FOR THE COMPANY:**

**(SGD.) R. RENNY**
**FOR: SENIOR VICE-PRESIDENT, WESTERN CANADA**

There appeared on behalf of the Company:

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| A. Giroux | – Counsel, Montreal |
| J. Torchia | – Manager, Labour Relations, Edmonton |
| L. Umberville | – Manager, Train Service, Edmonton |
| Dr. R. Dufresne | – System Director, Occupational & Health Services |
| D. W. Coughlin | – Director, Labour Relations, Montreal |
| Corporal J. L. Hickey | – Witness |

And on behalf of the Council:

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| D. Ellickson | – Counsel, Toronto |
| M. G. Eldridge | – Vice-General Chairperson, Edmonton |

J. W. Armstrong – General Chairperson, Edmonton
J. I. Musselwhite – Grievor

## AWARD OF THE ARBITRATOR

The evidence before the Arbitrator establishes that on May 26, 1995 the Company received a report from Corporal J.L. Hickey of Canadian Forces Base, Cold Lake, expressing the corporal's concern the he had observed the grievor, Mr. J.I. Musselwhite, to be under the influence of alcohol while performing the off-loading of jet fuel at the Cold Lake military base that morning. Upon receiving the information from Corporal Hickey, Company officers issued instructions to the grievor's train crew to stop their train on the main line, to secure it and to await a taxi to deadhead them to Walker Yard in Edmonton, where they were to report to the Manager–Train Service upon their arrival.

The evidence establishes that the train ceased movement as directed. However, Mr. Musselwhite did not follow the instructions given. Rather, without communicating with the rail traffic controller, any Company officer, or indeed his own crew, he disappeared. According to his own account, given some days subsequent, he stumbled while detraining the caboose of his train, injured his head and knee, became disoriented and proceeded to an adjacent highway from where he hitchhiked to Edmonton, to the home of his girlfriend. It is clear that nothing was heard by the Company from Mr. Musselwhite from the time his train stopped, at approximately 12:30 on May 26 until the following morning, at 01:18 on May 27, when he contacted the Crew Management Centre. Apparently he was then advised that he was being held out of service, to which he responded that he would "get ahold of the trainmaster tomorrow". He didn't.

It appears that the following afternoon Union representative Seagris contacted the Company's superintendent to advise that Mr. Musselwhite had contacted him. Although Superintendent Motluk then requested that Mr. Seagris tell Mr. Musselwhite to contact Mr. Umpherville of the Company, nothing more was heard from Mr. Musselwhite until June 2, 1995. The grievor was then advised that the investigation of his actions, originally scheduled for June 2, 1995, had been rescheduled for June 5, 1995.

Following the investigation Mr. Musselwhite was discharged for violation of Rule G, and a breach of the terms of his reinstatement into employment. It is common ground that Mr. Musselwhite was previously reinstated into his employment, pursuant to prior decisions of this Office (**CROA 2190**) and the signing of a reinstatement contract, dated December 3, 1993 which provides, in part:

> At all times you will be expected to fully comply with requirements of Rule G as a condition of employment including complete abstinence from illicit drugs. You are also required to completely abstain from drug and alcohol use. Should you fail to comply with these conditions at any time, and/or fail to comply with the Employee Assistance Program as directed by Dr. Vidins' report, you will be discharged from the Company and will not be considered for reinstatement under the policy.
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> Supervisors will have the authority to insist on a drug/alcohol test in a "just cause" (*) situation. Such tests are to be administered as soon as possible and in all case within forty-eight hours of notification to the employee. In a "just cause" testing situation you will also be required to attend the Medical Clinic for medical evaluation.
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> (*) "Just Cause" is defined as: Where the employer has reasonable grounds to believe that the employee has caused or contributed to an accident/incident or the employee has demonstrated a failure to meet the various requirements of the reinstatement conditions.

On behalf of the grievor, Counsel for the Council submits that the evidence before the Arbitrator is not sufficient to establish, on the balance of probabilities, that the grievor was in violation of Rule G. I cannot agree. Corporal Hickey, who was present at the arbitration hearing to give direct evidence if necessary, clearly formed the opinion that the grievor had consumed alcohol. His concern was sufficient to communicate that view to Petro-Canada, which apparently supplied the jet fuel to the armed forces base, and thereafter to the Company. A review of his description of what he saw, heard and smelled reflects the observations of a careful individual who avoided undue exaggeration or gratuitous comments. I am satisfied that the observations related by Corporal Hickey constitute, at a minimum, *prima facie* evidence from which the inference can reasonably be drawn that the grievor was under the influence of

alcohol when he was observed by Corporal Hickey. In the circumstances there is a natural onus upon the grievor to give some reasonable explanation of what transpired.

Far from giving a reasonable explanation, the grievor adopted a course of conduct which, to all appearances, is clearly more consistent with an attempt to avoid detection by the Company for a condition which he knew would cost him his job. Much of the grievor's conduct is such as to raise great concern as to his condition and his activities. Firstly, in my view implausibly, Mr. Musselwhite made no attempt to contact the members of his crew, nor anyone else, to advise that he was detraining, whether for the purpose of placing torpedoes on the track some distance behind the train, or for the purpose of hitchhiking a ride home. Very simply, the act of abandoning his train in circumstances in which he was directed to await deadhead transportation raises more than substantial questions about the nature of his actions. The fact that Mr. Musselwhite might not technically have been required, by any rule of the CROR, to communicate with his crew members as to his intention to either place torpedoes two thousand yards behind the train, or indeed to hitchhike home, is neither here nor there. His failure to give any indication to anyone of his intended course of action, coupled with his subsequent disappearance, point persuasively to the actions of an individual who had reason to avoid contact with the Company's officers, or indeed any witnesses. Moreover, the fact that Mr. Musselwhite remained virtually out of contact with the Company or its officers for a period of several days thereafter is no less supportive of the reasonable inference that he pursued a course of action calculated to conceal his condition from an employer, which had an obvious interest and concern in that regard.

This is not a case which depends entirely upon circumstantial evidence. The account of Mr. Musselwhite's condition, as observed by Corporal Hickey, which was sufficient to prompt him to alert the Company, is direct evidence. The suggestion of the grievor that Corporal Hickey might have smelled mouthwash, or a rubbing liniment, is equally unpersuasive, particularly when coupled with the bizarre course of action, and explanation for that action, pursued by Mr. Musselwhite.

Having weighed the evidence, I do not believe him. Regrettably, given the efforts of so many to assist Mr. Musselwhite with his alcoholism, it must be found that the Company has established, on the balance of probabilities, that the grievor did violate Rule G, by consuming alcohol or being under the influence of alcohol while on duty on May 26, 1995. By so doing, he was not only in violation of Rule G, but of the very clear conditions of his reinstatement into employment. For all of these reasons the Company was justified in terminating his services, and the grievance must be dismissed.

February 16, 1996 **(si**