CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2729

Heard in Calgary, Tuesday, 14 May 1996

concerning

CANADIAN PACIFIC LIMITED

and

CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS [BROTHERHOOD OF LOCOMOTIVE ENGINEERS]

DISPUTE:

The quantum of discipline, and time withheld from service, for Locomotive Engineer R.M. Jones who was not available when ordered for duty.

JOINT STATEMENT OF ISSUE:

Following an investigation conducted on August 3, 1994, in connection with failing to be available for duty for Train 355 West, July 30, 1994, Locomotive Engineer Jones was assessed 40 demerits and withheld from Company service for 16 days for:

> consuming alcohol while subject to duty, and for failing to ensure that you were in proper condition to carry out your employment obligations, and failing to be available when ordered duty, which resulted in your missing a call for Train 355 West at 0215 on July 30, 1994, Moose Jaw, Saskatchewan, a violation of CROR General Rule G.

The Council contends that Locomotive Engineer Jones was not in violation of Rule G, and thus should not have been withheld from service.

The Council has requested that Mr. Jones be paid lost wages and benefits for all time withheld from service. Additionally, the Council has requested a reduction in the discipline assessed to be consistent with a missed call.

The Company has declined the Council's request.

FOR THE COUNCIL:	FOR THE COMPANY:
(SGD.) D. C. CURTIS	(SGD.) M. E. KEIRAN
GENERAL CHAIRMAN	FOR: DISTRICT GENERAL MANAGER, PRAIRIE DISTRICT

There appeared on behalf of the Company:

R. E. Wilson	– Manager, Labour Relations, Calgary
M. E. Keiran	– Manager, Labour Relations, Vancouver
L. J. Guenther	– Labour Relations Officer, Calgary
S. Seeney	– Labour Relations Officer, Calgary
J. Copping	– Labour Relations Research Officer, Calgary
D. S. Winiski	– Manager, Yard Operations, Winnipeg
M. R. Reid	– District Crew Manager, Winnipeg

And on behalf of the Council:

D. C. Curtis	– General Chairman, Calgary
T. G. Hucker	– National Vice-President, Ottawa
J. D. Flegel	– Sr. Vice-General Chairman, Saskatoon
N. Davis	– Local Chairman, Moose Jaw
R. Burkett	– Vice-Local Chairman, Moose Jaw

AWARD OF THE ARBITRATOR

The record discloses that the grievor arrived at his home terminal, Moose Jaw, on July 28, 1994 and booked personal rest which expired at 1800 on July 29, 1994. He was, in the circumstances, subject to duty after that time. Indeed, while there is some slight dispute on the point, it appears that he had a reasonable expectation of being called in the early hours of the morning of July 30, 1994. In fact, he was called at 0215 to work on train 335 at 0400.

The Company attempted to call him at 0215 to work on train 335 at 0400. He did not answer the call, however, as he had been arrested for impaired driving some five hours previous. The record discloses that at 2140 on the evening of July 29, 1994, Mr. Jones was arrested and charged under Section 253(b) of the **Criminal Code of Canada** for operating a motor vehicle after having consumed alcohol causing a concentration in excess of 80 milligrams of alcohol in 100 millilitres of blood. He subsequently entered a plea of guilty to that offence.

The grievor asserts that he was not in fact subject to duty at the time he was found to have been impaired, while in control of his automobile. He states that he attempted to call the crew clerk, initially at 1800 on July 29 and again sometime later, but got either a busy signal or no answer.

The Arbitrator is not impressed with that evidence. If Mr. Jones wished to remove himself from the jeopardy of violating Rule G, it was plainly incumbent upon him to book off, by clearly communicating that wish to the crew clerk. Until he did so, he remained subject to duty, a status which must be determined by objective fact, and not, as a general rule, by an employee's own uncommunicated intention or state of mind. This is not a case where the grievor has advanced any credible inability to communicate with the Company his intention to remove himself from being subject to duty. He simply did not do so, and cannot now assert that he was not subject to duty.

The Arbitrator must agree with the Company that the circumstances at hand are similar to those found in **CROA 2255** where the following comments appear:

> 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.**
>
> (emphasis added)

(*See also* **CROA 557** *and* **2054**.)

General Rule G states, in part:

> **G (a)** The use of intoxicants or narcotics by employees subject to duty, or their possession or use while on duty, is prohibited.

The above is one of the most important rules in railroading, the violation of which merits a serious measure of discipline. In the instant case, as the Arbitrator has concerns as to the candour of the grievor, it is difficult to find mitigating circumstances that would justify a reduction of penalty.

For all of the foregoing reasons the grievance is dismissed.

May 17, 1996

(signed) MICHEL G. PICHER
ARBITRATOR