

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2767

Heard in Montreal, Tuesday, 10 September 1996

concerning

CANADIAN PACIFIC LIMITED

and

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

DISPUTE:

Dismissal of Yard Helper A.F. Accardo of Trail, B.C.

JOINT STATEMENT OF ISSUE:

On October 16, 1995 Mr. A. F. Accardo was issued a Form 104 informing him that he had been dismissed for:

“reporting for duty in an unsafe condition while impaired and under the influence of drugs, resulting in your causing a motor vehicle accident and being removed from Company property, detained, and formally charged under Section 253(a) of the Criminal Code of Canada and for your continuing refusal to appear for a properly scheduled investigation; a violation of CROR Rule G, at Trail, B.C. on August 3, 1995.”

The Council contends that the dismissal was not justified and that the grievor did not receive fair and impartial treatment in the handling of his case. The Council has requested immediate reinstatement into Company service, without loss of benefits or seniority and with full compensation.

The Company has declined the Council's request.

FOR THE COUNCIL:

(SGD.) L. O. SCHILLACI

GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) R. WILSON

FOR: DISTRICT GENERAL MANAGER

There appeared on behalf of the Company:

M. E. Keiran – Manager, Labour Relations, Calgary
R. Hempel – Labour Relations Officer, Calgary

And on behalf of the Union:

D. Ellickson – Counsel, Toronto
L. Schillaci – General Chairperson, Calgary
A. Accardo – Grievor

AWARD OF THE ARBITRATOR

It is not disputed that Yard Helper Accardo was in violation of Rule G when he reported for duty impaired on August 3, 1995. The material before the Arbitrator establishes beyond controversy, however, that the grievor's condition was caused by his having taken an overdose of the prescription drug Alprazolam, a form of zanax, prescribed by his physician for the treatment of his anxiety and depression. It appears that he took an excessive amount of the drug, in combination with Tylenol 3 on the same day he moved out of the matrimonial home after a dispute with his spouse.

The record reveals that the grievor was immediately taken out of service, and that some time elapsed before the completion of the disciplinary investigation conducted by the Company. It is common ground that the delay in the completion of the investigation was occasioned by the Company awaiting the results of a breathalyzer and blood test taken by Mr. Accardo at the instance of police authorities on the day of the incident which caused him to be removed from service. In the result, the grievor remained out of service from August 3, 1995 until October 16, 1995 when he was dismissed for his violation of Rule G.

In the circumstances of this case the Arbitrator cannot accede to the submission of the Council that the grievor did not receive the benefit of a fair and impartial investigation, as contemplated under the terms of the collective agreement. Nor can I find that there was a delay beyond the terms of the collective agreement with respect to the making of the Company's decision following the conclusion of the investigation. As the record discloses, during the course of the initial investigation conducted by the Company on September 7, 1995, the grievor and his union representative were advised that the Company would await the results of the tests taken when they would become available. A note within the record confirms that the Union's representative, quite correctly in my view, acceded to the investigation proceeding pending the availability of the results of the grievor's blood tests. In fact, however, the Company never received the actual results of the blood tests which it was awaiting. It appears, however, that on October 2, 1995 the Company received a general occurrence report from the CP Police which contained the following statement: "Preliminary Lab results report the presence of (barbiturates and opiates) in the suspect's blood, with further quantitative tests being undertaken." In fact, however, the Company never received any confirmation of the above statement either in the form of information from a laboratory or the police, nor a copy of any completed blood tests.

When the Company received the occurrence report it sought to reconvene the investigation to allow the grievor the opportunity to deal with its contents. However, when the grievor was advised that his brother, who is neither a union representative nor an employee of the Company, could not attend to represent him, he declined to appear at the reconvened investigation. In the circumstances, the Arbitrator can see no violation of article 32 of the collective agreement by the failure of the Company to provide to the grievor or the Council a copy of the occurrence report, or in the fact that it concluded the investigation based on the information which was then available to it. Nor can I sustain the suggestion that there was a violation of the twenty day time limit for the making of the Company's decision, assuming without finding that that requirement is mandatory. The evidence discloses that the decision was made within less than twenty days of the time that the grievor failed to appear for the continuation of the investigation.

The material now before the Arbitrator establishes, beyond substantial controversy, that the grievor was impaired on the day in question solely by reason of his having taken an excessive amount of a prescription drug, in combination with Tylenol 3, causing mental confusion, slurred speech and staggering, all side effects of an overdose of zanax medically recognized in the relevant medical literature. The Arbitrator agrees with the Company that it was the responsibility of the grievor to know the possible effects of the drugs which he was taking, and that he remains responsible for the overdose which he took, even if it was taken inadvertently or in error. The evidence before the Arbitrator further discloses that the grievor had developed a problem of dependency on the prescription drugs which he was using, and successfully followed a treatment program for that problem after his discharge. There is, in this case, nothing in the evidence before the Arbitrator to suggest, nor is there any argument made by the Company, that the grievor violated Rule G by the consumption of alcohol or any non-prescription drug.

The issue then becomes the appropriate measure of discipline in the circumstances of this case. In the Arbitrator's view there was a degree of fault on both sides. By failing to appear at the reconvened investigation Mr. Accardo deprived the Company of any answer to the suggestion in the CP Police report with respect to the

preliminary determination of drugs disclosed by the blood test. In the result, the Company was given no clarification of substance with respect to the cause of the grievor's impairment, save his own bare statement in the first investigation with respect to having exceeded the dosage for his prescription drugs. It appears that the grievor's full circumstances were not, in fact, disclosed to the Company until the Council's appeal at Step II of the grievance procedure on or about June 28, 1996. At that point a letter from the Council's representative was sent to the Company, including correspondence from the grievor's personal physician and the Trail Community Counselling Services with respect to the grievor's problem with prescription drugs. Until that date the Company did not have any substantial basis upon which to understand the full circumstances of the Rule G violation committed by the grievor.

There are obviously mitigating factors in the case at hand which would justify a form of discipline short of discharge. Firstly, the grievor is a long service employee who, though not without prior discipline, has recorded positive periods of service to the Employer. In addition, the prior record gathered in 1994 would appear to coincide, to some extent, with his personal difficulties in the use of prescription medication. Further, and perhaps most significantly, the medical evidence filed before the Arbitrator confirms that he has gained control of his personal problems, including his difficulties with the use of prescription drugs, and has, for some time, been in a position to return to productive employment without undue risk to the Company.

In the result, the grievance is allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment, without loss of seniority, and with compensation for wages and benefits lost from June 28, 1996 to the date of his reinstatement. The grievor's reinstatement is conditioned upon his agreeing to accept to provide to the Company, for a period of not less than two years from the date of his reinstatement, quarterly statements from the Trail Community Counselling Services, or a similar agency to be agreed upon between the parties, confirming Mr. Accardo's ongoing involvement in his recovery program.

September 14, 1996

(signed) MICHEL G. PICHER
ARBITRATOR