

CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 2959
Heard in Montreal, Thursday, 11 June 1998
concerning
VIA RAIL CANADA INC.
and
BROTHERHOOD OF LOCOMOTIVE ENGINEERS
EX PARTE

DISPUTE:

Appeal of the discipline assessed Locomotive Engineer James R. Owttrim for violation of CROR General Rule

EX PARTE STATEMENT OF ISSUE:

On November 16, 1996, J. Owttrim and D. Travers were employed as locomotive engineers on Train VIA 85 from Toronto to Port Huron.

At approximately 11:05 hours on the above date, train 85 struck a car at a level crossing outside of London, Ontario. During the investigation of the accident, D. Travers provided a breath sample to the police, which indicated a blood alcohol reading of .045 PPM.

Following an investigation into this matter, J. Owttrim was assessed 45 demerits for violation of General Rule A.

The Brotherhood contends that the discipline is unwarranted.

The Corporation has declined to alter the discipline assessed J. Owttrim.

FOR THE BROTHERHOOD:

(SGD.) J. R. TOFFLEMIRE
GENERAL CHAIRMAN

There appeared on behalf of the Corporation:

E. J. Houlihan - Senior Manager, Labour Relations, Montreal
L. Laplante - Labour Relations Officer, Montreal
E. Cadieux - Observer

And on behalf of the Brotherhood:

J. R. Tofflemire
- General Chairman, Toronto

AWARD OF THE ARBITRATOR

The material before the Arbitrator establishes that the grievor was the co-locomotive engineer operating an Amtrack train in VIA Rail service on November 16, 1996 from Toronto to Sarnia, Ontario. Following a level crossing accident near London at 11:05 hours, some three hours into the crew's trip, the grievor's working companion, Locomotive Engineer Travers, was subjected to a breathalyzer test by OPP constables investigating the accident. Although it was found that the grievor and crew were in no way

responsible for the accident, Mr. Travers did register a blood alcohol level of .045 milligram of alcohol per 100 millilitre of blood. He was discharged for a violation of rule G and subsequently reinstated, on certain conditions, by the award of this Office in **CROA 2882**. Significantly, at the time of the hearing in that case the grievor acknowledged his condition as an alcoholic and had successfully followed an in-patient medical treatment program, with out-patient follow-up, along with involvement in Alcoholics Anonymous.

The grievor in the instant case was assessed forty-five demerits by reason of the Corporation's conclusion that he violated general rule A(iii) by failing to detect or report the fact that the grievor was impaired at the commencement of his tour of duty, at or about 06: 10 hours on the day in question. The rule reads as follows:

A. Every employee in any service connected with the movement of trains or engines shall:

(iii) provide every possible assistance to ensure every rule, special instruction and general operating instruction is complied with, and shall report promptly to the proper authority any violations thereof,

The Corporation's position is that Mr. Owttrim should, by the exercise of reasonable diligence, have detected alcohol on the grievor's breath, and observed other outward signs that indicated his impairment and should have reported the situation accordingly. Based on the breathalyzer reading of .045 PPM taken at midday, and using generally accepted rates of alcohol elimination, the Corporation submits that upon going on duty at 06: 10 hours. Mr. Travers would have had between .177 milligrams and .141 milligrams of alcohol in 100 millilitres of blood. It argues that at that level he would have been visibly impaired, and that a strong odour of alcohol would have been detectable on his breath. It may be noted that the OPP constables who requested that Mr. Travers take the breathalyzer test did so after detecting the smell of alcohol on his breath while he was being interviewed in a closed police cruiser.

In response to the Corporation's question during his disciplinary investigation as to why he did not detect an odour of alcohol on the grievor in the early part of his tour of duty, and indeed through the entire period of three hours he worked together with Mr. Travers in the cab of the locomotive, Mr. Owttrim replied at answer 38 of the investigation:

38 A. The presence of diesel fumes in the AMTRACK locomotive as well as the presence of toilet fumes, and I might also add that I had a head cold and that I was frequently smoking cigarettes with my window open.

In support of the Brotherhood's position, its representative stresses a number of facts disclosed in the instant case. Firstly, he notes that

Conductor N. Hamilton and Assistant Conductor M. Salem provided statements, accepted by the Corporation, indicating that in the early morning they had briefly met the grievor on the platform prior to the departure of the train from Toronto, and had detected nothing unusual. Mr. Travers also encountered Yardmaster A. Pahor as he reported for duty. It appears that they exchanged greetings and that at that time the yardmaster noticed nothing unusual about Mr. Travers. Finally, the Brotherhood's representative stresses that the Corporation's own investigating officer at the scene of the level crossing accident, Assistant Superintendent Kelly Stewart, who rode to the hospital with the grievor and Mr. Travers for a period of some thirty minutes shortly following the breathalyzer test, indicated that she did not detect any odour of alcohol from Mr. Travers at that time. Indeed, it appears from the transcript of the investigation that Ms. Stewart encountered Mr. Travers on three separate occasions. The first was outdoors after the locomotive engineer had left the police car and she briefly told him that he was to go with her to the hospital for a blood test. The second occasion was also outdoors, when Ms. Stewart reminded Mr. Travers that he was to join her in her van to proceed to the hospital. Finally, she relates that she could smell nothing during the trip to the hospital, although it appears that there was a smell of food in the van as Mr. Owtrim was consuming a lunch of hot pasta. As a final point of mitigation, the Brotherhood's representative stresses that Mr. Owtrim was assigned to work with Mr. Travers from an emergency relief list. It appears that he did not regularly work with Locomotive Engineer Travers and had no reason to appreciate his personal mannerisms or any unusual departure from them.

The instant case presents some difficulty. The evidence would indicate that upon going on duty Mr. Travers was under the influence of a substantial amount of alcohol. The Arbitrator accepts the submission of the Corporation with respect to the probable degree of alcohol in Mr. Travers' blood at the time he commenced his tour of duty, based on the reading taken at midday and applying normal rates of alcohol elimination. It is also apparent, however, that several people who encountered Mr. Travers, albeit briefly, on the morning in question saw no immediate signs which indicated to them that he was impaired. Additionally, while it is true that Mr. Travers' impairment was later detected by police officers within the confines of a closed police cruiser, the conditions within the cab of a locomotive are arguably different, and might be closer to conditions outdoors, or at a minimum to those to be expected in a larger, more draughty space with a mixture of odours and fumes in the air.

At the outset, the Arbitrator agrees with the Corporation's interpretation of general rule A(iii). The test in a case such as this is not whether Mr. Owtrim in fact observed Mr. Travers and concluded that he was impaired, and failed to do anything. The test is whether he failed to apply the vigilance and care of a reasonable person in his position, having regard to normal standards of training and experience. In other words should he, by the exercise of reasonable diligence, have detected the state of impairment of Locomotive Engineer Travers on the morning in question?

In this matter the burden of proof is upon the Corporation. As is obvious from the facts of this case, the detection of alcohol on an individual's breath, and other signs of impairment, particularly in a seasoned alcoholic, is not necessarily an easy thing. It appears from the events recorded at the level crossing accident that the OPP police constables did not themselves suspect or detect any problem until they were in a closed automobile with Mr. Travers, when they first smelled an odour of alcohol on him. There is, moreover, no suggestion in the accounts of any of the witnesses that other outward signs of intoxication, such as a flushed face, glassy eyes, unsteady gait or thick speech were at any point detected in Mr. Travers. Such conditions would, I think, have been evident to the conductor, assistant conductor and yardmaster at the time Mr. Travers went on duty. None, however, was reported.

In these circumstances the Arbitrator finds it difficult to conclude, particularly within the somewhat different environment of a locomotive cab, that Mr. Owttrim would, by the exercise of reasonable diligence, have necessarily detected an odour of alcohol on the breath of Mr. Travers. There were no outward visible signs to prompt his concern. The record is devoid of any evidence as to the exchanges between the two engineers within the cab of the locomotive, or any factors such as whether Mr. Travers might have been chewing gum or consuming mints. In this regard it is noteworthy that Assistant Superintendent Stewart reported that one point during their encounter in London Mr. Travers was "chewing something".

While the Arbitrator readily appreciates the importance of rule A(iii), and the concerns which the Corporation legitimately brings to a situation of this kind, a factual conclusion to sustain the assessment of a penalty as serious as forty-five demerits must, of necessity, rest on a compelling evidentiary basis. In the instant case all of the evidence before the Arbitrator points to the conclusion that the condition of Mr. Travers on the morning in question in relation to the prior consumption of alcohol appears to have been less than obvious, having passed undetected by a number of individuals. In that circumstance, and given the conditions in the locomotive cab, I find it difficult to conclude that the Corporation has established, on the balance of probabilities, that Mr. Owttrim, who had little or no prior knowledge of Mr. Travers' mannerisms should, in the circumstances, have been able to detect his condition, based on the smell of his breath. While the employer's suspicion is understandable, as has been stated before, an arbitrator cannot convert suspicion into legal conclusions which involve grave consequences for an individual's employment. In this case the allegation against Mr. Owttrim is not proved, on the balance of probabilities.

For the foregoing reasons the grievance must be allowed. The Arbitrator directs that the forty-five demerits assessed against Mr. Owttrim be removed from his record.

June 12, 1998

MICHEL G. PICHER
ARBITRATOR