CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 666

Heard at Montreal, Tuesday, June 13th, 1978

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION (T)

DISPUTE:

Dismissal of Baggageman R.W. Briscoe of Capreol, Ontario, effective December 30, 1976 for violation of Uniform Code of Operating Rule G and for reporting late for duty for Train 2, Hornepayne, Ontario.

JOINT STATEMENT OF ISSUE:

Effective December 3, 1976, Mr. R.W. Briscoe was discharged for violation of Uniform Code of Operating Rule G and for reporting late for duty while employed as a Baggageman, Train No. 2, Hornepayne, Ontario.

The Union appealed the discipline on the grounds that: **1.)** the investigation was not conducted in accordance with Article 153 of Agreement 4.16 and therefore was not a fair and impartial hearing; **2.)** the employee was not called in accordance with Article 131.1 of Agreement 4.16; **3.)** the Company did not substantiate their decision that the employee violated Rule G; **4.)** the discipline assessed was too severe.

The Union has requested reinstatement of the employee in his former position with full compensation for time out of service commencing December 3, 1976.

The Company declined the request.

FOR THE EMPLOYEE:	FOR THE COMPANY:
(SGD.) F. R. OLIVER	(SGD.) S. T. COOKE
GENERAL CHAIRMAN	ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

G. E. Morgan	– System Labour Relations Officer, Montreal
G. A. Carra	– System Labour Relations Officer, Montreal
A. T. Deciccio	– Assistant Superintendent, Hornepayne
J. J. Campbell	– Formerly Trainmaster, Capreol
C. A. McHardy	– Labour Relations Assistant, Montreal
J. A. Morris	– Manager, Personnel Development & Organization, Montreal
P. Williams	– Labour Relations Assistant, Montreal

And on behalf of the Union:

F. R. Oliver	– General Chairman, Toronto
N. A. Levia	– Vice Chairman, Montreal
R. A. Bennett	– Secretary, Sarnia
R. R. Byrnes	– Local Chairman, Capreol
R. W. Briscoe	– Grievor, Capreol

AWARD OF THE ARBITRATOR

The Joint Statement of Issue sets out four grounds of appeal. I shall deal with each in turn. First, it is said that the investigation was not a proper one having regard to article 153 of the collective agreement. In particular, reference should be made to Article 153.2, which provides as follows:

> **153.2** The employee may select a fellow employee to appear with him at the investigation, and he and such fellow employee will have the right to hear all of the evidence submitted, and will be given an opportunity through the presiding officer to ask questions of witnesses whose evidence may have a bearing on his responsibility, questions and answers will be recorded. The employee will be furnished with a copy of his statement taken at the investigation.

The grievor attended a formal investigation on two occasions, along with a fellow employee. He was given the opportunity to question the witnesses, and certain witnesses were called at his request, to be questioned by him. With respect to certain witnesses, the Company put forward, at the investigation, letters or statements which they had made. These witnesses were (rather reluctantly on the Company's part, it seems) called for questioning by the grievor, but their original evidence was received in written form, and not *viva voce*. This, the Union argues, did not give the grievor the right to "hear" all of the evidence submitted, which right he is entitled to under Article 153.2.

In my view, this objection is not well founded. An investigative "hearing" of this sort means an enquiry in the general sense, at which evidence may properly be received through any of the appropriate senses. The gist of the provision is that the information on which the Company purports to rely be available also to the grievor, so that he may properly analyze it and if necessary attack its accuracy or reliability. The submission of statements, together with the subsequent opportunity to examine the individuals concerned, satisfies the requirement that the grievor have the opportunity to "hear" the evidence against him. This first ground of appeal fails.

Second, it is said that the grievor had not been called in accordance with Article 131.1 of the collective agreement. That Article is as follows:

> **131.1** Employees will be called as far as practicable 2 hours in advance of the time required to report for duty, except in cases of emergency. Where telephone service is available employees will be called by telephone except that other means will be used in cases of telephone system failure when the calling distance is not over 2 miles from the crew office. Other means may also be used when employees are accommodated in facilities provided by the Company. If other than local telephone is used, employees will be required to accept long distance charges. In the application of this paragraph, if employees in assigned service desire to be called on a regular basis, they will so request in writing.

This ground of appeal presumably relates to the charge that the grievor was late reporting for duty. Certainly the grievor was "subject to duty", and he did report, so that if he was under the influence of alcohol, he would have been in violation of Rule G.

In fact, the grievor had left the location where he could be expected to receive a call. His own statement is that he was in one of the rooms of a hotel in Hornepayne at the time when he could reasonably have expected a call. His assignment was a regular assignment and he knew that it was normal procedure for him to show up for work at the time required when his train was on time, or to call and inquire. He did neither. He relied, it seems, on some rumour that he heard that the train was late. In the circumstances, I would find that the grievor was in fact late in reporting for duty. In any event, as I have noted, he was subject to duty at the material times. The second ground of appeal fails.

The third ground of appeal is that the grievor did not violate Rule G. It was objected by the Union that the Company had charged the grievor with being "unfit for duty" and that this did not effectively advise him of the charge against him. It is very obvious from the circumstances in which the grievor was taken out of service, and the grievor was well aware, that he was considered "unfit for duty" because he was considered to be in violation of Rule G.

In support of the Company's contention that the grievor had been drinking, and reported for duty while under the influence of alcohol is, primarily the evidence of Mr. Deccicio and Mr. Campbell. The Union contends that the statement of Mr. Campbell should not be received, as it was not, it appears, presented to the grievor at the investigation. There was put to the grievor, at his investigation, a statement by Mr. Campbell to the effect that the grievor had admitted to having had "a lot to drink" (or words to that effect) the previous evening. If the whole

statement by Mr. Campbell was not presented at the investigation, however, then I think it cannot now be relied upon. The statement of Mr. Deccicio is, however, properly before me, as is his uncontradicted *viva voce* evidence. That is to the effect that the grievor, on reporting for duty, exhibited the classic symptoms of being under the influence of alcohol: his gait and his gaze were unsteady, his voice was slurred, and his breath smelled of alcohol – not the stale smell of alcohol consumed the night before, but that of alcohol consumed that day. There is also evidence that in a number of respects (difficulty in opening a lock; production of the wrong documents; slipping on the steps to the baggage car), the grievor's actions were those of a person under the influence. No one of these matters, taken alone, would be sufficient proof of drinking. Taken as a whole, however, the evidence requires the conclusion, on the balance of probabilities, that the grievor had been drinking.

There are, on the other hand, statements by the various persons with which the grievor had been in contact that day, to the effect that he had not been drinking, or did not appear to have been drinking. In many cases, the persons who made these statements were not available for cross-examination by the Company. Perhaps the most significant of these is a statement said to be that of a Dr. Malcolm, that he "did at no time see R. Briscoe or McCue consuming alcohol drinks on the morning of December third". McCue, it may be noted, is a fellow employee, a trainman, who had admittedly consumed alcohol while subject to duty that day. He was discharged, but has subsequently been reinstated. While there is some evidence that the grievor spoke to Dr. Malcolm in the morning of that day, he spent most of the time between noon and the time he reported for work in Dr. Malcolm's hotel room, along with certain others, discussing some project in which the doctor appears to have been interested at Hornepayne. Dr. Malcolm's statement does not refer to this period of the day in question.

There is, then, direct evidence to support the conclusion that the grievor was under the influence of alcohol (and thus in an unfit condition) when he reported for work. The grievor had, in the course of the investigation, ample opportunity to question the witnesses whose evidence was material. The statements submitted on the grievor's behalf, tending to show that he did not consume alcohol prior to reporting, do not fully cover the period in question. There is, as well, evidence of a blood test which the grievor took later on on the day in question and which appears to indicate a high alcohol content in the blood. The circumstances surrounding the taking of the blood test and its analysis are not, however, such as to confirm the reliability of that evidence, and I do not give it the weight it might otherwise have had. On all of the evidence, however, it is my conclusion that the grievor was in violation of Rule G at the material times, that he was thus unfit for duty and so subject to discipline. The third ground of appeal fails.

The fourth ground of appeal relates to the severity of the penalty imposed. I think it is clear from earlier cases that had the grievor been an engineer or conductor, he would properly be subject to discharge, and it would be difficult to imagine what considerations might lead to a reduction of the penalty in such a case. Here the grievor was a member of a train crew, although as a baggageman his responsibilities were not as great as those of a conductor or engineer. It is significant that, pursuant to its own policy, the Company, after what was, in effect, a six-month suspension, reconsidered the case of Mr. McCue, who had been discharged at the same time as the grievor. Mr. McCue was subsequently reinstated. The grievor was not, although it is not clear why he was considered not to meet the criteria of the reinstatement policy. The application of such policy, of course, is not in question in these proceedings.

In the case of a member of a train crew other than an engineer or conductor, there is perhaps somewhat more room for the exercise of discretion with respect to the appropriate penalty in a case of Rule G violation. The grievor is an employee of some thirty-four years' seniority. He is married with one child. He saw service with the Navy during the war. It appears that he has been disciplined on three previous occasions, twice in 1973, and once in 1967. There is no evidence of any recent misconduct, and no evidence of an "alcohol problem", beyond that relating to the day in question. This background, particularly that of length of service, tells in the grievor's favour. It must, unfortunately, tell against him, in view of my finding that he was in violation of Rule G, that the grievor did not make a full and frank disclosure to the Company, and seems not to have been particularly co-operative in the investigation, even though, up to a point, one can sympathize with his attitude.

In all of the circumstances of the particular case, it is my view that the penalty of discharge was too severe. Certainly a substantial period of suspension was in order, and in view of what I have said in the preceding paragraph of this award, I think that while an award of reinstatement should be made, this is a case in which the grievor is not entitled to compensation. It is therefore my award that the grievor be reinstated in employment forthwith, without loss of seniority, but without compensation for loss of earnings.

(signed) J. F. W. WEATHERILL
ARBITRATOR