CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2609

Heard in Montreal, Thursday, 13 April 1995

concerning

CANADIAN PACIFIC RAILWAY LIMITED

and

CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS (BROTHERHOOD OF LOCOMOTIVE ENGINEERS)

DISPUTE:

The dismissal of Locomotive Engineer S.L. Hébert, Montreal, Quebec.

JOINT STATEMENT OF ISSUE:

Locomotive Engineer S.L. Hébert was dismissed from the Company's service for a violation of Canadian Rail Operating Rules, Rule G, Train 290, Thursday, March 10. 1994.

The Union contends that **1.)** Locomotive Engineer Hébert did not consume intoxicants while subject to duty; **2.)** The evidence and procedure submitted does not establish a violation of Rule G; and **3.)** The investigation into this incident was not conducted in a fair and impartial manner.

The Union has requested that Locomotive Engineer Hébert be reinstated into Company service without loss of seniority, and with full compensation for wages and benefits for all time subsequent to his dismissal.

The Company has declined the Union's request.

FOR THE COUNCIL:	FOR THE COMPANY:
(SGD.) R. S. MCKENNA	(SGD.) R. WILSON
GENERAL CHAIRMAN	FOR: GENERAL MANAGER, IFS

There appeared on behalf of the Company:

R. J. Martel	– Labour Relations Officer, Toronto
R. E. Wilson	– Manager, Labour Relations, Toronto
J. Cuin	– Manager, Operations, Montreal
J. Blotsky	– Acting Trainmaster, Montreal
M. Lorrain	– Train Yard Coordinator, Montreal

And on behalf of the Council:

R. S. McKenna	– General Chairman, Ottawa
T. G. Hucker	– National Legislative Representative, Ottawa
G. Hallé	– Canadian Director, Ottawa
B. Brunet	– Vice-General Chairman, Montreal
L. O. Schillaci	– General Chairperson, CCROU(UTU), Calgary
S. Hébert	– Grievor

AWARD OF THE ARBITRATOR

As a preliminary matter the Council takes the position that the grievor was not afforded a fair and impartial investigation in keeping with the requirements of article 19 of the collective agreement. Specifically, it takes exception to the fact that the grievor or his union representative were not present during the taking of a statement from Machinist Pierre-Yves Reuze.

At the time in question Mr. Reuze was a machinist temporarily set up as a dispatch supervisor. In that capacity he observed the grievor during the course of his tour of duty on the evening of March 10, 1994. Normally, as a supervisor, Mr. Reuze would write a narrative report of his observations, as would other supervisors involved in the case. Those reports would, thereafter, be included in the disciplinary investigation documentation, and copies of them would be provided to the grievor and his union representative at the time of the disciplinary investigation. Indeed, the record in the instant case discloses a number of such narrative statements from other supervisors who were involved in the incident relating to Mr. Hébert. No exception is taken with respect of the use of them.

It appears, however, that as a newly promoted temporary supervisor, Mr. Reuze was uncomfortable with the prospect of drafting a narrative report. In light of his concerns, the Company decided to conduct a simple question and answer interview with Mr. Reuze to record his observations. The statement so taken was provided to the Council at the disciplinary investigation, and indeed Mr. Reuze was summoned to attend and be cross-examined by the Council. It appears that he did so in the company of a IAM union representative. Article 19 of the collective agreement provides, in part, as follows:

> **19(a)** When an investigation is to be held each engineer whose presence is desired will be notified at to the time, place and subject matter.
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> **19(b)** An engineer, if he so desires, may have an accredited representative of the Brotherhood assist him. The engineer will sign his statement and be given a carbon copy of it.
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> **19(c)** If the engineer is involved with responsibility in a disciplinary offence, he shall be accorded the right on request for himself or an accredited representative of the Brotherhood, or both, to be present during the examination of any witness whose evidence may have a bearing on the engineer's responsibility, to offer rebuttal thereto, and to receive a copy of the statement of such witness.
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> **19(d)** An employee will not be disciplined or dismissed until after a fair and impartial investigation has been held and until the employee's responsibility is established by assessing the evidence produced and no employee will be required to assume this responsibility in his statement or statements. The employee shall be advised in writing of the decision within 20 days of the date the investigation is completed, i.e., the date the last statement in connection with the investigation is taken except as otherwise mutually agreed.

The Council submits that the Company has violated the requirements of paragraph (c) of article 19, in that neither Mr. Hébert nor his union representative were present during the examination of Mr. Reuze. The Arbitrator can understand the concerns which the Council raises, having particular regard to the fact that Mr. Reuze was accompanied by another union's representative and appeared, by all outward indications, to be another unionized employee when he attended at the disciplinary investigation to be cross-examined. However, that is not an accurate perception of what transpired. At the time of his observations of the grievor, and for the purposes of the ensuing disciplinary investigation, Mr. Reuze was clearly a supervisor exercising managerial authority. He would, in the normal course, have provided a narrative written report of his observations, a practice accepted by the Council. However, he preferred to record his report in the form of recorded questions and answers. A text of the report of Mr. Reuze so gathered was provided to the grievor and his Council representative at the outset of his disciplinary investigation, and they had the fullest opportunity to cross-examine him on its contents.

In the Arbitrator's view there has, in the circumstances, been substantial compliance with the requirements of article 19 of the collective agreement. By the parties' own practice, supervisors are not examined during the course of an employee's disciplinary investigation. Their statements are gathered in the form of written reports, the content of which is made available at the investigation. The fact that Temporary Supervisor Reuze chose to record his report in a question and answer form, rather than a narrative form, does not change the substance of what transpired. Nor

does the fact that he attended the grievor's investigation hearing accompanied by his own union representative, at a time when he still held seniority as a machinist. In the result, the Arbitrator cannot sustain the objection taken by the Council with respect to the alleged violation of article 19 of the collective agreement. Specifically, there was no violation of the spirit or intention of sub-paragraph (c), nor of the standard of a fair and impartial investigation found within sub-paragraph (d) of that article.

When regard is had to the merits of the grievance, the Arbitrator has some difficulty with the grievor's case. The statement of Temporary Supervisor Reuze relates that on the evening of March 10, 1994 he was in the process of attaching chains between the units of the grievor's consist when he met Mr. Hébert, who asked him to remove snow on the pilot at the rear of the last unit. Mr. Reuze relates that he found the grievor's speech to be slurred, which caused him to immediately notify Assistant Manager Ken Arbuckle. When Mr. Arbuckle arrived on the scene Mr. Hébert asked him to fix the left side ditch light of a locomotive unit. Mr. Arbuckle states: "At this time I noticed he was talking incoherently and his breath had an odour of alcohol, his eyes seemed glazed but I could not tell if they were bloodshot because it was dark outside."

Mr. Arbuckle proceeded to contact Assistant Manager, Operations J. Vromet. Shortly thereafter Mr. J. Vromet and Mr. J. Blotsky, Acting Assistant Superintendent, were sent by Acting Superintendent J. Serena to remove the grievor and his crew from their train and bring them to the yard office. When Mr. Hébert had returned to the office Mr. Blotsky interviewed him. He relates that he smelled a distinct odour of alcohol on the grievor, that his eyes were bloodshot and that at times he was having difficulty understanding what was being said to him.

After Mr. Blotsky asked the grievor if he wished union representation, which the grievor declined, Mr. Blotsky asked if he would be willing to undergo a urine alcohol test, to which Mr. Hébert responded in the affirmative. Mr. Blotsky then initiated contact with the Medisys Clinic to arrange for the test. It appears that slightly more than an hour later the clinic technician arrived to collect the urine sample. At that point the grievor was again encouraged to contact his union representative, and finally agreed to do so. By telephone his advisor, Local Chairman B. Brunet, counselled the grievor not to give a urine sample until he arrived. Upon Mr. Brunet's arrival, within five to ten minutes, the Company was advised that the grievor declined to take a urine test and that a breathalyzer test should be administered instead. Concerned that the further delay which might be involved in attempting to obtain police assistance for a breathalyzer test could jeopardize the reliability of any findings, after obtaining advice from two labour relations officers in Toronto, Mr. Blotsky advised that the Company's policy in Montreal was to administer urine testing, and that it would not agree to a further delay to conduct a breathalyzer test. The grievor continued to decline, however, and no test was administered. The grievor was then held out of service pending a formal investigation.

The evidence further discloses that the grievor was observed by Assistant Manager, Operations J. Vromet. Mr. Vromet states that he had a cold at the time and could not smell anything, and so could not confirm the possible presence of alcohol on Mr. Hébert's breath. He states, however, that he noticed that the grievor's eyes were bloodshot and that his speech was incoherent.

Statements obtained by the Company from the grievor's fellow crew members, Conductor Y. Perron and Trainman A. Poitras, were also placed before the Arbitrator. Mr. Perron relates that he was in contact with the grievor on the first floor of the departure office, in the company of Trainmaster Lorrain, although he had not been with him in the locomotive. Mr. Perron relates that he did not smell alcohol on the grievor and that he considered him to be acting him in a normal manner. Mr. Poitras states that he did not smell alcohol on the grievor when they were on the locomotive, although he notes that he was on the front end of the leading unit to look after the switches while they made a short movement within the yard. He also states that Mr. Hébert's behaviour appeared to be normal.

There is an obvious difference in the evidence tendered through management's witnesses and the evidence of the grievor's fellow crew members. In considering that difference it is important, I think, to appreciate that neither Mr. Perron nor Mr. Poitras was aware of a concern as to the possible inebriation of Mr. Hébert when they casually observed him during the commencement of their tour of duty, or at any time prior to the separation of the crew for questioning in the General Yardmaster's office. On the other hand, following the initial concerns raised by Mr. Reuze, Supervisors Blotsky and Vromet were alerted to the possibility that Mr. Hébert was intoxicated, and engaged in conversation with him for the specific purpose of making a determination in relation to that concern. In the circumstances, the Arbitrator is satisfied that the observations of the three supervisors, and their corresponding evidence, are to be preferred to the evidence given by Mr. Hébert's fellow crew members.

A further factor to be considered is the impact, if any, on the grievor's initial willingness and later refusal to undergo a urine test, and his apparent ultimate willingness to undergo only a breathalyzer test. Viewed from one perspective, it can be argued that the willingness at first to undergo a urine test, and later a breathalyzer test, should support inferences of innocence on the part of the grievor. Viewed differently, however, it can also be argued that his reversal of position, and subsequent refusal to take a urine test when the clinic technician was present, coupled with the request for a breathalyzer test which could cause an indefinite delay in the taking of any test, suggest a course of conduct calculated to delay, or entirely avoid a test, such as to give rise to an inference against the grievor. In the Arbitrator's view the evidence in respect of the possible use of a urine test or breathalyzer test is equivocal and inconclusive in the case at hand. It is, moreover, unnecessary given my finding that the observations of Temporary Supervisor Reuze and Supervisors Blotsky and Vromet are credible and persuasive. I am satisfied, on the balance of probabilities, that Mr. Hébert presented himself for work on March 10, 1994 under the influence of alcohol in violation of General Rule G. If it were necessary to make a finding, the Arbitrator would be inclined to conclude that Mr. Hébert's insistence on a breathalyzer test when a urine testing technician was already present would support an inference adverse to the grievor. Finally, for the purposes of clarity, given the safety sensitive nature of the Company's undertaking as a common carrier and the grievor's position as a locomotive engineer, nothing herein should be interpreted to suggest that the Company did not have reasonable and probable grounds to require the grievor to take a test, that a urine test was unreasonable in the circumstances or that the employee had a right to insist on a breathalyzer test in preference to a urine test. The prospect of an employee assuming the care and control of a train's movement when under a reasonable apprehension of intoxication is extremely serious. If it was necessary to so find, I would conclude that the grievor's ultimate refusal to submit to a urine test requested by the Company was at his peril, and could, absent any other compelling explanation or mitigating evidence, support inferences adverse to the grievor with regard to his physical condition at the time.

The issue next to be determined is the appropriate measure of disciplinary penalty. Needless to say, the violation of Rule G by a person occupying the safety sensitive position of a locomotive engineer is among the most serious of disciplinary offences, particularly where it involves being under the influence of alcohol while on duty.

It is common ground that the grievor is an alcoholic. He was previously discharged in 1985 for a violation of UCOR General Rule G, although he was reinstated subject to certain conditions in March of 1986. The record discloses, therefore, that the Company made previous efforts to accommodate Mr. Hébert's condition as an alcoholic, having returned him to employment in 1986, on condition that he pursue an ongoing rehabilitation programme. In this case, concern arises not only because of the recidivist nature of the incident giving rise to the instant grievance, but perhaps more fundamentally because there is no indication in the record of an admission by the grievor that he did consume alcohol, or that his condition as an alcoholic contributed to the events of March 10, 1994. In the circumstances the Company is entitled to have reasonable and substantial concerns for the viability of Mr. Hébert's continued employment. Even though the grievor's long service, dating from 1972, might otherwise weigh as a mitigating factor, the Arbitrator is compelled to the unfortunate conclusion that the overwhelming thrust of the evidence supports the decision taken by the Employer, and no basis is made out for a substitution of penalty.

For all of the foregoing reasons the grievance must be dismissed.

April 20, 1995

(signed) MICHEL G. PICHER
ARBITRATOR