CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2868

Heard in Montreal, Thursday, 12 June 1997

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

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

DISPUTE:

On April 2, 1997, Locomotive Engineer W.A. Bent was discharged from Company service effective December 31, 1996 for violation of CROR Rule G.

JOINT STATEMENT OF ISSUE:

On December 31, 1996, Locomotive Engineer W.A. Bent reported for duty for relief train 390 at Hamilton, Ontario at 0010 hours. The Assistant Superintendent at Hamilton was advised by a fellow employee that Locomotive Engineer Bent did not appear to be in a fit condition for work. In conducting the preliminary investigation, Locomotive Engineer Bent was removed from service, due to an alleged violation of CROR Rule G.

Formal statements were completed and Locomotive Engineer Bent was subsequently dismissed from the Company's service for the violation of CROR Rule G.

The Brotherhood contends that the discipline is not warranted and that the Company violated the collective agreement including articles 71.1, 71.2, 71.7 and Addendum 48 of Agreement 1.1. The Brotherhood further contends that Mr. Bent was prejudged and that all the evidence was not taken into account in this instance.

The Brotherhood requests that the grievance be allowed; Mr. Bent reinstated with no loss of wages or service, or in the alternative, such other remedy as the Arbitrator may see fit.

The Company has declined the Brotherhood's appeal.

FOR THE COUNCIL:	FOR THE COMPANY:
(SGD.) C. HAMILTON	(SGD.) A. E. HEFT
GENERAL CHAIRMAN	FOR: ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

J. C. McDonnell	– Counsel, Toronto
D. T. MacKenzie	– Labour Relations Officer, Toronto
B. D. Taylor	– Relief Manager, Corridor Operations, Toronto
J. A. Malgo	– Assistant Superintendent, Niagara Falls
D. P. Anderson	– Assistant Superintendent, Oshawa
W. J. Trapler	– Special Agent, CN Police, Hamilton

And on behalf of the Council:

H. F. Caley	– Counsel, Toronto
C. Hamilton	– General Chairman, Toronto
Wm. A. Bent	– Grievor

AWARD OF THE ARBITRATOR

It appears that on December 30, 1996 the grievor received a call at 04:30, resulting in his commencing work at 07:15 on Train A560. He completed his work on that train at 11:30, at which time he booked six hours' rest. According to Mr. Bent's evidence, he consumed one bottle of beer at approximately 17:00, departing shortly thereafter to accompany his son to a local arena.

At approximately 22:30 Mr. Bent received a call from the Company to report to work on an assignment which commenced at 00:10 on December 31, 1996. After reporting for duty, he was transported by taxi with his work mate, Conductor Latour, bound for Paris, Ontario where they were to assume their relief assignment. Unbeknownst to the grievor, Conductor Latour had indicated to supervisors that he had concerns about Mr. Bent's condition. This caused Assistant Superintendent Donald Anderson to instruct Assistant Superintendent Doug Taylor to deal with the matter. Although it is not clear, it appears that either Mr. Anderson or Mr. Taylor directed the taxi carrying the grievor to Paris to return to the Hamilton Yard. Upon the grievor's return, Mr. Taylor and Assistant Superintendent John Malgo met with him in the yard office. Both Mr. Taylor and Mr. Malgo relate that they could detect an odour of alcohol on the grievor's breath. They also report that his eyes were red. There is no suggestion in the evidence that the grievor had any difficulty with his speech or with his gait and movements. When asked, Mr. Bent related to the supervisors that he had consumed a single bottle of beer at approximately 17:00 hours.

It appears that CN Police Officer Walter Trapler was called to the yard office, where he arrived at approximately 02:35. Sometime thereafter the grievor was asked if he was prepared to undergo a breathalyser test, to which he responded that he was. A breathalyser apparatus was brought to the premises by the Hamilton Regional Police and, at approximately 04:25 Officer Trapler administered the breathalyser test to the grievor. The breathalyser registered 0.00.

The Company does not assert that the grievor was under the influence of alcohol or intoxicated while on duty. Rather, it maintains that he violated Rule G by consuming alcohol while subject to duty. In **CROA 2054** the following comment appears:

> There can be little doubt that if the evidence disclosed that the grievor was consuming alcohol in the knowledge that he was to commence work within a few short hours he could be properly chargeable with a violation of Rule G (see **CROA 557, 629, 1074** and **1852**). The issue of whether an employee has used intoxicants while subject to duty is, as noted in the above arbitrations, a difficult one. It seems clear from the cases, however, that an employee who consumes alcohol in circumstances where he or she is "expected to be on duty within the period during which (the employee) might be affected thereby" (**CROA 557**), violates the rule. …

(*See also* **CROA 2167**.)

Bearing in mind that the Company has the burden of proof in this matter, what does the evidence disclose? By his own account, Mr. Bent consumed a single bottle of beer in the late afternoon, at or about 17:00 on December 30, 1996. He was not in fact called for duty until 22:24, when he was ordered for 00:20. Apart from a residual odour of alcohol on his breath, there were no outward signs of intoxication, save for the possible redness of the grievor's eyes, a condition which might well be consistent with the long hours he had worked in the previous day. As noted above, whatever alcohol he may have consumed before reporting for work, its quantity was such that it was fully metabolized and there was no trace of alcohol in his blood when the breathalyser test was administered.

In the most technical sense, in the case at hand, it might be argued that the grievor would have offended against Rule G had he accepted a call for duty at or shortly after 17:00 hours. In that circumstance, however, it is not disputed that the grievor would have the option of booking unfit for duty if he felt that he was, in the words of Arbitrator Weatherill, during the period where he "might be affected thereby".

Great care must be applied in considering whether an employees who is subject to call is to be considered as subject to duty for the purposes of Rule G. In **CROA 557** where it was asserted that the grievors violated Rule G by consuming alcohol during a period of time they might have received a call, although the expectation was that they would be called to work only the following morning, Arbitrator Weatherill commented, in part:

> The question whether or not the grievors were "subject to duty" is a difficult one. The expression does not appear to be defined in the Uniform Code. The grievors might, as they acknowledged,

> have received a call at any time, and in this sense they were "subject to duty". On the other hand, their status was certainly one of being "off duty" at the material times. Once they had received and accepted a call, then I think it is clear they would be "subject to duty". But it is by no means clear that, having gone off duty, and having no reason to expect a call before the morning, they should be considered as subject to duty and thus prohibited from drinking.
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> **…**
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> In my view the four grievors were not "subject to duty" within the meaning of Rule 'G'. While a definitive interpretation of that phrase should not be expected in a single case, it is my view that it should be read in view of the obvious purpose of the rule as a whole, namely to protect persons and property from the dangers of the operation of railway equipment by those not in a fit condition to do so. Thus employees who are on duty, or who may be expected to be on duty within the period during which they might be affected thereby, must not consume intoxicants or narcotics. An employee who had accepted a call would, in my view, clearly be "subject to duty" and there may well be other circumstances where that status would apply. The mere fact, however, that an unanticipated call might be made at any time would not, of itself, make an employee subject to duty within the meaning of Rule 'G'. Here, I find that the grievors were not subject to duty in that sense, and that they were not in fact in violation of Rule 'G'.

In my view the instant case falls generally within the principles discussed above. There is, very simply, no evidence from which the Arbitrator can responsibly conclude that the grievor consumed alcohol in a quantity or at a time when he was subject to duty in the sense that he had reasonable grounds to believe that his physical condition at work would be affected by his consumption of alcohol. Clearly, there was no consumption of alcohol by the grievor at or after the time he accepted his call to work, or indeed in the hours immediately preceding his acceptance of the call. In these circumstances I must conclude that the Company has not discharged the burden of establishing, on the balance of probabilities, that Locomotive Engineer Bent was in violation of Rule G.

For the foregoing reasons the grievance is allowed. The Arbitrator directs that the discipline assessed against the grievor be stricken from his record, and that he be reinstated into his employment without loss of seniority and with compensation for all wages and benefits lost.

June 20, 1997

(signed) MICHEL G. PICHER
ARBITRATOR