CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3279

Heard in Montreal, Tuesday, 10 September 2002

concerning

CANADIAN NATIONAL TRANSPORTATION LIMITED

and

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA)

DISPUTE:

The suspension and subsequent discharge through termination of contract of Mr. Jamie Merrylees for alleged violation of CN's Drug and Alcohol Policy.

JOINT STATEMENT OF ISSUE:

On March 1, 2002 Mr. Denis Lupien, the Manager of Road Operations for Road Railer detected what he perceived to be the odour of alcohol emanating from Mr. J. Merrylees an owner-operator for Canadian National Transportation Ltd. The CN Police were contacted concerning the matter and two constables were sent to investigate.

The CN police officers also detected an odour of alcohol; however, they did not find Mr. Merrylees suffering from slurred speech, blurred or glossy eyes or other indications of impairment. Mr. Merrylees voluntarily agreed to provide a sample of his breath for evaluation. Two samples were taken with an "Alco-Sensor" approximately 15 minutes apart and both samples registered "fail". Mr. Merrylees was suspended from service and escorted home. The Company informed Mr. Merrylees on March 7, 2002 that his contract was terminated as a result of a violation of CN's Drug and Alcohol Policy.

It is the Union's contention that the Company has failed to establish a violation of the Drug and Alcohol Policy and has failed to establish impairment on the part of Mr. Merrylees. Notwithstanding the above it is also the Union's contention that the discipline was too severe and progressive discipline was not used. The Union requests in resolve of this matter that Mr. Merrylees be reinstated and made whole for all losses as a result of his wrongful discharge.

It is the Company's contention that Mr. Merrylees was in violation of the Drug and Alcohol Policy as a result of being on Company property while under the influence of alcohol and that discharge was the appropriate penalty.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) J. R. MOORE-GOUGH	**(SGD.) D. BRODIE**
NATIONAL REPRESENTATIVE	**FOR: DIRECTOR, LABOUR RELATIONS, CNR**

There appeared on behalf of the Company:

D. S. Fisher	– Director, Labour Relations, Montreal
K. Madigan	– Vice-President, Labour Relations – North America, Montreal
D. Lupien	– Manager, Road Operations, CNTL
M. Peterson	– Manager, Road Operations, CNTL
F. Morgan	– Constable, CN Police

And on behalf of the Union:
J. Moore-Gough – National Representative, Chatham

AWARD OF THE ARBITRATOR

This grievance involves the discharge of an owner-operator tractor trailer driver for reporting to work under the influence of alcohol.

There is little dispute about the facts. On March 1, 2002, when the grievor, Mr. J. Merrylees, reported for work Manager of Road Operations, Mr. Denis Lupien, detected an odour of alcohol emanating from him. He requested the grievor to accompany him to a private office where Manager of Road Operations, Mr. Martyn Peterson, confirmed that he also smelled an odour of alcohol coming from Mr. Merrylees. When Mr. Peterson asked the grievor whether he had been drinking he responded that he had from ten to twelve beers on the evening prior, between 18:30 on February 28 and 01:30 on March 1, 2002. He related that he woke up at approximately 07:00 and arrived at work at 08:15 on the morning of the 1st. The grievor then agreed to the taking of a breath sample by two CN police officers who had arrived on the premises in response to the request of the two supervisors. The road side Alco-Sensor screening device registered a blood alcohol reading of 1.0 milligrams of alcohol per 100 millilitres of blood, a rate clearly in excess of the amount permissible under **Criminal Code of Canada**. The grievor was then removed from service and on March 7, 2002 was notified of the termination of his owner-operator contract for the violation of the Company's policies on workplace alcohol and drug abuse.

The representative of the Union asserts that the Arbitrator has no jurisdiction to find that the grievor was in violation any Company policy. He bases that submission on the fact that the grievor is not a safety sensitive employee. In that regard he directs the Arbitrator to a settlement reached between the Union and Canadian National Railway Company, in the form of a letter of understanding dated April 29, 2002. That letter of understanding provides a definition of safety-sensitive positions within CN, and does not include the owner-operators of tractor trailers.

The Arbitrator cannot accept that submission. There is no evidence before the Arbitrator to confirm that the settlement reached between CN and the Union had any application to the separate corporate entity which is the employer in the case at hand. Canadian National Transportation Ltd. is the employer privy to the collective agreement which is before me in this case. I am without any evidence to confirm that that separate company is bound by the settlement reached between CN and the CAW concerning the definition of safety-sensitive employees, or is indeed bound by CN's Drug and Alcohol Policy. In the Arbitrator's view the more appropriate approach to the case at hand is to deal with the issue of whether, as a general matter, the Company had just cause to terminate the grievor under the provisions of its collective agreement, given the fact that he reported for work and was prepared to operate a tractor-trailer while he had a blood alcohol content which was in excess of the rate acceptable under the **Criminal Code of Canada**, and which would be generally viewed as reflecting the impairment of his faculties by reason of the ingestion of alcohol.

Nor is the Arbitrator persuaded by the submission of the Union's representative that the grievor did not have the normal outward signs of alcohol inebriation, such as an unsteady gait, slurred speech or glassy eyes. It does not appear disputed that he performed reasonably well in a physical sobriety test to which he was subjected by the CN constables. For reasons elaborated within the jurisprudence, the subjectivity of evidence concerning the physical observations of persons suspected to be under the influence of alcohol are not to be preferred to the more objective data obtained from a breathalyzer test.

Nor does the Arbitrator have any difficulty concluding that a tractor trailer driver who is called upon to operate heavy road equipment works in a safety sensitive position. That is the learning of many prior arbitration awards. Those awards have also confirmed that, as a general rule, within the trucking industry discharge is the normal disciplinary sanction for driving while impaired by alcohol. The thrust of the jurisprudence is, in my view, well captured by the following passage in the decision of Arbitrator MacDowell in **Re Inter-City Truck Lines (Canada) Inc. and Teamsters Union, Local 880** (1988) 32 L.A.C. (3d) 370 (MacDowell):

> Drivers in the grievor's position are not subject to ongoing supervision as employees in a plant or warehouse might be. The employer must, of necessity, trust its drivers to obey the rules – particularly where, as here, the grievor is working on a shift and driving from a terminal where there are no managerial personnel present. The reality of the drivers' environment requires strict adherence to a clear and unequivocal rule: persons who abuse alcohol while at work or undertake

> their duties while impaired are subject to discharge. It is a rule which is simple, recognized by the collective agreement and admits no exceptions. It is also consistent with the established norms in the trucking industry where it is well recognized that drivers who drink on the job or purport to carry out their duties while under the influence of alcohol, do so at the risk of summary discharge. Drinking is a "cardinal sin" which renders an individual subject to "industrial capital punishment". It is as serious as a major theft – in fact, perhaps more serious because of the potential for physical harm to entirely innocent third parties. It must be remembered that the grievor is not a clerk who returns to his desk, inebriated, from a long lunch. The grievor is a professional truck driver, charged with the responsibility of driving a vehicle and cargo weighing more than 40 tons, to its destination, safely.
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> In the final result, I do not think that it matters very much whether the grievor consumed alcohol while on duty as the Company concluded based upon his representations (which he now says were untrue) or that he was quite impaired while driving and prepared to continue to drive in that condition. In either case, the grievor's conduct must be considered extremely serious, and "just cause" for discharge.
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> I am not unmindful of the hardships which the loss of the grievor's job may cause him. But, I am constrained to note that, in large measure, he has brought that hardship on himself. If, on one's own time, one indulges in alcohol, a board of arbitration has no right to sit in judgement. But once a driver puts at risk himself, his family, the company and its property, and members of the public who share the highway with him, he forfeits much of the sympathy to which he might otherwise have been entitled. He is jeopardizing the lives of innocent third parties, engaging in conduct which society itself has judged to be criminal and violating a well-known and firmly established norm in the trucking business. That is why arbitrators have, almost unanimously, treated impaired driving as just cause for discharge.
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> I have carefully considered the circumstances of this case, the way in which the industrial community views such matters, the overwhelming opinion of arbitrators on matters of this kind, and the serious consequences to the grievor arising from an acceptance of his former employer's position. I would be less than frank if I did not indicate some sympathy for the grievor's position and the consequences which will inevitably flow from my sustaining his discharge. However, having regard to the well established arbitral jurisprudence and the accepted norm applicable to professional truck drivers, I am not persuaded that I should interfere with the Company's decision.

See also **Re Premier/KVN Concrete and Teamsters Union, Local 230** (1993) 31 L.A.C. (4th) 146 (Gray).

When the principles canvassed are applied to the case at hand I can see little reason to disturb the decision of discharge made by the Company. The grievor did not appear at the hearing, and no evidence in respect of mitigating circumstances, medical or otherwise, was adduced in evidence. There is nothing in the material from which the Arbitrator can conclude that the grievor's actions were prompted by a medical condition or disability, or that he has acknowledged the seriousness of his actions. Nor can Mr. Merrylees claim surprise in the disciplinary result. Schedule C of the owner-operator's standard contract contains, within paragraph 5, an express provision confirming that the penalty for being under the influence of alcohol is "immediate termination".

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

September 13, 2002

(signed) MICHEL G. PICHER
ARBITRATOR