CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2209

Heard at Montreal, Thursday, 14 November 1991

concerning

CANADIAN PACIFIC LIMITED

and

UNITED TRANSPORTATION UNION

DISPUTE:

Discipline of 30 demerits assessed Mr. C.F. Deegan of Smiths Falls for conduct unbecoming an employee of C.P. Rail as evidenced by your conviction October 29th, 1990, of possession of a narcotic at Smiths Falls, Ontario, April 12th, 1990.

JOINT STATEMENT OF ISSUE:

On October 29th, 1990, Mr. C.F. Deegan, conductor/engineer, was convicted for possession of a narcotic at Smiths Falls on April 12th, 1990. Mr. Deegan had entered a ``not guilty" plea and did not appeal his conviction.

After a Company investigation, Mr. Deegan was assessed 30 demerits. The Union contends that Mr. Deegan was not subject to duty has a good clear record with the Company and that there was enough doubt in this case that Mr. Deegan should have been given the benefit of it and no discipline should have been assessed.

The Union further states that the conviction was not appealed for financial reasons.

The Union requests that all discipline be removed.

The Company declined the Union's request.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) J. R. AUSTIN	(SGD.) M. G. MUDIE
GENERAL CHAIRPERSON	GENERAL MANAGER, OPERATIONS & MAINTENANCE EAST

There appeared on behalf of the Company:

J. S. McLean	– Manager, Labour Relations, Toronto
R. P. Egan	– Labour Relations Officer, Toronto
G. Chehowy	– Labour Relations Officer, Montreal

And on behalf of the Union:

J. R. Austin	– General Chairman, Toronto
J. Noël de Tilley	– Vice-General Chairman, Montreal

AWARD OF THE ARBITRATOR

The Arbitrator accepts, for the purposes of this grievance, that the grievor was in possession of hashish while off duty on April 12, 1990 and that he smoked what appears to have been a relatively small amount of it in a single cigarette some eight hours prior to his call for duty. The issue is whether the possession and use of a prohibited drug by the grievor, away from the workplace and while off duty in a circumstance which bears no direct relation to his employment justified the assessment of discipline.

The issue of whether an employee's involvement with drugs in a non work-related setting justifies discipline is a matter of fact to be determined on the merits of each particular case. Among the factors to be considered are whether the use is isolated and casual, as opposed to habitual, and whether it involves aggravating factors such as producing

or trafficking in a prohibited drug. The evidence in the instant case reveals that the grievor consumed a single hashish cigarette while off duty and away from the workplace. While his name was reported in a local newspaper upon his conviction, there is nothing in that report to indicate that he was an employee of the Company nor is there any other evidence from which one can reasonably infer a basis for knowledge or concern among the public, among customers of the Company or among other employees.

As was noted in **CROA 1703**, the off-duty possession or use of a prohibited drug is not, of itself, necessarily grounds for discipline where it cannot be shown that a legitimate interest of the employer has been impacted. That is reflected in the following passage:

> ... While the off-duty possession of a prohibited drug is a serious matter, such conduct will not necessarily justify discharge, or indeed any measure of discipline, if the objective circumstances disclose no adverse impact on the legitimate interests of the employer. ...

The Company relies on the following passage from the same award:

> ... The incompatibility of habitual drug use or dependence by employees in the transportation industry, whose activities impact readily on the lives and safety of many, is scarcely debatable. The possession of an illegal drug by a railway employee while on duty or subject to duty is plainly prohibited by Rule G of the Uniform Code of Operating Rules. Such conduct has been clearly confirmed by this office as a dismissable offence. (*See CROA Case No. 1536*). The United States Federal Aviation Administration revokes the medical certification of any pilot for "mental and neurologic" standards if it is established that he or she has an active drug dependence. Because of their concern with the debilitating after effects of drug use, a number of airlines have adopted rules prohibiting any use whatever of drugs for a period of 24 hours prior to active duty. A physician retained by the US Airlines Pilots Association and that union's attorney have jointly stated that in their opinion the use of marijuana is not compatible with flight safety if it is within 24 hours of flight time. (*See Denenberg, Masters and Cooper, Proceedings of the Thirty-Sixth Annual Meeting of the National Academy of Arbitrators, cited above*).

On the basis of the foregoing passage the Company suggests that it was incompatible with safety for the grievor to be using a prohibited drug some eight hours prior to his call to duty. There is, however, no expert or medical evidence before the Arbitrator to substantiate the validity of that position in the circumstances disclosed in the instant case. While references to policy statements made by physicians and union representatives in the general literature on the subject of drug use is of general interest and can, as it was in **CROA 1703**, be pointed to as an indication of levels of concern for the problem of drug abuse in the transportation industry, such passages cannot be substituted for competent medical opinion bearing on the merits of the discipline of an individual employee in a specific case.

In this case, as in any case of discipline, the burden of proof is upon the Company. Absent any enunciated policy of the Company supported by competent medical opinion as to the impact of off-duty drug use, or any expert or medical evidence to establish that Mr. Deegan was liable to be affected in the performance of his duties some eight hours after the consumption of a single cigarette containing hashish, the Arbitrator has no evidentiary basis to accept the Employer's submission that its safety interests were negatively impacted by the employee's private off-duty conduct in the circumstances disclosed. While Mr. Deegan's unlawful activities are plainly not to be condoned, they cannot be used against him for the purposes of employment discipline absent cogent evidence that the employer's legitimate business interests have been or are likely to be affected by his actions. No such evidence is revealed in the case before the Arbitrator.

For the foregoing reasons the grievance must be allowed. The thirty demerits assessed against the grievor's record shall be removed forthwith.

November 15, 1991

(Sgd.) MICHEL G. PICHER
ARBITRATOR