CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2296

Heard at Montreal Tuesday, 10 November 1992

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Claim of behalf of Mr. G.M. Parent that his dismissal "for conduct incompatible with that of an employee of CN Rail on December 17, 1991" was unwarranted and invalid in the circumstances.

JOINT STATEMENT OF ISSUE:

In the early morning of December 17, 1991, the Company was informed by the Ontario Provincial Police that the grievor had been arrested and charged with possession for the purposes of trafficking. As a result of this, the grievor was dismissed effective February 26, 1992.

The Brotherhood contends: **1)** That the grievor was not on duty or subject to duty at the time he was detained by the police. **2**) That the Company violated all applicable provisions of the EAP and By-Pass Agreements by failing to provide the grievor with the proper opportunity for rehabilitation. **3)** That the investigation carried out by the Company in this case was invalid since it concerned a possible violation of Rule 'G'. The grievor was ultimately dismissed for unbecoming conduct, not for a Rule 'G' violation. **4)** That the investigation carried out by the Company in this case was invalid since the Brotherhood was not given the opportunity to question a key witness, CN Policeman R. Werden, in person. Furthermore, when the Brotherhood representative at the investigation objected to this, the Company officer involved refused to note the objection in the investigation record. **5)** That the discipline assessed was too severe and unwarranted in the circumstances.

The Brotherhood requests that the grievor be reinstated without loss of seniority and with full compensation for all wages and benefits lost as a result of this matter.

The Company denies the Brotherhood's contentions and declines its requests.

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD.) R. A. BOWDEN	(SGD.) M. M. BOYLE
8SYSTEM FEDERATION GENERAL CHAIRMAN	FOR: ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

D. C. Gignac	– System Labour Relations Officer, Montreal
D. C. St-Cyr	– Manager, Labour Relations, Montreal
M. S. Hughes	– System Labour Relations Officer, Montreal
J. P. Rainville	– System Labour Relations Officer, Montreal
R. C. Werden	– Special Agent, CN Police, Hornepayne
J. Little	– Coordinator Special Projects – Engineering, Montreal
G. Gregus	– Witness

And on behalf of the Brotherhood:

P. Davidson	– Counsel, Ottawa
R. A. Bowden	– System Federation General Chairman, Ottawa
D. Brown	– Senior Counsel, Assistant to the Vice-President, Ottawa

AWARD OF THE ARBITRATOR

It is not disputed that there is no violation of Rule G disclosed in the instant case. It is not disputed that the grievor, Welder Foreman G.M. Parent of Hornepayne, was apprehended in possession of a substantial quantity of hashish while off duty on December 17, 1991. The unchallenged evidence before the Arbitrator is that he was in possession of 28 grams of hashish, a quantity of rolling papers and a small scale, as well as what appears to have been one marijuana cigarette. His arrest was pursuant to the execution of a search warrant by the Ontario Provincial Police, and he was subsequently charged with possession of narcotics for the purposes of trafficking, a charge which remains outstanding to the present time, with an anticipated trial date in February of 1993.

The Arbitrator can see no substance to the submission of the Brotherhood that the Company has violated the grievor's right with respect to the application of the EAP and By-Pass Agreements to his circumstances. There is no evidence before me to suggest that Mr. Parent ever sought the assistance of the EAP program, or that access to it was ever denied to him. Perhaps most significantly, during the course of his investigation Mr. Parent denied the need for any such assistance. In answer to a question from the investigating officer he stated that he was transporting the drugs in question to a friend in Hearst, as a requested favour, and that he did not personally use drugs. In the circumstances the Arbitrator can find no violation of the grievor's rights or privileges with respect to the EAP program by the employer.

The Brotherhood next challenges the regularity of the investigation procedure. It submits that the investigation must be viewed as invalid because the notice of investigation was worded as being "in connection with an alleged violation of Rule G on December 17, 1991", and the discipline issued was not for a violation of Rule G, but for conduct unbecoming an employee. Narrowly put, the position of the Brotherhood is that the Company could not give the grievor notice of the investigation of one possible infraction, and thereafter, based on information gained during that investigation, discipline him for a separate infraction.

The Arbitrator cannot sustain that position. The following sections of article 18 of the collective agreement are pertinent:

> **18.2(b)** When required to attend a formal investigation, an employee will be given at least 48 hours' notice in writing. The notice will include the date, time, place and subject matter of the hearing.
>
> **18.2(d)** Where an employee so wishes an accredited representative may appear with him at the hearing. Prior to the commencement of the hearing, the employee will be provided with a copy of all of the written evidence as well as any oral evidence which has been recorded and which has a bearing on his involvement. The employee and his accredited representative 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 the witnesses (including Company Officers where necessary) whose evidence may have a bearing on his involvement. The questions and answers will be recorded and the employee and his accredited representative will be furnished with a copy of the statement.

As has been well established in the jurisprudence of this Office, the investigation procedure established under article 18 of the collective agreement is not a judicial or quasi-judicial process to be conducted on the model of the criminal trial. The purpose of article 18 is to provide the employee with certain minimal protections including the opportunity to know the general nature of an accusation against him or her, to know the documents, statements or other evidence being relied upon, and to have the opportunity to ask questions of any witnesses. Moreover, it does not appear disputed that the employee is given the opportunity to offer any explanation or evidence in rebuttal of the material in possession of the Company's investigating officer. So long as those general objectives are complied with, there can be said to be no violation of the spirit, or of the letter, of article 18 of the collective agreement.

It would, arguably, be contrary to the provisions of article 18 if an employee were disciplined following an investigation for an incident which was entirely unrelated to the material examined in the investigation. That,

however, is not what transpired in the instant case. The notice provided to the grievor gave him a clear indication that the Company had concerns with respect to his involvement with a prohibited narcotic some thirty minutes prior to the time he was scheduled to go on duty, when he was arrested on Highway 631 while driving in the direction of Hornepayne, his place of work. If, during the course of that investigation, it emerged that Mr. Parent was charged with a serious criminal offence which can be said to have affected the legitimate business interests of the Company, there is nothing in the procedures contemplated in article 18 which would prevent the Company from taking disciplinary action, based on the entirety of the information revealed the course of the investigation. In essence, the investigation is an interview conducted by the Company to attempt to determine what happened. If the investigation discloses that what happened was cause for serious concern, and possibly for discipline, the Company is entitled to take action accordingly, as long as it has allowed the employee the procedural protections guaranteed by article 18 of the collective agreement. There is nothing implicit in the language of article 18 to suggest that the Company is unable to discipline an employee for a reason other than a rule infraction specifically mentioned in the notice of investigation given to the employee. So technical a rule as the Brotherhood advances might have an understandable application in the criminal law. However, it does not commend itself to the common sense administration of an industrial enterprise on a day-to-day basis, and is plainly not reflected in the terms of the collective agreement.

Nor can the Arbitrator find any substance in the allegation that the grievor's rights under article 18 were violated by the alleged refusal of the Company to allow the opportunity to the Brotherhood's representative to question CN Police Constable R. Werden. The material before me is manifestly to the contrary. Firstly, during the course of the investigation the presiding officer offered the Brotherhood's representative the opportunity to speak with Constable Werden by telephone, as he was then absent on vacation. Secondly, the unchallenged representation of the employer is that the Company officer further offered the Brotherhood the opportunity to adjourn the proceedings so that Constable Werden could be present and questioned at a later date. Neither of these offers was accepted. I must therefore find that the objection made by the Brotherhood with respect to the availability of Constable Werden is entirely without merit, and that there is nothing the notations made or not made which discloses a violation of article 18.

The issue of substance is whether the discharge of the grievor was merited in the circumstances. There can be little doubt of the seriousness to the Company of an employee's involvement in trafficking in narcotics. In a recent arbitration award between **CP Rail and the CAW–TCA Canada, Rail Division, Local 101**, (award dated November 3, 1992) the Arbitrator had occasion to consider the appropriate measure of discipline in the case of a carman discharged for his involvement in drug trafficking. At pp 4-5 the following comments appear:

> Trafficking in narcotics is justly seen as a serious threat to social and legal order. As a common carrier with a high public profile, the Company is entitled to take such reasonable steps and precautions as are necessary to ensure its safe operations. This, in the Arbitrator's view, would extend to excluding from the workplace persons charged with or known to be involved in the trafficking of narcotics. As noted in CROA 1703, in a safety sensitive industry in the field of transportation, an employer may have a legitimate concern as to whether persons involved in the trafficking of narcotics will be prompted by the profit motive to pursue their illegal activities in the workplace.

The Arbitrator accepts the authorities cited by the Union to the effect that the employer is not to be the custodian of an employee's character. However, where an employer can establish a meaningful business interest to be protected, and where the off-duty conduct of an employee may be such as to risk the safety of the Company's operations or the integrity of its reputation, the balancing of the interests of the employer and of the employee may tip in the direction of justifying the removal of the employee from the workplace, even pending the resolution of as yet unproved criminal charges. In the instant case, in the arbitrator's view, it was reasonable for the Company to have a legitimate concern about the risk inherent in an active drug trafficker moving about its property, in a largely unsupervised setting, in contact with both operating and non-operating employees on an ongoing basis. Moreover, it is far from clear, as the Company argues, that other employees are willing to work in a safety sensitive environment alongside an employee charged with or known to be materially involved in the drug culture through the sale of narcotics.

There is, of course, a difference between being charged and being convicted. The preponderant arbitral opinion in Canada is that where an employee is subject to a serious criminal charge, in respect of which he or she has pleaded not guilty, as a general rule the appropriate procedure for an employer with a legitimate interest to protect is to

suspend the employee pending the resolution of the criminal charge. This is reflected in the following passage from **CROA 1703**:

> ... In some cases, however, off-duty conduct that is the subject of a criminal charge may seriously affect the legitimate interests of the employer. The operative principle was well summarized by the majority of the board of arbitration in **Re Ontario Jockey Club and Mutuel Employees Association** (1977) 17 L.A.C. (2d) 176 (Kennedy) at p. 178:
>
> ... The better opinion would appear to be that the employer's right to suspend where an employee has been charged with a criminal offence must be assessed in the light of a balancing of interests between employer and employee. The employee, of course, has a legitimate interest in being considered innocent until he has been proven guilty. If, however, the alleged offence is so related to the employment relationship that the continued employment of the employee would present a serious and immediate risk to the legitimate concerns of the employer as to its financial integrity, security and safety of its property and other employees as well as its public reputation, then indefinite suspension until the charges have been disposed of would appear to be justified. In determining the nature of the legitimate interests of the employer, it is necessary to look at the nature of the offence, the work being performed by the employee, and the nature of the employer's business.

In the Arbitrator's view, while the foregoing passage is generally applicable to the removal from service of employees pending the outcome of criminal proceedings, it does not speak fully to the particular circumstances of this case. In the case at hand the Company conducted its own formal investigation, in keeping with the provisions of article 18 of the collective agreement. Included in the investigation was the statement of Ontario Provincial Police Constable Gordon Gregus, who also testified at the arbitration hearing. His statement confirmed the possession of a substantial amount of prohibited narcotics by the grievor, as well as scales and other paraphernalia normally associated with trafficking. In the circumstances, the Arbitrator is satisfied that the Company was entitled to weigh the evidence at its disposal, including the grievor's own explanation, and draw its own conclusion as to whether he was, on the balance of probabilities, involved in the distribution of narcotics to a degree which is incompatible with his continued employment in a safety sensitive position with the Company.

The whole of the evidence before the Arbitrator casts grave doubt on the explanation given by Mr. Parent. Firstly, the evidence of Constable Gregus, made available to the Brotherhood prior to the arbitration hearing, discloses that he gave contradictory explanations as to his actions. According to Constable Gregus, Mr. Parent stated to the police that the hashish found in his possession was intended for his own consumption, over the period of two months. When questioned by the Company's officer during the investigation, however, Mr. Parent asserted that he was only carrying the narcotics to a friend, and that he was not himself a user. There are also serious questions with respect to his destination at the time he was apprehended. While his statement to the Company was to the effect that he was on his way to the doctor's, and was not coming to work, Mr. Parent made an entirely inconsistent statement to the investigating police officers.

As noted in **CROA 1703**, when evidence, however circumstantial, points to the involvement of a safety sensitive employee in the large-scale possession and distribution of narcotics, the employee bears an onus of clear and compelling explanation. As noted in that award:

> In a drug-related discipline case the burden of proof, as in any case of discipline, is upon the Company. Where, however, certain objective facts – however circumstantial – are established that would point to the heavy involvement of a railroad employee in the production and use of drugs, the onus may shift to the employee to provide a full and satisfactory account of his or her actions and circumstances to justify continued employment. The absence of a full and credible explanation, in the face of overwhelmingly incriminating evidence, leaves an employer with the public safety obligations of a railroad with little choice but to suspend or terminate the employment of a person whose habits or activities appear so dramatically incompatible with the safe operation of its business. ...

What, then, does the evidence in the case at hand disclose? The grievor was apprehended with quantities of narcotics which are plainly consistent with possession for the purposes of trafficking. He was also found to be in possession of paraphernalia, including scales, consistent with that purpose. Whether the Crown will be able to prove,

beyond a reasonable doubt, that he is guilty of the charge against him is not the issue at hand. The issue is whether the Company has discharged the burden of establishing, on the balance of probabilities, that Mr. Parent was sufficiently involved in the possession and distribution of narcotics, on December 17, 1991 so as to question the viability of his continued employment.

I am satisfied that it has. His possession of the drugs and equipment normally associated with trafficking is not disputed. The failure of candour on the part of Mr. Parent, and in particular the contradictions in the explanations which he gave for his actions, give no reassurance, and cannot be relied on or viewed as mitigating in the circumstances. This is not, in the Arbitrator's view, a case where an employee is charged in dubious circumstances and the pertinent facts must await the conclusion of a criminal trial. The evidence before me establishes, beyond any doubt, the off-duty involvement of Mr. Parent in the transportation and distribution of narcotics in circumstances which are sufficiently serious as to have undermined the link of trust which goes to the heart of his ongoing employment in a safety sensitive position.

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

November 13, 1992

(signed) MICHEL G. PICHER
ARBITRATOR