

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2410

Heard at Montreal, Thursday, 14 October 1993

concerning

VIA RAIL CANADA INC.

and

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

DISPUTE:

The dismissal of Locomotive Engineer A. Nolin, for conduct incompatible with his position as a locomotive engineer.

JOINT STATEMENT OF ISSUE:

On November 11, 1991, Mr. Nolin was arrested at his home by the Sûreté de Québec, for possession of cocaine. On September 29, 1992, Mr. Nolin appeared in court and pleaded guilty to the following charges:

- possession for purpose of trafficking of 500 grams of cocaine; and
- conspiracy to commit an indictable offence (trafficking of cocaine).

By letters dated September 17 and October 26, 1992, and in accordance with Article 68 of the collective agreement, the Brotherhood made two requests for a leave of absence for Mr. Nolin. Both requests were denied by the Corporation.

Following a disciplinary investigation held on November 23, 1991 at the location where he was incarcerated, Mr. Nolin was discharged.

The Brotherhood contends Mr. Nolin's discharge to be a case of wrongful dismissal; that Mr. Nolin's activities surrounding the criminal charge and conviction were of a social nature and not job related; and that his discharge was not warranted.

The Brotherhood contends that the Corporation had no contractual right to secure an employee statement or investigate and discipline as provided for in article 71.

The Brotherhood request that Mr. Nolin be reinstated without loss of seniority and with full compensation for all wages and benefits lost.

The Corporation has denied the Brotherhood's request.

FOR THE BROTHERHOOD:

(SGD.) B. E. WOOD
GENERAL CHAIRMAN

FOR THE CORPORATION:

(SGD.) C. C. MUGGERIDGE
DEPARTMENT DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Corporation:

K. Taylor	- Senior Advisor & Negotiator, Labour Relations, Montreal
D. A. Watson	- Senior Labour Relations Officer, Montreal
J-P Maheux	- Trainmaster, Montreal - Witness
Y. Samson	- Trainmaster, Montreal - Witness

And on behalf of the Brotherhood:

Philip Hunt	- Counsel, Ottawa
B. E. Wood	- General Chairman, Halifax
G. Hallé	- Canadian Director, Ottawa
M. Marcoux	- Local Chairman, Quebec
M. Gagnon	- Observer
A. Nolin	- Grievor

AWARD OF THE ARBITRATOR

The grievor, an employee of 21 year's service with a clear disciplinary record, was charged and convicted with possession of a narcotic for the purposes of trafficking. The substance in question was cocaine, and Mr. Nolin pleaded guilty, subsequently being sentenced to serve two years less a day. He was paroled after three months of incarceration.

The material before the Arbitrator reveals, without contradiction, that the circumstances of the offence for which he was convicted, following his guilty plea, are relatively unique. The evidence before the Arbitrator, which Counsel for the Brotherhood advises is the same as that presented before the criminal court, reveals that the narcotics in question were owned and kept by his girlfriend at her residence. It appears that he was not aware that the drug was intended for other than her own use, and that he did, on several occasions, convey telephone messages to her relating to the purchase of her drugs. No drugs were found on his person or at his own residence, notwithstanding a thorough search in that regard. In the result, because of the presumptions of law applied in criminal prosecutions respecting the possession and sale of narcotics, he was convicted, along with his girlfriend. While she received the same sentence as he, she served four times the period which he served in prison, being paroled after one year, an apparent reflection of her greater degree of responsibility for the offence.

The concern of this Office with respect to the involvement of employees in a safety sensitive position in the use or distribution of narcotics is a matter of record. Where employees are engaged in the large scale possession of drugs, or are seen as actively associated with drug trafficking, the incompatibility of such activity with their employment has been readily found. (CROA 1703, 2038, 2039, 2090, 2172, & 2296) In CROA 1703 the Arbitrator commented on the concerns of employers in safety sensitive industries with respect to off duty trafficking in narcotics on the part of an employee, stating in part:

Apart from the more serious criminal ramifications impacting on an employee's reputation, that approach reflects a natural concern that a person whose involvement with drugs extends to producing or selling it for profit. It is not unnatural to harbour concerns that the profit motive may cause the individual's trafficking to spread into the work place.

In the case at hand the circumstances are unique, and the Arbitrator is satisfied that, notwithstanding the grievor's guilty plea and conviction, the un rebutted facts disclose that he was not himself involved in the possession of narcotics in the physical sense, even though he may have been in the legal sense, and that he was not himself involved in selling narcotics. While his knowledge of his girlfriend's activities and his involvement in relaying telephone messages to her may have led to his conviction, they do not, of themselves, give rise to the kinds of concerns expressed in the cases cited above. On a fair appraisal of the facts, it would appear that while the grievor's conviction was merited under the law, he was clearly not a prime mover in drug trafficking activity, and was, in the end, tarred by another's brush.

On the whole, there are reasons to doubt that the summary discharge of Mr. Nolin was the appropriate disciplinary response in the circumstances. There are, it appears to the Arbitrator, a number of mitigating circumstances to consider. Mr. Nolin had 21 years' service at the time of his discharge, and his disciplinary record was clear. His responses to the Corporation during the course of the disciplinary investigation following his conviction were honest, and to all objective appearances, accurate as to the facts. Moreover, as elaborated above,

notwithstanding his conviction, his involvement in the criminal offence was clearly secondary to the activities of his girlfriend. Mr. Nolin denies any knowledge that she obtained cocaine other than for her own use, and asserts that he did not himself use the drug. There is no objective evidence to rebut, or indeed cast doubt, on his representations in that regard. Indeed, his sentencing and eventual parole after a brief incarceration suggest that the criminal authorities gave some weight to his explanation.

In the circumstances I am satisfied that the events which transpired are not such as to have destroyed the possibility of the grievor returning to productive service in a safety sensitive position. It seems to me that he may be allowed to do so, subject to conditions fashioned to protect the interests of the Corporation. The Arbitrator therefore directs that the grievor be reinstated into his employment forthwith, without compensation for any wages or benefits lost, and without loss of seniority. The grievor's reinstatement shall be on condition that he accepts to be subject to periodic drug testing by the Corporation, to be conducted randomly and in a manner that is not abusive, for a period of not less than three years from the date of his reinstatement. Evidence establishing the use or possession of any prohibited narcotic during the three year period in question will be grounds upon which the Corporation may nullify his reinstatement, with no further recourse to arbitration save upon the question of use or possession. The Arbitrator retains jurisdiction.

October 15, 1993

(sgd.) MICHEL G. PICHER
ARBITRATOR