

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2509

Heard in Montreal, Wednesday, 13 July 1994

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

**CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS
(UNITED TRANSPORTATION UNION)**

EX PARTE

DISPUTE:

Appeal of the discharge of Yardperson C. Facciol, MacMillan Yard.

COMPANY'S STATEMENT OF ISSUE:

During the execution of a search warrant at C. Facciol's residence, more than two pounds of marijuana was seized. In addition, the following materials were discovered and seized by the police. (1) Bulk marijuana leaves; (2) White plastic bag containing 52.2 grams of marijuana; (3) Set of brass scales and case; (4) Toke bottle; (5) 3 hash pipes; (6) Brass incense burner; (7) 12" fan; (8) 14" fan; (9) Box of nutrients for hydroponic growing; (10) Ventilation fan; (11) 2 transformers with light socket and screen; (12) 2 metal halide lights; (13) 3 pronged plastic hydroponic system; (14) Blue hydroponic reservoir containing 2 bottles of Formula "A" and Formula "B" nutrient; (15) Clothes line and spool of wire; (16) Standard heater/fan; (17) 5 gallon bucket containing tubing and other hydroponic paraphernalia.

As a result of the Company's investigation, C. Facciol was discharged from Company service for conduct incompatible with employment in a safety sensitive position.

The Union appealed the discharge of the grievor as being unjustified based on the following grounds: (1) The grievor was improperly held out of service without compensation pending the outcome of the investigation; (2) The Company's decision to dismiss the grievor was not based on the charge of which he was proven guilty in a criminal court of law; (3) The grievor worked for the Company without incident from the time of the legal charges and the date of dismissal; (4) The grievor should have been afforded the provisions of the Rule "G" By-Pass Agreement in Appendix "B" of the Union/Management Agreement on the Control of Drug and/or Alcohol Abuse.

The Union's appeal included reinstatement with reimbursement for all time lost.

COUNCIL'S STATEMENT OF ISSUE:

Effective 18 December 1992 C. Facciol was discharged from Company service for alleged conduct incompatible with employment in a safety sensitive position.

The Union appealed the discharge of the grievor as being unjustified based on the following grounds: (1) The grievor was improperly held out of service without compensation; (2) The Company's decision to dismiss the employee was not representative of the charges which he was facing, nor was the decision made conclusive to that which he was proven guilty of; (3) The grievor worked for the Company without incident from the time of the legal charges and the date of dismissal; (4) The Company should have afforded the grievor the benefits of the Employee Assistance Program.

The Union's appeal included reinstatement with reimbursement for all time lost.

FOR THE COUNCIL:

(SGD.) W. G. SCARROW
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) A. E. HEFT
for: VICE-PRESIDENT, GREAT LAKES REGION

There appeared on behalf of the Company:

- Morgan – Labour Relations Officer, Toronto
- A. E. Heft – Manager, Labour Relations, Toronto

And on behalf of the Union :

- W. G. Scarrow – General Chairman, Sarnia
- M. P. Gregotski – General Chairman, CN Central Lines, Fort Erie
- R. E. Beatty – Vice-General Chairman, CN Central Lines, Fort Erie
- B. Cushing – Witness, Toronto
- C. Facciol – Grievor

AWARD OF THE ARBITRATOR

The facts in the case at hand are the same as those before the Arbitrator in **CROA 2477**. The grievor in that case, as well as the grievor in the case at hand, shared a living accommodation in which they were found by local police to be producing quantities of marijuana. Although they were initially charged with the production of marijuana for the purposes of trafficking, their eventual convictions did not involve any aspect of trafficking. As related in **CROA 2477**, the Arbitrator is satisfied that the facts of the instant case are to be distinguished from those reflected in other awards, such as **CROA 1703**, and more closely involve an employee involved in the personal possession and use of marijuana away from the work place. There is no suggestion in the evidence before me as to any violation of Rule G.

Significantly, the evidence adduced by the Union discloses that in the past thirteen months Mr. Facciol has made substantial strides in relation to controlling his dependence on marijuana. During that time he has remained free of the consumption of alcohol or drugs of any kind, and as reflected by the evidence of his sponsor, Mr. Blake Cushing, he has been intensively involved in meetings and other activities of Narcotics Anonymous, including the ongoing assistance of other individuals with narcotic dependency problems.

In all of the circumstances the Arbitrator is satisfied that the case is an appropriate one for a reinstatement of the employee, on conditions fashioned to protect the legitimate interests of the Company. I am not satisfied, however, that the case discloses any violation of the Rule G By-Pass Agreement by the Company in the case at hand. Clearly there was no attempt by the grievor to bring himself within the Company's EAP program or the purview of the By-Pass Agreement by voluntary referral, at any time prior to the incident giving rise to his termination.

For the foregoing reasons the grievance is allowed, in part. Mr. Facciol shall be reinstated into his employment, without loss of seniority and without compensation for wages and benefits which he has lost. His reinstatement shall be conditional upon providing the Company, for a period of not less than two years from the date of his reinstatement, documentary evidence, on a quarterly basis, confirming his ongoing involvement in the activities of Alcoholics Anonymous and/or Narcotics Anonymous. For that period of time he shall also be subject to drug testing by the Company, to be conducted randomly, but not abusively, to confirm his ongoing abstinence from drugs.

July 15, 1994

(signed) MICHEL G. PICHER
ARBITRATOR