

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2620

Heard in Calgary, Wednesday, 10 May 1995

concerning

CANADIAN PACIFIC RAILWAY LIMITED

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Dismissal of Mr. W. Greenfield.

BROTHERHOOD'S STATEMENT OF ISSUE:

On May 31, 1994, the grievor was dismissed from Company service for alleged trafficking in cocaine in Medicine Hat, Alberta on April 9 and 10, 1994.

The Brotherhood contends that: (1.) The grievor was not in Medicine Hat on April 9 and 10, 1994; (2.) The Company has violated article 18.1 of Agreement no. 41 by not conclusively establishing the grievor's responsibility in this matter; (3.) The discipline assessed was unwarranted and too severe in the circumstances.

The Brotherhood requests that: The grievor be returned to his former position forthwith without loss of seniority and with full compensation for all straight and overtime wages and benefits lost from May 2, 1994.

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

FOR THE BROTHERHOOD:

(SGD.) JOHN J. KRUK

SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

R. Andrews	– Labour Relations Officer, Vancouver
L. Guenther	– Labour Relations Officer, Vancouver
R. Wedel	– Manager, Engineering Maintenance, Calgary
S. Clarke	– Road Foreman, Medicine Hat

And on behalf of the Brotherhood:

P. Davidson	– Counsel, Ottawa
D. McCracken	– Federation General Chairman, Ottawa
W. Kirkpatrick	– Feneral Chairman, Pacific Region, Vancouver
H. Helfenbien	– Local Chairman, Medicine Hat
W. Greenfield	– Grievor

AWARD OF THE ARBITRATOR

The grievor was dismissed for allegedly trafficking in cocaine from his home in Medicine Hat, Alberta, on April 9 and 10, 1994. His discharge came as a result of a criminal charge against him for trafficking in cocaine on the dates in question, following his arrest on April 29, 1994.

The evidence discloses that the charges against the grievor turned entirely on the information provided by a paid police informer. She informed police that a man sold her one gram of cocaine at Mr. Greenfield's residence late in the night of April 9, 1994, and at her residence the following day. However, at the preliminary hearing into the charges against the grievor, held on July 11, 1994, the Crown sought a stay of the charges against Mr. Greenfield. The transcript of the proceedings includes the following statements by the Crown Attorney: "... I've had the agent review this individual who is supposed to be Mr. Greenfield, Sir, and she's indicated that it is not him." Still later in the transcript the Crown advises the Court "... she's confident that it isn't the individual that had trafficked to her on these particular occasions. Given that, Sir, it's my application to stay the proceedings in relation to Mr. Greenfield."

The statements provided to the Company during the course of the disciplinary investigation conducted in respect of the grievor disclose a denial on his part of any involvement in the trafficking of cocaine. Mr. Greenfield then advised the Company that he was on vacation from March 21, to April 11, 1994, and spent the entire period away from Medicine Hat, until 15:30 on April 11. He related that he resided at his aunt's home in Edmonton from April 2 to April 11, 1994 and offered a Canadian Tire purchase receipt, telephone records, a speeding ticket issued in Edmonton and the possibility of statements from his relatives in Edmonton in support of his explanation. It appears that the Company chose not to pursue the information from members of the grievor's family offered during the course of the disciplinary investigation, and refused to believe him.

During the course of the investigation the grievor declined to answer questions as to whether he had previously used narcotics, stating that he had gone through the Company's Employee Assistance Program and wished that information to remain private and confidential. He also agreed to undergo a drug screening test, which was subsequently arranged. According to the Company's representations, the urine sample taken from the grievor by the Company's physician was mishandled, and no result could therefore be obtained. When the grievor was advised of this problem, and was requested to submit to a second drug test, he became concerned as to the Company's actions and sought the advice of his legal counsel. Upon being advised that the collective agreement contains no requirement to submit to a drug test, it appears the grievor's lawyer counselled him to decline, which he did.

At the hearing the grievor also tendered in evidence a letter dated November 4, 1994 from a supervisor attached to the Alberta Alcohol and Drug Abuse Commission, West End Treatment Centre in Edmonton, Alberta. That letter confirms that the grievor was present for treatment in Edmonton from March 22 to April 11, 1994, and attended daily, including Saturdays. In explanation, the grievor elaborated that he has been involved in drug treatment programs for a substantial period of time, and continues to be so involved to the present. His presence in Edmonton at the time of the alleged drug transactions in Medicine Hat was, he explains, in furtherance of his efforts to remain drug free. It is common ground that the letter of explanation offered in evidence at the arbitration hearing was not previously provided to the Company.

The first issue to be resolved is whether, on the balance of probabilities, the grievor was involved in the trafficking of narcotics, as alleged by the Company. In this matter the Company bears the burden of proof and, as reflected in prior awards, the standard of proof must be commensurate to the gravity of the accusation made against him (see **Re Indusmin Ltd. and United Cement, Lime and Gypsum Workers International Union, Local 488**, (1978) 20 L.A.C. (2d) 87 (M.G. Picher); **Re Corporation of the City of North York and Canadian Union of Public Employees, Local 94** (1944) 43 L.A.C. (4d) 52 (Solomatenko)).

In the instant case the Company has offered no direct evidence whatsoever to support the conclusion that the grievor was involved in trafficking in narcotics on April 9 or 10, 1994. In fact, such evidence as is before the Arbitrator is manifestly to the contrary. The statements of the Crown made for the Court record, referred to above, are categorical in reflecting the fact that the police informant stated that Mr. Greenfield was not the person who sold her drugs on the dates in question. Nor can the involvement of the grievor's home be necessarily seen as inculpatory. Mr. Greenfield explained during the course of the hearing that at the time of the alleged transaction he rented a basement apartment in his home to an individual who has since been convicted of drug trafficking. In addition, the Brotherhood offers in evidence the grievor's own direct testimony as to his whereabouts at the time, supported by

documentation, including a letter confirming his involvement in a drug treatment program in Edmonton on the dates in question.

In the face of such evidence the Arbitrator can ascribe no meaningful weight to the theories advanced by the Company's representative, including the suggestion that the grievor somehow changed his appearance over a period of months so as to deceive or confuse the police informant. On balance I must find that, while the Company was justified in withholding the grievor from service between April and July of 1994, pending the outcome of the charges against him for trafficking in cocaine, it had no justification to continue with that course of action, nor to terminate him from his employment, at any time after July 11, 1994 when the criminal charges against him were stayed in light of the statements made by the Crown Attorney before the criminal court. While an employer can decide to prove allegations of drug trafficking or other criminal conduct against an employee on the basis of the civil standard of proof, notwithstanding the withdrawal of criminal charges or acquittal of the employee in criminal proceedings, it must nevertheless be prepared to adduce clear and cogent evidence to support the allegation which it makes. In the instant case no evidence of that quality is advanced by the Company. While it is true, by the grievor's own acknowledgment, that he had a previous degree of involvement in drugs, for which he apparently sought assistance from the Company and continues to receive treatment, the Arbitrator cannot find, on the balance of probabilities, that Mr. Greenfield in fact engaged in conduct incompatible with his employment, so as to justify his discharge effective May 31, 1994.

For the foregoing reasons the grievance is allowed, in part. As noted above, the Arbitrator is satisfied that the Company had good reason to hold the grievor out of service until July 11, 1994. It may also be noted that the Brotherhood takes no objection to the Arbitrator attaching conditions to the grievor's reinstatement. The Arbitrator therefore directs that Mr. Greenfield be reinstated into his employment, forthwith, with compensation for all wages and benefits lost from July 11, 1994 until the date of his return to employment. He shall, moreover, return to work with his seniority unreduced, either by the period for which he was properly held out of service between April and July of 1994, or the period in respect of which his compensation has been ordered. The reinstatement of Mr. Greenfield is, however, conditional upon his undertaking to remain active in the drug treatment program of the Alberta Alcohol and Drug Abuse Commission, or such other similar agency as may be agreed between the parties, for a period of not less than two years following the date of his reinstatement. Further, he shall provide quarterly written confirmation from an officer of the AADAC or other agency, to confirm to the Company his ongoing participation in its program. Finally, the grievor shall, for the period of two years following his reinstatement, be subject to random drug testing, administered in a non-abusive fashion, to confirm that he remains free from the use of any proscribed narcotic.

May 18, 1995

(signed) MICHEL G. PICHER
ARBITRATOR