

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2824

Heard in Montreal, Tuesday, 11 February 1997

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Appeal of discharge on behalf of Mr. D. Godick, PIN-135372.

COMPANY'S STATEMENT OF ISSUE:

On July 26, 1996, Mr. Godick was discharged from Company service for conduct incompatible with his employment.

The Union contends that: the grievor has not been convicted of any offences related to these allegations; the grievor has been unjustly dealt with by the Company; and the discipline assessed was excessive and unwarranted in the circumstances.

The Union requests that the grievor be immediately reinstated with his previous seniority and that he be made whole for any losses he may have sustained as a result of the Company's action.

The Company has denied the Brotherhood's contention and declined their request.

BROTHERHOOD'S STATEMENT OF ISSUE:

On July 26, 1996, Mr. Godick was discharged from Company service for conduct incompatible with his employment related to allegations that he was in possession of tobacco products exceeding the legal limits exported from Ontario, carrying a concealed weapon, possession of a restricted weapon, possession of a narcotic and possibly for the purpose of trafficking, and open alcohol in a motor vehicle.

The Union contends that: **1.)** the grievor has not been convicted of any offences related to these allegations; **2.)** the grievor has been unjustly dealt with by the Company; and **3.)** the discipline assessed was excessive and unwarranted in the circumstances.

The Union requests that the grievor be immediately reinstated with his previous seniority and that he be made whole for any losses he may have sustained as a result of the Company's action.

The Company has denied the Brotherhood's contention and declined their request.

FOR THE BROTHERHOOD:

(SGD.) R. F. LIBERTY
SYSTEM FEDERATION GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) J. TORCHIA
FOR: VICE-PRESIDENT, CN WEST

There appeared on behalf of the Company:

S. Michaud – Assistant Manager, Labour Relations, Edmonton
J. Torchia – Manager, Labour Relations, Edmonton

And on behalf of the Brotherhood:

D. Brown – Sr. Counsel, Ottawa

P. Davidson	– Counsel, Ottawa
R. F. Liberty	– System Federation General Chairman, Winnipeg
D. Godick	– Grievor

AWARD OF THE ARBITRATOR

The material before the Arbitrator establishes, beyond dispute, that while off duty, driving back to work from his days off, the grievor was stopped by an RCMP constable for a routine vehicle check on June 3, 1996. Among the items found in his car was an unregistered .22 calibre handgun and ammunition, a small quantity of marijuana resin and marijuana seeds, as well as a book on how to grow marijuana, and a separate book, entitled “*The Poor Man’s James Bond*” which includes, among other things, instructions on how to make bombs. The car also contained a partly consumed bottle of liquor. It would be difficult to imagine a more ill-conceived collection of items to be carrying in one’s vehicle.

As the grievor was charged with a number of offences, including the possession of a prohibited narcotic, he declined to provide any answers to the Company during the course of a disciplinary investigation arising out of his arrest and charge. He did, however, agree to undergo a drug test, conducted some eight days after the incident, and it is common ground that the results of that test proved negative, consistent with the grievor’s own statements to the effect that he does not personally use marijuana or any other narcotic.

The evidence discloses that the grievor pleaded guilty to a charge of having a partially consumed bottle of alcohol stored in the passenger portion of his vehicle. Charges against him with respect to the possession of smuggled tobacco, which appear to have been groundless, were withdrawn. Based on the conclusion that the search of the grievor’s vehicle was illegal, contrary to section 8 of the Charter of Rights, the marijuana possession charge was dismissed. The evidence with respect to the unregistered hand gun, however, was not excluded, and the grievor was convicted of that charge, in respect of which sentencing is still pending.

Faced with the apparent facts of the incident, the Company had every reason to have substantial concern about the off-duty conduct of Mr. Godick. The fact remains, however, that the grievor is entitled to be judged having close regard to the facts of his particular case. At the arbitration hearing he testified that although he was in possession of the small quantity of marijuana and marijuana seeds, he was in fact transporting them for a friend, and was not himself a consumer of marijuana, although he had admittedly been convicted of a charge in relation to the possession of marijuana in 1981, a fact which he had previously disclosed to the Company at the time of a recall to work. The employer’s concerns were obviously not allayed by the grievor’s refusal to answer any questions relating to the charges against him, at least until his criminal trial was complete. The fact remains, however, that the information now available at the arbitration stage is more substantial than was previously disclosed, and that there are mitigating factors to be considered in this case.

Firstly, the grievor is an employee of some seventeen years’ service, whose work record is not in question. There is no suggestion that the partially consumed bottle of liquor stored in the passenger segment of his vehicle was being consumed at the time of his arrest, although he was technically guilty of the alcohol charge in respect of which he pleaded guilty. While the possession of a small amount of marijuana while off duty may not of itself sustain an employee’s discharge (*see CROA 2209*) greater concern does arise where it might appear that an individual is involved in the cultivation of marijuana (*see CROA 1703*). However, in the instant case, the successful passing of the urine and drug analysis test conducted by the Company gives substance to the grievor’s account of these events, including his explanation that he is not himself involved in the production or use of marijuana, but was carrying the cannabis resin and seeds for delivery to a friend. The Arbitrator can have little doubt, having regard to the grievor’s evidence, that he now appreciates the poor judgement exhibited on his part by engaging in that activity. Further, the Brotherhood points persuasively to the treatment by the Corporation of another employee in the same geographic area who, in October of 1985, was charged with possession of a restricted weapon, being a .22 calibre handgun, as well as possession of marijuana. Notwithstanding that he pleaded guilty to both charges, the employee received no discipline whatever from the Company.

On the whole, the Arbitrator is of the view that the Company did have grounds to assess discipline against Mr. Godick. In particular, the possession of marijuana seeds, with the possible indication of an intention to produce a prohibited narcotic, could arguably, without explanation, undermine the Company’s reputation and raise legitimate concerns for the safety of its operations. However, the explanation given by the grievor, and the negative results of

the drug test which corroborate his explanation, along with the other mitigating factors reviewed, cause the Arbitrator to conclude that this is an appropriate case for a reduction of penalty and a reinstatement, on conditions designed to protect the Company's interests.

For the foregoing reasons the grievance is allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment, without compensation and without loss of seniority subject to his agreeing to the two following conditions: Firstly, the grievor shall resume participation in the Company's EAP program, in which he was previously involved, for stress management for an appropriate period of time; secondly, for the period of two years following his reinstatement the grievor must agree to be subject to random drug and alcohol testing, to be conducted in a non-abusive fashion. Failure to honour these conditions will be grounds for the termination of the grievors' employment.

February 14, 1997

(signed) MICHEL G. PICHER
ARBITRATOR