CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2969

Heard in Montreal, Thursday, 16 July 1998

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS (UNITED TRANSPORTATION UNION)

EX PARTE

DISPUTE – COUNCIL:

The dismissal of Conductor W. Kruize.

COUNCIL'S STATEMENT OF ISSUE:

Conductor Kruize was dismissed by the Company "for conduct incompatible with that of a Canadian National employee on February 3, 1997."

The Union contends that: **1.)** The grievor did not receive a fair and impartial hearing. Assistant Superintendent S. Iatonna both participated in the investigation of the grievor, and was a witness at the investigation. It is the Union's position that Assistant Superintendent Iatonna's dual role necessarily compromised the procedural fairness that is required in an investigation. Therefore, any discipline imposed is null and void. **2.)** The Company has failed to establish that the grievor engaged in conduct incompatible with that of a Canadian National employee on February 3, 1997. There is no evidence that the grievor either possessed or consumed illicit drugs or alcohol while he was subject to duty. **3.)** The discipline assessed in this instance was too severe. The grievor is a long service employee with the Company who hired on in 1962. Therefore it is submitted that the penalty imposed upon the grievor is too severe.

The Union requested that Mr. Kruize be reinstated without loss of seniority and with compensation for all wages and benefits.

The Company disagrees with the Union's contentions and has declined the Union's request.

DISPUTE – COMPANY:

Appeal the discharge of Conductor W. Kruize effective February 3, 1997 for conduct incompatible with that of a Canadian National employee.

COMPANY'S STATEMENT OF ISSUE:

On February 20, 24, 25, 26 and 28 a formal investigation was conducted by the Company in relation to an incident which occurred on or about February 3, 1997 involving Conductor Kruize.

As a result of this formal investigation, the Company decided to discharge the grievor from service with the Company for conduct incompatible with that of an employee of Canadian National Railway. The discharge was effective February 3,1997.

The Council appealed the discipline imposed on the grounds that: **1.)** the investigation was not conducted in a fair and impartial manner, **2.)** the grievor has been unjustly discharged, and **3.)** the discipline was too severe.

The Council requested that the grievor be reinstated without loss of seniority and with compensation for all lost wages and benefits.

The Company declined the Council's request.

FOR THE COUNCIL: **FOR THE COMPANY:**

(SGD.) M. P. GREGOTSKI **(SGD.) P. MARQUIS**
GENERAL CHAIRPERSON **FOR: SENIOR VICE-PRESIDENT, LINE OPERATIONS**

There appeared on behalf of the Company:

M. Sherrard	– Counsel, Toronto
P. Marquis	– Labour Relations Officer, Toronto
Greg Search	– Labour Relations Officer, Toronto
S. Iatonna	– Assistant Superintendent, Brockville
O. Lavoie	– Transportation Officer, Montreal
P.C. S. Rudakas	– York Region Police Department, Toronto
P.C. W. Arniel	– York Region Police Department, Toronto
B. Ali	– Security, Best Western
M. Mawes	– Security, Best Western

And on behalf of the Council:

D. J. Wray	– Counsel, Toronto
M. P. Gregotski	– General Chairperson, Fort Erie
G. Binsfeld	– Vice-General Chairperson, King City
G. Bird	– Sr. Vice-General Chairperson, Montreal
Richard Dyon	– General Chairman, BLE, Montreal
Wm. M. Kruize	– Grievor

AWARD OF THE ARBITRATOR

At the time of the events giving rise to the grievor's discharge he had been employed by the Company, as well as by VIA Rail for a period of time, for a total of some thirty-five years. On February 2, 1997 the grievor was in service as a conductor in through freight service between Montreal and Toronto.

The evidence discloses that the grievor was provided overnight accommodation by the Company at the Best Western Hotel in Thornhill, Ontario for the night of February 2 and early morning of February 3, 1997. Having booked six hours' rest upon his arrival in Toronto the grievor was subject to a call from 01:30 onward on the morning of the 3rd. When the Company did attempt to call Mr. Kruize to order him for train 390 for an estimated departure of 02:30 it received no answer from the telephone in his room. The hotel security was then requested to attempt to locate him in the hotel. The night security supervisor eventually entered the grievor's room where a plastic bag containing a small quantity of marijuana was found on a table. The grievor was nowhere to be seen. When the Operations Management Centre was advised of the situation CN Police were notified, and were requested to contact the York Region Police to attend at the grievor's room at the hotel.

While three York Region police officers were attending at the scene, at or about 03:10 Mr. Kruize returned to his room in the company of two friends, Mr. Robert Smith and Ms. Karin Greenshields. Initially all three individuals denied knowledge or ownership of the marijuana found in the room. They told the police officers that a number of other people had been in the room earlier in the evening, and that the three of them had gone out for dinner. When the police searched the grievor's jacket, which was being worn by Ms. Greenshields, they found a number of tablets of the restricted drug known as "ecstasy". All three individuals denied knowledge or ownership of the tablets. During a telephone conversation shortly thereafter, Assistant Superintendent Iatonna asked the grievor whether he had been drinking, to which he replied in the negative. It is not disputed that he had previously indicated to the police officers that he had consumed two or three beers over the course of the evening. Assistant Superintendent Iatonna advised the grievor that he was being taken out of service and directed him to remain at the hotel to meet with him. However, when the police later advised the three individuals that no charges would be laid and that they were free to go, the grievor, along with his two friends, departed the hotel. He was therefore not present when CN Police Agent R. Patterson and Assistant Superintendent Iatonna arrived at the hotel shortly after 04:30.

The grievor was given notice to attend a disciplinary investigation for an alleged violation of Rule G. During the investigation both Mr. Kruize and Ms. Greenshields gave an account of the events of that evening. They relate that the marijuana found in the room belonged to Mr. Smith. According to their evidence, while the grievor was taking a shower with the two friends in attendance in his room, Mr. Smith and Ms. Greenshields smoked some of the marijuana. As the grievor emerged from the shower and smelled the marijuana, he instructed them to put it out, as they would get him into trouble. According to the account of both the grievor and Ms. Greenshields, shortly thereafter they went out for dinner. Finding that the restaurant in the hotel was closed, they proceeded to the home of

Mr. Smith's parents in King City. According to their evidence the grievor consumed two or three non-alcoholic beers at that location prior to leaving to return to the hotel at approximately 02:30.

Ms. Greenshields relates that during the course of the evening Mr. Smith gave her the ecstasy tablets to keep for him, and that she stored them in the pockets of Mr. Kruize's jacket, which she was wearing when the three were encountered by the police. It is not disputed that some four days after the incident the grievor voluntarily undertook his own urinalysis drug test at the Hotel Dieu Hospital in Kingston, where he resides. The test results were negative for all drugs, including cannabanoids.

The thrust of the position advanced on behalf of the grievor by the Council is that, although he was obviously found in a compromising situation, Mr. Kruize did not violate Rule G, did not consume or himself possess marijuana or any other prohibited drug, and should therefore not have been the subject of any discipline. It also submits that there were irregularities in the investigation process. Firstly, the Council objects to the fact that while the grievor was given notice that he would be investigated for an alleged violation of Rule G, he was ultimately disciplined for conduct unbecoming an employee, and not for a violation of Rule G. It argues that the change of grounds of discipline violates the standards of a fair and impartial investigation contemplated within article 82 of the collective agreement. Secondly, the Council alleges that because Superintendent Iatonna remained in attendance during the course of the investigation, even though he was not himself the investigating officer but was merely a witness, the investigation process was conducted improperly.

The Arbitrator cannot accept the submissions of the Council with respect to the regularity of the investigation process. The evidence reflects that Mr. Iatonna was retained to type the record of the investigation proceeding, apparently because of a physical limitation of the Company officer who conducted the investigation. Additionally, it appears that on occasion the investigating officer, whose first language is French, needed some assistance in the translation of words during the course of the investigation. This is not, in the Arbitrator's view, a circumstance comparable to **CROA 1720** and **1886**, where a key company witness also acted as investigating officer. The involvement of Assistant Superintendent Iatonna in the instant investigation was not substantial, and plainly did not call the impartiality of the proceedings into question.

Nor can the Arbitrator sustain the Council's suggestion that the Company could not discipline the grievor for anything other than a violation of Rule G, on the basis that he received a notice of investigation concerning an alleged violation of that rule. It is well settled that as long as the general standards of fairness and impartiality are maintained, an employee can be disciplined for an offence disclosed during the course of a disciplinary investigation, even where that offence is not the specific offence which he or she was originally alleged to have committed. The argument advanced by the Council in this case was also made in **CROA 2296** where the Arbitrator responded in the following terms:

> 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.
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> 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.

The Council's objection with respect to the sufficiency of notice to Mr. Kruize is therefore dismissed.

I turn to consider the merits of the grievance. What does the totality of the evidence disclose? It is, of course, undeniable that Mr. Kruize found himself in a highly compromising situation. With respect to his particular activities the Company had reason to be concerned, as the grievor had previously been convicted of a serious offence of trafficking in prohibited drugs, resulting in his being sentenced to fifteen months of incarceration in 1985. Additionally, as is evident from the record before the Arbitrator, both Mr. Kruize and his companions offered inconsistent and conflicting accounts of what occurred on the evening of February 2nd and the morning of February 3rd in relation to the consumption and possession of the drugs found in the hotel room. It appears that the final version of these events only emerged during the Company's investigation, as explained by both Mr. Kruize and Ms. Greenshields.

Upon a careful review of the entirety of the evidence the Arbitrator is satisfied that the grievor did not consume drugs or alcohol on the night in question. Indeed that appears to be a view shared by the Company, to the extent that it did not discipline the grievor for any violation of Rule G. The question then becomes whether Mr. Kruize was subject to discipline for the fact that a quantity of marijuana and other prohibited drugs were found in his room, albeit possessed by other persons, at a point in time when he was subject to duty. I am satisfied that the conduct of Mr. Kruize in that regard did leave him open to a serious degree of discipline. Needless to say, an employee who places himself in a position of obvious jeopardy, involving the open presence of illicit drugs in an away from home residence when he or she is subject to duty, does so at a great degree of peril. An employee who knowingly places himself or herself in such a compromising position knows, or reasonably should know, that the Company's reputation and legitimate business interests are put at substantial risk. I am, therefore, satisfied that the grievor did render himself liable to a serious degree of discipline.

There are, however, mitigating factors to be carefully weighed in the case at hand. Mr. Kruize is an employee of thirty-five years' service, first hired in 1962. Although he does have a record in relation to drugs arising from events which occurred some fifteen years ago, the evidence before the Arbitrator indicates compellingly that the grievor did not in fact possess or consume marijuana on the evening in question. That appears to be supported by the urinalysis drug test which he took some four days later. In the circumstances I am satisfied that a more appropriate disciplinary result would involve the substitution of a substantial suspension, and the reinstatement of Mr. Kruize, subject to certain conditions fashioned to protect the Company's legitimate interests.

For the foregoing reasons the grievance is allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment without loss of seniority and without compensation or benefits. Mr. Kruize's reinstatement is subject to his accepting, for a period of two years following his reinstatement, to be subject to periodic alcohol or drug testing, to be conducted on a random and non-abusive basis. Should Mr. Kruize fail to attend at an alcohol or drug screening test directed by the employer, or test positive in the event of such a test, he shall be subject to immediate discharge.

July 21, 1998

(signed) MICHEL G. PICHER
ARBITRATOR