

# CANADIAN RAILWAY OFFICE OF ARBITRATION

## CASE NO. 3263

Heard in Calgary, Thursday, 16 May 2002

concerning

**CANADIAN PACIFIC RAILWAY**

and

**BROTHERHOOD OF LOCOMOTIVE ENGINEERS  
(RAIL CANADA TRAFFIC CONTROLLERS)**

### **DISPUTE:**

Claim for 10 days lost wages for RTC R.G. Bisson for being held out of service pending investigation as per article 35.05.

### **JOINT STATEMENT OF ISSUE:**

On March 30, 2001, while Rail Traffic Controller R.G. Bisson was on annual vacation the Calgary City Police executed a search warrant at his house. RTC Bisson claims that his roommate was the only person named as the subject of the search warrant and was subsequently charged with improper storage of weapons and possession of a controlled substance. Mr. Bisson further claims that the Calgary City Police contacted him on April 2, 2001 and advised him that he would also be charged, as the house was owned by him.

On April 4th, 2001, while still on annual vacation, he phoned Mr. Rick Wilson, General Manager of the Network Management Centre, to advise him of the charges laid against him. In his conversation with Mr. Wilson, RTC Bisson claimed that the possession of a controlled substance charge had nothing to do with him and he advised Mr. Wilson that he was in Winnipeg visiting his children at the time the search warrant was executed.

On April 5th, 2001, while still on annual vacation, RTC Bisson attended the Calgary NMC and advised Management of these charges and stated that the possession of a controlled substance charges had nothing to do with him and that he had been advised by the Calgary City Police that he was only being charged because he was the owner of the house. At this time and during a subsequent meeting that took place on April 6th, 2001, RTC Bisson was asked to submit to a voluntary drug test. RTC Bisson declined to submit to a voluntary drug test on both occasions.

On April 11, 2001 the Company commenced a formal investigation with RTC R.G. Bisson. At this time, RTC Bisson was offered a third opportunity to submit to a drug test which he again declined.

On April 26, 2001 RTC Bisson completed an assessment, was then cleared to return to work by the Company's Medical Department and returned to work on May 10, 2001.

The Union has advanced a grievance stating that RTC Bisson must be paid for the initial 10 days held out of service as per article 35.05.

The Company has denied the grievance stating that RTC Bisson was not held out of service under the provisions of article 35.03.01 as alleged by the Union, rather he was withheld from service as a result of the Company's legitimate medical concerns surrounding his fitness to work in a safety sensitive critical position.

**FOR THE BROTHERHOOD:**

**(SGD.) J. RUDDICK**  
**GENERAL CHAIRMAN**

**FOR THE COMPANY:**

**(SGD.) L. D. WORMSBECKER**  
**FOR: DIRECTOR, NMC OPERATIONS**

There appeared on behalf of the Company:

J. Worrall	– Labour Relations Officer, Calgary
K. Fleming	– Legal Counsel, Calgary
R. Smith	– Manager, CMC, Calgary
S. Seeney	– Manager, Labour Relations, Calgary
R. Sabourin	– Labour Relations Officer, Calgary

And on behalf of the Brotherhood:

M. D. McGown, Q.C.	– Legal Counsel, Calgary
D. Irvine	– Legal Counsel, Calgary
D. Arnold	– Special Representative, Calgary
D. J. Essery	– Local Chairman,
R. G. Bisson	– Grievor

**AWARD OF THE ARBITRATOR**

The issue in the case at hand is whether the Company had reasonable grounds to request the grievor, Mr. R.G. Bisson, a rail traffic controller employed at Calgary, to undergo a drug screening test.

The evidence before the Arbitrator discloses that on Tuesday April 3, 2001 the Company became aware of an article in the Calgary Herald newspaper. Titled “Three more suspects surrender to police” the piece described a massive police raid, characterized as “a huge Hells Angels bust in and around Calgary” which involved a search on the Hells Angels’ club house and twenty-six other properties in the city. Among the properties searched was the grievor’s home. As a result of that search Mr. Bisson was charged with drug and weapons offences. In the Arbitrator’s view, bearing in mind that the content of a newspaper report is not necessarily conclusive evidence of the facts related, the Calgary Herald reported that some of those arrested were charged “... with multiple counts of trafficking in a controlled substance.” and also that the seizure involved \$1,000,000 worth of drugs and weapons, including hand guns, rifles, a cross-bow and a Uzi submachine gun.

The day following the newspaper report the grievor contacted Company supervisor R.E. Wilson and gave him brief details in relation to the newspaper article, agreeing to come and see him the following day. As Mr. Wilson was absent on the 5th, the grievor met with Assistant Director S. Bell and CMC Manager R. Smith.

During the course of that encounter Mr. Bisson advised Mr. Bell and Mr. Smith that he had been on vacation in Winnipeg when his home was raided pursuant to the execution of a search warrant. He advised that his room-mate, Mr. Stefan LeBlanc, a former Hells Angel “prospect” who is no longer active with the gang, was going to take responsibility for the small amount of marijuana, described as twenty-seven grams, found in a container in his garage. Mr. Bisson claimed no knowledge of the drugs found in his garage, and further elaborated that the weapons charges against him were in relation to improperly stored hunting rifles.

Bearing in mind that Mr. Bisson is a rail traffic controller, the equivalent of an air traffic controller in railway operations, whose employment is highly safety sensitive, Mr. Bell asked the grievor whether he would undergo a voluntary drug test before returning to service. The grievor declined, stating that he was not a drug user, that he had nothing to hide but that he felt that he should not be presumed guilty and should not be required to forfeit what he considered his fundamental right not to be made subject to a drug test in the circumstances.

Mr. Smith and Mr. Bell met again with Mr. Bisson on April 6, having obtained confirmation from CP police that the grievor was facing drug and weapons charges. Again they requested that he undergo a drug screening test prior to returning to service, advising him that he would be held out of service until he did so. Mr. Bisson again declined to take a drug test. He denied being a drug user, indicated his own scepticism as to the reliability of drug tests, protested that the Company could not, in any event, be properly concerned with what he might have done on his own time and volunteered to take motor skill testing to demonstrate his ability to perform the duties of the job. He also expressed concern that he might test positive by reason of secondary smoke inhalation.

In light of the grievor’s ongoing refusal to take a drug test Mr. Bell indicated to him that he would require a mandatory referral through the Company’s EFAP. By that avenue he would be required to see a counsellor and be assessed for a drug problem. The record discloses that an appointment was made for Mr. Bisson on the first

available date, April 26, 2001. He was then seen by Dr. Bill Campbell of the EFAP service, who asked him to provide a urine sample for a drug test, which Mr. Bisson then did, albeit under protest. On May 10, 2001 Mr. Bisson was certified by Dr. Kelly Brett of the EFAP service as "... medically fit to work in a safety critical position without restriction." Following that communication the grievor returned to work effective May 13, 2001.

The instant claim concerns the grievor's claim for compensation for being held out of service from April 5 through May 14, 2001. It does not appear disputed that the cutting off of his regular wages worked a hardship on Mr. Bisson, who utilized two weeks of vacation to provide wages for himself between April 29 and May 13, 2001. The Company's position is that it was entitled to keep Mr. Bisson out of service for the period in question, given the highly safety sensitive nature of his duties and the natural concern which the Company had with respect to his involvement with drugs in light of the charges against him and the circumstances in which they arose.

The Company also conducted a disciplinary investigation of Mr. Bisson. It should be noted that he was at all times candid and forthcoming with respect to his own involvement in the Hells Angels, and at least one previous drug offence. Mr. Bisson explained that there are several levels of hierarchy within the Hells Angels organization. At the top of the hierarchy are members, followed by prospects, hang-arounds, friends and associates. Mr. Bisson indicated that he had attained the level of a "hang-around", but had left the biker gang some eight months previous to the time of the Company's investigation. He also indicated that his room-mate, Stefan LeBlanc had been a prospect, but had also left the gang some two months previous.

Mr. Bisson related that he first had contact with the Hells Angels while he was himself a member of a motorcycle club in Winnipeg. Although Winnipeg did not have a Hells Angels chapter, he indicated that his involvement "... consisted of picking up the odd visiting member at the airport, taking them to the hotel, taking them out to the bar, fetching drinks and providing a buffer zone from curious onlookers". He described that kind of association as having lasted between 1993 and 1997, when he moved to Calgary. In Calgary, as a hang-around, he was involved in such tasks as cleaning the club house and serving drinks. According his account he was involved in social events of the Hells Angels, including dances and parties. During the course of his investigation it appears to have been confirmed that his room-mate, Stefan LeBlanc, was charged with trafficking, having apparently sold a quantity of drugs to an undercover police officer. Mr. Bisson nevertheless denied any knowledge of such activities, and stressed that he was himself not a drug user. According to his account of the facts, he was once previously convicted of the possession of a small quantity of marijuana, while employed by the Company in Winnipeg. He states that the marijuana was in fact his brother's, and that it was found under the seat of the car he was driving. Mr. Bisson relates that he took responsibility for the small amount of drugs found on that occasion to prevent his brother, who wished to find employment in the United States, from incurring a criminal record. When pressed upon the matter he indicated that the only drugs he had ever used were marijuana and hashish, and that he had not consumed them since the mid-80s.

Counsel for the Brotherhood submits that the Company did not, in the circumstances disclosed, have reasonable and probable cause to require Mr. Bisson to undergo a drug screening test before returning him to service. Counsel refers the Arbitrator to his own award in **Re Canadian Pacific Ltd. and United Transportation Union**, 1987, 31 L.A.C. (3d) 179 (M.G. Picher), and stresses that the facts which obtained in that case are substantially different from those concerning Mr. Bisson. In the **CPR Ltd.** case (**CROA 1703**) it was found that a conductor, Mr. Hutchinson, had a substantial marijuana growing facility in a greenhouse at his home. Given the volume of both growing and harvested marijuana involved, counsel submits that it was there reasonable for the Company to have concerns as to employee's ongoing involvement in both the trafficking and use of drugs. He maintains that in the instant case, where the amount of drugs found in the grievor's garage was extremely small, where they were arguably in the possession of his friend Mr. LeBlanc, and where the drug charges against Mr. Bisson were ultimately withdrawn, the Company did not have reasonable and probable grounds to demand that he undergo a drug screening test.

The Arbitrator has some difficulty with that submission in all of the circumstances. Firstly, as noted above, there are few positions within rail operations more safety sensitive than that of a rail traffic controller. The RTC works with limited supervision, and is responsible for the movement of trains over an assigned territory, generally by means of radio communication with running trades crews and others in the field. The comparison of the responsibilities of an RTC with those of an air traffic controller is not altogether inappropriate. The lives of individuals responsible for the movement trains, rail inspection equipment and rail repair equipment depend on the alertness, vigilance and continuous attention to their duties of rail traffic controllers.

The relationship between safety sensitive work and an employer's right to demand that an employee undergo a drug or alcohol test on the basis of reasonable and probable grounds was touched upon in the following terms in the Hutchinson award:

Does an employer's right to require an employee to undergo a fitness examination extend to requiring a drug test? I am satisfied that in certain circumstances it must. Where, as in the instant case, the employer is a public carrier, and the employee's duties are inherently safety sensitive, any reasonable grounds to believe that an employee may be impaired by drugs while on duty or subject to duty must be seen as justifying a requirement that the employee undergo a drug test. Given contemporary realities and the imperative of safety, that condition must be seen as implicit in the contract of employment, absent any express provision to the contrary.

...

Following a review of the jurisprudence and certain federal regulations the arbitrator continued:

What guidance do the foregoing considerations provide in the instant case? It appears to the Arbitrator that a number of useful principles emerge. The first is that as an employer charged with the safe operation of a railroad, the Company has a particular obligation to ensure that those employees responsible for the movement of trains perform their duties unimpaired by the effects of drugs. To that end the Company must exert vigilance and may, where reasonable justification is demonstrated, require an employee to submit to a drug test. Any such test must, however, meet rigorous standards from the stand-point of the equipment, the procedure and the qualifications and care of the technician responsible for it. The result of a drug test is nothing more than a form of evidence. Like any evidence, its reliability is subject to challenge, and an employer seeking to rely on its results will, in any subsequent dispute, bear the burden of establishing, on the balance of probabilities, that the result is correct. The refusal by an employee to submit to such a test, in circumstances where the employer has reasonable and probable grounds to suspect drug use and a risk of impairment, may leave the employee liable to removal from service. It is simply incompatible with the obligations of a public carrier to its customers, employees and the public at large, to place any responsibility for the movement of trains in the hands of an employee whom it has reasonable grounds to suspect is either drug-dependent or drug-impaired. In addition to attracting discipline, the refusal of an employee to undergo a drug test in appropriate circumstances may leave that employee vulnerable to adverse inferences respecting his or her impairment or involvement with drugs at the time of the refusal. On the other hand, it is not within the legitimate business purposes of an employer, including a railroad, to encroach on the privacy and dignity of its employees by subjecting them to random and speculative drug testing. However, where good and sufficient grounds for administering a drug test do exist, the employee who refuses to submit to such a test does so at his or her own peril.

A first issue in the instant case is whether the Company was justified in holding the grievor out of service pending its investigation. The conduct for which he was criminally charged appeared, on its face, to involve activities away from the workplace and on the grievor's own time. It is well-established that the laying of a criminal charge does not, of itself, justify the suspension of an employee, particularly where the conduct giving rise to the charge does not appear to be work-related. In some cases, however, off-duty conduct that is the subject of a criminal charge may seriously affect the legitimate interests of the employer. The operative principle was well summarized by the majority of the board of arbitration in **Re Ontario Jockey Club and Mutuel Employees Association** (1977) 17 L.A.C. (2d) 176 (Kennedy) at p. 178:

... The better opinion would appear to be that the employer's right to suspend where an employee has been charged with a criminal offence must be assessed in the light of a balancing of interests between employer and employee. The employee, of course, has a legitimate interest in being considered innocent until he has been proven guilty. If, however, the alleged offence is so related to the employment relationship that the continued employment of the employee would present a serious and immediate risk to the legitimate concerns of the employer as to its financial integrity, security and safety of its property and other employees as well as its public reputation, then indefinite suspension until the charges have been disposed of would appear to be justified. In determining the nature of the legitimate interests of the employer, it is necessary to look at the nature of the offence, the work being performed by the employee, and the nature of the employer's business.

(See also **Re Oshawa General Hospital and Ontario Nurses Association**, (1981), 30 L.A.C. (2d) 5 (Adams) where a board of arbitration sustained the suspension by a hospital of a nurse found in possession of a substantial quantity of marijuana and marijuana plants, and charged with the possession of narcotics for the purposes of trafficking and see, generally, **Re Hydro Electric Commission of the City of Hamilton and International Brotherhood of Electrical Workers, Local 138**, 1984, 13 L.A.C. (3d) 204 (Devlin)).

The question of whether the Company had reasonable grounds to require the grievor to undertake a drug test is one which must, in fairness, be assessed on the basis of the information which the Company had at its disposal when it made the request. Such facts as it may have developed later through further investigation may have a general bearing on the employee's liability to discipline, but cannot logically be brought to bear on the issue of whether the employer had reasonable grounds to demand a drug test when it did.

What, then, was the Company's knowledge at the time it required Mr. Bisson to undergo a drug test? Firstly, it should be noted that it had knowledge of Mr. Bisson's prior disciplinary record. It is not disputed that that record included two occasions of sleeping on duty, the most recent being in July of 1999. It also appears that on some three occasions the grievor was either cautioned or disciplined for absenteeism. Most significantly, of course, is the information which came to the attention of the Company's supervisors on April 3 through 6, 2001, commencing with the report in the Calgary Herald under the heading "Hells Angels Bust".

While it is true that Mr. Bisson insisted, throughout the Company's investigation, that he had no personal involvement with drugs, and that the Hells Angels is a club of "motorcycle enthusiasts", the Arbitrator finds that it was not unreasonable for the employer to have substantial concerns, given the general association, at least in the public eye, between the Hells Angels gang and drug trafficking. While there is reason to believe all that Mr. Bisson ultimately disclosed to the Company during the course of the investigation, it is important to appreciate that the details of his own involvement with the Hells Angels were not known at the time the decision was taken to hold him out of service pending a drug test. Obviously, the association of Mr. Bisson in a news report relating to massive searches and seizures, including the apparent seizure of over \$1,000,000 worth of drugs and weapons, would give cause for substantial concern as to whether the grievor was involved in the trafficking or use of drugs. The fact that his room-mate, also associated with the Hells Angels, was charged with trafficking would do little to assuage the Company's concern.

The Arbitrator well appreciates the grievor's concern for his own freedom of association, and the limits on the employer's legitimate interests as regards his off-duty activities. Nevertheless, where, as in the instant case, the objective information in the hands of the Company is such as to raise grave concerns with respect to whether an employee who holds a highly safety sensitive position within rail traffic operations is involved in the trafficking or use of drugs, it must be found that reasonable grounds existed to insist that the employee undergo a drug screening test as confirmation of his fitness to safely perform the duties of his position.

The evidence appears to confirm that the grievor did not, as he insists, have any significant involvement with the consumption of drugs. It may also be noted that Mr. Bisson is a generally good employee who is valued and respected for his contribution to the Company. Notwithstanding those facts, he must appreciate that the outward appearances of his drug possession and weapons charges, in the context of a larger high profile raid upon Hells Angels members and associates, including the trafficking charge against his room-mate, gave the Company little alternative but to follow the most responsible and cautious course in all of the circumstances.

On the basis of the foregoing the Arbitrator is satisfied that the Company did have reasonable and probable grounds to demand that Mr. Bisson undergo a drug screening test before returning him to the highly safety sensitive duties of a rail traffic controller. Nor does evidence disclose any violation of the **Canadian Human Rights Act**, an aspect not stressed in argument before the arbitrator. For these reasons the grievance must be dismissed.

May 27, 2002

**(signed) MICHEL G. PICHER**  
**ARBITRATOR**