

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 3584

Heard in Montreal, Tuesday, 10 October 2006

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

DISPUTE:

Claim for compensation for Sarnia Yard Service Employee B. Smits PIN 192670 as a result of his discharge effective 12 March, 2004.

JOINT STATEMENT OF ISSUE:

On or about the 20th day of December 2003, Mr. B. Smits was charged, under the Criminal Code of Canada for; "did unlawfully possess a controlled substance, to wit: Cannabis Marihuana for the purpose of trafficking, contrary to Section 5 (2) of the Controlled Drugs and Substance Act."

Following this charge, the Company held a Formal Employee Investigation on 12 January, 2004 and as a result of this investigation discharged Mr. Smits effective 12 March, 2004 for the following reason: "Charges under the Criminal Code of Canada for possession of a controlled substance for the purpose of trafficking, which constitutes activities incompatible with working a safety sensitive position with CN."

The criminal charge against Mr. Smits was withdrawn in court proceedings held 22 December, 2004. The Union advised the Company by letter dated 08 February, 2005 that the charge against Mr. Smits had been withdrawn. To date, Mr. Smits has not been returned to active service.

The Union is seeking an immediate return to service for Mr. Smits, with full compensation and benefits from 23 December, 2004 to present.

The Company and the Union have failed to achieve a mutually acceptable resolve only as it relates to the matter of compensation, if any, as a direct result of his discharge.

The Company, declined the Union's grievance.

FOR THE UNION:

(SGD.) R. A. BEATTY
GENERAL CHAIRPERSON

FOR THE COMPANY:

(SGD.) J. P. KRAWEC
MANAGER, LABOUR RELATIONS

There appeared on behalf of the Company:

- J. P. Krawec – Manager, Labour Relations, Toronto
- D. VanCauwenbergh – Sr. Manager, Labour Relations, Toronto
- T. E. Brown – Superintendent, Sarnia
- D. Gagné – Manager, Labour Relations, Montreal

And on behalf of the Union:

- M. A. Church – Counsel, Toronto
- J. Robbins – Vice-General Chairperson, Sarnia
- T. Hopwood – Local Chairperson, Sarnia
- A. Wer – Local Chairperson, Sarnia
- B. Boechler – General Chairperson, Edmonton
- R. A. Hackl – Vice-General Chairperson, Edmonton
- D. Bolianz – Local Chairperson, Winnipeg
- B. Smits – Grievor

AWARD OF THE ARBITRATOR

As reflected in the joint statement of issue, the sole issue before the Arbitrator relates to the compensation of the grievor. It is common ground that the grievor was removed from service, investigated and discharged while he was under the cloud of a criminal charge for allegedly being in possession of marijuana for the purposes of trafficking. It appears that that charge arose out of his being present in the home of a friend who had a marijuana growing operation at his home at the time the police executed a raid.

As is clear from the court records, it seems to have become evident that the grievor in fact had no involvement in the illegal activities of his friend, another Company employee who it appears was subsequently convicted, discharged from his employment with the Company and has not grieved that outcome. The record discloses that the charges against the grievor were withdrawn on or about December 22, 2004 and that

that result was communicated to the Company by the Union on or about February 8, 2005. Subsequently, the Company took the position that it would require a number of conditions to consider Mr. Smits' reinstatement. Firstly, it needed an official court document confirming the withdrawal of the trafficking charges against him. It further demanded that he undergo a drug test, follow a course of rehabilitation and, among other things, abstain from the consumption of alcohol and drugs for a two year period, while being subject to random unannounced testing. The record discloses that the Union objected to the conditions so put. Indeed, during discussions over a considerable period of time those conditions were reduced, as reflected in a letter dated July 10, 2006 issued by the Company to the Union's General Chairperson, Mr. R.A. Beatty. The conditions, as described in that letter, involve a period of one year of unannounced drug testing, with the grievor to be returned to active service upon qualifying in his Rules, with his benefits and seniority restored on the first day following reinstatement, all without compensation from the date of his discharge, with the interim period to count as a suspension. Those conditions have not been acceptable to the Union and, in the result, the grievor has remained away from work.

The record does disclose, however, that the Company indicated to the grievor, following his successful drug test obtained on or about July 4, 2006, that he was free to return to work. The Arbitrator is satisfied that the failure of the grievor to report for work at that point must, to some degree, be attributed to his own inaction.

The primary issue is whether the Company was justified in keeping the grievor out of service from and after February 8, 2005, when it apparently became aware that

he was no longer being prosecuted. The Arbitrator is satisfied that for a period of time the Company was justified in its position. It must be appreciated that the grievor stood charged with an extremely serious narcotics offence, a charge incompatible with ongoing employment in the safety-sensitive operations of a railway. Even after the charges against him were dropped, the Company was in receipt of a positive drug test which the grievor apparently undertook voluntarily during the course of the Company's disciplinary investigation. The Arbitrator appreciates that that positive test did not suggest any work-related misconduct by the grievor, to the extent that there is no suggestion of the grievor having consumed marijuana on duty or while subject to duty. However, viewed in the whole of the scenario it was nevertheless a disturbing piece of evidence from the perspective of the Company. In all of those circumstances I am satisfied that the Company was well justified in requiring hard evidence, in the form of a court document, confirming that the charges against Mr. Smits had been dropped. Unfortunately that document was not provided to the Company by the Union until on or about April 20, 2006. In these circumstances the Arbitrator cannot find that the grievor should be entitled to any compensation for the period between his initial removal from service and that date.

As regards the period after April 20, 2006, there appear to be mixed causes for the fact that the grievor has not returned to work. A contributing factor is the Company's insistence on post-reinstatement conditions which are normally associated with a person who has a confirmed alcohol or drug problem. That is plainly not the case with respect to the grievor. The Arbitrator is satisfied that the employer could not, as it sought to do, insist upon a random testing regime for the grievor, be it for two years or

for one year, given that he had in fact committed no work related wrong with respect to the Company's drug and alcohol policy, and was plainly not a person confirmed to have a drug or alcohol problem. By the same token, it was plainly open to the grievor to accept the offer of reinstatement, at least as of a negative drug test which he took on or about July 4, 2006.

In the result, the Arbitrator views this as a case of shared responsibility for the purposes of assessing the quantum of compensation. I am satisfied that the grievor should not be compensated for the period between his removal from service and April 20, 2006. During all of that period the Company had legitimate grounds for profound concern as to the criminal charges of trafficking in narcotics laid against the grievor, coupled with a positive drug test. As unfortunate as ungrounded criminal charges may be, the hardship flowing from them must be borne by the person charged, and not by the Company, to the extent that the grievor would have worked in a highly safety-sensitive capacity. However, during the period between April 20 and July 4, 2006 any delay in the grievor being reinstated must be viewed as attributable solely to the Company. After that date, however, I am satisfied that any failure of the grievor to return to active employment was largely his own fault, for not pursuing the Company's offer of reinstatement, even subject to protest and ultimate arbitration with respect to any conditions, when he had the opportunity to do so. I find his explanation, namely that he was once told to "stay off the property" to be simply unconvincing with respect to the ultimate resolution of his legal rights.

For the foregoing reasons the Arbitrator directs that the grievor be reinstated into his employment immediately, that his record contain no indication of a disciplinary suspension whatsoever for any of the events discussed herein, and that he be compensated for all wages and benefits lost between April 20 and July 4, 2006. The grievor shall obviously also be entitled to compensation for any delay in his reinstatement from the date of this award forward. Should there be any disagreement between the parties with respect to either reintegration or quantum the matter may be spoken to.

October 16, 2006

(signed) MICHEL G. PICHER
ARBITRATOR