CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3586

Heard in Montreal, Wednesday 11 October 2006

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED STEELWORKERS OF AMERICA (LOCAL 2004)

EX PARTE

DISPUTE:

The assessment of fifty-nine (59) demerits to Mr. Dean White.

UNION'S STATEMENT OF ISSUE:

The grievor was assessed fifty-nine (59) demerits for an alleged violation of Rule E of the CROR and the Company policy regarding failure to report an unsafe situation involving alcohol or drugs that may cause a potential unsafe situation causing harm to a co-worker on April 13, 2005.

The Union filed a grievance regarding this matter citing violations of articles 18.2(d), 18.4 and 18.6 of agreement 10.1.

The Union has argued that the Company's investigation revealed no evidence that the grievor was in possession of or used illegal drugs or knew of any other employees using illegal drugs while on the job. The Union has argued that the discipline is severe and unwarranted and should be immediately removed from the grievor's record.

The Company submits that the grievor is culpable of the discipline [sic] and that it has not violated the collective agreement.

The parties have not been able to resolve the dispute to date.

FOR THE UNION:

(SGD.) A. KANE
STAFF REPRESENTATIVE

There appeared on behalf of the Company:

C. Gilbert	– Manager, Labour Relations,
A. de Montigny	– Sr. Manager, Labour Relations, Montreal
D. Morin	– Assistant Chief Regional Engineering
F. Morgan	– CN Police

And on behalf of the Union:

A. Kane	– Staff Representative, Vancouver
J. Dinnery	– President, Local 2004, Edmonton
J. Vukoja	– Vice-President, Sudbury
S. Michaud	– Witness
D. White	– Grievor

AWARD OF THE ARBITRATOR

The material before the Arbitrator confirms, beyond controversy, that as a result of a tip received by CN Police, a van in which the grievor and other employees were riding was stopped by CN Police and searched in the early morning hours of April 13, 2005. Marijuana in substantial quantities was found in the vehicle. All six employees in the vehicle were interviewed and drug tested, and in addition all members of the extra gang crew, numbering some twenty-two, were also interviewed and drug tested. It appears that approximately 50% of the employees drug tested returned a positive result, and that four of the employees on the bus were identified by a trained drug detector dog as having the odour of marijuana on their person. In the end, two of the employees were found to have been in possession of drugs on Company premises while a further nine tested positive for cannabinoids in their system.

The grievor did not test positive. At the Company's disciplinary investigation, he denied any knowledge of the drugs which were found on the bus. Following its investigation the Company concluded that the grievor had failed in his obligation to notify the Company of a dangerous situation, namely the possession and use of marijuana by employees on Company premises. In the result, fifty-nine demerits were assessed against the grievor's record.

It is trite to say that in a case of this kind the burden of proof is on the Company. Given the seriousness of the allegations, the standard of proof should be of a high degree. What, then, is the Company's case? Essentially, as regards the grievor, it breaks down into two factors. Firstly, the Company notes that the CN Police received a tip from an anonymous informant indicating that there was the open sale and use of marijuana, particularly on the shuttle bus used to carry employees to and from their work site. Secondly, as regards Mr. White, the Company relies on a statement which he allegedly made to two supervisors who attended at the scene at the time of the raid. Their written report, dated April 22, 2005, is relatively thin. It reads, in part, "when asked if he knew about drugs being used on the gang he would waiver between yes and no. When asked how long this had been going on he said since he joined the gang April 2." That is the sum total of the Company's evidence.

The Arbitrator cannot find that the evidence so presented discharges the burden of proof upon it to demonstrate that the grievor was aware of the drugs that were present in the workplace or on the transportation bus. Firstly, the answer which he gave

to Supervisors Morin and Leduc are entirely consistent with his having only a general understanding, perhaps by hearsay, that drugs were present and were being used in and around the work site. There is nothing in the material to suggest that he had a firm knowledge of who might be possession of drugs, or indeed who might be using them. Nor is there any evidence from which to conclude that he was specifically aware of the drugs which were present on the bus at the time of the CN Police raid.

The fact that drugs were found on the bus, that an informant indicated that there was wide-spread selling and consumption of drugs among the workforce and that a number of employees tested positive by urinalysis test does not of itself establish a sufficient degree of knowledge on the part of the grievor with respect to drugs in the workplace so as to place him under an obligation to report an unsafe condition, presumably under CROR Rule A. It should be noted that the Arbitrator makes no finding, in fact, with respect to whether Mr. White should be deemed to be aware of the rule in questions, as he was not trained or otherwise qualified in the CROR rules.

Because of the Arbitrator's conclusion with respect to the lack of sufficient evidence in the Company's case, it is not necessary to deal with the alternative submission of the Union which alleges that the grievor was deprived of a fair and impartial investigation. However, if it were necessary to rule upon the matter, the Arbitrator would find it doubtful that there was any violation of article 18.2(d) of the collective agreement by reason of the fact that Mr. Morin conducted the first investigation. As is apparent from the record, when the grievor in fact denied any

knowledge of drug possession and use in the workplace the Company determined that it should substitute another person to conduct the investigation and introduce the report made by Mr. Morin and Mr. Leduc as evidence in the second investigation. In the result I would be compelled to find that the Company did not fail in its obligation to conduct a fair and impartial investigation, in the circumstances.

For all of the foregoing reasons the grievance must be allowed. The Arbitrator directs that the fifty-nine demerits assessed against the grievor be removed from his record forthwith.

October 16, 2006

(signed) MICHEL G. PICHER
ARBITRATOR