

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

CASE NO. 4661

Heard in Montreal, January 8, 2019

Concerning

CANADIAN NATIONAL RAILWAY

And

UNIFOR

DISPUTE:

A claim for lost wages and pensionable service during the excessive period that the Company unjustly held Ms. Jocelyn Zunti out of service.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

The Company held an investigation in accordance Article 24.2 of Collective Agreement 5.1 on March 27, 2014 for, "*Circumstances surrounding your arrest by Edmonton Police during your shift on Friday, March 21, 2014.*" A supplemental investigation was also conducted on June 2, 2014 in relation to these circumstances. Following these investigations, the Company did not assess any discipline, but chose instead to hold the grievor out of service until such time the Alberta Court of Queen's Bench came to a decision on the charges laid against her on March 21, 2014. The Court of Queen's Bench issued a final endorsement of a stay of proceedings on all charges on December 11, 2017. Based on the stay of proceeding by the court, the Union requested the Company to reinstate the grievor. However, before the grievor was permitted to return to work, the Company conducted another investigation on April 5, 2018.

The Company justified holding the grievor out of service in concern of allowing an employee who was facing charges of conspiracy to traffic cocaine and possession for the purpose of trafficking, albeit not yet proven in court, to continue working in the same work area of safety sensitive employees and whom speaks regularly to risk sensitive running trades employees. Furthermore, the Company relied on various CROA Awards to support their decision and to deny the Union's grievance.

The Union contends that the Company's decision was unreasonable and unjust, and that the arbitral jurisprudence they rely on is not germane to the circumstances of the instant case.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

The Company held an investigation in accordance Article 24.2 of Collective Agreement 5.1 on March 27, 2014 for; "*Circumstances surrounding your arrest by Edmonton Police during your shift on Friday, March 21, 2014.*" A supplemental investigation was also conducted on June 2, 2014 in relation to these circumstances. During both investigations Ms. Zunti declined to respond to Company questions, allegedly on the advice of her lawyer, and as a result the Company advised her that she would be held from service until such time as the investigation

could be completed. Following these investigations, the Company did not assess any discipline, however it held the grievor out of service until such time as the Alberta Court of Queen's Bench came to a decision on the charges that were laid against her on March 21, 2014. The Company was advised on December 18, 2017 that The Court of Queen's Bench issued a stay of proceedings on December 11, 2017, on the charges against Ms. Zunti. Based on the stay of proceedings by the court, the Union requested that the Company reinstate the grievor, however, before the grievor was permitted to return to work, the Company finalized the employee investigation on April 5, 2018.

The Company maintains that this matter has not been referred to arbitration in a timely manner, as it was submitted for arbitration over four years after the initial grievance of June 20, 2014, and in any event the Union amended their grievance on April 25, 2018, to reflect the time period as noted above in the Dispute section of this statement. Notwithstanding the above arguments, the Company maintains it had reasonable and probable grounds to withhold the grievor from service pending the outcome of her criminal proceedings.

The Union contends that the Company's decision was unreasonable and unjust, and requests lost wages and benefits be paid to Ms. Zunti.

FOR THE UNION:
(SGD.) B. Kennedy
National Representative

FOR THE COMPANY:
(SGD.) R. Campbell
Manager, Labour Relations

There appeared on behalf of the Company:

R. Campbell	– Manager Labour Relations, Winnipeg
D. S. Fisher	– Senior Director Labour Relations and Strategy, Montreal
M. Martens	– Manager Labour Relations, Montreal

And on behalf of the Union:

B. Kennedy	– National Representative, Edmonton
R. Shore	– Regional Representative, Langley
J. Zunti	– Grievor, St. Albert

AWARD OF THE ARBITRATOR

Nature of case

1. This case examines whether CN violated the collective agreement when it held Ms. Zunti out of service due to Edmonton police filing drug trafficking charges against her.

2. For the reasons given below, the arbitrator concludes that CN had proper grounds to hold Ms. Zunti out of service given all the circumstances and the serious

nature of the drug trafficking charges. Ms. Zunti, on the advice of counsel, refused to answer CN's questions when it tried to investigate why police had come to the workplace to arrest and later charge her.

3. However, Ms. Zunti is entitled to a partial remedy for CN's excessive delay after it had learned on December 18, 2017 that the Court had stayed all charges against her.

Facts

4. Ms. Zunti had worked for CN for three years as a Crew Dispatcher. Her primary duties were to call locomotive engineers (LE) and conductors for work. She worked alongside Rail Traffic Controllers (RTC). CN noted that LEs, conductors and RTCs all work in safety sensitive positions.

5. On March 21, 2014, Edmonton police came to CN's workplace and arrested Ms. Zunti. They later charged her with narcotics offences.

6. CN attempted to hold an investigation as required under the collective agreement. During the March 27, 2014 investigation, Ms. Zunti, on the advice of counsel, advised that "she was not at liberty to discuss it" (E-2; CN Exhibits; QA 10-12). CN offered Ms. Zunti a leave of absence, but she declined. CN then held her out of service effective March 25, 2014.

7. CN learned more about Ms. Zunti's situation from media reports (E-2; CN Exhibits; Tab 4). According to those reports, Ms. Zunti had been charged, along with twelve others, with drug related charges, including conspiracy to traffic cocaine and possession for the purpose of trafficking. As part of six major drug busts, Edmonton police had seized over \$800,000 in cash and 3.3 pounds of cocaine.

8. On June 2, 2014, after learning of this additional information, CN attempted to hold a supplemental investigation, but Ms. Zunti again indicated that she was "...not in a position to discuss this" (E-2; CN Exhibits; Tab 5; QA 11-12).

9. CN advised Ms. Zunti by letter dated June 9, 2014 that it would continue to hold her out of service until such time as she could respond to its questions regarding her arrest and criminal charges.

10. Unifor filed a grievance for Ms. Zunti on June 20, 2014.

11. On December 18, 2017, Unifor provided CN with documentation demonstrating that the charges against Ms. Zunti had been stayed. CN, however, did not hold its investigation until April 5, 2018. CN provided no explanation for this extensive delay. Ms. Zunti explained her side of the story at the interview. CN ultimately returned her to work on April 30, 2018.

12. In the interim, Unifor had amended its grievance on April 25, 2018. While the parties debated the scope of the grievance, the arbitrator finds that the original remedial request was broad enough to cover any and all losses for Ms. Zunti. Any remedy depended on whether CN could demonstrate that it had proper justification to hold her out of service pending resolution of the criminal charges.

Analysis and decision

13. CN raised a timeliness objection in addition to its position on the merits.

14. CN suggested that Unifor had failed to submit its grievance to arbitration within the collective agreement's mandatory time frames. The arbitrator dismisses this objection for two reasons. First, while CN raised this objection in its ex parte statement, the arbitrator found no record of its being raised prior to that time.

15. For example, there was no mention of a timeliness objection in CN's December 12, 2018 Step 3 letter (E-2; CN Exhibits; Tab 10). Similarly, that letter did not contest Unifor's suggestion in its April 25, 2018 letter that the parties had agreed to place the June 2014 grievance in abeyance. This failure to raise the objection during the lengthy period when Ms. Zunti was out of service satisfied the applicable test for waiver: [International Brotherhood of Electrical Workers System Council No. 11 v Canadian National Railway Company, 2018 CanLII 87236.](#)

16. Moreover, it appeared that both CN and Unifor took a “wait and see” approach for the pending criminal charges. This scenario satisfied the arbitrator that this case, which the parties described as unique, would also be an appropriate one in which to extend time limits under s.60(1.1) of the [Canada Labour Code](#).

17. CN summarized its position on the merits at paragraph 57 of its Brief (Ex-1):

57. The rail industry is inherently safety-sensitive. Illicit drugs (for that manner any impairing substance) have no place in a safety-sensitive work environment. It was necessary for the Company to examine the risk posed by an employee who has been not only implicated but formally charged by the Crown for crimes related to drug trafficking. Until such time as the risk could be properly assessed, it was appropriate to withhold her from service. The nature of the offence, and the safety critical nature of the railroad business requires this...

18. Unifor focused on Ms. Zunti’s non-safety sensitive position at CN at paragraph 68 of its Brief (U-1):

68. The reality of this case is substantially different than the arbitral jurisprudence the Company relied on in support of holding the Grievor out of service without pay. The Grievor’s occupation is not safety sensitive, safety critical or risk sensitive. At the material time she was employed as a Crew Dispatcher at the Company’s WOC in Edmonton. She is a clerical worker. The Grievor’s job is to call running trade employees (train crews) to work and provide them with various information and details pertaining to train line-ups and other related information, including collective agreement and local agreement matters, and enter and maintain proper computer records in the performance of her duties. She is not involved in the movement or operation of trains and does not work on equipment or tracks in the direct vicinity of moving trains or other railway equipment. She does not work outside at the Company’s Walker Yard or required to wear safety boots or other personal protective equipment. She works inside an office that is not a safety sensitive work area. And of significance when comparing this case to the opinions and decisions of Arbitrator Picher in the aforementioned CROA cases is the fact that the Grievor’s workplace is *heavily supervised and all of the telephone lines in this workplace are recorded and monitored.* (sic) (Emphasis in original)

19. Brown and Beatty at paragraph 703424 summarized the need to balance the parties' interests when an employee faced criminal charges:

In balancing these interests, various arbitrators have stated that to establish that the continued presence of the employee presents a reasonably serious and immediate risk to its legitimate concerns, the employer bears an onus to show that it investigated the charge to the best of its abilities, and that it took reasonable steps to ascertain whether the risk of continued employment could be mitigated by closer supervision or a transfer to another position.

20. Arbitrator Picher summarized the applicable principles for the railway industry in several cases, including [CROA&DR 1703](#):

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.

21. In [CROA&DR 3311](#), Arbitrator Picher dealt with a case involving drug trafficking charges filed against an LE. The charges arose from the break-up of a drug ring allegedly run by the Hells Angels:

The facts are not in dispute. On February 27, 2002 the grievor was taken into custody by two members of the Quebec Provincial Police upon his arrival on train 20 between Montreal and Quebec City, at La Gare du Palais in Quebec City. He remained in custody from February 27 to March 4, 2002, whereupon he was released on bail.

The grievor's arrest was part of a major police operation concerning the break-up of a drug ring operating in Quebec and New Brunswick, involving the Hells Angels motorcycle gang. Forty-six people were arrested and charged in that operation, including the grievor. Mr. Laroche was and remains charged with conspiracy to traffic a prohibited drug under the Controlled Substance and Drug Act, contrary to section 465 of the Criminal Code, trafficking in a prohibited drug, namely 2,000 tablets of "ecstasy", participating in gang activities related to the trafficking of "ecstasy" and possession of monies received as a result of criminal acts punishable under section 355(a) of the Criminal Code.

22. The grievor in **CROA&DR 3311** could not answer the railway's questions due to the criminal charges and his lawyer's advice:

During the course of a disciplinary investigation conducted by the Corporation the grievor declined to provide any substantial information with respect to the charges against him, on the advice of his criminal lawyer. He nevertheless denied any guilt of the charges against him, an assertion which he repeated at the arbitration hearing.

23. In balancing the parties' interests, Arbitrator Picher found in favour of VIA Rail:

...While Mr. Laroche is plainly entitled to the presumption of innocence as regards his rights under the criminal law, for the purposes of the law of employment the objective facts surrounding the charges against him raise substantial legitimate concerns. Media reports, in which his name and photograph have appeared, have associated him, as have the charges against him, with criminal gang activities allegedly conducted by the Hells Angels. Of the forty-six individuals arrested on February 27, 2002, he is among the four most heavily charged. Additionally, as reflected in his own disciplinary investigation, the grievor faced a substantial number of criminal charges in 1993, albeit it appears that he does not now have a criminal record.

In the Arbitrator's view in the circumstances disclosed it is amply within the prerogatives of the Corporation to protect its legitimate interests, including the safety of its passengers and its own reputation, until such time as the charges against Locomotive Engineer Laroche have been fully disposed of...

24. Ms. Zunti's situation differs in one aspect from that of the LE in CROA&DR 3311 since she does not occupy a safety-sensitive position. But the arbitrator does not read this Office's cases as suggesting that a railway cannot hold out of service a non-safety sensitive employee who faces serious criminal charges. It is rather the specific facts of each case which will determine how to balance the parties' interests.

25. In Ms. Zunti's case, her lawyer advised her not to answer CN's questions when it tried to interview her on two separate occasions about the criminal charges. This advice is standard, but it did place CN in a difficult position when trying to satisfy its obligation, as noted in the Brown & Beatty extract above, to investigate the charges. As part of this Office's longstanding expedited arbitration process, all or most railway collective agreements make timely investigations mandatory.

26. Moreover, the nature of the charges is an important factor. Just as in CROA&DR 3311, Ms. Zunti's charges arose out of a major drug ring bust. Ms. Zunti was just one of twelve people charged with drug trafficking offences. The arbitrator cannot judge CN's actions based on Ms. Zunti's satisfactory explanation given years later. The arbitrator must instead evaluate CN's decision based on the information it had when it decided to hold Ms. Zunti out of service.

27. Given the facts in this case, CN had a legitimate right to protect its operations and reputation, as Arbitrator Picher noted in CROA&DR 3311. CN is a major transportation undertaking carrying goods from coast to coast. Ms. Zunti worked

alongside employees engaged in safety-sensitive duties. This Office in [CROA&DR 2039](#) noted, in different circumstances, a railway's legitimate concerns whether someone might be distributing illegal drugs in a safety sensitive workplace.

28. The severity of the charges against Ms. Zunti, which arose as part of 6 highly publicized Edmonton drug busts, and which included cocaine trafficking allegations, tipped the balance in CN's favour.

29. A different conclusion might well follow in other circumstances for a minor criminal charge. As Arbitrator Picher noted in CROA&DR 3311, a criminal charge, by itself, does not justify holding an employee out of service.

30. But that is not the situation here. It is clearly unfortunate that Ms. Zunti had to wait so long before she could complete her interview with CN. But that does not make CN liable under the collective agreement for her resulting losses.

31. The situation changed, however, starting in December 2017.

32. The arbitrator partially upholds Ms. Zunti's grievance for the time period after CN learned that the charges against her had been stayed. Given the significant length of time she had been held out of service, CN ought to have immediately conducted its investigation. Instead, for reasons unknown, CN did not hold its interview until April 5, 2018. Ms. Zunti did not work her first shift until April 30, 2018.

33. CN learned of the stayed charges on December 18, 2017. The arbitrator concludes that, despite the upcoming holiday season, CN could have easily completed all the steps needed to return Ms. Zunti to work by January 2, 2018.

34. The arbitrator awards Ms. Zunti full compensation from January 2 to April 29, 2018. The compensation amount is remitted to the parties since there may be some statutory reimbursements in issue as well as issues concerning a delay in Ms. Zunti's availability to return to work.

35. The arbitrator remains seized should the parties fail to resolve the remedial issues.

January 29, 2019



GRAHAM J. CLARKE
ARBITRATOR