CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1476
Heard at Montreal, Thursday, February 13, 1986

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

CANADIAN BROTHERHOOD OF RAILWAY,
TRANSPORT AND GENERAL WORKERS

DISPUTE:

Appeal of dismissal of Ms. G. Linfield and Mr. T. Zuk of Windsor, Ontario.

JOINT STATEMENT OF ISSUE:

Ms. G. Linfield and Mr. T. Zuk were employed at the Company's Carload Centre at Windsor, Ontario. In May 1984 both employees requested a leave of absence for a four month period commencing in early June 1984. The Company denied the request. After the request for leave of absence was denied, Ms. Linfield and Mr. Zuk booked off sick. The Company subsequently dismissed them for failure to protect their assignments and booking sick from June 12, 1984 until October 22, 1984 to obtain leave of absence.

The Brotherhood contends the Company has violated Article 17.5 of Agreement 5.1 and requests that employees Zuk and Linfield be reinstated with full seniority rights and back pay. The Company denies the alleged violation and the Brotherhood's request.

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD.) T. N. STOL FOR: National Vice-President	(SGD.) D. C. FRAIEIGH Assistant Vice-President Labour Relations.

There appeared on behalf of the Company:

S. C. McDonell	- Solicitor, CN Law, Toronto
W. W. Wilson	- Manager Labour Relations, CN, Montreal
A. E. Heft	- Labour Relations Officer CN, Toronto
0. Rice	- Employee Assistant Program Counsellor, CN, Toronto
L. W. Metcalf	- Retired - Supt. Transportation, CN, Windsor
E. Sahli	- Retired - Carload Manager, CN, Windsor

And on behalf of the Brotherhood:

H. B. Geddes, Q.C.	- Solicitor, Windsor
T. N. Stol	- Representative, CBRT&GW, Ottawa
R. G. Stevens	- Representative, CBRT&GW, Toronto

T. Zuk - Grievor
G. Linfield - Grievor

AWARD OF THE ARBITRATOR

The grievors, G. P. Linfield and T. M. Zuk, are employees with 11 years service with the company. During their careers with the company their supervisors assessed their work performance as more than satisfactory. Mr. Zuk and Ms. Linfield live in a common law arrangement and as I understood the evidence are parents of a child born to them since the facts giving rise to their terminations.

It is common ground that since 1981 the grievors were heavy consumers of the prohibited drug, cocaine. Save for the payment of their rent their joint income from their employment with the company was used to finance their drug habit. Despite their heavy consumption the effects of the drug did not adversely impede the grievors from carrying out their employment duties. Indeed, they worked whatever overtime hours that were made available to them in order to purchase drugs.

It is also common ground that in mid-February 1984, the grievors participated in a scheme to bring cocaine into Canada from the United States. As I understand the vernacular of the drug trade they agreed to act as "mules" for the purpose of transporting a large amount of cocaine (1-1/4 lbs.) from the State of Nevada to Windsor, Ontario. In payment for their services the grievors received 2 ounce quantities of cocaine for their personal use. I was advised that the "street value" of the 1-1/4 lbs. of cocaine was at that time $250,000 and the grievor's payment amount to $8,000 each. While carrying out this scheme the grievors were apprehended by Michigan Drug Enforcement Officers in the City of Detroit. As a result of their activities the grievors were charged with conspiracy to possess cocaine for the purpose of trafficking.

The following sequence of events is not controversial and may be summarized as follows:

(1) Upon apprehension the grievors voluntarily agreed to plead guilty to the charge. As part of the plea bargain they were advised that they would incur a one year jail sentence of which 4 months would be served in a correctional institution. They were released from custody until sentencing by the court.

(2) On May 10, 1984, the grievors appeared before a Michigan judge for sentencing. In the interim period they were interviewed by Michigan State probation officers and were tested for drug consumption. They were given a one year sentence four months of which were to be served at correctional institutions where treatment for drug abuse took place. They continued to work their regular shifts before their sentencing.

(3) On May 16, 1984 the grievors made application to their superiors for a special leave of absence for a 4 month period for the period covering their jail sentence commencing in June 1984. The company denied their applications upon being apprised of the purposes for which the special leave requests

was made.

(4) On June 9, 1984 and June 12, 1984 Ms. Linfield and Mr. Zuk commenced serving their 4 month jail sentences at correctional institutions at Fort Worth, Texas, and Duluth, Minnesota respectively. During the period of their incarceration the grievors successfully completed several courses designed to assist them overcome their drug habit.

(5) For the period of their incarceration the grievors attempted "to book off sick". They adopted this procedure on the advice of their trade union representative after they were advised of the company's refusal to accede to their request for a special leave of absence.

(6) While serving their jail sentence the company issued letters summoning them to a disciplinary investigation for their alleged misconduct in failing to cover or protect their assignments and their booking off sick in order to obtain a leave of absence. Arrangements were made for a postponement of their disciplinary investigation until the grievors could make themselves available.

(7) At their disciplinary interviews conducted on October 22 and 23, 1984, Mr. Zuk and Ms. Linfield indicated their failure to protect their assignments was because of the requirement to attend the appropriate correctional institution. Moreover, they indicated their efforts to book off sick was in order to obtain a leave of absence. Each indicated however that their sickness was attributable to a severe drug dependency. This was the first occasion that the grievors related to the company that they had "a drug problem".

(8) On October 30, 1984, the grievors were advised of their terminations for the reasons alleged in their notices of discipline.

The grievors' discharge grievances were referred to CROA as a result of a direction of the Canada Labour Relations Board ordering their union to discharge its duty of fair representation with respect to them. As such, these grievances are properly before me and I am seized of determining whether on the facts adduced the employer had just cause to terminate.

This is an important point. My function is to determine pursuant to the just cause provisions contained in the collective agreement whether the employer's recourse to discharge was just and reasonable in all the circumstances. Whether the employer was in breach of the special leave provisions under Article 17.5 of Agreement 5.1 or, indeed, whether the grievors were improperly denied sick leave is not necessarily germane to the ultimate disposition of the principal issue. (In that particular regard, no grievances were presented to the employer with respect to those particular matters.) And that is, did the employer breach the just cause provisions of the collective agreement in dismissing the grievors for the alleged grounds that are set out in their notices of discipline?

The grievors' statements made at their disciplinary investigation as well as their statements made under oath at the hearing clearly established the grounds cited by the employer warranting the imposition of discipline. The only question that was actually argued before me was whether the employer's decision to discharge should be disturbed and replaced by a suspension without pay for the period the grievors were unable to cover their assignments because of their obligation to attend to their jail sentences.

In determining whether discharge is the only just and reasonable remedy in circumstances where an employee cannot attend to his or her job responsibilities due to a criminal conviction requiring his or her incarceration the parties referred me to the test cited in Re Alcan Canada Products and United Steelworkers (1974) 6 LAC (2d) 366 (Shime) at p. 393:

> "It is clear that the employer has an interest in not having production disrupted and in not being unduly inconvenienced due to absenteeism for a jail sentence. While it is understandable that an employee may be excused for absenteeism resulting from illness, the same tolerance may not be forthcoming when an employee is absent because he is serving a jail term. However, the employee has also an interest that is deserving of protection. An employee's service with the company and a good work record should be entitled to some protection with the result that in each case there must be a balancing of interests in order to determine whether the discharge is for just cause. There is no reason for a board of arbitration to consider absence per se as a basis for discharge. In this type of situation the employer's interest in having production free from disruption must be balanced against the employee work record, the nature of the offence and the duration of the jail sentence."

In having regard to that decision the trade union submitted that the employer's economic loss was at worst marginal as a result of the grievors' incarceration. In this regard that employer at the material time of the jail sentences was going through a process of consolidation and rationalization of its work force. Replacement employees were secured to perform the work functions hitherto discharged by the grievors. And, indeed, because these replacements were new hirees they were likely paid salaries that were at the base rates of the salary schedules. In response, the grievors' supervisor Mr. E. Sahli, Carload Manager (retired), testified that new hirees were required to replace the grievor at considerable expense to the company. New employees, apart from adjusting to the job, must undergo training programmes to enable them to adequately perform their new responsibilities. In that sense, the company suggested the disruption and dislocation caused by the grievors' incarceration represented a substantial loss.

It suffices to point out with respect to this aspect of the "balancing" test suggested in the Alcan Case (supra) that the employer clearly addressed its mind to the cost factor in determining the grievors' continued fate as employees of the company. Because it is a large company however with substantial financial resources it is

not entirely irrelevant to suggest that at a period of rationalization of its manpower resources, the company might very well have been able to endure without substantial economic dislocation, the temporary absences of two longstanding employees who had run amuck with the law. And given the grievors' relatively impeccable service with the company over an eleven year period, at first blush, it would appear that the financial considerations adversely affecting the company should take deference to the obvious practical needs of these employees whose ability to secure employment elsewhere may be diminshed by their criminal conduct.

But one significant factor in the equation provided in the Alcan test is the consideration of the nature of the offence that led to the grievors' incarceration. It is important to note that their unlawful conduct did not merely involve their being "busted" by the police for the off duty consumption of a prohibited drug substance in the privacy of their apartment. Nor were they charged by the company of a breach of Rule "G" with respect to the consumption of alcohol or prohibited drugs while subject to or under duty. Rather, the grievors knowingly engaged in a deliberate scheme to secure prohibited drugs from outside the country for purposes of trafficking within Canada. They assumed a risk that they knew or ought to be deemed to have known would result, if caught, in their incarceration. To be sure, the grievors participated in this scheme for the purpose of financing their own drug habit. And in this context, I must deal with the principal submission made by their Counsel.

In light of the company's Employment Assistance Programme and its enlightened approach to dealing with the treatment of drug and alcohol abuse with respect to its own employees it was argued that the grievors would have otherwise been eligible for EAP assistance had they made disclosure of their drug problem. And in this regard I am prepared to assume, contrary to the company's Counsel's submission, that the grievors were indeed "sick" because of their drug dependency. Accordingly, it was suggested that because it required the impact of a criminal conviction and the therapy of the drug treatment programme that was offered the grievors at the correctional institutions they attended to cause them to recognize that they had a drug addiction problem the grievors, at all material times, were ill prepared to take advantage of the company's EAP Programme. It was also submitted, that because the grievors have benefited from the drug treatment programmes offered at their respective correctional institutions they are in a like situation with respect to their rehabilitation as if they had properly taken advantage of the company's EAP Programme. In other words, the bottom line put forward is that the employer could be the beneficiary of two rehabilitated employees who have overcome their drug dependency and who, in light of their satisfactory work records, could, if reinstated, make a continuing contribution to its enterprise.

The company submitted that the position advanced by the trade union with respect to the company's EAP Programne would, if accepted by me, represent an abuse of that programme. It is a cardinal rule of the programme that an employee, eligible for its benefits, must voluntarily come forward and request its benefits before the committal of misconduct that may be rooted in alleged drug or alcohol abuse. The EAP programme, it is argued, cannot be seen as a "refuge"

for avoiding discipline once an act of misconduct has been committed. In the grievors' situation their reliance on the EAP Programme represents the "abuse" that the sponsors of the programme (both employer and trade union) sought to frustrate.

Based upon the facts and circumstances described to me during the course of the grievors' own testimony I am compelled to agree with the company's submissions. At no time after the grievors' apprehension in February 1984 by Michigan authorities did they come forward to seek the assistance of their trade union or the company with respect to their drug problem. At that time they had already pleaded guilty to a serious criminal charge and knew, by virtue of their plea bargain, that they faced a minimum jail sentence of four months. During the period between February 1984 and their sentencing on May 10, 1984 they continued to work for the company. They did not advise any company representative during that period that they were being interviewed by Michigan state probation officers with respect to any alleged drug problem. Indeed, the evidence disclosed that during this entire period they continued to consume illicit drugs both before and after work. And in Mr. Zuk's case he admitted to taking drugs occasionally at work. The grievors neither asked for EAP assistance at that time nor did they seek the help of the company with respect to any anticipated absence from work due to their pending incarceration at a drug treatment facility.

Counsel suggested that no such employer assistance was requested because the grievors never recognized at that time that they had a drug problem. I do not agree. I am satisfied they recognized they had a problem when their meagre financial resources impelled them to commit a serious criminal act in order to feed their drug habit. They recognized they had a problem when they voluntarily pleaded guilty to the criminal charge and accepted a minimum four month jail sentence. Moreover, they recognized they had a problem when they were interviewed and tested for their drug problem by Michigan authorities which led to their being sentenced to a correctional institution that offered treatment facilities for drug abuse.

And, the reason why they never came forward to make full disclosure to their employer of their drug problem is quite simple. They did not want assistance. The grievors merely wanted to continue their drug habit. At a time when they could have prepared the company for their eventual incarceration they elected to remain silent. And in my view they did so because neither Mr. Zuk nor Ms. Linfield expected that they would in fact be incarcerated. Through the efforts of their Counsel they admitted that they were still negotiating with Michigan authorities with respect to the elimination and removal of their jail sentences. Because Ms. Linfield was pregnant at the time she especially did not expect to be incarcerated. Both grievors admitted their disappointment at the judge's verdict. Moreover, they were both taken by surprise with respect to that verdict to the extent they asked for and were granted a reprieve of one month's duration in order to enable them to arrange their private affairs before they began serving their sentences. And, of course, it was only at that time that they finally sought the employer's assistance by requesting a special leave of absence "for personal reasons".

In resolving this matter, I am not satisfied that the employer was

duty bound to extend to the grievors any assistance with respect to its EAP programe which it would not have given employees in like circumstances who had not committed an act of criminal misconduct. Moreover, I am not convinced the employer owed the grievors any special consideration where, as a last recourse, they sought the company's assistance where all else failed. In the last analysis the grievors' strategy was to continue feeding their drug dependency. For example, Mr. Zuk readily admitted that at that time, "I could only ponder my cocaine consumption". Each assumed a calculated risk and lost. As a result I cannot find that the company acted unjustly or unreasonably when it ultimately discharged the grievors in October, 1984, for their failure to protect their assignments.

For all the foregoing reasons the grievances are denied.

DAVID H. KATES,
ARBITRATOR.