CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2172

Heard at Montreal, Thursday, July 11, 1991

concerning

CANADIAN PACIFIC EXPRESS & TRANSPORT

and

TRANSPORTATION COMMUNICATIONS UNION

DISPUTE:

By letter dated January 21, 1991, employee Mike McArthur was dismissed by CP Express & Transport.

JOINT STATEMENT OF ISSUE:

The Union submits that there were no justifiable grounds for the dismissal and that Mr. McArthur was dismissed without just cause. In the alternative, the Union submits that the penalty of dismissal was excessive. The Union asserts a violation of Article 8 of the Collective Agreement.

The Union requests that the grievor be reinstated with full seniority, compensation and benefits or alternatively reinstated as determined by the Arbitrator.

The Company seeks to uphold the dismissal.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) J. J. BOYCE	(SGD.) B. F. WEINERT
SYSTEM GENERAL CHAIRMAN	DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Company:

M. Failles	-- Counsel, Toronto
B. F. Weinert	-- Director, Labour Relations, Toronto
T. Messina	-- Terminal Foreman, Brandon
Cpl. W. Anderson	-- Witness

And on behalf of the Union:

D. Wray	-- Counsel, Toronto
J. Crabb	-- Secretary/Treasurer, Toronto
W. Berezinsky	-- Local Chairman, Winnipeg
M. McArthur	-- Grievor

AWARD OF THE ARBITRATOR

The evidence and materials before the Arbitrator establish that the

grievor, Mr. Mike McArthur, was discharged from his position as a warehouseman and delivery driver with the Company at Brandon, Manitoba on January 21, 1991. The discharge was based on the fact that the grievor was found to be in possession of some twenty growing marijuana plants, a substantial quantity of marijuana and hashish oil, as well as extensive apparatus for the growing and processing of marijuana, in his home. This resulted in the grievor being convicted, upon his own guilty plea, of possession of narcotics for the purposes of trafficking. The seriousness of the conviction registered against the grievor, and the facts which give rise to it cannot be disputed. The concerns relating to any employee employed in a safety-sensitive position within the transportation industry being heavily involved in the cultivation and or distribution of narcotics has been the subject of prior discussion in this Office (see Canadian Pacific Ltd. and United Transportation Union (1987), 31 L.A.C. (3d) 179 [M.G. Picher]). As the decision in CROA 1703 indicates, involvement with drugs, particularly outside the workplace, may or may not justify an employee's discharge, depending on all of the circumstances of the particular case. Factors such as the length of an employee's prior service and quality of his record, as well as his candour and the likelihood of rehabilitation are all to be taken into account in such a case, as in any case of discipline.

Regrettably, in the instant case, the mitigating factors are not extensive. Firstly, Mr. McArthur is not a long service employee, having first worked for the Company on March 15, 1988. Secondly, the circumstances of his arrest, which took place at his home during a lunch period during his shift, disclose beyond dispute that he had taken steps to be in possession of marijuana while at work over the balance of the day, although he maintains that he did not intend to consume it during that time.

Additionally, the evidence surrounding his arrest suggests the possibility that he was consuming or was about to consume marijuana during the lunch period when he was arrested at his home. The uncontroverted evidence is that there was an open pile of marijuana on a coffee table in his home when he was apprehended. The grievor's explanation that the marijuana so placed consisted of high potency buds of the plant that were left there to dry is left in substantial doubt by the contrary evidence of RCMP Corporal William Anderson, who was involved in the arrest. He relates that the marijuana which was open on the table at the time of the arrest was dried marijuana leaves, and not buds as stated by Mr. McArthur.

This conflict in the evidence leaves some doubt as to the grievor's candour with the Company, and with the Arbitrator, concerning his immediate involvement with marijuana in the moments prior to his arrest. While he was not discharged for consuming marijuana during his lunch period, this uncertainty in the evidence does little to support the argument of Union's counsel that the grievor has been fully candid and forthcoming in all aspects of his evidence. Lastly, while the grievor relates that he has been involved on a regular basis in the activities of Narcotics Anonymous through a church in Brandon, the evidence contains no independent corroboration of that fact, as is usually the case in drug and alcohol related grievances involving proof of rehabilitation. In other words, there is no

documentation, whether in the form of a letter from a physician, social worker or an administrator of Narcotics Anonymous to confirm Mr. McArthur's account of his rehabilitation activities.

The onus on an employee in the transportation industry convicted of a narcotics trafficking offence, who seeks the benefit of an arbitrator's discretion to reduce a disciplinary penalty, is not insubstantial. If mitigating factors are to be relied on, they must be clearly established and they must, in the end, be convincing. In the instant case that is not so. The grievor is a short term employee who cannot invoke long service as a basis for compassionate consideration. The events of his arrest and conviction, and particularly the conflicting evidence between Mr. McArthur and Corporal Anderson, leave some substantial doubt about the candour of the grievor's testimony. Lastly the absence of any independent corroboration of his claims of rehabilitation are cause for additional concern. Against those uncertainties the Arbitrator must balance the critical interests of the Company for the operation of its safety-sensitive enterprise.

In all of the circumstances the Arbitrator is satisfied that the Company was justified in terminating the grievor's services, and that the circumstances of the case do not justify a reduction of penalty. For the foregoing reasons the grievance is dismissed.

July 13, 1991

(Sgd.) MICHEL G. PICHER
ARBITRATOR