CANADIAN RAILWAY OFFICE OF ARBITRATION

Supplementary Award to

CASE NO. 2498

Heard in Montreal, Thursday, 15 September 1994

concerning

Canadian National Railway Company

and

Canadian Council of Railway Operating Unions [United Transportation Union]

There appeared on behalf of the Company:

G. C. Blundell – Manager, Labour Relations, Edmonton

K. Carroll – Manager, Train Services, Syminton

And on behalf of the Union:

D. Wray– Counsel, Toronto

J. W. Armstrong – General Chairperson, Edmonton

M. G. Eldridge – Vice-General Chairperson, Edmonton

Supplementary AWARD OF THE ARBITRATOR

This matter has been returned to the Arbitrator by reason of a dispute which has arisen between the parties in respect of the grievor's reinstatement into his employment. The award herein, dated June 21, 1994, reinstated the grievor to his job in the following terms:

… The Arbitrator directs that the grievor be reinstated into his employment forthwith, without compensation or benefits, and without any loss of seniority. Mr. Gillam's reinstatement shall be conditioned upon his accepting that for the period of two years following his reinstatement he shall not, within any given six-month period, register failures to respond to work at a rate in excess of the average of other employees within his classification at his home terminal. Failure to adhere to that condition shall render him liable to termination.

Prior to reinstating the grievor the Company required that he undergo a medical examination. That examination included a drug test which the Company maintains disclosed that the grievor had used cannabis. On that basis it declined to reinstate him and terminated his employment.

It is common ground that the Company requires its employees to undergo periodic medical examinations, generally every two years, as well as requiring them to pass periodic examinations in respect of the Canadian Rail Operating Rules. That practice, which is not challenged by the Union, is in keeping with the right, and indeed the obligation, of the Company to ensure the physical capacity and competence of running trades employees occupying safety sensitive positions. It is common ground, however, that while the Company administers drug tests to persons who are newly hired as employees, as a condition of hiring, it does not administer drug tests to established employees as part of their biennial medical check up.

The Company takes the position that in the case at hand the decision not to reinstate Mr. Gillam did not involve the imposition of discipline, but amounted to an administrative decision to terminate his employment for a reason analogous to physical incapacity. On that basis it submits that it was under no obligation to conduct a disciplinary investigation under the terms of article 117 of the collective agreement. The Union takes

the opposite position, and submits, as a first argument, that the grievor's termination by the Company was disciplinary, and must be found to be null and void as no disciplinary investigation was conducted. Article 117.1 of the collective agreement provides as follows:

117.1 No employee will be disciplined or dismissed until the charges against him have been investigated; the investigation to be presided over by the man's superior officer. He may, however, be held off for investigation not exceeding 3 days, and will be properly notified, in writing and at least 48 hours in advance, of the charges against him.

The Arbitrator has substantial difficulty with the position advanced by the Company with respect to the nature of the decision taken in respect of Mr. Gillam. The record reflects that Dr. R. Barriault, the Company's Director of Occupational Health Services for Western Canada, advised the Manager of Train and Engine Service, in a letter dated July 6, 1994, that, in part, Mr. Gillam

"... has been found unfit for safety sensitive positions due to the fact that he is in violation of Rule G."

During the course of the grievance process, in a letter dated August 17, 1994 the Senior Vice-President of the Company for Western Canada wrote to the Unoin's General Chairperson, in part, as follows:

In reviewing Mr. Gillam's previous work record, with the Company combined with his recent involvement in the use of illegal substances, it is clear to the Company that he has demonstrated that his attitude towards work responsibilities has not changed from the time of his dismissal.

It was not disputed by the Company, before the Arbitrator, that in fact no violation of CROR Rule G is made out on the evidence. The positive drug test would indicate, at most, the consumption of cannabis by the grievor during a broad window of time of several weeks prior to the taking of the test. It would not and could not establish the precise time at which the drug was consumed, or the quantities consumed. It would clearly not establish that Mr. Gillam was involved the use of an intoxicant or narcotic, or its possession, while on duty or subject to duty, in violation of Rule G.

The above passage of the Company's letter of August 17, 1994 more truly reflects, in the Arbitrator's view, the motive for the decision to refuse to reinstate Mr. Gillam, and to terminate his employment. The Company asserts that the grievor has demonstrated a failure to change his attitude in respect of his work responsibilities, citing both his previous work record and the result of the drug test. In the Arbitrator's view that is a position which the Company was entitled to take, whatever the validity of its merits. It was, however, a decision motivated by the grievor's conduct and the Company's judgment in respect of that conduct and the prospects for the grievor's rehabilitation. So viewed, it is difficult to characterize the Company's decision as being other than disciplinary. There appears to have been no evidence before the Company, and indeed none was placed before the Arbitrator, to establish through medical expertise that the grievor suffered from a medical incapacity, including drug addiction or drug dependence, which would have rendered him unemployable.

Central to the position advanced by the Company is its assertion that Mr. Gillam had no employment relationship with the Company under the terms of the collective agreement on July 18, 1994. That position is plainly not sustainable. The issue of the grievor's employment status was the very question before the Arbitrator in the original hearing of this matter on June 16, 1994, at which time the Arbitrator ordered the grievor's reinstatement "into his employment forthwith".

The status of an employee under the terms of a collective agreement has been the subject of considerable examination by boards of arbitration. Employees may variously have seniority rights, recall rights while they are laid off or, if they are subject to discipline, rights in respect of the grievance and arbitration provisions of a collective agreement, even though they may not be in service and in a position to exercise other rights under the terms of an agreement (see e.g., CROA 2100 and see, generally, Brown & Beatty, Canadian Labour Arbitration, (3d) (Aurora 1994) at 6:2352).

In the case at hand Mr. Gillam was at all times an employee under the terms of the collective agreement, at the very least for the purposes of the discipline, grievance and arbitration provisions contained within it. By the determination of this Office made on June 21, 1994, he remained an employee entitled to reinstatement, without any loss of seniority. That status was purportedly taken away from him by the Company by reason of a decision which the Arbitrator can only characterize as disciplinary, prompted by the result of the drug test administered to Mr. Gillam. In the result, the disclosure of the drug test would place the grievor in a position where he might be liable to discipline, if the Company could establish, on the balance of probabilities, that his use of cannabis disclosed a work related offence going to the legitimate business interests of the employer. As prior decisions of this Office have noted, depending on the circumstances, the isolated use of soft drug or single occassion on an employee's own time may not justify the employee's termination where no legitimate employer interest can be shown to be affected (see CROA 1703).

In the case at hand the Company effectively deprived the grievor of any forum to explain the result of the drug test, including the allegation of a violation of Rule G on his part, and made a judgment with respect to his conduct and potential for rehabilitation without following the investigative procedure provided in article 117.1 of the collective agreement. At all material times Mr. Gillam was an employee with vested rights in respect of the discipline procedures provided under the collective agreement. Those were entirely disregarded by the Company, and in the result the Arbitrator must find that his purported termination by the Company, in disregard of the requirements of article 117.1, on July 18, 1994, is void ab initio.

The Arbitrator directs that the Company reinstate Mr. Gillam into his employment, forthwith. In the circumstances, however, I do not deem this to be an appropriate case for an order of compensation. In light of the position argued by the Union, effectively acceding to the jurisdiction of the Arbitrator to impose conditions upon the grievor's reinstatement, the Arbitrator directs that the grievor's reinstatement shall further

be conditional upon his being subject to random drug testing, administered in a non-abusive fashion, for a period of not less than two years from the date of his reinstatement. Failure to pass any such test shall render Mr. Gillam subject to discharge.

16 September 1994(sgd) MICHEL G. PICHER
ARBITRATOR