

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3305

Heard in Calgary, Thursday, 14 November 2002

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

EX PARTE

DISPUTE:

Appeal the dismissal of Locomotive Engineer C.G. Buors of Winnipeg, MB, for "Charges under the Criminal Code of Canada for cultivation of marijuana for the purpose of trafficking which constitutes activities incompatible with working a Safety Sensitive Position with Canadian National."

BROTHERHOOD'S STATEMENT OF ISSUE:

On or about February 4, 1997, CN Police were informed that on January 27, 1997, Locomotive Engineer Buors had been charged by the Winnipeg Police Force with cultivating marijuana and possession of marijuana for the purpose of trafficking. As a result of and based upon that information, the Company conducted an investigation on February 14, 1997, subsequently discharging the grievor on February 18, 1997.

The Brotherhood contends that the Company has not demonstrated that Locomotive Engineer Buors' activities were with working in a safety sensitive position with the Company for the following reasons: **(1.)** there was no evidence or allegation that the grievor used illicit drugs while off-duty or subject to duty; **(2.)** the grievor was not in violation of CROR rule G; **(3.)** there was no evidence that the grievor had a substance abuse problem that required intervention of any kind, and; **(4.)** the Company conducted an investigation prior to the grievor even entering an initial plea with respect to the charges that were before the Court.

The Brotherhood further contends that the discipline assessed is unwarranted and that Locomotive Engineer Buors must be reinstated into his former position and compensated for all lost wages and benefits while dismissed.

The Company denies the Brotherhood's position.

FOR THE BROTHERHOOD:

(SGD.) D. E. BRUMMUND
(FOR) GENERAL CHAIRMAN

There appeared on behalf of the Company:

D. VanCauwenburgh - Manager, Human Resources, Winnipeg
 S. Blackmore - Manager, Human Resources, Edmonton
 K. Guiney - Manager, Human Resources, Transcona

And on behalf of the Brotherhood:

B. McHolm - Counsel, Saskatoon
 D. E. Brummund - Sr. Vice-General Chairman, Edmonton

AWARD OF THE ARBITRATOR

The material before the Arbitrator confirms, beyond dispute, that the grievor, Locomotive Engineer C.G. Buors, was charged and eventually convicted for cultivating marijuana and the possession of marijuana for the purpose of trafficking. When the Company became aware of the criminal charge it conducted a disciplinary investigation. During the course of that investigation the grievor declined to provide any material information and indicated that he would refuse to take a drug test. Based on the information then available to it the Company terminated Mr. Buors for conduct incompatible with his continued employment at a locomotive engineer.

As the record discloses, on November 26, 1998 the grievor pleaded guilty to the charge of the cultivation of a narcotic contrary to section 6(1), of the **Narcotic Control Act** and possession of a narcotic for the purpose of trafficking, in violation of section 4(2) of the **Narcotic Control Act**. He then received a twenty-three month conditional sentence, to be served in the community, and one year's probation.

The evidence before the Arbitrator further discloses that following his termination and conviction Mr. Buors was again charged, in August of 2002, for cultivation and possession of

marijuana for the purposes of trafficking. Newspaper reports surrounding those charges appear to confirm that Mr. Buors became something of a marijuana rights crusader, actively involved in the movement for the legalization of marijuana. In an interview with the Winnipeg Free Press of March 6, 2002, the following statement is attributed to Mr. Buors:

Oh yeah, I'll be quite open. I advocate for the end of drug laws - make them available in the market place. It wouldn't matter to me if it was heroin, cocaine. Tobacco and alcohol are far more harmful.

It is, of course, open to the grievor to advocate for the legalization of marijuana and other drugs. For the time being, however, marijuana remains a prohibited substance, in relation to which this Office has taken a consistent position as regards the obligations of a running trades employee in the highly safety sensitive circumstances of the railway industry. In that regard the following comments appears in **CROA 2039**:

In the Arbitrator's view, involvement in the chemical or horticultural production of a prohibited narcotic is an illegal activity which cannot be reconciled with the responsibilities of a locomotive engineer. The Company must have the fullest confidence that persons with the safety sensitive responsibilities of an engineman are not involved to such a degree in the drug culture. Apart from the taint of illegality involved, such activities plainly undermine the confidence which managers, other employees and the public at large are entitled to have with respect to the trustworthiness and overall character of individuals charged with the safe operation of trains.

Further, in **CROA 1703** the following appears:

Where, however, certain objective facts - however circumstantial - are established that would point to the heavy involvement of a railroad employee in the production and use of drugs, the onus may shift to the employee to provide a full and satisfactory account of his or her actions and circumstances to justify continued employment. The absence of a full and credible explanation, in the face of overwhelmingly incriminating evidence leaves an employer with the

public safety obligations of a railroad with little choice but to suspend or terminate the employment of a person whose habits or activities appear to dramatically incompatible with the safe operation of its business.

Where, however, the employee is uncooperative and evidence of his or her involvement with drug use goes unexplained, termination of the employment relationship may be the only responsible alternative.

In the instant case counsel for the Brotherhood draws to the Arbitrator's attention recent guidelines promulgated by the Canadian Human Rights Commission. He stresses the content of those guidelines as they would place substantial limits on drug testing in the workplace, affirming the obligations of employers to accommodate persons who have drug or alcohol dependency. With respect, the Arbitrator takes no issue with the content of those guidelines. They are, however, beside the point for the purposes of the instant case. There is nothing before me to indicate that the grievor is drug dependent and therefore in need of accommodation. The issue of concern in this case is a different one, namely the illegality of the grievor's conduct and the potential impact of such illegality on the Company's legitimate interests.

As an employer in a highly safety sensitive industry, it is not unreasonable for a railway to conclude that the employment of an individual who produces and possesses narcotics for the purposes of trafficking, presumably for profit, and advocates the more wide-spread consumption of that narcotic, poses an unacceptable risk. That risk operates both at the level of the possible pursuit of the profit motive by that employee within the workplace and in respect of the obvious harm to the Company's public image as a common carrier with safety sensitive obligations. To adopt an argument advanced by the Brotherhood's representative, given the present state of our law it is not unreasonable to expect that a locomotive engineer must choose between continued employment within the running trades and acknowledged public involvement in the production and distribution of a prohibited narcotic. Regrettably, it would appear that Mr. Buors has made his choice. In the circumstances the Arbitrator can see no responsible basis for a reversal of the discipline assessed against him. While it is arguable that it might have been more appropriate for the Company to suspend the grievor pending the outcome of the criminal charges against

him, given the ultimate disposition of those charges, no prejudice to the employee is disclosed.

For all of the foregoing reasons the grievance must be dismissed.

November 19, 2002

(signed) MICHEL G. PICHER
ARBITRATOR