CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1926

Heard at Montreal, Wednesday 14 June 1989

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

UNITED TRANSPORTATION UNION

DISPUTE:

Assessment of 30 demerit marks to Yard Helper P. Keeping of Ottawa, Ontario, effective 2 February 1988, and his subsequent dismissal effective 14 March 1988, for accumulation of demerit marks.

JOINT STATEMENT OF ISSUE:

The grievor was instructed to report to the Company's Medical Clinic for an examination to take place on February 3, 1988. The grievor did not appear for examination. Subsequent to this, the grievor was removed from service. An investigation was held on February 26, 1988 and, as a result, the grievor was assessed 30 demerit marks. Consequently, the grievor was discharged for accumulation of 60 or more demerit marks.

The Union appealed the matter on the basis that the discipline was unwarranted and requested that the grievor be returned to service

The Company declined the appeal.

FOR THE UNION:	FOR THE COMPANY:
(SGD) W. G. SCARROW	(SGD) M. DELGRECO
GENERAL CHAIRMAN	FOR: ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

J.B. Bart	– Manager, Labour Relations, Montreal
J.D. Pasteris	– Manager, Labour Relations, St. Lawrence Region, Montreal
S. Grou	– Labour Relations Officer, Montreal
P.D. Morrisey	– Labour Relations Officer, Montreal
S.F. McConville	– Labour Relations Officer, Montreal

And on behalf of the Union:

W.G. Scarrow	– General Chairman, Sarnia
J.A. McLean	– Local Chairman, Ottawa
G. Binsfeld	– Secretary, GCA, St. Catharines
P. Keeping	– Grievor

AWARD OF THE ARBITRATOR

This grievance concerns the discharge of an employee for his alleged refusal to submit to a drug test upon the direction of the Company. Thirty demerits were assessed against the grievor, as a result of which he was discharged for accumulation of more than sixty demerit marks.

The facts are not in dispute. Yard Helper Paul Keeping is twenty-five years old, unmarried and entered the service of the Company in May of 1985. He was promoted to the rank of conductor in 1987. During the last year of his employment Mr. Keeping was able to hold and protect a regular yard assignment in Walkley Yard at Ottawa. Because that work involved a midnight shift, Mr. Keeping was able to pursue his university education on a part-time basis, part of which he had already completed. He therefore enrolled in three courses in the Faculty of Engineering of Carleton University, which he was able to attend during the day, while working full time for the Company on the midnight shift in the yard.

In July of 1987 it came to the attention of the Company that Mr. Keeping was overdue for his periodic medical examination. During the examination, taken on July 16, 1987, a urinalysis test disclosed a positive result for the presence of drugs in the grievor's system. As a result he was removed from service on July 25, 1987. Subsequently, on August 4, 1987 Mr. Keeping tested negative for drugs and was returned to service.

On August 7, the grievor was interviewed by the Assistant General Superintendent, St. Lawrence Region. The grievor then related to the Company officer that in the past, occasionally and on a social basis, he had used marijuana and hashish. He further disclosed that on one occasion he had tried cocaine. Mr. Keeping advised the Assistant General Superintendent that none of these experiences involved the use of drugs when he was at work, or subject to duty, contrary to the stipulations of Rule G. This statement on the grievor's part appears to have been accepted by the Company. It is common ground that the grievor has never been found to have used drugs at work, to have otherwise violated Rule G or to have been subject to discipline for such an infraction.

In light of the grievor's positive drug test, however, he agreed to undergo periodic drug testing by the Company. The precise terms of Mr. Keeping's agreement with the Company are reflected in the following statement in a confirmatory letter from Assistant General Superintendent J.G. Goulet, dated August 8, 1987:

> ... In order that the Company can verify your promise to abstain from drugs, you agreed to undergo drug testing within 3 months from this interview and then at three-month intervals for the next two years, or as required by the Company's medical officer at our medical clinic in Montreal.

The initial test to be taken by the grievor would have been scheduled three months after his negative test of August 4, 1987. It is common ground, however, that the first quarterly test taken by Mr. Keeping was not done until November 17, 1987, and that this was as a result of a discussion with his supervisors with respect to a time that would be convenient for him to travel to Montreal to take the test. No objection was apparently taken by the Company to his request to undergo the test on that date.

On January 20, 1988 a tragic accident occurred in the Walkley Yard, resulting in the death of the yard foreman who was in charge of the crew to which Mr. Keeping was assigned as a yard helper. There is no suggestion that the accident was in any way caused by any act or omission on the part of the grievor. Immediately following the accident Mr. Keeping spoke to police and Company officials, giving a full account of his recall of the events surrounding the fatality. There was no suggestion at that time that the grievor was in an impaired condition, nor was there any attempt on the part of the Company to remove him from service or request that he submit to a drug test.

More than a week following the fatal accident at, on February 1, 1988 at approximately 1640 hours, Trainmaster Normand Bishop telephoned the grievor at his residence and instructed him to report to the Montreal clinic of the Company the following morning to undergo a drug test. Mr. Keeping then advised the Trainmaster that he was unable to go on such short notice, as he had course obligations the following morning at Carleton University. It appears undisputed that Mr. Keeping then advised Mr. Bishop that he would call Company Doctor Milet at the clinic the following day.

The next day, being advised that Mr. Keeping had not attended for testing at the Company clinic in Montreal, Trainmaster Bishop instructed the crew supervisor to inform the grievor that he was out of service and was to report for his test on February 3. At 1500 hours that day the grievor called to advise Mr. Bishop again that he could not attend the clinic on the 3rd of February because of his study obligations, indicating that he could attend on the 6th.

As that was a Saturday, and Mr. Bishop noted that the clinic would be closed, the grievor then advised him that his next availability was Tuesday the 9th of February. Mr. Bishop then informed Mr. Keeping that he could not work until he complied with the appointment at the Montreal clinic.

Mr. Keeping next called Mr. Bishop of February 8, at 1500 to inquire if he was to go to the clinic the next day. The trainmaster then told him that he was not to go. The Company continued to hold the grievor out of service and, following an investigation on February 26, 1988, assessed thirty demerit marks for his alleged failure to attend for a drug test as instructed, which resulted in his discharge for an accumulation of more than sixty demerits.

It is acknowledged by the Company that the request by Trainmaster Bishop that the grievor attend for a drug test on February 2 and February 3 was arguably not in strict keeping with the agreement made between the grievor and the Company respecting the terms of the drug tests to be administered to him. As he was to be tested at three month intervals, and his last test had been on November 17, the general expectation was that he would again be tested on or about February 17, 1988. So viewed, the test he was directed to take was not a test at the regular three month interval. It is equally arguable however, that the test ordered by Mr. Bishop would have been some six months, less a day or two, from the initial test of August 4, 1987. It is also clear that the test was not requested by the Company's medical officer.

The Company submits that quite apart from the terms of the agreement made previously with Mr. Keeping, it had reasonable grounds to direct him to take the drug test on either February 2 or February 3, 1988. In support of that view it marshals the following points

- six and one-half months earlier Mr. Keeping had tested positive for drugs
- he admitted to prior use of cannabis and cocaine
- he had agreed to an undertaking to undergo drug testing at three month intervals or at such lesser intervals as might be required by the Company's medical officer
- on December 27, 1987 the grievor booked sick after accepting a call to work
- on January 13, 1988 he was involved in an incident whereby a railway car was caused to couple while travelling at an excessive speed there were discrepancies between his account of the events surrounding the fatality of January 20, 1988 and that of the engineer on the crew. The Company submits that the foregoing factors gave it reasonable grounds to demand that the grievor submit to a drug test, and to discipline him for his failure to do so.

The position advanced by the Union differs substantially. It stresses that the Company's concern for the necessity of a drug test to be taken by Mr. Keeping arose only after his statement of January 28 in relation to the fatal accident, which apparently conflicted in some material respects of that of another employee. The Union's representative notes that Mr. Keeping spoke at length with both police and Company officials immediately following the accident of January 20, 1988, and that there was no suggestion on the part of anyone present that he was impaired or under the influence of any substance. The Union argues that if the Company had any concerns in that regard, it should have directed an immediate drug test, rather than do so after the passage of more than ten days.

In assessing the grievor's conduct, the Union also points to the documentary material filed in evidence which supports his explanation that he was required by his obligations as a student to be in attendance at laboratory sessions and studies preparatory to examinations, in consequence of which he could not attend in Montreal on either February 2 or February 3. In this regard the Union's representative emphasizes the undisputed evidence that Mr. Keeping sought to co-operate as fully as possible, firstly by himself calling the Company's doctor in Montreal after his initial conversation with Mr. Bishop, and also by his willingness to offer a number of alternative dates that would not inconvenience his studies.

In considering the grievor's state of mind the Union's representative points to the fact that the initial drug test taken pursuant to the agreement between the Company and Mr. Keeping, on November 17, 1987, was scheduled after some mutual discussion to determine a time that was convenient for the grievor. He further notes that Mr. Bishop gave Mr. Keeping no indication that on the occasion of the second test the failure to attend at the time directed by the Company would result in the grievor's discharge or, at any time prior to February 8, 1988, that it could not be done at an alternative time that would involve less of a conflict with his university program. Stating that it is not uncommon for the Company to hold employees out of service who are overdue for a medical examination,

the Union argues that the Company's willingness to negotiate a convenient time for the grievor's first drug test in November, and the failure on the part of Mr. Bishop to advise Mr. Keeping that he would be subject to discipline for failing to appear for his drug test on February 2 or February 3, 1988, even though he was held out of service, underscore the fact that Mr. Keeping was not aware of the stakes involved and did not act in a culpable manner in disregard of a Company directive. The Union also questions the reasonableness of requiring the grievor to attend at a drug test on less than twenty-four hours' notice when the test was to take place in another city over one hundred miles distant. It emphasizes that that practice is markedly inconsistent with the normal kind of notice allowed to employees who are instructed to take medical examinations. The Union further questions the reasonableness of the apparent failure of the Company to consider the possibility of having Mr. Keeping tested at an Ottawa facility which would, arguably, have avoided the problem of disrupting his studies.

I turn to consider the competing submissions of the parties. The right of a railway to require an employee to undergo a drug test was first discussed by this Office in **CROA 1703**. In that case the Arbitrator made the following observations:

> Does an employer's right to require an employee to undergo a fitness examination extend to requiring a drug test? I am satisfied that in certain circumstances it must. Where, as in the instant case, the employer is a public carrier, and the employee's duties are inherently safety sensitive, any reasonable grounds to believe that an employee may be impaired by drugs while on duty or subject to duty must be seen as justifying a requirement that the employee undergo a drug test. Given contemporary realities and the imperative of safety, that condition must be seen as implicit in the contract of employment, absent any express provision to the contrary. ...

After reviewing a number of authorities and precedents the awards continues:

> What guidance do the foregoing considerations provide in the instant case? It appears to the Arbitrator that a number of useful principles emerge. The first is that as an employer charged with the safe operation of a railroad, the Company has a particular obligation to ensure that those employees responsible for the movement of trains perform their duties unimpaired by the effects of drugs. To that end the Company must exert vigilance and may, where reasonable justification is demonstrated, require an employee to submit to a drug test. Any such test must, however, meet rigorous standards from the stand-point of the equipment, the procedure and the qualifications and care of the technician responsible for it. The result of a drug test is nothing more than a form of evidence. Like any evidence, its reliability is subject to challenge, and an employer seeking to rely on its results will, in any subsequent dispute, bear the burden of establishing, on the balance of probabilities, that the result is correct. The refusal by an employee to submit to such a test, in circumstances where the employer has reasonable and probable grounds to suspect drug use and a risk of impairment, may leave the employee liable to removal from service. It is simply incompatible with the obligations of a public carrier to its customers, employees and the public at large, to place any responsibility for the movement of trains in the hands of an employee whom it has reasonable grounds to suspect is either drug-dependent or drug-impaired. In addition to attracting discipline, the refusal of an employee to undergo a drug test in appropriate circumstances may leave that employee vulnerable to adverse inferences respecting his or her impairment or involvement with drugs at the time of the refusal. On the other hand, it is not within the legitimate business purposes of an employer, including a railroad, to encroach on the privacy and dignity of its employees by subjecting them to random and speculative drug testing. However, where good and sufficient grounds for administering a drug test do exist, the employee who refuses to submit to such a test does so at his or her own peril.

As may be gleaned from the foregoing, the right that an employer may have to demand that its employees be subjected to a drug test is a singular and limited exception to the right of freedom from physical intrusion to which employees are generally entitled by law. As such it must be used judiciously, and only with demonstrable justification, based on reasonable and probable grounds.

The Company does not base its case on an assertion that Mr. Keeping was being ordered by Mr. Bishop to take his quarterly test. If that is so, what reasonable grounds are advanced by the Company to support its directive to the grievor that he should submit to an ad hoc mandatory drug test on February 2 or February 3, 1988? The first grounds advanced relate to the grievor's admitted occasional use of drugs in the past, and his positive test more than six

months earlier. The Arbitrator can attach no weight to those factors. They were the very reasons for the detailed agreement entered into between the Company and the grievor with respect to his obligation to submit to quarterly drug tests. The fact that Mr. Keeping agreed to submit to drug tests every three months or at such other times as might be directed by the Company's medical officer is not of itself reasonable grounds to believe at any given point that he is impaired by drugs or dependent upon them, so as to justify a directive that he undertake a drug test outside the framework of his agreement with the Company.

Nor are the other factors cited by the Company particularly persuasive. On one occasion, when he discovered that a tour of duty would take him out of town longer than he expected, Mr. Keeping failed to attend work after accepting a call. Shortly thereafter he was involved in an overspeed coupling during switching. Lastly, his account of events surrounding the fatality on January 20, 1988 differed in certain respects from that of another employee. With the greatest respect, the Arbitrator does not see how any of these events, whether they are viewed separately or taken together, can be said to give rise to a reasonable suspicion that the grievor was under the influence of drugs while on duty or subject to duty, in contravention of Rule G or in violation of his specific agreement with the Company. While it is not necessary to resolve the issue, the pattern of conduct displayed by the Company is not inconsistent with the suggestion of the Union that the directive of Mr. Bishop that the grievor take a drug test was a colourable attempt on its part to use the drug test as a means of verifying the reliability of Mr. Keeping's account of the fatal accident, rather than ascertaining his fitness for duty at any given point.

In assessing the culpability of the grievor's conduct it is essential to view the events in question from his perspective. For the reasons related, he had previously agreed to submit to quarterly drug tests, or to such further tests as might be directed by the Company's medical officer. His last test had taken place on November 17, 1987. It was performed on that date, rather than November 4, in part because he indicated to the Company that it would be more convenient for him. While Mr. Keeping's agreement with the Company did not involve any prearranged testing dates, it was not unreasonable for him to expect that the next test would be taken on or about February 17, 1988. When he was contacted by Mr. Bishop on February 1 Mr. Keeping explained to the trainmaster that it would conflict with his university obligations to attend the next day in Montreal for a drug test. The Arbitrator is satisfied that that explanation is amply substantiated in the documents filed. Mr. Keeping then phoned the Company doctor himself the next day, only to be advised that he was on vacation. There was no communication by Mr. Bishop to Mr. Keeping that his failure to attend on the specific day or days indicated would constitute an insubordinate refusal to follow a Company directive which would result in severe discipline. In his exchanges with Mr. Bishop Mr. Keeping was at all times respectful, indicating to him which days would be convenient for him to take a test, as had been the case the previous November. There was, moreover, no suggestion on the part of Mr. Bishop that the directive was in any way related to the fatal accident which had occurred some ten days previous or that it involved anything more than another of his quarterly tests. Lastly, while Mr. Keeping understood that he was held out of service until the drug test was taken, this was not inconsistent with general Company practice or, indeed, his own prior experience with overdue medical examinations.

What do the facts then establish? In the Arbitrator's view the grievor had reasonable grounds to believe that the directive that he attend at Montreal, on less than twenty-four hours' notice, in circumstances which conflicted with his university studies, was not an obligation which he must fulfill on pain of dismissal. At that point in time he was aware of only ten demerits outstanding on his own record, as no decision had yet been taken with respect to his failure to work on December 27 or the overspeed coupling incident. There were no circumstances pointed to by the Company which would have put Mr. Keeping on notice that its officers had any reasonable grounds to believe that he had consumed drugs or had violated either Rule G or his agreement with the Company to remain free of drugs. Significantly, on the occasion of the fatal accident of January 20, 1988 when Mr. Keeping was interviewed both by the police and by Company officials, there was no suggestion communicated to him that he was suspected to have been under the influence of drugs and no directive that he then undergo a drug test.

On the whole, I am satisfied that Mr. Keeping was reasonably entitled to believe that the call made to him by Mr. Bishop was simply in furtherance of his prior agreement to take a drug test at the Company's clinic in Montreal on a once-every-three-months basis as he had done in November. There was no indication to him that this was a request outside that agreement, nor was it an exceptional request made on the part of the Company's medical officer, as contemplated within the agreement. I am satisfied, on the balance of probabilities, that the grievor was left with the impression, as he was reasonably entitled to be, that he was negotiating a second reasonable testing date with Mr. Bishop, with no suggestion that disciplinary consequences might result.

On the basis of the facts as reviewed, the Arbitrator must conclude that the directive addressed to Mr. Keeping by Mr. Bishop cannot be characterized as a requirement that he take a drug test based upon reasonable and probable grounds supported by any objective evidence. The fact that Mr. Keeping may have been absent from work, made an error in the coupling of a car or had a difference of opinion with another employee on the recall of certain events does not support a reasonable suspicion that he was under the influence of drugs, notwithstanding his prior admission of occasional social drug use away from the work place more than six months previously.

Alternatively, if what transpired is to be characterized as a request on the part of the Company for Mr. Keeping to submit to his quarterly drug test, the Arbitrator has great difficulty in understanding how his response and conduct in relation to that request could justify the imposition of thirty demerits, resulting in his discharge. It is not disputed that Mr. Keeping was then carrying a three course load as a day student in engineering at Carleton University, a circumstance that was known to the Company. Mr. Keeping explained to Mr. Bishop that he could not, on such short notice, miss certain lab and study sessions which were essential to his course of study. That explanation is substantiated in the documentary evidence before the Arbitrator. Lastly, the pattern established between the grievor and the Company in November of 1987 with respect to his being tested in Montreal was that the test was to be done on a date which, after discussion, was found to be convenient to him. Against that background, Mr. Bishop made no indication to Mr. Keeping that his failure to attend in Montreal for a drug test on either February 2 or February 3 might be at the cost of his employment.

The Arbitrator is compelled to conclude that by any reasonable application of the standards described in **CROA 1703** or, alternatively, the terms of the specific agreement made between the Company and Mr. Keeping as it had previously been administered, the employer could not, upon a review of all of the circumstances, conclude that the failure of Mr. Keeping to attend for a drug test in Montreal on either February 2 or February 3 constituted just cause for the imposition of thirty demerits and his subsequent discharge. After a careful examination of the facts, and bearing in mind the legitimate reasons which Mr. Keeping had for not travelling to Montreal for his test on February 2 or 3, 1988, I can find no fault on the part of Mr. Keeping that would justify the imposition of any discipline whatsoever. Nothing in this award should, however, be construed as a comment on whether the Company could not justifiably have required the grievor to submit to a drug test immediately after the accident in Walkley Yard on January 20, 1988.

For the foregoing reasons the grievance must be allowed. The grievor shall be reinstated forthwith into his employment, with compensation and benefits, including compensation for the time held out of service prior to discharge, and without any loss of seniority. It appears from the evidence, however, that subsequent to his termination Mr. Keeping chose to undertake full-time university studies, rather than alternative full-time employment. While the facts relating to that choice are not before me, it would appear that there may be some adjustment to be made in the amount of compensation owing, flowing from Mr. Keeping's decision not to pursue full-time employment after his termination by the Company. It appears to the Arbitrator that the details of the amount of compensation are best left to be worked out between the parties. I retain jurisdiction should there be an inability to reach agreement on that matter, or on any other aspect of the interpretation or implementation of this award.

June 16, 1989

(sgd) MICHEL G. PICHER
ARBITRATOR