CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2129

Heard at Montreal, Thursday, 14 March 1991

concerning

CANADIAN PACIFIC LIMITED

and

UNITED TRANSPORTATION UNION

DISPUTE:

Appeal of discipline and subsequent discharge for accumulation of demerit marks assessed the record of Conductor T. Rachar of MacTier.

JOINT STATEMENT OF ISSUE:

On July 17, 1989, Conductor T. Rachar was working as the conductor on a work train assignment on the Parry Sound Subdivision. The other crew members on this assignment were Locomotive Engineer K. Smith and Brakeman L. Richer.

On July 20, 1989, Brakeman Richer reported to a company officer, Assistant Superintendent D.N. Paquin, an incident which allegedly had occurred in a Company provided hotel room on July 18, 1989. As the result of the aforementioned report Conductor Rachar was withheld from service and an investigation was conducted.

Subsequent to the investigation Conductor Rachar was assessed 45 demerit marks for "conduct unbecoming an employee" by allegedly threatening a fellow employee on July 18, 1989. The assessment of discipline resulted in Mr. Rachar's accumulation of 60 demerits and his subsequent dismissal.

The Union states that the assessment of discipline was unwarranted and accordingly is requesting that Conductor T. Rachar be reinstated into Company service.

The Company has declined the Union's request.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) J. R. AUSTIN	(SGD.) E. S. CAVANAUGH
GENERAL CHAIRPERSON	GENERAL MANAGER, OPERATION & MAINTENANCE, IFS

There appeared on behalf of the Company:

H. B. Butterworth	– Assistant Supervisor, Labour Relations, IFS, Toronto
B. P. Scott	– Labour Relations Officer, Montreal
L. S. Wormsbecker	– Labour Relations Officer, Montreal

And on behalf of the Union:

J. R. Austin	– General Chairperson, Toronto
B. Marcolini	– President, Ottawa
L. Davis	– Local Chairperson, MacTier
B. Rachar	– Observer
T. Rachar	– Grievor

AWARD OF THE ARBITRATOR

The thrust of the Company's position is that on the evening of July 18, 1989, the grievor threatened employee L. Richer with physical harm while Mr. Rachar, Mr. Richer and a third employee, Mr. G. Michaud, were socializing in Mr. Michaud's motel room. According to the Company's view of the facts, as related by Mr. Richer and Mr. Michaud, Conductor Rachar produced a piece of hashish while the three men were conversing. He then stated to Mr. Richer that what went on in that room must remain there, and that if Mr. Richer said anything he would push him in front of a train. According to the Company, as evidenced in the accounts of Mr. Richer and Mr. Michaud, Mr. Richer then immediately left the room while Mr. Rachar and Mr. Michaud shared a single "joint" of hashish and tobacco.

It is common ground that Mr. Richer did not disclose the threat allegedly made by Mr. Rachar until some two days later, after he was diagnosed as having suffered a bout of angina and a mild heart attack. While it is not clear from the material before the Arbitrator whether Mr. Richer suffered from any prior heart condition, it appears that his initial complaint to a Company supervisor was made on the basis of his own belief that the grievor's alleged threat, coupled with other abusive statements over several days of their working together, created undue stress which precipitated his medical condition. While the material before the Arbitrator does confirm the medical symptoms suffered by Mr. Richer and diagnosed on July 20, 1989, there is no medical evidence or opinion before me to establish a causal link between Mr. Richer's illness and the threat alleged to have been made by Mr. Rachar.

Needless to say, threatening another employee with physical harm or death is a serious disciplinary infraction which may well justify dismissal. That has long been recognized by Canadian arbitrators and has been confirmed in the prior awards of this Office (*see, e.g.,* ***CROA 1701***). In such a case, however, the Company bears the onus of proof. It must satisfy the Arbitrator that the threat alleged was, on the balance of probabilities, in fact made. Where, as in the instant case, the impugned conduct is so serious as to itself arguably constitute a criminal offence, it is generally recognized that the standard of proof is commensurately high, and that the allegation should be proved on the basis of clear and cogent evidence.

The material before the Arbitrator, however, raises serious concerns as to the credibility of the account of the motel room incident related both by Mr. Richer and Mr. Michaud. If their evidence is to be believed the grievor was the person in possession of the hashish and both he and Mr. Michaud were involved in smoking it. However, when the grievor was requested by the Company to give a urine sample for the purposes of a drug test he agreed to do so. Several days prior to the investigation conducted by the Company on July 24, 1989, Mr. Rachar attended at the Wright Medical Clinic in Parry Sound in the company of a Company supervisor. He then provided a urine sample which subsequently disclosed no evidence of the use of cannabis or any other prohibited narcotic. While it appears that Mr. Rachar may have been alone in a separate room when he produced the urine sample, no apparent objection to that method of proceeding was raised by the Company's officer. In the circumstances, it must be emphasized that the urinalysis test was initiated by the Company, that its officer was present on the premises when it was taken, that it proved negative, and that such a reading generally confirms that the person tested has not utilized drugs for a period as great as sixty days prior to the test (see CROA 2025). The best evidence before the Arbitrator, therefore, would appear to indicate that Mr. Rachar did not consume hashish on the evening of July 18, 1989.

This, in my view, substantially undermines the credibility of the account of the evening's events given both by Mr. Michaud and by Mr. Richer. It appears implausible that Mr. Rachar would have been in possession of hashish in light of the evidence which suggests that he did not use that drug or any other drug for a substantial period of time both before and after that date. If, as the evidence suggests, he did not use the drug, it is highly doubtful that he was in possession of it or, by extension, that he would have made a threatening statement to Mr. Richer purportedly to ensure the concealment of his own wrongdoing. Needless to say, the Arbitrator's conclusions might well have been otherwise had Mr. Rachar's drug test proved positive.

The grievor denies having been in possession of hashish on the evening in question, denies having smoked it with Mr. Michaud and also denies having made any statement of a threatening nature to Mr. Richer, although he concedes that in general conversation he may have made a comment to the effect that Mr. Richer's unsafe habits on the job could cause him to get hurt. On balance, while the overall facts of this case are not without some doubt, I am compelled on the basis of the objective evidence before me to prefer the denial of Mr. Rachar to the accusations of the two other employees involved. While the Company's representative suggested that there might be reason to suspect the regularity of the urine test taken by Mr. Rachar, it is difficult to attribute any significant weight to that suggestion where the material discloses beyond controversy that the drug test was taken at the Company's request

and was conducted with a Company supervisor in attendance who apparently made no objection to the procedure which was followed. The Arbitrator has obvious difficulties with a submission from the Company which is, in effect, based on an impeachment of its own procedure.

Apart from the foregoing considerations, there are independent grounds in the evidence before me to doubt the merits of the allegations made against Mr. Rachar. As noted above, the grievor states that at most he might have told Mr. Richer that his dangerous working habits could cause him to get hurt. Mr. Michaud, on the other hand, states that whatever the grievor said to Mr. Richer was stated in a joking fashion. Whatever may have been said, it is not without significance that if Mr. Richer felt immediately threatened he nevertheless made no complaint to any Company officer for some two days. That is so notwithstanding that Assistant Roadmaster E. McConnell was at all time present as part of the crew on the work train. Moreover, one of the answers given by Mr. Richer during the course of his statement at the investigation is less than persuasive of his complaint that he was the subject of seriously intended physical threat. When asked whether he would agree that what Mr. Rachar said was expressed in a joking manner Mr. Richer responded: “I guess it was left to the individual’s interpretation.” On balance, the Arbitrator finds it difficult to reconcile an answer so equivocal with an allegation so serious.

For all of the foregoing reasons I am compelled to conclude that the Company has not discharged the onus of establishing, on the balance of probabilities, that Conductor Rachar did in fact utter a threat against Trainman L. Richer on July 18, 1989, as alleged. The grievance must therefore be allowed. The grievor shall be reinstated into his employment with compensation for all wages and benefits lost, and without loss of seniority.

March 15, 1991

(Sgd.) MICHEL G. PICHER
ARBITRATOR