

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1768

Heard at Montreal Tuesday, 12 April 1988

Concerning

CANADIAN PARCEL DELIVERY (CP EXPRESS & TRANSPORT)

And

TRANSPORTATION COMMUNICATIONS UNION

EX PARTE

DISPUTE:

The dismissal of CanPar employee J. Palmer, Toronto, Ontario, for allegedly smoking marijuana.

BROTHERHOOD'S STATEMENT OF ISSUE:

On May 6, 1987, while performing his duties, employee Palmer was approached and accused of smoking marijuana, by supervisor K. Lee

Supervisor K. Lee took employee Palmer to R. Crooks' office (Preload Manager).

A discussion took place in the office and after a thorough search of the work area by Mr. R. Crooks, he determined there was no evidence that this employee was smoking marijuana and allowed employee J. Palmer to continue working.

An investigation was held and on May 21, 1987, employee Palmer was fired.

The Brotherhood filed a grievance requesting employee Palmer be reinstated with full seniority and benefits, and paid all time lost while held out of service.

The Company declined the Union's request.

FOR THE BROTHERHOOD:

(SGD.) J. J. BOYCE
SYSTEM GENERAL CHAIRMAN

There appeared on behalf of the Company:

C. W. Peterson	– Counsel, Toronto
D. J. Bennett	– Labour Relations Officer, Toronto
B. Saunders	– Witness
K. Lee	– Witness

And on behalf of the Union:

D. Wray	– Counsel, Toronto
J. J. Boyce	– System General Chairman, Toronto
J. Palmer	– Grievor

AWARD OF THE ARBITRATOR

The grievor is a relatively junior employee who was employed as a dockman at the Company's Toronto sorting warehouse. He had some seventeen months' of service when he was discharged in late May of 1987 for allegedly smoking marijuana while on duty. In the circumstances it is not disputed that discharge would be an appropriate measure of discipline in the event that the evidence should sustain the allegation. The sole issue, therefore, is whether Mr. Palmer did smoke marijuana while on the job on May 6, 1987.

Two persons gave evidence on behalf of the Company. Mr. Kenneth Lee, a supervisor on duty in the warehouse on the day in question, testified that towards the end of his shift, at or about 8:00 a.m., he was in an area of the warehouse adjacent to the grievor's work station dislodging a parcel jam in a section of a conveyor belt. As he was picking parcels off the floor Mr. Lee looked up and saw Mr. Palmer who was working in an area known as "the pit". The grievor was then some twenty to twenty-five feet away from Mr. Lee, with his back turned towards him. According to Mr. Lee's evidence Mr. Palmer was squatting down in a position that would conceal him from view and a cloud of smoke was clearly visible above his head. While he could not see the grievor's face or hands, Mr. Lee testified that he formed the opinion that Mr. Palmer must be smoking a cigarette, something plainly prohibited within the warehouse. He testified that when he walked up to Mr. Palmer he found him standing, but there was no cigarette of any kind visible either in his hands or anywhere in the vicinity. Mr. Lee stated that he detected a strong smell of marijuana. On the strength of what he then smelled and had earlier observed he instructed Mr. Palmer to accompany him, assigning another employee to his post in the pit. Thereafter Mr. Lee and the grievor met Mr. Frank Costa, the grievor's direct supervisor on the shift. After a brief explanation by Mr. Lee the three returned to the pit area to look for a discarded marijuana cigarette. They found nothing, and subsequently Mr. Lee ushered the grievor to the office of Terminal Manager Robert Crooks to discuss the matter further. During all of this time, Mr. Palmer strongly denied any suggestion of wrong-doing, and by his own admission registered extreme anger towards Mr. Lee for what he maintained was an unfounded accusation. Mr. Crooks then assured him that no conclusion had been drawn and that the issue was simply a matter of attempting to determine what had happened. There being no physical evidence of marijuana, given the heated dispute between the supervisor and Mr. Palmer, Mr. Crooks ordered Mr. Palmer to return to work, which he did for the balance of the shift.

Two days later another employee, Ms. Barbara Saunders, disclosed to Supervisor Costa that she had knowledge of the incident involving the grievor. Her evidence is that she was working in the sorting aisle, some fourteen or fifteen feet away from where Mr. Palmer was working in the pit at the time of the incident involving Mr. Palmer and Mr. Lee. According to her evidence, moments before Mr. Lee arrived on the scene, she recognized the smell of marijuana. She relates that she looked around her and saw Mr. Palmer standing in the pit puffing on a marijuana "joint". Not wanting to become involved, she states that she then turned back to her task of sorting parcels on the conveyor belt. She states that she was next surprised by seeing the marijuana cigarette land on the conveyor immediately in front of her at or about the time she first heard Mr. Lee's voice as he confronted Mr. Palmer. According to Ms. Saunders the marijuana cigarette was quickly picked up and pocketed by another employee working next to her. While she did not immediately reveal the identity of that person to Mr. Costa, during the investigation, after some prodding, she eventually did so.

The grievor denies that he smoked marijuana on the job as described by Mr. Lee and Ms. Saunders. He relates that he has long had an antagonistic relationship with Mr. Lee, due in part to his responsibilities as plant vice-president of the Union, and previously as shop steward, in which capacities he has been responsible for processing a number of grievances. His position is that both Mr. Lee and Mr. Costa, whom Ms. Saunders acknowledges is her friend, have brought a false allegation against him as a pretense to get rid of him.

The sole issue is credibility. The evidence of Mr. Palmer on the one hand, and that of Mr. Lee and Ms. Saunders is clearly irreconcilable. Given the seriousness of the accusation, if Mr. Lee's evidence stood alone there might be reason to doubt the validity of the Company's case. By his own admission he did not see Mr. Palmer actually smoking, nor was he able to find any marijuana in or around the grievor's work place. Given that there were some four employees working within a ten to fifteen foot radius, even accepting that Mr. Lee saw smoke and smelled marijuana, it would be difficult to isolate Mr. Palmer as the person responsible.

The case therefore turns in large part on the evidence of Ms. Saunders. She testified that she saw Mr. Palmer smoking the marijuana cigarette, and witnessed, at least in part, its disposal when Mr. Lee happened on the scene. The Arbitrator has carefully reviewed both her testimony and that of the grievor. On balance I am satisfied that she

was neither defensive nor evasive in her replies, both in examination in chief and under cross-examination. While she admitted to some uncertainty with respect to precise second-by-second timing and the measure of distances, it does not appear disputed that she did have a clear sight line to where the grievor was working, at least when he was standing. While Mr. Lee testified that he saw Mr. Palmer crouching down, and Ms. Saunders' evidence is that she saw him puffing the marijuana cigarette while standing, the Arbitrator is satisfied that there is in those accounts no material conflict. There is no reason to conclude, on the balance of probabilities, that Mr. Palmer might not have been crouching, or sitting on a box as he maintains, or standing, all in turn, during the time that would have been required for him to light and smoke the marijuana "joint".

Most importantly, on the critical points of her evidence with respect to what she observed, Ms. Saunders gave consistent, measured and credible testimony. The same cannot be said of Mr. Palmer. His testimony was evasive, defensive and at times hostile. Even accepting, as he suggests, that his posture is prompted by anger at the accusation made, the Arbitrator is compelled, overall, to find the evidence of Ms. Saunders more credible and reliable than that of Mr. Palmer. Taken together with the corroboration of Mr. Lee's evidence, her testimony provides an account which, on the balance of probabilities, I am compelled to prefer.

For the foregoing reasons the Arbitrator concludes that the Company has discharged the onus of proof in this case. The grievance is therefore denied.

April 15, 1988

(signed) MICHEL G. PICHER
ARBITRATOR