

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2671

Heard in Calgary, Wednesday, 15 November 1995

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

TRANSPORTATION COMMUNICATIONS UNION

DISPUTE:

The dismissal of Weston Storeperson Mr. Albert Bernardino, #539171.

JOINT STATEMENT OF ISSUE:

On May 2, 1994, an investigation was held with Mr. A. Bernardino in connection with the circumstances leading to his being held out of service on April 25, 1994.

As a result of the investigation held on May 2, 1994, Mr. Bernardino was issued Form 104 which stated that he had been "dismissed for consuming narcotics while on duty April 25, 1994."

The Union appealed the dismissal on the basis that the Company had not substantiated the charges against Mr. Bernardino. The Union progressed a grievance requesting that Mr. Bernardino be reinstated with full seniority, compensation and benefits.

The Company has declined the Union's grievance.

FOR THE UNION:

(SGD.) D. JAMES KENT
DIVISIONAL VICE-PRESIDENT

FOR THE COMPANY:

(SGD.) C. GRAHAM
FOR: GENERAL MANAGER,
OPERATIONS & MAINTENANCE, CPRS

There appeared on behalf of the Company:

G. D. Wilson	– Counsel, Legal Services, Montreal
C. Graham	– Labour Relations Officer, Montreal
C. M. Rear	– Witness
B. Benner	– Manager, Material, Ogden

And on behalf of the Union:

P. Moss	– Counsel, Winnipeg
D. J. Kent	– Divisional Vice-President, Winnipeg
A. Bernardino	– Grievor

AWARD OF THE ARBITRATOR

The evidence before the Arbitrator establishes that Sergeant C.M. Rear of the CP Police was summoned to the area of the paint shop at Weston on the evening of April 25, 1994. He received a telephone call from a security guard in the Weston Shops advising that three persons had entered the scale shack in suspicious circumstances. Some five minutes later, in the company of Constable R.R. Huff, Sergeant Rear entered the shack. He relates that he was met with "a very pungent odour" which he believed to be the smell of marijuana. Three employees, including the grievor, were inside the shack. Upon conducting an immediate search Sergeant Rear recovered a number of items, including a metal smoking pipe, a "roach clip", cigarette paper and a small quantity of material which was described by one of the employees present, Mr. L.D. Bailey, as being "hash". Also found within the scale shack were the remains of a cigarette which Sergeant Rear described as "a roach".

The record discloses that the three employees, the grievor, Mr. Bailey and employee R.B. Middleton, were taken into custody and removed to a Winnipeg police station where they were further questioned. It is common ground that Mr. Bailey was charged with possession of a narcotic, that Mr. Bernardino was released, being advised that no charges would be laid against him, and that Mr. Middleton was released on the understanding that he might be the subject of a later summons. It does appear disputed that no charges were subsequently laid against Mr. Middleton. It also appears that Mr. Bailey was eventually acquitted.

Prior to Mr. Bernardino leaving the Winnipeg police station he was questioned by Constable Huff in the presence of Sergeant Rear. At that time the grievor signed a written statement, apparently on the understanding expressed by the officers that it would not be used against him. Sergeant Rear testified that in his view that meant that it would not be used in any criminal proceeding. The statement taken by the two police officers, and signed by the grievor, includes the following statement:

I went to meet Derek to give him a hand under the hooks, and we decided to go inside to have a cigarette, Derek had a roach so we lit it up. That's when you guys came in, that's just what happened.

Later in the same statement, when asked whether he had anything to add, Mr. Bernardino stated:

Just to apologize, I was the oldest one there. I should have stopped before it happened.

The statement given to the officers also contains admissions on the part of the grievor that he had previously smoked marijuana on a social basis, and had done so at work "once or twice".

Counsel of the Union argues that the statement obtained by the police officers should not be viewed as a voluntary statement on the part of Mr. Bernardino, to the extent that it was obtained in consideration of the grievor being advised that he would not be charged, and that his statement would not be used against him. The Arbitrator cannot accept that submission. The evidence of Sergeant Rear is that upon being apprehended inside the scale shack Mr. Bernardino was cautioned as to his rights. There is no evidence of any threats, promises or other undue influence being brought to bear on Mr. Bernardino prior to or at the time of the statement which he made to the police officers, some two hours after his original arrest. In the circumstances I view the statement as admissible as a voluntary confession on the part of the grievor. I am satisfied, on the balance of probabilities, that the grievor did participate in the consumption of cannabis during the course of his tour of duty on the evening of April 25, 1994. The evidence further confirms that Mr. Bernardino works in a safety-sensitive position, being involved in the operation of a fork-lift as a part of his duties as a storeperson. The seriousness of drug use on the job by an employee involved in safety-sensitive work has been amply discussed in prior awards and need not be revisited here (**CROA 1536, 1703 and SHP-378**).

Apart from the gravity of the offence committed by Mr. Bernardino, his prior disciplinary record is of little assistance by way of mitigation. At the time of the incident his record stood at thirty demerits, twenty-five of which were incurred in September of 1993 in relation to working in an unsafe manner. Further, in 1990 the grievor was discharged by reason of the accumulation of demerits, and was reinstated without compensation, only by reason of the exercise of the discretion of this Office to reduce the penalty assessed against him (see **CROA 2088**).

In all of the circumstances I can see no responsible basis upon which a reduction of the penalty of discharge can be justified in this case. The grievor knew, or reasonably should have known, that the consumption of cannabis during his tour of duty was a dismissible offence. Neither his prior record nor his lack of candour during the

Company's own disciplinary investigation would suggest that the Company erred in its decision as to the appropriate penalty.

For these reasons the grievance must be dismissed.

November 20, 1995

(signed) MICHEL G. PICHER
ARBITRATOR