

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2994

Heard in Calgary, Tuesday, 10 November 1998

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Claim on behalf of Machine Operator A. Wirth.

EX PARTE STATEMENT OF ISSUE:

On July 23, 1998 the grievor received Form 104 stating that he was being dismissed from Company service for "conduct unbecoming an employee on the Canadian Pacific Railway as evidenced by you possession and use of illegal narcotics on company property a violation of rule #1 of the work area sleeping and boarding car rules and regulations at Chase, BC on May 13, 1998." The Brotherhood grieved.

The Union contends that: **1.)** The discipline assessed was in the circumstances, unwarranted. **2.)** At the time of dismissal, the grievor was an outstanding long service employee who, throughout his career, was only ever the recipient of very minor discipline. **3.)** Mitigating factors existed which should have served to exonerate the grievor in this instance.

The Union requests that: **1.)** The grievor be reinstated forthwith without loss of seniority and with full compensation for all financial losses incurred as a result of this matter. **2.)** The grievor be provided with a written apology for the false and unsubstantiated allegations which resulted in his dismissal and which caused him and his family undue and unwarranted stress and hardship.

The Company denies the Union's contentions and declines the Union's request.

FOR THE BROTHERHOOD:

(SGD.) J. J. KRUK
SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

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| R. M. Andrews | – Manager, Labour Relations, Calgary |
| J. Dragani | – Labour Relations Officer, Calgary |
| E. J. MacIsaac | – Labour Relations Officer, Calgary |
| D. E. Freeborn | – Labour Relations Officer, Calgary |
| Det. Sgt. M. Sikomas | – CP Police, Chase, B.C. |

And on behalf of the Brotherhood:

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| D. W. Brown | – Sr. Counsel, Ottawa |
| P. Davidson | – Counsel, Ottawa |
| J. J. Kruk | – System Federation General Chairman, Ottawa |
| Wm. Brehl | – General Chairman, Revelstoke |
| H. Heinrichs | – General Chairman, |
| H. Thiessen | – System Federation General Chairman (ret'd) |

AWARD OF THE ARBITRATOR

The evidence of Canadian Pacific Police Detective Sergeant Mike Sikomas relates that on May 13, 1998 at approximately 12:12 hrs., he observed two BC tie gang employees standing on the end platform of a boarding car stationed on a side track, adjacent to the main line at Chase, B.C. Detective Sergeant Sikomas relates that he approached the two individuals undetected, to within a distance of some eight feet. He observed them "passing something back and forth, and exhaling smoke." When he was close to the individuals he detected the smell of marijuana. He then went onto the platform and confronted the two individuals, the grievor Mr. Wirth and employee Shane Good. There was no marijuana cigarette then in evidence. According to Detective Sergeant Sikomas, the employees neither admitted nor denied smoking marijuana. A search of their quarters revealed nothing in the way of narcotics or related paraphernalia. It appears that during further questioning, when the detective sergeant asked them who was supplying marijuana to the crew members, both employees denied using cannabis.

Shortly after the incident a conversation transpired between Shane Good and Supervisor Darren Schmidt. During the course of that conversation, which occurred on May 13 at approximately 16:40, Mr. Schmidt relates that Mr. Good stated that "he was caught red handed". It is common ground that Mr. Good then agreed to submit to a drug test, the result of which was positive for cannabinoids. He was subsequently dismissed and no grievance has been initiated in respect of his discharge. It is arguable, on the strength of the statement Mr. Good gave to Supervisor Schmidt that the positive test was influenced by what Mr. Good admitted was his own earlier consumption of marijuana on the previous weekend, although it is clear that Mr. Good made no such assertion through the filing of a grievance against his discharge. It is also notable that during the course of his disciplinary investigation Mr. Good agreed with the report of Detective Sergeant Sikomas to the effect that there was an unmistakable odour of burning marijuana in the air.

Shortly following the incident Mr. Wirth had a conversation with Assistant Supervisor Dave Pratt and an individual named Kim King. According to Mr. Pratt's statement, during that conversation Mr. Wirth admitted that he did occasionally smoke marijuana on a social basis. He relates, in part: "Al Wirth also said that he doesn't smoke at work but sometimes he will smoke after work well before he is subject to duty." During the course of that conversation Mr. Wirth refused to undergo a drug screening test, stating that he wanted "... to talk to someone first."

Following his disciplinary investigation the Company discharged the grievor for a violation of Work Area, Sleeping and Boarding Car Occupants Rules and Regulations. Rule no. 1 reads, in part:

The use or possession of intoxicants, narcotics, or other mood altering agents is prohibited at all times on company property. Or on property such as hotel rooms and hotel parking lots that are rented and paid for by Canadian Pacific Railway.

The first issue to be resolved is whether the grievor did, as the Company alleges, consume marijuana on the occasion he was observed by Detective Sergeant Sikomas. On a review of the material filed, I am satisfied, on the balance of probabilities, that he did. There are clear inconsistencies in the statements offered by Mr. Wirth following the incident of May 13, 1998. As noted above, during the course of his conversation with Assistant Supervisor Pratt, Mr. Wirth admitted to smoking marijuana on a social basis. However, during the course of his disciplinary investigation he made a contrary statement, asserting that he had not smoked marijuana since his school days. Further, the statement made by Mr. Good to Supervisor Schmidt is, in my opinion, consistent with the report of the incident related by Detective Sergeant Sikomas.

At the arbitration hearing Detective Sergeant Sikomas was present and available to testify and be cross-examined on what he observed. The grievor was not available to give any direct evidence or rebuttal to the testimony which the police officer was available to provide.

Further, it is not unreasonable to draw adverse inferences from the fact that Mr. Wirth declined the Company's request to submit to a drug screening test. In **CROA 1703** the following comments were made in relation to such a refusal:

... 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.

In all of the circumstances I am satisfied that the grievor was involved in the consumption of marijuana when he was observed by Detective Sergeant Sikomas on the platform of the boarding car at Chase, B.C. on May 13, 1998. It appears that the grievor was not on active duty at the time, as he and his crew had been released from duty following a safety meeting. However there is no dispute that he was on Company property, in boarding car facilities plainly falling within the purview of rule no. 1. The prohibition against the consumption of marijuana on Company property, particularly in circumstances such as those disclosed in the case at hand, in close proximity to a double track main line, need scarcely be elaborated. Intoxication, whether by alcohol or narcotics, in such a location is plainly incompatible with the most rudimentary notions of safety. The rule in question is eminently reasonable and its violation must be viewed as serious.

Moreover, there is little reason in the material before me to mitigate against the grievor's discharge. Accepting as I do the evidence of Detective Sergeant Sikomas, I am compelled to conclude that the grievor was at all times uncooperative, not only by refusing to undergo a drug test, but in his subsequent denial of any involvement in smoking marijuana at the time he was plainly observed doing so by Detective Sergeant Sikomas. In these circumstances there is little basis upon which the Arbitrator can consider the substitution of a lesser penalty.

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

November 17, 1998

(signed) MICHEL G. PICHER
ARBITRATOR