CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3145

Heard in Montreal, Tuesday, 10 October 2000

concerning

CANADIAN PACIFIC RAILWAY LIMITED

and

UNITED STEELWORKERS OF AMERICA TRANSPORTATION COMMUNICATIONS UNION AMALGAMATED NATIONAL LOCAL 1976)

DISPUTE:

Dismissal of Mr. R. Marleau, who was employed as a minibus driver at St. Luc Yard.

JOINT STATEMENT OF ISSUE:

During his shift on April 20, 1999, Mr. Marleau was arrested by the police when cocaine was found in a Company vehicle for which he was responsible. On May 31, 1999, the Company began an investigation into the circumstances surrounding his shift of April 20, 1999. A supplementary investigation was also held with Mr. Marleau on July 12, 1999. As a result of these investigations, the Company dismissed Mr. Marleau for inappropriate conduct for an employee "when an illegal substance (cocaine) was found in a Company vehicle for which (he was) responsible" when he was working as a minibus driver at St. Luc Yard in Montreal, on April 20, 1999.

The Union filed an appeal, claiming that the dismissal was excessive and unjustified. The Union demanded that Mr. Marleau be reinstated without loss of seniority as a minibus driver and that he be paid all lost wages and benefits since April 21, 1999.

The Company denied the Union's request.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) N. M. LAPOINTE	(SGD.) R. HAMPEL
PRESIDENT, LOCAL 1976	FOR: R. A. DECICCIO

There appeared on behalf of the Company:

R. Hampel	– Labour Relations Officer, Calgary
R. Sabourin	– Labour Relations Officer, Calgary
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And on behalf of the Union:

R. Pagé	– Representative, Montreal
S. Hadden	– Representative, Eastern Canada, Montreal
J. Greffe	– President, Local 1290, Montreal
R. Marleau	– Grievor

AWARD OF THE ARBITRATOR

A number of facts relating to the grievance are not contested. On April 20, 1999, the grievor was assigned to work as a bus driver at St. Luc Yard, transporting employees in a Company minivan. His shift was from 15:00 to 23:00.

Around 19:00, Mr. Marleau parked his vehicle in the parking lot of an open-air restaurant on Décarie Street. While he was waiting in line to be served, a truck parked next to the grievor's minivan. The truck driver came and spoke to Mr. Marleau for a few seconds. The driver, named Donald Renaud, then went over to the grievor's van, opened the door and put something inside. At virtually the same time, a third vehicle arrived in the parking lot and Mr. Renaud exchanged a large sum of money with the driver. Suddenly several police cars arrived on the scene, and Mr. Renaud, his female companion who was in his truck, the grievor and the driver of the third vehicle were all arrested in a drug raid.

The police officers immediately asked Mr. Marleau to go with them to his minivan. A plastic bag containing seven grams of cocaine was found in the ashtray of the vehicle. Mr. Marleau was searched and was found to have over five hundred dollars and a small amount of marijuana in his pockets.

Charged with possession of cocaine for the purpose of trafficking, the grievor was found not guilty in a decision rendered June 8, 2000, by the Honourable Micheline Corbeil Laramie. She came to the conclusion that possession of the drug in question by the grievor was not proven beyond all reasonable doubt because he had not had control of his vehicle at the critical moment and the prosecution had not provided sufficient evidence of his consent. One element in particular appears to have influenced the court. In the judge's opinion, there did not seem to have been any complicity between the grievor and the accused supplier, Mr. Renaud. In his testimony, Mr. Marleau said that he knew Mr. Renaud only by his first name and had not seen him for several months at the time of the incident of April 20. The judge worded her conclusion as follows: "Even if the defendant's testimony has some holes in it, it cannot be concluded therefrom that he was aware of Renaud's actions."

The account of this incident that Mr. Marleau gave to the Company at his disciplinary investigation raises some serious doubts in this respect, however. In his statement to the employer of May 31, 1999, Mr. Marleau said that on the very day that he met Mr. Renaud, the latter had called him on his cell phone at around 17:30. Mr. Marleau claims that the conversation was limited to the subject of sports cards and lotteries. The arbitrator finds it odd, to say the least, that the grievor, who insisted before the judge that he had not "seen" Mr. Renaud for months, somehow forgot to mention that the two of them had spoken on the phone less than two hours before they met at the restaurant on April 20, 1999.

Second, it is agreed that the grievor did not reveal to the Company that he had a quarter of a joint of marijuana in his pocket when he was arrested. An admission to this effect was obtained from the grievor by the Crown prosecutor at trial, during his cross-examination, and only after a series of evasive answers from Mr. Marleau.

In arbitration, evidence is measured on the balance of probabilities, and not according to the standard of reasonable doubt that applies in criminal law. It is clearly established in the case law of this Office that it is incumbent upon an employee who appears to be implicated in the possession or trafficking of drugs to provide a clear and convincing explanation, in default of which the tribunal can come to negative conclusions regarding the employee. In **CROA 1703**, the arbitrator argued as follows:

> In a drug-related discipline case the burden of proof, as in any case of discipline, is upon the Company. Where, however, certain objective facts – however circumstantial – are established that would point to the heavy involvement of a railroad employee in the production and use of drugs, the onus may shift to the employee to provide a full and satisfactory account of his or her actions and circumstances to justify continued employment. The absence of a full and credible explanation, in the face of overwhelmingly incriminating evidence, leaves an employer with the public safety obligations of a railroad with little choice but to suspend or terminate the employment of a person whose habits or activities appear so dramatically incompatible with the safe operation of its business. …
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> …

> It is generally accepted that an employer making a grave charge against an employee should be expected to provide proof whose reliability is commensurate with the seriousness of the allegation (*See* ***Indusmin Ltd.*** *(1978), 20 L.A.C. (2d) 87 (M.G. Picher)*). By the same token, when such evidence is established which, absent some good and credible explanation, would, on the balance of probabilities, lead to an inference of wrongdoing, it is incumbent on the employee affected to provide a full and compelling explanation. …

(See also **CROA 2238** and **2296**)

How do these principles apply in the case at issue? The evidence establishes the following facts:

1. During his shift the grievor received a call on his cell phone from Donald Renaud.

2. A short time later, Mr. Marleau and Mr. Renaud met at a restaurant on Décarie Street, where their vehicles were parked next to one another.

3. After a conversation that lasted about 30 seconds, Mr. Renaud went and put seven grams of cocaine in the Company minivan driven by Mr. Marleau.

4. A search of Mr. Marleau revealed that he had over $500 on him, an amount of money that corresponds to the value of the cocaine that was put in his vehicle.

5. At the same time, he was also found to have in his possession a small quantity of marijuana, in the form of a cigarette.

Given these incriminating facts, the grievor's explanation leaves a great deal to be desired. First of all, he did not inform his employer that he had a joint of marijuana in his possession when he was arrested. Second, he admitted to the Company that he had spoken on the telephone to the accused cocaine dealer the same day they met, but he did not mention the call in the evidence he gave at his trial in Superior Court. He thus led the court to believe that he had not had any contact with Mr. Renaud for several months, which was clearly untrue.

The arbitrator feels that under the circumstances there was clearly just cause to dismiss the grievor. First, as a bus driver responsible for the safe transportation of Company employees, his possession of drugs, in this case cannabis, at work would in itself be sufficient cause for dismissal. Possession of a narcotic by an employee whose duties require him to ensure a high degree of safety is clearly incompatible with the bond of trust essential to such a job. For this reason alone, the arbitrator would have necessary grounds to dismiss the grievance.

Second, given these highly suspicious circumstances that seem to implicate Mr. Marleau in the purchase of a large quantity of cocaine, the grievor's explanations are inconsistent, not to say frankly contradictory and misleading. As noted above, the grievor seems to have attempted to mislead the Court with regard to the degree of recent contact between Mr. Renaud and himself. Furthermore, he made a weak attempt to claim before the Court that the joint in his possession was only tobacco, but that claim also turned out to be false.

In short, the grievor's credibility leaves a great deal to be desired. In the Arbitrator's opinion, it is no coincidence that the person to whom he had spoken on the telephone a little less than an hour earlier parked his truck beside the grievor's van in the restaurant parking lot. In my opinion, the balance of evidence shows that is was no coincidence, either, that the same person allegedly placed a large quantity of cocaine in Mr. Marleau's van after talking to him for only a few seconds. The explanations provided by Mr. Marleau, to the effect that he knew nothing of the drug deals going on around him, nor of Mr. Renaud's actions, are totally implausible, given the evasive, contradictory and misleading evidence that he presented first to his employer and then the Quebec Superior Court.

The Arbitrator cannot allow the Union's preliminary objection, either, to the effect that the discipline is null and void because of a failure to respect deadlines in communicating the employer's decision. Article 27.3 stipulates that the Company's decision "must be rendered within 21 calendar days of the closing of the investigation, except if the parties agree otherwise." The article in question contains no sanction and expresses no practical consequence if the deadlines are not respected. It is agreed that in the present case, the letter of dismissal was issued on the twenty-second day following the closing of the investigation. For reasons fully developed in the case law of this office, the Arbitrator must recognize the wording of article 27.3 as being of a directive, rather than compulsory, nature, with regard to compliance with the stipulated deadlines. There is nothing in the context of the article, nor in its language, to justify the conclusion that a failure to respect the deadline should nullify the discipline. Such a consequence, in

my opinion, would require a clear, unequivocal articulation in the wording of the collective agreement (see **CROA 2830**).

For all these reasons, the grievance must be denied.

October 13, 2000

(signed)MICHEL G. PICHER
ARBITRATOR