CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3377

Heard in Montreal, Thursday, 16 October 2003

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Dismissal of Mr. M. Lebeau.

BROTHERHOOD'S STATEMENT OF ISSUE:

By way of form 104 dated July 22, 2002, the grievor was dismissed from Company service for his alleged "conduct unbecoming an employee as evidenced by your possession of illegal drugs and alcohol on Company property, a violation of Rule 1.8 of the Algoma Track Program Hotel and Camp Rules at Jackfish, Ontario, May 16, 2002." In response, a grievance was filed.

The Union contends that: **(1.)** The grievor is a long standing employee with a stellar discipline record; **(2.)** The grievor should properly have been extended deferred discipline; **(3.)** The discipline assessed was excessive and unwarranted in the circumstances.

The Union requests that: the grievor be reinstated into Company service forthwith, without loss of seniority and with full compensation for all wages and benefits lost as a result of this matter.

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:

D. E. Guérin	– Labour Relations Officer, Calgary
E. J. MacIsaac	– Manager, Labour Relations, Calgary
C. Goheen	– Track Field Coordinator

And on behalf of the Brotherhood:

P. Davidson	– Counsel, Ottawa
J. J. Kruk	– System Federation General Chairman, Ottawa
D. W. Brown	– Sr. Counsel, Ottawa
M. Couture	– General Chairman, Eastern Region

AWARD OF THE ARBITRATOR

This grievance, which concerns the discharge of Machine Operator M. Lebeau for the possession of marijuana and alcohol on Company boarding cars at Jackfish, Ontario, raises a relatively novel issue concerning the admissibility of evidence. During the presentation of its case the Company sought to introduce evidence to the effect that the grievor, who was criminally charged for the possession of marijuana, had avoided conviction by submitting to alternative measures under the provisions of section 717 of the **Criminal Code of Canada**. The Brotherhood objected to the admissibility of that evidence, and the implied admission of guilt which it raises.

The Company's representative argued that the employer felt it incumbent upon it to bring forward evidence that the grievor had voluntarily submitted to alternative measures, in exchange for the dropping of the charges against him. It felt compelled to do so as a means of countering any suggestion which might be made in defence of the grievor by the Brotherhood that the criminal charges against him for the possession of marijuana had been dismissed, which would technically be true. The Company further notes that several prior reported arbitration awards have dealt with the fact that the employee under consideration had been made the subject of an alternative measure or diversion program under section 717 of the **Criminal Code of Canada**. In that regard reference was made to **Re Bay v. United Steelworkers of America, Local 1000 (Retail Wholesale Canada)** [2000] O.L.A.A. No. 256 (Barrett); **Re Nova Scotia (Civil Service Commission) v. Nova Scotia Government Employees Union** [2000] N.S.L.A.A. No. 25 (Veniot); **Re Caterair Chateau Canada Limited** [1996] B.C.C.A.A.A. No. 150 (Gordon).

Counsel for the Brotherhood submits that on the plain language of the **Criminal Code** no evidence concerning any statement accepting responsibility by a person alleged to have committed an offence is admissible in evidence where such an admission was made for the purposes of gaining access to the alternative measures provisions of the **Code**. In that regard counsel for the Brotherhood points to the language of section 717 of the **Code** which reads, in part, as follows:

> **717. (1)** Alternative measures may be used to deal with a person alleged to have committed an offence only if it is not inconsistent with the protection of society and the following conditions are met:
>
> **(a)** the measures are part of a program of alternative measure authorized by the Attorney General or the Attorney General's delegate or authorized by a person, or a person within a class of persons, designated by the lieutenant governor in council of a province;
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> **(b)** the person who is considering whether to use the measures is satisfied that they would be appropriate, having regard to the needs of the person alleged to have committed the offence and the interest of society and of the victim;
>
> **(c)** the person, having been informed of the alternative measures, fully and freely consents to participate therein;
>
> **(d)** the person has, before consenting to participate in the alternative measures, been advised of the right to be represented by counsel;
>
> **(e) the person accepts responsibility for the act or omission that forms the basis of the offence that the person is alleged to have committed;**
>
> **(f)** there is, in the opinion of the Attorney General or the Attorney General's agent, sufficient evidence to proceed with the prosecution of the offence; and
>
> **(g)** the prosecution of the offence is not in any way barred at law.
>
> **(2)** Alternative measures shall not be used to deal with a person alleged to have committed an offence if the person:
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> **(a)** denies participation or involvement in the commission of the offence; or
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> **(b)** expresses the wish to have any charge against the person dealt with by the court.

> **(3) No admission, confession or statement accepting responsibility for a given act or omission made by a person alleged to have committed an offence as a condition of the person being dealt with by alternative measures is admissible in evidence against that person in any civil or criminal proceedings.**
>
> (emphasis added)

In the Arbitrator's view the Brotherhood's objection must prevail. There can be little doubt that an arbitration proceeding conducted under the **Canada Labour Code** is in the nature of a civil proceeding as contemplated within the language of section 717 (3) of the **Criminal Code of Canada**. Bearing in mind that arbitration proceedings under the **Code** involve the exercise of powers common to quasi-judicial tribunals, including the power to compel the attendance of witnesses, the production of documents and the taking of evidence under oath, coupled with the fact that the awards of boards of arbitration are enforceable through the courts, there can be little doubt but that an arbitration under the **Code** must qualify as a civil proceeding within the meaning of section 717 of the **Criminal Code of Canada**.

It seems evident to the Arbitrator that an essential reason for the statutory inadmissibility of any such admission is to encourage the use of the alternative measures or diversion programs contemplated by Parliament within section 717 of the **Criminal Code**. Failing any such privilege or protection persons who might otherwise face liability in other civil or criminal proceedings might be obviously reluctant to take advantage of the diversion program. Obviously, therefore, it is incumbent upon tribunals such as boards of arbitration to respect the underlying purpose of the inadmissibility rule and the clear letter of that rule as expressed in section 717(3) of the **Criminal Code of Canada**. Nor can much be drawn from the arbitral awards cited by the Company, as they do not appear to have involved any objection as to admissibility. For these reasons the Arbitrator must sustain the objection of the Brotherhood as to the admissibility of any evidence concerning the grievor's involvement in an alternative measures or diversion program stemming from the criminal charge of possession of marijuana which was made against him following the incident which is the subject of this arbitration.

The evidence before the Arbitrator confirms that pursuant to an anonymous tip the Ontario Provincial Police, assisted by a drug sniffing dog, searched Company boarding cars at Jackfish, Ontario on May 16, 2002. That search revealed, among other things, the presence of some 4.2 grams of marijuana concealed behind a coffee machine adjacent to the grievor's bed in his room on one of the boarding cars. The police search also revealed two full bottles of beer as well as four empty beer bottles in the grievor's locker at the boarding car facility. Following a disciplinary investigation the Company notified Mr. Lebeau, by letter dated July 22, 2002, that he was dismissed from Company service by reason of his possession of illegal drugs and alcohol on Company property, contrary to rule 1.8 of the Algoma Track Program Hotel and Camp Rules. That rule, which is well disseminated in the workplace, reads as follows:

> **1.8** The use or possession of alcoholic beverages, mood altering agents, any types of firearms or any illegal weapon is strictly prohibited on Company property or motel rooms.

The grievor denies that the marijuana found behind the coffee maker adjacent to his bed was his. On his behalf the Brotherhood's counsel suggests that the evidence in that regard is entirely circumstantial, that the marijuana might just as easily have been concealed there by the grievor's roommate, or by other persons residing in the boarding car who, it appears, occasionally made use of the coffee maker.

With respect to the alcohol found in the grievor's locker, plainly contrary to the Company rule, Mr. Lebeau offered the explanation that he simply put it in the locker because he was concerned that the bottles might explode if they were left in his car, by reason of heat. He further related that he had travelled to Terrace Bay, Ontario on the day before the search of the boarding car and had consumed two of the six beers in the company of a friend who had drank the other two beers. On his behalf it is further stressed that there is no suggestion that he consumed the alcohol while on duty or subject to duty, or that he was intoxicated during working hours.

The evidence further discloses, to the satisfaction of the Arbitrator, that upon being advised that the grievor was charged with the possession of marijuana, his supervisor, Track Programs Field Coordinator Clifford Goheen, offered him the opportunity to undergo a drug test. While a drug test would obviously not provide conclusive proof as to when or where Mr. Lebeau might have consumed marijuana, assuming a positive result, a negative test result would plainly have been significant to the extent that it would have supported his statement, made during the disciplinary investigation conducted by the Company, that he had never possessed or consumed marijuana or any other prohibited drug. However, Mr. Lebeau declined the invitation to undergo a drug test.

Upon a review of the totality of the evidence the Arbitrator has substantial difficulty with the credibility of the grievor's explanations. Firstly, concerning the beer bottles found in his locker, it is difficult to understand on what basis he might be concerned about the possible explosion of beer bottles stored in his car. The evidence tendered by the Company, which is not challenged, is that on May 16, the weather at Jackfish, Ontario was far from warm. Information downloaded from an Environment Canada website, tendered in evidence by the Company, confirms that on May 15 and 16, 2002 the temperature high ranged between 5.4 and 6.7 degrees Celsius with occasional ice pellet showers and periods of snow and drizzle. In these circumstances the grievor's explanation for the location of the beer found in his locker is simply not credible.

Nor is the fact that Mr. Lebeau declined to undergo a drug test, a conclusion the Arbitrator draws based on the more credible evidence of Mr. Goheen, a helpful element in respect of his case. In a prior award this Office had occasion to consider the significance of an employee refusing to undergo a drug test in circumstances where an employer, in a safety sensitive industry, might have reasonable and probable cause to request such a test. In **CROA 1703** (**Re Canadian Pacific Ltd. and United Transportation Union** (1987) 31 L.A.C. (3d) 179 (M.G. Picher)) the following comment was made:

> … 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.

On the whole I am satisfied, on the balance of probabilities, that the grievor was in possession of the marijuana found adjacent to his bed during the police search of the boarding car facility. Given the transparency of Mr. Lebeau's attempt at explaining the alcohol which was in his possession, and his refusal to undergo a drug test notwithstanding his protestations that he had never used marijuana, I find his denial to lack credibility. I find, on the balance of probabilities, that he did possess the marijuana found in his bedroom.

What, then, is the appropriate disciplinary result? In prior awards this Office has recognized the seriousness of drug possession and/or consumption in the safety sensitive environs of railway operations. In **CROA 2994**, a grievance involving Canadian Pacific Railway and the Brotherhood of Maintenance of Way Employees, the dismissal of an employee for smoking marijuana at a boarding car facility was sustained, the arbitrator commenting as follows:

> … 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.

While it is true that the grievor is an employee of some twenty years' service, the fact remains that he knowingly violated a cardinal Company rule prohibiting the possession of drugs or alcohol in boarding car facilities, adjacent to a main track. The seriousness of the actions of the grievor, coupled with his failure to admit to any wrongdoing, leaves the Arbitrator little alternative but to sustain the decision of the Company to terminate his services.

For the foregoing reasons the grievance must be dismissed.

October 21, 2003

(signed) MICHEL G. PICHER
ARBITRATOR