CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3609

Heard in Calgary, Tuesday, 13 March 2007

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED STEELWORKERS OF AMERICA, LOCAL 2004

DISPUTE:

The discharge of Foreman Maurice Manahan of Chetwynd, B.C., for violation of CROR Rule G and violation of CN's Drug and Alcohol Policy – use of narcotics while on duty on October 18, 2006, and refusal to submit to a drug test requested by the Company on October 27, 2006.

JOINT STATEMENT OF ISSUE:

On October 25, 2006, one of Mr. Manahan's fellow bargaining unit employee approached Assistant Track Supervisor Brian McCurdy, to report that on October 18, 2006, at around 08:30 hours he witnessed Mr. Manahan and [another employee], smoke a marijuana cigarette while on duty and in a Company vehicle. On October 27, 2006, Mr. Tim McMillan, Senior Manager, Engineering and CN Police Constable Jamie Thornton requested Mr. Manahan and [the other employee] to undergo drug testing. Mr. Manahan refused the Company's request to complete a drug testing process despite the advice that such a refusal would be considered to be a positive test result and a policy violation.

The Union contends that the Company assessed unwarranted discipline in discharging Mr. Manahan given the circumstances. The Union further contends that the Company did not have reasonable cause to request that Mr. Manahan submit to a drug test and has requested reinstatement, with Mr. Manahan made whole for all lost earnings and benefits.

The Company disagrees with the Union's contentions and has declined the Union's request.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) A. KANE	(SGD.) D. BRODIE
STAFF REPRESENTATIVE	FOR: VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

D. Brodie	– Manager, Labour Relations, Edmonton
A. DeMontigny	– Sr. Manager, Labour Relations, Montreal
T. McMillan	– Sr. Manager, Engineering, Prince George
P. Payne	– Manager, Labour Relations, Edmonton
S. Blackmore	– Manager, Labour Relations, Edmonton

And on behalf of the Union:

A. Kane	– Staff Representative, Vancouver
J. Dinnery	– President, Saskatoon
P. Jacques	– Chief Steward
M. Manahan	– Grievor

AWARD OF THE ARBITRATOR

The grievor, 49 years old, was hired by British Columbia Railway, the predecessor to this employer, on May 5, 1986. He was working as a Maintenance Gang foreman on October 18, 2006.

The most compelling evidence in this case is that of the bargaining unit employee and his observations of what took place on October 18, 2006. He was sitting in the passenger seat and saw a marijuana "joint" pass between the grievor and another employee seated in the back seat. The two of them smoked the whole "joint" together. The scent was unmistakeably that of marijuana.

This was not a fleeting incident which the bargaining unit employee observed from afar. He was actually right inside the truck with the two employees seated in the front passenger seat. He had an unobstructed view of the joint being passed back and forth. He stayed in the truck from the time they lit the joint right up until they finished it together in the truck. The evidence is that the bargaining unit employee did not partake nor did his coworkers offer him any of the joint while the three men were in the truck together.

The bargaining unit employee, an employee with 25 years of service, was understandably hesitant about reporting his two fellow employees. The bargaining unit employee testified at the investigation and at the arbitration hearing that he was hesitant and confused afterwards because he knew that it meant having to report his fellow employees, possibly having to sit through an investigation and subsequently a possible arbitration. That is the reason he hesitated for a week before he reported the incident. Put simply, his hesitation or confusion was not due to what he saw but rather due to the anxiety of having to report two of his co-workers for an incident that could ultimately cost them both their jobs. There is no evidence that the bargaining unit employee had anything to gain by reporting the incident nor is there any suggestion that his reporting of the grievor and his fellow employee was an act of spite or revenge. The arbitrator accepts his observations as being a truthful account of the incident.

The employer further submits that the culpability of the grievor is also supported by the grievor's own actions in refusing to submit to a drug test when confronted with the accusation by the employer on October 27, 2006. This was not a case, in the employer's view, where it attempted what amounts to a random drug test. The employer takes the position that it had reasonable cause to request that the grievor submit to the test given the eyewitness observations of the bargaining unit employee. The employer maintains that its actions fell squarely within the policy guidelines which read:

> REASONABLE CAUSE
>
> Testing for drugs and alcohol will take place when the company determines there is reasonable cause to suspect alcohol or other drug use in violation of this policy.
>
> The decision to test will be made by a supervisor in conjunction with a second person (e.g. another supervisor or other individual) wherever practical. The decision will be based on specific, personal observations such as, but not limited to:
>
> - Observe use or evidence of use of a substance (e.g. smell of alcohol).

In the view of this arbitrator, the employer did have reasonable cause to request the grievor attend for testing, notwithstanding that nine days had transpired since the actual incident. The policy is clear that any observed use of drugs or alcohol provides reasonable cause for requesting that an employee submit to testing. Even in the absence of the policy, the employer has the right and obligation to ensure there is has been no violation of CROR Rule G, particularly given the responsibility of a foreman for the safety of train crews.

The grievor refused to submit to testing. His co-worker, by contrast, complied with the request. Given the first-hand account of the bargaining unit employee and bearing in mind that the grievor's co-worker tested positive, it is appropriate in the view of the arbitrator to draw an adverse inference against the grievor based on his refusal to submit to a drug test on October 27, 2006. The evidence in this case is consistent with other awards of this office where an adverse inference has been relied on as evidence of culpability.(See **CROA 1703, 2994**) The grievor's refusal to be tested is therefore further evidence of his culpability.

The grievor claims that his attendance for a drug screening test on November 17, 2006, which showed a negative result, is support for his position that he had not been smoking marijuana at the time. This position is not tenable. A test one month after the alleged incident is insufficient evidentiary support to rebut both the first-hand observations of the independent employee and the grievor's own unwillingness to submit to testing when first approached about the incident on October 27, 2006**.**

The union also argued in this case that the grievor and other former employees of British Columbia Railway did not receive a copy of the employer's drug and alcohol policy. The employer asserts, on the other hand, that the grievor was mailed a copy of the policy. It is not necessary to decide here whether or not the policy was properly communicated to the employee in keeping with the rule set out in the **KVP** (1965) 16 L.A.C. 73 (Robinson). The breach in this case falls under CROR Rule G which reads, in part, as follows:

> G. (a) The use of intoxicants or narcotics by employees subject to duty, or their possession or use while on duty, is prohibited.
>
> (b) The use of mood altering agents by employees subject to duty, or their possession or use while on duty, is prohibited except as prescribed by a doctor.

CROR Rule G is a federal regulation and a Track Maintenance Foreman was aware of and clearly subject to this rule. In the safety-sensitive railway industry, a violation of this cardinal rule alone can lead to severe discipline up to and including discharge.

As to penalty, the comments of Arbitrator Picher in **CROA 3377** are worth noting:

> 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.

The grievor has over 20 years of service and a good work record. As noted above, however, he did not admit to any indiscretion in a workplace where safety around heavy equipment is critical. The grievor‘s lack of frankness over his clear wrongdoing in this case, as supported unequivocally by the observations of his fellow bargaining unit employee, coupled with the seriousness of the rule breach, precludes the arbitrator from modifying the penalty.

The grievance is dismissed.

March 23, 2007

(signed) JOHN M. MOREAU, Q.C.
ARBITRATOR