CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 3691

Heard in Montreal, Thursday, 11 September 2008

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA)

EX PARTE

DISPUTE:

Dismissal of Daniel Lemay at Autoramp, Montreal.

JOINT STATEMENT OF ISSUE:

On March 16, 2008, the griever, Daniel Lemay, was dismissed for: "*Violation de la politique de la compagnie sur les drogues et alcool suite à l'accident survenu le 15 février, 2008*."

The Union submits that there was no just cause for discipline or dismissal in this case. The Union seeks in resolution that Mr. Lemay be reinstated and made whole for lost wages and benefits, including interest. The Union further requests an award of punitive and exemplary damages and such other remedy as the Arbitrator may deem appropriate.

The Company denies the Union's contentions and claims. The Company submits that there was just cause for dismissal. The Company also submits that there are no basis for punitive and exemplary damages, or other remedy.

FOR THE UNION:

(SGD.) F. CLÉMENT
FOR: NATIONAL REPRESENTATIVE

FOR THE COMPANY:

(SGD.) S. GROU
FOR: DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Company:

S. Grou – Manager, Labour Relations, Montreal
D. S. Fisher – Director, Labour Relations, Montreal
R. Champagne – Assistant Superintendent – Mechanical, Montreal
F. O'Neill – Manager, Labour Relations, Toronto

And on behalf of the Union:

A. Rosner	– National Representative, Montreal
C. Rainville	– Regional Representative, Montreal
D. St-Louis	– National Representative, Montreal
D. Lemay	– Grievor

AWARD OF THE ARBITRATOR

The record discloses that the grievor was involved in an accident during the course of his work on February 15, 2008. Employed at the Autoramp facility in Montreal, a yard dedicated to the off-loading and storage of new automobiles, Mr. Lemay was assigned to drive a fifteen seater bus utilized to shuttle employees who parked the new cars in the yard storage facility as they were removed from incoming trains.

On the day in question the yard had been hit with a considerable snow fall, and it is common ground that, while snow removal operations were ongoing, in many locations there was up to two feet of snow. It is common ground that in moving in and around the car storage area employees are to drive on the designated driveways, and are not to cross through the area reserved for the parking of new cars. During the course of his day, at or around 1:15 p.m., while transporting three employees, Mr. Lemay encountered a blockage of his route in both directions by snow removal equipment. He opted to attempt to reach an adjacent driveway by cutting through a parking zone designated as C-129. In his opinion there was sufficient clearance for his vehicle to move through an open space in the parking area, a manoeuvre which would allow it to then emerge free on the opposite side, to be able to go on and pick up and drop off other employees. However, as he attempted to negotiate his way through the two feet of

snow, his minibus slid and the left rear of his vehicle collided with the right rear bumper of a parked Volkswagen, causing body damage to that new car.

It appears that the grievor immediately evacuated and locked his minibus and radioed his supervisor to advise what had occurred. After meeting briefly with his supervisor, Mr. Joe Mallozzi, Mr. Lemay was given another minibus and continued on his assignment.

Shortly thereafter he was summoned to the Autoramp office where he was met by a CN constable. He was then asked if he had consumed any alcohol or drugs to which he responded that he had had a few glasses of wine the evening before, celebrating Valentine's Day with his wife. He estimated the time of his alcohol consumption to be at or about 21:00. The constable's report of the incident indicates that the grievor did not show any signs of alcohol inebriation, nor did he have alcohol on his breath. He was asked and agreed to undergo both an alco-sensor test and drug test by urinalysis. The alco-sensor test produced a result of 0.00. His urinalysis proved positive for marijuana.

By his own admission, Mr. Lemay did occasionally smoke marijuana on weekends. He admitted to the Company that he had smoked marijuana on the Saturday previous to the Friday on which the incident occurred. He categorically denied having consumed marijuana at any time since then.

It is notable that Mr. Mallozzi completed the form which the Company requires him to fill out prior to directing an employee to undergo drug testing. Part D of that form

deals with behaviour observed, although it appears to be intended for reasonable cause testing only. In any event, it was filled out by Mr. Mallozzi with the following entries: speech – normal; balance/walking – normal; eyes – normal; awareness – normal. Mr. Mallozzi also noted that the grievor's skin was pale rather than "flushed" or "excess perspiration" and that he did not check any of the thirteen listed abnormalities under mood/behaviour or a section entitled "other" where an additional eleven listed abnormalities can be checked. In other words, to all outward appearances, as judged by Mr. Mallozzi, Mr. Lemay appeared normal and in full command of his faculties. In fact he is described as having been extremely calm.

Following a disciplinary investigation conducted on February 25, 2008, the grievor was dismissed for having violated the Company's drug and alcohol policy. The sum and substance of the Company's position is that having tested positive for marijuana, in a post-accident circumstance, Mr. Lemay violated the Company's Drug and Alcohol Policy. The issue in this arbitration, however, is whether there was just cause to terminate the grievor. The Arbitrator can see none.

The only legitimate issue to be considered is whether the grievor was impaired by reason of the ingestion of marijuana, or any other substance, at the time of his driving accident on Company premises on February 15, 2008. It is well settled that a positive drug test for marijuana does not prove impairment. Commenting recently on the argument that a mere positive drug test constitutes a violation of the Company's drug policy which merits discipline, in **CROA&DR 3668** the Office reasoned as follows:

> The Company's representatives submit that it is a violation of the Company's drug policy to have a "presence in the body" of marijuana, and that the grievor

> violated that rule. Firstly, it would appear more correct to say that in the case at hand the grievor had anti-bodies to THC in his system at the time of the urinalysis test. There is no evidence of any active THC in the grievor's body at the time of the urinalysis test. That aspect of the Company's reasoning is therefore questionable. Nor is it clear to the Arbitrator on what basis it can be concluded that by consuming marijuana on a Saturday evening, some thirty hours before his scheduled return to work on Monday morning, Mr. Johnson could be said to have consumed drugs or alcohol while "subject to duty." The Arbitrator can see no credible link between the consumption of marijuana on a Saturday and impairment or likely impairment at the registering of a positive drug test the following Tuesday, or for that matter the following Monday, if the test had been taken at that time.

Moreover, in **SHP 530**, the Arbitrator made the following comment:

> The real conflict between the Company's drug and alcohol policy and the collective agreements of both the Union and the Intervener is the contradiction between substantial parts of the language of the policy and the just cause provisions of the agreements. For example, at p. 20 of the policy the Company states that "presence in the body … of illegal drugs is prohibited while on duty". At page 16 of the policy employees are advised that any violation of the policy by an employee in a risk sensitive position "… will result in dismissal". However, it is common ground (and on this all of the expert witnesses are in agreement) that a positive drug test gives no indication as to when or in what amount the drug in question was ingested. More specifically, it cannot, standing alone, establish impairment while an employee is on duty, is subject to duty or is on call. In that context, if parsed literally, the rule expounded by the employer is that if an employee has ingested an illegal drug, for example marijuana, during a scheduled leave or holiday, and tests positive some weeks later, he or she will be discharged. In the Arbitrator's view, that rule is unreasonable on its face as there is no nexus between a positive drug test, standing alone, and impairment while on duty. So construed the rule would purport to regulate the private morality of employees, without reference to any clearly demonstrated legitimate employer interest.
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> Under the collective agreements, which contain extensive provisions for the investigation of disciplinary infractions, employees are to be discharged or disciplined only for just cause. To the extent that the policy stipulates that for unionized employees a positive drug test is, of itself, grounds for discipline or discharge, it must be found to be unreasonable, and beyond the well accepted standards of the **KVP** decision.

It is, of course, open to the Company to argue that a positive drug test coupled with an accident and other objective facts may support the inference that an employee is in fact impaired at the time of an accident or incident. Is there any such evidence in the case at hand? Other than the fact that the grievor was involved in a motor vehicle

mishap which might have befallen anyone, and that he violated the rule against crossing over the area reserved for parked cars, there is nothing to sustain the position of the Company that the grievor was in fact impaired by the consumption of marijuana. It is not insignificant that he was observed to be normal not only by his supervisor and by other employees, but also by the police constable who investigated as well as the Company nurse who administered the urinalysis test. In my view the Company knew, and reasonably should have known, that it did not have evidence to justify the conclusion that the grievor was impaired and to terminate his employment on that basis. Much less could it terminate him on the theory that merely testing positive for marijuana constitutes a violation of the Company's drug policy that justifies discharge.

For all of these reasons the grievance must be allowed. The Arbitrator directs that the grievor be reinstated into his employment forthwith, with compensation for all wages and benefits lost, with interest, and without loss of seniority. In all of the circumstances, however, I do not consider this to be an appropriate case to direct, as the Union requests, the payment of punitive and exemplary damages, assuming, without finding, that I have such jurisdiction under the instant collective agreement.

September 15, 2008

(signed) MICHEL G. PICHER
ARBITRATOR