

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 3970

Heard in Montreal, Wednesday, 12 January 2011

Concerning

VIA RAIL CANADA INC.

And

TEAMSTERS CANADA RAIL CONFERENCE

EX PARTE

DISPUTE:

Appeal the discharge of Locomotive Engineer Justine Chambers of Edmonton, AB, for “your conduct unbecoming”.

UNION’S STATEMENT OF ISSUE:

On February 11, 2010, a package addressed to Ms. Chambers was sent from Prince George to Jasper on VIA train #6 for furtherance to Edmonton. Ms. Chambers was unaware of this package until being advised on February 13, 2010. Due to delay in train connections, the package was stored in the Jasper VIA Station where a VIA Agent felt that the package contained marijuana based on their recognition of an odour emanating from the package. The Agent contacted local authorities and the package was seized and found to contain marijuana.

The Union contends that the Corporation did not prove guilt with regards to violating the Corporation’s Code of Conduct. The Union further contends that the investigation was not fair or impartial in violation of Article 20 of Agreement 1.4.

It is the Union’s position that Ms. Chamber’s discipline is unwarranted and should be expunged or, in the alternative, the discipline should be significantly reduced. Ms. Chambers should be compensated for all loss of wages or benefits.

The Corporation’s only response has been the acknowledgement of the Union’s grievance, which was submitted at Step III of the grievance procedure on June 21, 2010.

FOR THE UNION:

(SGD.) T. MARKEWICH
FOR: GENERAL CHAIRMAN

There appeared on behalf of the Corporation:

D. Stroka	– Sr. Advisor, Labour Relations, Montreal
K. Thomas	– Manager, Customer Experience, Vancouver
B. A. Blair	– Sr. Advisor, Labour Relations, Montreal
P. McCarron	– Director, Train Operations, SWO & West
J. Maillot	– Advisor, Labour Relations, Montreal

There appeared on behalf of the Union:

D. Ellickson	– Counsel, Toronto
B. Willows	– General Chairman, Edmonton
T. Markewich	– Sr. Vice-General Chairman, Edmonton
J. Chambers	– Grievor

AWARD OF THE ARBITRATOR

The material before the Arbitrator confirms that Locomotive Engineer Chambers was the named recipient of a package, sent by her daughter in Prince George, destined for Edmonton. It appears that the package in question was given to a train crew departing Prince George on February 11 on a train then bound for Jasper. The instructions relayed were to have the package held in Jasper until it could be placed on a train from Jasper to Edmonton on Saturday, February 13th.

The package, said to be the size of a shoebox, arrived in Jasper where it was dropped off at the Jasper Station on the evening of February 11, 2010 by Train Service Manager Gilbert Pouliot. The latter gave the package to the Station-In-Charge, Ms. Susan McCarthy who placed it in the ticket office to await its transfer onto a Jasper-Edmonton train two days later.

Both that evening and the next morning Ms. McCarthy and other workers noticed a smell of marijuana coming from the parcel. Ms. McCarthy reported the matter to her immediate supervisor, Ms. Kelly Thomas. As a result, the RCMP was notified and

attended at the location with a dog trained to sniff out illegal drugs. The dog identified the parcel as containing an illegal substance, as a result of which it was confiscated. In a reporting letter addressed to Ms. Thomas dated February 13, 2010 Constable A. Mills of the RCMP reported that the parcel was found to contain twenty-nine grams of marijuana, which substance was sent to a laboratory for analysis. The analyst's certificate which was ultimately received by the Corporation on March 30, 2010 does confirm that the package contained marijuana.

The grievor's evidence is that she was unaware of a package being sent to her by her daughter until she received a call relatively early in the day on Saturday, February 13th. According to her testimony her daughter then told her that she had sent a package by train via Jasper, and that it should arrive in Edmonton that evening. She was told that it contained coffee and a mug which the grievor's daughter was sending to her father as a Valentine's Day gift. The grievor's husband is also a locomotive engineer with the Corporation and, it appears that it is not uncommon for employees and their families to send things to each other with the assistance of other employees in the passenger train service.

It is not disputed that thereafter Ms. Chambers' husband called the Jasper Station to verify that the package was there and would be forwarded to Edmonton later in the day. According to the account of Richard Comar, Senior CSA at Jasper, he received the call from the grievor's husband midafternoon on Saturday, February 13, 2010. Mr. Comar, who was not aware of what had occurred with the package, advised him that it was no longer there, suggesting that perhaps that Ms. McCarthy, who was on

her days off, had taken it with her to Edmonton to drop off. According to Mr. Comar, an hour later the grievor made the first of several telephone calls to him inquiring as to the whereabouts of the box, indicating that it was a gift from her daughter. During the course of her calls she obtained from Mr. Comar a number by which she could reach the operating crew on the train bound for Edmonton which was to have taken the package as well as the cell phone of Ms. McCarthy. It appears that the information she received from both of those sources was that they had no knowledge as to where the box was.

According to the grievor's testimony, it was only after these events that she received a call from employee Bruce Brown from Jasper. Mr. Brown related to Ms. Chambers that the RCMP had attended at the station at Jasper and seized the package intended for delivery to her on suspicion that it contained marijuana. The grievor states that she then called her daughter again to demand an explanation of what might have occurred. It appears that her daughter then admitted that she had placed marijuana in the package.

The grievor's daughter was called as a witness at the arbitration hearing. She confirmed that she had developed a plan to ship an ounce of marijuana to her brother in Edmonton. Her plan was to place the marijuana in a package along with coffee intended as a gift for her father. She had apparently arranged with her brother that he would pick the package up from the station in Edmonton at the same time as he drove his father to work on the evening of February 13th. He was then to remove the marijuana from the

package and to purchase a coffee mug which he would return to the package along with the coffee for delivery to his father as a Valentine's Day gift from his daughter.

The Corporation conducted a disciplinary investigation to inquire as to the grievor's knowledge of how a package addressed to her and sent through the Corporation's train system could in fact contain an illegal substance. Ms. Chambers denied knowledge of the package's contents. During the investigation the grievor stated that she was aware only that her daughter was sending coffee for her father. A review of her answers during the course of the investigation confirms that she was relatively short in her answers and evasive with respect to the facts in relation to her daughter. She explained that she made repeated phone calls to the Jasper Station because she felt that she was "getting the run-around" with respect to the whereabouts of a gift parcel her daughter had advised her was in transit. As is evident from a review of the investigation report, Ms. Chambers did not offer an explanation to the investigating officer of the facts which emerged through her evidence at the arbitration, as well as through the evidence of her daughter. In the result, not surprisingly, the Corporation came to the conclusion that the grievor was attempting to hide the facts and that she must have had knowledge of the contents of the parcel being sent to her.

While the Arbitrator can understand that perception, particularly as it was based entirely on the facts available to the Corporation through its own investigation, the evidence adduced at the arbitration hearing reveals substantially more of the story. I am satisfied that the grievor and her daughter were honest and forthright in their evidence given at the arbitration hearing, and that it was not until she was advised by Mr. Brown

that the package had been seized for suspected marijuana that the grievor became aware that something was not right and ceased her attempts to locate the package.

Although the Corporation's representative characterizes the several telephone inquiries made by the grievor as "frenzied", that is not how they are described by Mr. Comar, who received most of them. I am satisfied that the inquiries made by Ms. Chambers were reasonable, given the apparent inability of anyone to locate the parcel.

What the record before the Arbitrator reveals is that at the time of the Corporation's investigation, which was close to two months after the events, the grievor was aware that the package had indeed contained marijuana, although she did not realize that until such time as it was discovered by the police and reported to her by Mr. Brown. At the time of the investigation she would have had natural concern for the risk to her daughter based on any statements which she might make on the record. It is therefore not surprising that her demeanour before the Corporation during the investigation process was less than forthcoming. The fact remains, however, that because she was not fully open with the Corporation it was left to draw an obviously negative inference from the answers that were provided by her.

In this, as in any case of discipline, the burden of proof is on the employer. It must establish, on the balance of probabilities, that the employee disciplined did engage wrongdoing so as to justify the discipline assessed. Upon a review of the facts I am satisfied that the grievor did not knowingly engage in the transportation of marijuana on the Corporation's passenger trains. I find that the ill-advised plan to place marijuana and

coffee in a parcel to be sent from Prince George as a purported gift from the grievor's daughter was entirely her daughter's doing, in accordance with a plan which was then known only to the grievor's daughter and son, who was to receive the package in Edmonton. The Corporation has adduced no evidence to compellingly establish that the grievor had any knowledge that the package contained marijuana or that she was involved in any scheme to transport or receive into her own possession an illegal drug. The fact remains, however, that by her highly guarded answers to the Corporation during the course of the disciplinary investigation Ms. Chambers placed the Corporation in a position in which it had little alternative to conclude that she was involved.

In my view these facts merit the exercise of the Arbitrator's discretion to reduce the penalty assessed against the grievor, albeit this should not be a case for compensation given that she did withhold information during the course of the investigation which effectively led to her discharge. The Arbitrator therefore directs that the grievor be reinstated into her employment forthwith, without loss of seniority and without compensation for wages and benefits lost.

January 17, 2011

(signed) MICHEL G. PICHER
ARBITRATOR