CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3186

Heard in Montreal, Thursday, 15 February 2001

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Claim on behalf of Mr. M. Rapp.

BROTHERHOOD'S STATEMENT OF ISSUE:

By way of Form 104 dated April 26, 1999, the grievor was dismissed from Company service for allegedly "testing positive for cannabis, on a randomly administered substance test provided February 17, 1999; in violation of you return to work letter dated October 22, 1998". Th Brotherhood grieved the dismissal.

The Union contends that: **(1.)** the grievor did not, at the material time, smoke marijuana. In support of this the grievor, on February 27, 1999, undertook an independent drug test that produced a negative result. **(2.)** The Company did not, with respect to the grievor, fulfil its obligations under the EFAP. **(3.)** The return to work letter dated October 22, 1998 did not provide that the grievor will be automatically dismissed if he tested positive in a randomly administer drug test. **(4.)** the dismissal of the grievor was unreasonable and unwarranted in the circumstances.

The Union requests that the grievor be reinstated to his former position forthwith without loss of seniority and will full compensation for all financial losses incurred 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. Freeborn	– Labour Relations Officer, Calgary
J. Dragani	– Labour Relations Officer, Calgary

And on behalf of the Brotherhood:

P. Davidson	– Counsel, Ottawa
J. J. Kruk	– System Federation General Chairman, Ottawa
D. W. Brown	– General Counsel, Ottawa

AWARD OF THE ARBITRATOR

The Arbitrator is satisfied, on the basis of the evidence filed, that the grievor did violate the conditions of his continuing employment contract when he tested positive for marijuana on February 17, 1999. That fact is not materially mitigated by the grievor apparently testing negative in a separate drug test which he took privately some ten days later.

The record discloses that the grievor held the safety-sensitive position of thermite welder. In May of 1998 Mr. Rapp was found to be in possession of marijuana when he was stopped at a random road spot check by the RCMP in Vancouver. Following his conviction for that offence the Company required the grievor to be mandatorily referred to the Employee and Family Assistance Program (EFAP), and to sign, with the assent of the Brotherhood, a "return to work" agreement which included periodic random drug tests for a period of twenty-four months. The conditions contained in the agreement of reemployment, reflected in a letter dated October 22, 1998 signed by the grievor as well as the Company's District Manager, Engineering Services are as follows:

> Dear Mr. Rapp,
>
> This letter is further to your investigation dated June 15, 1999 and to your subsequent mandatory referral to the EFAP. In order to expedite your return to work, you will be required to comply with the following conditions:
>
> 1. Before actually recommencing duty it will be necessary for you to pass a safety-sensitive re-employment medical examination which will include a substance test. Requalification under the CROR will be required as well, if such qualification has expired. The costs of any such requalifications are to be borne by yourself.
>
> 2. You will then be subject to mandatory substance testing by the Company for a 2 year period, from the date of this letter. You will be required to undergo this testing on a randomly administered basis.
>
> It is understood that a positive substance test, for narcotics and/or alcohol, could put your employment relationship with the CPR in jeopardy.
>
> I trust that the above clearly details what will be expected of you upon your return to work. If so, please signify your concurrence below.

There can be little doubt but that the failure of the random drug test of February 17, 1999, apparently the first such screening to which the grievor was subjected, does constitute a violation of the conditions of his return to work agreement.

It is, of course, true that the positive drug test for cannabinoids does not of itself establish that the grievor possessed or use marijuana while on duty or subject to duty. It cannot be disputed, however, that the positive drug test in itself constitutes a violation of his condition of reemployment. And, while the Brotherhood's counsel is correct in stressing that the letter does not expressly call for automatic discharge in the event of a positive drug test, it would appear to the Arbitrator implicit within the terms of the letter that the grievor was put on clear notice that the Company would reserve the right to terminate his employment in the event of a positive substance test. It has done so, and in the Arbitrator's view its actions in that regard should not lightly be disturbed.

The fact that the Company gave the grievor an opportunity, both through the EFAP referral and the return to work protocol, following his first involvement with drug possession is clear evidence of a constructive and progressive approach to discipline on its part. Mr. Rapp, who is employed in a safety-sensitive position, was given an opportunity to end his involvement with drugs while continuing in his employment through an obvious measure of progressive discipline. As noted in prior awards of this Office, such agreements should not lightly be disturbed by a board of arbitration (see **CROA 2595, 2632, 2704, 2743, 2753** and **2965**).

For all of the foregoing reasons I am satisfied that the Company was entitled to invoke the terms of the return to work agreement, and it had just cause to terminate the grievor by reason of his violation of its terms. The grievance must therefore be dismissed.

February 19, 2001

(signed) MICHEL G. PICHER
ARBITRATOR