CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 3080
Heard in Montreal, Tuesday, 11 January 2000
concerning
CANADIAN PACIFIC RAILWAY COMPANY
and
CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS
(UNITED TRANSPORTATION UNION)
EX PARTE

DISPUTE:

The issue in dispute involves Mr. C.D. Costa, of Schreiber, Ontario who was dismissed from Company service on December 29, 1997,

EX PARTE STATEMENT OF ISSUE:

Mr. Costa was informed by notice of form 104 dated December 29, 1997 as follows:

> Please be informed that you have been dismissed for your failure to comply with the terms of your reinstatement into Company service set out in the letter dated January 4, 1996, as evidenced by your having tested positive for cannabinoids in a random urine sample taken at Terrace Bay, Ontario, on October 29, 1997.

The Union maintains, the evidence shows, the employer has failed to meet its burden of proof, as described to substantiate a dismissal. Accordingly, the Union requests the grievor's reinstatement with compensation and all other benefits.

The Company has declined the Union's request.

FOR THE COUNCIL:
(SGD.) **Q. A. WARREN**
GENERAL CHAIRPERSON
There appeared on behalf of the Company:

R. Smith	- Labour Relations Officer, Calgary
S. Seeney	- Manager, Labour Relations, Calgary
Dr. B. Kurtzer	- Witness
P. Wilson	- Witness
S. Black	- Witness
P. Chaput	- Witness
D. Hoppenreys	- Witness
M. Imbeault	- Witness

And on behalf of the Council:

D. A. Warren	- General Chairperson, Toronto
R. Saarinen	- Local Chairperson
D. Genereux	- Vice-General Chairperson
K. A. Lane	- Legislative Representative

AWARD OF THE ARBITRATOR

This arbitration relates to the discharge of the grievor following a positive drug test, in violation of a last chance employment contract which he had previously signed. The Council challenges the regularity of the drug testing process and the consent obtained from Mr. Costa. The Company submits that the testing process, including documentation and chain of custody, was entirely regular and that there is no basis to question or reverse the Company's decision to terminate the grievor's employment.

The grievor, who commenced employment with the Company in February of 1985, has had admitted problems with drug use over the years. During an earlier period of his employment, between 1990 and 1992, Mr. Costa was made subject to a voluntary agreement to be subject to periodic drug testing for a twenty-four month period. In 1994 he admitted himself to a detoxification centre in Thunder Bay. There followed a considerable period of absence from work and, in July of 1995 the grievor was advised that his employment record would be closed absent adequate documented information as to his drug dependency problem. It appears that at that time Mr. Costa was seeking admission to the Camillus Treatment Centre in Elliott Lake, which he eventually obtained in September of 1995. Having completed his rehabilitation at the Camillus Centre on October 13, 1995 Mr. Costa was provided yet another opportunity to demonstrate his ability to work in a drug and alcohol free state. By agreement with the Company, he executed a letter dated January 4, 1996 reinstating him to employment subject to certain conditions, including random drug and alcohol testing for a period of two years.

The Company notes that there were some irregularities in the process of drug testing the grievor over that time. In November of 1996 a urine sample he provided was below the acceptable temperature range. When asked to return for a further test shortly thereafter, he failed to appear. He was assessed ten demerits for that incident.

The record reveals that in fact the random drug tests initially administered to Mr. Costa were not truly random. It appears that while the dates of the tests may have been randomly selected, the grievor was given considerable advance notice of the tests. A new procedure was adopted for the purposes of the drug test which led to the grievor's termination. Based on general concerns within the Company as to the reliability of the previous approach to random testing, it was decided that employees would be given only immediate notice at work of the requirement to undergo a drug test, and would not be left unattended until the test was completed. It is on that basis that the grievor was advised that he would be required to provide a urine sample for drug and alcohol testing on October 29, 1997.

The grievor's urine sample was collected at the Terrace Bay Hospital for eventual analysis by Maxxam Analytics Inc. in Mississauga, Ontario. The

evidence establishes that on the afternoon of October 29, 1997, following the conclusion of his tour of duty, Mr. Costa was approached by Road Manager Mike Imbeault and Manager of Operations D.L. Hoppenreys at the conclusion of his rules class, and was advised that he was to proceed to the hospital for his random drug and alcohol test. It is not disputed that Mr. Imbeault drove the grievor to the hospital and remained with him until the test was completed.

The sample was sent by courier from the collection facility to the laboratories of Maxxam, where it was received within forty-eight hours, and tested positive on an initial screen conducted on October 31, 1997. In accordance with normal procedure the sample was then given secondary confirmation testing by the normal GC/MS method, which was conducted on November 3rd. Based on the results, on November 5th, the testing authority confirmed that the grievor's urine sample had tested positive for cannabinoids, in a reading which has subsequently been qualified as in the high range of 130 ng/ ml.

The Arbitrator has considerable difficulty with the attack which the Council attempts to make on the regularity of the collection, custody and testing of the grievor's urine sample in the case at hand. The first objection is to the effect that the grievor did not in fact give consent to be tested for other than alcohol. That argument appears to stem from the grievor's own reflection after he gave his urine sample, upon reading the testing custody and control form, a copy of which was provided to him. Part E of step 1 of the form lists a number of drugs or drug types as well as ethanol, under the heading "Tests, to be performed". On the form utilized only "ethanol" is checked off within that section. On that basis the grievor formed the view that he could argue that he had consented in writing only to be tested for ethanol alcohol, and not for the other substances, including cannabinoids.

The Arbitrator is not impressed with that argument. Firstly, it is common ground that the battery of drug tests to be performed in his case, as apparently had been done on a substantial number of prior occasions, was captured by the notation "panel 5" which appears in a space provided within in part E of step 1 of the form. There is no dispute that panel 5 is the generally understood term for the list of normally tested drugs, including cannabinoids. On its face, therefore, the form does contain a specific reference to the five normal drug screens to which the grievor was being subjected, and that notation was plainly on the form when he signed it. It appears that the grievor's suggestion that he may only have consented to a test which would detect alcohol in his system, communicated to Mr. Imbeault in the truck as he was being driven back to the workplace from the hospital, prompted concerns among the Company's own officers, who subsequently generated a more specific consent form which, in any event, the grievor ultimately signed.

Most importantly, the issue is whether the grievor in fact consented to be tested for cannabinoids by urine sample on October 29, 1997. There can be

little doubt that in fact he did. He was clearly advised by his supervisors of the purpose of the test which was to be taken, a test which was being done pursuant to his general consent to be randomly tested for drugs and alcohol in accordance with the terms of reinstatement of the letter of January 4, 1996, an obligation which Mr. Costa explicitly accepted in writing in a separate document signed January 5, 1996. There can be no serious suggestion that the grievor did not in fact consent to what transpired in relation to submitting a urine sample for dr-ug and alcohol testing on October 29, 1997.

The second allegation. of the Council is that the grievor's urine sample was contaminated after it was collected and while it was being shipped, tested and re-tested. That argument is based entirely on minor discrepancies in the documentation reflected on the custody and control form which accompanied the grievor's urine sample. The first challenge relates to the fact that the section of the form entitled "specimen released by" was not in fact signed by Ms. Suzanne Black, the nurse who both received and released the specimen to the courier. In fact, Ms. Black subsequently signed a correcting declaration, and attended the hearing where she could be examined under oath as to her involvement in the release of the specimen. It seems that the grievor himself erroneously signed the section which should have been signed by Ms. Black. Most significantly, the evidence before me establishes, beyond any doubt, that Ms. Black did release the specimen, properly packaged and sealed, to the proper courier.

The Council then suggests that the form should have been signed by the courier to attest as to its receipt and transmission to the testing laboratory. In fact that is impossible, from a practical standpoint, as a part of the custody and control form is itself packaged and sealed within the box which is utilized to ship the urine sample. Significantly the form does contain a proper signature with respect to the receipt of the sample by Maxxam. Courier records obtained by the Company confirm that the sample in question was delivered to the testing laboratory in Mississauga at or about 0708 hours on October 31, 1997. There is no shred of evidence with respect to any possible irregularity in the handling of the urine sample from that point forward. It was subjected to preliminary screening, for which it tested positive, on the same day it was received, and as noted above was processed for secondary testing on November 3rd, again registering a strong positive result for cannabinoids.

Given the seriousness of a positive drug test, it is of course essential that the process of collection, transportation, testing and documentation be performed with great care, and by verifiable means, so as to ensure a secure chain of custody and reliable results. Upon a close review of the facts, including the process which was followed in th e case at hand and the documentation surrounding that process, I am satisfied that the Council's challenge to the handling of the grievor's urine sample cannot succeed. The material before me amply confirms that Mr. Costa consented to the giving and testing of his urine sample for drugs and alcohol, both in

fact and in writing, and that the sample was properly collected, and subjected to all of the normal rigorous conditions with respect to sealing, identifying, documenting and ultimately testing the sample which he provided. He tested positive for cannabinoids, contrary to the last chance conditions under which he was reinstated. In those circumstances his discharge was justified.

The grievance must therefore be dismissed.

January 14, 2000

MICHEL G. PICHER
ARBITRATOR