CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 3326

Heard in Montreal, Wednesday, 12 March 2003

concerning

CANPAR

and

UNITED STEELWORKERS OF AMERICA (LOCAL 1976)
EX PARTE

DISPUTE:
The assessment of 20 demerits to Mr. Alejandro Barrios, employed at Canpar's Lakeshore Terminal in Toronto, in relation to am incident on October 8, 2002, in which marijuana was consumed by an employee on duty.

UNION'S STATEMENT OF ISSUE:
On October 8, 2002, Mr. Barrios joined three other employees during the lunch hour and went to a fast food restaurant. During the ride back to the terminal one of the employees, seated in the back seat of the automobile, consumed a marijuana cigarette. The front passenger window was open at this time. Upon arriving at the terminal, Mr. Barrios, who was seated in the front passenger seat, quickly vacated the vehicle.

The Company subsequently became aware of the consumption of marijuana by the employee in the back seat, and conducted an investigation. Based on the facts adduced at the investigation, the Company concluded that other employees, including the grievor, had breached their duty of fidelity to their employer by failing to report that one of their co-workers was in possession, and using, a prohibited substance.

Mr. Barrios denied knowing that marijuana had been consumed, and stated that his presence in the automobile was for a legitimate purpose, as he was advising the driver of the vehicle on a collective agreement matter.

The Union progressed a grievance, claiming that Mr. Barrios had no knowledge of the consumption of marijuana and had not breached any duty to the employer. The Union requested that the demerits be removed from the record of Mr. Barrios.

The Company declined the grievance.

FOR THE UNION:
(SGD.) D. NEALE
VICE-PRESIDENT / FST
There appeared on behalf of the Company:
P. D. MacLeod – vice-President, Operations, Mississauga
And on behalf of the Union:
P. J. Conlon – Chairman, Board of Trustees, Toronto
R. Pagé – Staff Representative, Montreal

AWARD OF THE ARBITRATOR

This grievance concerns the assessment of twenty demerits against Warehouseman Alejandro Barrios for failing to report another employee who consumed marijuana. On behalf of the grievor the Union argues that he was unaware of the consumption of marijuana which occurred and that the Company had no basis to assess discipline against Mr. Barrios. Alternatively, it is submitted that in the circumstances the imposition of twenty demerits in the Brown System, which results in discharge upon the accumulation of sixty demerits, was excessive, and that a written reprimand would have been sufficient.

At the time of the incident, October 8, 2002, the grievor had been employed for some four and a half years as a warehouseman at the Company's Lakeshore Terminal in Toronto. It is not disputed that that facility is a safety sensitive work environment where the moving of parcels involves the use of an extensive system of conveyors and chutes, where employees must access ladders and platforms and work in areas with moving equipment, such as trucks and tow motors.

The evidence confirms that on the evening of October 8, 2002 Mr. Barrios left the warehouse premises and proceeded by car with three other employees to a nearby Wendy's restaurant for their dinner break. It appears that his responsibilities as a Union Steward required him to discuss a grievance being filed by employee Scott Reed, who was the owner and driver of the vehicle utilized. On the drive back from the Wendy's restaurant to the warehouse Mr. Barrios was seated in the passenger side of the front of the vehicle while Mr. Reed was driving. In the rear of the vehicle sat employees Brian O'Donnell, located on the passenger side, and Sean Power, seated behind the driver. I am satisfied on the basis of the entirety of the evidence before me that during the ride back Mr. O'Donnell lit and consumed a marijuana joint. When the vehicle returned to the employees'

parking lot Mr. Barrios immediately disembarked and entered the terminal building while the other three employees remained in the car for a few minutes longer. It appears that after the employees had left the vehicle a security guard became suspicious as the car appeared to be filled with heavy smoke. Upon approaching the car, whose windows were partially down, the security guard, accompanied by another guard, then detected a strong odour of marijuana. Two members of management were then called to confirm their observations.

As a result of these findings, all four employees were questioned individually about the activities which had transpired in the vehicle. Mr. Power and Mr. Reed both made statements indicating that Mr. O'Donnell had been smoking marijuana in the rear seat of the car on the way back from Wendy's. Mr. O'Donnell denied any knowledge of marijuana being consumed in the vehicle. It does not appear disputed, however, that during the initial interview he appeared dazed and that he had sustained a minor head injury shortly after his return from the meal break.

When he was questioned about what had occurred Mr. Barrios responded that he had smelled something, that he believed that someone in the back seat was smoking a cigarette, and that he had opened his window as he is sensitive to cigarette smoke and dust. Although he admitted being familiar with the smell of marijuana, he denied that he was aware of anyone in the vehicle smoking marijuana at the time in question. During the formal investigation conducted by the Company Mr. Barrios stated in part "I noticed someone smoking a cigarette, I opened the window because cigarette smoking dust and fumes make an effect on me to have a runny nose. I keep looking at the right at the window, because when I look at the left I sense of smoking cigarette. I focus on the grievance …".

The Company assessed twenty demerits against Mr. Barrios for what it characterizes as the deliberate violation of Company rules concerning the obligation to report the misconduct of another employee. In that regard the Company's national rules and regulations were cited, including paragraph 9, which reads as follows:

9. An employee aware of misconduct or neglect of duty on the part of another employee who fails to report same to a supervisor will be deemed equally censurable with the offender.

It appears that a similar set of rules is independently established for the Toronto location. Paragraphs 14 and 15 of those security rules and regulations read as follows:

14. Employees will not be permitted on property if they are found to be intoxicated or are under the influence of narcotics. No employee shall have in his possession or consume any alcohol or narcotic drugs while on CANPAR property. CANPAR property will included the designated employee parking lot.

15. An employee aware of misconduct or neglect of duty on the part of another employee, and who fails to report same to a supervisor will be deemed equally censurable with the offender.

As a result of the Company's investigation Mr. O'Donnell was discharged, a sanction against which he has apparently not grieved. Employees Scott Reed and Sean Power were each issued written reprimands for failing to immediately disclose the misconduct of a fellow employee. The Company's representative explains that they were given sanctions of a lesser degree than Mr. Barrios because they did "come clean" at the time of the Company's formal investigation into the incident. The Company maintains that the refusal of Mr. Barrios to admit to his knowledge of the consumption of marijuana in the vehicle constitutes a more serious degree of deliberate deception and stresses that it is particularly incompatible with his obligations as a Union steward and a member of the workplace Health & Safety Committee.

On behalf of the Union it is argued that there is no compelling evidence to confirm that in fact Mr. Barrios was aware that marijuana was being consumed in the vehicle. The Union's representative stresses the fact that Mr. Barrios was seated in the front passenger seat of Mr. Reed's car, that he was focused on discussing Mr. Reed's grievance with him as he drove the vehicle, and that several windows, including the window next to Mr. Barrios, were open at the time. While he acknowledges that there might be grounds for suspicion that Mr. Barrios was in fact aware of what was transpiring, he notes to the Arbitrator's attention previous awards of this Office stressing the evidentiary principle that a board of arbitration "cannot convert suspicion into legal conclusions." (**CROA 1776, 2152, 2561, 2740, 2771, 2847**)

The Company's representative acknowledges that there may be a natural reluctance on the part of an employee to "blow the whistle" on another employee. However that may be, in the Arbitrator's view, quite apart from any explicit rule, there are

circumstances, especially those which may critically concern operations in a highly safety sensitive working environment, where codes of silence can have no place. Codes of silence can have no place where the conduct in question involves, for example, the operation of heavy equipment or working in a safety sensitive environment while intoxicated or under the influence of drugs. Such conduct plainly places not only the offender in a position of peril, but endangers the health and safety of other employees in the workplace who may or may not be aware of their fellow employee's impaired condition. Further, in the case at hand, as noted by the Company's representative, there was a clear opportunity for Mr. Barrios to takes steps to urge Mr. O'Donnell to remove himself from the workplace following his consumption of marijuana, possibly avoiding the dangerous situation which in fact developed.

A central issue in this grievance relates to a finding of fact. Did the grievor know of the consumption of marijuana in the vehicle, and therefore fail to report it to his supervisors as required by the Company rule. It may be noted in passing that the Union takes no objection of the propriety of the Company rule for the purposes of this grievance, although it does so without prejudice and reserves the right to question whether it is in keeping with the standards of the **KVP** case (**Re Lumber & Sawmill Workers' Union, Local 2537 and KVP Co. Ltd.**, (1965), 16 L.A.C. 73 (Robinson)) in another circumstance.

In considering the issue of fact the Arbitrator cannot share the view of the Union's representative with respect to the credibility which can be attached to Mr. Barrios' explanation of what occurred in the car. There is no dispute before the Arbitrator that the odour of marijuana is pungent and unmistakeable. Two other employees in the vehicle, Mr. Power and Mr. Reed, the driver, had no difficulty in recognizing that marijuana was being consumed and that Mr. O'Donnell was smoking it in the back seat. Given Mr. Barrios' own admission that he is familiar with the smell of marijuana, I find it impossible to draw any inference other than that he was himself aware that marijuana was being smoked in the back seat of the vehicle on the return to the warehouse from the Wendy's restaurant. With the greatest respect to the contrary argument made by the Union's representative, this is not a case where it can fairly be said that the evidence adduced by the Company does no more than raise a suspicion. In the Arbitrator's view it is more appropriate to say that the overwhelming evidence, including the credible testimony of two other employees, is such as to raise a presumption of knowledge on the part of Mr. Barrios, which

presumption would require him to produce a clear and convincing explanation to establish his own ignorance of what was happening around him. Upon a close examination of the entire record I am satisfied that he has clearly failed to do so. On balance, the compelling inference is that Mr. Barrios, like the other employees in the vehicle, was well aware that one of the employees in the back seat of the car was smoking a marijuana cigarette upon their return to work on the evening of October 8, 2002.

The next issue become the appropriate measure of discipline in the circumstances. Clearly if the grievor, like the two other employees, had initially failed to alert management of Mr. O'Donnell's misconduct, but had come clean at the point of a formal investigation, a lesser degree of discipline would be appropriate. Unfortunately, what the record discloses is what the Arbitrator is compelled to conclude was a conscious course of denial and deception taken by Mr. Barrios in the face of an extremely serious incident. While I agree that the assessment of twenty demerits, which is one third of the number of demerits which would merit discharge, is a serious level of discipline, I do not consider that the penalty should be interfered with or adjusted by the Arbitrator in the circumstances. That conclusion is further supported in that the grievor, a relatively junior employee, was previously assessed twenty demerits for unsafe work habits.

For all of the foregoing reasons the grievance must be dismissed.

March 14, 2003 MICHEL G. PICHER
ARBITRATOR