

**CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 3368**

Heard in Montreal, Thursday, 11 September 2003

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
EX PARTE**

DISPUTE:

Dismissal of Mr. A. Majcher.

BROTHERHOOD'S STATEMENT OF ISSUE:

By way of form 104 dated July 22, 2002, the grievor was dismissed from Company service for his alleged "conduct unbecoming an employee as evidenced by your possession of illegal drugs on Company property a violation of Rule 1.8 of the Algoma Track program Hotel and Camp Rules at Jackfish, Ontario, May 16, 2002." In response a grievance was filed.

The Union contends that: **(1.)** The grievor is an employee with an otherwise perfect discipline record; **(2.)** The grievor should properly have been extended deferred discipline; **(3.)** The discipline assessed was excessive and unwarranted in the circumstances.

The Union requests that the grievor be reinstated into Company service forthwith without loss of seniority and with full compensation for all wages and benefits lost 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:

M. Moran - Labour Relations Officer, Calgary

E. J. MacIsaac - Manager, Labour Relations, Calgary

D. E. Guérin - Labour Relations Officer, Calgary

C. Goheen - Track Field Coordinator

And on behalf of the Brotherhood:

P. Davidson - Counsel, Ottawa
J. J. Kruk - System Federation General Chairman, Ottawa
D. W. Brown - Sr. Counsel, Ottawa
M. Couture - General Chairman, Eastern Region
A. Matcher - Grievor

AWARD OF THE ARBITRATOR

The material before the Arbitrator establishes that, pursuant to a tip on May 16, 2002, a police search of boarding cars assigned to the Algoma Rail Gang No. 1 at Jackfish, Ontario, was conducted for the purpose of finding prohibited narcotics. It appears that some three employees were then found to be in possession of narcotics within the sleeping accommodations. During the course of the police investigation OPP Constable L.A. Lagacé believed that he saw a bud of marijuana sitting on a cup holder in a truck utilized by the grievor, Mr. A. Majcher. As the vehicle was locked the officer determined to investigate further at a later time. When Mr. Majcher returned from his work to the sleeping accommodation he was advised that he should attend at the police station to speak with Constable Lagacé, which he then did the same evening.

At that time, in the presence of Track Field Coordinator Clifford Goheen, Constable Lagacé conducted a search of the grievor's truck. No bud of marijuana was then apparent in the vehicle. It would seem that the police officer carefully examined the floor of the truck and found what has been described as a single, small flake of marijuana on the floor. The record indicates that he showed the flake to the grievor who then agreed that it was marijuana. It is not disputed that there was no further police investigation and that no charges were brought against Mr. Majcher.

According the Company, supported by the recollection of Mr. Goheen, during the course of the discussions with Mr. Majcher at the police station he was asked by Constable Lagacé when he had last smoked marijuana, and he responded that he had done so at a party some two weeks previous. Subsequently, however, Mr. Majcher says that he was confused by the question, partly because of the stressful situation in which he found himself, and believed that he was being asked when marijuana might last have been used in or around his truck. He states that he was attempting to refer to a fishing trip which he had taken with

three friends, some two weeks prior, during which two of his friends did roll a joint and consume it in his truck.

In support of the grievor's evidence at the arbitration the Brotherhood called as a witness Mr. Majcher's friend, an old high school acquaintance who is not himself an employee of the Company. Mr. Majcher's friend testified at the arbitration hearing that during the fishing trip taken in Mr. Majcher's truck some two weeks prior he had a small amount of marijuana in his possession, that he rolled and smoked a marijuana cigarette with another friend while seated in the front seat of the truck when Mr. Majcher had left the vicinity of the truck to go fishing. According to the friend's evidence, Mr. Majcher subsequently became aware that the two had consumed a joint, although the grievor and the other friend apparently did not participate.

The issue in this arbitration is whether the grievor was, as the Company alleges, knowingly in possession of marijuana at the boarding car facility at Jackfish. Its representatives rely on the fact that Constable Lagacé believed that he saw a marijuana bud in the cab of the locked truck during the police search of the boarding car facility when the employees, including the grievor, were away at a remote work site. The suggestion implicit in the submission of the Company is that the grievor got rid of the marijuana bud before appearing for the interview with Constable Lagacé at the OPP police station.

The Arbitrator has substantial difficulty with the case presented by the Company. Firstly, the employer bears the burden of proof, and it is well established that where criminal or quasi-criminal activity is alleged, the evidence presented should be of a standard commensurate with the seriousness of the charge. When the objective evidence is examined, the fact is that no marijuana, beyond the trace evidence of a single flake, was found in the grievor's truck when it was eventually searched by the Ontario Provincial Police. Moreover, if Constable Lagacé had been sufficiently persuaded that what he saw in the cab of the grievor's truck was a marijuana bud, it is less than clear that he could not have arranged for himself, another constable or a Company supervisor to await the return of Mr. Majcher from the work site, so that they could then search his vehicle without any opportunity for interference. The fact that he simply asked that the owner of the truck present himself at the police station for an interview is less than persuasive with respect to the degree of conviction then held by the police constable with respect to the content of the grievor's truck.

What does the evidence disclose, in the end? No significant quantity of marijuana was found in Mr. Majcher's truck. At the arbitration hearing a witness gave evidence which would explain the presence of a flake of marijuana on the floor of the vehicle. Moreover, even if one accepts that Mr. Majcher did admit to consuming marijuana at a party some two weeks prior, it is far from clear that that would constitute a violation of any Company rule or that evidence of such an isolated recreational use of marijuana while off duty and away from Company premises would justify the assessment of any discipline (see, e.g., **CROA 2209**).

In the result, the Arbitrator is compelled to the conclusion that the Company has not discharged the burden of establishing, on the balance of probabilities, that Mr. Majcher was knowingly in possession of marijuana or that he used marijuana at or near the boarding car facility at Jackfish, Ontario while on company service. The grievance must therefore be allowed. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without loss of seniority and with compensation for wages and benefits lost.

September 19, 2003

(signed) MICHEL G. PICHER
ARBITRATOR