

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

CASE NO. 4735

Heard in Montreal, May 14, 2020

Concerning

CANADIAN PACIFIC RAILWAY

And

UNITED STEELWORKERS – LOCAL 1976

DISPUTE:

The dismissal of Mr. F. Nadeau in connection with the incident on May 31, 2019 where the worker forgot recreational cannabis in his lunch box and brought it with him to work.

JOINT STATEMENT OF ISSUE:

On May 31, 2019, Mr. Nadeau was working on the night shift at the North gate of the Parc Automobile de St. Luc.

Following the witness's allegations that there was a strong odour of cannabis and that the worker had used it during his shift, the employer dismissed the worker for investigation.

On June 10 and June 26, 2019, the worker participated in an investigation related to the alleged facts.

Form 104 states that the worker is dismissed for "having consumed and possessed a prohibited substance during his shift".

On July 22, 2019, the Union filed a grievance requesting the reinstatement of the worker and the reimbursement of the wages lost since July 15, 2019.

The Union considers that there is no evidence on the record that Mr. Nadeau was intoxicated at work and that the discipline is too severe.

The Employer denied the grievance.

FOR THE UNION:
(SGD.) N. Lapointe
Staff Representative

FOR THE COMPANY:
(SGD.) P. Sheemar
Labour Relations Officer

There appeared on behalf of the Company:

D. Zurbuchen	– Manager, Labour Relations, Calgary
P. Sheemar	– Labour Relations Officer, Calgary
S. Oliver	– Manager, Labour Relations, Calgary
S. Morin-Alguire	– Witness, Montreal

And on behalf of the Union:

N. Lapointe	– Staff Representative, Montreal
M. Godin	– Recording Secretary, Unit 1290, Montreal

A. Daigault – Business Agent, Montreal
F. Nadeau – Grievor, Montreal

AWARD OF THE ARBITRATOR

The grievor, a spare on-call driver, was working as a replacement for another employee during the 22:00 to 06:00 night shift on May 30/31, 2019. The grievor typically works the day shift. He started working for the Company in March 2007.

The grievor was assigned that evening to a security gatehouse kiosk (“guérite”) located at the Company’s St. Luc car compound, commonly known as the Toyota compound. As a spare driver, the grievor performed various assignments for the Company including off-loading cars from the rail cars and operating vehicles. The grievor was not considered to be working in a safety-sensitive position, although he was expected to demonstrate care and caution while performing his duties.

The grievor was approached during his night shift by Supervisor Morin-Alguire, who was also called as witness during these proceedings. Mr. Morin-Alguire had observed and was pursuing a bicyclist in the St. Luc compound. He approached the gate kiosk where the grievor was working and the grievor raised the gate to allow him to pass through with his vehicle. Mr. Morin-Alguire was surprised that he was let through without first having to identify himself. He decided to get out of his car and speak to the grievor. Mr. Morin-Alguire indicated in his post-incident statement that he could smell marijuana inside the gate kiosk area and that the grievor displayed physical signs of cannabis use:

Lorsque je suis entré dans le poste, vers 4h 50, j'ai senti une forte odeur de cannabis et j'ai remarqué que l'employé avait les yeux larmoyants, que ses pupilles étaient dilatées et que ses mains tremblaient.

After observing the grievor, Mr. Morin-Alguire decided to contact CP police to provide assistance. He also asked the grievor if he had consumed cannabis while at work to which the grievor replied that he sometimes used it at home but not at work: «Pas au travail, mais parfois à maison». The grievor also admitted at that time that he had cannabis in his lunch bag and in his car. Mr. Morin-Alguire was then able to reach the grievor's supervisor, Mr. Sam Abdel-Raham, and asked him to attend at the gate kiosk.

Mr. Morin-Alguire confirmed the same particulars as set out in his statement during his testimony in these proceedings. He testified that he specifically asked the grievor whether he had consumed cannabis while on duty to which the grievor replied "No".

Constable Belizaire of the CP police confirmed that he attended at the gate kiosk after being called by Mr. Morin-Alguire. He said in his statement that the grievor admitted to him that he consumed marijuana while working his overnight shift. Mr. Abdel-Raham, for his part, said that he arrived at the kiosk gate at about 07:20 and spoke with the grievor. He said that he immediately asked the grievor if he had smoked marijuana during his tour of duty and that he replied "No". The grievor further advised Mr. Abdel-Raham that he had smoked marijuana that afternoon prior to his shift, but not

during his shift. A video was also introduced at the investigation from a surveillance camera which shows the grievor "...about 10 times [tries to] topple something through the window of the security kiosk...and ends with something throwing out the window".

The Union maintained that the grievor was very honest during the investigation. The grievor, in that regard, denied that he was smoking cannabis in the kiosk or elsewhere, but admitted that he was smoking cigarettes inside the kiosk during his shift. He also admitted being a recreational user of cannabis and that he had some inside his work lunch bag that night. He stated that he had forgotten to remove it from his lunch bag after a fishing trip. The Union noted that the grievor recently took part in a detoxification program for alcohol and no longer consumes cannabis on a regular basis. The grievor also has a clear discipline record.

The central issue in this case is the grievor's credibility.

According to Constable Belizaire's statement, the grievor admitted to him that he used cannabis while on duty. According to both to Mr. Morin-Alguire and Mr. Abdel-Raham, by contrast, the grievor denied using cannabis on duty. The grievor himself denied at his investigation having used cannabis during his shift.

And yet all the evidence points to the grievor having smoked marijuana while on night duty: he was alone in the kiosk at night with no formal supervision; he admitted to having cannabis nearby in his lunch bag; he mentioned that he was a casual marijuana

user and had used it the afternoon before reporting for his night-shift duty; he was observed to have physical signs of impairment when confronted by Mr. Morin-Algure; he was working inside the kiosk that night which was permeated by the distinct odour of marijuana; and, a surveillance video shows him flicking out ashes from the kiosk and then throwing out what appears to be a rolled joint-certainly an object bigger than a cigarette.

Similar to the conclusion reached by Arbitrator Silverman in **CROA&DR 4445**, I find the grievor's version of events to be lacking in credibility. In order to accept the grievor's account, I would have to reject the version of events provided by the Company's witnesses who had nothing to gain by reporting the incident. I find the evidence of Mr. Morin-Algure, who was first on the scene, to be a straightforward account of his observations. His testimony was steadfast in the arbitration proceedings and he did not vary his account of the events in any substantial way from his statement. Further, there is no indication that he was motivated for any reason to target the grievor or fabricate his testimony. I therefore reach the same conclusion in that regard as Arbitrator Silverman in **CROA&DR 4445**:

If I were to accept that version of events, I would have to find that Trainmaster Bruno essentially fabricated details of what occurred in order to implicate the Grievor *and no evidence before me suggests any reason why that would have occurred.*

In the end, I agree that the evidence, on balance, indicates that the grievor smoked cannabis inside the gate kiosk during his tour of duty on May 30/31, 2019.

The next issue is whether the grievor's breach of the Company's *Alcohol and Drug Procedures Policy* (HR 203.1; ss 3.1.3), which prohibits the use and possession of cannabis when an employee is subject to duty, is grounds for dismissal. Arbitrator Picher noted the seriousness of cannabis possession and consumption while on duty in **CROA 3417** where he states:

It is well established that the use of intoxicants and narcotics in the safety sensitive environs of a railway is clearly a serious disciplinary offence, generally inconsistent with continued employment. That is particularly so when the offending employee has not acknowledged the seriousness of his actions or admitted to any wrongdoing, as is the case in the grievance at hand. (See: **CROA 3377 and 3378**.)

More recently, Arbitrator Weatherill, in **CROA& DR 4705** upheld the discharge of a machine operator who was found to be in possession of alcohol in a Company supplied motel room. Arbitrator Weatherill concluded, as I do in this case, that the grievor's testimony "strains credulity".

The possession and use of cannabis while on duty, which like alcohol is prohibited by Company policy given the safety-sensitive environment of railway operations, is generally considered by this office to be inconsistent with continued employment: **See CROA 3417**. More importantly, the grievor's lack of candidness about smoking cannabis in the kiosk while unsupervised and alone on night duty, leads to an irreparable breach of trust. His length of service of thirteen years and otherwise clean record is unfortunately an insufficient basis to mitigate the penalty of dismissal. For all these reasons, the grievance is dismissed.

May 26, 2020



JOHN M. MOREAU
ARBITRATOR