CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3668

Heard in Montreal, Thursday 10 April 2008

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED STEELWORKERS OF AMERICA (LOCAL 2004)

EX PARTE

DISPUTE:

The discharge of Mike W. Johnson for "Violation of CROR Rule G and failure to comply with CN's drug and alcohol policy by virtue of your positive drug test following your alleged assault on November 5, 2007, near Weslang B.C."

UNION'S STATEMENT OF ISSUE:

There is no dispute that the grievor was involved in a verbal altercation with a contractor who alleged the grievor had also poked him with a two way radio antenna on November 5, 2007. The Company investigated this matter and informed the Union at Joint Conference on December 19, 2007 that the grievor had not been disciplined for his involvement in the altercation. Mr. Johnson returned to work the next day November 6, 2007. He complied with a Company request made during his lunch break and submitted to a post incident drug test. There is no dispute that the test indicated a positive result for marijuana.

The Company held a formal investigation regarding the above-mentioned matter on November 8, 2007. The grievor was subsequently discharged on December 10, 2007. The Union filed a Step 3 grievance as per Articles 18.4, 18.5 and 18.6 of the Collective Agreement. The Union has grieved the Company assessed unjust and excessive discipline in discharging the grievor.

The Union has grieved that there is no evidence that the grievor was impaired while on duty and was not in violation of Rule "0" on November 5, 2007. The Union further grieved they disagreed with the Company's investigating officer's interpretation of the CN Drug and Alcohol policy.

The Union has requested that the grievor be immediately reinstated and made whole for all lost monies and benefits.

The Company contends that the discipline is warranted under the circumstances as the grievor had breached the Company's Drug and Alcohol Policy.

The Company further contends discharge is not in violation of the collective agreement.

FOR THE UNION:

(SGD.) A. KANE
NATIONAL STAFF REPRESENTATIVE

There appeared on behalf of the Company:

D. Brodie	– Manager, Labour Relations, Edmonton
A. De Montigny	– Sr. Manager, Labour Relations, Monttreal
D. Fisher	– Director, Labour Relations, Montreal
A. Daigle	– Manager, Labour Relations, Montreal

And on behalf of the Union:

P. Jacques	– Chief Steward, Mountain Region
M. Piché	– Staff Representative, Toronto
M. W. Johnson	– Grievor

AWARD OF THE ARBITRATOR

The facts in relation to this grievance are not in dispute. During the course of work on Monday, November 5, 2007, Track Maintainer Michael Johnson became involved in a verbal altercation with the employee of a contractor. Essentially Mr. Johnson, who was working as a flagman and was responsible for the safety of work being performed on the roadway at Mileage 107 of the Yale Subdivision, took exception to the position of the boom of a crane which he maintained was fouling the track. A discussion between the grievor and the crane operator was apparently interrupted by a foreman of the construction contracting company who became engaged in an argument with Mr. Johnson. It is alleged by the foreman that the grievor approached him with his telephone in hand, thrusting the phone into his face. When the matter matured into a complaint to the Company, the following day, November 6, 2007, the grievor's supervisor discussed the matter with him during the lunch hour. The supervisor decided to treat the matter as an incident which merited post-incident drug testing and requested that Mr. Johnson undergo a drug test. It appeared that Mr. Johnson readily complied with that request, but indicated to his supervisor that his test would in all likelihood be positive, as he had smoked marijuana during his days off, over the course of the prior weekend. As appears from a subsequent investigation, Mr. Johnson maintains that he did smoke marijuana during the course of the evening on Saturday, November 3, 2007.

The grievor's drug test was returned as positive for cannabinoids. Following a disciplinary investigation, he was discharged effective December 10, 2007, for having violated Rule G and for failure to comply with the Drug and Alcohol Policy.

There is no evidence placed before the Arbitrator to confirm that Mr. Johnson was impaired when he came to work on the morning of Monday, November 5, 2007. The Company has produced no medical or scientific evidence, or expert testimony, to establish that he would then have been in a state of impairment by reason of his consumption of cannabis close to a day and a half before that time. In its submission to the Arbitrator the Company asserts that when the grievor did report for duty on November 5, 2007, having previously consumed marijuana on Saturday night, he attended at work "with it still present in his system, and was likely still under the influence of that illegal drug." Its representative submits that the grievor's willingness to attend at work "while potentially impaired" represents a risk that is intolerable for the Company. In that regard the Employer relies on a decision of the Alberta Court of Appeal in **Alberta (Human Rights and Citizenship Commission) v. Kellogg, Brown & Root (Canada) Company**, (2006 ABCA 426). That case involved a new employee, Mr. Chiasson, who failed to pass a pre-employment drug test, being found positive for having smoked marijuana several days before the test. It appears that Mr. Chiasson had consumed marijuana on a Saturday, some five days before the drug screening test. As a result of his positive test the employee was terminated. Mr. Chiasson filed a complaint with the Alberta Human Rights and Citizenship Commission, alleging discrimination on the grounds of perceived physical and mental disability. He did not, however, claim to be dependant or addicted, but merely a casual marijuana user.

The Human Rights panel which heard the case heard extensive expert testimony. There does not appear to be any dispute as to the nature of the expert evidence which was placed before the Human Rights panel. That evidence is characterized, in part, as follows in the decision of Madam Justice S.L. Martin of the Alberta Court of Queen's Bench (2006 ABQC 302). She stated, in part:

> [34] All experts agreed that drug testing by urinalysis does not measure actual impairment levels. A urine test measures only the presence of inactive cannabis metabolites rather than active substances (by comparison a breathalyzer test for alcohol measures the active substance at the time of an event). As a result, drug testing by urinalysis cannot measure whether an employee was under the influence of drugs at a particular time. Cannabis metabolites remain in a person's system for an extended period of time following use of the drug. in the case of heavy users, Dr. Macdonald testified that cannabis metabolites can be detected for up to 30 days or more. Dr. Chiasson agreed that even in moderate users traces can be detected even after someone has abstained for four days. In cases of occasional use of marijuana, the "Report of the Special Senate Committee on Illegal Drugs" indicates that the inactive components of THC can be detected up to a maximum period of seven days.
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> [35] Dr. Chiasson, the employer's expert, said that a positive drug test cannot pin-point when the drug was consumed, discriminate between isolated or recreational use, abuse or dependence of the drug, quantify the amount of the drug consumed, determine the degree to which the user was intoxicated, confirm or allow diagnosis of any drug abuse or dependence, evaluate the general

> health condition of the donor, or evaluate the donor's present capability to perform a certain task or any task whatsoever.
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> [38] While there is a dispute concerning the residual effects of marijuana use, there are two recognized phases of intoxication. Phase 1 consists of a feeling of euphoria or what is commonly referred to as the "high." This involves a feeling of intoxication, with decreased anxiety, alertness, depression and tension and increased sociability, self-confidence and talkativeness. A person will also experience a sensation of satisfaction and well-being. a feeling of calmness and relaxation, a lack of inhibition, a changed perception of time, increased sense perceptions, and magical thoughts such as a false impression of being able to fulfill a task or responsibility. This phase is noticed within minutes of smoking and reaches a plateau lasting two to four hours, depending on strength and dose. Phase 2 or "coming down" involves physical and mental slowness, which generally occurs after an hour or more. During one or the other of the intoxication phases, some people also experience weaker short and medium term memory, decrease in attentiveness and concentration, weakening of reflexes, weakening of reaction time, low capacity to accomplish certain complex tasks, movement coordination troubles, and impaired driving capability. Most of the effects of cannabis on behaviour usually last less than four hours.

The Human Rights panel found that because the employee was only a casual user of marijuana, no disability, real or perceived, was established. On that basis it dismissed his claim. In the Court of Queen's Bench, upon judicial review of that decision, Madam Justice Martin concluded that in fact by reason of its decision to discharge Mr. Chiasson the Company, referred to as KBR, perceived him as suffering from a disability which rendered him unemployable. She therefore reversed the decision of the Human Rights panel and directed that KBR cease its contravention of the **Human Rights, Citizenship and Multiculterism Act**, R.S.A. 2000 **CH**-14.

Significantly, for the purposes of this grievance, the judgement of Madam Justice Martin includes a relatively extensive analysis of the issue of the possible residual effects of marijuana. In that regard she makes the following observations:

> [133] KBR argued that the residual effects of marijuana allow it to screen out prior users through pre-employment drug testing because even though the employee may not be in the intoxication phase, there may be residual impairment or flashbacks at work from off site drug use. **I do not believe the evidence tendered is sufficiently strong to support such a conclusion, either as applied to Mr. Chiasson or generally**. Any assertion that Mr. Chiasson was residually impaired at work between July 8 and 17, 2002, from the marijuana he smoked on June 22, 2002, has not been established.
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> [134] Generally, Dr. Chiasson talked briefly of an alleged hangover effect, but his opinion is not supported by the weight of the literature. The Senate Committee Report to the Federal Government on the decriminalization of marijuana (Canada, Senate Special Committee on Illegal Drugs, *Cannabis: Our Position for a Canadian Public Policy* (Ottawa: Senate, 2002)(Chair: Pierre Claud Nolin)), found ninety-five percent of users to be recreational users and concluded at 165, "that the state of knowledge supports the belief that for the vast majority of recreational users, cannabis presents no harmful consequences for physical, psychological or social well-being, either in the short or long term". Even Dr. Chiasson agreed that research by the National Research Council could not conclude occasional marihuana use produces measurable next day performance effects. The Leirer study, the only study which documented any residual effect, studied nine pilots and has not been replicated. In addition, KBR failed to establish the level of risk associated with these alleged residual effects and compare them to risks associated with employees who are hung over from alcohol, sleep deprived, taking over the counter cold medications or distracted by personal problems or workplace tensions. It is interesting to note that in *Trimac*, the arbitrator rejected delayed or residual effects as a basis to support mandatory random drug testing (para. 74).
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> [135] The evidence in the case at bar also supports the approach used in *Entrop*. The Court of Appeal of Ontario found at para. 99 that:
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> > … urinalysis is a reliable method of showing the presence of drugs or drug metabolites in a person's body. But drug testing suffers from one fundamental

> flaw. It cannot measure present impairment. A positive drug test shows only past drug use. It cannot show how much was used or when it was used. Thus, the Board found that a positive drug test provides no evidence of impairment or likely impairment on the job. It does not demonstrate that a person is incapable of performing the essential duties of the position. The Board also found on the evidence that no tests currently exist to accurately assess the effect of drug use on job performance and that drug testing programs have not been shown to be effective in reducing drug use, work accidents or work performance problems. On these findings, random drug testing for employees in safety-sensitive positions cannot be justified as reasonably necessary to accomplish Imperial Oil's legitimate goal of a safe workplace free of impairment.
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> [136] The flaws in pre-employment testing derive from the fact that a positive test does not show future impairment, or even likely future impairment on the job, yet the applicant who tests positive once is not hired. The reasonable necessity of this standard is also called into question because KBR proposes a single standard of pre-employment testing for all employees, whether in safety sensitive positions or not.
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> (emphasis added)

The Alberta Court of Appeal reversed the decision of Madam Justice Martin. Declining to follow the reasoning of the Ontario Court of Appeal in **Entrop v. Imperial Oil Ltd.**, the Court found that the employer's policy did not violate the Human Rights Statute. It came to that conclusion, in part, based on "evidence" of which it gives no specifics and no elaboration, with respect to the residual effects of marijuana. The Court of Appeal states, in part:

> [33] … The evidence disclosed that the effects of casual use of cannabis sometimes linger for several days after its use. Some of the lingering effects raise concerns regarding the user's ability to function in a safety challenged environment. …

How is this decision of the Alberta Court of Appeal to be understood? The Arbitrator has considerable difficulty with that question. There is an extensive body of scholarly literature and research dealing with the immediate and residual effects of marijuana. That learning was extensively referred to in the judgement of Madam Justice Martin in the Court of Queen's Bench. It was also cited in the decision in the Ontario Court of Appeal in **Entrop**. However, in the decision and reasoning of the Alberta Court of Appeal in **Kellogg, Brown & Root**, there is simply no reference to the medical or scientific authority upon which the Court bases its conclusion that the effects of cannabis use linger for days. As can be seen from the passages quoted above, that conclusion was specifically rejected by Madam Justice Martin who preferred the overwhelming expert evidence, including the evidence of the employer's own expert based on the findings of the National Research Council, that occasional marijuana use cannot responsibly be associated with any measurable next day performance effects. Madam Justice Martin concluded, in the Arbitrator's view correctly, that the vast preponderance of the scholarly literature does not support the theory of residual impairment or measurable next day performance effects.

A board of arbitration must generally respect the decisions of the courts, and may obviously be subject to judicial review for failing to correctly apply the law. There is, however, no principle of *stare decisis* which binds a board of arbitration, particularly when courts of equal stature have expressed differing views or differing approaches on the same topic. From that standpoint, this Office prefers the reasoning of the Ontario Court of Appeal in the **Entrop** decision which found, among other things, that a positive urinalysis test "… cannot measure present impairment."

Has there been a violation of Rule G. I think not. That rule reads as follows:

> G (a) The use of intoxicants or narcotics by employees subject to duty, or their possession or use while on duty, is prohibited
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> (b) The use of mood altering agents by employees subject to duty or their possession or use while on duty is prohibited except as prescribed by a doctor.
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> (c) The use of drugs, medication or mood altering agents, including those prescribed by a doctor, which, in any way, will adversely affect their ability to work safely, by employees subject to duty, or on duty, is prohibited.

(d) Employees must know and understand the possible effects of drugs, medication or mood altering agents, including those prescribed by a doctor, which, in any way, will adversely affect their ability to work safely

The Company's representatives submit that it is a violation of the Company's drug policy to have a "presence in the body" of marijuana, and that the grievor violated that rule. Firstly, it would appear more correct to say that in the case at hand the grievor had anti-bodies to THC in his system at the time of the urinalysis test. There is no evidence of any active THC in the grievor's body at the time of the urinalysis test. That aspect of the Company's reasoning is therefore questionable. Nor is it clear to the Arbitrator on what basis it can be concluded that by consuming marijuana on a Saturday evening, some thirty hours before his scheduled return to work on Monday morning, Mr. Johnson could be said to have consumed drugs or alcohol while "subject to duty." The Arbitrator can see no credible link between the consumption of marijuana on a Saturday and impairment or likely impairment at the registering of a positive drug test the following Tuesday, or for that matter the following Monday, if the test had been taken at that time.

The ability of a railway to conduct drug testing is an extraordinary incursion into the rights of privacy of its employees. Boards of arbitration have nevertheless recognized that drug testing represents an appropriate balancing of the employer's interest, however, in a safety-sensitive industry, particularly in the circumstance of reasonable cause or an incident or accident in the workplace. Needless to say, handling the results and interpretation of a positive drug test must nevertheless remain a rigorous exercise, and should, in the view of this Office, not result in the termination of an employee in circumstances which disclose no job related misconduct. In the instant case the evidence simply does not sustain the position of the Company that the grievor was suffering from after-effects or any impairment by reason of his consumption of marijuana more than a day prior to his return to work and more than two days before the taking of his positive drug test. Nor does this conclusion work great unfairness on the Company. There is existing technology which would allow the employer to test for actual impairment, should it wish to do so. Taking that approach would appear to avoid any controversy about impairment. (see, **Imperial Oil Ltd. v. Communications, Energy and Paperworkers Union of Canada, Local 900**, (2008 CanLII 6874 (On S.C.D.C.)).

For all of the forgoing reasons the grievance must be allowed. The Arbitrator directs that the grievor be reinstated into his employment, forthwith, with compensation for all wages and benefits lost and without loss of seniority.

April 30, 2008

(signed) MICHEL G. PICHER
ARBITRATOR