

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

CASE NO. 3733

Heard in Calgary, Thursday, 12 March 2009

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

EX PARTE

DISPUTE:

Discharge of Locomotive Engineer J.R. Adam of Kamloops, B.C.

COMPANY'S STATEMENT OF ISSUE:

On May 21, 2006, Mr. Adam was involved in a side collision with a passenger train in the Kamloops Yard and was required under CN's Drug and Alcohol policy to undergo post accident drug and alcohol testing. Mr. Adam tested positive for an illegal drug.

On May 31, 2006, a formal investigation was held where Mr. Adam admitted consuming marijuana on May 18, 2006. Mr. Adam was discharged from the Company for failure to comply with CN's Drug and Alcohol policy when he tested positive for an illegal drug on May 22, 2006 as a result of post accident drug testing after being involved with a side collision with a passenger train on May 21, 2006.

The Union contends that the discipline is unwarranted and ought to be expunged.

The Company contends that it had proper grounds to discharge Mr. Adam. The Company disagrees with the Union's position and has declined the Union's grievance.

FOR THE COMPANY:

(SGD.) D. CROSSAN

FOR: DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Company:

D. Crossan	– Manager, Labour Relations, Prince George
D. VanCauwenbergh	– Director, Labour Relations, Edmonton
R. Robinson	– Engine Service Officer, Vancouver
G. Capeness	– Nurse Case Manager, OHS, Edmonton

And on behalf of the Union:

D. Ellickson	– Counsel, Toronto
T. Markewich	– Sr. Vice-General Chairman, Edmonton
J. Adam	– Grievor

AWARD OF THE ARBITRATOR

Following a collision and derailment, as described in **CROA&DR 3732**, Locomotive Engineer Adam was requested to undertake a post accident drug test. He in fact tested positive for THC, for the consumption of marijuana. Following an investigation he was subsequently terminated for “failure to comply with the CN Alcohol and Drug Policy when you tested positive for an illegal drug on May 22, 2006 ...”.

It is well established that a positive drug test which reveals the presence of antibodies to THC in the body does not establish impairment. In **Canadian National Railway Company** (2000) 95 L.A.C. 4th 341 [SHP 530] at p. 400 the arbitrator commented:

A positive drug test is not conclusive of impairment when on duty, subject to duty or on call. It does not, therefore, of itself constitute just cause for discipline or discharge. It may, however, become material evidence which, in light of other evidence, supports inferences of impairment that do justify discipline or discharge.

Mr. Adam does not deny that he consumed marijuana. According to his explanation, he did consume marijuana some two days prior to the incident, on May 19, 2006 when he was not on duty or subject to duty, having booked off. There is no evidence before the Arbitrator to challenge that claim, nor any direct proof that the grievor was in fact impaired at the time of the collision in which he was involved on May 21, 2006. Nor is the Arbitrator persuaded, on the facts of the instant case, that the mere fact of the collision is itself corroborative proof of the grievor’s own impairment at the time. The evidence suggests a number of mitigating factors, including limited visibility

by reason of the tall state of some uncut brush and the fact that the grievor had not been specifically advised by the yardmaster of the possible movement of the RMR train. While these factors do not excuse a violation of CROR 105, they do tend to reduce the likelihood of impairment as the only plausible explanation for what occurred.

However there is an element of further concern which emerged from the answers given by the grievor during the course of his disciplinary investigation. He indicated at that time that he was given to relatively regular consumption of marijuana, to the extent that he used it as a form of pain relief from his confirmed medical condition of ankylosing spondylitis, a form of arthritic inflammation of the spine. He also indicated that he used marijuana to assist in the stimulation of his appetite. It is not disputed that he did not have a prescription for the use of medical marijuana under the supervision of a physician. Although he was not disciplined for violating the Company's drug policy by reason of this form of undisclosed self-medication, the Company's representative stressed to the Arbitrator that the conduct of the grievor did in fact violate the obligation to keep the Company advised of any drugs being consumed for medical purposes.

Having regard to all of the evidence, the Arbitrator is satisfied that there are reasons to consider the reinstatement of Mr. Adam in the case at hand. Firstly, he is an employee of thirty years' service with a relatively positive disciplinary record. While he has had some discipline over the years, it has happened on only six occasions, with no serious rule infraction resulting in a derailment, save on one occasion in 1984, more than twenty years previous to the incident which is the subject of this grievance. Also, given the grievor's age of fifty-one years, termination is a particularly difficult

consequence as applied to his personal circumstances. On the whole, therefore, the Arbitrator is satisfied that there are reasons to return the grievor to his employment.

However, grave concerns arise in the unusual circumstances of this case. This Office has never before been confronted with an individual who professes to self-medicate by the use of marijuana. The prospect of the continued use of a prohibited drug by the grievor following his reinstatement into a highly safety sensitive position is, to say the least, less than reassuring. It is therefore, in the Arbitrator's view, necessary to fashion conditions of reinstatement to fully protect the legitimate interests of the Company.

For the reasons related above, the grievance is allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment, forthwith, without compensation for any wages and benefits lost and without loss of seniority. However, the grievor's reinstatement shall be conditioned on his accepting to be subject, for a period of not less than two years, to random drug and alcohol testing, to be administered in non-abusive fashion. The grievor shall also entirely abstain from the consumption of any illegal drug, at any time, during the two year period of the condition. A violation of these conditions shall give the Company grounds to terminate the grievor's employment.

March 16, 2009

(signed) MICHEL G. PICHER
ARBITRATOR