# CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

# CASE NO. 3753

Heard in Montreal, Thursday, 16 April 2009

concerning

## CANADIAN NATIONAL RAILWAY COMPANY

and

## TEAMSTERS CANADA RAIL CONFERENCE

## EX PARTE

**DISPUTE:**

The discharge of Shayne Gormley for alleged failUre to comply with the Company's drug and alcohol policy.

**UNION'S STATEMENT OF ISSUE:**

Shayne Gormley was working as a Traffic Coordinator in Vancouver's Thornton Yard on December 24, 2006. One of the movements he was monitoring was involved in a side collision. The Grievor was required to provide a contacted by a BN Crew seeking yarding instructions and assistance. The Grievor provided instructions to the BN Crew and committed to monitor their movement and assist via camera.

The BN movement became involved in a side swipe of yard movement on the west end of the yard. The Grievor was required to provide an employee statement with respect to this matter, following which, he was assessed 20 demerits, which is under appeal.

Despite the fact that there was no indication of impairment or intoxication, the Grievor was required to undergo drug and alcohol testing. The breath analysis for alcohol was negative, but the drug screening indicated a positive result.

Union contends that there was no reasonable cause to require the Grievor to undergo drug and alcohol testing and, as such, the test results were improperly obtained and the resultant discipline should be considered void ab initio. In the alternative, and without prejudice to the foregoing, the Union contends that a positive urinalysis result does not indicate impairment and the Grievor should not have been disciplined for such.

The Company contends that it is within its rights to require post accident drug and alcohol testing and relies on the results of such and has declined the grievance.

**FOR THE UNION:**

**(SGD.) R. A. HACKL**
**FOR: GENERAL CHAIRMAN**

There appeared on behalf of the Company:

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| F. O'Neill | – Manager, Labour Relations, MacMillan Yard |
| R. A. Bowden | – Manager, Labour Relations, MacMillan Yard |

And on behalf of the Union:

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| D. Ellickson | – Counsel, Toronto |
| B. R. Boechler | – General Chairman, Edmonton |

R. A. Hackl – Sr. Vice-General Chairman, Edmonton
S. Gormley – Grievor

## AWARD OF THE ARBITRATOR

The following is the award of the arbitrator in **CROA&DR 3752** and **3753**.

The facts are not in dispute. The grievor first instructed the BN crew to yard their train into track PF06. He then further instructed the BN crew to double over the head end 23 cars into track PF01. There were 63 cars already sitting in track PF01 at the time. The grievor further advised the crew that he would monitor their movement. The BN crew understood that the grievor was observing the track and began shoving their cars into PFO1 as instructed. While doing so, the BN cars coupled onto the stationary cars already in the track causing them to move westward out of track PF01 and into the side of the west lead yard assignment resulting in a derailment. The grievor indicated at his investigation that he had control of the movement in accordance with CROR 115.

The Union concedes that discipline is appropriate but that 20 demerits is an excessive disciplinary response. The Company maintains that the grievor is deserving of the 20 demerits given the violation of CROR 115.

The grievor admitted at the investigation that he had assumed responsibility of the BN movement while shoving the 23 cars. The grievor clearly did not try to deflect responsibility for his actions during his statement. He appears to have learned from the incident and has also expressed a genuine resolve to do his best in the future. There are also other mitigating factors to consider including the grievor's 15 years of service and the fact that he has had no current demerits on his record. After reviewing the circumstances of this case, and also having reviewed similar decisions of this office, including **CROA 2990** and **3237**, I am of the view that this is an appropriate case to reduce the penalty of 20 demerits imposed by the Company.

The grievance is upheld with the direction that the record of the grievor for this incident in **CROA&DR 3752** show a reduction to a disciplinary penalty of 15 demerits.

As part of the Company's investigation into the incident, the grievor was required to undergo post-accident alcohol and drug testing some four hours after the incident. His breath sample was negative for the presence of alcohol. The urine sample he provided confirmed the presence of marijuana metabolites. The grievor was removed from service. The grievor attended a formal investigation regarding his failure to comply with the Company Drug and Alcohol policy during his tour of duty on December 24, 2006. The grievor denied at the investigation that he was impaired by drugs while on duty and also denied having a drug or alcohol problem. The grievor was given his termination notice on January 31, 2007.

The Company policy states, at p.7, that drug testing with be performed:

> … where reasonable cause exists to suspect alcohol or drug use or possession in violation of this policy, including after an accident or incident. Post accident testing is done after any significant accident or incident where an experienced operating officer, upon consideration of the circumstances determines that the cause may involve or is likely to involve a rule violation and/or employee judgment.

Arbitrator Picher endorsed the acceptability of post-accident drug testing in **SHP 530:**

> I am also satisfied that a fair extension of reasonable cause testing is that it applies quite properly in a post accident or post incident situation.

Arbitrator Jolliffe also endorsed this approach in a recent decision submitted by the Union: United Assn. Of Journeyman and Apprentices of the Plumbing and Pipefitting Industry, Local 663 v. Mechanical Contractors Association of Sarnia [2008] OLAA No. 621. He notes at paragraph 149:

> Frankly, I prefer the approach taken by Arbitrator Picher as recently discussed in his 2007 decided *Imperial Oil* case as upheld on judicial review which I interpret as varying little from the analyses undertaken by several other arbitrators in various provincial jurisdictions, as noted by the parties set out earlier in this award … As the case law has developed, I do not see that for non-random testing one's concern has ultimately moved far from the longstanding principle that any demand for testing, being a physical intrusion on the person "… must be used judicially and only with

> demonstrable justification, based on reasonable and probable grounds", as earlier stated by Arbitrator Picher in the CNR case, and in my view not much altered by human rights analysis.

and further at paragraph 151:

> Firstly, with respect to the MCAS members' policies respecting the testing itself, although they vary to a degree as presented, in my view, they are acceptable where indicating that the company may require at its discretion that testing take place in order to confirm or eliminate alcohol or drug consumption as a contributing factor where the employer has reasonable cause to suspect impairment by reason of immediate observations concerning employee performance or demeanour. Likewise they are acceptable where an incident/accident has occurred where there is cause to suspect alcohol or drug use by reason of the occurrence itself, observations and surrounding circumstances, and in such case such testing should be done as soon as possible, with four hours having been mentioned as the outside limit in most of the written policies.

The grievor in this case failed to properly monitor the movement as he had undertaken to do in violation of CROR 115(c). The grievor himself admitted in that regard that he assumed responsibility to observe the track as the crew began shoving the cars into track PF01. The ensuing collision produced a derailment which fortunately only resulted in equipment damage and no personal injuries on this particular tour of duty. I do not have any difficulty accepting the position of the Company that there were grounds for alcohol and drug testing, pursuant to the terms of the policy, as a result of the accident and the direct involvement of the grievor, who had assumed the prime responsibility for monitoring the movement on track PF01.

The reliability of drug testing as an indication of impairment while on duty was addressed by Arbitrator Picher in **SHP 530**. The *Conclusion* portion of his award states in part:

> 2. 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, support inferences of impairment that do justify discipline or discharge.

And similarly in **CROA 3632** :

> What does the evidence in the case at hand confirm? Firstly, the positive drug test result cannot, of itself, confirm that the grievor was under the influence of marijuana during the course of his duty. As noted in prior awards (**SHP 530**), the positive result for cannabinoids can only indicate the consumption of marijuana over a relatively broad band of time, most commonly in the area of approximately one week in advance of the taking of the sample.

Similar to **CROA 3632**, the question then becomes the appropriate measure of discipline. The positive test result does reflect the fact that the grievor, an employee with 15 years of service, elected to take the risk of imbibing an illegal substance. It is simply not credible for the grievor to maintain, as he did at his investigation, that he was unaware that his off-duty conduct might result in a violation of the policy. His deliberate lifestyle choice yielded the result of a positive drug test, a decision for which the grievor must accept full responsibility. In a very real sense, therefore, the grievor was the author of his own misfortune. There is, on the other hand, no direct evidence here that supports a finding that the grievor was impaired while at work and I am satisfied that this is a case where the termination penalty should be set aside.

The grievance is allowed in part. The grievor is to be reinstated to his employment without compensation or loss of seniority. The grievor's reinstatement shall be conditional upon his written agreement to be subject to random, unannounced drug and alcohol testing, to be administered for a period of not less than two years from the date of his reinstatement. Any failure on his part to comply with the conditions of such testing, or a positive test result, shall be grounds for immediate termination of the grievor's employment. His discipline record will stand at 15 demerits based on the findings noted above from case number **CROA 3752**.

May 22, 2009

**(signed) JOHN M. MOREAU, Q.C.**
**ARBITRATOR**

On November 24, 2009, there appeared on behalf of the Company:

D. Crossan – Manager, Labour Relations, Prince George
D. S. Fisher – Director, Labour Relations, Montreal

And on behalf of the Union:

R. A. Hackl – Sr. Vice-General Chairman, Edmonton

## SUPPLEMENTARY AWARD

On September 8, 2009, the Union requested that a supplementary hearing be held "… regarding the application of the Arbitrator's decision in **CROA & DR 3753** (Gormley discharge)". The basis for the request was that the Arbitrator erred in his award of May 22, 2009 by including a reference to alcohol testing as part of the reinstatement order of the grievor. A supplementary conference call hearing was arranged for November 24, 2009 with representatives of the Company and the Union, and the Arbitrator. During the course of the oral submissions, the Union requested an opportunity to address the issues raised during the conference call by way of written submissions. The Company did not object to the request. The parties then provided their written submissions in accordance with the timelines established by the Arbitrator and agreed to by the parties during the conference call.

In order to focus on the issue at hand, it is worth noting the concluding paragraph of the May 22, 2009 award:

> The grievance is allowed in part. The grievor is to be reinstated to his employment without compensation or loss of seniority. The grievor's reinstatement shall be conditional upon his written agreement to be subject to random, unannounced drug and alcohol testing, to be administered for a period of not less than two years from the date of his reinstatement. Any failure on his part to comply with the conditions of such testing, or a positive test result, shall be grounds for immediate termination of the grievor's employment. His discipline record will stand at 15 demerits based on the findings noted above from case number **CROA 3752.**
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> (emphasis added by underlining)

The Union submits that it is not seeking a review of the award but rather a clarification of the existing award and/or the correction of what it views as an error in the award. The Union maintains that the Arbitrator's jurisdiction is not limited to the correction of simple "technical errors" (i.e. a typographical error) but also includes what the authors Brown and Beatty in *Canadian Labour Arbitration* (4th) at 2:4000 describe as "...errors arising from accidental slips or omissions..." The Union maintains on this latter point that the order for random alcohol testing by the Arbitrator was inconsistent with the rest of the award. The Union notes that no evidence was adduced that alcohol was a factor, nor was alcohol discussed during the hearing, nor was alcohol testing requested by way of relief. The Union is of the view that this is the kind of accidental error that the Arbitrator has the jurisdiction to correct and indeed should correct. The Union also adds that random alcohol testing is an extraordinary and onerous intrusion on a person's rights and that it is unfair to require alcohol testing as a result of a mistake.

The Company maintains that the Arbitrator has exhausted his jurisdiction and, with the exception of clerical or typographical errors, cannot amend or in any way change the substance of the award. The Company submits that the award is unambiguous and that the Arbitrator has no jurisdiction to remove the requirement for alcohol testing from the award. The Company further maintains that the doctrine of *functus officio* is applicable in the instant case. The Arbitrator's order for the grievor to undergo drug and alcohol testing, in the Company's view, is not an "error" of the type falling within the exceptions to the *functus officio* rule. The Union, in the end, is not seeking the correction of a typographical error but rather seeks an amendment to a significant part of the Arbitrator's order. The Company submits that to allow corrections of so-called "slip-ups", as the Union has characterized the order for alcohol testing, is incorrect and would undermine the need for certainty in arbitration awards, as mandated in the *Canada Labour Code*.

The Arbitrator notes that the expectation of the parties in a dispute before a judicial or quasi-judicial body is that the decisions rendered are final, binding and not subject to review, in accordance with the doctrine of *functus officio*. Brown and Beatty at 2:4000 explains that principle as follows:

> In general terms, the doctrine of *functus officio* stipulates that once a board of arbitration has finished making its decision, its grant of jurisdiction is terminated and thereafter it has no power to render a further decision or award.

The only exception to the above rule is that arbitrators may correct errors of a clerical nature, as noted in Mitchnick and Etherington, *Leading Cases on Labour Arbitration* at s. 3.7 where the authors state:

> According to the doctrine of *functus officio*, once an arbitrator has issued a final award his or her jurisdiction is exhausted and the award cannot be altered except to correct a clerical error. The arbitrator cannot subsequently make a finding already made or interpret the award for the parties.

I also note the comments of this office set out in **CROA 3207** (Supplementary Award).

> More fundamentally, as the primary basis for this supplementary award, I must agree with counsel for the Company that the Arbitrator is *functus officio* in this matter. While this Office maintains an implicit retainer of jurisdiction, without attaching to each and every award a statement with respect to remaining seized of a dispute (supplementary award to **CROA 1861**), the retainer of jurisdiction can only be exercised to explain or complete an award, not to reconsider it on its merits or alter any substantive aspect of its conclusions. Boards of arbitration, including this Office, do not have an inherent jurisdiction to reconsider their awards. That jurisdictional reality is essential to the interests of clarity and finality in the disposition of disputes and the final and binding determination of the rights and obligations of parties under collective agreements governed by the *Canada Labour Code*. The retainer of jurisdiction is, of course, available for such purposes as dealing with aspects of the dispute which have not been fully resolved in the original award, and perhaps not addressed in evidence, such as calculation of compensation secondary to the principal conclusion of the award. Considerations of that kind do not arise in the case at hand.

Any review of the instant award concerning whether the order of the arbitrator for drug and alcohol testing is supported by the evidence, as the Union argues here, would amount to a substantive review of the evidence presented by the parties at the hearing and a violation of the *functus officio* principle. In that regard, the Arbitrator has no jurisdiction to revisit the award to determine whether there was any evidence of alcohol before the Arbitrator to support the direction for alcohol and drug testing. That is not the kind of clerical error correction permitted under the *Canada Labour Code* once awards have been issued and would amount to a derogation of the Arbitrator's jurisdiction if such a review were undertaken.

To summarize, an Arbitrator only maintains jurisdiction to correct clerical errors, such as typographical errors, which arise as a result of an accidental slip or omission. An arbitrator has no inherent jurisdiction to review an award for any substantive matter once the award is issued. The Arbitrator, in this case, therefore has no jurisdiction to review the instant award to determine whether the directions accompanying the reinstatement order is supported by the evidence concerning the presence or absence of alcohol. I would add that, in dealing with substance use and/or abuse, the remedy of the Office has consistently been to include testing for all substances, including alcohol. (See, e.g., **CROA 2683, 2969, 3632** and **3701**.)

For all the above reasons, the presiding Arbitrator must deny the request of the Union to reopen this grievance and alter the award as requested.

Signed at Calgary, December 22, 2009

**(signed) JOHN M. MOREAU, Q.C.**
**ARBITRATOR**