CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3818

Heard in Montreal, Wednesday, 14 October 2009

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

EX PARTE

DISPUTE:

Discharge of Locomotive Engineer D. Birkeland.

COMPANY'S STATEMENT OF ISSUE:

On January 9, 2009, Mr. Birkeland was required to attend a formal investigation in connection with the circumstances surrounding: Alleged violation of CN's Drug and Alcohol Policy while employed as the locomotive engineer on the 07:00 Extra BIT assignment on December 20, 2008.

Subsequent to the investigation, the Company issued a discipline form 780 assessing Mr. Birkeland with a discharge from Company services for violation of CN's Drug and Alcohol Policy while employed as the locomotive engineer on the 07:00 Extra BIT assignment on December 20, 2008.

The Union contends that the discipline assessed was unwarranted and should be removed and that Mr. Birkeland be compensated for all lost wages and benefits.

The Company disagrees.

FOR THE COMPANY:

(SGD.) R. A. BOWDEN
MANAGER, LABOUR RELATIONS

There appeared on behalf of the Company:

S-P Paquette	– Counsel, Montreal
D. S. Fisher	– Director, Labour Relations, Montreal
Dr. L. Kadehjian	– Biomedical Consultant, Palto Alto (CA)
D. Cater	– Terminal Manager, BIT, Concord
R. Hemmle	– Manager, Crew Centre, Montreal
K. Smolynec	– Sr. Manager, Occupation Health, Montreal

And on behalf of the Union:

C. J. Morrison	– Counsel, London
P. Vickers	– General Chairman, Sarnia
B. Willows	– General Chairman, Edmonton
T. Beaver	– General Chairman, CP Lines East, Oshawa
D. Birkeland	– Grievor

AWARD OF THE ARBITRATOR

It is not disputed that the grievor failed to stop his movement safely and caused a derailment which resulted in damage to the tracks and three containers, with damage ultimately assessed at $21,000. Following the accident Mr. Birkeland was asked to undergo a post-incident drug and alcohol test, in accordance with the Company's *Policy to Prevent Workplace Alcohol and Drug Problems*. The grievor took the drug and alcohol tests, albeit under protest. The drug testing was two-fold, including both the taking and analysis of a urine sample as well as the taking and analysis of an oral fluid sample. Both samples proved positive for cocaine and cocaine metabolites. More particularly, the urine sample provided showed a concentration of cocaine metabolites of 1090 ng/ml. The oral fluid sample revealed a concentration of cocaine of 18 ng/ml and a concentration of cocaine metabolites of 70 ng/ml.

At the arbitration the Company presented an expert witness with respect to the interpretation of the drug test results. Dr. Leo Kadehjian, a biomedical consultant, testified with respect to the information concerning the test readings. He explained that the urinalysis test indicated that the sample provided was found to be dilute, something which would normally occur by virtue of the ingestion of water, perhaps as much as a litre. He testified that there is a rough formula applied to compensate for the dilution, and that by the application of that formula the urinalysis test revealed a concentration of cocaine metabolites which corresponded closely to the reading obtained through the oral fluids sample. When asked what the readings would indicate Dr. Kadehjian testified that two scenarios were possible. He explained that the readings recorded would be consistent with the ingestion of cocaine by an occasional user sometime within a period of five to eight hours before the taking of the samples. Alternatively, he added that the same readings could be obtained from a habitual cocaine user, using a substantial amount of cocaine, in a period twenty-four to forty-eight hours prior to the point of collection. The evidence provided by Dr. Kadehjian was not substantially challenged by any contrary expert testimony.

The grievor's explanation for his positive drug test was that he is not a habitual user of cocaine, and that he had consumed cocaine on a social occasion with friends several days prior to December 20, 2008, during his days off.

Counsel for the Union submits that the Company did not have reasonable grounds to test Mr. Birkeland. It submits that the reasonable cause / post-incident report form made out by Supervisor D.J. Cater gave no outward indications of any conduct or appearance on the part of the grievor that would justify a reasonable cause drug test. He submits that in effect the supervisor simply imposed the test by reason of the accident, without reasonable cause. Given the grievor's long service and the lack of factors beyond the accident to justify the drug test, counsel submits that the test should be viewed as void *ab initio* and the termination of the grievor should be reversed.

Counsel for the Union further argues that the positive drug tests cannot, to a certainty, confirm that the individual was impaired at the time the test was taken. Stressing that the burden of proof remains upon the Company, he argues that in the case at hand the grievor's test result does not establish, on the balance of probabilities, that he did consume cocaine immediately prior to or during his tour of duty on December 20, 2008.

The Company's representatives make a different argument. They submit that the grievor must either have consumed cocaine on the day of the accident and drug and alcohol tests or, in the alternative, if he did consume cocaine as he asserts, namely some two to three days prior, he must be habitual and heavy user of cocaine. On either theory, the Company maintains that its decision to remove the grievor from his employment is a safety sensitive position of locomotive engineer is entirely justified.

How is this Office to approach the case at hand? Firstly, I have some difficulty with the suggestion of the Union that the Company did not have grounds to request the drug and alcohol test as it did. It is well established that the consumption of certain drugs, including cocaine, does not, unlike the consumption of alcohol, create a set of physically obvious and identifiable symptoms or manifestations of drug consumption. Secondly, in the case at hand, in the supervisor's judgement the accident which occurred was uncharacteristic and unexplained.

The Company's policy contains the following passage with respect to post-accident or incident testing:

> Reasonable Cause and Post Accident Testing
>
> Biological testing for the presence of drugs in urine or alcohol in breath is conducted 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

> judgement, in cases of reasonable cause or post accident testing, any employee whose breath alcohol concentration is over 0.04 or who tests positive for illegal drugs would be considered to be in violation of this policy.

In the Arbitrator's view the foregoing statement properly reflects the appropriate approach to the balancing of interests which is inherent in the drug and alcohol testing of safety sensitive employees. That was confirmed in **SHP 530**, an award which extensively reviewed the Company's drug and alcohol testing policy. In that award the following comment appears:

> In the result, and consistent with the preponderance of the jurisprudence, I am satisfied that the balancing of interests approach is the correct one in a case of this kind, and that reasonable cause drug testing is an appropriate rule and policy, particularly within the context of a safety sensitive industry such as railroading. Reasonable cause drug testing is a concept that was confirmed within the railway industry more than ten years ago by the awards in **Canadian Pacific Limited** and **CN,** referred to above, and it has not since been negated by any negotiated collective agreement provision of which I am aware. 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. As the lessons of the Hinton collision and the focus of the Foisy Commission Report made clear, in the aftermath of an accident, which in the railway industry can be of catastrophic proportions, a railway can expect to be held to a standard of intense scrutiny with respect to the due diligence it exercises in ensuring the fitness for duty of its employees. It can expect to be held to a rigorous obligation to gain the widest possible information about factors which may have influenced the unfolding of an incident. This level of obligation was found to be a legitimate basis for reasonable cause drug testing by the Human Rights Boards of Inquiry in **Entrop**.

When the foregoing principles are applied to the case at hand the Arbitrator is satisfied that the accident which occurred, which can be fairly characterized as an unexplained derailment, did merit the administration of a post-accident drug and alcohol test, as indeed determined by the Company's supervisor. The issue then becomes what conclusion is to be drawn from the results of the test, combined with the statements of Mr. Birkeland.

When regard is had to the whole of the evidence, including the expert testimony presented by the Company, the Arbitrator finds both the statements and actions of Mr. Birkeland to be troubling. If, as the grievor maintains, he is not a habitual cocaine user then the only conclusion to be drawn is that he did in fact consume cocaine some eight to five hours prior to the taking of the urinalysis and oral fluids drug samples. Alternatively, if he did not consume during that period, but in fact did so some twenty-eight to forty-eight hours previous, as he maintains, he is not being honest with respect to his use of cocaine and must, on the balance of probabilities, be viewed as a person who is a habitual cocaine user. Either scenario raises serious issues with respect to the grievor's honesty, as well with respect to his actual involvement with a drug whose consumption immediately before or during a tour of duty in a highly safety sensitive workplace is such as to cause substantial concern and call into question his continuing employability.

On the whole of the evidence before me I am inclined to conclude, on the balance of probabilities, that the grievor did in fact consume cocaine on the day of his tour of duty, an obviously serious infraction that would justify discharge, absent the most compelling mitigating factors. There are no mitigating factors presented in the case at hand beyond the grievor's prior service. However, given the gravity of the offence committed, the Arbitrator is not persuaded that his prior service can outweigh the safety concerns which present themselves in the face of an employee who would knowingly consume cocaine immediately prior to or during his or her tour of duty. The Arbitrator's first inclination is to accept the grievor's statement that he is not a habitual cocaine user. Accepting that statement, however, leads to the unfortunate inference that he did consume cocaine immediately prior to or during the course of his tour of duty on December 20, 2008.

In the alternative, if the Arbitrator is in error with respect to the above conclusion, the most that can be said is that the grievor was not honest with the Company, nor with the Arbitrator, and that he is in fact a habitual drug user who may have consumed cocaine during his days off. But to accept that explanation is to recognize that the grievor was deceitful in his statement to the Company and maintained that same deceit before the Arbitrator. On what basis should an employee so lacking in candour be given relief from discipline which is otherwise justified? I can see none. Having regard to the whole of the material before me, I am satisfied, on the balance of probabilities, that the grievor did consume cocaine immediately prior to or during the course of his tour of duty on December 20, 2008 and that he was in fact impaired by cocaine at the time his urine and oral fluid samples were taken, as well as

immediately previous to that time, during his tour of duty. The only alternative conclusion is that he is in fact a habitual user of cocaine, and that he has been dishonest both with his employer and with the Arbitrator. In either event his grievance cannot succeed.

For all of the foregoing reasons the grievance must be dismissed.

November 6, 2009

(signed) MICHEL G. PICHER
ARBITRATOR