CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4229

Heard in Montreal, July 11, 2013

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the dismissal of Locomotive Engineer Dale Marciszyn.

JOINT STATEMENT OF ISSUE:

On May 2, 2012, following a series of investigations, Mr. Marciszyn's employment was terminated "For conduct unbecoming an employee as evidenced by providing false and/or misleading information to the Company during a formal investigation conducted on Jan. 13, 2012 while employed as a Locomotive Engineer at Regina, Saskatchewan."

The Union contends that the termination of Mr. Marciszyn's employment is unjustified, unwarranted and excessive in the circumstances. The Union further contends that the Company breached the parties' June 16, 2010 agreement in the course of its investigations. The Union further contends that the actions of the Company in this case have violated Engineer Marciszyn's rights as contained in the Canada Labour Code, Canadian Charter of Rights and Freedoms, the Canadian Human Rights Act, the Personal Information Protection and Electronic Documents Act and our Collective Agreement, including the preamble and Article 23.

The Union requests that Mr. Marciszyn be reinstated without loss of seniority and benefits, and that he be made whole for all lost earnings with interest. The Union further seeks a declaration that the Company has breached the parties' June 16, 2010 agreement. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company disagrees and denies the Union's request.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) D. Able	**(SGD.) M. Thompson**
General Chairperson	**Manager Labour Relations**

There appeared on behalf of the Company:

R. Hampel	– Counsel, Calgary
D. Freeborn	– Director, Labor Relations, Calgary
M. Chernenkoff	– Labour Relations Officer, Calgary
A. Becker	– Labor Relations Officer, Calgary

There appeared on behalf of the Union:

K. Stuebing	– Counsel, Toronto
G. Edwards	– Vice General Chairman, Revelstoke
D. Able	– General Chairman, Calgary
J. Cooper	– Vice Local Chairman, Moose Jaw
D. Becker	– Vice General Chairman, Medicine Hat
B. Brunet	– General Chairman East LE,
B. Hiller	– General Chairman, East CTY,
W. Apsey	– Vice General Chair, Smith Falls
D. Marciszyn	– Grievor, Moose Jaw

AWARD OF THE ARBITRATOR

The material before the Arbitrator discloses that the grievor tested positive for marijuana in a post incident drug test following a run through switch on December 19, 2011.

Difficulty arose by reason of a statement made by the grievor during the course of the ensuing disciplinary investigation. In dealing with the result, he said in part: “I object to the compressed nature of the word positive. I was advised by the Doctor doing the test that I was positive for exposure within the last forty days.”

It appears that the Company’s investigating officer took that statement to mean that the grievor was asserting that, at most, he had been impacted by passive exposure to marijuana smoke. In fact what the grievor meant by the word “exposure” was the actual consumption of marijuana, and he was only parroting the word used by the physician who reported to him on the result of his urine sample. Mr. Marciszyn also openly questioned the right of the Company to make any investigation of marijuana

consumption on his part when he was neither at work nor subject to being called to duty.

While the Company assessed fifteen demerits against the grievor for the run-through switch incident, it investigated him further in relation to what it viewed as potentially false statements on his part concerning his possible consumption of marijuana.

The record before the Arbitrator confirms that at the first disciplinary investigation conducted on January 13, 2012 at question and answer thirty-nine the grievor was asked when he consumed marijuana which would have produced the positive test. His response was: “after I took a personal I was exposed December 7, 8, 9, and possibly the 10th, 2011. In relationship to the untimely death of a seven-month relative.” Mr. Marciszyn went on to deny the use of marijuana at work or while subject to duty.

What now emerges is that the grievor adopted the word used by the Company’s Doctor in expressing his consumption of marijuana as having been “exposed”. Understandably, the investigating officer appears to have concluded that the grievor was asserting that he had tested positive by reason of the passive inhalation of second hand marijuana smoke to which he had been exposed, something which I am satisfied he was not intending to convey.

Unfortunately, the jousting between the grievor and the Company's investigating officer, which extended to further days of investigation conducted on February 27, and April 12, 2012 did not reveal a clear understanding of the grievor's admission until some twenty-nine questions had been put to him on the occasion of the second supplementary investigation conducted on April 12, 2012. When he was asked to elaborate on what he meant by his use of the term "exposed" he then explained that he was adopting the phrase used by the Company's Doctor. Pressed further, he admitted that by "exposed" he intended to mean the actual direct consumption of marijuana on his part.

The Arbitrator can appreciate the Company's view that the grievor provided what it viewed as false and misleading information during the investigation process. I am not, however, persuaded that his intention was as sinister as the employer would have it. During the course of his first investigation on January 13, 2012 when specifically asked at question and answer thirty-nine when he consumed marijuana which produced the positive test he responded that he was "exposed" on December 7, 8, 9, and possibly 10 2011 at a family gathering in relation to a funeral.

In the Arbitrator's view a close examination of the tortuous course of the grievor's disciplinary investigations would indicate that Mr. Marciszyn adopted a posture of volunteering as little information as possible and used language which, it now appears, did mislead the Company in its understanding of his actions and his responses in relation to those actions. Unfortunately, it is only during the course of the second

supplementary investigation on April 12, 2012 that he was squarely asked what he meant by the use of the word “exposed” to which he responded “well, it means used.”

In the Arbitrator’s view what emerges is a failing of communication both on the part of the investigating officer and the grievor. While I cannot share the Company’s view that the grievor deliberately set out to mislead the investigating officer, I can readily accept that his general posture in the face of questioning and his choice of words was less than forthcoming, clear or candid. It remains, however, that the evidence before me does not show a deliberate intent to mislead his employer.

In the result, I am satisfied that the grievance should be allowed, in part. I therefore direct that the grievor be reinstated into his employment forthwith, without loss of seniority and without compensation for any wages or benefits lost. For the period of two years following his reinstatement the grievor shall be subject to periodic unannounced drug or alcohol testing to be administered in a non-abusive fashion. The failure to undergo or to pass such a test may result in the termination of his employment.

July 12, 2013

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MICHEL G. PICHER
ARBITRATOR