

CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4240

Heard in Montreal, September 12, 2013

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

**TEAMSTERS CANADA RAIL CONFERENCE
MAINTENANCE OF WAY EMPLOYEE DIVISION**

DISPUTE:

Discipline Assessed to Mr. Troy Reid.

JOINT STATEMENT OF ISSUE:

On March 21, 2013, the grievor was dismissed by the Company for his "willful use of an illegal and prohibited substance resulting in a positive test conducted on February 12, 2013." On May 23, 2013, the Company rescinded the dismissal and substituted, for the same alleged infraction, a 30 day suspension.

The Union contends that the grievor was never impaired while on or subject to duty. Prior CROA jurisprudence is clear that discipline assessed in the absence of impairment will be held to be Invalid. The grievor has been cooperative throughout. He contacted EFAP and underwent an assessment that concluded that he does not have a dependency problem. In addition, he signed an agreement to abstain from drugs and alcohol and to participate in random testing. The discipline assessed the grievor was unfair and unwarranted.

The Union requests that, the discipline assessed be ordered stricken from the grievor's record and that he be made whole for all losses incurred as a result of this matter.

The Company denies the Union's contentions and declines the Union's request

FOR THE UNION:
(SGD.) W. Brehl
President

FOR THE COMPANY:
(SGD.) M. Moran
Manager Labour Relations, Edmonton

There appeared on behalf of the Company:

B. Sly	– Director Labour Relations, Calgary
G. DeCiccio	– Senior Vice President, Calgary
D. Freeborn	– Director Labour Relations, Calgary
D. Guerin	– Director Operations Centre, Calgary

There appeared on behalf of the Union:

W. Brehl	– President, Ottawa
D. Brown	– Counsel, Ottawa

AWARD OF THE ARBITRATOR

On February 12, 2013 the grievor was involved in an incident in which a speed swing which he was operating accidentally knocked down a pedestrian. The grievor was apparently assessed thirty demerits for his operation of the speed swing. He was also directed to undergo drug and alcohol testing after the accident.

The test results confirmed that the grievor tested positive on a urine drug test for marijuana. Following a disciplinary investigation, in which the grievor admitted to having consumed marijuana on a previous Saturday evening, he was discharged. That penalty was subsequently reduced to a thirty day suspension, discipline which is the subject of this grievance.

The Arbitrator cannot see any lawful basis upon which any discipline can be sustained as against the grievor in the circumstances. It is clear that the grievor did not possess or consume any unlawful drug while at work or subject to duty. It is equally clear that he was not impaired while at work or on Company premises. Fundamentally, the Company is imposing a workplace disciplinary penalty upon the grievor for activities in which he engaged off premises in his own off duty time. There is no evidence placed before the Arbitrator to suggest that the grievor's consumption of marijuana in a social setting affected or threatened the Company's legitimate business interests. As the Union's representatives characterized, what the discipline in the instant case seeks to

do is to assert a degree of control on the grievor's personal life away from the workplace.

The arbitral law in relation to this question is extremely well settled. It was well summarized in the passage of the award of this Arbitrator dated July 18, 2000 concerning the review of CN's Drug and Alcohol Policy (SHP 530), in that award the following comments appear :

The real conflict between the Company's drug and alcohol policy and the collective agreements of both the Union and the Intervener is the contradiction between substantial parts of the language of the policy and the just cause provisions of the agreements. For example, at p. 20 of the policy the Company states that " presence in the body ... of illegal drugs is prohibited while on duty". At page 16 of the policy employees are advised that any violation of the policy by an employee in a risk sensitive position "... will result in dismissal". However, it is common ground (and on this all of the expert witnesses are in agreement) that a positive drug test gives no indication as to when or in what amount the drug in question was ingested. More specifically, it cannot, standing alone, establish impairment while an employee is on duty, is subject to duty or is on call. In that context, if parsed literally, the rule expounded by the employer is that if an employee has ingested an illegal drug, for example marijuana, during a scheduled leave or holiday, and tests positive some weeks later, he or she will be discharged. In the Arbitrator's view, that rule is unreasonable on its face as there is no nexus between a positive drug test, standing alone, and impairment while on duty. So construed the rule would purport to regulate the private morality of employees, without reference to any clearly demonstrated legitimate employer interest.

Under the collective agreements, which contain extensive provisions for the investigation of disciplinary infractions, employees are to be discharged or disciplined only for just cause. To the extent that the policy stipulates that for unionized employees a positive drug test is, of itself, grounds for discipline or discharge, it must be found to be unreasonable, and beyond the well accepted standards of the KVP decision.

In addition, in the Arbitrator's view, the rule of automatic discipline or discharge cannot be defended on the basis of the general proviso found at p. 38 of the policy, which states that an investigation will be conducted "in accordance with the collective agreements, if applicable". The fact that a disciplinary investigation confirms that the policy has been violated by the mere fact of positive drug test does nothing to make the rule any more reasonable or justifiable on a legitimate business basis. A positive drug test, which is not proof

of impairment while on duty, while subject to duty or while on call, cannot, standing alone, be just cause for discipline.

In the instant case the Company notes that it has established, as part of its Alcohol and Drug Policy, Article 2.4.2 of OHS 5100 which effectively states that for employees in safety critical or safety sensitive positions a positive drug test, in and of itself, is a violation of the Company's policy. With respect, the Arbitrator cannot find that that aspect of the Company's policy, which in the strictest sense has no basis in science or technology with respect to impairment or the risk of impairment on the job, can fairly be said to be a valid rule in furtherance of the Company's legitimate business interests.

The arbitral jurisprudence in respect of drug testing in Canada is now extensive. It has been repeatedly sustained by the courts and is effectively the law of the land. Part of that law, as stated in the passage quoted above, is that a positive drug test, conducted by urine analysis, standing alone, does not establish impairment at a point in time which corresponds with an employer's legitimate business interests and, standing alone, cannot be viewed as just cause for discipline.

That is precisely what the instant case involves. The Company seeks to punish an employee for activity which occurred while he was off duty, off Company premises which, in and of itself, posed no threat or harm to the Company's operations or its legitimate business interests. In these circumstances the Arbitrator cannot responsibly conclude that the employer had just cause for the assessment of any discipline against the grievor, merely by reason of his having registered a positive result to a urine

analysis drug test, or by his admission that he did consume marijuana in a social setting while off duty.

The grievance must therefore be allowed. The Arbitrator directs that the thirty day suspension be removed from the grievor's record and that he be compensated for all wages and benefits lost.

September 13, 2013

MICHEL G. PICHER
ARBITRATOR