CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4247

Heard in Montreal, October 9, 2013

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The issuance to Gary McMillan of a 90 day suspension and discharge.

JOINT STATEMENT OF ISSUE:

Mr. Gary McMillan employed as a locomotive engineer at CN. He was accommodated permanently at a position with Bombardier working on GO train assignments. On June 12, 2013, following an investigation, Mr. McMillan was assessed a 90 day suspension "for 439 violation signal 118A3 located at Bathurst while working as an Engineer on GO assignment E672 on May 6, 2013". In addition, on June 12, 2013, following an investigation, Mr. McMillan was discharged from his employment for "failure to comply with CN's Drug and Alcohol Policy and Bombardier's Drug and Alcohol Policy and circumstances related to testing positive for drugs on May 6, 2012."

With regard to the 90 day suspension, the Union contends that there was no just cause for the suspension and that the penalty is unwarranted and excessive in all of the circumstances. The Union requests that the suspension be removed and Mr. McMillan be paid for the 90 days. With regard to the discharge the Union contends that there was no just cause for termination and that the penalty is unwarranted and excessive in all of the circumstances. The test and sample collection were not conducted properly and the results are therefore not reliable. Further, the Company could not ascertain whether Mr. McMillan was under the influence of drugs at the time of the incident. The Union requests that Mr. MacDonald be reinstated without loss of seniority and benefits, and that he be made whole for all lost earnings with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company does not agree with the Union's positions. With regard to the 439 violation, the Company contends that there is no dispute that the violation occurred. As with all 439 violations, running a red signal is a very serious rule violation that can have devastating effects. The Company's position is that the assessment of 90 day suspension is reasonable in all the circumstances as discipline was clearly warranted. With regard to the discharge, the Company does not agree that the test was flawed in anyway. The Company contends that a trained individual conducted the test and there was no contamination. The Company contends that the test was reviewed by a medical review officer and the result was confirmed that Mr.

McMillan had amphetamines in his system on May 6, 2013. The Company contends that during the investigation conducted, Mr. McMillan could provide no explanation for the amphetamines found in his system denying that he had any. Given the circumstances, the Company submits that discharge was warranted.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) R. Caldwell	**(SGD.) M. Marshall**
General Chairman	**Senior Manager Labour Relations**

There appeared on behalf of the Company:

M. Marshall	– Senior Manager, Labour Relations, Toronto
D. Larouche	– Labour Relations Manager, Montreal
K. Smolynec	– Senior Manager Occupational Health Services, Montreal
D. Gagne	– Senior Manager, Labour Relations, Montreal
G. Curtis	– Superintendent Regional Operations, Toronto

There appeared on behalf of the Union:

K. Stuebing	– Counsel, Toronto
R. Caldwell	– General Chairman, Bancroft
P. Vickers	– Retired General Chairman, Sarnia
P. Boucher	– Vice General Chairman, Belleville
B. Willows	– General Chairman, Edmonton
B. Ermet	– Vice-General Chairman, Edmonton
G. McMillan	– Grievor, Toronto

AWARD OF THE ARBITRATOR

This award concerns two grievances: a 90-day suspension assessed for a Rule 429 violation at Bathurst Street west of Union Station in Toronto as well as a discharge grievance. This latter grievance pertains to the company's allegation that the grievor ("Mr. McMillan") failed to comply with CN and Bombardier's drug and alcohol policies and circumstances relating to testing positive for drugs on May 6, 2013.

Mr. McMillan had 23 years of service at the time of his dismissal. Due to physical restrictions, Mr. McMillan was assigned to work in the GO transit system in 2004. He continued to work in that system through the transition of the GO contract to Bombardier, during which time CN continued to supply engineers to Bombardier while it

increased its engineer workforce. Mr. McMillan continued to work as a Commuter Train Operator (“CTO”) employed by CN but managed by Bombardier through a special agreement between CN and Bombardier renewed regularly since then.

Subsequent to sustaining two workplace injuries in the 1990’s, the most recent of which was in October 1999, Mr. McMillan was prescribed painkillers, including opioid painkillers, which led to oxycontin dependence. In 2003, Mr. McMillan commenced a monitoring program for the use of opiates and he was on a methadone program from March 2005 until January 2007. At that time, Mr. McMillan returned to safety critical duties. As per the medical guidelines that apply to persons employed in such positions, Mr. McMillan provided periodic medical reports to CN in 2006, 2007, 2009 and 2012. As part of that report, among other things, employees agree to report any medical condition that may constitute a threat to safe railway operations. In 2006 and 2007, Mr. McMillan’s reports referenced his oxycodone dependence and his methadone treatment. The 2009 and 2012 reports are checked off as “no” for substance abuse or dependence.

On May 6, 2013, while working on a GO assignment E872 in the Union Station Rail Corridor (“USRC”) rail line near Bathurst Street, Mr. McMillan, at approximately 18:43 hours, went through a red light signal at mile post 1.05, signal 118 A-3. Mr. McMillan knew that the signal before 118 A-3 was a clear to stop signal. He was unsure of signal 118 A-3’s indication. He proceeded through signal 118 A-3 at 55 mph. He should have been prepared to stop 300 feet prior to signal 118 A-3.

Mr. McMillan explained that the sun bothered both he and his crew mate, CTO-B, on May 6, 2013 as they were approaching signal 118A3. At the last second, Mr. McMillan and CTO-B realized the signal was red. Instead of bringing the train into emergency, Mr. McMillan applied the brakes and only applied the emergency brake when he approached a crossover. When asked specifically why he did not put the train into emergency immediately, Mr. McMillan stated: “I find that hard to answer. I saw no movement, I brought it to a controlled stop as soon as I could and then I plugged it.” The train stopped 1000 feet after the signal. Once stopped, Mr. McMillan assumed that he did not have to go flagging because the TTR had put out the emergency call and all trains were to stop. When CTO-B asked Mr. McMillan if he should go flagging, Mr. McMillan dissuaded him from doing so.

Immediately following this incident, the supervisor of the USRC line attended the scene and pulled the crew out of service. Mr. McMillan and TCO-B were taken back to Bombardier’s yards and were tested for alcohol and drugs, as per the normal procedure following a Rule 439 violation.

Before the urine test was administered, Mr. McMillan dropped the sample container in the toilet. Ideally another one would have been provided to him. Instead the specimen collector wiped the specimen container and gave it back to him. Mr. McMillan’s sample initially tested non-negative for amphetamines. Given the result, the sample was sent to the laboratory for analysis. The tests demonstrated that Mr.

McMillan had 13,423 ng/mg of amphetamines in his system. The positive cut-off level for this drug is 250 ng/ml.

In light of the result, on May 13, 2013, Dr. Greenwald, the Medical Review Officer (“MRO”), who validated the testing procedure and provided an extensive affidavit that explains the process of validation, contacted Mr. McMillan to notify him of the result and obtain an explanation. Mr. McMillan did not follow up with the MRO to contest the results of the test.

During that telephone conversation Mr. McMillan was also asked if he had any concerns about the test. He was offered an opportunity to contact the MRO’s office within a 72 hour window should he wish to contest the results of the test. Had he done so, a second confirmation test from the “split sample” obtained on May 6, 2013 would have been undertaken. During the conversation Mr. McMillan disclosed the medications prescribed to him and other over the counter medication he had taken. He denied taking any other prescribed, over-the counter or illicit drug use.

Mr. McMillan spoke with OHS after being informed of the positive test result. He answered questions about substance use. Among other information about medications he was currently taking, Mr. McMillan disclosed his history of oxycodone dependence and the methadone treatment programs prior to his return to duties in 2007. Mr. McMillan provided answers to questions 3,6 and 7 of the questionnaire administered on May 13, 2013, as follows:

3. “Have you ever used cocaine, crack, LSD, PCP, heroin, amphetamines of other illegal drugs?” No.

6. “Have you ever had problems related to the misuse of prescribed or over-the-counter medications?” No.

7. “Have you ever been in a treatment program for alcohol and drug addiction?” Mr. McMillan identified that he was in a program in the late 1990’s and early 2000, finishing the methadone program two years later.

At no time did Mr. McMillan identity that he was in any other programs or had any relapses since his return to safety critical duties.

Mr. McMillan attended at the meeting to investigate the circumstances of his positive urine test on May 22, 2011. At its outset, he expressed his view that the testing procedures were flawed because he had dropped the specimen container in the toilet prior to the sample collection. The investigative meeting ensued. He denied using amphetamines or drugs. Mr. McMillan was unable to explain the positive drug test.

In anticipation of this hearing, and on October 4, 2013 the Union provided to the Company correspondence dated September 26, 2013 from Dr. Lao, a family physician with a Methadone exemption licence since 2012. Mr. McMillan has been under the care of Dr. Lao in a methadone treatment program since December 2011, subsequent to a relapse. Dr. Loa also references a relapse in 1999 in his letter. Mr. McMillan was on a trial of “the Suboxone maintenance program” for a short time but that program proved unsuccessful. Relevant excerpts of Dr. Lao’s letter are set out below:

> Mr. McMillan's weekly monitored urine drug screens have been mostly negative for cocaine, benzodiazepines, opiates and oxycocet. We do not routinely screen for amphetamines unless clinically indicated. Urine toxicology is performed at a laboratory at the onset of the program. On these occasions in August 2009 and January 2012 the urine drug screens were negative for amphetamines.
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> Since restarting the Methadone program Mr. McMillan has been compliant and the weekly monitored urine drug screens have been mostly negative. He was positive for opiates perhaps on one or two occasions for legitimate reasons.
>
> In summary, in the period of time that I have known Mr. McMillan, he has been a model patient. He is stable on the Methadone maintenance program and has not demonstrated use of any illicit drugs. Clinically, there is no suspicion of amphetamine abuse and hence has not been tested for such drugs.

In addition to the letter from Mr. Lao, on the evening prior to the hearing, the Union provided to the Company a hair shaft screen report from a sample taken on October 7, 2013. The sample tested for amphetamines is negative.

Decision

The Union challenges the Company's assessment of discipline for both the Rule 439 violation as well as the discharge imposed for the violation of the CN's and Bombardier's Drug and Alcohol policies together with the circumstances relating to the positive testing for drugs on May 6, 2013.

Rule 439 Violations

With respect to the violation of Rule 439, the Union submits that the incident was an isolated one - simply an error in judgment. The Union points out that in Mr. McMillan's 23-year career, his disciplinary record reveals only warnings/reprimands with the exception of one prior Rule violation, namely Rule 308.1, in November 2012. The Union reminds me that there was no damage or injury stemming from the Rule 439

violation and that Mr. McMillan expressed remorse during his statement. Further, the Union points out that there is a range in the quantum of discipline to be assessed for a Rule 439 violation. In this case, it maintains that on an individual assessment of the circumstances here, a 90-day suspension is unwarranted.

A violation of Rule 439 is a cardinal rule violation, arguably the most critical cardinal rule. It is trite to say that as such it merits a serious disciplinary sanction. I have thoroughly reviewed the cases provided to me. The fact that there was no damage or injury flowing from this violation is of little assistance to Mr. McMillan. There could have been dire consequences. It is significant that Mr. McMillan was driving a passenger train at the tail end of rush hour when he went through a stop signal near Union station. Being “bothered” by the sunlight cannot begin to explain why Mr. McMillan went through a stop signal at 55 mph when he knew the signal before the 118 A-3 was clear to stop and that as such he had to stop 300 feet before reaching that point.

Mr. McMillan’s misconduct was compounded by his failure to immediately put the train in emergency once he saw the stop signal and again by only applying the emergency brake when he saw a switch further down the track not lined for his movement. As a result of Mr. McMillan’s actions, his train came to a stop 1300 feet beyond where it should have stopped.

The factual circumstances surrounding this Rule 439 Rule violation are extremely disconcerting and the threat to public safety occasioned by Mr. McMillan’s conduct

cannot be overstated. I have considerable difficulty understanding how a person with Mr. McMillan's service would bring his train to a stop in the manner he did. Moreover, Mr. McMillan inappropriately dissuaded CTO-B from flagging. These are aggravating circumstances.

In 2002, the Arbitrator in *CROA 3292* pointed out that prior awards had noted that long discipline free service is a compelling basis for a reduction of a 90-day suspension. He cites *CROA 2161, 2949*, and *3005* in support of that proposition. In doing so, the Arbitrator reduced the penalty from a 90-day suspension to 60-days in a case of a 29-year employee who had passed a stop signal in excess of 300 feet. In a more recent case before me, in *CROA 4105*, when a grievor with 38 years of service who had only been disciplined once, passed a stop signal by a car length in what were deemed by the same Arbitrator to have been aggravating circumstances, he upheld the 90-day suspension. Considering the aggravating circumstances surrounding the Rule 429 violation here, I do not consider this to be an appropriate case for a reduction of penalty.

Discharge for violation of CN's Drug and Alcohol Policy and Bombardier's Drug and Alcohol Policy and circumstances relating to testing positive for drugs.

The Union takes the position that the Company has expanded its grounds for discharge beyond Form 780. It argues that the Company is precluded from alleging Mr. McMillan's alleged dishonesty during its investigation of the drug test.

The Union also maintained that the urine specimen submitted for testing was contaminated and therefore unreliable. In addition, the Union relies on Dr. Lao's letter to challenge the validity of the May 6, 2013 test result. According to the Union, the hair shaft drug screen report from the sample collected on October 7, 2013 provides "unequivocal evidence" that he did not use amphetamines.

I cannot agree that the Company has sought to expand the grounds for termination. Counsel for the Union repeatedly referred to those grounds at the hearing as an allegation that Mr. McMillan had failed to comply with CN's and Bombardier's drug and alcohol policies. Mr. McMillan was not discharged merely for testing positive for amphetamines on May 6, 2013. Had that been the case discipline could not be sustained against him. The jurisprudence is clear that a positive drug test, which is not proof of impairment while on duty (or while subject to duty or on call), cannot, **standing alone** (my emphasis) be just cause for discipline. Mr. McMillan was discharged because of the "circumstances relating to the testing" that he could not explain. He was unable to provide any explanation as to why, assuming a valid test (which I will address below) there was 53 times the amount of amphetamines in his system on May 6, 2013, when the cut off for a positive result is 250ng/ml.

If I find that Mr. McMillan's test was indeed valid, that finding leads to the inescapable conclusion that Mr. McMillan was untruthful during the investigation. It will mean that Mr. McMillan continues to be untruthful to this day. To be dishonest in the

face of a positive test is, in my view, captured by the circumstances referred to in Form 780.

The Union's challenge to the validity of the test performed must fail. The affidavit of Dr. Greenwald, the MRO, who had direct knowledge of Mr. McMillan's testing, provides extensive and detailed evidence about the specimen collection and process by which the urine analysis was done. The evidence provided is highlighted in the company's submissions:

- The specimen collector in the grievor's case properly split the urine specimen into Bottles A and B, sealed the bottles and sent them to the laboratory as per normal procedures;

- The Urine sample was non-negative on the Point of Collection Test (POCT). Meanwhile, the specimen validity test levels were all normal, showing that the sample was not tampered with, contaminated or substituted in any way;

- The urine sample was analyzed in laboratory and showed amphetamine. It was tested positive at 13,423 ng/ml, while a level below 250 ng/ml would have been considered negative;

- Dr. Greenwald reviewed the test, as she does in any positive results. She talked with Mr. McMillan and advised him of the results. He did not voice any concerns about the testing process during the interview and did not contest the drug test results when he was advised of the 72-hour window to do so;

- When Dr. Greenwald was contacted by CN following the first part of the employee statement, she was made aware of Mr. McMillan's allegation. Dr. Greenwald explains in great details how nothing the grievor stated could have impacted the validity of the test;

- The POCT container had no water in the chamber. The separate POCT test reaction chamber was not open, activated or exposed. Moreover, any amount of water entering in the container could have changed the sample temperature, most likely lowering the temperature such that it would have shown to be outside of acceptable range for testing. The specimen collector tested the specimen pH, specific gravity and temperature, which were all normal;

- Moreover, the analytical laboratory also checks the sample for dilution, and it was found by the lab that the sample was not diluted, confirming that the sample contamination had not occurred.

I accept Dr. Greenwald's medical opinion that there was no procedural or medical explanation for the positive amphetamine test result and that the test result confirmed that Mr. McMillan had amphetamines in his system on May 6, 2013.

Mr. McMillan had an opportunity to challenge the validity of the test when he spoke with Dr. Greenwald and the fact that he did not do so at that time is suspect. Moreover, a careful review of the above-cited portions of Dr. Lao's letter does not assist Mr. McMillan in challenging the test results. Negative tests for amphetamines in August 2009 and January 2012 do not speak to the May 6, 2013 test and those were the only two occasions Mr. McMillan has been tested for amphetamines since he has been under Dr. Lao's care.

Moreover, the timing of the hair shaft drug screening report stemming from a sample taken on October 7, 2013, five months after May 6, 2013, on the eve of the hearing is equally suspect. There is not dispute that the further out the testing, the less accurate it is. What the Union asserts is unequivocal evidence that Mr. McMillan did not use amphetamines at any time prior to May 6, 2013 is evidence that I cannot accept. The test performed on May 6, 2013, is the best and most reliable evidence.

What Dr. Lao's letter does reveal, however, is that Mr. McMillan has not been forthcoming about the status of his health, specifically as it relates to his medical condition that "may constitute a threat to safe railway operations." The excepts from Dr. Lao's letter make it clear that Mr. McMillan was dishonest during his interview and that

he concealed his relapses in 2009 and 2011 and his ongoing treatment with OHS on May 13, 2013. Moreover, Mr. McMillan did not identify “substance dependence” in completing the periodic medical report in 2012. He had done so in 2006 and 2007. The fact that Mr. McMillan did not disclose his relapses on the 2012 periodic report is consistent with Mr. McMillan concealing them during the investigation.

I can come to no other conclusion that Mr. McMillan was dishonest with the Company in his statement on May 22, 2013, and that continued to maintain that dishonestly, when he could have “come clean” in the face of the overwhelming evidence of a positive test result for amphetamines. He has been dishonest with the Company and during the course of this proceeding.

In all the circumstances, Mr. McMillan’s conduct, properly characterized as dishonest, meant to conceal and deceive the Company, is incompatible with the safety critical position Mr. McMillan held. By his actions Mr. McMillan has destroyed the bond of trust essential between himself and his employer.

For all of these reasons, the grievances are dismissed.

October 14, 2013

CHRISTINE SCHMIDT
ARBITRATOR