CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4256

Heard in Calgary, November 12, 2013

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The Company's requirement to have Traffic Coordinator M, of Vancouver, BC, undergo drug testing due to an incident occurring in the Yard on January 30, 2010.

UNION'S EXPARTE STATEMENT OF ISSUE:

On January 30, 2010, the Grievor was working as Traffic Coordinator in Lynn Creek Yard in Vancouver. During this tour of duty, a yard crew was involved in a side collision. Despite the fact that the Grievor was not in charge of the movement, had not authorized the movement, and had no knowledge that the crew was making the movement or that an incident had occurred, the Company required the Grievor to undergo testing for drug and/or alcohol impairment. The test was negative.

The Company acknowledges that the Grievor "...was not directly in control of the movement and did not know it had occurred until informed by the crew."

It is the Union's position that the testing was unnecessary, unreasonable and contrary to the Company's policy.

The Company disagrees, stating in their Step II response that the Grievor was "...directly responsible for all movements happening in the Lynn Creek yard" and that "The Officer on scene had determined that this incident was caused by a rule violation and/or employee judgement, but was unsure if it was caused by a failure of the other employees or the extent of Mr. M's direct involvement in the incident"

The Company has not otherwise responded to the grievance.

FOR THE UNION:
(SGD.) R. Hackl
General Chairman

FOR THE COMPANY:
(SGD.)

There appeared on behalf of the Company:

D. Crossan	– Manager Labour Relations, Prince George
K. Morris	– Senior Manager Labour Relations, Edmonton
P. Payne	– Manager Labour Relations, Edmonton
D. Brodie	-- Manager Labour Relations, Edmonton

M. Petersen -- Assistant Superintendent, Vancouver

There appeared on behalf of the Union:

D. Ellickson – Counsel, Caley Wray, Toronto
R. Hackl – General Chairman, Saskatoon
R. Thompson – Vice General Chairman, Saskatoon
J. Robbins – General Chairman East, Sarnia
J. Lennie – Vice General Chairman East, Port Robinson

AWARD OF THE ARBITRATOR

The record confirms that on January 30th, 2010 the grievor, M, was on duty as the traffic coordinator at Lynn Creek yard. Among employees under his direction was the crew of the 06:30 extra yard assignment comprised of a locomotive engineer, a conductor and an assistant conductor. At or about 13:15 the Company learned that the yard assignment train was involved in a substantial side collision. As the locomotive engineer of that assignment was proceeding outwards from the yard his movement collided with substantial force into a train with an extensive consist of cars that was stationed on track NF-52.

It is common ground that the cars on track NF-52 had been placed there by the grievor some forty minutes previous. They had in fact been left foul of the switching lead by the grievor.

Following an initial investigation of the collision Trainmaster Kaviraj Cheema and Assistant Trainmaster Mike Petersen removed all of the employees involved from service based on the instruction of the General Superintendent.

The subsequent investigation made on the ground by General Superintendent Taylor indicated that the conductor and assistant conductor of the yard assignment were located at a substantial distance, at the east end of NF-57 at the time the collision occurred. Based on that information Mr. Taylor determined that post-accident drug and alcohol testing should occur but that it should be limited to the locomotive engineer and the grievor. In the Company's submission the decision to test was made based on the probability of a rule violation having occurred, with a possible involvement of an error in an employee's judgment resulting in a serious accident. The drug and alcohol tests of both the grievor and the locomotive engineer were returned as negative.

Although following a disciplinary investigation conducted on February 3, 2010 the grievor was assessed a written reprimand, that discipline was in fact later removed by the Company at Step 2 of the grievance procedure. The instant grievance does not relate to discipline. It relates solely to the Union's assertion that the Company did not have proper grounds to require the grievor to undergo drug and alcohol testing.

In the instant case the decision to conduct drug and alcohol testing of the Yard-master as well as the locomotive engineer following the serious collision which occurred was made pursuant to the Company's view of the proper exercise of its discretion in respect of post-accident testing under the terms of the CN Policy to Prevent Alcohol and Drug Problems and its related Guidelines. That Policy provides in part:

> 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.

Counsel for the Union argues that there was simply no logical basis to conclude that the grievor, then on duty as Yardmaster, had any material involvement in the collision which occurred so as to render himself subject to the possibility of post-accident testing. He stresses that he was not involved in the yard movement which caused the collision and was in fact located at all material times in the yard office at some distance. The Company's representatives respond that as Yardmaster the grievor was responsible for all movements within the yard, that he had placed the consist of cars in track NF-52 and had failed to provide to the yard crew the opportunity of a pull back to allow their movement to operate in a clear path.

After a careful review of the facts the Arbitrator is compelled to agree with the Union. I must agree with the Union as to the appropriateness of the comments made by Arbitrator Sims in *Weyerhaeuser Company Ltd. v. C.E.P., Local 447 [2006], 154* L.A.C. (4th) 3, in respect of the thresholds for properly invoking post-incident or post-accident drug and alcohol testing. In that award Arbitrator Sims took issue with the approach taken by the employer. He commented, in part, as follows:

> There are 3 elements to the post-incident testing discussed in the cases of particular significance here. They are the threshold level of incident needed to justify testing, the degree of inquiry necessary before the decision is made, and the necessary link between the incident and the employee's situation to justify testing.

In the view of Arbitrator Sims, which this Arbitrator shares, there must be a genuine exercise in judgement by the employer to justify post-incident testing, meaning more than the mere application of a checklist. At page 54 of his award Arbitrator Sims further commented in that regard:

> However, as was obviously the case in *Fording (Kryderman)*, and as is the case here with the use of the "Quick Guide" if such a device too readily leads to the attitude that "if we tick off the boxes we can test" it is harmful because it distracts from judgment that inevitably needs to be exercised based on the entire circumstances. It is not enough to say, "Ok – we have enough to test" if important factors have been ignored or avoided. The individual to be tested should, unless the circumstances preclude it, be asked for their explanation. If they are sufficiently close to the incident to justify finding out whether their being impaired might be part of the cause, their explanation of events must also be relevant to the decision as to whether testing is justified.

It is of interest, as stressed by counsel for the Union, to note that there was nothing suspicious suggested in the Reasonable Cause/ Post Incident Report Form filled out by Trainmaster Cheema. In that form under "behaviour observed" he noted the grievor's speech, balance / walking and eyes all to be "normal". He made a similar assessment of the grievor's mood / behaviour as well as the condition of his skin and the level of his awareness. In the result, on the face of the report form there is nothing unusual or irregular reported with respect to the actions or conditions of the grievor as observed by Trainmaster Cheema.

Nor, as also stressed by the Union, is there any indication that the grievor had any proximate involvement in the collision. There is no suggestion that he was in immediate radio contact with the crew as it was performing its work, that he gave any particular directions to the crew or had any other operational involvement in the incident which resulted in the collision.

In the circumstances, I have substantial difficulty understanding on what basis the Company's officers could conclude that there was a clear link or a probable link between the incident which occurred and the grievor's actions or condition. He was,

very simply, going about his business conducting other work in the yard office at the time of the collision. There is no suggestion that he contributed to the collision nor was any discipline ever assessed against him. Nor has it been suggested by the Company that the Yardmaster was under any obligation to give a special warning to the locomotive engineer with respect to the presence of a substantial consist of cars in track NF-52, a fact that was plainly obvious for the locomotive engineer to see.

What the material before the Arbitrator establishes is that a collision occurred in the yard while the grievor was on duty as Yardmaster. With respect, that of itself does not justify requiring an employee to undergo a drug and alcohol test in the wake of a collision or other accident. There is no evidence to suggest that the Company's officers who conducted the preliminary investigation of the collision believed or had reason to believe that any act or omission of the grievor contributed to the collision which occurred. There is no suggestion that there was anything improper in his having placed a consist of cars in NF-52 or that he was under any particular obligation to alert yard crews about the presence of cars in that track. Nor, as noted above, was there anything to suggest to the Company's supervisors that Yardmaster M was in any way involved in the minute to minute operations of the yard movement which became involved in the collision due to the apparent carelessness of its locomotive engineer.

In all of the circumstances I am compelled to agree with the Union that the Company's officers did not have a sufficient basis to conclude that the grievor had any involvement or likely responsibility for the collision which occurred. To use the words of

Arbitrator Sims, the Company has not established the necessary link between the incident and the situation of the grievor so as to have justified the requirement that he undergo drug and alcohol testing.

The grievance is therefore allowed. The Arbitrator declares that the Company exceeded the proper bounds of its own Drug and Alcohol Policy and violated the grievor's rights by requiring him to undergo a drug and alcohol test. With respect to any further remedy beyond this declaration the Arbitrator remits the matter to the parties and retains jurisdiction.

November 18, 2013

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MICHEL G. PICHER

ARBITRATOR