CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4288

Heard in Montreal, February 12, 2014

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the termination of Locomotive Engineer David Lee.

UNION'S EXPARTE STATEMENT OF ISSUE:

Following an investigation, Engineer Lee was discharged on September 19, 2012 for "conduct unbecoming an employee as evidenced by your refusal to provide relevant information regarding your positive substance test results from a test conducted on August 10th, 2012, following a Cardinal Rule Violation, during your tour of duty as Locomotive Engineer on 2/C25-10 at Medicine Hat, Alberta, a violation of Company Policy OHS 4100."

The Union contends that the investigation was not conducted in a fair and impartial manner per the requirements of the Collective Agreement. For this reason, the Union contends that the discipline is null and void and ought to be removed in its entirety and Engineer Lee be made whole.

Alternatively, the Union contends that the Company's collection and administration of a substance screening test to Engineer Lee in the circumstances on August 10th, 2012 breached the terms of Policy 5100, the June 16, 2010 and February 8, 2012 Agreements between the parties, the Collective Agreement, the Criminal Code of Canada, the Canada Human Rights Act and the Personal Information Protection and Electronic Documents Act.

The Union contends that Engineer Lee's dismissal is unjustified, unwarranted and excessive in all of the circumstances, including that there is no job-related misconduct disclosed in these circumstances. Finally, the Union contends that Mr. Lee's discharge was contrary to the Collective Agreement and the Canadian Human Rights Act.

The Union requests that the discipline be removed in its entirety, that Engineer Lee be ordered reinstated forthwith 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.

FOR THE UNION:
(SGD.) D. Able
General Chairperson

FOR THE COMPANY:
(SGD.)

There appeared on behalf of the Company:

B. Sly	– Director Labour Relations, Calgary

There appeared on behalf of the Union:

D. Ellickson	– Counsel, Caley Wray, Toronto
G. Edwards	– Senior Vice General Chairman, Revelstoke
D. Able	– General Chairman, Calgary
D. Becker	– Local Chairman, Medicine Hat
D. Olson	– General Chairman, Calgary
D. Fulton	– Vice General Chairman, Calgary
G. Edwards	– Vice General Chairman, Calgary
D. McCulloch	– Local Chairman, Saskatoon
D. Lee	– Grievor, Dunmore

AWARD OF THE ARBITRATOR

During the course of the grievor's shift on August 10, 2012 a tank car was improperly released and travelled a substantial distance through a switch in uncontrolled circumstances. Following the incident the grievor and his crew were made to undergo post-incident drug and alcohol testing. The urine sample obtained from the grievor returned positive for prohibited drugs. It does not appear disputed that at the time of the drug testing the grievor passed a saliva swab test, thereby confirming that he was not impaired at the time of the incident.

During the course of the ensuing disciplinary investigation the Company's investigating officer repeatedly asked the grievor a number of questions with respect to when he last used the substance which caused his positive drug test, a question the grievor declined to respond to on the advice of his Union. Subsequently, by notice dated September 19, 2012 the grievor was advised that he was dismissed: "for conduct

unbecoming an employee as evidenced by your refusal to provide relevant information regarding your positive substance test results from a test conducted on August 10, 2012, following a Cardinal Rule Violation, during your tour duty as Locomotive Engineer on 2/C25-10 at Medicine Hat, Alberta, a violation of Company Policy OHS 4100."

Specifically, at Q & A 51 the Company's officer asked the grievor "On what date did you take the substances that resulted in a positive drug test ?" Thereafter, at Q & A 54 he asked "When did you last use the substance that resulted in a positive drug test in relation to the start of your shift on August 10 ?"

As noted above, the grievor declined to answer both questions on the advice of his Union. As is apparent from the notice, it is the grievor's refusal to provide that information which the Company chose as the grounds for his termination. The Company's fundamental position appears to be that it was entitled to know the time at which an illegal drug may have been consumed by the grievor as part of its inquiry into the causation of the Cardinal Rule Violation which occurred.

The Union submits that the Company has effectively agreed that questions such as those put to the grievor are not proper during the course of a disciplinary investigation. In that regard it cites an agreement made between the parties dated June 16, 2010. That agreement provides, in part :

> 12. The Company confirms that the quantitative results or drug substances type of any and all substance screening tests taken under the Revised Policy shall be provided exclusively to the Company's Occupational Health Services (OHS) department. The Company further confirms that at no point will any Company supervisors be provided the quantitative results or drug substance type

> of a substance screening test conducted under the Revised Policy, other than whether the test is “negative” or “non-negative” in respect of the applicable cut-off concentration under the Revised Policy either “negative” or “positive” with regard to a breath alcohol test.
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> 13. The Company confirms that, should an employee be asked to attend a formal statement (i.e. investigation) further to any issue arising under the Revised Policy, under no circumstances will the Investigating Officer inquire as to the specific or quantitative results or drug substance type of any substance screening test conducted under the Revised Policy (other than “negative”, “positive” or “non-negative”). Further, the Investigating Officer shall not require any explanation by any employee as to the quantitative results or drug substance type of any substance screening test conducted under the Revised Policy. However, in the even that such a question, or a question of equivalent consequence is advanced to an employee, the employee may refuse to answer without any consequence or adverse inference whatsoever.

In the Arbitrator’s view the questions put to the grievor did not run afoul of the protections found in paragraphs 12 and 13 of the parties’ Agreement of June 16, 2010. The investigating officer did not in fact inquire as to the specific or quantitative results or the precise nature of the drug substance used by the grievor which would have caused his positive drug test result. His questions went solely to the time at which the grievor last consumed the substance that resulted in his positive drug test. In the Arbitrator’s view that is a relevant consideration for a safety sensitive employer to take into account and constitutes a question not prohibited by the parties’ agreement of June 16, 2010. I cannot find that the questions put to the grievor by the investigating officer violated the parties’ agreement. It is important to stress that the inquiry of the investigation officer was not ask the specific or quantitative results or drug substances type used by the grievor, but merely as to when he last made use of a prohibited drug. That is a question which, in my opinion, is in no way prohibited by the parties’ agreement of June 16, 2010.

While it is true that the investigating officer asked the grievor whether he was willing to volunteer information with respect to the quantity and substance type used, when the grievor declined to do so the matter was not pursued. That said, however, it is difficult to square the question put by the investigating officer with the parties agreement of June 16, 2010 which expressly states that "under no circumstances will the investigating officer inquire as to the specific or quantitative results or drug substances type…" It may be a relatively fine point, but the fact remains that the investigating officer did not directly ask the grievor the prohibited questions, but rather inquired as whether he was willing to volunteer that information. In my view what occurred was not a violation of the parties' agreement of June 16, 2010. I am not, upon a review of the material before me, satisfied that the grievor was in fact denied a fair and impartial investigation in respect of his positive drug test.

Of greater concern is the Company's decision to terminate Mr. Lee, an employee of eighteen years of service with a relatively good disciplinary record which stood at five demerits, at the time of the culminating incident. The grievor does not present as chronic problem employee. Moreover, as is well established in the jurisprudence, the registering of a positive drug test by way of urinalysis does not confirm that the grievor was impaired at the time of the incident which gave rise to the Company's decision to perform drug testing. Indeed, it does not appear disputed that the cheek swab test also performed confirmed that the grievor was not impaired at the time. Given that information, I have some difficulty understanding the pertinence of the investigating officer's inquiry as to the precise time and circumstances of the grievor's last use of the

drug which prompted the positive result, save perhaps to deal with the relatively speculative question of whether that drug consumption might have occurred while the grievor was on duty or subject to duty.

Notwithstanding the foregoing observations, the Company does make what I consider to be a proper and important submission. Absent any response from grievor as to the time of his drug consumption, the Company could have no assurance that he was not under the influence of a prohibited substance at some point when he was on duty or subject to duty. I find it difficult to dismiss the Company's concern or rule that the time and place of drug consumption by an employee in a highly safety sensitive industry is an irrelevant matter beyond the proper inquiry of his or her employer. By way of example, it would obviously make a substantial difference if an employee admitted to having smoked marijuana during his or her vacation as opposed to having consumed that drug immediately prior to coming to work or while on duty. I am satisfied that there was nothing inappropriate in the questions put by the investigating officer, save perhaps asking the grievor to volunteer the nature of the substance consumed in a repeated and relatively insistent manner. I must, however, conclude that the grievor was under no form of immunity against answering the Company's questions with respect to the precise time of his drug consumption, given the employer's legitimate interests in the safety of its operations. In my view his refusal to answer those legitimate inquires did render him open to discipline of a serious nature.

In the result, while I am satisfied that the grievor was deserving of discipline, on the whole I consider that it is not inappropriate to return him to his employment, subject to conditions fashioned to protect the employer's legitimate interests. The grievance is therefore allowed, in part. The Arbitrator directs that Mr. Lee be reinstated into his employment forthwith, without compensation for wages and benefits lost and without loss of seniority, on condition that he accept to work under the following conditions: for a period not less than two years from the date of his reinstatement the grievor shall be subject to random alcohol and drug testing to be administered in an non-abusive fashion. Should he decline to undergo testing or test positive for either drugs or alcohol, he shall be subject to termination.

February 17, 2014

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MICHEL G. PICHER
ARBITRATOR