

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4311**

Heard in Montreal, May 14, 2014

Concerning

CANADIAN PACIFIC RAILWAY

And

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

DISPUTE:

Dismissal of Mr. B.B.

JOINT STATEMENT OF ISSUE:

On December 12, 2013, the grievor, Mr. B.B., was dismissed by the Company for "operating a vehicle in an unsafe manner" and for his "willful use of an illegal and prohibited substance resulting in a positive test conducted on November 12, 2013." A grievance was filed.

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 is a long service employee with a positive record. His discipline record was clear at the time of the incident. The Company failed to follow the rules of progressive discipline. The discipline assessed the grievor was unfair, excessive and unwarranted.

The Union requests that the grievor be reinstated into Company service immediately without loss of seniority and with full compensation for all wages and benefits lost 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.) D. Cote

There appeared on behalf of the Company:

D. Guerin	– Director Labour Relations, Calgary
N. Hasham	– Counsel, Labour & Litigation, Toronto

There appeared on behalf of the Union:

W. Brehl	– President, Ottawa
A. Della Porta	– Director, Lachute

AWARD OF THE ARBITRATOR

At the time of the events here under consideration the grievor was assigned as an assistant thermite welder on the Northern Ontario Thermite Welding Crew. As part of his assignment the grievor was required to drive a high rail equipped Ford F250 Truck from Sudbury to Nipigon in preparation for a work cycle to begin on November 13, 2013. To shorten the driving time and distance the grievor chose to take a gravel road known as the Ramsey Road, apparently a road used by the public but essentially dedicated to lumber and logging operations. As he was travelling across the Ramsey Road at approximately 14:00 on November 12, 2013 the grievor encountered packed snow and slippery conditions and his truck did a 180° turn, as well as a complete roll, coming to rest upright against a tree. From that situation Mr. Bigney was driven to the Chapleau station by a passerby in another vehicle.

After the grievor's return to a motel in Chapleau, upon receiving his report of the events management determined that he should be made subject to a post-incident/accident substance test. That test was taken beginning at 20:40 the same evening, as a result of which Mr. Bigney registered positive on the urine drug test for the consumption of marijuana. During a subsequent disciplinary investigation he stated that : "I smoked a joint on the weekend". As his crew was then on an 8/6 work cycle the weekend would have involved six consecutive days off, and no further information was sought nor offered with respect to the precise time the marijuana was might have been consumed.

Following a disciplinary investigation Mr. Bigney was dismissed for operating a vehicle in an unsafe manner as well as for his wilful use of an illegal and prohibited substance, causing a positive drug test on November 12, 2013.

The grievor is an employee of some twenty-five years of service. It does not appear disputed that he had only been disciplined on one previous occasion over all of those years, apparently for the consumption of alcohol in a motel room provided by his employer. In the Arbitrator's view while the grievor's actions were serious, particularly with respect to the accident which effectively disabled his truck, albeit without major damages to it, I do not consider this a case appropriate for the employee's termination. Firstly, there is no evidence that the grievor possessed or consumed any illegal drugs while on duty or subject to duty. The positive drug test which he did undergo establishes only that at some indeterminate time prior to the test he did consume marijuana. His own account that he did so while off duty is not contradicted by any significant evidence. In my view the Company knew, or reasonably should have known, that the off duty consumption of marijuana would not, of itself, sustain the discharge of a twenty-five year employee with a close to exemplary disciplinary record. There is, very simply, nothing in the evidence to link his consumption of marijuana, which he states occurred during the off duty period of a weekend, with his duties and obligations as an employee. There is simply no evidence to establish that the grievor attended at work in the possession of drugs, under the influence of drugs or suffering the after effects of recent drug consumption. It should perhaps be stressed that no medical evidence was tendered with respect to the nature or possibility of "after affects".

In the result, I am compelled to the conclusion that the grievor's off duty consumption of an illicit drug, a fact which I am satisfied had no causal relationship to his driving accident, could not form the basis of any discipline against the grievor. At most, he committed an error in driving on a slippery road for which I am satisfied that some measure of discipline was appropriate.

For the foregoing reasons the grievance is allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, with compensation for all wages and benefits lost. The only discipline to be registered against him shall be the assessment of twenty demerits for the unsafe operation of a Company vehicle.

May 20, 2014

MICHEL G. PICHER
ARBITRATOR