

**CANADIAN RAILWAY OFFICE OF ARBITRATION  
& DISPUTE RESOLUTION  
CASE NO. 4314**

Heard in Montreal, May 15, 2014

Concerning

**CANADIAN PACIFIC RAILWAY**

And

**TEAMSTERS CANADA RAIL CONFERENCE  
RAIL TRAFFIC CONTROLLERS**

**DISPUTE:**

Appeal of the 45 demerits issued to Rail Traffic Controller David Tremain on August 6, 2013 for his alleged violation of CROR Rule 136c and RTC Manual Section 8.3 Verification of Authorities during his tour of duty on July 4th, 2013 and his dismissal for conduct unbecoming for allegedly engaging in an illicit and prohibited substance (cocaine) incompatible with his Safety Critical position as evidenced by the positive result of his post incident/accident substance test held on July 4<sup>th</sup>, 2013.

**JOINT STATEMENT OF ISSUE:**

On July 10, 2013 Rail Traffic Controller David Tremain attended an investigation in connection with the events surrounding his issuance and subsequent protection of an OCS train clearance when he allegedly failed to catch an incorrect verification repeat of an OCS train clearance when it was voiced by the Conductor during his shift as the Windermere Sub RTC on July 4, 2013. The error resulted in the movement of a train proceeding into the limits of a Foreman's Track Occupancy Permit, without authorization and protection.

Subsequent to his alleged rules violation, Mr. Tremain was taken for post-incident/accident substance testing. Mr. Tremain tested positive for cocaine during his urine test but tested negative during his breath alcohol test and negative during his oral swab test.

The Union contends that given Mr. Tremain's previous discipline record the assessment of 45 demerits for this incident and the resulting dismissal for conduct unbecoming is excessive. The Union requests that RTC Tremain be reinstated without loss of seniority and be made whole for all lost wages and benefits.

The Company disagrees and denies the Union's request.

**FOR THE UNION:  
(SGD.) S. Brownlee  
General Chairperson**

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

There appeared on behalf of the Company:

D. Guerin – Director Labour Relations, Calgary  
N. Hasham – Legal Counsel, Toronto  
B. Free – Manager,

There appeared on behalf of the Union:

D. Ellickson – Counsel, Caley Wray, Toronto  
S. Brownlee – General Chair, Stony Plain  
C. Clark – Vice General Chair, Okotoks  
D. Tremain – Grievor, Calgary,

### **AWARD OF THE ARBITRATOR**

The record confirms that the grievor did admittedly commit an error while managing the Windermere subdivision as its rail traffic controller on July 4, 2013. It is common ground that he did not correct an error made by a crew on train 567-04. The grievor was giving the crew a clearance for the south siding switch at Canal flats and during the radio exchange the crew's repeat of the clearance incorrectly identified the location as the North siding switch at Canal flats. The grievor missed that error and gave the clearance. As a result, train 567-04 made a slight entry into the limits of an area protected by a track maintenance foreman.

Following the incident the grievor was required to undergo a post-incident drug and alcohol test. That test was returned positive for cocaine. As the positive indication was found through urine analysis, the test could not confirm that the grievor consumed cocaine while on duty or subject to duty. His unchallenged representation is that on two prior occasions he had consumed cocaine in a social setting, while off duty. Following an investigation the Company assessed forty-five demerits against the grievor for his

rules violations and registered his dismissal for conduct unbecoming by reason of his positive drug test.

The Arbitrator has difficulty with both heads of discipline.

The grievor is an employee of twenty-five years of service, who had no demerits on his record at the time of the incident here under consideration. In fact his record was such that he had garnered thirty-seven positive merit points on his record, albeit he was subject to discipline in the past.

I deal firstly with the issue of the rule violation. As noted above, it is not disputed that the grievor made an error in failing to detect and correct a mistake in a repeat communicated to him by a crew in the field. In my view, given the length of the grievor's service and the quality of his discipline record, the assessment of twenty demerits would have been ample to convey to him the importance of bringing close care and attention to his communications with running crews in the field. I am therefore satisfied that it is appropriate to reduce the discipline assessed for his rules infraction to twenty demerits.

I am also compelled to accept the submission of the Union concerning the Company's purported discharge of the grievor for having consumed cocaine in a social setting during his off-duty time. There is no suggestion in the instant case of the grievor having possessed or consumed cocaine while on duty or subject to duty.

In a recent award, **CROA&DR 4240** the Company discharged a running trades employee who tested positive on a urine drug test for marijuana. There was no suggestion that he had consumed marijuana while on duty or subject to duty. In that award, which allowed the grievance and reinstated the employee with compensation, the Arbitrator made the following comment:

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 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.

I am satisfied that the principles commented upon above apply in the instant case, as regards the grievor's positive drug test. There is simply no evidence to suggest that the grievor possessed or consumed any illegal drug while on duty or subject to duty. The fact of testing positive for cocaine, for use on the grievor's own time and in a social setting, does not give rise to any violation of the grievor's obligations towards the Company as an employee, and cannot form the basis of any discipline. I must agree with counsel for the Union that the instant case is to be resolved on the basis of the principles discussed and conclusions reached in **CROA&DR 4240** and **4296**.

For the foregoing reasons the grievance is allowed, in part. The Arbitrator directs that the discipline against the grievor for his rules violation be reduced to twenty demerits, and that he be reinstated into his employment forthwith, with no discipline to be recorded in relation to his positive drug test, with compensation for all wages and benefits lost.

May 20, 2014

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MICHEL G. PICHER  
ARBITRATOR