

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4329**

Heard in Montreal, July 10, 2014

Concerning

CANADIAN PACIFIC RAILWAY

And

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

DISPUTE:

Dismissal of Employee K.

UNION'S EXPARTE STATEMENT OF ISSUE:

On January 14, 2014, the grievor, Mr. K, was issued two Forms 104. The first advised him that he was assessed with 30 demerits for his alleged failure, on December 12, 2013, to operate a spreader safely resulting in a collision between the spreader and a signal. The second 104 informed him that he was dismissed from Company service for a violation of Rule G as evidenced by positive test results on December 12, 2013. Both matters were grieved but the present dispute deals only with the Company's decision to dismiss.

The Union contends that the grievor acknowledges smoking a joint of marijuana on the night of December 11, 2013; on December 12, 2013, the grievor began work at 5:00 AM. At approximately 11:00 AM the above mentioned collision occurred. Throughout the day, the grievor had a number of exchanges with supervisors, none of which detected any evidence of impairment. The substance tests were administered between 7:00 and 7:30 PM. In these circumstances, it was improper for the Company to administer the tests; DriverCheck, the Company that oversaw the tests, acknowledges that oral fluid testing can only establish likely usage and not definite usage. The grievor was not impaired while at work; the grievor commenced service in August 1977 and has a near perfect discipline record. He has no history of substance abuse or drug use. His dismissal was excessive, unfair 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.

The Company denies the Union's contentions and declines the Union's request.

FOR THE UNION:
(SGD.) W. Brehl
President

FOR THE COMPANY:
(SGD.)

There appeared on behalf of the Company:

B. Sly – Director, Labour Relations, Calgary
N. Hasham – Counsel, Toronto

There appeared on behalf of the Union:

W. Brehl – President, Ottawa
D. Brown – Counsel, Ottawa
K. – Grievor, Sudbury
W. Coe -- Witness, Parry Sound

AWARD OF THE ARBITRATOR

The grievor, employee K, tested positive for the consumption of marijuana in the course of a substance test conducted following a collision between a spreader which he was involved in operating and a dwarf signal on the Parry Sound subdivision during snow clearing operations on December 12, 2013. The grievor does not deny that he consumed marijuana. By his unchallenged account, he did so on the prior evening in the company of a friend. It is not disputed that employee K tested positive both through a confirmatory urine drug test and a positive oral fluid drug test.

The Company's representatives stress that the positive oral swab test would be consistent with the consumption of marijuana at time prior to or subject to his duty period, and possibly while on duty, suggesting that he was potentially impaired while operating the spreader.

In the Arbitrator's view, for the purposes of disposing of this grievance, even if the scenario posited by the Company is true, and that the grievor's consumption of marijuana was closer in time to his commencing work, I consider that there are substantial mitigating factors in the instant case which must be considered. The grievor

is a highly respected employee of some twenty-six years of service with the Company. During part of that time he served in a number of Union functions, including the System Federation General Chairman of the Canadian System Federation, being the Union's highest ranking officer with the Company. He is a person of known integrity and decency.

While the Arbitrator is satisfied that employee K did violate the Company's drug and alcohol policy, and improperly consumed marijuana at a precise time which I find it unnecessary to determine, save that it was in reasonable proximity to his period of active duty, I am not persuaded that this grievance cannot be resolved on the basis that respects the grievor's past contributions to the Company and protects the Company's legitimate interest going forward.

For these reasons the grievance is allowed, in part. I direct that the grievor be reinstated into his employment forthwith, without loss of seniority and without compensation for any wages or benefits lost. For the period of two years following his reinstatement the grievor shall be subject to random drug testing, to be administered in a non-abusive fashion. Any positive drug test will obviously have the most negative consequences for his employment security.

July 14, 2014

MICHEL G. PICHER
ARBITRATOR