# CANADIAN RAILWAY OFFICE OF ARBITRATION

# & DISPUTE RESOLUTION

# CASE NO. 4355

Heard in Montreal, January 14, 2015

Concerning

**CANADIAN PACIFIC RAILWAY COMPANY**

And

**TEAMSTERS CANADA RAIL CONFERENCE**

**DISPUTE:**

The discharge of Locomotive Engineer J. Cinq-Mars on December 6, 2013 for willingly failing to comply with the Canadian Pacific Alcohol and Drug Policy (Canada Only) Policy OHS4100, a violation of Canadian Pacific Procedure OHS5100 Alcohol & Drug Procedures (Canada Only), on November 16th, 2013 as evidenced by your positive substance test in Winnipeg, MB.

**JOINT STATEMENT OF ISSUE:**

The Union contends that the Company did not have reasonable and probably grounds to subject Locomotive Engineer Cinq-Mars to substance testing and the request was made contrary to the Company's own Policy. Further, the fact of testing positive for marijuana, consumed on Locomotive Engineer Cinq-Mars' own time, does not give rise to any violation of his obligations toward the Company as an employee and cannot form the basis of any discipline.

The Union requests that the discipline be set aside, Locomotive Engineer Cinq-Mars reinstated and made whole for all loses.

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

| **FOR THE UNION:** | **FOR THE COMPANY:** |
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| **(SGD.) G. Edwards** | **(SGD.) L. Smeltzer** |
| **General Chairman** | **Labour Relations Officer** |

There appeared on behalf of the Company:

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| B. Medd | – Labour Relations Officer, Calgary |

There appeared on behalf of the Union:

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| K. Stuebing | – Counsel, Caley Wray, Toronto |
| G. Edwards | – General Chairperson, Revelstoke |
| H. Makoski | – Senior Vice General Chairperson, Winnipeg |
| G. Brunette | – Local Chairperson, Winnipeg |
| J. Cinq-Mars | – Grievor, Winnipeg |

## AWARD OF THE ARBITRATOR

On November 16, 2013, J. Cinq-Mars, the grievor failed to ensure that he had a train specific TGBO. In the result he was given a post incident/accident drug test. The grievor tested negative for breath alcohol, negative for oral fluid and positive for urine drug test. The grievor was given a twenty-one day suspension for not having the TGBO (that is the subject of a **CROA&DR 4354** before this Arbitrator).

An investigation was conducted on December 2, 2013. The grievor said he attended at a friend's house on November 13, 2014, drank beer and smoked some marijuana. The grievor was discharged by the Company for failing to comply with the Company's alcohol and drug policy as evidenced by the positive drug test.

There is no evidence before the Arbitrator that shows that Mr. Cinq-Mars was impaired at work on November 16, 2013. He stated in the investigation report that he would never come to work or be subject to duty impaired because his job is dangerous. He relied on his negative oral swab test to verify the truth of that statement.

The Union relies on the negative oral swab test and the lack of evidence of impairment. The Union says that there was no on duty impairment and as a consequence no cause for discipline or discharge.

The Union says there is no breach of Rule G (the use of intoxicants or narcotics on duty or subject to duty.) and that the Company cannot establish such a breach in this case. It says that the **CROA&DR** jurisprudence clearly supports the Union's position.

The Company says the grievor violated its Alcohol and Drug Policy. It reviews the safety critical nature of the grievor's employment. The Company does not advance any evidence of impairment by the grievor while on duty. It relies on the urine test and the fact that the grievor was in violation of the CRO Rule regarding the TGBO.

The Company relies on its Alcohol and Drug Policy. The Union responds with reference to the decision in **CROA&DR 4240:**

> In the instant case the Company notes that it has established, as part of its Alcohol and Drug Policy, Article 2.4.2 of OHS 5100 which effectively states that for employees in safety critical or safety sensitive positions a positive drug test, in and of itself, is a violation of the Company's policy. With respect, the Arbitrator cannot find that that aspect of the Company's policy, which in the strictest sense has no basis in science or technology with respect to impairment or the risk of impairment on the job, can fairly be said to be a valid rule in furtherance of the Company's legitimate business interests.
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> The arbitral jurisprudence in respect of drug testing in Canada is now extensive. It has been repeatedly sustained by the courts and is effectively the law of the land. Part of that law, as stated in the passage quoted above, is that a positive drug test, conducted by urine analysis, standing alone, does not establish impairment at a point in time which corresponds with an employer's legitimate business interests and, standing alone, cannot be viewed as just cause for discipline.
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> That is precisely what the instant case involves. The Company seeks to punish an employee for activity which occurred while he was off duty, off Company premises which, in and of itself, posed no threat or harm to the Company's operations or its legitimate business interests. In these circumstances the Arbitrator cannot responsibly conclude that the employer had just cause for the assessment of any discipline against the grievor, merely by reason of his having registered a positive result to a urine analysis drug test, or by his admission that he did consume marijuana in a social setting while off duty.

In **CROA&DR 3701** the Arbitrator found that "standing alone, therefore, a positive drug test cannot be just cause for discipline, even if it may, technically, be a violation of the Company's Alcohol and Drug Policy (**CROA&DR 3668** and **3691**)". He found that consideration must be had to other corroborative evidence suggesting impairment. See also **CROA&DR 4240** where the Arbitrator overturned the issuance of a thirty day suspension and allowed the grievance in full. Further in the line of cases on this issue is **CROA&DR 4296** where the Arbitrator again overturned a discharge and allowed the grievance in full, noting that the law on the issue is settled.

In light of the above jurisprudence and the facts of this case, the grievance is allowed. The grievor is to be reinstated to his employment forthwith with compensation for all wages and benefits lost and without loss of seniority, subject to the disciplinary suspension provided for in **CROA&DR 4354**.

Marilyn Silverman

February 5, 2015

MARILYN SILVERMAN
ARBITRATOR