

**CANADIAN RAILWAY OFFICE OF ARBITRATION  
& DISPUTE RESOLUTION**

**CASE NO. 4365**

Heard in Montreal, February 11, 2015

Concerning

**CANADIAN PACIFIC RAILWAY**

And

**TEAMSTERS CANADA RAIL CONFERENCE**

**DISPUTE:**

Discharge of Locomotive Engineer Ron Schotts.

**JOINT STATEMENT OF ISSUE:**

On January 3, 2014 Locomotive Engineer Schotts was dismissed by the Company for “conduct unbecoming an employee of Canadian Pacific as evidenced by the positive results of your post incident substance test conducted following the discovery of your crew operating train 462-04 between Glenlily and Yahk without correct train documents on December 4th, 2013 a violation of CP’s Alcohol and Drug Policy.”

The Union contends that the Company did not have reasonable and probable grounds to subject Locomotive Engineer Schotts 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 Schotts’ 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 Schotts reinstated and made whole for all losses.

**FOR THE UNION:**

**FOR THE COMPANY:**

**(SGD.) G. Edwards**

**(SGD.)**

General Chairman

There appeared on behalf of the Company:

B. Medd

– Labour Relations Officer, Calgary

And on behalf of the Union:

- |             |   |
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| K. Stuebing | – Counsel, Caley Wray, Toronto              |
| H. Makoski  | – Senior Vice General Chairperson, Winnipeg |
| G. Edwards  | – General Chairman, Revelstoke              |
| B. Plant    | – Local Chairperson, Cranbrook              |
| R. Schotts  | – Grievor, Cranbrook                        |

## **AWARD OF THE ARBITRATOR**

### **Issues**

1. Ron Schotts is a 29 years service employee, 50 years of age, a Locomotive Engineer. He has a good work record, with only one cardinal rule violation in December 2011.
2. There are two issues in this case: whether the Grievor should have been substance tested at all; and what the consequence to his employment should be of the positive drug test result.

### **Facts**

3. The incident giving rise to the substance test was the following. A crew consisting of the Grievor and Conductor Clinton Massong was called for train 468-03 at 0700 on December 4, 2013. They completed a job briefing at Fort Steele and then took a cab to Eastport to meet their train. They had a TGBO and consist for train 468-03. They were advised via radio by the Union Pacific (UP) Clerk that the train was staged in track 1 at Shorty Creek. They boarded the train there. After boarding the crew realized the lead unit did not match their paper work. The crew questioned the UP Clerk concerning the lead locomotive numbers. They were told by the Clerk that they had been issued with wrong locomotive numbers, but again the Clerk told them that they were on the right train, 468-03. This was not correct. The discrepancy was not readily apparent as both trains had 98 cars. The conductor walked back eight cars to remove

handbrakes. He did not check any car numbers against his consist. Had he done so, he would have discovered that they did not match either. When the Conductor got back to the head end, he again checked with the UP Clerk to confirm if they were on the right train. He confirmed they were. This information was not correct. The Grievor and his Conductor were on the wrong train. They contacted the Eastport Depot three times in order to clarify the matter, without success.

4. As the Union submits, the Grievor and his crewmate acted with due diligence in quickly discerning and persistently following up with the UP Clerk to solve the paperwork discrepancy. The Grievor and his Conductor contacted the RTC and advised of the new lead unit. They received a clearance and departed Glenlilly, clearing the main at Yahk. The actual train they departed on was 462-04, not the train for which they possessed paperwork (468-03). Train 462-04 was carrying dangerous commodities for which the crew did not have the proper paperwork.

5. The incident investigation resulted in a determination that, in all the circumstances, the Grievor's behavior was not culpable, and therefore, no discipline was assessed against him. From the above, it appears that the Grievor performed his duties in a professional manner and took appropriate action to ensure the safe operation of the equipment in his charge. His responsible handling of the situation does not suggest any impairment.

6. When it was determined that the Grievor and his Conductor were operating the wrong train, they were removed from the train at Yahk and sent for substance testing. The basis for the testing was that the Grievor and his Conductor were transporting dangerous commodities without their knowledge and without proper documentation.

7. The Grievor's substance test on December 4, 2013 revealed the following: negative breath alcohol test; positive confirmatory urine drug test; and negative oral fluid drug test. This

established past use of an illegal drug, but not impairment. In the subsequent investigation the Grievor explained that he consumed one inhalation of marijuana on December 3, 2013, approximately 19 to 20 hours before reporting for duty.

**Should the Grievor have been substance tested?**

8. The rule from the Company's Drug & Alcohol Procedures regarding post-incident testing includes the following:

Alcohol and drug testing may also be required following any other significant work incident / accident or a near miss which indicated a serious lack of judgment or unexplained human response on the part of the employee(s) involved that had significant potential for more serious consequences.

A Post Incident / Accident test would not be justified in situation where there is evidence that the act or omission of the individual(s) could not have been a contributing factor to the incident / accident e.g. structural, environmental or mechanical failure, or the individual clearly did not contribute to the situation.

9. The Union notes that the investigation into the Grievor's behaviour established no misconduct by him. He was exonerated. The Union suggests that the document discrepancy is not a "significant incident", and should not have resulted in a substance test for the Grievor.

10. Despite the Grievor's own lack of blameworthiness in the matter, he was found to be transporting dangerous commodities without his knowledge and without proper documentation. This is a significant incident. A substance test must be taken as soon as reasonably possible if it to be of use. At the time the Grievor's train was stopped and he and his Conductor were removed from it, the Company could not have known that the Grievor's conduct was not a contributing factor to the incident, nor at that time did he clearly not contribute to the situation. Those facts were only established later, following an investigation. Accordingly, at the time the

Grievor was sent for substance testing, he was not excluded as a possible contributor to the incident.

11. In the circumstances, it was legitimate for the Company to have tested the Grievor as part of its post-incident testing protocol.

**Was there just cause for the Grievor's termination?**

12. Under the Company's Drug & Alcohol Procedures, "employees holding Safety Critical or Safety Sensitive positions are prohibited from having a positive test for drugs as determined through the testing program". The Company relies on this as the basis for terminating the Grievor's employment.

13. I recognize the safety sensitive nature of the Grievor's work, the vital importance that the Company's Locomotive Engineers are not impaired when they perform their extremely responsible work. However, as is well established in several CROA decisions (*SHP 530*, **CROA 3668, 3691, 3701, 4039, 4240, 4288, 4296, 4353, and 4355**):

A positive drug test, which is not proof of impairment while on duty, while subject to duty or while on call, cannot, standing alone, be just cause for discipline.  
(*SHP 530*)

14. A positive oral fluid drug test will likely result in a finding of actual impairment, but proof only of past use, as occurred with the Grievor, does not. In the circumstances, I can find no breach of the Grievor's responsibilities to perform his work without impairment by drugs or alcohol.

15. At the end of his investigation, the Grievor volunteered the following comment:

"I have been up until now only a casual user and have not used marijuana very often. Also, I have never used it nor been under its effects while subject to duty. I do not have a dependency problem with marijuana. Further, I have made a decision not to partake in this substance again while in the employment of Canadian Pacific Railway. Also, I have been in contact with EFAP in this regard. I know I obeyed all rules and procedure and took what I believed to be the necessary steps to ensure that I performed my duties safely."

16. Furthermore, since his termination, the Grievor has gone to East Kootenay Addiction Services (EKASS) on January 30, 2014, where he was assessed "as having a low probability of having a substance dependence disorder". He also attended NA/AA meetings in early 2014.

17. In light of these findings, I find no misconduct by the Grievor. The grievance is upheld. The Grievor is reinstated in employment with compensation for lost wages and benefits, including pension, and without loss of seniority.

18. I remain seized of the implementation of this award.

February 27, 2015



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**CHRISTOPHER ALBERTYN  
ARBITRATOR**