CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4399

Heard in Calgary May 14, 2015

Concerning

CANADIAN PACIFIC

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the termination of Conductor Clinton Massong's employment.

UNION'S EXPARTE STATEMENT OF ISSUE:

On January 3, 2014, following an investigation, Locomotive Engineer Massong was dismissed from Company service "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 Glenlilly and Yahk without correct documents on December 4th 2013, a violation of CP's Alcohol and Drug Policy".

The Union contends that the Mr. Massong's discharge is unjustified, unwarranted and excessive in all of the circumstances. The Union contends that there is no work-related misconduct disclosed in the circumstances.

It is the Union's view, on the basis of the evidence disclosed in the investigation and the information set out in grievance procedure, that Mr. Massong's termination is contrary to the Collective Agreement, June 16, 2010 Agreement, February 8, 2012 Agreement and the Canadian Human Rights Act. The Union requests that Mr. Massong be reinstated without loss of seniority and benefits, and that he be made whole for all lost earnings with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company disagrees and denies the Union's request

FOR THE UNION:
(SGD.) D. Fulton
General Chairperson

FOR THE COMPANY:
(SGD.)

There appeared on behalf of the Company:

D. Cote	– Labour Relations Officer, Calgary
D. Guerin	– Director Labour Relations, Calgary
D. Pezzaniti	– Labour Relations Officer, Calgary

There appeared on behalf of the Union:

R. Church	– Counsel, Caley Wray, Toronto

D. Fulton – General Chairman, Calgary
D. Edward – Vice General Chairman, Calgary
B. Knight – Local Chairman, Cranbrook
C. Massong – Grievor, Cranbrook

AWARD OF THE ARBITRATOR

The grievor and his locomotive engineer were called for train 468-03 on December 4, 2013. After completing a job briefing and obtaining a TGBO and consist for that train they proceeded to the train and boarded it. After boarding they realized that the train consist did not match their paperwork. The grievor walked back to removed handbrakes but did not check the car numbers again. The grievor checked with the Union Pacific Clerk to see if they were on the right train, received clearance and departed. They were not on the right train and so the paperwork they had did not match the train they were working on. An investigation found that the grievor was not responsible for the mistake and no discipline was issued.

However, as a result of the incident, a substance test was conducted on the crew and the grievor tested negative for breath alcohol and oral fluid but positive for urine drug test. At the investigation meeting held into the positive urine test, the grievor advised that he used marijuana after dinner on December 3, 2014. He admitted to occasional, non-regular use. The grievor was terminated on January 3, 2014 under the Company's Alcohol and Drug Policy.

In addition to challenging the discharge the Union challenged the Company's requirement to conduct substance abuse screening tests in this case. Given the determinations made in **CROA&DR 4365** on this issue, a case concerning the locomotive engineer involved in this same incident, which found in these circumstances it was justified for the Company to have tested the locomotive engineer, I make the same determination here for the reasons expressed in that case.

The Company relies on the safety sensitive position held by the grievor and says that positive test may have some impact on his work. Further, it relies on its Alcohol and Drug Policy.

The Union relies on a number of cases issued by this Office, including the one referenced above where the locomotive engineer who was part of the crew in this case, was reinstated after discharge for a positive urine test in **CROA&DR 4365.**

In **CROA&DR 4240:**

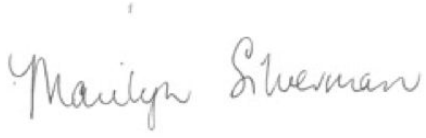
> In the instant case the Company notes that it has established, as part of its Alcohol and Drug Policy, Article 2.4.2 of OHS 5100 which effectively states that for employees in safety critical or safety sensitive positions a positive drug test, in and of itself, is a violation of the Company's policy. 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.
>
> 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.
>
> 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.

As an alternative submission, the Company asked that conditions be imposed on the grievor if he is reinstated. The suggested conditions are similar to the ones recognized as appropriate by this Office in the accommodated reinstatement of employees who suffer from substance dependence. There is no evidence or law provided by the Company as to why these conditions are appropriate given the relevant jurisprudence of this Office. Accordingly, there is no reason to impose conditions on the grievor and I decline to do so.

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.



May 29, 2015

MARILYN SILVERMAN
ARBITRATOR