

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

**CASE NO. 4400**

Heard in Calgary, May 14, 2015

Concerning

**CANADIAN PACIFIC RAILWAY**

And

**TEAMSTERS CANADA RAIL CONFERENCE**

**DISPUTE:**

Appeal of the thirty day suspension and termination of Conductor B. Yamazaki's employment.

**UNION'S EXPARTE STATEMENT OF ISSUE:**

Following an Investigation, on December 23, 2013, Conductor Yamazaki was assessed a thirty day suspension "for failure to ensure proper authority to occupy the North Main Track between Signal 1678N Murdoch and Signal 1697N Glenmore, Brooks Subdivision when reversing direction and making a forward movement after obtaining a CROR 577 work authority for the controlled location of Murdoch, a violation of: CROR User Manual for T+ E Reporting for Duty item 2.1, CROR User Manual for T+E While On Duty item 2.2, CROR User Manual for T+E Crew members item 2.3, CROR User Manual for T+E Section 17 Item 17.6 Changing Direction, CROR General Notice, CROR General Rules A (i), (iii), (vi), CROR Rule 106, CROR Rule 573(a), (b), CROR Rule 80 Main Track Authorization, Train and Engine Safety Book T-0 Job Briefings while employed as a Conductor on train 113-16 on the Brooks Subdivision November 20, 2013."

In addition, following an investigation, on December 23, 2013, Conductor Yamazaki was dismissed from the Company's service "For your positive post incident/accident drug test following a rules violation on November 20, 2013 for violation of Company Policy OHS 4100, OHS 5100: CROR User Manual for T+E Reporting for Duty item 2.1, CROR User Manual for T+E While On Duty item 2.2, CROR User Manual for T+E Crew members item 2.3, CROR General Notice, CROR General Rules A (i), (iii), (iv), (v), (vi), (vii), (x), CROR Rule 106, CROR Rule G, while employed as a Conductor on train 113-16 on the Brooks Subdivision November 20, 2013."

With regard to the thirty day suspension, the Union contends that the investigation was not conducted in a fair and impartial manner per the requirements of the Collective Agreement. For this reason, the Union contends that the discipline is null and void and ought to be removed in its entirety and Conductor Yamazaki be made whole.

In addition, the Union contends that there was no just cause for the suspension and that the penalty is unwarranted and excessive in all of the circumstances. The Union requests that

the suspension be removed and Conductor Yamazaki be made whole for the thirty days as well as time improperly withheld from service.

With regard to the discharge the Union contends that the investigation was not conducted in a fair and impartial manner per the requirements of the Collective Agreement. The Union further contends that the Company breached the June 16, 2010 Agreement in its conduct of this investigation. For this reason, the Union contends that the discipline is null and void and ought to be removed in its entirety and Conductor Yamazaki be made whole.

The Union further contends that there was no just cause for discipline whatsoever and that the penalty is unwarranted and excessive in all of the circumstances. There was no cause for requesting that Conductor Yamazaki submit to a substance screening test on November 20, 2013. Moreover, the Company is unable to establish any alleged Rule G violation in these circumstances, including that Conductor Yamazaki tested negative for breath alcohol and negative for oral fluid substance screening tests. Finally, there is clear double jeopardy in the repeat assessment of discipline for the same alleged infractions.

The Union requests that the discipline be removed in its entirety, that Conductor Yamazaki be ordered reinstated forthwith 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 with the Union's positions in respect of each assessment of discipline 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
R. Chadwell	– Assistant Superintendent, Fort Steele

There appeared on behalf of the Union:

R. Church	– Counsel, Caley Wray, Toronto
D. Fulton	– General Chairman, Calgary
D. Edward	– Vice General Chairman, Medicine Hat
B. Yamazaki	– Grievor, Medicine Hat

### **AWARD OF THE ARBITRATOR**

This case is about a thirty day suspension and subsequent discharge of the grievor a ten year employee with the Company.

The thirty day suspension was assessed because the grievor, a conductor, failed to ensure proper authority to occupy a track in the Brooks subdivision on November 20, 2013. The conductor and locomotive engineer received a 577 work authority on the North and South main tracks within a controlled location but, in the process of switching their train, the train proceeded on the North track past the inside signal. The grievor was allowed to finish his tour of duty and then was taken for substance abuse testing. He was taken in a car by a Manager and asked questions, without a Union Steward present. The grievor tested negative for breath alcohol, negative for oral fluid and positive confirmatory for urine drug test. The investigation material discloses that he shared a "joint" with some friends at a poker game on Monday night, November 18, 2013. The grievor said he did not have a substance abuse problem, had never reported for duty impaired and had never consumed or been in possession of any substances while on duty on November 20. He was discharged for the positive urine test, leading to the second matter determined here.

The investigation material discloses that the grievor thought he had authority and was trying to complete switching of the trains. He realized only after he was contacted by the RTC to obtain the correct clearance that he did not have the proper authority. He said he did not know that he had passed the controlled location as his location precluded him from seeing that end of the train. The Union asserts that the investigation was not conducted in a fair and impartial manner and further that the grievor was subject to "double jeopardy"; for the same incident.

The Union questions the merit of a substance screening test when the grievor was quite a distance away from the location of the violation. It says that the Company did not have reasonable and probable grounds to subject the grievor to substance testing. The Union also says there was no Union representative in the car when the grievor was questioned.

On the issue of testing, the Company had the right to request a substance test when the grievor was involved in an incident that resulted in his train not having proper authority to be on the track. Ensuring that authority was clearly part of his responsibility, and his being on the track without authority, and the potential consequences of that, qualifies as an incident justifying the testing. Given the fact that there is no dispute or inconsistency as to the facts of this incident, there is no value in making any determination as to what the grievor was asked and answered before the formal investigation proceeded.

### *The 30 day suspension*

The grievor has been with the Company for ten years and has no discipline on his record. He committed an infraction by not ensuring that the movement of his train accorded with the work authority. He readily admitted this and knew that. This is a clear Rule violation and proper work authority is essential to the safety of train operations. As part of the crew, the grievor was responsible for ensuring that he had the proper

authority. The grievor has a clean work record, and he readily admitted the incident without excuse.

A ten day suspension is substituted for the thirty day suspension.

### The Discharge

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. It further asserts there is no breach of Rule G (the use of intoxicants or narcotics on duty or subject to duty) and contends 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 occupying the track without authorization.

The Union references 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.

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 suffers 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.

Accordingly, the grievance is allowed in part. 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 ten day disciplinary suspension assessed to the grievor for the work authority violation.

May 29, 2015

A handwritten signature in cursive script that reads "Marilyn Silverman". The signature is written in dark ink and is positioned above a horizontal line.

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MARILYN SILVERMAN  
ARBITRATOR