CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4476

Heard in Edmonton, July 12, 2016

Concerning

CANADIAN NATIONAL RAILWAYS COMPANY LIMITED

And

UNIFOR COUNCIL 4000

DISPUTE:

Appeal of discharge of CN Intermodal Employee Jared White.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Mr. White completed a 3 year term on an elected position with the Union which ended on June 30, 2015. Mr. White informed the Company that he would return to his previous position of Heavy Equipment Operator (HEO) at Brampton Intermodal Terminals, which is a safety sensitive position. On June 24, 2015, Mr. White was required to attend a "Return to Duty Medical Evaluation" prior to returning to work. The medical assessment normally includes a urinalysis test to determine if the employee is drug free. On June 29, 2015, Occupational Health Services (OHS) contacted Mr. White to advise him that he would be required to provide a hair sample for analysis. CN did not ask Mr. White for a urinalysis test at any time throughout this process. The Grievor fond that there was no justification for such an intrusive invasion of his privacy and dignity. Therefore, he declined to submit to the demand. The Company held the Grievor out of service, pending the compliance of their demand and subsequently discharged him for alleged absence from work without authorization.

It is the Union's position that there was no just cause for demanding a hair test. Nor was there a balanced need for such an intrusive invasion of Mr. White's privacy and dignity. Therefore, there was no just cause for being held out of service and subsequently, no just cause for being discharged. Furthermore, Mr. White's protection of such rights must not be viewed as a negative connotation.

The Union contends that the dismissal was excessive, arbitrary, and discriminatory, in bad faith and asks that the Grievor be reinstated to service without loss of seniority and that he be made whole for all lost earnings, benefits and appropriate damages as may be seen fit by the arbitrator.

The Company disagrees with the Union's contentions and has declined the Union's grievance.

FOR THE UNION:
(SGD.) R. J. Fitzgerald
National Representative

FOR THE COMPANY:
(SGD.)

There appeared on behalf of the Company:

J. Darby	– Labour Relations Associate, Toronto
S. Blackmore	– Senior Manager Labour Relations, Edmonton

There appeared on behalf of the Union:

R. Fitzgerald	– National Staff Representative, Toronto
M. Robinson	– Regional Representative, Mississauga
B. Kennedy	– President Council 4000, Edmonton

AWARD OF THE ARBITRATOR

This arbitration concerns the dismissal of employee Jared White, for failure to communicate with the Company and failure to return to work after having been asked to provide the CN Rail Chief Medical Officer a hair sample. His employment file was subsequently closed, effective September 1, 2015.

Mr. White was hired by the Company on June 12, 2001, as an Equipment Operator at the Brampton Intermodal Terminal. In 2003, he qualified as a Heavy Equipment Operator (Intermodal Crane Operator) and later qualified as a Lead Hand in 2006. At the time of dismissal, he had been with CN Rail for fourteen years.

Some six years later, the Grievor was elected as the CAW's – the predecessor of the Unifor Union –Regional Representative for the Great Lakes Region, representing the members of CN Rail's Intermodal and Clerical staff, as well as the Toronto Terminal Railway flagging employees. As per the Collective Agreement, Mr. White commenced his three year term on July 7, 2012, through his authorized leave of absence. His scheduled return to work was set on July 1, 2015, at the same terminal and still as a Heavy Equipment Operator (HEO), a safety sensitive position.

Prior to returning to work, the Grievor was informed that he would have to pass a Return to Duty medical assessment. On June 18, 2015, after informing the Company that he would return to work as an HEO, he added that he would contact Occupational Health Services (OHS) on the same day to schedule his examination, which he did. The medical examination was to take place on June 26.

However, three days before his appointment, the Grievor called to inform them that he could not make it and requested that his assessment be rescheduled. A new date, June 29, was chosen and agreed upon. Mr. White was informed that he could not return to work prior to his medical assessment.

On June 30, the Company was informed by OHS that the Grievor could not be cleared to return to work and necessitated a follow-up from the Company's Chief Medical Officer (CMO). The CMO is an experienced physician in charge of assessing the employees' fitness to duty, taking into account medical history and information from the current medical assessment. Depending on the specifics of each position, further examinations or testing may be required.

On July 2, 2015, the Grievor was contacted to inform him that prior to being cleared to return to work, he was to provide a hair sample in order to test for illicit drugs. Mr. White refused to participate and said he would contact the Union.

Neither the Company nor the OHS were contacted in the following two weeks. On July 15, 2015, the Grievor was sent a letter, with a copy for the Union, letting him know that he was required to contact OHS before July 22, 2015, to complete his medical examination. Failure to do so would make the Grievor subject to discipline measures up to the closure of his employment file for failure to protect his assignment.

Having not heard from the Grievor, on July 24, the Company sent a letter and Notice to Appear for Investigation to him via email and Purolator, with a copy sent to the Union, advising him that his failure to comply with OHS requirements was considered an unauthorized leave of absence as of July 1, 2015. The letter also indicated that he was suspended pending the investigation scheduled for August 4, 2015.

Five days later, on July 29, Purolator returned the envelope, telling the Company that they were unable to deliver the letter, having been denied by the Grievor. The notes on the package read: “Refused over phone, wouldn’t provide new address and says he doesn’t want it”. On August 4, the Grievor did not show up for his formal investigation and did not provide a reason why.

On August 5, the Company sent another letter, by email and Purolator, to Mr. White, along with and two Notices to Appear for formal employee statements scheduled for August 10. The letters advised the Grievor that his non-compliance could result in disciplinary action, up to the closure of his file. A copy was also sent to the Union. Mr.

White did not attend the August 10 formal employee statement and did not indicate why he failed to do so.

In the meantime, on August 7, OHS phoned Mr. White and left a message which went unanswered. The next day, the Union grieved the Employer's request for a hair sample. On August 10, OHS reached the Grievor by phone to discuss the additional testing, to which he answered that OHS should deal with the Union and that he was feeling harassed by OHS.

On August 18, the Union received an email from the Company confirming that they had received the grievance. The email also indicated that Mr. White could work in a clerical position that was not safety sensitive to protect his seniority, pursuant to Article 22.8 of the Collective Agreement. Alternatively, the Employer asked that the Grievor explain why he could not work.

Article 22.8 states that:

> Employees who are absent from work without authorization for more than fifteen (15) consecutive working days will forfeit their seniority and their services will be dispensed with. Authorization will be given in case of bona-fide illness or injury or other reason acceptable to the Company.

On August 20, the Company answered the Union's grievance and urged, once again, Mr. White to occupy a non-safety sensitive position until the matter was settled. The Union informed the Company that they had informed the Grievor of the Company's suggestion.

On September 1st, 2015, the Company, having not received any answer from the Grievor since July 1st, sent him a letter advising him that, because of his failure to both comply with the Company's demands or present himself at work, he was dismissed, effective September 1st. The Union added the appeal of the discharge of Mr. White to the grievance regarding his refusal to provide a hair sample.

The Company explains that the medical documents of Mr. White's that were handed to the CMO, Dr. Daniel Leger, for review revealed that he had past cocaine use and mental health conditions that were not disclosed in his "Pre-Placement Medical Questionnaire" completed on June 29, 2015. That inconsistency led Dr. Leger to order a hair sample to verify the Grievor's claims of abstinence and make sure he was fit to return to work. A decision that was the CMO's alone.

The position of HEO is safety sensitive and, as such, allows the Company to prevent any usage of alcohol and/or drugs at the workplace. This designation and drug policy has been in place since 2001 and has not been contested by the Union since the award in case SHP 530, where Arbitrator Picher explained that:

> It is clearly within the legitimate interests of a railway to reasonably ensure that persons who move into risk sensitive positions do not suffer from an active drug or alcohol addiction or dependency. While a positive drug or alcohol test during the promotion or transfer process will not be conclusive of that question, it will justify further inquiries and a more complete assessment of the individual, so as to rule out any such problem prior to the individual assuming risk sensitive responsibilities. The careful vetting of applicants for risk sensitive positions, including drug and alcohol testing administered by the employer, is a reasonable exercise of a railway's management rights, as a further means to ensure safe operations.

Here is the Company's process to evaluate an employee's overall medical condition and thus verifying his fitness to work in a safety sensitive position:

> *1) A Pre-employment medical examination consisting of:*
>
> *Medical Questionnaire*
> *Physical Examination*
> *Physical Examination*
> *Hearing, color sense and vision assessment*
> *Urine drug screen*
>
> *As well as any medical assessments deemed necessary by the physician that arise out a review of the answers to the questionnaire, the examination findings, the medical history of the applicant and the results of testing. Additional medical follow ups before finalizing a fitness for duty assessment may include medical reports, expert medical assessments, any biological testing indicated.*
>
> *2) Return to work medical assessment for a safety sensitive employee after a significant time out of a safety sensitive position:*
>
> *Medical Questionnaire*
> *Physical Examination*
> *Hearing, color sense and vision assessment*
> *Review of CN medical history and pre employment medical*
>
> *In addition to any medical assessments deemed necessary by the physician that arise out of the questionnaire, examination, medical history and testing. The additional medical testing may include medical reports, expert medical assessments, any biological testing indicated.*

The Union alleges that Mr. White misread the question, which explains the discrepancy between the two answers. Whether this is true or not, a hair sample would have provided indications as to whether the Grievor was fit to return to work or not, which was the reasoning behind Dr. Leger's request for additional biological testing.

The legitimacy of the Company's desire to ensure a drug free workplace has been recognized by the jurisprudence for a long time now. In 1987, Arbitrator Picher stated that:

> "[...] an employer charged with the safe operation of a railroad, the Company has a particular obligation to ensure that those employees responsible for the movement of trains perform their duties unimpaired by the effects of drugs. To that end the Company must exert vigilance and may, where reasonable justification is demonstrated, require an employee to submit to a drug test"[1]

Additionally, the refusal of an employee to subject himself to a drug test can cause one to draw an adverse inference from his decision. In **CROA&DR 3581**, Arbitrator Picher stated that:

> There is, however, one important distinguishing factor on the facts. It is not disputed that the grievor refused to undergo an alcohol and drug test when directed to do so. I am satisfied that the request made to the grievor was entirely appropriate and in keeping with the Company's policy of administering alcohol and drug tests in appropriate situations where there has been an accident or incident.[…]
>
> When confronted with the order to take a drug and alcohol test, whatever his own feelings, it was the grievor's obligation to "obey now – grieve later" if he felt that the directive was somehow unfair. By refusing to undergo a drug test, in the Arbitrator's view, Mr. Alexander radically changed the nature of his own infractions over the course of these events, and rendered himself liable to a more severe degree of discipline. Whatever his personal feelings, his refusal to take an alcohol and drug test in the circumstances does leave him open to the drawing of adverse inferences, and does little to bolster his credibility.

Arbitrator Picher, in the previously cited **CROA&DR 1703**, had mentioned that:

> "In addition to attracting discipline, the refusal of an employee to undergo a drug test in appropriate circumstances may leave that employee vulnerable to adverse inferences respecting his or her impairment or involvement with drugs at the time of the refusal. On the other hand, it is not within the legitimate business purposes of an employer, including a railroad, to encroach on the privacy and dignity of its employees by subjecting them to random and speculative drug

[1] **CROA&DR 1703**

> testing. However, where good and sufficient grounds for administering a drug test do exist, the employee who refuses to submit to such a test does so at his or her own peril."

Furthermore, in **CROA&DR 3609**, Arbitrator Moreau indicated that:

> The grievor refused to submit to testing. His co-worker, by contrast, complied with the request. Given the first-hand account of the bargaining unit employee and bearing in mind that the grievor's co-worker tested positive, it is appropriate in the view of the arbitrator to draw an adverse inference against the grievor based on his refusal to submit to a drug test on October 27, 2006. The evidence in this case is consistent with other awards of this office where an adverse inference has been relied on as evidence of culpability. (See CROA 1703, 2994) The grievor's refusal to be tested is therefore further evidence of his culpability.

As for the closure of his file, the Company gave the Grievor clear instructions and ample opportunities to comply with them. Mr. White willfully rejected any and all of the Employer's and OHS's suggestions and attempts to reach him. The Company offered him more than once the possibility of taking up clerical work, a non-safety sensitive position, so as to protect his seniority until the dispute be resolved, in accordance with Article 22.8 of the collective agreement.

Not only did the Company offer alternative work to the Grievor, they waited for forty-five days before closing his employee file, thirty days after it could be closed for an unauthorized leave of absence. During that time, the Company tried to contact Mr. White numerous times, without any success.

It is true that the Grievor's current address changed, but he no less decided to uphold that information from the Company, refusing to tell Purolator where he could have the letters delivered.

In **CROA&DR 4276**, Arbitrator Schmidt stated, regarding the lack of communication from the grievor, that:

> In this case the grievor failed in fulfilling his obligation of communicating with the Company after his medically supported leave became an unauthorized leave of absence. Even if I accepted that the grievor informed the Company that he was leaving the country on October 11, 2012, which I do not, the grievor had ample opportunity upon receipt of the Company's and GWL's correspondence upon his return on November 22, 2012 to communicate with the Company. He did not do so. In such circumstances the Company was entitled to close his employment file. There are no mitigating circumstances, such as a clean disciplinary record or extraordinary years of service with the Company, that would warrant my considering the grievor's reinstatement.

Arbitrator Picher, in **CROA&DR 3847**, a case where the employee failed to communicate with the Company after he left his position because of an injury, dismissed the grievance, writing that:

> The fact of an injury or medical leave of absence does not absolve an employee from his or her responsibility to communicate on a reasonable basis with his or her employer. I do not consider that it was inappropriate for the Company to seek the medical updates which it did nor to confirm, given the apparent long silence from the grievor, that he intended to continue in his employment at CN. His failure to give any response is, in my view, evidence which the Company could use to conclude that he had effectively abandoned his employment. In the Arbitrator's view this is not a circumstance in which the Company was under an obligation to conduct a disciplinary investigation, as the action taken constituted a non-disciplinary, administrative closure of Mr. Vlutters' employment file. For the reasons related above, I am satisfied that the grievor is the author of his own misfortune and that he did, as the Company asserts, effectively abandon his employment.

In **AH 584**, Arbitrator Picher explained that employees had the duty to communicate with their employer in order to keep its employer apprised of their situation. Failure to do so violates the obligation of candour and communication owed to the company. If the employee was reinstated in that case, it was only because of her

more than twenty years of service, had a diagnosed illness and had a “near exemplary discipline record”.

The Union repeatedly claimed that a hair sample test was an unreasonableinvasion of the Grievor’s privacy and dignity, alsosubmitting that the Company should have proceeded with the “customary” urinalysis instead. However, the Union failed to present any jurisprudence whereas the use of hair follicles would be considered a breach of one’s privacy and dignity.

In fact, in **CROA&DR 4277,** Arbitrator Schmidt, having to decide on the validity of an employer’s drug policy, concluded that:

> Breathalyser testing has been found to be minimally intrusive, and the collection of urine has also been found not to violate the “respect and dignity” clause in collective agreements. I am satisfied that hair follicle sampling is minimally intrusive and does not violate the “respect and dignity” clause.

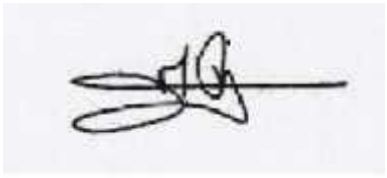
The Union also contends that hair sampling is “An inadequate and unreliable test process”. In claiming so, it cited criminal law jurisprudence, most notably an Ontario’s Court of Appeal case[2] where hair follicle evidence of cocaine consumption was rejected by the court. While hair samples may not be used as evidence in a criminal court where a certain version of events has to be established beyond reasonable doubt, such is not the case here, where the balance of probabilities is to be applied. Indeed, the Company

[2] *R.* v. *Broomfield*, 2014 ONCA 725

has used such samples in the past and has been mentioned by arbitrators in their decisions as deciding factors.[3]

The Grievor's unfounded refusal to subject himself to a hair sample drug test and his further failure to properly communicate with the Company are the causes of his subsequent dismissal. The Company was diligent in its numerous attempts to reach Mr. White and even offered him a non-safety sensitive position until the case was settled, which would have greatly reduced any financial consequences for the Grievor. The closing of Mr. White's assignment is the result of his faults and cannot reasonably be attributed to the Company's actions.

For the above-mentioned reasons, the grievance is dismissed.



September 21, 2016

MAUREEN FLYNN
ARBITRATOR

[3] For examples, see: **CROA&DR 4352, CROA&DR 4222** and **CROA&DR 4064**