CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4487

Heard in Edmonton, September 13, 2016

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Discharge of Conductor M. B. on January 5, 2016.

JOINT STATEMENT OF ISSUE:

On December 17, 2015 Mr. B. was required to attend testing at the Driver Check facility. Mr. B. was contacted by the Medical Review Officer from Driver Check on December 19th with the positive result of his test. CN's Occupational Health Nurse advised the Company on December 21st that Mr. B. was in violation of his Continuing Employment Contract.

Mr. B. was required to attend a formal investigation on January 1, 2016. Mr. B. claimed that he unintentionally ingested marijuana by eating cookies that his wife had brought home from a party.

As a result of the findings of the investigation Conductor B. was discharged from the Company for "*Your failure to comply with the terms of your Continuing Employment Contract with CN dated July 23, 2015, when you tested positive on your drug test reported by OHS on December 21, 2015*".

The Union contends that the discipline assessed is unjustified, unwarranted, discriminatory and in any case excessive. The Union further contends that the discipline assessed is in violation of the 4.16 Collective Agreement and in particular Articles 82, 85. It is the Union's position that the Company is also in violation of arbitral jurisprudence in this matter.

The Union submits that Conductor B. did not knowingly or willingly violate the terms of his Continuing Employment Contract. The Union further submits that the Company has acted in a discriminatory manner with respect to Conductor B.'s disability which is in violation of the *Canadian Human Rights Act*; the Company's Duty to Accommodate; the *Canada Labour Code,* and Article 85 of Agreement 4.16.

Conductor B. did go to DriverCheck, the same provider the Company used, and had his own retest done on Tuesday December 23, with the results, as submitted to the Company, showing negative.

The Union seeks to have Conductor B. reinstated without loss of seniority and made whole for all lost wages and benefits. The Union further seeks to have the Company remove any/all records of discharge from Conductor B.'s personal and discipline history.

It is the Union's position that given the violations of the Collective agreement a Remedy is applicable in the circumstances consistent with Addendum 123 of the Collective Agreement.

The Company disagrees with the Union's position. It is the Company's position that Mr. B. was required to abstain from the use of illicit drugs on or off work for the duration of his contract. Mr. B. was aware that a violation of his continuing employment contract would result in discharge.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) J. Robbins	**(SGD.) V. Paquet**
General Chairman	**Labour Relations Manager**

There appeared on behalf of the Company:

V. Paquet	– Labour Relations Manager, Toronto
D. Larouche	– Senior Manager Labour Relations, Montreal
A. Daigle	– Labour Relations Manager, Montreal
O. Lavoie	– Manager Labour Relations Manager, Montreal

There appeared on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
J. Robbins	– General Chairman, Sarnia
R. Hackl	– National V. P., Saskatoon
J. Lennie	– Local Chairman, Port Robinson
R. Donegan	– General Chairman, Saskatoon
J. Holliday	– General Chairman, Vancouver
R. Caldwell	– General Chairman, Bancroft
P. Boucher	– Vice General Chairman, Belleville

AWARD OF THE ARBITRATOR

The grievor, referred to only as M.B., had twenty-six years of service with CN at the point of his termination. He worked as a conductor and was fifty years old. He was terminated for failing a random drug test required of him under a Continuing Employment Contract. He entered into that contract voluntarily, to settle an earlier grievance.

In January 2015, CN had terminated the grievor for refusing to provide a urine sample for a post-incident/accident test. CN's "Policy to Prevent Workplace Alcohol and Drug Problems provides, in part:

> Reasonable Cause and Post Accident Testing
>
> Biological testing for the presence of drugs in urine or alcohol in the breath is conducted where reasonable cause exists to suspect alcohol

> or drug use or possession in violation of this policy, including after an accident or incident. Post-accident testing is done after any significant accident or incident where an experienced operating officer, upon consideration of the circumstances, determines that the cause may involve or is likely to involve a rule violation and/or employee judgment. In cases of reasonable cause or post-accident testing, any employee whose breath alcohol concentration is over 0.04 or who tests positive for illegal drugs would be considered to be in violation of this policy.
> …
>
> Violations
>
> Violation by an employee will result in corrective action up to and including dismissal. … Refusal to complete the testing process set out under this policy is considered a policy violation. (*emphasis added*)

When the test was demanded of him, the grievor took the view that there was no cause for him to be tested as he was not controlling the movement of the train. He refused the test, which resulted in termination. The Union was able to negotiate the grievor's reinstatement subject to conditions. On July 23, 2015 the grievor, the Union, and the Employer signed the Continuing Employment Contract, the significant parts of which provide:

> 2. You will be subject to frequent performance observations by your supervisor, including work safety and attendance, which will be documented and shared with the Chief Medical Officer or delegate for the duration of this contract. You are required to comply with CN's Policy to Prevent Workplace Alcohol and Drug Problems and all CN work Policies.
>
> 3. You are required to abstain from use of illicit drugs and at all times, on or off work for the duration of this contract.
>
> 4. You will be subject to unannounced testing for illicit drugs. When you are contacted by Occupational Health Services, you are required to report to the clinic or laboratory as directed as soon as possible. A positive drug test or lack of cooperation with the testing process will be considered a violation of this employment contract and will result in investigation.
>
> 5. Should you fail to fully comply with the CN Policy to Prevent Workplace Alcohol and Drug Problems, you will be discharged from

> CN and will not be eligible for continuing employment or reinstatement.

The Employer views this as a "last chance agreement". The Union characterizes it as less than that, relying particularly on some of the fine points in the obligations above. There is no dispute that this contract was voluntarily entered into and a condition of the grievor's reinstatement.

On December 17, 2015 the grievor was required to report to Driver Check for a test and did so. Driver Check is an independent testing organization CN uses to perform random and unannounced testing of the type referred to in paragraph 4. On December 19, 2015 he was told he had tested positive for marijuana and that the Company would be so advised. Driver Check's Medical Review Officer told him the result was low but positive and explained his ability to seek a retest if he wished it. She asked him if there was a legitimate medical explanation for a positive result. He did not dispute the result or ask for a retest, although he obtained his own test a couple of days later. The MRO reported that:

> Mr. B. proceeded to advise that he received 3 dozen cookies from his wife for his 50th birthday from Jamaica, he noted that he ate these 6 at a time and didn't feel anything. Mr. B. advised if there was any marijuana it would be coming from the cookies, but his daughter and his wife know that his job depends on this. Mr. B. denied any medications or medical marijuana.

An investigation meeting was held on January 1, 2016 over the allegation that he had failed to comply with the terms of the Continuing Employment Contract as shown by the positive test. He confirmed his understanding of the contract and the consequences of failing to abide by the contract's terms. He originally disagreed with the test results

"because I hadn't taken any drugs". He submitted the negative results of a retest he took on December 23. He was then asked, by his Union Representative:

> 23Q. Mrs. Little to Mr. B.: Why did you test positive on Dec 17th 2015 for marijuana?
>
> A. It has come to my knowledge that when my wife threw me a 50th birthday party on December 12th that one of the guests brought cookies infused with marijuana. Those cookies ended up being brought home by my wife and on Tuesday Dec 15 I ate the cookies with a glass of milk before bed. My wife and I had no idea at the time that the cookies contained cannabis concentrate. This only came to light after the test and then my wife began to call each and every person that attended the party as it became obvious that this was the only way that I could have encountered marijuana is through ingestion …

M.B. submitted a written statement, dated December 23, 2015, from a person who was present at the birthday party:

> I would like to address the recent issue with M.'s substance test that came back positive. The results were an incredible shock to me as I am a close friend of M.'s and I would never have expected these results.
>
> The only scenario I can possibly imagine to have caused this result has the blame falling entirely on my own shoulders.
>
> At M's recent 50th birthday party, I did bring several desserts as my contribution to the party. Some of my desserts were for public consumption and some of them were infused with marijuana for more private consumption. I have access to marijuana with a valid medical marijuana license. I did keep these desserts apart from the general area of food served at the party, but it appears as though M. ended up inadvertently ingesting some of these private desserts.
>
> I am embarrassed that this has placed M. in such a difficult position, and I have offered my sincere apologies to him.
>
> I wish now to offer you the same; my absolute and most sincere apologies. What began as an innocent idea and offering for others and myself unintentionally caused damage to my friend's reputation and lifestyle.
>
> I happily offer my word and can answer any questions you may have in order to address your concerns.

M.B. was then asked:

> 25Q. Mrs. Little to Mr. B.: Have you willing taken illicit drugs?
> A. Absolutely not.

At the conclusion of the inquiry M.B. made the following statement:

> I would like to say that I'm angry and upset by what happened. As I have stated this was not by my doing. I believe that since my return to service I have been a positive employee for the company. I have had a positive attitude and have worked everyday I possibly could without non contractual loss time. I want the company to know that I do not take illicit drugs. The only drugs I use are prescribed by my doctor. I signed a contract with the company knowing full well that I would live up it on this basis, being I do not use illicit drugs. This whole experience has been an embarrassment and unfortunately a learning experience for me about trusting the environment around me. I am truly sorry for any inconvenience, let down, or otherwise that this has caused. I am committed to living up to the contract and being a positive, productive and safe employee for the company.

The fact that the grievor took a test eight days after the first test is not relevant. It was too long after the failed test to cast any doubt on its conclusion. See **CROA&DR 3186**. If the grievor doubted the initial test, the obvious remedy was to ask for an immediate retest.

The Union's assertion of discriminatory conduct is without foundation. The grievor asserts that he did not knowingly consume marijuana. There is no alternative plea of, "but if I did knowingly take marijuana, it is because I suffer from an addiction". Similarly there is no suggestion these events related to his 2009 medical condition.

The grievor maintains that his Continuing Employment Contract was imposed due to conduct based on his principled position that he should not be liable for a test, rather than conduct indicative of drug use. That point is of limited persuasive value. There is a

reason refusal to test is taken as a breach of such policies, in that such a refusal raises a suspicion, particularly if there is some prior history of drug use, that there is something to hide, raising a form of adverse inference. Any suggestion that M.B. was assiduous in avoiding marijuana intake is dampened by his admission in the June 23, 2015 Substance Abuse Questionnaire that he considered green tea/food containing THS at a retreat in Jamaica in June 2015.

The Union contrasts the wording of this Continuing Employment Agreement with what it views as stricter wording in orders given by CROA awards such as **CROA&DR 3355** and **CROA&DR 3588**. The Company refers to **CROA&DR 3186** which rejected a similar argument saying:

> While the Brotherhood's counsel is correct in stressing that the letter does not expressly call for automatic discharge in the event of a positive drug test, it would appear to the Arbitrator implicit within the terms of the letter that the grievor was put on clear notice that the Company would reserve the right to terminate his employment in the event of a positive substance test. It has done so, and in the Arbitrator's view its actions in that regard should not lightly be disturbed.

At the point of discharge, the grievor held fifteen active demerits, although cumulatively he had received five written reprimands, 215 demerit points, two deferred suspensions and eight suspensions. I take no account of discipline overturned by previous CROA decisions (**CROA&DR 3936** and **4214**). Mitigating factors in this case include the fact the test reading was at the low end of the scale. They include the grievor's age and long service with CN. They include the addiction and medical issues he has faced and largely overcome without apparent remission. They include the fact that he was tested on three occasion in 2015 all with negative results.

Even if there is no strict liability, the central question becomes, on a balance of probabilities, did M.B. knowingly ingest marijuana. The test establishes that it was ingested. Whether it was innocent and unavoidable turns on the credibility of the explanations put forward. After assessing the explanations advanced and when they were advanced, I am unable to accept them as credible. The explanation advanced in the friend's letter is significantly different from the quite explicit account given to the Medical Officer at the time of the test, with its description of cookies from the grievor's wife in Jamaica.

The grievor was reinstated before subject to strict conditions through the Continuing Employment Agreement. He has been shown not to have complied with these conditions. This too is a case where there is insufficient basis to alter the Employer's decision. The grievance is dismissed.

October 27, 2016

ANDREW C. L. SIMS
ARBITRATOR