CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3632

Heard in Montreal Thursday, 13 September 2007

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED STEELWORKERS OF AMERICA (LOCAL 2004)

DISPUTE:

The discharge of Machine Operator James Mochoruk effective January 8, 2007, for his responsibility for the track unit collision between his ballast regulator and a tamper on December 6, 2006, at Barriere on the Clearwater Subdivision, as well as his violation of CROR Rule G(a) and CN's Policy to Prevent Workplace Alcohol and Drug Problems, by virtue of his positive drug test following the collision.

JOINT STATEMENT OF ISSUE:

On December 6, 2006, the ballast regulator which Mr. Mochoruk was operating collided with a tamper machine while working on the Company's track at Barriere, B.C. Following the accident, Mr. Mochoruk was requested to undergo drug testing. Mr. Mochoruk competed the drug testing process and tested positive for the presence of marijuana. Following an investigation into the circumstances of the collision and his positive drug test result, Mr. Mochoruk was discharged for his responsibility for the track collision, as well as his violation of CROR Rule G(a) and CN's Policy to Prevent Workplace Alcohol and Drug Problems.

The Union contends that the Company assessed unwarranted discipline in discharging Mt. Mochoruk. The Union further contends that the drug testing that Mr. Mochoruk was subjected to did not clearly identify the substance(s) that he tested positive for, and stated that the positive result may have resulted from either prescription, or over the counter medications, and has requested reinstatement with Mr. Mochoruk made whole for all lost earnings and benefits.

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

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) A. KANE	**(SGD.) D. BRODIE**
STAFF REPRESENTATIVE	**FOR: VICE-PRESIDENT, LABOUR RELATIONS**

There appeared on behalf of the Company:

D. Brodie	– Manager, Labour Relations, Edmonton
A. de Montigny	– Sr. Manager, Labour Relations, Montreal
Dr. B. Kurtzer	– Witness
Dr. C. Page	– Witness

And on behalf of the Union:

A. Kane	– Staff Representative, Burnaby
J. Dinnery	– President, Saskatchewan
J. Vucoja	– Vice-President, Toronto
P. Jacques	– Chief Steward, Mountain Region
G. Colli	– Chief Steward, Prairie Region
P. Wright	– Chief Steward, Atlantic Region

AWARD OF THE ARBITRATOR

On December 6, 2006 the grievor, James Mochoruk, was working as a Group II Machine Operator in charge of a ballast regulator. His vehicle collided with a tamper machine which was stationary at the time, on the Company's track at Barriere, British Columbia. As a result of the accident Mr. Mochoruk was requested to be drug tested, which he accepted to do.

The process utilized, apparently newly adopted since November of 2006, first involved the taking of a sample in single vial, with a screening capacity. The vial is equipped with litmus type readings which allow two possible conclusions: negative and non-negative. A non-negative reading is not a confirmed positive, but requires that the sample be forwarded to the laboratory for further testing by the traditional methods of immunoassay as well as gas chromatography and mass spectronomy. It is only after that ultimate test that a positive can be determined. If the screening sample taken on site gives a negative indication, the sample is simply discarded and there is no further testing to be conducted.

The on site sample provided by the grievor at the point of collection in Kamloops on December 6, 2006 registered non-negative. As a result it was sent to the laboratory for fuller testing, ultimately resulting in a positive result for cannabinoids.

Unfortunately it appears that the new system of point of collection screening may have caused some confusion in the minds of company officers conducting the disciplinary investigation. On December 7, 2006, the day following the collection, Mr. Mochoruk was notified that he was to attend a disciplinary investigation in connection with the track collision "by virtue of your positive test result following this result". The disciplinary investigation itself was conducted on December 15, 2006, before the results of the laboratory tests and the ultimate confirmation of a positive result were known to either the Company or the Union. Unfortunately, however, the grievor was given every reason to believe, at the time of the investigation, that he had in fact tested positive. The basis of confusion is reflected in one of the questions put by the investigating officer which reads as follows:

> Q.44 Why do you think you complied with the policy, in light of the fact from the evidence that the following the alcohol and drug test performed there was a Non-Negative test for the presence of illegal drugs. Which means the test was found to be positive for the presence of illegal drugs in your system.

In fact the investigating officer was incorrect in suggesting that the grievor was then found to have tested positive for the presence of any illegal drugs in his system. In fact it was only after the grievor's discharge, and by its own unilateral efforts, that the Union finally obtained a copy of the laboratory results which ultimately did confirm a positive result for cannabinoids.

During the course of the disciplinary investigation the grievor maintained that a positive result in his case, a result which had not yet truly been confirmed, must have resulted from the ingestion of second-hand marijuana smoke at two parties which he had attended within four or five days of the collection of his urine sample. He relates that he was at two social functions where others were consuming marijuana, although he denies that he did so. In coming to its decision to terminate the grievor the Company concluded that Mr. Mochoruk was being less than honest, and that his attempt at concealing the facts essentially broke the bond of trust essential to the employment relationship. His notice of discharge also charged him with having violated the Company's drug and alcohol policy by testing positive and violating Rule G.

As reflected in the joint statement of issue, the Union does not take issue with the disciplinary investigation conducted by the Company. In other words, it does not maintain that there was a failure of the obligation of a fair and impartial investigation. While it is arguable that it might have raised that ground of objection, the fact remains that the overall process of investigation now presented to the Arbitrator is less than compelling, at least as relates to the misunderstanding of the Company's own investigating officer with respect to the value to be attached to the initial screening test made at the point of collection. Before the Arbitrator both parties appear to agree that the better course would have been to await the ultimate receipt of the final laboratory test before commencing the disciplinary investigation. Needless to say, the precipitous launching of a disciplinary investigation based only on the screening test may prove extremely problematic from a procedural point of view, placing the Company at some risk.

The Union also takes issue with a number of technical aspects of the testing process. These concern whether the test was in fact a split sample or single sample test and whether it involved a six panel or five panel test. These

considerations relate entirely to the Company's drug and alcohol testing policy, a document which is not part of the collective agreement and which does not represent any agreement between the Company and the Union. While it is obviously open to the Union to challenge the regularity of the chain of custody and process of urine sample testing, it cannot expect to vitiate a test simply because there may have been a form or process which in some minor way deviates from the Company's own policy.

On a review of these facts, and having particular regard to the evidence of Dr. Barry Kurtzer, the Arbitrator is satisfied that here was, in fact, no departure from the standards of the Company's own policy. In substance what did transpire was the taking of a urine sample which could be treated as a split sample and, at the laboratory level, the application of the normal five panel test. The confusion with respect to a six panel test appears to arise from the fact that amphetamines and methamphetamines are both tested for, although they have traditionally counted as one panel substance. The Arbitrator can give no weight to the Union's objections concerning the manner in which the grievor's test was administered and processed.

What does the evidence in the case at hand confirm? Firstly, the positive drug test result cannot, of itself, confirm that the grievor was under the influence of marijuana during the course of his tour of duty. As noted in prior awards (**SHP 530**), the positive result for cannabinoids can only indicate the consumption of marijuana over a relatively broad band of time, most commonly in the area of approximately one week in advance of the taking of the sample. (See, e.g., **SHP 530**.) For reasons also detailed in other awards of this Office, the Arbitrator cannot accept the suggestion of the grievor that the positive test result was caused by the inhalation of second hand marijuana smoke. By his description of the events which he attended, there appears to have been ample ventilation and the circumstances were plainly not such as would cause the extraordinary result of a positive reading through second hand smoke inhalation. That phenomenon seems to result only from intense exposure to marijuana smoke in a small and sealed environment, a fact situation which simply does not arise in the case at hand. (See, e.g., **CROA 2965**.)

The issue then becomes the appropriate measure of discipline in the case at hand. I must accept that the grievor was not forthright in his explanation of a positive test result, and that he was deserving of discipline. In all of the circumstances, however, and in particular having regard to the fact that impairment while at work or while subject to duty is in fact not proved on the basis of any direct evidence, the Arbitrator is satisfied that this is an appropriate case for some mitigation of penalty. The grievance is therefore allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without compensation for any wages and benefits and without any loss of seniority. The grievor's return to work shall be conditioned upon his agreeing to be subject to random, unannounced drug and alcohol testing, to be administered in a non-abusive fashion, for a period of not less than two years from the date of his return to work. Failure to comply with the conditions of such testing or a positive test result shall be grounds for termination of the grievor's employment.

September 17, 2007

(signed) MICHEL G. PICHER
ARBITRATOR