CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3971

Heard in Montreal, Wednesday, 12 January 2011

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

EX PARTE

DISPUTE:

The reasonableness of the Company's decision to amend its continuing employment/reinstatement contracts to signal hair testing as one of the testing procedures that may be employed to monitor abstinence for employees who have been diagnosed with a substance use disorder.

UNION'S STATEMENT OF ISSUE:

By email dated May 5, 2010, the Company advised the TCRC that its continuing employment/reinstatement contracts had been updated to signal hair testing as one of the testing procedures that might be utilized by a medical practitioner to monitor abstinence for employees who have been diagnosed with a substance use disorder.

By letter dated July 6, 2010, the TCRC submitted a general policy grievance with respect to all collective agreements grieving the Employer's violation of union and employee rights by requiring members to submit to drug testing by hair analysis. The TCRC submits that the testing of workers who test positive for alcohol or drugs by hair follicle analysis as a condition of reinstatement is unnecessarily intrusive, goes beyond the standard of reasonable necessity and ignores the available alternatives of responsible supervisory monitoring. Furthermore, the Company has not justified the extraordinary measure of its newly-adopted policy. The Company has ample means of dealing with any problems of drugs and alcohol in the workplace through existing policies and programs. Finally, the TCRC suggests that the Company cannot show that measures less intrusive than drug testing by hair follicle analysis are not available to it to properly address substance abuse problems in the workplace.

The TCRC requested that the Employer remove from its continuing employment/ reinstatement contracts any and all references to "hair" as one of the acceptable testing procedures.

It is the Union's position that the Company's decision to amend its continuing employment/reinstatement contracts to include hair testing as a possible testing procedure violates the implied term of every applicative collective agreement to respect the dignity and privacy of employees. In addition, the Company's decision violates article 71 of agreement 1.1, article 91 of agreement 1.2, article 82 of agreement 4.16, article 32 of agreement 4.2, article 121 of agreement 4.3, article 21 of the FBCR-LE collective agreement, article 104 of the FBCR-CTY collective agreement, article 15 of the NBEC-LE & NBEC-CTY collective agreements, article 9 of the RCTC collective agreement, article 7.1 and article 30 of the CFMG collective agreement in that employees may be dismissed from their employment on the basis of unfair, arbitrary and invasive means. Finally, the Company's decision is in violation of its own Human Rights Policy / Harassment Free Environment, in which the Company undertakes to ensure that all employees are treated fairly and equitably in a harassment-free environment.

The Company had declined the grievance.

FOR THE UNION:

(SGD.) D. J. SHEWCHUK
PRESIDENT

There appeared on behalf of the Company:

Wm. Hlibchuk	– Counsel, Montreal
D. Crossan	– Manager, Labour Relations, Prince George
G. Granatstein	– Counsel, Montreal

There appeared on behalf of the Union:

J. L. Shields	– Counsel, Ottawa
D. Finnson	– Vice-President, Ottawa
B. Willows	– General Chairman, Edmonton
B. R. Boechler	– General Chairman, Edmonton
R. A. Hackl	– Vice-General Chairman, Edmonton

AWARD OF THE ARBITRATOR

The Union has filed a policy grievance objecting to the Company's announced intention, as contained in an email of May 5, 2010, to use hair testing as one of the possible procedures in the monitoring for the abstinence of employees who have been reinstated into employment by agreement, in accordance with a Continuing Employment / Reinstatement contract. The Union submits that the Company's decision to utilize hair testing in that context is unduly intrusive, fails to respect the dignity and privacy of employees, and violates a number of provisions of its collective agreements.

The Company objects to the arbitrability of the grievance as filed. Firstly, it submits that the Union did not comply with the procedural requirements of the various collective agreements in the progressing of this matter to the CROA&DR. On that basis, it argues that the grievance is not properly before the Arbitrator. Secondly, it submits that the subject matter which the Union seeks to grieve is not arbitrable as it relates entirely to the content of reinstatement agreements, the terms of which it submits fall outside the scope of the collective agreement and therefore outside the jurisdiction of this Office. Thirdly, the Company submits that in any event the issue is premature, as it does not arise from any actual case where an employee's rights might allegedly have been violated.

The instant grievance raises the status of contracts of ongoing employment/reinstatement made by the parties themselves. Such contracts are typically made in situations where an employee has been discharged, has filed a grievance against that discharge and the parties decide to reinstate the employee into his or her employment, subject to certain agreed conditions. Where the discharge has involved the use of drugs or alcohol, it is not uncommon for such conditions to involve total abstinence from the consumption of drugs and/or alcohol and random drug and alcohol testing to take place of a period of two years. Failure to respect the conditions of such agreements is generally grounds for dismissal. Boards of arbitration, including this Office, have long recognized the value of such agreements and have followed a general arbitral policy not to interfere with them (see, e.g., **CROA 2632**).

Before the Arbitrator the Company submits that its decision to consider the option of hair testing in the monitoring of reinstated employees who are subject to an ongoing employment contract is not itself a policy. It is, in counsel's submission, merely a term which the employer may choose to require as part of a reinstatement contract which would be acceptable to it. In essence, the Company's counsel submits that whatever terms the employer may choose to require as part of a reinstatement contract, those elements of themselves are not a policy. More critically, to the extent that any continuing contract of reinstatement results in a consensual arrangement, accepted by the Union, there can be no offence to the collective agreement.

In **SHP 530** the Arbitrator had occasion to do an exhaustive review of the Company's Drug and Alcohol Policy as it stood in the year 2000. That award effectively determined which parts of the policy could not stand as they did offend either specific provisions of the collective agreement or provisions of employment related statutes, such as the **Canadian Human Rights Act**.

It may be noted that in that case the Company agreed to submit the entirety of its policy to arbitral review, with the full opportunity of all unions which were subject to the policy to participate. As a review of the decision reveals, the subject of reinstatement contracts of employment was examined. In the concluding summary of the award, at pp. 149-150 the following entries appear:

> 3 For employees occupying risk sensitive positions, the Company may, under pain of discipline and subject to principles of just cause, conduct drug and alcohol testing by breathalyser and urinalysis in circumstances of reasonable grounds, including following any significant accident or incident, and as part

> of a medical examination to determine fitness for duty upon transfer or promotion into a risk sensitive position. Such testing may also be part of any conditions or terms of reinstatement negotiated with the employee's bargaining agent. (For the purposes of clarity, post-reinstatement drug testing agreements can, by consent, involve random, unannounced drug testing, to be administered in a non-abusive fashion.)
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> …
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> 5. To the extent that the wording of the policy might be interpreted to suggest that the Company negotiates reinstatement contracts of employment with employees without consultation with their bargaining agent, it would be in violation of the collective agreements and the exclusive bargaining rights of the unions concerned. No such agreement can be validly negotiated without the agreement of an employee's bargaining agent.
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> …
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> 7. The position which the Company takes as regards the specific content of a reinstatement agreement is only that, and the statement of its position in that regard within the policy is not a violation of any collective agreement.

At the risk of seeming technical, I consider it important to distinguish between what I will characterize as two separate phases with respect to a continuing contract of employment. The first phase is that of negotiation, where the employee, the Company and the employee's Union bargain the terms of the individual contract of employment which will govern the reinstatement of that individual. As reflected in paragraph 7 of the summary excerpted from **SHP 530** above, what one party or the other may put on the table for inclusion into an ongoing contract of employment is not a matter governed by the collective agreement. Absent proposing something that is patently illegal, it is difficult to see upon what basis making a proposal, before any agreement is made, can of itself be viewed as a violation of the collective agreement.

Different considerations, however, come into play once the contract of employment has been executed. Clearly, that contract must be viewed as an extension

of the collective agreement, to the extent that it contains further terms and conditions of employment negotiated and agreed to between the Company and the Union, as well as by the employee concerned. As a general rule, therefore, whether such an agreement has been respected or broken is an issue which can be subject to the grievance and arbitration provisions of the collective agreement.

There is no provision of the collective agreements of which the Arbitrator has been made aware which would prohibit any particular term being sought to be included or actually included within the body of a continuing contract of employment. Indeed, such contracts are highly individualistic and commonly take their specific terms from the factual circumstances of the employee under consideration. There is an obvious value in both parties having the maximum of flexibility in approaching the terms of an ongoing contract of employment.

With the greatest respect to the Union, I cannot see how the mere proposing of the possibility that the Company may require a particular kind of drug or alcohol testing as part of an agreement for the reinstatement and ongoing and continuing employment of an individual with drug or alcohol problems can be characterized as being in and of itself a violation of the collective agreement. Moreover, if the Union should be of the view that a particular proposal does violate the collective agreement it is at liberty to refuse that term, refuse to execute the proposed ongoing contract of employment and to fully pursue the employee's grievance to arbitration. In that context, I have great difficulty concluding that the Company's notice of its intent to possibly use the testing of

hair samples in future reinstatement and continuing employment contracts can be viewed as violating any part of the collective agreement. On that basis alone, without commenting on the issue of timeliness or prematurity, I am compelled to conclude that the grievance, as framed, is not arbitrable.

For the purposes of clarity, however, it should be stressed that the Arbitrator makes no comment nor any finding with respect to whether hair testing, as part of the ongoing employment regime of a reinstated employee would or would not violate the collective agreement or the protections of an employment related statute such as the **Canadian Human Rights Act**, in a specific case. It should be stressed that this Office has heard no evidence with respect to the nature of the information gathered through hair testing nor any evidence with respect to the reliability of hair testing results and the issues of custody and privacy which may relate to it. That is simply to say that should an individual employee ultimately be discharged for having violated a continuing contract of employment as a result of failing a hair test, he or she could possibly challenge that test as being unlawful or contrary to an implicit term of a collective agreement or of the terms of any employment related statute. I must agree with the Company, however, that that is a situation which has simply not matured and is not properly raised in the instant policy grievance.

In the alternative, if it were necessary to so rule, I would also have difficulty with the Union's position regarding the Company's objection as to the manner in which the policy grievance has been progressed. It does not appear disputed that the matter did

not progress through the normal grievance steps of the many collective agreements which are cited by the Union. Given that the Company has not agreed to the matter being heard as an accelerated policy grievance, contrary to what it did **SHP 530**, I would be compelled to agree with the Company that the matter has not been brought to this Office in compliance with the terms of the collective agreements or the rules of this Office.

For all of the foregoing reasons the grievance must be viewed as inarbitrable and it is therefore dismissed.

February 16, 2011

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MICHEL G. PICHER
ARBITRATOR