CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4028

Heard in Montreal, Wednesday, 13 July 2011

Concerning

VIA RAIL CANADA INC.

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The dismissal of Locomotive Engineer "R".

JOINT STATEMENT OF ISSUE:

Based on the information received by the police, R was met by a VIA Manager when he reported for duty on January 20, 2011. As the manger suspected R of being in violation of CROR Rule G, R was removed from service. Following an investigation R was dismissed for insubordination and violation of CROR Rule G.

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 Locomotive Engineer R be made whole. The Union contends that there is no just cause for Locomotive Engineer R's discharge and that this penalty is excessive and unwarranted in all of the circumstances. The Union contends that the Company's disciplinary action breaches the collective agreement and the *Canadian Human Rights Act*.

The Union requests that Locomotive Engineer R be reinstated without loss of seniority and benefits and that he be made while for all lost earnings, with interest. In the alternative, the Union requests that the penalty be mitigated as the arbitrator sees fit.

The Corporation submits that it had reasonable cause to instruct R to under an alcohol and drug test. R refused. Under the circumstances, the Corporation maintains that the dismissal of R was warranted and appropriate.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) WM. MICHAEL	**(SGD.) D. STROKA**
GENERAL CHAIRMAN	**SR. LABOUR RELATIONS ADVISOR**

There appeared on behalf of the Company:

D. Stroka	– Sr. Advisor, Labour Relations, Montreal
J. Kelly	– Manager, Train Operations,

B. A. Blair – Sr. Labour Relations Officer, Montreal

There appeared on behalf of the Union:

M. A. Church – Counsel, Toronto
Wm. Michael – General Chairman, Toronto
P. Hope – Vice-General Chairman, Toronto
R – Grievor

AWARD OF THE ARBITRATOR

Upon a close review of the evidence the Arbitrator is satisfied that the grievor did knowingly violate the Corporation's Drug & Alcohol policy. The evidence of Hamilton Police Detective Wm. J. Elliott confirms that on January 19, 2011 he visited the grievor's home in Hamilton, apparently seeking to interview two other individuals who were the grievor's tenants. Detective Elliott relates that when R answered the door he could detect a strong smell of freshly burned marijuana emanating from his apartment behind him. During their conversation he learned that the grievor is a locomotive engineer with the Corporation. Subsequently he notified the employer of his concern as to whether R might operate a locomotive under the influence of marijuana.

Some fourteen hours after his encounter with Detective Elliott R appeared for work. He was then observed by Manager, Train Operations Jerome Kelly. According to a memorandum prepared by Mr. Kelly: "[R]'s pupils were extremely large and his eyes appeared glossy." According to Mr. Kelly's account, shortly thereafter he withdrew the grievor from service and advised him that he would have to undergo a drug and alcohol test. However, it appears that the grievor immediately fetched his coat and uttered words to the effect of: "You are fucking stressing me out, you are fucking stressing me out again." He then proceeded to the parking lot where he got into his car and left the

workplace without complying with the direction of Mr. Kelly. In his memorandum Mr. Kelly relates that he called out to the grievor, in part, "… if you leave it will be considered an admission of guilt and you will be held out of service without pay, do you understand?" The grievor nevertheless entered his car and drove away.

It appears that sometime later R attended at a Hamilton hospital to be drug tested, apparently on his own. That test, the results of which were filed in evidence at the disciplinary investigation by the Union, indicates that he tested negative for marijuana. There is, however, no evidence as to the procedures followed in relation to the test which was administered, including issues of security and the chain of custody of any urine sample. I am compelled to conclude that it cannot be given any significant weight.

At the time of these events the grievor had recently returned to work following an absence due to an episode of post-traumatic stress disorder, apparently triggered by a level crossing accident in which he had been involved. It appears that he was still under counselling in relation to that condition at the time of the events of January 19 and 20, 2011.

Following the disciplinary investigation conducted, the Corporation concluded that the grievor violated Rule G, drawing the inference that he was under the influence of marijuana at the time he appeared for work, being unwilling to place any reliance on the independent drug test which he subsequently took. Additionally, the Corporation concluded that the Corporation had been insubordinate in refusing to take the drug test which would have been administered by the Corporation in controlled circumstances.

During the course of his investigation R denied that he was asked to take a drug test. At most he appears to concede that at one point, as he was leaving in his car, Mr. Kelly made a comment to the effect that his leaving must mean that he would not come upstairs to take a test. I do not find that aspect of the grievor's evidence to be credible. The unchallenged representation of the Corporation was that arrangements had already been made, based on the information provided by Detective Elliott, to have the Corporation's drug testing service present that morning for the purpose of conducting a test on R, although the technicians had apparently not arrived at the time of his confrontation with Mr. Kelly. I accept without reservation the truth of Mr. Kelly's memorandum which states that he specifically reported to the Toronto Maintenance Centre with the intention of seeing if R was impaired when he reported for duty at 03:50. Mr. Kelly expressly stated to R that he was concerned about the appearance of his eyes and asked if he had "taken anything". He did not accept the grievor's explanation that the appearance of his might be explained by the fact that he had just woken up. I accept that shortly thereafter Mr. Kelly expressly advised R that he was taking him off his assignment and that he must be tested for drugs and alcohol. At that point the grievor advised Mr. Kelly, who was not aware of it, that he had previously been on stress leave and proceeded to fetch his coat and leave, stating "You are fucking stressing me out, you are fucking stressing me out again."

The Union submits that the grievor was denied a fair and impartial investigation. The Arbitrator cannot agree. Article 20.2 of the collective agreement provides as follows:

> **20.2** A locomotive engineer will not be disciplined or dismissed without having had a fair and impartial hearing and his responsibility established.

The record before the Arbitrator confirms that neither Detective Elliott nor Mr. Kelly attended to be examined during the grievor's disciplinary investigation. Rather, the email which Detective Elliott had forwarded to a Corporation supervisor was entered into evidence as well as the memorandum prepared by Manager, Train Operations Jerome Kelly. Those were duly provided to the grievor and his Union representative at the commencement of the investigation. It is well established that the Corporation is entitled to rely on documentary evidence such as the memorandum of a supervisor, and is not compelled to call the author of a memo as an actual witness or interviewee (see **CROA 1575, 2920, 3261, 3270** and **CROA&DR 3461, 3627, 3749** and **3777**). In the circumstances I cannot find that not having Detective Elliott or Mr. Kelly present at the investigation involved any violation of the provisions of article 20 of the collective agreement or a denial of the right to a fair and impartial investigation. The grievor and his Union representative were given every opportunity to respond to and rebut the written statements of Detective Elliott and Mr. Kelly. The cases which the Union relies on, involve either the case of a person being examined during an investigation in the absence of the employee concerned, or the company failing to share critical documentary evidence with a grievor and his or her union (e.g. **CROA 3164** and **3322**). Nor am I persuaded that the tone of questioning used by the investigating officer was, of itself, inconsistent with a fair and impartial investigation. The Union's preliminary objection in that regard must therefore be dismissed.

On a careful review of the totality of the evidence the Arbitrator has substantial concern. The evidence of Detective Elliott, which I accept, is that there was every

reason to believe that the grievor was consuming marijuana, albeit a fair number of hours prior to his tour of duty. Mr. Kelly's recital of evidence states that when the grievor did appear for work his pupils were greatly dilated, a generally accepted symptom of marijuana consumption. Lastly, and perhaps most tellingly, the grievor refused to submit to the Corporation's drug and alcohol test, and left the premises notwithstanding the warnings uttered by Mr. Kelly.

In **CROA 1703** this Office commented as follows:

> … 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 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.

On the whole of the evidence I am satisfied that the grievor did present himself for work under the influence of marijuana on the morning of January 20, 2011. I am satisfied that he knowingly refused to undergo the Corporation's drug and alcohol test and I share the scepticism of the Corporation with respect to the reliability of the subsequent test which he purports to have taken himself, without employer supervision.

Nor can I accept the submission of the Union's counsel that the grievor was the victim of discrimination having regard to his emotional and psychological condition in relation to post-traumatic stress disorder. Having a bona fide medical condition does not insulate any employee from the normal rules of the workplace, including the obligation to abstain from drug and alcohol consumption immediately prior to attending at work, or

the obligation to accede to a reasonably made request to undergo drug and alcohol testing, as was done in the case at hand.

The issue then becomes the appropriate disciplinary outcome. I am satisfied that the grievor should not return to active service. However, fair regard must be had to the fact that in a few months the grievor will reach age fifty-five, and will then have some thirty-three years of service. If in fact that age and service will then entitle him to take unreduced early retirement pension benefits, I would be inclined to order a conditional suspension until that date, on the condition that the grievor then take his retirement. If I am incorrect my assessment of that pension possibility, I would sustain the Corporation's position and dismiss the grievance outright. For the moment I deem it appropriate to do neither, and remit the matter back to the parties for their own discussion, reserving on the ultimate disciplinary outcome in the event that they should be unable to reach any agreement.

July 21, 2011

(signed) MICHEL G. PICHER
ARBITRATOR