CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4211

Heard in Montreal, May 16, 2013

Concerning

CANADIAN NATIONAL TRANSPORTATION LIMITED

And

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA)

DISPUTE:

The termination of the Standard Contract of CNTL Owner Operator Pauline Fondeur for failing a random drug and alcohol test.

JOINT STATEMENT OF ISSUE:

On November 16, 2012, a formal investigative hearing was held in connection with Ms. Fondeur failing a random United States Department of Transportation (DOT) Drug and Alcohol test that was conducted by an external testing provider 'DriverCheck' on November 8, 2012 at Winnipeg, Manitoba, Canada. Following the investigation, the Standard Contract between Ms. Fondeur and CNTL was terminated on account of her failing the "DOT Drug and Alcohol test." The Union contends that there was not reasonable cause to subject Ms. Fondeur to a random drug and alcohol test at a time when she was not required or likely to be required to perform cross-border work nor expressed interest in performing cross-border work, and therefore violated her legal rights as protected by the Canadian Charter of Rights and Freedoms and the Canadian Human Rights Act. The Union also contends that the Company violated the collective agreement by failing to conduct the investigative hearing process in a fair and impartial manner and failed to adhere to the terms and guidelines of the CN and CNTL Drug and Alcohol Policies when conducting the tests.

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

FOR THE UNION:
(SGD.) B. Kennedy
President

FOR THE COMPANY:
(SGD.) R. Bateman
Director Labour Relations

There appeared on behalf of the Company:

J. Darby	– Labour Relations Associate, Concord
D. S. Fisher	– Senior Director Labour Relations and Strategy, Montreal
M. Peterson	– CNTL Manager, Truck Operations, Concord
R. Basso	– CNTL Truck Operations Supervisor, Concord
R. Campbell	– Manager, Labour Relations, Winnipeg

There appeared on behalf of the Union:

B. Kennedy	– President CAW Council 4000, Edmonton
R. Fitzgerald	– National Representative, Toronto
W. Gajda	– Regional Representative, Toronto
J. White	– Regional Representative, Toronto
P. Fondeur	– Grievor, Winnipeg

AWARD OF THE ARBITRATOR

The material before the Arbitrator confirms that the grievor, Tractor Trailer Owner-Operator Pauline Fondeur of Winnipeg was terminated by reason of failing a drug and alcohol test on November 8, 2012. It is common ground that the test in question was administered randomly under the employer's Drug and Alcohol Policy adopted by the employer in 2007.

As a matter of background, it is important to appreciate that the Company operates regularly into the United States. In that context, the Owner-Operators who are members of the bargaining unit may be subject to random alcohol and drug testing in conformity with U.S. department of Transport Regulations. That is reflected in the following excerpt from the Company's own Drug and Alcohol Policy:

> As per the Collective agreement, all CNTL Owner Operators and Replacement Drivers hired after January 28, 2007 and Replacement Drivers are eligible to be assigned moves to the United States. CNTL Owner Operators hired before January 28, 2007, and their Replacement Drivers can be assigned moves to the

> United States on a voluntary basis. In either case the above drivers are subject to the Drug and Alcohol testing requirements of the United States. Failure to meet these requirements will result in the termination of the Standard Contract of that Owner Operator.

It is not disputed that in conforming to the Drug and Alcohol testing requirements of the United States the Company does administer random drug tests. In doing so, it would appear to fall within the accepted policy of the Canadian Human Rights Commission with respect to Alcohol and Drug Testing in safety sensitive positions, as published in October of 2009.

In the instant case, when questioned as to the result of her drug test the grievor admitted to having consumed marijuana. According to her explanation, while she was at a social event at a friend's home not long before her test, the guests were served baked goods containing marijuana. According to her account they were only informed of the fact afterwards, when they were on their way to a music concert. The grievor, who had returned a negative result on a random drug test previously, maintains that she does not knowingly consume marijuana, and on the occasion here under consideration became aware of having done so only after the fact.

Based on the grievor's positive drug test, the employer terminated her employment. The Union takes issue with a number of aspects of the treatment of the grievor. Its representative submits that the investigation conducted by the Company prior to the decision to terminate the grievor was not conducted in a fair and impartial manner. In that regard the Union's representative points to the Company having entered

into evidence the grievor's prior disciplinary record as well as a number of rulings by the investigating officer to the effect that certain matters were to be considered irrelevant.

Issue is also taken with the manner of which the drug sample was treated, with the Union emphasizing that the grievor was not, as is done under the American department of Transport Rules, clearly advised that there had been a split of the original sample, so as to allow the possibility of her requesting a verification test to be taken based on the second specimen.

The Company's representative submits that the investigation procedure under the instant Collective agreement is substantially less formal than is found under many of the Collective agreements which govern railways and trade-unions in this office. He maintains that there was nothing untoward in the manner of which the disciplinary investigation was conducted, nor in the procedure followed with respect to taking and analysing the grievor's urine sample for the purposes of the drug and alcohol test. With respect to the issue of random drug testing the employer stresses that it has little alternative, given that it is subject to the mandatory requirements of the Department of Transport Rules and Regulations which govern bargaining unit employees who operate in the United States. While it is not disputed that the grievor has herself not operated to or from American destinations, the Company stresses that she was at all times liable to be so assigned, as was made clear in a communication from the Company's Assistant Vice President to the Union's president on January 14, 2007 which reads as follows:

> Dear Mr. Fitzgerald,
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> In order to assist in the potential expansion of CNTL transborder services into the United States, all new hires in Canada must be qualified and eligible, and remain so, to perform any cross border trucking assignments. These new hires must accept any and all U.S. dispatches. Failure to do so will result in termination of the Standard Contract and their names will be removed from the seniority list. The opportunity to U.S. work will be bulletined to the owner-operators at the terminal for a period of fifteen (15) days.
>
> Owner operators will be permitted to use replacement drivers while completing the requirements to drive in the U.S.
>
> Yours truly,
> James Carins
> Assistant Vice-President IMX

The letter above quoted is, as can be seen, consistent with the Company's Drug and Alcohol Policy, whereby employees hired after January 28, 2007 are liable to be assigned to handle traffic into the United States and are therefore subject to U.S. drug and alcohol testing requirements.

Upon a review of the facts, the Arbitrator is satisfied that the Company did not violate any provision of the Collective agreement nor of any Canadian law to the extent that it required its employees who are subject to travelling into the United States to be subject to American drug testing rules, including random alcohol and drug testing. While the general rule of application may be different as regards random alcohol and drug testing for employees in safety sensitive work whose employment is performed entirely in Canada, the specific legal obligations and liability of the instant employer, operating as it does a common carrier service into the United States, did make it subject to American drug testing rules promulgated by the U.S. Department of Transport, which

included the requirement to randomly alcohol and drug test employees subject to possible assignment into the U.S.

In these exceptional circumstances I am satisfied that random drug and alcohol testing, as was administered to the grievor, was not improper. Nor can I sustain the relatively technical argument of the Union with respect to the split specimen aspect of the test administered. It appears that in fact the specimen was split, save that the grievor may not have been informed as to the availability of a possible second test. While that objection might have some validity in another case, it is relatively academic to the extent that in the instant case the grievor voluntarily admitted to having consumed marijuana when she was confronted with the result of her positive drug test.

The real issue in the case at hand is the appropriate disciplinary response. In weighing that question I believe that there are some mitigating factors to be considered in the instant case. Firstly, there can be no doubt but that the grievor was open and candid with her employer at all times. She in fact admitted to the consumption of marijuana, albeit in circumstances which were initially outside her knowledge. There is simply no evidence to challenge her assertion that in fact she does not consume marijuana. Nor is there any suggestion in the material before me that she was ever impaired by alcohol, marijuana or any other drug while on duty or subject to duty.

In the result, I am satisfied that this is an appropriate case for the exercise of the Arbitrator’s discretion to reduce the penalty assessed against the grievor, albeit subject

to conditions fashioned to protect the employer's legitimate interests. The grievance is therefore allowed, in part. The Arbitrator directs that the grievor be reinstated into her employment forthwith, without loss of seniority and without compensation for any wages or benefits lost. The grievor's reinstatement shall be subject to her accepting to be subject to random alcohol and drug testing, to be administered in a non-abusive fashion, for the period of two years following her reinstatement. Failure to make herself available for a random drug and alcohol test, or providing a positive sample may result in the termination of her employment.

May 17, 2013

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MICHEL G. PICHER
ARBITRATOR