CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4296

Heard in Calgary, March 12, 2014

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the termination of Locomotive Engineer Shawn Gardippie.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Following an investigation, Engineer Gardippie was discharged on February 12, 2013 for conduct unbecoming an employee as demonstrated by your willful use of an illegal and prohibited substance as evidenced by your positive substance test conducted on December 17, 2013, a violation of Company policy OHS 5100, OHS 4100 and GOI Sec.3, while employed as a Locomotive Engineer in Calgary, Alberta.

The Union contends the Company response to the facts of this case was unjustified, un warranted and excessive in all circumstances.

The position of the Union is the actions of the Company in this case breached the terms of Policy 5100, the June 16, 2010 Agreement between the parties, the Collective Agreement and the Canada Human Rights Act.

The Union requests that the discipline be removed in its entirety, that Engineer Gardippie be ordered reinstated forthwith without loss of seniority and benefits, and that he be made whole with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) D. Able	**(SGD.)**
General Chairperson	

There appeared on behalf of the Company:

M. Moran	– Manager Labour Relations, Calgary
M. Thompson	– Manager Labour Relations, Calgary

There appeared on behalf of the Union:

M. Church	– Counsel, Caley Wray, Toronto
G. Edwards	– Vice General Chairman, Revelstoke
G. Lawrenson	– Local Chair, Calgary
D. Able	– General Chair, Calgary

D. Adams	– Vice Local Chair, Calgary
D. Olson	– General Chair, Calgary
D. Fulton	– Vice General Chair, Calgary
D. Kennedy	– Local Chair, Calgary
S. Gardippie	– Grievor, Calgary

AWARD OF THE ARBITRATOR

On December 17, 2013, Locomotive Engineer Guardippie ("the grievor") was involved in a derailment. As a result, the crew was ordered for post- incident testing. The grievor was hired in January 1984 and had 29 years of service with the Canadian Pacific Railway Company ("the Company") when he was discharged. He had no demerits on file and a commendable disciplinary history until the discipline (which is the subject matter of a pending grievance) and discharge arising from the facts before me.

The results of the post-incident testing were as follows: negative for breath alcohol, negative for the oral fluid drug test and positive for the urine test. As a result of the positive urine test, the grievor was required to attend a formal investigation on January 31, 2013. During his statement, the grievor revealed that two days prior to his tour of duty on December 17, 2012, he attended at a Christmas party and used marijuana.

The Company does not dispute the fact that the grievor was not impaired or under the influence of any substance during his tour of duty. Nevertheless, the Company asserts that the grievor was in violation of its alcohol and drug policy and procedures, and that for the violation the grievor’s dismissal was justified. The

Company's view is that using a prohibited substance while employed in a safety critical position warrants the grievor's dismissal.

The Company's position has no merit. No discipline can be sustained against the grievor. To the extent that a policy stipulates that for unionized employees a positive drug test is, of itself, grounds for discipline or discharge, it is unreasonable and beyond the well accepted standards set out in *KVP Co. Ltd. and Lumber & Sawmill Workers' Union, Local 2537* (1965), 16 L.A.C. 73 (Robinson).

This law is settled. It has been for some time.

Moreover, Arbitrator Picher very recently addressed the Company's alcohol and drug policy and procedures in a case where the facts are similar in all material respects to those before me. In **CROA 4240**, the grievor was dismissed by the Company for "willful use of an illegal and prohibited substance resulting in a positive test conducted on February 12, 2013."

In **CROA 4240**, the Company subsequently rescinded the grievance's dismissal and substituted a 30-day suspension. Even that was found to be unjust. In concluding the grievance should be allowed in full and all discipline rescinded, Arbitrator Picher offered the following comments about the Company's policy and procedures:

> In the instant case the company notes that it has established, as part of its alcohol and drug policy, article 2.4.2 of 0HS 5100 which effectively states that for employees in safety critical or safety sensitive positions a positive drug test, in and of itself, is a violation of the company's policy. With respect, the arbitrator cannot find that that aspect of the company's policy which in the strictest sense

> has no basis in science or technology with respect to impairment or the risk of impairment on the job, can fairly be said to be a valid rule in furtherance of the company's legitimate business interests.
>
> The arbitral jurisprudence in respect of drug testing in Canada is now extensive. It has been repeatedly sustained by the courts and is effectively the law of the land. Part of that law, as stated in the passage quoted above is that a positive drug test, conducted by urine analysis, standing alone, does not establish impairment at a point in time which corresponds with an employer's legitimate business interests and, standing alone, cannot be viewed as just cause for discipline.

In light of the above, it will be apparent that this grievance must be allowed. The grievor is to be reinstated to his employment forthwith with compensation of all wages and benefits lost and without loss of seniority.

Finally, I note the final paragraph of the Company's brief states:

> Clearly the company advises against the arbitrator reinstating the employee in the case before you. However, in the event the arbitrator elects to ignore the advice of the Company and you reinstate this employee, it remains our position that the circumstances surrounding the discipline assessed to the grievor do pose a continued risk to the Company's operation and public safety. Should an incident occur following your reinstatement of the grievor it will be a matter of public record that for the reason stated before you today, Canadian Pacific remains opposed to returning the grievor to the workplace. The Company maintains that the Arbitrator and the Union bear the burden of responsibility of any such consequences that may arise.

The above excerpt misconceives and attempts to undermine the role of the arbitrator. First, the arbitrator does not take the advice of any party. Rather, the arbitrator assesses the facts and the law as presented by the parties in the course of the hearing. In this case, the facts and the law led me to a result in favour of the Union and the grievor. Second, the outcome in this case has nothing to do what may or may not happen in the future, and it is not persuasive for a party to attempt to influence the

outcome of a grievance in its favour by resorting to veiled threats of legal consequences against the arbitrator (as well as the party opposite).

March 20, 2014

CHRISTINE SCHMIDT
ARBITRATOR