CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4353

Heard in Montreal, January 14, 2015

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Dismissal of Conductor N. McDougal.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Following an investigation, Conductor McDougal was discharged on July 25, 2014 for "your engaging in the use of an illegal and prohibited substance as evidenced by your positive post-incident substance test completed on July 8, 2014, a violation of OHS Policy 5100 items 2.4.2 and 3.1 and OHS Policy 4100 while working as a Conductor in Montreal on July 8th, 2014".

The Union contends that the Company's response to the facts of this case was unjustified, unwarranted 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 Conductor McDougal 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.

The Company disagrees and denies the Union's request.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) B. Hiller	**(SGD.)**
General Chairperson	

There appeared on behalf of the Company:

B. Medd	– Labour Relations Officer, Calgary

There appeared on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
B. Hiller	– General Chairperson, Toronto
W. Apsey	– Vice General Chairperson, Smiths Falls
N. McDougal	– Grievor, Smiths Falls

AWARD OF THE ARBITRATOR

On July 8, 2014 Neil McDougal, the grievor was involved in an incident where a trailing car he was controlling hit a stop block. The crew involved were subjected to post incident/accident testing. Mr. McDougal tested negative for breath alcohol, negative for oral fluid and positive for urine drug test.

An investigation was conducted on July 19, 2014 and the grievor admitted that he had shared a “joint” with three friends on July 7, 2014. He said that smoking marijuana was an isolated incident and not something that he does regularly. He was on rest and not subject to duty. The grievor apologized for the incident and said his positive urine test had nothing to do with the incident. The grievor was discharged for failing to comply with the Company’s alcohol and drug policy as evidenced by the positive drug test.

There is no evidence before the Arbitrator that demonstrates that Mr. McDougal was impaired at work on July 8, 2014. The grievor indicated in the investigation report that the road foreman who directed the grievor to attend the drug test indicated that he looked fine, did not smell of alcohol and his eyes were clear. Further the material indicates the grievor had a 20-30 minute discussion with the trainmaster the morning of July 8, 2014 when he reported for work. There was no suggestion as to the grievor’s fitness.

The Union relies on the negative oral swab test, the lack of evidence of impairment of those who came into contact with the grievor on July 8, 2014 and the grievor's own evidence. The Union says that there was no on duty impairment and as a consequence no cause for discipline or discharge.

The Union says there is no breach of Rule G (the use of intoxicants or narcotics on duty or subject to duty. and that the Company cannot establish such a breach in this case. It says that the **CROA&DR** jurisprudence clearly supports the Union's position.

The Company says the grievor violated its Alcohol and Drug Policy. It reviews the safety critical nature of the grievor's employment.

In respect of the Alcohol and Drug Policy the Arbitrator in **CROA&DR 4240** addressed that argument as follows:

> In the instant case the Company notes that it has established, as part of its Alcohol and Drug Policy, Article 2.4.2 of OHS 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.
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> 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.
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> That is precisely what the instant case involves. The Company seeks to punish an employee for activity which occurred while he was off duty, off Company premises which, in and of itself, posed no threat or harm to the Company's

> operations or its legitimate business interests. In these circumstances the Arbitrator cannot responsibly conclude that the employer had just cause for the assessment of any discipline against the grievor, merely by reason of his having registered a positive result to a urine analysis drug test, or by his admission that he did consume marijuana in a social setting while off duty.

In **CROA&DR 3701** the Arbitrator found that "standing alone, therefore, a positive drug test cannot be just cause for discipline, even if it may, technically, be a violation of the Company's Alcohol and Drug Policy (**CROA&DR 3668** and **3691**)". He found that consideration must be had to other corroborative evidence suggesting impairment.

These were followed in each of **CROA&DR 4240** and **CROA&DR 4296.**

In the circumstances of this case and in regard to the **CROA&DR** jurisprudence on this issue, this grievance is allowed. The grievor is to be reinstated to his employment forthwith with compensation for all wages and benefits lost and without loss of seniority.

February 5, 2015

MARILYN SILVERMAN
ARBITRATOR