CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4378

Heard in Calgary, March 10, 2015

Concerning

CANADIAN NATIONAL RAILWAY

And

UNIFOR COUNCIL 4000

DISPUTE:

Thirty demerits assessed Mr. Weston for willful misconduct, abandoning his trainee who became involved in a derailment while he went for lunch on April 4th, 2014.

JOINT STATEMENT OF ISSUE:

Then Union alleges that Mr. Weston was an experienced trainer, who had worked with Mr. Abdi for 6 weeks and was just getting ready to qualify him in a couple of days such that it would not be unreasonable to leave him alone to allow him to make sure a move without watching him. Furthermore they provide that it was unfair to allege Mr. Weston "abandoned his post" as he was on a scheduled dinner break with many of his peers.

The Company disagrees with the Union's allegations.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) B. Kennedy	**(SGD.) R. Campbell**
President	**Labour Relations**

There appeared on behalf of the Company:

R. Campbell	– Manager Labour Relations, Winnipeg
R. Bateman	– Director Labour Relations, Toronto
R. Emond	– Manager LRC, Edmonton
D. King	– Mechanical Supervisor, Edmonton

There appeared on behalf of the Union:

R. Fitzgerald	– National Representative, Toronto
R. Shore	– Regional Representative Council 4000, Vancouver
J. Dowell	– President Local 4001, Edmonton
P. Weston	– Grievor, Edmonton

AWARD OF THE ARBITRATOR

The grievor, Philip Weston is fifty-five years old with thirty-three years of service.

Mr. Weston was assessed thirty demerit points for leaving his trainee who then became involved in a derailment. The grievor had gone on a meal break. As a result of this incident, Mr. Weston was directed to undergo post-incident drug and alcohol testing. He refused and was discharged. That discharge grievance is the subject of **CROA&DR 4379**. Both of these incidents are dealt with in this Award.

Mr. Weston is a Hostler at the Walker Locomotive Reliability Centre in Edmonton. Hostlers move locomotives in the engine and repair facilities.

Mr. Weston is an experienced Hostler and an experienced Hostler trainer. On the day of the incident, April 4, 2014, the grievor was responsible for training Hostler Trainee Dendar Abdi. Mr. Abdi had seven months experience as a Helper and almost six weeks training as a Hostler. This was the first time Mr. Abdi was switching on his own, a solo run.

When the grievor took his meal break Mr. Abdi was left working with Hostler Helper Goodfellow; an experienced hostler helper with twenty-four years at the Company. He was not Mr. Abdi's trainer. The two of them began moving the units and as a result of not protecting the point and not securing the appropriate switch, a westward move was made and the derailment occurred. This action violated two

CROR/Non-Main Rules; 104(b) regarding the run through of the switch and 115 regarding observing the point when moving equipment. Mr. Abdi admitted he made a mistake and apologized.

The investigation material records that the grievor said that Mr. Abdi had been a trainee for almost six weeks and that this was a simple move that he could do himself. The grievor was monitoring Mr. Abdi on his radio while taking the meal break.

The grievor maintained in the investigation that his practice is sometimes to leave trainees on their own and observe them on camera or through radio communication. He says his manager was aware of this practice. His manager, Manager Emond, provided a written statement that he knew that the grievor would allow a trainee who was close to the end of his training to switch on his own, but Mr. Emond understood that the grievor would be in close proximity to monitor the movement.

The issuance of thirty demerits for failing to supervise the trainee in this circumstance was warranted. The grievor left his trainee to do his first solo run without proper supervision. The grievor bears responsibility for that decision. Even accepting some form of monitoring was being conducted, the extent of it was not sufficient in the circumstances.

As a result of the incident, the entire crew including the grievor, was required to undergo post-incident drug testing. The grievor refused. His reason was that he was not

directly involved with the incident when it occurred. For this refusal the grievor was discharged.

The Company relies on the Company Policy to Prevent Workplace Alcohol and Drug Problems. It relies on the analysis and principles established in **SHP 530.**

The relevant portions of the Policy are:

> Biological testing for the presence of drugs in urine or alcohol in the breath is conducted where reasonable cause exists to suspect alcohol or drug use or possession in violation of this policy, including after an accident or incident. Post-accident testing is done after any significant accident or incident where an experienced operating officer, upon consideration of the circumstances, determines that the cause may involve or is likely to involve a rule violation and/or employee judgment. In cases of reasonable cause or post-accident testing, any employee whose breath alcohol concentration is over 0.04 or who tests positive for illegal drugs would be considered to be in violation of this policy.

And the failure to submit to a test is described as follows:

> Failure to submit to a test within the designated time frame, refusal to submit to a test or any attempt to tamper with a test sample is considered a policy violation.

In addition to the incident as a reason for testing, the Company also relies upon the observations of a manager who reported that the grievor's speech was rapid and included cursing; that his mood/behavior was nervous and talkative and his skin flushed.

The Union contends that in these circumstances the request for a drug test amounted to random testing. It contends that the Company did not have reasonable cause or justification to require the testing.

CROA&DR 3727 bears similarities to the instant case. In that case a grievor refused a drug and alcohol test, where he had left his post without a proper briefing with his yard helper. An accident occurred and the grievor refused a request for testing. This Office found that the grievor should not have refused the drug test. He was reinstated without compensation.

In **CROA&DR 1703,** this Office commented on the refusal to submit to a drug test and the relevant considerations:

> The refusal by an employee to submit to such a test, in circumstances where the employer has reasonable and probable grounds to suspect drug use and a risk of impairment, may leave the employee liable to removal from service. It is simply incompatible with the obligations of a public carrier to its customers, employees and the public at large, to place any responsibility for the movement of trains in the hands of an employee whom it has reasonable grounds to suspect is either drug-dependent or drug-impaired. 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. (Emphasis added).

And in **CROA&DR 3841**, the following statements are pertinent:

> When confronted with the order to take a drug and alcohol test, whatever his own feelings, it was the grievor's obligation to "obey now – grieve later" if he felt that the directive was somehow unfair. By refusing to undergo a drug test, in the Arbitrator's view, Mr. Alexander radically changed the nature of his own infractions over the course of these events, and rendered himself liable to a more severe degree of discipline. Whatever his personal feelings, his refusal to take an alcohol and drug test in the circumstances does leave him open to the drawing of adverse inferences, and does little to bolster his credibility.

This Office finds that the circumstances justified the Company's request for a drug test. The grievor should not have refused it. Even without Mr. King's later observations, the Company was justified in its request for testing in view of the grievor's connection to the incident. I do not accept the Union's submission that the request was akin to random testing. The grievor's conduct and actions were connected to the event leading to the derailment. The grievor's involvement, decision making and judgment were at issue and his refusal to undergo the test was not justified.

However, in view of the grievor's long service, the specific facts of this case, and the relevant CROA jurisprudence, (**CROA&DR 3727, 3841** and **3581),** mitigation of penalty is warranted and the grievor is to be reinstated without compensation.

Accordingly, the grievance in **CROA&DR 4378** is dismissed.

The grievance in **CROA&DR 4379** is allowed in part. The grievor is reinstated without compensation or benefits but without loss of service. His time off work is substituted with a period of suspension.

April 1, 2015

MARILYN SILVERMAN
ARBITRATOR