CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4432

Heard in Toronto, January 12, 2016

Concerning

CANANDIAN NATIONAL TRANSPORTATION LIMITED (CNTL)

And

UNIFOR COUNCIL 4000

DISPUTE:

Discharge of Owner Operator Jatinder Buttar for alleged serious act of misconduct or gross violation, the Standard Contract between this Contractor and CNTL was terminated effective March 10, 2014.

COMPANY'S EXPARTE STATEMENT OF ISSUE:

On February 17, 2014 the grievor was subjected to random drug and alcohol testing as part of the program for cross-border drivers' compliance with the U.S. Department of Transportation (US DOT) regulations. The test results came back positive for cocaine.

It is the Union's position that the test did not indicate impairment or that the Grievor was under the influence of a substance at the time and that there are mitigating factors to consider. Further the Union alleges the Company has not satisfied its burden in terms of termination.

The Company disagrees with the Union's allegations.

FOR THE UNION:	FOR THE COMPANY:
(SGD.)	(SGD.) R. Campbell
	Labour Relations

There appeared on behalf of the Company:

R. Campbell	– Manager Labour Relations, Winnipeg
S. Blackmore	– Senior Manager Labour Relations, Edmonton
J. Darby	– Manager Labour Relations, Toronto
M. Peterson	– CNTL Operations Manager, Toronto

There appeared on behalf of the Union:

W. Gajda	– CNTL Regional Representative, Toronto
R. Fitzgerald	– National Staff Representative, Toronto
J. Buttar	– Grievor, Vancouver
R. Buttar	– Observer, Vancouver
M. Robinson	– Observer, Toronto

AWARD OF THE ARBITRATOR

Mr. Jatinder Buttar (the "grievor") was a Tractor Trailer Owner Operator whose standard contract with Canadian National Transportation Limited ("CNTL") was terminated following a failed random drug and alcohol test administered on February 17, 2014. The test results came back positive for cocaine.

The grievor was hired by CNTL in June 2007. On November 6, 2012, the parties agreed that the grievor's previous termination at CNTL for fraudulently reporting arrival and departure times and travelling on non-truck routes would be replaced with a time served suspension, considered as Step 3 discipline. Prior to that discipline, in 2010, the Company could also have terminated the grievor as it was a third occurrence in the parties 3-strike discipline system. Instead the Company issued a four-day suspension.

There is no dispute that Owner-Operators may be subject to random alcohol and drug testing in conformity with the United States Department of Transport ("US DOT") Regulations. Those Regulations prohibit the presence of an illicit drug in the body. In **CROA&DR 4211** Arbitrator Picher determined that employees hired after January 28, 2007 are subject to US DOT Regulations and that those who fail the random drug tests are properly subject to discipline. Unlike Canada, level of impairment is not considered, nor is there a requirement for measurement for illicit drug impairment, under US DOT Regulations.

To the extent that the Union suggested in it submissions that **SHP 530** and the **CROA&DR** jurisprudence that followed it precludes the imposition of discipline in the circumstances at hand – where the Company is not able to demonstrate (nor did it allege) impairment on duty, that is not the case in the unique circumstances of Owner-Operators who may operate within the US, and therefore are subject to the rules and regulations governing cross-border operations.

The following excerpt from the Company's Drug and Alcohol policy, also referenced in **CROA&DR 4211**, is reproduced below:

> As per the collective agreement, all CNTL Owner Operators 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.

The Company and the Union have also negotiated the "three strikes" discipline system set out in article 8.1 of the collective agreement.

Since the grievor was properly subject to discipline for having tested positive for cocaine, this was his third disciplinary occurrence at Step 3. The Company submits that the grievor was terminated in accordance with the Collective Agreement. It also takes the position that, pursuant to section 60. (2) of Part 1 of the *Canada Labour Code*, I lack the jurisdiction to alter the specific penalty for a third occurrence, which the parties have themselves expressly negotiated.

During the investigation, when questioned about the result of the drug test being positive for cocaine, the grievor explained that he had had a cup of herbal tea the evening before the test at a gathering. This is also what he told to the physician who contacted him on February 19, 2014, to inform him of the positive test result. According to the grievor, the physician asked if he "was aware that he may have had coca leaf." He responded that that could have been the case.

During the investigation the grievor went on to say that he immediately called his friend who verified that he had had coca leaf. In response to a subsequent question in the investigation, the grievor denied that he aware that he had had the coca leaf, though the cup of tea had been green tea, but then stated that the words "coca" had been mentioned with respect to the cup of tea. The grievor also pointed out that he had taken around "4 drug tests" before this last one came up positive for cocaine and that none had been positive. The Union directs me to several negative drug tests undergone by the grievor since February 19, 2014. None were administered within the time frame that would have given rise to a challenge to the validity of the positive test for cocaine.

Both parties agree that **CROA&DR 4211** is a very similar case to this one. In that case the Owner-Operator tested positive for marijuana and admitted to having consumed marijuana. The Company terminated the grievor. The Arbitrator found that there was no question that the employee was liable to discipline for having failed the random drug test properly administered by the Company. Arbitrator Picher's view, however, was that it was an appropriate case to reduce the penalty and reinstate the

grievor without compensation. In that case, as in this one, there was no evidence to suggest the grievor was impaired by alcohol or drugs while on or subject to duty. In that case, Arbitrator Picher found the grievor to be “open and candid” with his employer at all times. A careful review of the grievor’s statement, and his comments relayed above, would not lead me to make the same comment in the case before me.

In grievor in **CROA&DR 4211** was subsequently terminated a second time following her reinstatement. The second termination was referred to me as the arbitrator **(CROA&DR 4414).**

In **CROA&DR 4414**, I reviewed the “three strikes” discipline system. When an employee gets to a third occurrence, the collective agreement provides for the immediate termination of the employee’s standard contract. Considering the grievor’s discipline record in that case, her length of service (approximately six years at the time of termination) and the fact that she had effectively had two last chances under the three strike system negotiated by the parties, I was not persuaded that the case was an appropriate one to disturb the penalty issued.

In its submission, the Union argued, as it did in **CROA&DR 4211**, that the grievor was not clearly advised that there had been a split of the original sample so as to allow the possibility of his requesting a verification test to be taken based on the second specimen. Arbitrator Picher did not sustain that technical argument. I see no reason to sustain the same argument in this case.

The grievor in this case was a relatively short service employee as was the grievor in **CROA&DR 4211**. He too has effectively had two “last chances” under the three strikes system of discipline**.** The grievor’s disciplinary record had twice the active discipline events on file (twelve as opposed to six) than the employee in **CROA&DR 4211**. I am not persuaded, having regard to all of the above, that this would be an appropriate case to disturb the penalty imposed, even assuming without finding, as Arbitrator Picher appears to have found, that the arbitrator has the jurisdiction to do so.

Accordingly, the grievance is dismissed.

January 19, 2016

CHRISTINE SCHMIDT
ARBITRATOR