SHP726

IN THE MATTER OF AN ARBITRATION

BETWEEN

CANADIAN NATIONAL RAILWAY COMPANY

(The "Company")

AND

UNIFOR

(The "Union")

RE: The Discharge of Mr. Dorion for violation of CN's Policy to Prevent Workplace Drug and Alcohol Problems as a result of a positive drug test following post-accident/incident testing on March 21, 2015.

SOLE ARBITRATOR: CHRISTINE SCHMIDT

Appearing For The Company:

R. Campbell	– Manager Labour Relations
Dr. M. Snider - Adler	– Chief Medical Review Officer for DriverCheck Inc.
D. Fisher	– Senior Director Labour Relations and Strategy
B. Harper	– Collector, Absolute Testing Inc.

Appearing For The Union:

B. Stevens	– National Rail Director
T. McKimm	– Vice President Local 100 Prairie Region
A. Venkatarangam	– Vice President Local 100 Great Lakes Region
R. Dorion	– Grievor

A hearing in this matter was held in Montreal on July 29, 2016.

A W A R D

I issued a bottom line decision on August 3, 2016 dismissing a grievance filed by the Union on behalf of Mr. Dorion (the “grievor”). This award sets out the reasons for that decision.

The grievor was discharged following the positive drug test results obtained after submitting to a post/incident test for reasonable cause on March 21, 2015. At the time of the grievor’s discharge he had approximately two and a half years’ service as a car mechanic at Symington Yard.

Two witnesses gave evidence at the hearing for the Company: Mr. Bruce Harper, a certified collector and DriverCheck employee and Dr. Snider-Adler, Chief Medical Review officer at DriverCheck, who testified to the veracity of the conclusions set out below. The grievor testified for the Union.

The relevant facts are not substantially in dispute.

On March 21, 2015, the grievor was assigned to work the day shift commencing at 08:00 hours as part of a crew of four. The employees were assigned to change out wheels on freight cars. Approximately one hour into the shift, the crew failed to notice a six-foot gap in the rails. The Drop Table was not in the correct position. As a result, the leading axle and wheels of the first hopper car dropped into the wheel pit. The operation

was shut down and the crew was sent for Post Incident/Accident drug and alcohol testing.

The grievor was asked to provide a urine sample, which tested non-negative for marijuana and negative for cocaine in a point of collection test ("POCT"). As a result of the non-negative result, the grievor was asked to provide an oral fluids sample. He did so. The samples provided by the grievor were sent for analysis.

The protocols for oral fluid collection procedures are thorough and clear (as they are for Urine collection). They need not be reproduced here. Mr. Harper testified that he is intimately familiar with the procedures and that he follows them without exception. He has done so for years.

The chain of custody protocol provides a paper trail that documents the handling of the oral fluids specimen from the moment of collection through lab analysis and the reporting of verified results. The grievor signed the chain of custody form certifying as follows:

> I certify that I provided my specimen to the collector; that I have not adulterated it in any manner, the specimen used was sealed with a tamper-evident seal in my presence, and that the information provided on this form and on the label affixed to the specimen is correct.

The detailed quantitative results of the analysis performed on the grievor's urine and oral fluid samples revealed that the urine sample showed a concentration of

marijuana metabolite of 335 ng/ml. The oral fluid sample showed a concentration of cocaine parent of 19 ng/ml and a concentration of marijuana parent of 40 ng/ml.

On March 27, 2015 the Medical Review Officer ("MRO") called the grievor and informed him that his urine sample was positive for marijuana and that the oral fluid sample was positive for marijuana and cocaine. The grievor acknowledged knowing how marijuana came to be in his system but adamantly denied use of cocaine. As per the protocol in place, the MRO informed the grievor about what is referred to as the split – specimen procedure, which allows for the retesting of samples. The MRO asked the grievor to contact him within 72 hours should he wish to have that retesting done. The grievor did not do so.[1]

On March 31, 2015, DriverCheck notified the Company that the grievor's oral fluid sample had tested positive for both THC and cocaine.

On the recommendation of his Union representative, the grievor took a hair drug test on April 2, 2015. The results of that testing were negative for cocaine and positive for marijuana 2.2 pg. mg. This information was provided to the Company. Dr. Snider-Adler reviewed these results and issued a report to the Union in which she concluded that the negative result for cocaine from the hair analysis did not conflict with the tests previously performed.

[1] When the grievor finally did make the request, it became apparent that there was not enough sample to have the split sample testing performed. In any event, I note that Dr. Snider-Adler testified that she had not once, in her nine years of experience, had a reanalysis come back with a different result than the initial one.

On April 10, 2015 the Union requested that a sample of the oral swab be forwarded to a lab of the grievor's choice for DNA analysis. There was enough of the sample to allow for this testing, however, the Union subsequently advised that it no longer wished to have that testing performed, and no testing was ordered. The DNA testing, had it been performed, would have definitively proven if the sample tested was not the grievor's.

The grievor's formal investigation was held April 6, 2015. The grievor admitted to being an occasional marijuana user. He said that he had consumed a minimal amount of marijuana at approximately 21:00 hours the night before his March 21, 2015 day shift (approximately 15.5 hours before the oral swab testing). The grievor denied ever having used cocaine. He stated that he disagreed with the test results and denied being under the influence of either marijuana or cocaine or their after effects during his shift. The Union asserted the view that someone had erred in the handling of the sample and/or test results. The Union said that it would endeavour to provide "proof" to support that view.

The Union does not contest the science of the testing undertaken by the Company or Dr. Snider-Adler's opinion. The laboratory results of the urine and oral fluid samples are consistent with prior marijuana use. The level of the marijuana parent at 40 ng/ml (four times higher than the accepted cut-off level) is consistent with marijuana use within the four hours immediately prior to the administration of the oral swab. A

concentration of marijuana higher than 10 ng/ml not only demonstrates very recent use, it is in turn a scientifically reliable and valid indicator of impairment.[2]

Though cocaine was not reported as present in the urine sample, that finding was consistent with very recent consumption, as the body had not sufficient time from the moment of last consumption to process the drug and metabolize it. The oral fluid analysis, however, was conclusive of cocaine consumption within the period of five to eight hours prior to the sample's collection.

The negative result for cocaine on the hair analysis undertaken twelve days after the incident is not inconsistent with the aforementioned conclusions.

Notwithstanding the above, the Union's position is that the Company has failed to prove its case on the requisite standard of proof – the balance of probabilities – on the basis of clear, cogent and convincing evidence. It says that irregularities in the integrity of the sample collection, testing and reporting of the test results call into question the test results. The Union argues that there was a mixing-up of the grievor's samples.

In support of its position the Union says that Mr. Harper was the only person working at the lab on March 21, 2015, having been called in on a Saturday, and that he was pressed for time. The Union refers to a comment made by Mr. Harper in his

[2] These test findings demonstrate that the grievor consumed marijuana some time around or after 8:30 in the morning on the day of the accident. This time frame corresponds to the time after the grievor reported for duty.

account of the collection procedure. He recounted that when he took a second swab on March 21, 2015, he had only one remaining test kit, and he told the grievor that if the test did not work (the first did not) the grievor would have accompany Mr. Harper across town to retrieve more test kits to successfully complete the collection procedure.

In addition, the grievor testified that that a child (the grievor's son) had been in attendance at the testing facility on March 31, 2015. He had been running around and the grievor told the child to sit down. The Union contends that Mr. Harper was therefore distracted and made an error as he performed sample collection and testing. The Union also relies on a typo with respect to the date on the of the oral fluid custody control form (03/21/14 is written on the form when it should have been 03/21/15)[3] and another date error in the first MRO report, which date had been corrected to reflect the date all parties agree the testing occurred. The Union characterized these errors as fatal flaws in the chain of custody process.

I disagree with the Union's submission that the Company has failed to prove its case. The grievor himself did not suggest that there were anomalies in the collection process. There is simply no other evidence to support the Union's submission that the chain of custody was anything but secure. The evidence of Mr. Harper's comments to the grievor about the possibility of having to retrieve another test kit, and the allegedly distracting impact of the child's presence at the lab is in the nature of conjecture. It does not establish that an error in the test was made. Nor is there anything particularly telling in terms of the test results related to the typo in the oral fluid drug testing custody and

[3] The same typo was made on another crew member's oral fluid custody control form.

control form or the insertion of the wrong date on the initial MRO report. Those minor errors do not cast into doubt the test results.

The overwhelming evidence in this case is that the grievor consumed both cocaine and marijuana immediately before he commenced his shift on March 21, 2015 or shortly thereafter. I find that he was impaired during his shift and there is simply no other rational conclusion to be drawn having regard to the evidence before me.

An individual in the grievor's position who causes himself to become impaired on the job merits the most severe discipline, absent very compelling mitigating factors. Not only was the grievor impaired, I must conclude that he has been dishonest about when he had last used marijuana and about his denial of cocaine use. The Company's decision to discharge the grievor in these circumstances was entirely appropriate and should not be disturbed.

The grievance is therefore dismissed.

September 2, 2016

CHRISTINE SCHMIDT
ARBITRATOR