



TEAMSTERS CANADA RAIL CONFERENCE DIVISION 320



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July 9, 2009

Subject: Random Drug Testing

Dear Brothers and Sisters,

Please find appended information regarding random drug testing forwarded to you on behalf of the TCRC 320 Legislative Representative [Gerry Ranson](#) .

Random drug testing again rejected by Ontario Court of Appeal

Posted July 2, 2009

Imperial Oil's second attempt to institute random drug testing at its Nanticoke, Ontario petroleum refinery has suffered the same fate as its first. The province's Court of Appeal has affirmed prevailing arbitral jurisprudence holding that random drug testing – as opposed to testing for reasonable cause, post-incident or as part of a rehabilitation plan – will seldom be justified, even in safety-sensitive work environments.

Background

The ruling was triggered by a policy grievance filed by the CEP against Imperial Oil's reintroduction of random drug testing, this time using a saliva swab test. In the company's submission, the use of a swab test addressed the "fatal flaw" presented by urinalysis testing, rejected by the Court of Appeal in 2000 in the *Entrop* case because it could not detect present impairment but only past use. Upholding the policy grievance, a board of arbitration chaired by **Michel Picher** held that, even if the swab test could be analogized to a breathalyzer test (the use of which was upheld in *Entrop* in a human rights context), it did not pass muster under the 'balancing of interests' approach applied in collective agreement arbitration, which favours employee privacy in the absence of consent or an established drug problem at the workplace. See Lancaster's *Human Rights and Workplace Privacy E-Bulletin*, February 16, 2007, Issue No. 82.

Arbitration Decision

The arbitration board concluded that, "absent contractual or statutory consent or reasonable cause to conduct a drug test, random drug testing under the Policy violated Imperial's contractual commitment under Article 3.02 of the collective agreement to treat individuals in the workplace with 'respect and dignity'." The board further held that, "Article 3.02 aside, such drug testing could not be justified 'on a responsible application of the balancing of interests approach in a safety sensitive environment that has carefully evolved over the decades within the arbitral jurisprudence in Canada'...."

As the board observed, without employee consent, "the Canadian arbitral position on drug testing in the workplace is based on 'a balancing of interests approach,' seeking fairly to allow employers that margin necessary to ensure safety while preserving to employees, particularly to employees who have given no reason for suspicion of impairment, a modicum of dignity and privacy." **Thus, drug testing is not permitted in the**

absence of some form of cause, and random testing may only be justified as part of a rehabilitative return to work arrangement or in circumstances of an established drug problem in the workplace.

Judicial Review Sought

Imperial Oil brought an application for judicial review to the Ontario Superior Court. However, applying a standard of patent unreasonableness, Justice Katherine Swinton, writing for a unanimous Court, rejected all three of the employer's arguments and dismissed the application for judicial review (see Lancaster's *Labour Arbitration E-Bulletin*, October 7, 2008, Issue No. 106). The company sought and was granted leave to appeal to the Ontario Court of Appeal.

Court of Appeal's Decision

The Ontario Court of Appeal unanimously dismissed the appeal. Writing for the Court, Justice Eleanor Cronk expressed agreement with the analysis of the Superior Court, stating: "In the end, I agree with the Divisional Court's conclusion on this issue. The majority's reasons reveal that its rejection of Imperial's random drug testing measures, absent reasonable cause, was based on the language of the parties' own bargain as embodied in the collective agreement, and the evidence adduced before the Board regarding the requisite balancing of interests inherent to the examination of a random drug testing policy in the workplace."

Specifically, having regard to the context that there had never been even one substantiated case of drug impairment on the job at the workplace, coupled with the absence of a drug problem in the workforce or the community, the Court of Appeal ruled that it was reasonable for the board to have concluded that Imperial's random drug testing constituted "an unwarranted intrusion on [employees'] privacy [and] an unjustifiable affront to their dignity."

Rejecting Imperial Oil's submission that the board erred in failing to consider the *Human Rights Code* in its interpretation of Article 3.02, Justice Cronk applied the reasonableness standard (*Dunsmuir v. New Brunswick*, reviewed in Lancaster's *Labour Arbitration E-Bulletin*, September 10, 2008, Issue No. 105) and arrived at the same conclusion as the Superior Court, i.e. that the board's interpretation of Article 3.02 did not fall outside "the range of possible and defensible ... outcomes," and was therefore reasonable. Moreover, Justice Cronk continued, nothing in the unqualified language of Article 3.02 limited its scope to dealing only with the minimum standards for protection against discrimination under the *Code*, and *Entrop* was of no assistance because it did not involve the interpretation or application of the collective agreement.

Finally, the Court of Appeal noted that its affirmation of the reasonableness of the board's decision on Article 3.02 rendered it unnecessary to consider the board's ruling that, regardless of Article 3.02, the random drug testing provisions of Imperial's policy could not be justified without clear and unequivocal contractual language signifying employee consent to such testing measures.

Imperial Oil Limited v. Communications, Energy & Paperworkers Union of Canada, Local 900
Ontario Court of Appeal
Justices Michael Moldaver, Kathryn Feldman, and Eleanor Cronk
May 22, 2009

In Solidarity,

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