CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4584

Heard in Edmonton, September 14, 2017

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The dismissal of Locomotive Engineer M. Maggio of Mactier, Ontario.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Following a formal investigation, Mr. Maggio was issued two form 104 forms [sic], dismissing him from Company service for "breaching the bond of trust necessary for continued employment".

The Union contends that the discipline in this circumstance is excessive and unwarranted.

Mr. Maggio was forthright and honest in the investigation. He took full responsibility for the incident. The Union contends that the discipline of outright dismissal assessed is not borne of any aggravating factor and as such, cannot stand.

The Union contends in the instance of the first form 104 for the rules violations, the discipline is excessive. Arbitral jurisprudence is replete with decisions where the outright dismissal has been substituted for a lesser quantum of discipline. (2356). Furthermore, a rules infraction, albeit a serious offence, is by no means a breach of the bond of trust, rather it was an error made.

With respect to the second form 104 dismissal, the Union contends jurisprudence from CROA states the following,"…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." Other cases where discipline was overturned and allowing the grievances in full are CROA&DR 4240 and 4296. In this instance, there was no evidence adduced to suggest impairment. The discharge cannot therefore stand.

In light of both stated reasons, the Union contends that even with both the rules infractions and the positive test, Mr. Maggio ought not to have been dismissed from Company service.

The Union seeks to have Mr. Maggio re-instated to employment without loss of seniority. The Union further seeks that Mr. Maggio be made whole for all wages and benefits lost with interest while discharged. In the alternative, the Union requests that the discipline be substituted for such lesser penalty as the Arbitrator sees fit.

The Company considers the discipline assessed as appropriate and that it met its burden of proof.

FOR THE UNION: **FOR THE COMPANY:**
(SGD.) J. Campbell **(SGD.)**
General Chairperson

There appeared on behalf of the Company:

S. Oliver	– Labour Relations Officer, Calgary
D. Pezzaniti	– Manager Labour Relations, Calgary

There appeared on behalf of the Union:

M. Church	– Counsel, Caley Wray, Toronto
J. Campbell	– General Chairman, Peterborough
W. Apsey	– General Chairman, Smiths Falls
M. Maggio	– Grievor, Mactier

AWARD OF THE ARBITRATOR

The grievor, Locomotive Engineer Michael Maggio, received two Form 104's terminating his employment after thirty-five years and eleven months employment. The first involves a Rule 42 incident where his train ran into protected territory. The second, arises from drug testing following that incident. I propose to address the second matter first.

Mr. Maggio underwent a urinalysis screening test right after the incident. He passed the screening but a marijuana metabolite was found in the subsequent urinalysis. At the investigation he was asked to explain.

> A During holidays I was at a party, we were having a few drinks and this is when the substance was used. I was not subject to duty at the time.

He acknowledged being aware of CP's Alcohol and Drug procedures. He admitted consuming marijuana as revealed in the test, 68 hours before the test and 36 hours before being subject to duty. He offered to submit to a random testing regime in future saying:

> I have been a loyal and proud employee for Canadian Pacific for 35 years and 11 months now. I am not now or ever have been a

> substance user. I was at a barbeque party earlier in the week, we were drinking when the substance went around. It was a very stupid mistake and have been regretting it since. I was on holidays at the time and not subject to duty. I will willingly go for any substance test at any time Canadian Pacific deems necessary to keep my job and maintain good faith and trust with the Company. I also tested negative for the swab at the time of the incident.

The Union too emphasizes that Mr. Maggio was tested for impairment right after the incident and passed the tests even under what it views as the low levels prescribed for a failure. No other evidence of impairment is put forward, just that his urine suggested the earlier use of marijuana. That is admitted.

Several CROA cases discuss the consequences of a positive urine test, without more, and in the face of negative tests for impairment. The Union refers to **CROA 4524**, **4311, 4039, 3668, 3691, 3701, 4240, 4298** and Ad Hoc SHP 530. It is sufficient to note Arbitrator Clarke's comments in the most recent decision.

> 24. CP had the burden of proof to demonstrate that Mr. Playfair was impaired at the time of the November 15, 2015 incident. As numerous CROA decisions have already noted, it is not enough to show that a urine test indicates an employee may have traces of marijuana in his/her system. Those results do not demonstrate impairment at the material times. In Mr. Playfair's situation, he tested negative for the more specific oral fluid drug test.
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> 25. CP's position, as set out in its policy and as argued, posits that employees should never take illegal drugs. But the case law has not upheld a policy that extends that broadly.

The Company in its brief acknowledges these cases, but still says there is a violation of the Drug and Alcohol Policy which is "worthy of some discipline". That view conflicts with paragraph 25 quoted above. The Company argues that the admitted use

of marijuana should still incur a disciplinary response and is ancillary to, and an aggravating factor in respect to, the Rule 42 incident. In my view the case law does not support that position. Clearly it is not a mitigating factor. The grievance in respect to the second Form 104 is allowed and that discipline is to be expunged from the grievor's record.

Turning to the incident itself, the grievor and Conductor Jennifer Bujold were operating train 247-05 on September 6, 2016. A maintenance crew under Foreman Edward Brennan was working on track over which 247-05 would pass. Such maintenance is protected by Rule 42 which provides:

> 42. Planned Protection
>
> (b) A movement in possession of the Form Y must not proceed beyond the red signal located at the identifiable location stated in the GBO, enter the track limits stated in the GBO, or make a reverse movement within such track limits until instructions have been received from the foreman named in the GBO. When a specific track is to be used, instructions from the foreman must specify the track upon which the instructions apply.
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> (c) The instructions must be repeated to, and acknowledged by, the foreman named in the GBO before being acted upon.

A GBO, General Bulletin Order, consists of instructions regarding track conditions, restrictions and other information that affect the safety and operation of a movement. A TGBO is a document provided for a specific movement which tabulates the GBO's applicable to that particular run.

Mr. Maggio and Ms. Bujold received their TGBOs when they started their run at Mactier, through Sudbury, and then east. It listed Foreman Brennan's protected track, which began just east of Sudbury. The form Y from the TGBO read:

> Between mile 72 and mile 88 Cartier sub, restriction Rule 42 on all main tracks Daily 0500 to 1300.

Ms. Bujold conducted their briefing when they began their duties. However, they both mistakenly mentally recorded the protected area as being from mile 79, the old Via Rail Station, to mile 82. Ms. Bujold reported that she and Locomotive Engineer Maggio believed that the Rule 42 began at mile 79 to 82 on the Cartier Subdivision and that they would only need to speak to Foreman Brennan if they were going to use the crossovers at mile 79.22 to enter the yard. Mr. Maggio had no explanation for this mistake. During the run they reminded each other of the GBO, but did not refer to the TGBO they each had on their desks in front of them. Rather they just repeated their flawed memory that it began at mile 79.

As their movement approached the protected zone it passed a red flag at mile 72. Neither Ms. Bujold nor Mr. Maggio saw this flag. Locomotive Engineer Maggio's explanation was that:

> Q45: … can you please explain why you did not notice the red flag being displayed at mile 72 on the Cartier Subdivision?
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> A45: I was standing up to change channels at the time at this location and paying attention to the left where the cantilever was for the signal, not looking across the field for the flag.
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> Q46: What kind of communication was going on in the cab of the locomotive at this time?

A46: We were switching channels to channel 7 and trying to get a hold of Sudbury Yard for instructions.

Foreman Brennan and his crew were working on the north track just after a crossing at mile 75.47. He had told control to direct Train 247-05 to the south track because his crew was working on the north track. At 9:35 a.m. Mr. Brennan saw the crossing gates close and train 247-05 coming towards them. He immediately radioed them asking if they had received his Rule 42 limits.

On getting the call Locomotive Engineer Maggio applied a full independent brake and their movement came to a complete stop within 30 seconds. Before that they had been travelling at about 40 miles per hour and were 3 miles into the protected zone. Mr. Maggio said “Oh shit” and then said they had protection but only from mile 79. Mr. Brennan said no, its from Mile 72 – 79, to which Mr. Maggio said “we are in your limits and stopping.”

From this point on the parties differ on how events are to be characterized. The Employer’s view of what followed is that there was an attempt to cover up the breach, while the Union and the grievors deny that is so. An important part of Mr. Maggio’s termination is the allegation of failing to report the incident, and the implication that this was deliberate.

The Rules require that, once a train passes into a Foreman’s limits without authority, an emergency broadcast must be made. The crew must report the violation to

the RTC or a Director, or have the Foreman do so. Neither step was taken. Mr. Maggio agrees that when Mr. Brennan called him he did not perform an emergency radio broadcast “because the emergency was over in the same breath that it happened.” Asked why he would think that, he replied, “because we immediately received instructions from Foreman Brennan”. He says they got written permission from Foreman Brennan to proceed right after they stopped. Asked why he had not contacted the RTC or the Director to tell them they had violated Rule 42 he answered: “I did not because the Supervisor at Sudbury had called and instructed us to take the unit to the fuel stand and go to the station to await further instructions.”

Similarly he replied that he did not ask Foreman Brennan to report the incident because he had given them instructions already and “I thought everyone knew at the time”. Both Ms. Bujold and Mr. Maggio accept in retrospect that they should have broadcast the emergency and reported the incident right away. Mr. Maggio said it was not his intention to be untrustworthy, but at the time he was very shaken up and was feeling sick and not thinking straight.

Ms. Bujold said too she “was under the assumption that everybody was aware because of the change in plans received from Supervisor Lawley in Sudbury”. The assumption appears to have been correct as they were met by managers for testing and briefing at the location to which they were directed.

Weighing the sequence of events and the various explanations, while the crew clearly failed in their broadcast and reporting responsibilities, I am not persuaded that this was in any attempt to cover up what had happened. The assumption that Mr. Brennan and the RTC knew what happened was not unreasonable. New instructions were received right away and clearance given to proceed.

The Company has established that this crew missed the red flag, violated the protected area by their initial mistake over mile 79, and by failing to recheck the documentation. They also failed to broadcast and report, but, I find, without any intent to deceive or cover up. In fact, and in terms of crew member responsibility, both violated the same rules and are equally culpable. However, their prior records and length of service are quite different.

Was Mr. Maggio's dismissal for this incident excessive? The Employer's position is that it was not. He is six months from qualifying for a full pension. His record over that time is far from discipline free. Over the years he accumulated a total of 120 demerits, but in most instances he achieved an annual reduction. One exception to this occurred in 2008 when he avoided termination by a deferral of points. In 2015 he received a deferred 7 day suspension for failure to complete a company medical and attendance related issue. Most of his record arises from absenteeism issues and smoking in inappropriate places. He attributes some of his discipline to a particularly difficult Trainmaster no longer in that job. There is no pattern of conduct similar to the offences now under consideration.

The Employer's position is that a Rule 42 violation, because of its potential for catastrophic consequences is a most serious offence worthy of significant discipline. It refers to **CROA 4250** where Arbitrator Schmidt set aside a Rule 42 violation, but for a grievor with a clear record and twenty-nine years service, compared to Arbitrator Keller in **CROA 3472** said;

> Rule 42 is a cardinal rule. Violations of this rule can result in significant danger not only to the train crew but to those working within the limits. That there were none at this time does not exclude the possibility.

He declined to mitigate the termination, but partly due to lack of candour and acceptance of responsibility. Arbitrator Picher in **CROA 3961** held that termination was appropriate for an employee with 45 demerits and violated Rule 42.

The Union advances, as a mitigating factor the fact that the practice of warning of Rule 42 protection through the use of a Yellow over Red signal had lapsed, but was reinstated right after this incident. As the Union concedes, this does not excuse the error, but it is a factor worthy of some consideration. In the Union's submission, the precedents show discipline upwards of 50 demerits for a Rule 42 event. It argues, based on the following comments by Arbitrator Picher in **CROA 2356**, that outright discharge requires some aggravating factor not present here.

> Outright discharge for a violation of Rule 292, generally coupled with other rules violations, is revealed in a relatively limited number of cases (*see* CROA 474, 681, 745, 1479, 1505, 1677 *&* 2124 *[reduced to a suspension]*). In each of the cases involving an imposition of outright discharge by the company there has been some aggravating factor.

The Union also cites **CROA 2356**, where a grievor with seven years service and a clear record was reinstated, despite aggravating factors.

> The grievor is an employee of some seven years' service, whose disciplinary record was clear at the time of the incident. If his actions had involved only the passing the stop signal, and the immediate stopping of his train thereafter, precedent would suggest the assessment of a substantial number of demerits or a suspension to have been an appropriate disciplinary response. In light of the aggravating actions pursued by the grievor, it is not inappropriate to view the whole of his actions as deserving of a serious sanction, up to and including a significant period of suspension.

In July 2017, the Company made a “with prejudice” offer to reinstate the grievor, without compensation but with a series of conditions primarily concerning the marijuana aspect of these events. The Union rejected the offer, but was willing to accept reinstatement under the proposed terms with the question of compensation proceeding to arbitration, based on its view that a ten month time served suspension was excessive for this thirty-six year employee.

Having weighed all these factors I conclude the penalty of termination would only be justified had the employer established its allegation that the grievor had deliberately failed to report this incident in an effort at cover-up. The evidence convinces me that he did not. However, the incident was a very serious cardinal rule violation involving an incorrect assumption which Mr. Maggio failed to double check against the documentation, and as well missing a red flag. For the reasons given above, I find any additional penalty due to the test indicative of prior marijuana use, without any suggestion of impairment, is inappropriate. I agree with the Union as well that based on the case law a ten month suspension was somewhat excessive. I substitute in its place reinstatement subject to a

six month suspension, recognizing the seriousness of the violation and the grievor's previous record. The grievor will be reinstated to service and otherwise made whole, with jurisdiction reserved to finalize the matter, if necessary.

November 24, 2017 _____

ANDREW C. L. SIMS, Q.C.
ARBITRATOR