

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 4725

Heard in Calgary, February 11, 2020

Concerning

CANADIAN PACIFIC RAILWAY

and

**TEAMSTERS CANADA RAIL CONFERENCE
MAINTENANCE OF WAY EMPLOYEES DIVISION**

DISPUTE:

The dismissal of J. Fairbrother on June 11, 2019, for positive post/incident drug test that were supplied to the Company on May 9, 2019 at CBI Home Health in Abbotsford, BC.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

On June 11 2019, the grievor, Mr. John Fairbrother, was formally advised that he was dismissed from Company service "effective June 11, 2019 for the following reasons: Positive/post incident drug test that was supplied to the Company on May 9 2019 at CBI Home Health in Abbotsford BC following an incident that resulted in damage to a switch stand" A grievance was filed.

The Union contends that the grievor tested negative on both the breath and oral swab tests. Consequently, he was not impaired at work and could not be subject to any form of discipline.

The Company violated section 3.2.2 of its Alcohol and Drug Procedures by administering a drug test for a non-major (non-significant) incident. In general, it was, in the circumstances, improper for the grievor to have been required to undergo testing.

The grievor's dismissal was unfair and unwarranted.

The Union requests that the grievor be reinstated forthwith without loss of seniority and with full compensation for all losses incurred as a result of this matter.

The Company denies the Union's contentions and declines the Union's request

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

The issue giving rise to this dispute involves bargaining unit employee John Fairbrother, dismissed from Company service following a post incident accident positive test result while he was operating a ballast regulator that made contact with a switch stand damaging it on May 9, 2019.

An incident involving the ballast regulator making contact with the switch stand which the Grievor was the operator occurred on May 9, 2019. Because of this incident, Post-Incident Accident testing was conducted. The Grievor's Post-Incident test result indicated a positive Drug Urine.

The Grievor accepted an Admission of Responsibility and was assessed a Caution on May 27, 2019 for the incident involving the regulator and the switch. An investigation was taken for the post incident drug and alcohol results on May 28, 2019. The Grievor's NON-DOT Drug Test indicated a positive Urine result for Marijuana Metabolite.

On June 11, 2019, the Grievor was dismissed from Company service because of the positive post/incident drug test results that were supplied to the company on May 9, 2019 at CBI Home Health in Abbotsford BC. Following an incident that resulted in damage to a switch stand. As a result, he violated Company Policy HR 203.1 and CROR General Rule G. A grievance was filed.

Company Position:

The Company affirms that the Grievor accepted responsibility for the incident involving the Ballast Regulator he was operating made contact with a switch stand in Huntington Yard on May 9, 2019. This incident resulting in the post incident testing of the Grievor.

The Grievor's Post-Incident test results indicated he was positive for Marijuana Metabolite.

By the Grievor's own admission in his investigation, that on May 4, 2019 he consumed marijuana while camping with friends, 5 days prior to the incident wherein the ballast regulator his was operating made contact with the switch standing in Huntington Yard.

The Grievor's positive test results are in violation of the Company's Drug and Alcohol Policy HR 203.1 and a violation of the Canadian Rail Operating Rules General Rule G.

As such, the Grievor was dismissed from Company Service on June 11, 2019.

The Union disagrees with the Company's position.

FOR THE UNION:
(SGD.) G. Doherty

President

FOR THE COMPANY:
(SGD.) D. McGrath

Manager, Labour Relations

There appeared on behalf of the Company:

- | | |
|---------------|--------------------------------------|
| D. McGrath | – Manager, Labour Relations, Calgary |
| W. McMillan | – Manager, Labour Relations, Calgary |
| D. Pezzanitti | – Assistant Director, Calgary |

And on behalf of the Union:

- | | |
|---------------|--------------------------------|
| H. Helfenbein | – Vice President, Medicine Hat |
| D. Brown | – Counsel, Ottawa |
| G. Doherty | – President, Brandon |

AWARD OF THE ARBITRATOR

1. John Fairbrother, the Grievor, joined the Company on June 4, 2012.
2. On May 9, 2019 while working as a Machine Operator in Huntington Yard, Mission, BC, the Grievor's Ballast Regulator came into contact with a switch stand causing minor damage. No one was hurt.

3. The Grievor subsequently endorsed an Admission of Responsibility (AOR) for the incident and was assessed a caution as discipline (Company Tab 7/8).

4. Following the incident the Grievor was required to undergo a Post-Incident substance test in which he tested negative on the Oral Fluid drug test and positive for the Urine Drug test (60ng/ml).

5. The threshold limits for drug concentration set out in the Company Policy are as follows:

- Urine Testing: 15ng/ml (screening) and 15ng/ml (confirmation); and
- Oral fluid Testing: 10ng/ml (screening) and 10ng/ml (confirmation).

6. The Grievor explained the presence of marijuana in the following way:

Q6. Can you please explain in detail the positive result found in the Urine Drug Test that you supplied to the company?

A6. Yes, my urine drug test was positive for marijuana metabolites.

Q7. Can you explain why marijuana was found in your urine drug test?

A7. Because I was out camping on my days off with my friends on Saturday May 4th, not subject to duty and had consumed some marijuana that evening.

Q8. How often do you use marijuana?

A8. Next to none.

...

Q11. Do you have a drug dependency?

A11. No.

7. Following the investigation, on June 11, 2019, the Grievor was served with a Form 4 (Company Tab 1) advising him that he had:

... been DISMISSED from Company service effective June 11, 2019, for the following reason(s): Positive post/incident drug test results that were supplied to the company on May 9, 2019 at CBI Home Health in Abbotsford BC. Following an incident that resulted in damage to a switch stand. As a result you have violated the following: HR procedure 203.1 (and) CROR General Rule G.

Legitimacy of Test

8. The Union initially challenges the legitimacy of the Company's demand for a drug test in the first place. It argues that the Post-Incident testing can only be carried out when the employee's actions or lack of actions contribute to the cause of the accident. The accident, however, must be more than a minor breach which, by the Company's conduct and the discipline imposed, suggests the opposite.

9. In that respect, it relies on Section 5.2.2 of Policy 203.1 which provides that Post-Incident testing may be required only:

...after a significant work related incident, a safety related incident or a near miss as part of an investigation. (Union Tab 5)

10. In the present case, the Grievor was operating equipment involved in a collision with a switch. While the criteria for the Union's Post-Incident testing suggests that a drug test may be required "*after a significant work related incident, safety related incident or a near miss as part of an investigation*", the enumeration of the criteria cannot be taken as definitive.

11. The use of the word "*may*" reflects the permissive nature of the examples which follow. As noted, the fourth criteria lists as part of that description: "*...an incident or near miss that creates the risk (of serious damage)*".

12. In the circumstances here, the incident, and the Grievor's involvement in the same, leads me to conclude that the Post-Incident drug test was appropriate.

Dismissal/Impairment

13. The Company argues that the presence of metabolites in his urine and the positive THC for his oral fluids, represent a violation of *CRO General Rules G* in that he was not fit for duty and therefore his conduct warranted dismissal.

14. It also asserts that separate and apart from a finding of impairment, the presence of marijuana in the Grievor's system – at the levels disclosed - represents a breach of *#HR203.1 Alcohol and Drug Policy and Procedures* and therefore warrants discipline.

15. The Union argues that the application of *CRO Rule G* relative to the ingestion of Marijuana is clear and consistent: in the absence of the proof of impairment no discipline, particularly that of dismissal, can be imposed.

16. While it concedes that the Grievor had a urine metabolite test which exceeded the threshold limits set by the Company's Policy, the Union argues (relying on the jurisprudence cited) that a breach of the Company's Policy does not equate with a determination of impairment and that, failing the same, no discipline of any kind can be assessed against the Grievor.

17. A review of both the Union's and the Company's submissions reflect that their respective positions on both issues are, in essence, on all fours with those argued before me in **CROA 4729**.

18. There is nothing to be gained by re-tilling the well cultivated jurisprudence which addressed Marijuana testing as it relates to a determination of impairment.

19. For the reasons set out in **CROA 4729** – which I adopt here - I conclude that the law with respect to the ingestion of Marijuana and the determination of impairment is unequivocally settled. A trace amount of marijuana in the urine does not constitute evidence, in and of itself, of impairment and its existence does not warrant a discipline of dismissal.

20. The Grievor's dismissal must therefore be set aside forthwith.

Breach of Company Policy

21. The remaining issue is also identical to that discussed in **CROA 4729**. The same Company Policy applies.

22. In their submissions of the issue here, the Union and the Company raised essentially the same arguments, as were raised in **CROA 4729**, on whether or not a breach of the Company's Policy constitutes sufficient grounds to impose discipline of any kind.

23. In response to the same, and arriving at my determination here, I adopt and apply the reasoning set out in paragraphs 21– 37 of **CROA 4729**.

24. As stated in paragraph 30 thereof:

I am unable to conclude – without the appropriate evidence, including expert evidence – whether, inter alia, the Drug Concentration Limits for Marijuana Metabolite (THC) in the urine, or Marijuana (THC) in oral fluids, as set out in # HR 203.1, are reasonable limits so as to apply to the Grievor or otherwise support the imposition of any remedy for their breach. Nor – without such evidence - can it be concluded that, as the Union alleges in its Policy Grievance, aspects of the Drug and Alcohol Testing Policy are unreasonable and unenforceable for failing to meet the KVP standards.

25. As discussed in **CROA 4729**, the TCRC has already filed a comprehensive grievance relative to the validity of the Company's existing *Alcohol and Drug Testing Policy and Procedures* which applies in the present case.

26. As also stated there: I am unable to rule on whether any remedy for the breach of the existing policy (short of impairment) is appropriate, applicable or enforceable until a determination is reached in Policy Grievance R106-355.15464 regarding the reasonableness and enforceability of the same.

27. Although it involves discrete Unions, given that the identical impugned Company Policy applies to both, the most practical and efficacious way of dealing with this remaining issue is to await the determination of the TCRC's Policy Grievance R106-355.15464, 500.03.15468 & 288-080.

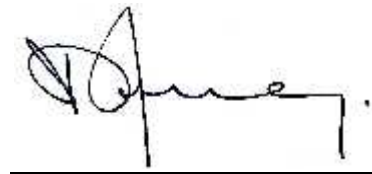
Conclusion

28. The Grievor's dismissal shall be set aside. He shall be reinstated forthwith, without loss of seniority or benefits and be made whole.

29. For the reasons set out in **CROA 4729** I will reserve jurisdiction, and postpone a decision, on whether any remedy is available consequent on a breach of the Company's *Alcohol and Drug Testing Policy and Procedures*, until Policy Grievance *R106-355.15464, 500.03.15468 & 288-080* is concluded.

30. In the event that the parties in **CROA 4729** have not moved forward on the said Grievance within 90 days, this matter may be returned to me, on the application of either party, for further directions/determinations as necessary.

31. I shall retain jurisdiction with respect to the interpretation, application and implementation of this award.

A handwritten signature in black ink, appearing to read "Richard I. Hornung", written over a horizontal line.

**RICHARD I. HORNUNG, Q.C.
ARBITRATOR**

April 15, 2020