

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

**CASE NO. 4727**

Heard in Calgary, February 11, 2020

Concerning

**CANADIAN PACIFIC RAILWAY**

-And-

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

**DISPUTE:**

Dismissal of R. Proctor.

**THE UNION'S EXPARTE STATEMENT OF ISSUE:**

On June 11 2019, the grievor, Mr. Richard Proctor, was formally advised that he was dismissed from Company service effective June 11, 2019 for "Positive/post incident drug test that was supplied to the Company on May 15, 2019 at Kamloops Healthcare Services following an incident at the Semlin west backtrack that resulted in a derailed car." A grievance was filed.

The Union contends that:

1) The grievor's oral swab result was 3 ng, well below the 10 ng threshold set by the Company's Alcohol and Drug Policy. As a result, the grievor tested negative on both the breath and oral swab tests, was not impaired, and could not be the subject of any form of discipline.

2) The Company violated section 3.2.3 of its own 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.

3) 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:**

Following a formal investigation, the Grievor, Richard Proctor was formally advised that he was dismissed from Company service effective June 11, 2019 for:

*"Positive post incident drug test that was supplied to the Company on May 15, 2019 at Kamloops Healthcare Services following an incident at the Semlin west backtrack that resulted in a derailed car."*

The Union objected to the dismissal and a grievance was filed.

Company Position:

1. The Grievor tested positive in his urine and oral tests for marijuana which constitutes a clear violation of HR 203.1 and Rule G.

2. As per the positive tests the Grievor was impaired and not free from acute, chronic, hangover and after-effects as indicated in HR 203.1.

3. The Grievor failed to remove a derail which resulted in the derailing of a rail car and was therefore subject to post-incident drug and alcohol testing.

4. The Grievor's dismissal was a violation of HR 203.1 and Rule G which warrants discipline up to and including dismissal.

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

**FOR THE UNION:**

**(SGD.) G. Doherty**

President

**FOR THE COMPANY:**

**(SGD.) F. Billings**

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. The Grievor, Richard Proctor, began his employment with the Company in March 2012.

2. On May 15, 2019, while working at Semlin West, BC the Grievor set out to remove a derailing device from the rail in the backtrack. While doing so, he, was distracted by a radio call and, in the process, forgot to remove the derailing device. Nevertheless he lined the Semlin backtrack for reverse and instructed his co-worker that the derail was in the non-derailing position and that the switch was appropriately lined to make a reverse movement. Because the Grievor failed to remove the derailing device, a rail car derailed when it came into contact with it.

3. An investigation ensued and the Grievor was assessed a 20-day suspension for the derailment (Form 104; Union Tab 1). That suspension is not in dispute.
4. The Grievor, and other crew members, were post-incident tested on May 15, 2019.
5. The results revealed that the Grievor tested positive for marijuana on the Oral Fluid Drug test with a quantitative level of 3ng/ml. He also tested positive for marijuana on the Urine Drug Test with a quantitative level of 230ng/ml.
6. During questioning on the derail investigation on May 29, 2019 (Company Tab 7), the Grievor states (Q.9):

*...I then communicated with Ely via portable that I heard him get protection and I will go back and get the derail and the switch and then call him. I walked to the derail and removed the lock. I thought I heard someone call me on the radio, and so I stood up and looked at the portable to see what channel it was on and inadvertently forgot to put the derail in the non-derailing position. I walked to the Semlin backtrack switch on the West end and lined it for reverse. I instructed Ely that the de rail was in the non derailing position and that the Semlin West backtrack switch was lined for reverse and that he was ok to come back three cars to clear switch...*

7. Thereafter, in the investigation, on June 4, 2019, regarding the presence of marijuana in his system, the Grievor states (Q.24) that the last known day he used marijuana/CBD oil with THC was the day prior to the incident (Tuesday, May 14, 2019) at approximately 6:00 PM.

8. On June 11, 2019, the Grievor was dismissed from the Company via Form 104 (Company Tab 1) for the following reasons:

*Positive post incident drug test that was supplied to the Company on May 15, 2019 at Kamloops Healthcare Services following an incident at the Semlin west backtrack that resulted in a derailed car.*

9. 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.

10. It asserts further that separate and apart from a finding of impairment, the presence of marijuana in the Grievor's system represents a breach of *#HR203.1 Alcohol and Drug Policy and Procedures* (Company Tab 5), (the "Policy") and therefore warrants discipline.

11. The Union points out that there were no objective signs of impairment and 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.

12. 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).

13. The Union points out that by the application of the Company's own Policy, the Grievor's oral fluids were below the threshold limit proscribed therein; and, relying, *inter alia* on **CROA 4695-M**, the test result is not only insufficient for it to conclude that the Grievor was impaired; rather, the oral fluid test proves the opposite.

14. 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) 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.

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

### **Dismissal/Impairment**

16. 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.

17. 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.

### **Breach of Company Policy**

18. The Company's Policy, at issue here, is identical to that discussed in **CROA 4729**.

19. The Union and the Company, in this case, raised essentially the same arguments, regarding the issue of whether or not a breach of the Company's policy constitutes sufficient grounds to impose discipline of any kind, as those raised in **CROA 4729**.

20. In response to the same, I adopt the reasoning set out in paragraphs 21 – 36 of **CROA 4729**.

21. 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.*

22. 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.

23. 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.

24. Given that the identical impugned Policy applies in both cases, the most practical way to deal with the issue of the reasonableness of the Company's Policy is to await the determination of the TCRC's Policy Grievance *R106-355.15464, 500.03.15468 & 288-080*.

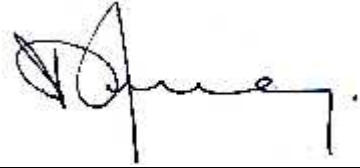
### **Conclusion**

25. The Grievor's dismissal shall be set aside; he shall be reinstated forthwith, without loss of seniority, and be made whole.

26. 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 the Policy Grievance # *R106-355.15464, 500.03.15468 & 288-080* is concluded.

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

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

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

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

April 15, 2020