CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4729

Heard in Calgary, February 12, 2020

Concerning

CANADIAN PACIFIC RAILWAY

and

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The Union advanced an appeal of the dismissal of Locomotive Engineer J. Sullivan of Coquitlam, B.C.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Following an investigation, Engineer Sullivan was dismissed for the following reasons, Please be advised that you have been DISMISSED from Company Service for the following reason(s): *For the non-negative test results of your for-cause drug and alcohol test completed on March 13, 2019. A violation of CROR General Rules, Section G, CP Rule Book for Train and Engine Employees, General Rules and Policy #HR203-Alcohol and Drug Policy (Canada*).

Union's Position:

The Union contends that the facts in this case have determined that this is a case where the discipline administered was unwarranted, unjustified and excessive. As seen in every discipline case, to establish the validity of its actions the Company must substantiate that the penalty imposed was commensurate to the actions of the grievor. The Union contends that the Company has not considered the mitigating factors that took place prior to the incident.

Engineer Sullivan was ordered for Train 203-12 at 02:00 March 13, 2019 and at the completion of his tour of duty he went home. Somewhere between 13:30 and 13:45 on March 13, 2019 he was advised by Assistant Superintendent McRobbie that he was ordered to report for post incident testing. Even though he was off duty in his place of residence for more than one hour and forty-five minutes, he willingly reported and participated in the substance screening.

The Union contends the Company has not produced any evidence that supports any form of just cause for the test. The Company did not assess Engineer Sullivan's condition, nor did it provide any reasons for the tests that would demonstrate just cause.

The Union further contends that the Company is aware of all the recent CROA Arbitration Awards such as CROA 4355, 3668, 3691, 4240 and 4296 that have supported the Union's position. Arbitrators have mirrored the Union's position agreeing that a positive urine test cannot be linked to present impairment.

We therefore contend that Engineer Sullivan did not violate any legitimate Company Policy and the Company was not free to terminate his employment. The Company's decision to dismiss Engineer Sullivan was therefore excessive, unwarranted and unjustified in the circumstances. Engineer Sullivan is a long service employee with thirty-five years of dedicated service at the time of his dismissal and possesses an admirable work record.

The Union requests that Engineer Sullivan be reinstated without loss of seniority and that he be made whole for all lost earnings and benefits with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit. The Company has failed to respond to the Union's request.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

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Union's Position:

The Union has filed their own Ex Parte Statement of Issue.

Company's Position

The Company disagrees with the Union's contentions and denies the Union's request. The Grievor's culpability was established through the fair and impartial investigation. Discipline was determined following a review of all pertinent factors including the Grievor's service and his past discipline record. Further, before discipline was assessed the Company duly considered all mitigating and aggravating factors.

The Grievor was post-incident tested on March 13, 2019 the results of which were a positive Urine Drug test. This is indeed a violation of the Company's Alcohol and Drug Policy and Procedures. These policies, which were clearly communicated to all Train and Engine Employees, state: *"**Disciplinary action up to and including dismissal** will be taken where CP has determined that violations of this Policy and Procedures have occurred." (**Emphasis Added**).*

As the Union is aware, when considering past jurisprudence, each case must still be measured on its own merits. Those merits include taking into consideration the Drug and Alcohol policy governing employees at the time of the incident.

The Company's position continues to be that the discipline assessed was just, appropriate and warranted in all the circumstances. Accordingly, the Company cannot see a reason to disturb the discipline assessed.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) G. Edwards	**(SGD.) S. Oliver**
General Chairperson	Manager, Labour Relations

There appeared on behalf of the Company:

S. Oliver	– Manager, Labour Relations, Calgary
D. McGrath	– Manager, Labour Relations, Calgary
T. Gain	– Legal Counsel, CP, Calgary

And on behalf of the Union:

M. Church	– Counsel, Caley Wray, Toronto
G. Edwards	– General Chairperson, Calgary
G. Lawrenson	– Vice General Chairperson, Calgary

A. Golab – Local Chairperson, Coquitlam
J. Sullivan – Grievor, Coquitlam

AWARD OF THE ARBITRATOR

1. The Grievor, James Sullivan, began his employment with the Company in September 2018.

2. On March 13, 2019 he was involved in a run through switch incident.

3. On April 7, 2019 he was advised by the Company (Form 104; Company Tab 5) that he would be assessed 10 Demerits for his culpable participation in the incident. The assessment of demerits was not grieved and is not in dispute.

4. Following the run through on March 13, 2019, the Grievor was also subjected to a post-incident test for drugs and alcohol which, I conclude, was justifiable in the circumstances.

5. The post-incident test revealed the following results:

- Negative - Breath Alcohol test
- Negative - Oral Fluid Drug test
- Positive - Urine Drug test.

6. There was no objective evidence of physical impairment.

7. Nevertheless, on April 11, 2019, the Grievor was provided with a further Form 104 (Company Tab 1), which stated:

> *Please be advised that you have been DISMISSED from Company Service for the following reason(s): For the non-negative test results of your for-cause drug and alcohol test completed on March 13, 2019. A violation of CROR General Rules, Section G, CP Rule Book for Train and Engine Employees, General Rules and Policy #HR203-Alcohol and Drug Policy (Canada).*

8. Following which, the Grievor was offered a without prejudice, without precedent, voluntary reinstatement agreement(s) (Company Tab 8 & 9). The two most recent were sent on December 11, 2019 and January 24, 2020. They included: compensation for the period in which he was dismissed less appropriate mitigation; applicable deductions; reinstatement with full benefits; and no loss of seniority.

9. The Union considered the terms of the agreement onerous and unjustified and declined the offer.

10. The Union grieved the Grievor's dismissal contending both that he did not violate a legitimate Company policy and that the termination of his employment, given the lack of evidence of his impairment, was unwarranted and unjustified.

11. The Company asserts that termination was justified given the safety sensitive nature of his employment and the Grievor's breach of the Company's Alcohol and Drug Policy #HR 203 and Procedures #HR 203.1 (Company Tab 8).

Impairment/Dismissal

12. Dealing first with whether the penalty of dismissal was warranted.

13. There is nothing to be gained by re-telling the well cultivated jurisprudence which has addressed marijuana testing and impairment in similar cases. In his decisions (**CROA 4706, CROA 4709** and **4712)**, Arbitrator Moreau thoroughly canvasses the relevant case law and concludes as follows:

> *In 2017, Arbitrator Clarke followed the lengthy line of cases in this area and concluded in **CROA 4524**:*
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> *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 time. In Mr. Playfair's situation, he tested negative for the more specific oral fluid drug test.*

> *Arbitrator Sims followed Arbitrator Clarke and came to the same conclusion in **CROA 4584**.*
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> *Most recently, Arbitrator Weatherill, in **CROA&DR 4695-M**, dealt with a dismissal grievance involving a foreman who was subject to a substance abuse test after a derail incident. The results were a negative breath alcohol and oral fluid test and a positive urine test, results which are similar to a number of these cases including the one before this arbitrator. Citing Arbitrator Picher in **CROA 4240**, Arbitrator Weatherill noted that having marijuana in one's body is not conclusive of impairment. He states:*
>
> *Having traces of marijuana in the body may raise a question of whether there is impairment, but that bit of evidence by itself is not enough to establish impairment, whereas the negative breath alcohol and oral fluid tests strongly indicate that there was not. There is no suggestion CROA&DR 4712 – 8 – whatever that the grievor's conduct, movements or verbal behaviour were indicative of impairment.*
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> ***I have no difficulty arriving at the same conclusion reached by Arbitrator Weatherill, as have other arbitrators from this Office before him, that a urine drug test that uncovers traces of marijuana is not conclusive of impairment.** As he succinctly put it "…that bit of evidence by itself in not enough to establish impairment, whereas the negative breath alcohol and oral fluid tests strongly indicate there was not". Apart from the stand-alone unreliability of the urine test as an indicator of impairment, it is noteworthy that Arbitrator Weatherill cited the contradictory results between the oral fluid test and the urine drug test as further support for his finding of insufficient evidence of impairment.*
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> **(CROA 4709**; at pp. 9-10; emphasis added):

14. I agree with, and adopt, the reasoning of Arbitrator Moreau.

15. For the purposes of this Office, the law with respect to the ingestion of marijuana and the determination of impairment is unequivocally settled. Trace marijuana in the urine is not evidence, in and of itself, of impairment and its existence does not warrant a discipline of dismissal.

16. Accordingly, the Grievor's dismissal shall be set aside and he shall be immediately re-instated and made whole.

Breach of Company Policy

17. On September 24, 2018, the Company issued a revised *Alcohol and Drug Testing Policy and Procedure* which came into effect on October 17, 2018.

18. Broadly put, the Company argues that irrespective of the existing case law relative to impairment, the detection of metabolites in the Grievor's urine confirms a breach of the Company's existing *Alcohol and Drug Testing Procedures # HR203.1* for which – having regard to the safety sensitive nature of the Grievor's position - it is entitled to impose appropriate remedial conditions on re-instatement: (in this case in the form of a re-instatement agreement).

19. Put equally broadly, the Union's position is that the trace amounts of metabolite set out in the Company's Policy do not reflect impairment and therefore do not represent an "offense" for which any discipline can be imposed.

20. In that regard it relies, *inter alia,* on **CROA 4240** wherein Arbitrator Picher states:

> *In the instant case the Company notes that it has established, as part of its Alcohol and Drug Policy, Article 2.4.2 of OHS 5100 which effectively states that for employees in safety critical or safety sensitive positions a positive drug test, in and of itself, is a violation of the Company's policy. With respect,* ***the Arbitrator cannot find that that aspect of the Company's policy, which in the strictest sense has no basis in science or technology with respect to impairment or the risk of impairment on the job,*** *can fairly be said to be a valid rule in furtherance of the Company's legitimate business interests.*

21. **CROA 4240** did not involve an examination of evidence relative to the reasonableness of the policy itself. This is understandable in that the conclusions arrived relate to the applicability of the policy as regards the determination of impairment.

22. Proof of impairment is not at issue at this point. As indicated above, that issue as it relates to trace metabolites in a urine test, is settled law.

23. Nor is the issue of whether a positive test, as defined in the Company's *Alcohol and Drug Testing Policy*, is conclusive with respect to the determination of marijuana impairment and/or discharge.

24. Rather, the question at this point is whether a positive urine drug test, falling outside the thresholds set out therein, represents a breach of the Company's existing Policy for which some remedy (in this case it requests a re-instatement agreement in some form), is appropriate.

25. Additionally, for this aspect of the Company's argument, the Union asserts that the Company's Policy No. HR 203 & 203.1: fails to meet the KVP standards; violates the Collective Agreement and applicable legislation including the *Human Rights Act*; and, the applicable standards with respect to work place substance testing as defined in leading arbitral jurisprudence.

26. The dispute is not over the Company's right to enact policies relative to its operational requirements in a safety sensitive industry. Rather, the Union's objections relate to the reasonableness, applicability and enforceability of aspects of the existing policy. It alleges that the policy is unenforceable based on existing standards and jurisprudence and therefore does not support any remedy for its breach.

27. It suggests that I am therefore without jurisdiction to order any conditions to the Grievor's re-instatement. It puts it simply as follows: *"Mr. Sullivan is either guilty of misconduct or not. If not, you are spent"*.

28. This difference of opinion between the parties is a continuing one and has led to repeated dismissals and consequent arbitrations which has plagued their relationship and burdened the CROA process with cases that share largely repetitive issues.

29. From the material submitted, it appears that in recent years both the potency and concentration of marijuana has increased and that significant advancements have been made relative to marijuana testing.

30. Given the circumstances, 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.

31. Fortunately, the parties have already put those very questions regarding the validity of the Company's Alcohol and Drug Testing Policy in issue.

32. On March 25, 2019, in a detailed and thorough Policy Grievance *(R106-355.15464, 500.03.15468 & 288-080),* the Union challenged the validity and enforceability of the Company's *Alcohol and Drug Testing Policy*. In the Grievance it states (at p. 1):

> *On September 24, 2018, the Company issued a revised Alcohol and Drug Testing Policy and Procedure (Canada) (hereinafter the "Revised Policy") that introduced new requirements with respect to the Company's substance testing policy. The Company's Revised Policy indicates that the revisions to the January 1, 2012 Policy came into effect on October 17, 2018.*
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> *The Union contends that aspects of this Revised Policy violate the respective Collective Agreements, the June 16, 2010 Agreement, applicable legislation including the Canadian Human Rights Act, the privacy rights of employees and applicable standards with respect to workplace substance testing as defined in leading arbitral jurisprudence.*

33. On May 24, 2019, the Company filed an equally detailed and thorough grievance response.

34. A hearing on that Policy Grievance will provide an opportunity for the parties to address the concerns regarding appropriate evidence upon which a reasoned conclusion can be arrived at. As well, the resultant decision will inform – if not determine – the remaining issue before me here.

35. In that respect, the comments of Arbitrator Ish, in a recent decision (*Saskatchewan Health Authority v. Health Sciences Association of Saskatchewan*; (March 31, 2020), are instructive and put this matter into perspective:

> *[44] The alcohol and drug policy in issue in this arbitration was unilaterally enacted by the employer.* ***The legal issue is whether the alcohol and drug testing contemplated by the policy is a valid exercise of the employer's management rights under the collective agreement.*** *In the earliest published Canadian arbitration decisions, it was recognized that an employer is not permitted to "promulgate unreasonable rules and then punish employees who infringe them". (John Inglis & USW, Local 4487 (1957)), 7 LAC 240 (Laskin), at p. 247, cited in Irving 2013 at para. 22). In 1965 Arbitrator Robinson set out the scope of management's rule-making authority in the now universally accepted KVP decision. In Irving 2003 the Supreme Court of Canada described KVP 1965 as persuasive and said at para. 24:*
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> > *"The heart of the 'KVP test', which is generally applied by arbitrators, is that any rule or policy unilaterally imposed by an employer and not subsequently agreed to by the union, must be consistent with the collective agreement and be reasonable."*
>
> (Emphasis added*)*

36. Given the lack of evidence before me, I am unable to determine "… *whether the alcohol and drug testing contemplated by the policy is a valid exercise of the employer's management rights"* - and thereafter rule on whether any further remedy is applicable, appropriate or enforceable - until the parties conclude the existing Policy Grievance relative to the reasonableness and enforceability of the Company's *Alcohol and Drug Testing Policy (# HR 203) and Procedures (# HR 203.1)*.

37. Accordingly, the parties must proceed (before another arbitrator) with an *Ad Hoc* hearing on Grievance 500.03.15468 as soon as possible to ensure that this issue is fully and finally addressed. I suggest an *Ad Hoc* hearing in that the issues to be addressed, and the necessary evidence, will no doubt be complex and lengthy.

38. An analysis/examination of the Company's policy – similar to that undertaken in *SHA v. HSAS (supra)* - would resolve the ongoing issue of its enforceability. Failing which – considering the number of past grievances and awards related thereto - it is abundantly clear that this issue will continue to arise and impact the parties' relationship.

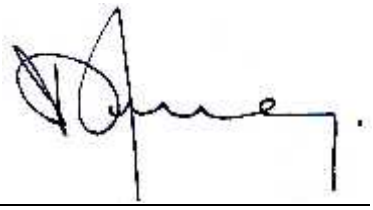
Conclusion

39. The Grievor's dismissal shall be set aside; he shall be re-instated forthwith and be made whole.

40. I will reserve jurisdiction on, 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 parties have concluded the grievance process on Policy Grievance *R106-355.15464, 500.03.15468 & 288-080.*

41. In the event that the parties have not proceeded with the Policy Grievance within 90 days, the matter may be brought back before me - on the application of either party - for further directions or determination as may be required.

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



April 15, 2020

Richard I. Hornung, Q.C.

Arbitrator