

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

CASE NO. 4736

Heard in Montreal, May 29, 2020

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The dismissal of Locomotive Engineer N. Daggett of Sudbury, Ontario, on May 10, 2019 for violating Policy # HR 203 Alcohol and Drug Policy (Canada).

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Following a formal investigation, Mr. Daggett was dismissed from Company service for violating: "Policy # HR 203 Alcohol and Drug Policy (Canada) effective January 1st, 2012 and revised October 17th, 2018."

Union Position:

The Union contends the discipline is excessive and unwarranted in the circumstances. Following a run-through switch, Locomotive Engineer submitted to a post-incident test which had the following results; "...were Negative for Breath Alcohol Test, Negative for Oral Fluid Drug Test and Positive for Urine Drug Screen".

Locomotive Engineer Daggett was forthright and honest in his investigation, answering all questions truthfully. He expressed remorse and even went so far as to confirm he would no longer use cannabis while employed at Canadian Pacific.

It has been well established within CROA jurisprudence "... that a positive drug test, conducted by urine analysis, standing alone, does not establish impairment at a point in time which corresponds with an employer's legitimate business interests and, standing alone, cannot be viewed as just cause for discipline." (CR4296)

The Union further relies on CR4240 wherein it reads in part; "The Company seeks to punish an employee for activity which occurred while he was off duty, off Company premises which, in and of itself, posed no threat or harm to the Company's operations or its legitimate business interests. In these circumstances the Arbitrator cannot responsibly conclude that the employer had just cause for the assessment of any discipline against the grievor, merely by reason of his having registered a positive result to a urine analysis drug test, or by his admission that he did consume marijuana in a social setting while off duty."

Notwithstanding the jurisprudence relied on above, it must also be stated that the Company's Revised Drug and Alcohol Policies are themselves subject to separate appeals by this Union.

For the foregoing reasons, the Union seeks to have the discipline assessed Locomotive Engineer Daggett expunged, and that he be reinstated to Company Service. Further, that Mr. Daggett be made whole for all wages and benefits lost while dismissed. In the alternative, the Union requests that the discipline be substituted for such lesser penalty as the Arbitrator sees fit.

Company Position:

The Company chose not to provide its position to the Union.

THE COMPANY'S STATEMENT OF ISSUE:

Following a formal investigation on May 1, 2019, Mr. Daggett was dismissed from Company service on May 10, 2019, for violating: "Policy # HR 203 Alcohol and Drug Policy (Canada) effective January 1st, 2012 and revised October 17th, 2018." resulting from a positive Urine Drug Screen test.

Company Position:

The Company maintains the Grievor admitted culpability for a run through switch which resulted in derailment of two cars on April 17, 2019. That derailment resulted in Post-Incident Accident testing of the crew.

The Grievor's Post-Incident test results indicated a Positive Urine Drug Screen test. In his investigation on May 1, 2019, the Grievor confirmed that he was advised of his positive test results for Cannabis and Marijuana, and he occasionally used cannabis as a recreational user.

The Grievor's positive test results are in violation of the Company's HR 203 Alcohol and Drug Policy (Canada) and as such the dismissal was warranted.

Union Position:

The Union disagrees with the Company's position.

FOR THE UNION:

(SGD.) J. Campbell

General Chairman

FOR THE COMPANY:

(SGD.) D. McGrath

Manager, Labour Relations

There appeared on behalf of the Company:

D. McGrath	– Manager Labour Relations, Calgary
S. Oliver	– Manager Labour Relations, Calgary
J. Shaw	– Manager Labour Relations, Calgary

And on behalf of the Union:

M. Church	– Counsel, Caley Wray, Toronto
J. Campbell	– General Chairman, Peterborough

AWARD OF THE ARBITRATOR

On April 17, 2019, the Grievor was the locomotive engineer on Train U56-17 which ran a switch. No discipline was issued to the grievor for the incident.

Subsequent to the incident, the grievor was required to submit to a series of alcohol and drug tests. The results of the test were negative for breath alcohol, negative for the oral fluid (swab) test and positive for the urine drug screen test. An investigation was held on May 1, 2019 where he was advised of the test results. The grievor admitted during the investigation to being a recreational user of cannabis. There is no dispute that the grievor was otherwise honest and answered all the questions truthfully that were put to him in the investigation.

The Company does not dispute that the case law from this Office has consistently held that a positive urine test is insufficient proof of impairment. To quote Arbitrator Weatherill in **CROA&DR 4695-M**:

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 there was not. There is no suggestion whatever that the grievor's conduct, movements or verbal behaviour were indicative of impairment.

The Company notes that it offered to reinstate the grievor, with conditions, in a series of three voluntary re-instatement agreements, the latest one being proposed recently as May 12, 2020. All three were rejected by the Union. The Company submits that the conditions set out in the latest VSA of May 12, 2020, in particular, approximates what an arbitrator would order as part of a reinstatement order in similar circumstances where there is evidence of a positive urine test but a negative oral fluid (swab) test.

The Union maintains that it is clear on the evidence that the Company has not demonstrated proof of impairment. The Union notes that a positive urine test is

insufficient evidence of impairment, as noted in the series of CROA cases. On that basis, the Union submits that the Company has no just cause or basis to discipline the grievor and he should be reinstated and made whole. In reference to the VSA's, the Union notes that even the latest proposal of May 12, 2020 contains a clause which precludes arbitral review in the event of a breach of the Agreement. That provision alone, in the Union's view, is unacceptable.

I reach the same conclusion as in **CROA&DR 4695-M** that the grievor did not violate the Company's policy nor is there cause for discipline.

The grievor is entitled to be reinstated forthwith without further conditions. He shall otherwise be made whole without any loss of seniority, benefits and he shall be compensated for lost earnings. I accept the Union's submission that the grievor's compensation for lost earnings shall be calculated from the date of his termination, with the exception of the period from September 24, 2019 to October 8, 2019.¹ I shall retain jurisdictions should any issues arise with respect to the implementation of this award.

June 10, 2020



JOHN M. MOREAU
ARBITRATOR

¹ It was understood during the course of the grievance procedure that no liability was to accrue for those 8 days as a result of a time limit extension agreed to between the parties.