CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4743

Heard in Montreal, June 10, 2020

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE
MAINTENANCE OF WAY EMPLOYEE DIVISION

DISPUTE:

Dismissal of Mr. J. Jones.

THE UNION EXPARTE STATEMENT OF ISSUE:

On April 25 2019, the grievor, Mr. Jamie Jones, was formally advised that he was dismissed from Company service "effective April 26, 2019 for the following reasons: For cause post incident non negative substance results that were taken on March 19 2019 after an incident that occurred at Magellan where you did not exit your vehicle to guide the reverse movement and vehicle contacted a cross warning device" - a violation of CROR Rule G. he Union objected to the dismissal and a grievance was filed.

The Union contends that:

1) The grievor's oral fluids test produced a result that was below the threshold limit and he could not therefore be considered impaired. In view of this, he could not properly be assessed discipline of any kind for this matter;

2) The grievor was in the back seat of the truck involved in the incident and there was nothing he could have done that could have altered the outcome. Consequently, it was wrong for the Company to have required the grievor to undergo substance testing;

3) In any event, the grievor was not investigated for the incident for which he was sent for testing. Was honest and cooperative throughout the investigation;

4) 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:

On April 25, 2019, the grievor Mr. J. Jones was formally advised that he was dismissed from Company service "effective April 26, 2019 for the following reasons:

For cause post incident non-negative substance results that were taken on March 19, 2019 after an incident that occurred at Magellan where you did not exit your vehicle to guide the reverse movement and vehicle contacted a cross warning device" – a violation of CRO Rule G.

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

Company Position:

The grievor was properly dismissed for violation of CRO Rule G.

The grievor was a member of the crew involved in an incident and subsequently was post incident test.

The company had sufficient cause for testing as the grievor ought to have gotten out of the vehicle to spot the vehicle.

The grievor tested positive in his oral fluids and urine for cocaine which constitutes a violation of CRO Rule G.

As per the positive tests the grievor was unfit for safety sensitive duties.

The Company maintains that the discipline assessed was appropriate in all the circumstances.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) G. Doherty	**(SGD.) F. Billings**
President	Senior Director, Labour Relations

There appeared on behalf of the Company:

F. Billings	– Manager Labour Relations, Calgary
S. Oliver	– Senior Manager Labour Relations, Calgary

And on behalf of the Union:

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

AWARD OF THE ARBITRATOR

1. The Grievor began his employment with the Company on April 24, 2017.

2. On March 19, 2019, the Grievor held the position of Machine Operator (a safety sensitive position). While he was a passenger in a truck, the operator reversed the vehicle and the crane on the truck came into contact with a crossing warning device, causing damage. At the time there were four occupants in the truck in addition to the Grievor. Two of the occupants got out of the truck when the reversing process began,

in compliance with *Rule E-2 Vehicle Use for Company Business*. The Grievor did not exit the vehicle.

3. Rule E-2(3) provides:

> *If there is a passenger in the vehicle, the driver must ensure that the passenger exists the vehicle and assists in guiding the driver when backing up. Back up cameras do not relieve employees of the requirement to provide backup assistance.*

4. The Union argues that the provisions of Rule E-2 were complied with by the two passengers who exited the vehicle and that there was, accordingly, no obligation on the Grievor to leave the vehicle pursuant to Rule E-2. As a result, the Company lacked any grounds or basis for testing him in the first place.

5. A reading of Rule E-2 leads me to conclude that it is intended that if one is a passenger in a vehicle, he/she is required to exit the vehicle to assist in the reversing procedure.

6. The Grievor, having breached the rule, and a collision having ensued, the Company was entitled, pursuant to the *Post Incident Testing Provisions (5.2.2)* of its *Alcohol and Drug Procedure HR203.1* to require post incident testing following a significant work related incident or a safety related incident as this case presented.

7. Accordingly, the Grievor and other members for the crew were properly post-incident tested (POCT) and the subsequent laboratory tests confirmed the Grievor's positive oral fluid and urine drug test for cocaine.

8. Following an investigation, the Grievor was formally advised on April 25, 2019 that he was dismissed from the Company service for a positive drug test which represented a violation of *CRO General Rule G (I-IV).*

9. The Union's remaining argument is that the Grievor's oral fluid test produced a result, at the point of contact testing (POCT), that was below the threshold limit and therefore he could not be considered impaired.

10. It asserts that although the Grievor's oral fluid test registered 12ng/ml for the presence of cocaine, that amount was below the threshold set by the Company's own Policy to establish impairment. Accordingly, irrespective of any subsequent results proffered, the Grievor could not be considered impaired and therefore, could not legitimately be regarded as having violated Rule G.

11. The Union's argument appears to rely on its interpretation that the POCT is the "screening" test referred to in the Company's policy. Based on the same, the Union provided a detailed submission which challenged, from one angle or another, the validity of the Company's test and its introduction into evidence here based on the administration of the test and what it saw as discrepancies between the readings provided by the initial POCT the subsequent confirmation test at the laboratory.

12. However, as pointed out in **CROA 4742,** a review of the Company's Policy (6.15) makes it clear that "… ***all*** *POCT test samples are sent to the laboratory for further confirmatory analysis...*". Further, the explanation contained in the *Company's Procedure #HR 203.1* entitled: "*Screening*" (at p. 33), makes it apparent that: "***All drug tests*** *…are first tested* ***in the laboratory*** *with a* ***screening test*** *called immunoassay testing"*. A reading of the entire section makes it apparent that the POCT sample taken as part of the Post Incident Test - which the Union's argument appears to rely on - is not the "screening test" referred to in # HR 203.1.

13. It is apparent, from the letter by Dr. Snider-Adler, that the drug sample provided by the Grievor was positive for cocaine and fell both within the parameters contained in the grounds for his dismissal for "… *cause post incident non-negative substance results that were taken on March 19, 2019",* as well as the thresholds contained in the Company's policy.

14. The only evidence available to the board is that contained in the March 6, 2020 letter from Doctor Snider-Adler. In that letter, Dr. Snider-Adler concludes as follows:

> *In this case, the oral fluid sample had a confirmation result of benzoylecgonine at 12 ng/mL. This, however, would not have been confirmed using LC/MS/MS testing, had the screen test not be at or above 20 ng/mL. In this case, we can assume that there was also the likely presence of the other metabolites and/or cocaine itself (with cocaine being less than 8 ng/mL or it would have resulted in a confirmed positive test). The combination of these would have resulted in a screen test at or above 20 ng/mL. The combined cross-reactivity of cocaine and its metabolites were enough to produce an absorbance exceeding the 20 ng/mL calibration standard (i.e., a presumptive positive test result despite the fact that benzoylecgonine itself was at a concentration level below the 20 ng/mL screening cut-off).*

> ***Summary***
> *In summary, Mr. Jones had a positive urine drug test for benzoylecgonine (cocaine metabolite) as well as a positive oral fluid test for benzoylecgonine. Both were positive at or above the confirmation cut-off level. This is consistent with the use of cocaine.*

15. No alternative evidence was adduced by the Union to show that the POCT it relied on somehow impugned the results of the tests provided by the laboratory.

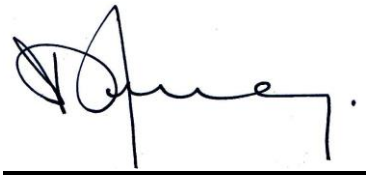
16. In **CROA 4707**, Arbitrator Moreau recently analyzed the cases dealing with the dismissal of employees who came to work with cocaine in their system. He states:

> *The seriousness of reporting to work while under the influence of cocaine was underlined in CROA&DR 4653 & 4654 by Arbitrator Hornung:*
>
> > *Even leaving aside the fact that the imposition of 15 demerits for the breach of Rule 104 put him over the top subject to dismissal, his coming to work under the influence of cocaine represents a serious offense deserving of severe discipline. In both instances herein, I conclude that discipline was warranted and the discipline imposed was reasonable in the circumstances.*
>
> *More recently, in Ad Hoc 663, Arbitrator Clarke, in dealing with a locomotive engineer who had consumed cocaine close to the time he was operating a train, noted at para 134:*
>
> > *The extreme seriousness of Mr. A's action is beyond doubt.*
>
> *The evidence in this case is clear that the grievor tested positive for cocaine in both his urine test and the oral swab shortly after the incident. Similar to the comments of Arbitrator Hornung above, the grievor's decision to show up for work after using cocaine, in whatever amount, was a reckless decision which calls for a severe disciplinary response. The safety risks posed by an employee running heaving equipment like the grievor while under the influence of cocaine could lead to catastrophic results. To borrow from Arbitrator Clarke's words, the "extreme seriousness" of the incident "is beyond doubt".*
> *...*
> *I conclude with the comment that cocaine is an illegal substance which can easily lead to devastating health and addiction*

> *consequences. To uphold the grievance in the face of the clear evidence that the grievor willingly took cocaine prior to starting work would be both contrary to recent arbitration awards of this Office and send the wrong signal to other employees in safety-sensitive positions who deliberately consume a toxic drug like cocaine before reporting for duty.*

17. I share the logic and sentiments of Arbitrator Moreau. It having been proven by the confirmation laboratory tests that the Grievor was impaired by cocaine while at work, a breach of CRO Rule G has been established. The discipline of dismissal is reasonable in all the circumstances.

18. The grievance is dismissed.



June 30, 2020

RICHARD I. HORNUNG, Q.C.

ARBITRATOR