CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4754

Heard in Montreal, July 8, 2021 via Zoom Video Conferencing

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE
MAINTENANCE OF WAY EMPLOYEE DIVISION

DISPUTE:

Dismissal of Mr. L. De Craeke.

JOINT STATEMENT OF ISSUE:

Following a formal investigation, the Grievor, Mr. L. De Craeke was formally advised that he was dismissed from Company Service effective September 17, 2019 for: *"Positive post incident test results that were supplied to the company of August 14, 2019, after the track unit (he) was operating contacted a crossing two consecutive times,".*

The Union objected to the dismissal and 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; Post incident testing was improper in this case and in violation of the Company's own testing policy. In addition, the Company violated section 15.1 of the Collective Agreement; The Grievor's dismissal was unfair and unwarranted.

The Union requests that: the Grievor be reinstated without loss of seniority and with full compensation for all losses incurred as a result of this matter. The Union also requests that, with the exception of the normal FAF and substance test required by Company Policy for employees returning to work after a prolonged absence, the Company be ordered to ensure that there will be no OHS involvement upon or prior to the Grievor's return to work.

The Company's position: the Grievor tested positive for marijuana and cocaine in his urine which constitutes a clear violation of HR 203 and Rule G. As per the positive test the Grievor was not free from acute, chronic, hangover and after-effects as indicated in HR 203. The Grievor made contact with a crossing while operating equipment, causing significant damage to the equipment. This is a serious incident and therefore subject to post-incident drug and alcohol testing. The Grievor's dismissal was a violation of HR 203 and Rule G which warrants discipline up to and including dismissal.

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

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) W. Phillips	**(SGD.) F. Billings**
President	Manager, Labour Relations

There appeared on behalf of the Company:

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

And on behalf of the Union:

D. Brown	– Counsel, Ottawa
W. Philips	– President, Ottawa

AWARD OF THE ARBITRATOR

1. This case concerns Mr. De Craeke's dismissal arising from a positive drug test administered post-incident. The urine test performed on Mr. De Craeke showed a result of 122ng/ml for Tetrahydrocannabinol ("THC") and 1091ng/ml of cocaine. The breath and oral swab tests were negative.

2. The Company takes the position that the incident was "serious". It claims significant damage was caused and therefore it subjected Mr. De Craeke to post-incident drug and alcohol testing. According to the Company, the positive urine test constitutes a clear violation of HR Policy 203 and CROR Rule G which warrants the dismissal.

3. The Union disputes the dismissal alleging Mr. De Craeke was not impaired while at work and could not be subject to any form of discipline. It claims post-incident testing was improper and in violation of the Company's own testing policy. The testing results are not in dispute. Rather, the Union claims the Company has failed to prove just cause

for discipline, requests that the discharge be vacated, and that Mr. De Craeke be reinstated immediately with full compensation.

4. After thoroughly reviewing the evidence, materials and submissions presented by the parties, I find that the Company has not established, on a balance of probabilities, that testing was appropriate in the circumstances. Even if I were to assume that the testing was appropriate, the evidence presented does not support a finding that Mr. De Craeke was impaired while on duty. The discharge is therefore quashed. This decision will refer only to the relevant facts and arguments which are necessary in making my decision.

RELEVANT FACTS

5. Mr. De Craeke held the position of a Machine Operator with approximately seven years of service at the time of the incident. This is a safety-sensitive position requiring compliance with specific standards including reporting and remaining fit to work.

6. On August 14, 2019, Mr. De Craeke was operating a piece of on track equipment called a “spiker”. Before proceeding over a crossing, he failed to lift and lock the work heads of the spiker causing damage to his machine and the crossing. He proceeded to back up, raised the work heads on his spiker and continued forward while dropping his work heads again. This caused additional damage to his machine and to the crossing.

7. After securing the equipment, Mr. De Craeke reported the incident to his supervisor. On that same day, the Company sent Mr. De Craeke for post-incident related drug and alcohol testing. The collection test which occurred at approximately 3:18 P.M. confirmed the following:

- Negative Breath and Alcohol Test
- Negative Oral Fluid Drug Test
- **Positive Urine Drug Test**

8. Mr. De Craeke accepted responsibility for the incident and signed an admission of responsibility in relation to the damage he had caused to the spiker and crossing. On September 3, 2019, he was assessed 10 demerits for the incident with no further investigation. On September 17, 2019, Mr. De Craeke was terminated from his employment for the *"positive post-incident test results".*

OBJECTION – LEGITIMACY OF THE POST-INCIDENT TESTING?

9. The Union raises an objection challenging the legitimacy of the drug testing. The Union asserts the incident was minor. It claims that post-incident testing was not warranted in the present circumstances and was conducted contrary to the *CP Alcohol and Drug Procedure #HR 203.1* ("**the Policy**"). The relevant excerpts of the Policy read as follows:

> "**5.2.2 Post Incident Testing**
>
> Post Incident alcohol and drug testing may be required after a significant work related incident, a safety related incident or a near miss as part of an investigation.
>
> Employees are expected to participate fully in an investigation. Failure to report an incident is a violation of the Canadian Internal Control Plan for Incident Reporting.

> A significant work related incident, safety related incident or near miss may involve any one of the following:
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> • a fatality;
>
> • any number of serious injuries or multiple injuries to Company personnel or the public requiring medical attention away from the scene or lost time injuries to Company personnel; or an incident or near miss that creates this risk;
>
> • significant loss or damage to Company, public or private property, equipment or vehicles or an incident or near miss that creates this risk;
>
> • an incident with serious damage or implications to the environment, or an incident or near miss that creates this risk.
>
> The decision to refer an individual for testing will be made by the Supervisor investigating the incident after consultation with and agreement of an Experienced Company Operating Officer (ECOO), i.e. Senior Vice President (SVP), Assistant Vice President, (AVP), General Manager (GM), Superintendent, Director or Chief Engineer. Unionized employees will be entitled to union representation provided this does not cause undue delay.
>
> Post Incident testing is not justified if it is clear that the act or omission of the individual(s) could not have been a contributing factor to the incident e.g. structural, environmental or mechanical failure or the individual clearly did not contribute to the situation."

10. The Company considers that post-incident testing was triggered due to the incident which it characterizes as "serious" and "significant". The Policy lists several examples of what "significant work related incidents" may involve including a fatality, serious or multiple injuries, serious damage to equipment or property, and a near miss that creates a risk.

11. In support of its position, the Company cites **CROA 3841**, a case involving a Locomotive Engineer who was terminated from his employment for refusing to undergo drug and alcohol testing after running through a yard switch. The Union took the

position that the incident was not significant and did not constitute grounds for testing. Arbitrator Picher found that although the damage was relatively minor, the run-through of a plainly visible switch was inexplicable. Based on Company practice to test employees in such circumstances and that fact that running through a switch can cause more serious damage, including a possible derailment, the Arbitrator concluded that the request for testing was appropriate.

12. Each case must be evaluated with its surrounding context and circumstances. The facts in this case are distinguishable from **CROA 3841**. The Company adduced no evidence in support of its assertion that Mr. De Craeke was involved in a serious incident. There was no evidence of the alleged damage caused by the incident. And there was no injury, no fatality, no environmental damage or any near miss presented. Without the corroborating evidence, I am unable to conclude that the incident was serious or significant.

13. If I were to assume that the testing was appropriate, I must next consider whether the Company has proven that Mr. De Craeke was impaired.

DOES THE EVIDENCE SUPPORT A FINDING OF IMPAIRMENT?

14. This Office has an abundance of jurisprudence outlining the applicable analysis in cases where employees are terminated for positive drug testing. The law is clear and has been repeated time and time again. The test for the justifiable assessment of discipline is one of impairment.

15. Rule G of the Canadian Railway Operating Rules (CROR) sets out clear and unequivocal standards which employees must follow. Essentially, the use or possession of drugs, narcotics or intoxicants is prohibited on duty. Employees must have the ability to work safely. These rules are not in dispute. Mr. De Craeke confirms he understands the policies and their application. He adds he is committed to abide by them. The question is, did Mr. De Craeke breach the policies?

16. The Company bears the onus to establish, on a balance of probabilities, that Mr. De Craeke was impaired while on duty. It provided a report prepared by Dr. Melissa Snider-Adler, a recognized expert and clinician in the field of workplace drug testing. The Union responded to the Company's evidence by presenting a report prepared by Dr. David Rosenbloom, a pharmacist and professor experienced in the field of workplace drug testing.

17. An investigation was conducted in connection with the positive substance results. During the investigation, Mr. De Craeke was asked to explain why marijuana was found in his urine. He responded that he smoked a bit of marijuana before going to bed to help him sleep on his rest days. Questioned on the last time he used marijuana; Mr. De Craeke stated it may have been August 8, 2019. He claimed it is not a habit, and that he consumes very minimal amounts before bed to help him fall asleep. He added that melatonin is the substance he usually takes to assist him with his sleep.

18. At the investigation, the same questions were repeated regarding his cocaine consumption. Mr. De Craeke responded he rarely uses cocaine. He admits to having indulged with friends on an event on his rest day, August 10, 2019. This was the last time he used cocaine. He further stated he has no drug or alcohol dependency.

19. Both parties relied on renowned experts to present their medical evidence. The opinions provided by the experts are of the highest calibre. They make salient points about the case before us and elaborate the scientific data clearly. There is common ground between the two experts that the positive urine tests indicate consumption from days prior to the testing with no definite determination as to exact timing of use, and how much of each substance was consumed. Hence, it is not possible to draw conclusions regarding the degree of impairment.

20. The case law in relation to this question, including from this Office, is well settled, and the learned arbitrators have come to the same conclusion on this issue: a positive urine test alone is not enough to establish impairment.[1]

21. **CROA 4706** is clear on this issue. In that case, as in the present matter, the grievor produced a negative breath and oral fluid test and a positive urine test for marijuana. Expert witnesses were called by both parties. The Arbitrator ruled that there needs to be more than a urine test to determine impairment. The same conclusion was reached in **CROA 4314**, which dealt specifically with cocaine. The test is ultimately one

[1] CROA 4240, 4296, 4314, 4584, 4695, 4706, 4709, 4725, 4726, 4727 and 4729 and most recently in ADHOC 729.

of impairment regardless of the substance. **CROA 4709** makes another important point, that negative breath and oral test strongly indicate that there was no impairment despite a positive urine test.

22. Finally, the Company argues that Mr. De Craeke's employment record is relevant in assessing whether the incident is isolated and refers to it as evidence of his drug use and failure to adhere to Company policies. The record indicates Mr. De Craeke was terminated from his employment in 2013 for violating Rule G. He was reinstated with the assistance of the Union and afforded with an opportunity to salvage the employment relationship. It is unnecessary to address the disciplinary record in this case as the Company failed to prove impairment and therefore establish there were grounds for discipline.

23. In **CROA 4729**, Arbitrator Hornung's summarizes the jurisprudence as follows: *"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 or dismissal."* There is no evidence placed before me to suggest that Mr. De Craeke was impaired while on duty or that he reported unfit to work on August 14, 2019, in violation of Company policies.

CONCLUSION

24. Accordingly, the grievance must therefore be allowed. During its rebuttal, the Company asked that, in the event of the Grievor's reinstatement, back pay be limited to the first day of hearing, which was in July 2020. Given there was no rationale or precedent proffered in support of this demand, I must decline it.

25. Mr. De Craeke's dismissal is set aside. He is to be reinstated into employment without loss of seniority or other benefits and otherwise made whole. I remain seized with respect to any dispute that may arise regarding the implementation of this award, if necessary.

July 20, 2021

AMAL GARZOUZI
ARBITRATOR