

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

CASE NO. 4798

Heard via Videoconference and in Gatineau, Québec, December 16, 2021

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The dismissal of Locomotive Engineer S.D. of MacTier, Ontario, following a post-incident test.

JOINT STATEMENT OF ISSUE:

While working as Locomotive Engineer on train 119-19 on May 20, 2020, Locomotive Engineer S.D. and crew were involved in an incident (subject of a separate appeal). Due to this incident the crew was requested to undergo post-incident substance testing.

Following an investigation, Locomotive Engineer S.D. was subsequently issued a Discipline form 104 which read:

At the conclusion of that investigation it was determined the investigation record as a whole contains substantial evidence proving you violated the following:

HR203.1 Alcohol and Drug Policy

3.1 Standards

3.1.4 Illegal or Illicit Drugs and Mood Altering Substances

3.1.5 CROR Rule G

3.2.2 Disclosure and Requests for Assistance

3.4.1 General Provision

4.1 Standards and Consequences

CROR General Rule G

T&E Rule Book Section 2.2, Item (d) While on Duty

In consideration of the above the bond of trust has been broken and as a whole contains substantial proof that, you had violated "Rule G" which was demonstrated by your actions.

Please be advised that you are dismissed from Company Service, effective June 23, 2020, for failing to ensure that at all times while working, on duty, or subject to duty you were fit to work and free from adverse effects of prohibited and illegal substance as evidenced by your positive Post Incident Urine and Oral Fluid Drug test collected on May 20, 2020.

Union Position:

The 2019 and 2018 Drug and Alcohol policies are under separate appeal and conflict with the June 16, 2010 agreement.

The Union further contends that the discipline in its entirety as the Company sought to have the crew tested post incident where the presumption was that the crew was in violation of a rule when it has the means to verify the incident using the forward-facing camera. We suggest this was done solely to support the Company's desire to justify "post incident testing" of the crew.

Notwithstanding the above argument and without prejudice, the Union contends the outright discharge of Locomotive Engineer S.D. for a positive urinalysis and swab is excessive given her length of service, her record and her acceptance of responsibility.

In the response to the step one appeal, Superintendent Harter quoted from the Company's Drug and Alcohol policy (subject to a separate appeal) wherein he wrote "Disciplinary action up to and including dismissal will be taken where CP has determined that violations of this policy and procedures have occurred." The Union contends all of the Company's policies, whether the Hybrid Discipline Policy (subject of a separate appeal), and Alcohol and Drug Procedures (subject of separate appeal) state "up to dismissal". The Company has levied the ultimate penalty by immediately assessing discharge without any consideration of mitigating factors.

The Company has failed to take into account that S.D. was forthright and honest throughout the investigative process. She readily admitted to a mistake in judgement, was extremely remorseful and immediately following the testing, sought professional advice which is documented and was made available to OHS through the investigating officer during the statement and prior to any discipline being assessed.

During the investigation, S.D. advised that she sought help, yet the Company chose to ignore this and outright dismissed her instead of allowing her to get assistance, receive benefits, and be accommodated under a return to work accommodation. The Company's own Chief Medical Officer has previously stated, "for example, the CMO noted that 10 % of employees will have a substance use disorder. In addition, the CMO commented that a job termination can lead to financial and other stressors which may lead to a substance use disorder. Comments were also made that reliance cannot be had on employee medical forms since they may lie about substance abuse".

Furthermore, the Company both publicly and internally calls all employees at CP as being part of a "family". The Union believes that if this is in fact true, S.D., having been in CP for over thirty-one years, ought to be given an opportunity to prove she has learned from this incident. Furthermore, S.D. would agree to measures to protect the Company's legitimate interest.

For all of the reasons and submissions set forth in the Union's grievances, which are herein adopted, the Union requests that S.D. be reinstated to her position of Locomotive Engineer, and she be compensated [for] all loss of wages, benefits, and without loss of seniority.

The Union further requests S.D. be accommodated as per Company Policy for Workplace Accommodation, the *Canadian Human Rights Act*, the Commission's Workplace

Accommodation, and the policy requirements under CHRC alcohol and drug testing, as well as any other policy, law, past practice/prejudice, right, or regulation that may apply.

In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

Company Position:

The Company disagrees with the Union position and denied the Union's allegations and request.

The Company has cause to require the crew to submit to post incident testing, given the seriousness of the incident that occurred. The Company maintains it was compliant with the requirements of Policy and Procedure HR 203 and 203.1. The grievor tested positive for Urine and Oral Drug Screen for Cocaine, an illegal and banned substance.

The Company maintains the grievor's culpability as outlined in the discipline letter was established following the fair and impartial investigation. Discipline was determined following a review of all pertinent factors. The Company's position continues to be that the discipline assessed was just, appropriate and warranted in all the circumstances.

The Company maintains no violation of the Workplace Accommodation policy, the *Canadian Human Rights Act*, the Commission's Workplace Accommodation or policy requirements under CHRC Alcohol and Drug Testing were violated as the Grievor had never sought medical consultation, nor did they ever request for an accommodation with the Company prior to the incident, in order to substantiate any alleged medical disability and/or substance use disorder.

The Union further stated a desire in their grievance correspondence to reserve the right to allege a violation of, refer to and/or rely upon any other provisions of the collective agreement and/or any applicable statutes, legislation, acts or policies. In accordance with the grievance procedure, the Company will be prepared to proceed only on the issues that have been properly advanced through the grievance procedure.

Accordingly, the Company cannot see a reason to disturb the discipline assessed and requests the Arbitrator be drawn to the same conclusion.

FOR THE UNION:

FOR THE COMPANY:

(SGD.) E. Mogus

(SGD.) L. McGinley

General Chairperson

Assistant Director Labour Relations

There appeared on behalf of the Company:

J. Bairaktaris – Director Labour Relations, Calgary
L. McGinley – Assistant Director Labour Relations, Calgary

And on behalf of the Union:

M. Church – Counsel, Caley Wray, Toronto
E. Mogus – General Chairperson, Oakville
J. Bishop – Local Chair and SVG LE, MacTier
S.D. – Grievor, Barrie

AWARD OF THE ARBITRATOR

1. The Grievor was working as a Locomotive Engineer, a safety-critical position. She tested positive for cocaine post incident. As a result, she was dismissed for failing

to ensure that at all times while working, on duty or subject to duty, she was fit to work and free from the adverse effects of prohibited and illegal substance, in violation of the Company's *Alcohol and Drug Procedures # HR 203.1 (D&A Procedure)*, Rule G of the *Canadian Rail Operating Rules (CROR)* and the *Rule Book for Train and Engine Employees (T&E Rule Book)*.

2. The main question in this case is whether the Grievor was impaired while on duty. To answer this question, it must be determined whether the quantitative levels of cocaine and cocaine metabolite (benzoylecgonine) revealed by her drug test are conclusive of impairment. This includes establishing whether the Grievor used cocaine approximately thirty-six hours before being tested, as she claims, or closer to the testing.

3. The Union argues that the letter of discharge does not specifically assert that the Grievor was impaired at work and therefore the Company cannot raise this argument to support the discharge. I reject that position at the outset, as the letter alleges that the Grievor violated Rule G of the CROR. As set out below, Rule G prohibits the use of drugs which will adversely affect an employee's ability to work safely. In my view, the reference to Rule G in the letter of discharge unequivocally includes impairment.

4. The Union also makes the following arguments, which I will address below:

- a. Post-incident testing was not justified and therefore the Grievor's drug test results are not admissible.
- b. The reports by Dr. Snider-Adler are not admissible as expert evidence.

- c. The Company has not discharged its burden to prove that the Grievor was impaired at the time of the incident.
- d. In the alternative, the Grievor should have been accommodated.
- e. In the further alternative, discharge is an excessive measure.

Are the post-incident testing results admissible?

5. The Union contends that the Grievor's drug test results should be disregarded, as post-incident testing was not justified.

6. On May 20, 2020, the Grievor was working as a Locomotive Engineer, alongside a fellow Conductor. The Grievor began her tour of duty at approximately 0820 hours. She was assigned to operate train 119-19. At approximately 1200 hours, the crew unexpectedly came upon a stop signal (red light). The Grievor brought the train to a controlled stop and placed an emergency call to the Rail Traffic Controller to report they had passed a stop signal. When questioned by the Assistant Superintendent, the Grievor indicated that she had been busy focusing on a brake valve and gauges and did not see the preceding signal, which announced the upcoming stop signal. The Conductor stated that he was doing paperwork and did not see the preceding signal either. The crew was subject to post-incident drug and alcohol testing, as per the *D&A Procedure*.

7. The Grievor was urine tested at approximately 1525 hours. The Grievor was oral fluid tested (saliva) at approximately 1550 hours. The test results were positive for cocaine and cocaine metabolite.

8. Later that day, the Company reviewed the download of the locomotive's forward-facing camera and determined that the advance signal encountered by the crew was a clear signal. The investigation revealed that the stop signal was caused by an operational error. Therefore, the Grievor was not deemed culpable of passing the stop signal. She was, however, disciplined for failing to observe the preceding signal, which is the subject of a separate grievance.

9. The Union argues that, before sending the crew for testing, the Company should have reviewed the forward-facing camera download to verify what the advance signal had shown. I reject this argument.

10. Section 4.3. of the *D&A Procedure* states:

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.

...

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.

...

11. In this case, the Grievor reported having passed a stop signal, which is a safety-related incident justifying post-incident testing under section 4.3 of the *D&A Procedure*. The Grievor (as well as the Conductor) admitted to having failed to observe the advance signal. Consequently, the Company had reason to believe that this omission was a factor in the incident. There was no reason to expect the Company to delay the drug

testing procedure to review the download of the forward-facing camera, a process which the Company explained requires a certain expertise and some time to complete. Therefore, the Company was justified in sending the Grievor for post-incident testing when it did, and her drug test results are admissible.

Are Dr. Snider-Adler's reports admissible as expert evidence?

12. To demonstrate that the Grievor was impaired while on duty, the Company filed two reports by Dr. Snider-Adler, which it seeks to introduce as expert evidence. The Union objects to this qualification and to the admissibility of these reports. It considers that Dr. Snider-Adler is not independent, notably as she was the DriverCheck Medical Review Officer ("MRO") involved in reviewing the Grievor's drug test results and is an advocate for the Company. It also raises the late timing of the second report.

13. The first report is dated September 9, 2019. It is titled *Expert Opinion Paper Regarding Substance Use in the Workplace* (the "2019 Report"). This report is general in nature and provides an analysis of the effects of alcohol and drug use on individuals and the impact on safety-sensitive and safety-critical work. It addresses various drugs, including cocaine. A copy of this report was provided to the Grievor and the Union at the beginning of the Grievor's investigation statement, along with her drug test results.

14. The second report is dated November 29, 2021 (the "2021 Report"). It addresses questions posed by the Company relating to the Grievor's drug test results, specifically to establish whether she was impaired while on duty.

15. The Supreme Court of Canada set out the following criteria for the admissibility of expert opinion evidence in *R. c. Mohan*, 1994 CanLII 80 (CSC), [1994] 2 RCS 9, at para. 17: relevance, necessity in assisting the trier of fact, the absence of any exclusionary rule and a properly qualified expert.

Relevance

16. The reports by Dr. Snider-Adler are clearly relevant, as they specifically address the core issues of this case, notably the general impacts of cocaine on individuals and the likelihood of impairment by the Grievor while on duty on the day of the incident, based on her drug test results.

Necessity in assisting the trier of fact

17. Considering the technical nature of the issue, i.e., whether the Grievor was impaired by the effects or after-effects of cocaine while on duty, expert evidence is necessary.

18. While the Company has established cut-off levels for cocaine use in its *D&A Procedure*, those are the subject of a separate grievance. Therefore, the Grievor's test results must be examined in their own context to determine whether, on the day of the incident, she was impaired by her cocaine intake. Scientific information which is outside the experience and knowledge of this Office is required to assist in making this determination.

Absence of any exclusionary rule

19. The Union has not raised the application of an exclusionary rule.

Properly qualified expert

20. The Union argues that Dr. Snider-Adler is not independent. Specifically, it states that she has had a business relationship with the Company through her role as MRO with DriverCheck for approximately fifteen years and has been involved in hundreds of MRO reviews. It also raises that she is an advocate for the Company, as she has written many reports for the Company and testified on its behalf in grievance arbitration.

21. As stated at the outset of her 2019 Report, Dr. Snider-Adler has been practising in the field of addiction medicine since 2000. She has been working as an MRO for DriverCheck since 2007 and is currently its Chief MRO. DriverCheck provides drug and alcohol testing programs to thousands of companies in Canada. Dr. Snider-Adler also works in two clinics, offering care to more than 200 patients with substance abuse disorders. She is often asked to provide expert opinions about drug testing in the workplace. She is an Assistant Professor at Queen's University Medical School Family Practice Residency Program and as such is involved in Resident education and training in the field of Addiction Medicine. She is also qualified as an Expert Witness for Addiction and as an Expert Witness for Drug Testing Interpretation in the Ontario Court of Justice. Her credentials and experience are not at issue.

22. The fact that DriverCheck is retained by companies to provide drug and alcohol testing programs and that its MROs may be called to testify as expert witnesses in no way suggests that their work is not independent. On the contrary, testing is an objective process. The fact that Dr. Snider-Adler has performed hundreds of MRO reviews contributes to her expertise.

23. Also, the fact that the Company has called upon Dr. Snider-Adler as a consultant to obtain expert reports on the issue of alcohol and drug in the workplace cannot, in and of itself, lead to the conclusion that her analysis and recommendations always support the Company's views, that she is an advocate for the Company or that her independence is compromised.

24. While this is not determinative, Dr. Snider-Adler makes the following comments in the introduction of her 2021 Report, confirming her commitment to her independence: "... I acknowledge my duty is to assist the Arbitrator impartially on matters relevant to my area of expertise and not to be an advocate for any party. I further acknowledge that my duty as an expert to provide evidence pursuant to the above principles prevails over any obligation which I may owe to any party by whom or on whose behalf I am engaged."

25. It is significant that Dr. Snider-Adler treats hundreds of patients with substance abuse disorders and teaches addiction medicine.

26. Dr. Snider-Adler's active practice with both employers and individuals, as well as in the field of academics, supports her status as an independent expert, as does her recognition as an expert by the court.

27. As mentioned by the Union in its written submissions, Dr. Snider-Adler has testified as an expert witness on several occasions before this Office. Arbitrator Clarke commented as follows on her standing as an independent expert witness in *Ad Hoc* **663**, issued in September 2019:

Doctor Snider-Adler clearly had the relevant expertise. The arbitrator did exclude her from the hearing given her hybrid role. When she testified, her demeanor showed that she gave evidence favorable to both sides, including during cross-examination when she commented on how to accommodate an employee suffering from an addiction. During her testimony, Dr. Snider-Adler did not advocate for CP but instead provided the arbitrator with helpful expertise regarding the meaning of the drug test results at the heart of this case.

28. The Union provided no evidence which would lead me to take a different view on Dr. Snider-Adler's standing as an independent expert witness.

Issues relating specifically to the 2021 Report

29. The Union states that the 2021 Report was created long after it filed its grievance and set a hearing date. The Union does not allege any collective agreement violation specific to the timing of the report or its communication. Similarly, it does not refer to any prejudice resulting from said timing. The Union did not seek an adjournment to submit the 2021 Report to its own expert for review. In the circumstances, I reject the Union's objection to admissibility as it relates to the timing of the report and its communication.

30. The Union further contends that Dr. Snider-Adler cannot properly act as an expert witness in this case as she was involved with the discharge from the outset, through her role as the DriverCheck MRO in reviewing the Grievor's drug test results. The Union argues that she would be giving expert evidence about her own work (her MRO notes), which she would presumably have an interest in defending. I disagree.

31. There is no evidence that Dr. Snider-Adler was involved in the Grievor's discharge in any way, or that she performed the drug test. The MRO's role is described in Appendix 2 of the *D&A Procedure* which sets out the drug testing process. Under this process, urine and oral fluid specimens for drug testing are analyzed by a fully qualified and accredited laboratory. Drug test results which are confirmed as positive by the laboratory are reviewed by an MRO, who is described as an independent physician who will discuss the results with the individual to determine whether the positive laboratory test could have a legitimate medical explanation. After the discussion with the individual, the MRO will determine whether the result to be reported to the Company will be negative, negative with safety advisory, a verified positive, or a tampered or substituted specimen result. It is important to note that the laboratory's determination of a positive result when conducting a drug test for the Company is based on the cut-off levels established by the Company in its *D&A Procedure*.

32. In this case, Dr. Snider-Adler, acting as the DriverCheck MRO, reviewed the Grievor's positive laboratory test results and contacted her to discuss them. She then

confirmed the laboratory positive results, meaning that the Grievor did not offer a legitimate medical explanation for her positive results.

33. The 2021 Report was prepared in response to questions raised by the Company further to the Grievor's investigation statement. Specifically, the Company asked for Dr. Snider-Adler's expert opinion on the following issues: the Grievor's last cocaine consumption, the type and likelihood of impairment at the time of the drug collection and at the start of the workday, and the possibility that she last used cocaine at 0300 hours on May 19, 2020 (some 36 hours prior to testing), as she claims.

34. The Union did not set out how Dr. Snider-Adler's 2021 Report could come in contravention with her MRO notes (which the Union qualifies as a report), or how she could otherwise feel compelled to defend her MRO notes in her 2021 Report in a way that would jeopardize her independence.

35. The MRO review performed by Dr. Snider-Adler on behalf of DriverCheck in May 2020 is different from the analysis she provided as a consultant in her 2021 Report. The MRO review pertains strictly to the Grievor's results based on the cut-off levels established by the Company, whereas the 2021 Report pertains mainly to the likelihood of impairment, including the time of consumption.

36. Dr. Snider-Adler's 2021 Report provides a thorough scientific analysis, supported by several scientific studies on the effects of cocaine on individuals. There is no evidence to suggest that she was anything but objective and unbiased in her analysis.

37. For all these reasons, I reject the Union's objection regarding Dr. Snider-Adler's qualification as an independent expert witness. The 2019 and 2021 Reports are admissible as expert evidence.

Was the Grievor impaired while on duty?

38. A determination must be made whether the Grievor was impaired when reporting for duty on May 20, 2020, not at the time of testing as suggested by the Union.

39. In this case, there is no evidence that the Grievor displayed physical signs of impairment on the day of the incident. Therefore, the analysis to be undertaken relies exclusively on her drug test results.

40. As mentioned above, the Grievor was tested on May 20, 2020, at approximately 1525 and 1550 hours. Her drug test returned positive for cocaine, with the urinalysis showing a quantitative level of 658 ng/mL for cocaine metabolite and the oral fluids showing 89 ng/mL for cocaine metabolite and 35 ng/mL for cocaine. The *D&A Procedure* (which is subject to a separate grievance) establishes cut-off levels at 100 ng/mL, 8 ng/mL and 8 ng/mL respectively. The following charts provide a visual

summary of the data under review in this case. The “length of time detected in sample” is based on Dr. Snider-Adler’s 2019 Report.

Substance	Test	Grievor’s quantitative levels	Cut-off under D&A Procedure	Length of time detected in sample (non-chronic users)
Cocaine metabolite	Urine	658 ng/mL	100 ng/mL	2 to 5 days Using 100 ng/mL test result
Cocaine metabolite	Oral fluid	89 ng/mL	8 ng/mL	36 – 48 hours Using 8 ng/mL test result
Cocaine	Oral fluid	35 ng/mL	8 ng/mL	Up to 8 hours Using 8 ng/mL test result

Note: Cocaine is not tested in urine

41. On May 26, 2020, Dr. Snider-Adler, acting as MRO for DriverCheck, contacted the Grievor to inform her of her positive drug test results and to discuss them. Dr. Snider-Adler’s notes show that the Grievor admitted to illicit drug use and repeatedly stated she had last used cocaine thirty-six hours before the test, which translates to approximately 0325 hours on May 19, 2020.

42. During the investigation statement held by the Company on June 12, 2020, the Grievor indicated that she had last used cocaine on May 19, 2020, at around 3:00 a.m. She stated she did not remember the quantity of cocaine used. She confirmed the accuracy of the answers she had provided to the MRO. She stated that she was aware of the D&A Procedure. She indicated that she was not a regular or chronic user but mentioned that she had experimented with cocaine prior to May 19, 2020.

43. Dr. Snider-Adler's expert reports are of assistance in determining whether the Grievor was impaired while on duty. Considering the technical nature of the evidence, it is useful to reproduce extensive portions of the reports.

44. Based on the Grievor's statements to the MRO and during the investigation, I accept that she was not a frequent user. This finding is consistent with the Grievor's psychiatrist report prepared further to an assessment conducted on June 3, 2020 (the "Psychiatrist Report"): the Grievor reports having "used cocaine sporadically and approximately 5 times in the past 2 years." Therefore, my analysis focuses on the excerpts of Dr. Snider-Adler's expert reports relating to occasional use.

45. In her 2019 Report, Dr. Snider-Adler explains the difference between acute intoxication and residual impairment, and how these affect safety-critical work:

Cocaine/Benzoyllecgonine

...

Acute Intoxication – Cocaine

Initial use of cocaine will result in a "high" as well as an increased level of energy, alertness, and sociability with a decreased need for sleep, and appetite. Depending on the route of administration, it is not uncommon to see anxiety, panic attacks, paranoia, irritability, impaired judgment, delusions and hallucinations. These acute intoxication effects can last for hours depending on the route of administration, the dose and quantity of cocaine used.

...

Residual Impairment – Cocaine

As the level of cocaine in the blood dissipates, the user experiences agitation and depression and then enters a "crash" phase. This crash is due to the depletion of neurochemicals during use, as well as sleep deprivation (due to the acute use of cocaine). This includes significant

and prolonged lethargy, somnolence, cognitive impairment and depression. The crash can last for one to five days or longer in those with more pronounced and prolonged cocaine use.

...

With respect to safety-critical and safety-sensitive work, both the “high” and the “crash” will result in impairment that can negatively impact an employee's ability to carry out their safety-critical and safety-sensitive duties in a safe manner. In fact, the impairment that occurs with the “crash” can be more dangerous in these environments than the acute effects of the high, especially under circumstances of low dose cocaine use.

(Emphasis added)

46. In her 2019 Report, Dr. Snider-Adler also explains what the testing process can demonstrate regarding timing of use and impairment:

Cocaine and Oral Fluid

With respect to cocaine, we have the ability to test for both cocaine, as well as the metabolite benzoylecgonine (BZE). This allows for better interpretation of information regarding timing of use and therefore impairment.

...

When there is cocaine and benzoylecgonine both present, it is important to look at the quantitative level as well as the ratio of benzoylecgonine to cocaine.

...

When the benzoylecgonine quantitative level is higher than the quantitative level of cocaine, the timeframe for use is 2 to 12 hours.

...

...

A positive oral fluid test of cocaine and/or BZE indicates use of cocaine in a timeframe prior to the test that correlates with an individual being unfit for safety-critical and safety-sensitive duties.

(Emphasis added)

47. In her 2021 Report, Dr. Snider-Adler specifically analyzes the Grievor's test results and statements, in response to questions raised by the Company:

Summary of Information in this Report

For ease of reading, I have summarized the answers to the questions posed. The details and information pertaining to my opinion and answers are provided in the body of the report below.

1. In the attached statement, Ms. [S.D.] at Q34 indicates: "Yes I have experimented in the past". There is no indication on file that she is a chronic user of cocaine. Ms. [S.D.] started work at 0820 and was post incident tested at 1525 and 1550 respectively. Based on the attached test results and the science, can you advise when she mostly likely last consumed cocaine?

For occasional users of cocaine, the presence of cocaine in the oral fluid would indicate use of cocaine within approximately 12 hours prior to the collection. This would mean that there was use in the early hours that same day (May 20, 2020).

...

2. Based on her test results, can you confirm the type (acute, residual, etc.) and likelihood of impairment at the following times:

a. At the time of the drug testing collection

If Ms. [S.D.] was not a regular user of cocaine, the use would have occurred in the early morning hours of May 20, 2020, within approximately 12 hours of the collection. Cocaine acute intoxication usually lasts only a few hours, however the effects can continue due to the presence of cocaine in the blood (there is a correlation between the presence of cocaine in the oral fluid and cocaine in the plasma with plasma levels being present for longer), as well as the after-effects (the "crash") that can occur after the elimination of cocaine.

b. At the start of the work day 7 hours prior to the test?

Ms. [S.D.] reported for duty at 0820, which would be hours after the likely use of cocaine if Ms. [S.D.] was not a regular user of cocaine. The acute intoxication of cocaine would have been present at that time.

3. In the MRO notes and in her statement, Ms. [S.D.] indicates her last use was 0300 on May 19. Is this possible based on her alleged frequency of use, test results and the science?

As reviewed below, Ms. [S.D.] does not admit to using cocaine regularly (she advised that she had “experimented in the past”. Based on this, as well as the presence of cocaine itself in the oral fluid, the use likely occurred within 12 hours prior to the collection. If the use was a much larger dose, or repeated doses over that day or days prior, it is possible that the use did occur within 24 hours of the test.

...

Based on my comprehensive review, it is not likely, based on the results of this test, that Ms. [S.D.] used cocaine 36 hours prior to the test, even if she had a history of large dosing, repeated doses of cocaine or chronic, daily (or almost daily) use of cocaine.

(Emphasis added)

48. Dr. Snider-Adler also provides a comprehensive review of studies conducted on the effects of cocaine on individuals – references have been omitted here:

Drug Testing for Cocaine

Oral Fluid – Cocaine

...

As per Cone and Huestis (2007), in an occasional user of cocaine, one does not usually see the presence of cocaine in the oral cavity for longer than 12 hours when testing at 1 ng/mL or above. Using the Substance Abuse and Mental Health Services Administration confirmation cut-offs (SAMHSA) for oral fluid of 8 ng/mL, which is the same confirmation cut-off level used by Canadian Pacific Railway, both Scheidweiler et al. (2010) and Ellefson et al. (2016) found shorter detection times of cocaine in the oral fluid.

Ellefson et al. (2016) found that cocaine was detected in the oral fluid at a cut-off level of 8 ng/mL or above for up to 12.5 hours; however, most individuals had levels that fell below the 8 ng/mL much faster. This was not a study of those who use cocaine chronically (daily or in large binge amounts). Benzoyllecgonine was only found at or above this cut-off for up to 28 hours.

...

Cocaine can continue to be detected in very low quantitative levels for days following this. These very low levels are just above the level of detection, (0.5 ng/mL) and would not continue to show positive when using a cut-off level of 8 ng/mL such as is used with Canadian Pacific Railway testing. When using a cut-off of 8 ng/mL the expectation would be a negative test sometime during the period of 24 hours after

use in a chronic, heavy users of cocaine, but much faster in occasional users of cocaine.

In an individual who does not use cocaine regularly, it is possible for cocaine to be present for up to 12 hours, with benzoylecgonine levels increasing over time of use. This, however, is based upon studies looking at the limit of detection testing (or a cut-off of 0.5 to 1 ng/mL). Using Canadian Pacific Railway's confirmation cut-off levels of 8 ng/mL, studies often conclude that the timeframe for detection is shorter.

...

In this case, there was the presence of both cocaine and benzoylecgonine. This can represent the recent use of cocaine in an individual who does not use cocaine regularly. However, this may represent use of cocaine up to 24 hours prior in an individual using large doses of cocaine (binge use) with a history of more frequent use previous use of cocaine.

In this case the benzoylecgonine: cocaine ratio is greater than 1 (the metabolite concentration is higher than that of the cocaine) and is consistent with use of cocaine 12 hours up to 24 hours prior to the collection. The longer period of time would occur if there was a large intake of cocaine (binge use), with the timeframe closer to 12 hours based on a smaller intake of cocaine.

Ms. [S.D.] does not admit to regular use of cocaine. If this was inaccurate and Ms. [S.D.] used cocaine regularly (larger doses daily or almost daily) it is possible that cocaine may remain positive for up to 24 hours. There are no studies that I could find, even when assessing daily, chronic, heavy users of cocaine, or with repeated use of cocaine, where cocaine continues to test positive at the quantitative levels seen in this case (35 ng/mL) 36 hours after use in the oral fluid.

(Emphasis added)

49. The Union presented no evidence to contradict or challenge the findings of the 2019 and 2021 Reports.

50. Based on the Grievor's quantitative levels and the science as explained by Dr. Snider-Adler in her 2019 and 2021 Reports, I conclude, on a balance of probabilities, that the Grievor used cocaine within twelve hours of testing and therefore within five

hours of reporting for duty on May 20, 2020. This means the Grievor was impaired from the effects or after-effects of cocaine while on duty. She was in the acute intoxication phase when reporting for duty, and therefore subject to possible anxiety, panic attacks, impaired judgment, delusions and hallucinations. As the acute intoxication phase referred to as the “high” dissipated, she entered the “crash” phase while on duty and was then, more likely than not, affected by the effects of residual impairment, such as lethargy and cognitive impairment at the time of the incident and testing.

Did the Grievor suffer from a drug addiction, triggering the duty to accommodate?

51. On June 1, 2020, the Grievor was assessed by a psychologist, on her own initiative. The psychologist issued a report stating that she did not suffer from substance abuse disorder and that, from a psychological perspective, the Grievor was a healthy normally functioning adult.

52. The Psychiatrist Report prepared further to the June 3, 2020 assessment also concluded that the Grievor did not meet the criteria for substance use disorder.

53. On January 23, 2021, a psychotherapist who the Grievor had been working with since December 2019 (for reasons unrelated to substance abuse) also issued a report stating that the Grievor did not meet the criteria for any addiction diagnosis.

54. Therefore, based on the Grievor's own medical evidence, she did not suffer from a substance use disorder. In the absence of such a disability, the Company had no duty to accommodate the Grievor.

55. The Union emphasizes what it refers to as the "rehabilitation" efforts undertaken by the Grievor further to her discharge, notably through counselling. It is certainly commendable that the Grievor took measures to educate herself on the effects of drug use and to assist her in addressing her drug use. However, in the absence of a disability, the Grievor's post-discharge efforts are not a determining factor in this case.

Was discharge an excessive penalty?

56. Before addressing the level of discipline, it is useful to review the applicable framework.

57. Rule G of the CROR, which is incorporated in the *D&A Procedure* (section 3.1.5), sets out the standards relating to intoxicants, narcotics, drugs, medication or mood-altering agents. It states:

(i) The use of intoxicants or narcotics by employees subject to duty, or their possession or use while on duty, is prohibited.

(ii) The use of mood altering agents by employees subject to duty, or their possession or use while on duty, is prohibited except as prescribed by a doctor.

(iii) The use of drugs, medication or mood altering agents, including those prescribed by a doctor, which, in any way, will adversely affect their ability to work safely, by employees subject to duty, or on duty, is prohibited.

(iv) Employees must know and understand the possible effects of drugs, medication or mood altering agents, including those prescribed

by a doctor, which, in any way, will adversely affect their ability to work safely.

(Emphasis added)

58. The *T&E Rule Book* provision referred to in the discharge letter (section 2.2, item (d)) is similar in content to Rule G cited above.

59. In this case, the Grievor held a position of Locomotive Engineer, a safety-critical position. She was entrusted with the safe operation of trains. The Grievor was aware of the Company's position and expectations regarding drug use, including the relevant provisions of Rule G, the *D&A Procedure* and the *T&E Rule Book*. There is no ambiguity as to the prohibition regarding impairment for employees in safety-critical positions.

60. I have considered the mitigating factors of this case, as raised by the Union. The Grievor had thirty-one years of service and was approximately two years away from being eligible for an unreduced pension. She had only 10 demerit points on her discipline record (related to the incident which led to the drug test discussed in this case), which are the subject of a separate grievance. During the investigation, she expressed remorse for her drug use, which she indicated was the result of bad judgment.

61. A significant aggravating factor also applies here. While the Union insists that the Grievor was truthful throughout the process, the evidence is to the contrary. The

Psychiatrist Report shows that the Grievor indicated on June 3, 2020 that she had used “4-5 lines of cocaine” prior to the incident. Meanwhile, during her investigation statement held only nine days later, on June 12, 2020, when asked by the Company about the amount of cocaine she had consumed, the Grievor indicated that she did not remember the quantity. This contradiction leads to the conclusion that she was not truthful in responding to the Company’s questions during the investigation. Based on the expert evidence, she was also untruthful about when she used cocaine. She was apparently more motivated to minimize the consequences of her actions than allowing the Company to have a clear view of the situation before taking remedial action. Honesty is a foundation of the employment relationship and is particularly important in matters relating to safety-critical duties. The Grievor’s lack of honesty in regard to the timing and quantity of her cocaine consumption, which could possibly have assisted the Company in determining her level of impairment, is a significant aggravating factor.

62. It is well established that the operation of trains is a safety-critical activity which is incompatible with impairment while on duty, due to the potential catastrophic consequences that accidents can have, notably for employees and for the public. Impairment from the use of illicit drugs such as cocaine is a serious offence that cannot be tolerated.

63. In this case, the Grievor chose to report to work while impaired from the use of an illicit drug, rather than booking unfit. She performed her safety-critical duties while impaired, moving from the acute intoxication phase (the “high”) when she reported for

duty to the early residual impairment phase (the “crash”) at the time of post-incident testing, approximately seven hours later.

64. Considering the severity of the Grievor’s actions and the significant aggravating factor (lack of honesty), notwithstanding her very long service and good disciplinary record, the decision to terminate the Grievor was reasonable. It would not be appropriate to substitute a lesser penalty in the circumstances.

65. The grievance is dismissed.

April 21, 2022



**JOHANNE CAVÉ
ARBITRATOR**