

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

CASE NO. 4805

Heard via Video Conference and in Ottawa, Ontario, January 12, 2022

Concerning

CANADIAN PACIFIC RAILWAY

And

UNITED STEELWORKERS – TC LOCAL 1976

DISPUTE:

The dismissal of Groundperson L. Colarusso of Vaughan, Ontario, for her failure to comply with the Company's Alcohol and Drug Policies and Procedures.

JOINT STATEMENT OF ISSUE:

On November 17, 2020, Ms. Colarusso was involved in a Blue-Flag safety incident. Following the incident, Ms. Colarusso was post-incident substance tested.

On November 17, 2020, Ms. Colarusso was Held Out of Service pending the outcome of a formal investigation.

Ms. Colarusso's initial Post-Incident Testing was negative for breath, non-negative for urine and positive for oral. After further analysis, the testing results came back as follows:

Breath Alcohol Test	Negative
Oral Fluid Drug Test	Positive for Marijuana
Urine Drug Test	Positive for Marijuana

On December 1, 2020, Ms. Colarusso attended a formal investigation in connection with, "*Your results from Post-Incident Drug and Alcohol Testing conducted on November 17, 2020.*"

On December 16, 2020, the Company dismissed Ms. Colarusso from Company Service via Form 104.

The Union filed a grievance on January 22, 2021. The Company declined the Union's grievance on March 8, 2021.

The Union's Position:

The discipline issued is excessive and unwarranted.

The Company failed to demonstrate impairment at the time of the incident and therefore did not meet the burden of proof to dismiss the employee.

A grievance has been filed against the Company's Alcohol and Drug Policy and Procedures. Said grievance has not yet been heard.

Ms. Colarusso is a long service employee.

Ms. Colarusso has taken an active role in seeking assistance and will continue to do so.

As a full final resolve, the Union requests the dismissal be removed and that Ms. Colarusso be reinstated and compensated for all lost wages and benefits.

The Company's Position:

The Company cannot agree with the Union's contentions.

It is the position of the Company that the discipline assessed was appropriate, warranted and just in all the circumstances. Culpability was established through a fair and impartial investigation. It was determined that the Grievor was in violation of CP's Alcohol and Drug Policy (HR 203) and Procedures (HR 203.1) Canada, revised September 1, 2019, while on duty, in a safety sensitive position, following a major Blue-Flag incident for which she was found culpable during her tour of duty on November 17, 2020.

The Union's notion that the Company's Alcohol and Drug Policy is under grievance is irrelevant as the Company considers the policy to be in effect and therefore discipline assessed is valid.

Accordingly, the Company respectfully requests the Arbitrator dismiss the Union's grievance in its entirety.

FOR THE UNION:

FOR THE COMPANY:

(SGD.) N. Lapointe

(SGD.) D. Pezzaniti

Staff Representative

Director, Labour Relations

There appeared on behalf of the Company:

- S. Oliver – Manager, Labour Relations, Calgary
- E. Carriere – Manager, Labour Relations, Calgary

And on behalf of the Union:

- N. Lapointe – Staff Representative, Montreal
- N. Lapointe – Vice President-FST, Montreal
- L. Colarusso – Grievor, Vaughan

AWARD OF THE ARBITRATOR

1. This case concerns the dismissal of the Grievor for the alleged failure to comply with the Employers Alcohol and Drug Policies and Procedures.

2. The Grievor is 63 years old and, at the time of discharge, she had approximately twenty years of service. Her active discipline record included 10 demerit points and a formal reprimand, both of which were related to safety issues while operating equipment.

3. On November 17, 2020, the Grievor voluntarily accepted an overtime shift beginning at approximately 9:00 a.m. During that shift, the Grievor was involved in a Blue-Flag safety incident and she received a 20-day suspension, which was not grieved.

4. The Grievor and the other employees involved in the Blue Flag safety incident underwent a post-incident substance test. The Grievor's results were as follows:

- Oral Fluid (Saliva) Test: 38 ng/ml
- Urine Test: 73 ng/ml

5. There is no dispute that these levels are in excess of standards of impairment, which are well-recognized in this Office's jurisprudence: see **CROA 4789**. For example, the accepted threshold for impairment based on the oral fluid test is 10 ng/ml. The Grievor's results were nearly four times that amount.

6. The medical evidence provided by the Union shows that the Grievor did not meet the criteria for a substance use disorder.

7. The Union submitted that the Grievor showed no signs of impairment on November 17th and none of the managers or supervisors who interacted with her on that date expressed any concerns.

8. The results of the oral fluid swab test have been accepted as a reliable indicator of impairment: see, for example, **CROA 4742**. The fact that the Grievor may not have displayed outward signs of impairment does not override or cast doubt on the post-incident test results. Moreover, there is no dispute that the Employer was entitled to require drug testing following the Blue Flag safety incident. In those circumstances, there is no requirement that the Employer also identify visual signs of impairment to require drug testing.

9. I find that the Grievor was impaired when she attended work on November 17, 2020, and that it was appropriate to impose discipline in the circumstances.

10. In assessing whether it was reasonable to discharge the Grievor, I have considered the mitigating factors that exist in this case. The Grievor explained that she was experiencing very trying personal circumstances at the time. She has since sought support and, according to her doctor, has made significant progress. At the investigation interview, the Grievor acknowledged that she consumed marijuana approximately eight hours before the beginning of her overtime shift. I have also considered the Grievor's age and her twenty years of service.

11. It is also important to consider the gravity of the offence. Attending work in a safety-sensitive position while impaired is a serious offence that attracts severe discipline: CROA

4653 and **4654**. Particularly in the safety-sensitive environment of the railway, impairment at work cannot be tolerated.

12. As noted, the Grievor voluntarily accepted an overtime shift beginning on the morning of November 17. She did so knowing that she had consumed cannabis approximately eight hours before the start of her shift. The Union submits that it can be difficult for an individual to assess whether they are impaired. In this case, however, the results of the oral swab test suggest a very significant level of impairment.

13. I note that this was not the Grievor's first experience with the Drug and Alcohol Policies and Procedures, albeit in different circumstances. In 2018, the Grievor was initially deemed unfit for a transfer to a safety-sensitive position, because of the results of a pre-placement substance test. The Employer permitted a second pre-placement medical test on certain conditions. The Grievor ultimately qualified for the transfer.

14. In all of these circumstances, given the safety-sensitive environment in which she worked and the gravity of her infraction, I cannot conclude that discharge was unreasonable. The Grievance is therefore denied.

15. In closing, I note that the Company sought to rely on its Hybrid Discipline and Accountability Guidelines as well as certain provisions of its Drug and Alcohol Policy, which lower the threshold for impairment and create a 28-day cannabis ban for employees in safety-sensitive positions. The Union objected to these policies. It submits

they were introduced unilaterally by the Employer and are the subject of outstanding Union grievances.

16. These issues are beyond the scope of my jurisdiction. In any event, assessing the discipline without regard for the policies in dispute and based solely on existing CROA jurisprudence and principles, I am satisfied that the discharge was appropriate in the circumstances.



January 24, 2022

MICHELLE FLAHERTY

ARBITRATOR