

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

**CASE NO. 4822**

Heard in Calgary, Alberta, May 16, 2023

Concerning  
**CANADIAN PACIFIC KANSAS CITY RAILWAY**  
And

**TEAMSTERS CANADA RAIL CONFERENCE  
MAINTENANCE OF WAY EMPLOYEES DIVISION**

**DISPUTE:**

Claim on behalf of Mr. K. Sproat.

**JOINT STATEMENT OF ISSUE:**

On October 19, 2020, Mr. K. Sproat, the grievor was dismissed from Company services for the following reasons:

*“For failing to adhere to CP Policy HR203 Alcohol and Drug Policy, CP Procedures HR203.1, and CROR Rule G as determined by your positive reasonable suspicion test results on August 25, 2020.*

*Summary of rules violated:*

<i>BOOK</i>	<i>SECTION</i>	<i>SUBSECTION</i>	<i>DESCRIPTION</i>
<i>HR 203 - Alcohol and Drug Policy</i>	<i>Section 2</i>	<i>2.1</i>	<i>All employees must report for work in a condition that enables them to safely and effectively perform their duties.</i>
<i>HR 203 - Alcohol and Drug Policy</i>	<i>Section 2</i>	<i>2.2</i>	<i>All employees must report fit to work and remain fit for work and be able to perform their duties free from adverse effects of alcohol and/or drugs. Adverse effects may include acute, chronic, hangover and other after-effects.</i>
<i>HR Policy and Procedure</i>	<i>Section 3</i>	<i>3.1 Standard</i>	<i>All employees must report for work in a condition that enables them to safely and effectively perform their duties. To minimize the risk of unsafe and/or</i>

203.1			<i>unsatisfactory performance due to the use or adverse effects of alcohol and/or drugs, employees are required to report fit for work and to remain fit for work. Adverse effects may include acute, chronic, hangover and after-effects.</i>
<i>HR Policy and Procedure 203.1</i>	<i>Section 3</i>	<i>3.1.3 Cannabis</i>	<p><i>For purposes of this Procedure, all references to cannabis includes cannabidiol (CBD).</i></p> <p><i>Recreational Cannabis</i></p> <p><i>The following are prohibited at all times while an employee is working, on duty, subject to duty, on Company premises and worksites, on Company business and when operating Company vehicles and moving equipment (whether on or off duty):</i></p> <ul style="list-style-type: none"> <li><i>- The use, possession, distribution, offering or sale of recreational cannabis;</i></li> <li><i>- Reporting for work or remaining at work under the effects of cannabis from any source, including acute, chronic, hangover or after-effects of such use;</i></li> <li><i>- Consumption or use of any product containing cannabis (including but not limited to smoking, vaporizing, ingestible oils, food products, tinctures, capsules, topicals etc.) including during meals and breaks.</i></li> </ul>
<i>HR Policy and Procedure 203.1</i>	<i>Section 3</i>	<i>3.1.3 Cannabis</i>	<p><i>28-Day Cannabis Ban</i></p> <p><i>Employees in or subject to a Safety Critical Position or Safety Sensitive Position are further prohibited from using or consuming cannabis from any source for a minimum 28 days before being on duty or subject to duty. This 28-Day Cannabis Ban is in addition to and does not in any way limit the prohibitions set out in the above or other employee obligations set out in the Policy or Procedure. For clarity, an employee is still required to report to work and remain at work free from the effects of cannabis regardless of the last date of use or consumption. For example, chronic use of cannabis may create adverse effects that impair an employee's fitness for work beyond the 28-day period.</i></p>
<i>HR Policy and Procedure 203.1</i>	<i>Section 3</i>	<i>3.1.4 CROR G</i>	<p><i>(i) The use of intoxicants or narcotics by employees subject to duty, or their possession or use while on duty, is prohibited.</i></p> <p><i>(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.</i></p>

			<p><i>(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.</i></p> <p><i>(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.</i></p>
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The Union objected to this assessment and filed a grievance on October 30, 2020; the Company responded on December 4, 2020.

The Union contends that:

1. The Company did not have reasonable grounds to test the grievor. The justification used by the Company, a brief redacted and anonymous email, does not and cannot satisfy, and indeed violates, the requirements for fairness and impartiality provided for in section 15.1 and 15.2 of the collective agreement. Given the circumstances, the Company's actions amounted to nothing more than the imposition of random testing. In addition, the Notice of Investigation served to the grievor was in violation of section 15.2 which, in turn, rendered the entire investigation in violation of sections 15.1 and 15.2;
2. The Company's actions violated section 4.2 of Policy HR 203.1 "Reasonable Suspicion (Signs and Symptoms) Testing";
3. The discipline assessed was unfair and unwarranted.

The Union Requests that the grievor's dismissal be declared void ab initio and that he be ordered reinstated into active service immediately without loss of seniority and with full compensation for all wages and benefits lost as a result of this matter.

The Company's Position:

1. The Company denies the Union's contentions and declines the Union's request.
2. The Company maintains the Grievor's culpability as outlined in his discipline letter was established following a fair and impartial investigation. In regards to the Unions allegations that the Notice of Investigation was in violation of Section 15, the Company maintains that there was an administrative error on the NOI and that the investigation was held in accordance with Section 15.1 and 15.2.
3. Specifically regarding the grounds to reasonable suspicion test the Grievor, the material supplied as evidence into the investigation established an anonymous report was made to CP's confidential "A-line" reporting system that the Grievor "smokes before work". Based on this information, the Company properly required a substance test from the Grievor and he was tested in accordance with Policy HR 203.1.

4. Furthermore, the Grievor's positive tests confirmed he was unfit for duty and subsequently in violation of the Company's Alcohol & Drug Policy and Procedures HR203 and CROR Rule G but further substantiates the requirement for reasonable suspicion testing.

5. The Company maintains that the Grievor was rightfully dismissed given the circumstances and that the discipline should not be disturbed.

**FOR THE UNION:**

**(SGD.) W. Phillips**

President

**FOR THE COMPANY:**

**(SGD.) F. Billings**

Assistant Director Labour Relations

There appeared on behalf of the Company:

F. Billings	– Assistant Director, Labour Relations, Calgary
L. McGinely	– Assistant Director, Labour Relations, Calgary

And on behalf of the Union:

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

**AWARD OF THE ARBITRATOR**

**BACKGROUND**

1. The Grievor entered Company service on November 7, 2011 as a Trainperson Trainee in the Train and Engine department and transferred to the Engineering Services department in October 2012. At the time of his dismissal, the Grievor was working as Machine Operator and had approximately 9 years of service. As a Machine Operator, his position is a Safety Sensitive Position.

2. On August 23, 2020 at 10:16 pm, Community Connect received an email with the subject line, "Drug use at work" which alleged that the Grievor smokes before work. Community Connect is a Company communication channel for the public to make general inquiries concerning real estate, crossings, rail safety, as well as a variety of other topics.

3. On August 24, 2020 at 9:25 am, Community Connect forwarded the email to Company Officer Cody Gagne, in the Employee Relations department. At 10:13 that morning, Mr. Gagne forwarded the e-mail on to Company Officer, Chad Deschamps who is a local Company Officer in the Engineering Services department where the Grievor worked and in a position to arrange for testing. The e-mail informed Mr. Deschamps that there had been a reasonable suspicion report and that DriverCheck, the third party drug and alcohol testing company, should be arranged to meet the Grievor when he reports for his next shift.

4. The Grievor underwent reasonable suspicion drug and alcohol testing between 7:16 am and 7:49 am when he reported. The results of the point of collection tests (POCT) were non-negative. The Grievor's saliva produced a result for marijuana metabolite in the amount of 24 ng/ml. No other substances were found during testing. The Grievor was held from service pending the results of laboratory confirmation testing and an investigation.

5. Following the investigation, the Company found the Grievor culpable for failing to adhere to CP Policy HR 203 Alcohol and Drug Policy, CP Procedures HR 203.1, and CROR Rule G. As a result, the Grievor was subsequently dismissed on October 19, 2020.

## **ANALYSIS AND DECISION**

6. The Company maintains that the Grievor was properly notified of the investigation and that he had ample time to review the evidence package. As such, he knew and understood the allegations against him and the content of the accuser's evidence. In this instance, the Company submits that the identity of his accusers and the origin of the accusations are one in the same. Similar to the accusations against him and the content of those accusations, the Grievor knew the origin of the accusations, Community Connect. In addition, the Grievor was afforded a Union Representative to assist him during his statement who of which made several objections on his behalf and was given the opportunity to provide rebuttal evidence in his own defense as well.

7. The Company maintains that Grievor was properly tested and that he received a fair and impartial investigation. As such, the only remaining issue is the discipline assessed.

8. Based on the totality of the evidence and the Grievor's own acknowledgment, the Company maintains that the Grievor was culpable for the violation of the aforementioned rules, that those violations warrant some form of discipline, and that the discipline assessed was reasonable in all the circumstances.

9. The Company maintains that the investigation that the Grievor consumed marijuana prior to duty causing him to be impaired while trying to execute his safety sensitive duties. During his statement, the Grievor confirmed he used an E-Pen with CBD and THC.

10. CP submits that he tested positive for marijuana in his urine and oral fluid samples. More specifically, his urine contained 7904 ng/ml of marijuana and his oral fluid (saliva) contained 24 ng/ml of marijuana – marijuana parent. All of these levels are significantly above the thresholds outlined in the Company's Alcohol and Drug Policy and Procedures, HR 203.1. The Company submits that, the Grievor's urine contained over five hundred (500) times the amount of marijuana than the drug concentration limit of 15 ng/ml and his oral fluid contained ten (10) times the amount of marijuana than the drug concentration limits of 2ng/ml. As a result, he was unfit for duty and subsequently in violation of the Company's Alcohol & Drug Policy and Procedure HR 203 and Rule G, all of which warrant discipline up to and including dismissal. The Union maintains the Grievor was not properly Tested. During the investigation, the Union made an objection concerning the manner in which the Grievor came to be tested. More specifically, the Union objected to the fact that the Grievor had been tested at all. No workplace incident had occurred to justify testing. Rather, the test was required as a result of an alleged complaint received by the Company on August 23, 2020.

11. The Company's submits that there are three main issues for adjudication:

- i. Whether the Company had grounds for a reasonable suspicion test of the Grievor.
- ii. Whether the Grievor received a fair and impartial investigation.
- iii. Whether the discipline assessed was just, appropriate and warranted.

12. The Union argues that the only evidence for the complaint (and its contents) that has ever been provided is an email dated August 23, 2020 that, in its entirety, states “The CP employee I speak of is Ken Sproat (who) works out of Revelstoke I know he smokes before work”. This email was passed on to Employee Relations on August 24, 2020 by CP Community Connect employee Christine Brown with a covering email that stated “this is the only information we have received”. The name of the person who sent the complaint was redacted. Despite the vagueness of the information received, and without taking any steps to investigate either its legitimacy or veracity, the Company simply demanded that the Grievor submit to testing.

13. The Union submits that the trigger event was an email by an unknown source sent to the Company on August 23 2020 at 22:16. The Company did not follow the prescribed guidelines in 4.2 Reasonable Suspicion testing where an employee must be observed on the day of the complaint by a Supervisor and the decision to do so would be documented as per the Policy (emphasis added). In regards to the Reasonable Suspicion Complaint the Union objects to the Company providing into evidence a redacted email which is a violation to Article 15.1 and 15.2. Furthermore, to the violation of entering redacted evidence into this investigation, the redacted evidence is an email, which states Mr. Sproat smokes before work. The Company has not entered any evidence referring to any drug use.

14. The Union objects to the email portion from Cody Gagne where he states:

.....based on the reasonable suspicion from the email below, please arrange to have driver check scheduled to meet Mr. Ken Sproat once he reports to work on his next shift...

15. The Union his action was is in violation of HR 203.14.2 - Reasonable Suspicion (Signs & Symptoms) Testing procedure in that he had no authority to issue that direction.

16. The Union also maintains that one of the fundamental and longstanding rules of fairness in this industry is that an employee has a right to know the identity of anyone making allegations against him/her. It relies on CROA 2573 in which the Arbitrator Picher held the following:

Article 8.4 of the collective agreement is critical to the procedural protections of employees in relation to investigations and discipline. It is an expression of the principle that the employee is entitled to know the identity of his or her accuser and the particulars of any written or verbal statement received by the Company, to the extent that such statements may be used in proceedings relating to the employee's discipline or dismissal.

17. I find CROA 2573 is not on point with these facts. This is not similar to a report of an employee tailgating while driving a Company vehicle. In such a case as Arbitrator Picher stated there is no protection or recourse for an Employee from adverse use of the information by the Company.

18. In this case the Company redacted the name of the person who made the allegation. The Company Policy protects the privacy of those involved providing:

3.2.9 Confidentiality

Confidentiality will be maintained to the greatest extent possible except where limited disclosure is necessary for related health and safety concerns, e.g. there is deemed to be a potential for risk to the employee, other employees, or to the Company, the public and/or the communities we operate in. That is, only the information strictly limited to the level of functionality (e.g. fitness for work and any restrictions and/or limitations that may apply) may be shared as required for purposes of determining fitness for work, appropriate work accommodation and/or return to work initiatives.

19. I find that the initial allegation does not determine if a Reasonable Suspicion Test is required of the accused employee. The provisions of Company Policy set in place specific provisions on how the need for a substance test is determined. In this regard the Policy provides:

#### 5.2.1 Reasonable Suspicion (Signs and Symptoms) Testing

If there are grounds to suspect that an employee is unfit to be at work, the employee will be escorted by a Supervisor to a safe and private place, interviewed, and given an opportunity to explain why they appear to be in a condition unfit for work. Unionized employees will be entitled to Union representation provided this does not cause undue delay.

Reasonable Suspicion alcohol and drug testing will be required if, as a result of this assessment, the supervisor has reasonable grounds to believe that the actions, appearance or conduct of an employee while on or subject to duty are indicative of possible use of alcohol and/or drugs. The decision to request that an employee participate in a Reasonable Suspicion test will be made by a Supervisor after consultation with another member or the management team (on site if possible) and agreement by an Experienced Company Operating Officer (ECOO) i.e. Senior Vice President (SVP), Assistant Vice President (AVP), General Manager (GM), Superintendent, Director or Chief Engineer.

The basis for this decision will be documented. The referral for a test will be based on specific, personal observations and indicators including but not limited to:

- observed use or evidence of use of a substance (e.g. smell/odour);
- erratic or atypical behaviour or changes in behaviour of the employee;
- changes in the physical appearance or speech patterns of the employee, for example dilated pupils or other physical signs of alcohol and/or drug use;
- an event or chain of events suggesting reckless, irrational, and/or dangerous behaviour;
- agitation, sleeping or drowsiness at the workplace, or evidence of impaired judgment or thought processes;
- any other observations that suggest the employee may be unfit to be working on Company premises due to the use of alcohol and/or drugs.

The responsible Supervisor will consult with an ECOO on any decision to remove an employee from service after the Reasonable Suspicion testing has been administered based on the signs.

20. In this case Community Connect forwarded the email to Company Officer Cody Gagne, on August 24, 2020 at 9:25 am in the Employee Relations department. At 10:13 that morning, Mr. Gagne forwarded the email on to Company Officer, Chad Deschamps who is a local Company Officer in the Engineering Services department where the Grievor worked and in a position to arrange for testing. Notwithstanding the clear provisions of the Policy his email informed Mr. Deschamps that there had been a reasonable suspicion report and that DriverCheck, the third party drug and alcohol testing company, should be arranged to meet the Grievor when he reports for his next shift.

21. As a result, the Grievor underwent reasonable suspicion drug and alcohol testing between upon reporting for his next shift. The results of the point of collection tests (POCT) were non-negative. As a result, the Grievor was held from service pending the results of laboratory confirmation testing and an investigation. On September 17, 2020, the Grievor was issued a Notice of Investigation for September 23, 2020 in connection with the substance test results supplied to the Company. On October 19, 2020, the Grievor was dismissed from Company services for the following reasons:

For failing to adhere to CP Policy HR203 Alcohol and Drug Policy, CP Procedures HR203.1, and CROR Rule G as determined by your positive reasonable suspicion test results on August 25, 2020.

22. The Company maintains that the Grievor was properly tested. In support of the dismissal the Company relies on SHP-726, CROA cases 4789, 4707, 4733 and 4742 which I find not on point with the facts of this Reasonable Suspicion case.

23. The Union relies on AH 807, a recent decision issued December 20, 2022. The Union claims it is most on point to these facts. In that matter arbitrator Clarke dealt with a situation of violation of the CP Alcohol and Drug Policy and Procedure (HR 203 and 203.1). CP had received an anonymous tip on its Alert Line2 (A-Line) about Mr. Calibaba's alleged marijuana consumption and an intent to clean his system in the event of a urine test. Based on this information, CP conducted drug and alcohol testing. In addressing the Company's reliance on an anonymous tip Arbitrator Clarke stated:

For the reasons which follow, the arbitrator orders CP to reinstate Mr. Calibaba with full compensation and seniority. CP failed to demonstrate how an anonymous tip from its A-Line provided it with reasonable grounds to test Mr. Calibaba for drugs and alcohol. The Record also did not disclose any steps CP took under its Drug and Alcohol Policy3 (Policy) to ensure it had reasonable grounds before proceeding with testing. Even if there had been grounds for testing, the results showed that Mr. Calibaba was not impaired when subject to duty.

24. In this case there is no evidence that the Grievor was properly interviewed by a Supervisor. Or that any documentation was made of symptoms, chain of events or other observations that



the Grievor was unfit. There is no evidence that an ECOO was consulted. Similarly there is no evidence that Employee Relations Officer Gagne had reasons, qualifications or authority to direct that DriverCheck, the third party drug and alcohol testing company, should be arranged to meet the Grievor when he reported for his next shift. Mr. Gagne did not have the reasonable and probable grounds required a Reasonable Suspicion Test demand because he knew, or ought to have known, the allegation could have been false.

25. I find there was no evidence that the Grievor was attempting to delay the process or to justify the denial of the right to the Supervisor Interview. It affords a reasonable and required step in the Policy. When the Company denies the accused his rights under the Policy, it cannot assert that the Policy is being properly applied, since the exercise amounts to a denial of an Employee right.

26. It should also be stated there is a Company interest in requiring the Supervisor interview. Clearly, the Supervisor interview serves to prevent valuable investigative time and resources from being diverted, wasted or misapplied. The Supervisor interview also protects innocent Employees from consequences that can flow from false accusations. The broad scope of the Supervisor interview provisions serves to protect the integrity and efficiency of an investigation and discipline which may follow. I find that in these facts and circumstances the Company did not have reason to test the Grievor. The Grievor's Union Representative objected to the test and the absence of the Supervisor's interview at the outset of the investigation.

27. However, during the investigation the Grievor acknowledged that following the death of his wife in 2017 he took time off for stress. Rather than using his Doctor's prescribed medicine, he began using marijuana in early 2020. Given the Grievor's own admissions I find he was reporting for work regularly in violation of the Policy beginning in 2020. Unlike AH 807 relied on by the Union, the Grievor's test results were positive for marijuana with 7904 ng/ml in his urine and 24 ng/ml in his oral fluid. The cut off levels in HR 203.1 are 15ng/ml in urine and 2ng/ml in oral fluid. He acknowledged regularly smoking marijuana 8-9 hours before coming to work. In this case with well over the threshold for impairment with 24n/ml of marijuana in his saliva.

28. The Policy, recognizes the requirement for the Supervisor interview. It also requires proper documentation procedures, training, discretion and judgment of personnel applying the Alcohol and Drug Policy Procedures. As I have previously noted, the Company recognized the overall process is an important element for ensuring the integrity of the test results. These are threshold requirements necessary in the establishment of the validity of the test results for discipline cases which may follow.

29. I recognize that the finding of an improper and unjustified substance test is a significant factor, particularly in the safety sensitive railway position of the Grievor. I also recognize that an improper test does not relieve an employee from the important and ongoing responsibility to be forthright and honest when agreeing to be questioned. After carefully reviewing the investigation, I find that the Grievor statements regarding his drug use concerning given his Safety Sensitive position of a Machine Operator. The Grievor acknowledged choosing to use marijuana instead of taking his Doctor's prescribed antidepressant medication. He acknowledged that he knew he was violating the Policy.

30. In this case the Company received the drug use allegation while the Grievor was on his days off. He and his Union were not notified of the allegation when it was received. Reasonable Suspicion test provisions under the Policy provided for employees to be entitled to Union representation provided this does not cause undue delay. No incident was involved and he has no record of any previous discipline. He is committed returning to work fit for duty.

31. After careful consideration of the facts and arguments placed before me, I have determined that there is not just cause for dismissal. I find that significant discipline is appropriate.

32. The Grievor is to be reinstated into Company service immediately without compensation or loss of seniority. The Grievor's pension entitlement will be protected by a minimal, but sufficient contribution agreed to by the parties. The Grievor will be subject to random substance testing for a period of two years from the date of his return to work.

33. I will retain jurisdiction in the event there are any difficulties in the interpretation, application or implementation of this award.



June 16, 2023

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**TOM HODGES**  
**ARBITRATOR**