

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

CASE NO. 4826

Heard in Calgary, Alberta, May 18, 2023

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the dismissal of Conductor K. Pathmanathan.

THE JOINT STATEMENT OF ISSUE:

Following an investigation, Mr. Pathmanathan was dismissed which was described as “For your non-negative test results of your for cause drug and alcohol test completed on January 31, 2021. A Violation of CROR General Rules, Section G, CP Rule Book for Train and Engine Employees, General Rules and Policy #HR203 – Alcohol and Drug Policy (Canada).”

The Union contends that the investigation was not conducted in a fair and impartial manner under the requirements of the Collective Agreement. The Union contends:

- The inclusion of Appendix B MRO Notes is a violation of the June 16, 2010 Agreement.
- Questions 33 to 45, 48, 53, 54, and 55 are all asked in violation of the June 16, 2010 Agreement.
- Union Objection entered at Question 25 – the incident leading to the substance testing did not meet the threshold to trigger a substance test. The test was conducted in violation of the June 16, 2010 Agreement and CP Rail’s Policy HR203.1.

For this reason, the Union contends that the discipline is null and void and ought to be removed in its entirety and Mr. Pathmanathan be made whole.

The Union contends the Company has failed to meet the burden of proof required to sustain formal discipline related to the allegations outlined within the discipline assessment.

The Union contends that the Company continues to ignore arbitral jurisprudence on this subject, and that Mr. Pathmanathan's dismissal is unjustified, unwarranted and excessive in all of the circumstances, including significant mitigating factors evident in this matter.

It is also the Union's contention that the penalty is contrary to the arbitral principles of progressive discipline.

The Union contends that the Company had no cause to conduct a post-incident substance test, violating the Alcohol and Drug Procedures Policy 203.1, Mr. Pathmanathan's *Canadian Human Rights* and the June 16, 2010 Substance Test Agreement.

The Union requests that Mr. Pathmanathan be reinstated without loss of seniority and benefits, and that he be made whole for all lost earnings with interest. The Union further requests damages as a result of the above-noted violations and Company actions. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

Company Position:

Along with the points outlined in grievance replies, the Company maintains that the 2010 Agreement referenced by the Union was no longer in effect, the Union failed to provide a rationale for the allegation that the Formal Investigation was not fair and impartial, failed to provide a rationale as to how the *Canadian Human Rights Act* was violated.

The Company maintains that its decision was appropriate in all of the circumstances.

FOR THE UNION:

(SGD.) D. Fulton

General Chairperson

FOR THE COMPANY:

(SGD.) J. Bairaktaris

Director Labour Relations

There appeared on behalf of the Company:

L. McGinely	– Assistant Director, Labour Relations, Calgary
F. Billings	– Assistant Director, Labour Relations, Calgary
A. Cake	– Manager, Labour Relations (Observer), Calgary
R. Araya	– Manager, Labour Relations (Observer), Calgary

And on behalf of the Union:

M. Church	– Counsel, Caley Wray, Toronto
D. Fulton	– General Chairperson, Calgary
J. Hnatiuk	– Vice General Chairperson, Calgary
P. Boucher	– President TCRC, Ottawa
R. Finnson	– Vice President TCRC, Ottawa
J. Bishop	– Senior Vice General Chairperson LE - East
D. J. Edward	– Senior Vice General Chairperson, Calgary (virtually)
K. Pathmanathan	– Grievor, Vancouver (virtually)

AWARD OF THE ARBITRATOR

1. This Grievance concerns the dismissal of the Grievor on February 24, 2021 due to the results of a urine test which detected the presence of cocaine metabolites. At the time of his dismissal, the Grievor had twelve months of active service.

The Facts

2. The facts are straightforward and not in dispute.
3. On February 4, 2021 at 22:00, the Grievor was called to work as Conductor. He was part of a crew along with a Brakeman and a Locomotive Engineer. At approximately 00:30 on February 5, 2021, the train ran through the C2/C3 switch at the west end of the Port Coquitlam Yard. At the time of the run through, the Brakeman was appropriately riding on the footboard of the locomotive while the Grievor – who was also required to ride the footboard - was in the locomotive cab, with the Locomotive Engineer.
4. The Brakeman had stated “Ok ahead to the switch”, however the Engineer did not hear this transmission and “just went ahead”, resulting in the run through (the “Incident”).
5. An Investigation took place on February 15, 2021. The Grievor was interviewed for both his positive drug result and the incident that triggered the test. The Grievor was represented at both interviews by the Union.
6. Regarding the Investigation of the Incident itself, the Grievor indicated:

...We saw a red board at MacAuley and we came to a stop. I went into the cab to talk to the tower on the locomotive radio and asked the tower for a light at MacAuley and then discussed our move in the a-yard. I was looking at our switch list for the a-yard and getting all the paperwork in order and next thing I know is the engineer was pulling ahead. I did not see the light. As we were pulling ahead I heard on the radio, “switch ahead” and then I heard “Stop-stop-stop”. Once I heard the stop broadcast, I stood up and told the engineer to stop-stop. The engineer was still hesitant and by the time he realized and put the train into emergency we went through the switch by a half a car. (A20)
7. When asked why he was not positioned outside of the cab while approaching the switch – as required by Operating Bulletin Number BCO-009/17 – his answer was:

I did not instruct the engineer to go ahead. We were stopped at a red light so I was inside doing paperwork. When he pulled ahead, it happened so quickly, I did not have time. (A29).
8. The Grievor indicated in the next Question and Answer that the Brakeman was on the point “before we even pulled for the light”. The Grievor stated the movement stopped about half a car through the switch (A32).
9. As the Company did not consider it was clear the actions of the Grievor could not have been a contributing factor to the run through, the Grievor was subject to post-incident substance testing shortly after the incident occurred. The Grievor’s urine was collected at 01:55 on February 5, 2021.

10. The results of the Grievor's post-incident testing was:
 - a. Breathalyzer Test: negative
 - b. Oral Swab test: negative
 - c. Urinalysis: non-negative on screening; confirmed as positive for cocaine metabolites at 141 ng/ml.
11. The Urinalysis result will be referred to as the "Positive Test".
12. During the Interview regarding the Positive Test, there were multiple questions regarding the Grievor's use of cocaine that were objected to by the Union.
13. The Grievor agreed he had worked Sunday January 31, 2021 from 15:30 to early in the morning on February 1, 2021, and that he last used cocaine after that shift (which he described as "Sunday evening", but which would have been early Monday morning, February 1, 2021). The Grievor declined to answer how he took the cocaine. He indicated he had not used Cocaine since February 1, 2021. The Grievor stated he did not know the amount of cocaine taken on February 1, 2021: "I don't know the exact amount, I just used it". When asked how often he took Cocaine, the Grievor answered "I barely use it". When asked the reason for the use of Cocaine, the Grievor stated "I used it cause I was out with friends".
14. The Grievor also stated he had never reported for duty under the influence of a prohibited substance or consumed a prohibited substance while on duty, subject to duty or while on rest at an away from home terminal. He stated he was not impaired during his shift, and that he did not use cocaine during his shift. The Grievor agreed he understood that when he showed up to work "with substances which caused a positive drug test in your system that you may be putting the safety of yourself, your fellow co-workers, the company's assets, and the environment at risk", although this was another question objected to by the Union.
15. There was no evidence of any other signs of impairment or concerns with the possibility of impairment of the Grievor raised by the Company, beyond the trace cocaine metabolites in the Grievor's urine and the fact the incident occurred.

The Policy and CROR Rule G

16. Policy Number HR203 is the Company's Drug and Alcohol Policy, effective January 1, 2012; last revised in September of 2019. This policy and related procedure will be referred to as "the Policy". Like other policies of its kind, the Policy provides for testing on "reasonable suspicion" and post-incident, as well as under reinstatement agreements, or when related to a medical condition. A Policy Grievance has been filed

by the Union regarding the reasonableness of the Policy. This Grievance is scheduled to be heard in October of 2023.

17. Under Section 3 of the Policy, all employees must “report fit for work and remain fit for work and in a condition that enables them to safely and effectively perform their duties”. Procedure HR203.1 is stated to set out the “standards and expectations” related to the “use or adverse effects of alcohol, medications, cannabis/marijuana (whether for medical or recreational use), legal, illegal or illicit drugs or any mood-altering substance...”. Appendix 2 sets out the testing procedure and the “Drug Concentration Limits” by class of drugs and the mode of testing. The screening concentration of cocaine metabolite is set as “equal to or in excess of” 150 ng/ml. The “confirmation concentration” is set at “equal to or in excess of” 100 ng/ml.

18. CROR General Rules Section G has several bullet points outlining certain actions. The Company focused on two bullet points:

- The use of drugs, mood altering agents or medications, 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.
- 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.

Summary of the Arguments

19. The Union has argued that the overwhelming weight of jurisprudence supports the view that dismissal cannot be upheld based on a positive urinalysis result for drugs. It urged the mere presence of such metabolites do not establish just cause for discipline, and there is no other evidence on which the Company relied that could support that response. The Company argued the concerns which arise from the use of cocaine in this safety sensitive industry – and in the Grievor’s safety critical role - should be a paramount consideration. It urged that cocaine – as an illicit drug – should be subject to stricter considerations than marijuana, which is not. It also argued the Grievor’s failure to understand the impacts of ingestion of cocaine supported its discipline decision, as he was in violation of CROR Rule G in not understanding this impact.

20. While there were other arguments raised by the Union and noted in the JSI – including whether the Company had cause to test the Grievor, whether the Investigation was fair and impartial, and whether a letter agreement dated June 16, 2010 applied to this situation - in view of my finding in this case, it is not necessary to address those arguments.

Analysis and Decision

21. It is not disputed that the railway is a highly safety-sensitive industry. The Company, the Union and the employees who work in this industry share in the responsibility to ensure safe practices are observed.

22. It is also acknowledged the Company has a legitimate and pressing responsibility – and a legal obligation – to ensure that its business in run as safely as possible. That responsibility includes ensuring that its employees are not impaired on the job by any type of drugs or alcohol. Drug and alcohol testing after incidents occur is one way this is accomplished.

23. I wish to emphasize that I am confident all employers and unions – and arbitrators - agree that trains should not be crewed by individuals whose judgment is impaired by the use of drugs or alcohol. The stakes are high and the consequences potentially catastrophic. Those consequences could be felt not just by the Company, the Union and the employees involved, but by the communities through which the railway travels.

24. The issue which the jurisprudence has grappled with is the balance to be struck in this country between what an individual chooses to do in their own private life and the legitimate safety interests of the employer in their performance while at work¹.

25. As noted by Arbitrator Clarke in **AH663**:

This Office has treated impairment as being among the most serious offences an employee can commit (at p. 28).

26. While the safety critical nature of the Grievor's role is recognized and acknowledged, it must also be recognized and acknowledged that there is a significant body of jurisprudence – including from this Office – regarding how drug and alcohol testing results can be used in determining when an individual has reached the point of impairment. Former CROA Arbitrator Weatherill dealt with a similar situation as the one before me in **CROA 4695-M** (October 2019). In that case – like in the one before me - the grievor tested negative for breath alcohol and negative for drugs on the oral fluid test, but positive on urinalysis. In that case – unlike in this one – the substance was marijuana.

27. Arbitrator Weatherill held the urinalysis result did not indicate the Grievor was impaired while on duty². He stated:

Having traces of marijuana in the body may raise a question of whether there is impairment, but that bit of evidence by itself is not enough to establish impairment, whereas the negative breath alcohol and oral fluid tests strongly indicate there was not. There is no suggestion whatever that the grievor's

¹ See for example *CEP, Local 30 v. Irving Pulp & Paper Ltd.* 2013 SCC 34 at para. 19 where the Court considered this to be a “delicate” balance.

² Upheld on judicial review: *CP Rail Company v. TCRC* 2020 ONSC 6683

conduct, movements or verbal behaviour were indicative of impairment. From all of the material before me I find as a fact that the grievor was not impaired during the course of his shift on August 17, 2017 (at p. 4).

28. The Company has urged that this conclusion is different when the metabolite in the urine is cocaine – which is an illegal substance – rather than marijuana – which is not. It urged the significant jurisprudence that has developed around the use of marijuana can be distinguished.

29. In **CROA 4695-M**, Arbitrator Weatherill quoted the following broad statement from **CROA 4240**, a 2013 decision of Arbitrator Picher”

The arbitral jurisprudence in respect of drug testing in Canada is now extensive. It has been repeatedly sustained by the courts and is effectively the law of the land. Part of that law – is that a positive drug test, conducted by urine analysis [sic], standing alone, does not establish impairment at a point in time which corresponds with an employer’s legitimate business interests and, standing alone, cannot be viewed as just cause for discipline (at p. 4 of that decision, and p. 5 of Arbitrator Weatherill’s analysis).

30. A review of the substantial body of jurisprudence which has grown around the issue of drug and alcohol testing demonstrates that it is not the *type* of impairing substance that is determinative of whether just cause exists for discipline. Rather, the question that must be addressed is whether the individual is *impaired* on the job by whatever drug (including alcohol). It is this fact of *impairment* – and not just “some” level of use - that shifts the balancing of privacy and safety interests in the employer’s favour, even for conduct which the individual chooses to engage in on their own time³.

31. In determining impairment, each case will turn on its own facts.

32. A case which considers both marijuana and cocaine is **SHP726**. In that case, the grievor tested positive on an oral swab test for cocaine and marijuana. Regarding the marijuana test, the result was four times higher than the accepted cut off-level, which the arbitrator accepted indicated marijuana use within the preceding four hours immediately prior to the administration of the oral swab. She accepted that this demonstrated both recent use and a “scientifically reliable and valid indicator of impairment” (at p. 5).

33. Regarding cocaine use, the arbitrator was satisfied that the oral fluid analysis was conclusive of cocaine consumption within five to eight hours prior to the sample’s collection (prior to metabolization by the body, resulting in a positive oral fluid but a negative urine test). The arbitrator found there was “overwhelming evidence” of the consumption of both cocaine and marijuana immediately before the grievor commenced

³ See for example **AH729**, which lists multiple CROA cases for this point, including **CROA 4584**

his shift, and that he was “impaired” during his shift (at p.7). The Company’s decision to dismiss the grievor was upheld.

34. A further case involving cocaine use is **AH663**. In that case, Arbitrator Clarke was satisfied that the employee “took cocaine at a time when it would impact his work performance”. He further found “the test results show that cocaine had been taken within hours of the testing” (at para. 129). Arbitrator Clarke in that case did not refer to the word “impaired”, but to “impact”, although as quoted earlier, he did then note that “impairment” is considered very serious in the railway industry (at p. 28).

35. In the case before me, the Grievor stated he ingested cocaine on his own time on February 1, 2021 early in the morning, after his shift and not between that that time and when he was tested. There was no evidence which cast doubt on that statement. The Grievor was then tested on February 5, 2021, early in the morning, after the run through, which had occurred at 00:30. The test was approximately four days after his admitted ingestion of cocaine in on February 1, 2021 and two and one half hours after the start of his shift on February 4, 2021. His urine tested positive for 141 ng/ml of cocaine, which was above the concentration cut off limit for a urine test under the Policy (which was 100 ng/ml), but below the screening concentration limit set in the Policy (which was 150 ng/ml).

36. Unlike in **SHP726**, in this case, the Grievor’s oral fluid swab test was negative for cocaine. There is no evidence he took cocaine “immediately before” his shift. Unlike in **AH663**, there is no evidence that the Grievor “took cocaine within hours of the testing”.

37. The Company argued there are a number of ways that the ingestion of cocaine before reporting to work can influence the risk which that substance may pose to an individual working in a safety critical role, such as a Conductor, which would justify its discipline. This includes the influence of the “crash” phase.

38. The “crash” phase describes the various residual effects that can occur after the use of cocaine, leading to substantial memory and cognitive impairments. The Company argued its medication information established these residual effects include “decreased alertness and arousal, poor attention, reaction time, concentration and divided attention” which impacts resulted after the use of stimulants, “despite return to zero blood levels due to the significant neurochemical changes that occur in the aftermath of stimulant use such as cocaine”. It also argued these effects can last “from one to five days” depending on the route of administration, amount of cocaine used, use of other substances at the same time, and chronicity of use⁴.

39. Dr. Snider-Adler also noted that acute intoxication from cocaine can last for hours” and can cause anxiety, panic attacks, paranoia, irritability, impaired judgment, delusions

⁴ As noted in the Report of Dr. Snider Adler, September 2019

and hallucinations.⁵ As cocaine levels dissipate, the user can experience “agitation and depression” *prior to* entering the “crash” phase”.⁶

40. To find that this Grievor was impaired by cocaine during his shift on February 4/5, 2021 – either by the initial high or the “crash” from cocaine – would require evidence. That evidence would need to be combined with the Grievor’s urine test result – which established the presence of cocaine metabolites - to establish that it was more likely than not the Grievor was suffering from an impairment to his job performance that could reasonably be linked to his cocaine use several days before.

41. In this case, that evidence is lacking.

42. There is no evidence of any verbal or behavioural issues, cognitive lapses, irritability or other “crash” type symptoms. Those involved in the Grievor’s testing in the early morning hours of February 5, 2021 did not raise any issues that would support the impact of a “crash” from cocaine use.

43. The fact the Grievor was riding in the locomotive cab and not on the footboard as he was supposed to do is not indicative of an issue that is “more likely than not” to have been caused by a “crash” phase. His presence in the locomotive was adequately explained by the fact he was doing paperwork and was not expecting the train to move. While the Grievor could face discipline for that lapse, it does not support he was subject to a “crash” from cocaine use.

44. While the Grievor admitted in his interview he could have reacted faster to the train moving, his lack of reaction speed was just as likely to have been caused by surprise that the train was moving at all, as it was to be caused by cocaine use.

45. Finally, there was no suggestion from medical personnel that the Grievor’s drug result was of a nature which supported a conclusion he had consumed cocaine close in time to the beginning of his shift.

46. Regarding his lack of knowledge of the impact of cocaine use and the impact of CROR Rule G, this lack of knowledge may have some application in a situation where there *is* evidence of residual impairment. The lack of understanding that there *could* be such a residual impairment would be relevant to that evidence and its impact. However, in this case, that evidence is lacking.

47. The Grievor had a Positive Test result, and a negative oral fluid result for cocaine. While the Positive Test is one piece of evidence and demonstrates some “use” of cocaine several days before, it does not establish impairment by cocaine while on the job, in a circumstance when the oral fluid test was negative and there is no evidence of residual

⁵ At p. 14

⁶ At p. 14.

impairment from a cocaine “crash”. No other evidence was tabled which would indicate his job performance was impacted by his use of cocaine four days before.

48. Considering all the material before me, I find as a fact this Grievor was not impaired during his shift on February 4/5, 2021. As a result, there was no just cause to discipline the Grievor for his illegal drug use which had occurred several days before his shift began.

49. The Union has urged that no conditions should be attached to the Grievor’s reinstatement nor should he be subject to a lengthy suspension, as he was not impaired on the job.

50. Conditions have been imposed under certain circumstances, and discharge has been converted to suspensions. The facts in each case are determinative.

51. This case is distinguishable from **AH787** and **AH729**. In **AH787**, the Grievor was not forthright and accountable regarding his drug use, but stated he had “no idea” how he tested positive. It was this lack of forthrightness and accountability which supported the application of conditions on his reinstatement.

52. The facts in this case are distinguishable. While there were questions the Grievor refused to answer during the Investigation – such as how he had ingested cocaine -he did not try to hide or cover that cocaine use had occurred, or when.

53. In **AH729**, Arbitrator Moreau reinstated the Grievor without compensation, which resulted in a lengthy suspension, because the grievor had given misleading answers at his Investigation. That case is also distinguishable. The Grievor did decline to answer certain questions in the Investigation, but he did not mislead.

54. The Union has urged that damages be assessed against the Company for continuing actions in dismissing individuals based on negative urinalysis results, in the face of the established jurisprudence.

55. An arbitrator has jurisdiction to award damages as a remedy, where that damage award would be a just and reasonable in all of the circumstances. The Union has grieved the Company’s Policy. That grievance will be heard in the Fall of 2023. In my view, it would not be appropriate to award damages against the Company for following its Policy, when the reasonableness of that Policy will shortly be adjudicated.

Conclusion

56. The dismissal is set aside. On the totality of the evidence, the Grievor was not impaired from either the use of cocaine or the impact of a “crash” phase during his shift on February 4/5, 2021.

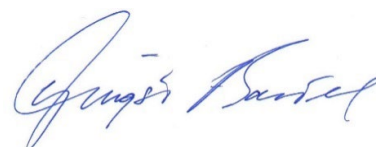
57. I decline to impose any conditions on the Grievor's reinstatement, nor do I consider it appropriate to convert the time between the dismissal and reinstatement to a lengthy suspension in the circumstances of this case.

58. As there was no just cause for discipline, the Grievor is to be reinstated without loss of seniority and benefits and is to be made whole for all lost earnings. The Grievor has already been assessed 15 demerit points for the incident which led to the testing.

59. In view of this finding, it is not necessary to determine the other arguments raised by the parties, including whether the Grievor should have been tested, whether the Investigation process was fair and impartial, or whether the June 2010 Agreement applied to this dispute.

60. I remain seized to address any issues relating to the implementation of this Award.

June 19, 2023



**CHERYL YINGST BARTEL
ARBITRATOR**