CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4845-M

Heard in Edmonton, September 14, 2023

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the dismissal of Conductor T. Persoage of Winnipeg, MB.

JOINT STATEMENT OF ISSUE:

Following an investigation, Mr. Persoage was dismissed on March 23, 2021 for the following reason(s):

"For your positive reasonable suspicion substance test performed on February 26, 2021. A violation of CP's Alcohol and Drug Policy HR 203 and CP Procedure HR 203.1."

UNION POSITION:

The Union contends that the investigation was not conducted in a fair and impartial manner under the requirements of the Collective Agreement. The Union further submits the investigation has violated the June 16, 2010 Agreement regarding post-incident testing. As a result the Union contends that the discipline is null and void (void ab initio), ought to be removed in its entirety and Mr. Persoage 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 further contends that the Company continues to ignore arbitral jurisprudence on this subject, and that Mr. Persoage's dismissal is unjustified, unwarranted, and excessive in all of the circumstances, including significant mitigating factors as outlined in the grievance correspondence.

The Union asserts the Company's Alcohol and Drug Procedures (Canada) HR203.1 policy violates numerous aspects of the June 16, 2010 Agreement with the Company, the Collective Agreement, applicable legislation including the Canadian Human Rights Act, and is an unreasonable exercise of management rights. As a result, the Union disputes the policy's application in the instant matter for reasons previously provided within the grievance procedure.

The Union requests that the Company remove the discipline in its entirety and Mr. Persoage be reinstated without loss of seniority and benefits. Additionally, the Union requests 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:

The Company disagrees and denies the Union's request.

The Company's position continues to be that the discipline assessed was just, appropriate and warranted in all the circumstances. Accordingly, the Company cannot see a reason to disturb the discipline assessed. The Company disagrees with the Union's position regarding the fairness and impartiality of the investigation and their allegation that the discipline is void ab initio. Discipline was determined following a review of all pertinent factors, including those described by the Union. The Company further maintains the Grievor's culpability as outlined in the discipline letter was established following the fair and impartial investigation.

The Company respectfully maintains the facts speak for themselves. The Grievor was dismissed for his positive substance test results in violation of multiple rules and Policy. Given that the Grievor had a Positive Drug Test, he was indeed in violation of the Company's Alcohol and Drug Policy and Procedures. These policies, which were clearly communicated to all Train and Engine Employees, state:

> "Disciplinary action up to and including dismissal will be taken where CP has determined that violations of this Policy and Procedures have occurred." (Emphasis Added)

The Company maintains the Grievor's reasonable suspicion test was warranted under the circumstances and consistent with Company policies, procedures and arbitral jurisprudence.

The Union suggests the Company has violated "Collective Agreements, the June 16, 2010 Agreement, applicable legislation including the Canadian Human Rights Act, employees' privacy rights and applicable standards with respect to workplace substance testing as defined in leading arbitral jurisprudence". However, when the Union makes such a claim, they have an obligation to substantiate these allegations. As the Union has failed to advance any specifics, the Company takes the position that it is prejudiced by the fact that it cannot properly defend against broad and unspecific allegations.

Further, even if the Company were to accept that the 2010 letter is current (which it is not), the letter refers to post-incident testing, not reasonable suspicion as is the case with Mr. Persoage. Accordingly, any references made to post-incident testing in the Union's position are without merit and bear no relevance in this case.

The Company maintains that the Grievor's Human Rights were not violated; the Company's HR 203 and 203.1 Policy and Procedures are in keeping with the decision of Stewart v. Elk Valley Coal Corp., 2017 SCC 30, which found that the assessment of discipline for a violation of a similar policy was not contrary to human rights legislation. The Grievor knew yet failed to comply with HR 203 and 203.1.

Regarding the Alcohol and Drug Policy, the Company maintains the Policy has not been ruled upon and the grievance related to this matter is outstanding pending arbitration.

Regarding the Union's request for damages, the Union provides no rationale in support of its claim for damages. Damages are reserved for conduct which is found to be harsh, vindictive, reprehensible and malicious, as well as extreme in its nature such that by any reasonable standard it is deserving of full condemnation and punishment, as established in the notable Honda Canada Inc v. Keays Supreme Court of Canada decision. In CROA 4605, Arbitrator Clarke distinguished in his award that in order to claim for damages, the party claiming such must make a compelling argument to support this claim:

> "...the burden remains on a party claiming such damages to provide argument and case law supporting its remedial request. A neutral arbitrator is not in a position to develop a party's legal arguments."

The Union has failed to allege such conduct on behalf of the Company or supply sufficient details to support such an allegation. As such, the Company maintains the request for damages is without merit.

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

As an additional comment, failure to specifically reference any argument or to take exception to any statement presented as "fact" does not constitute acquiescence to the contents thereof. The Company rejects the Union's arguments, maintains no violation of the agreement has occurred, and not compensation or benefit is appropriate in the circumstances.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) D. Fulton	**(SGD.) F. Billings**
General Chair CTY-W	Assistant Director Labour Relations

There appeared on behalf of the Company:

A. Cake – Manager Labour Relations, Calgary
S. Scott – Manager Labour Relations, Calgary
A. Harrison – Manager, Labour Relations, Calgary
R. Dales – Assistant Superintendent, Winnipeg Terminal, Winnipeg

And on behalf of the Union:

K. Stuebing – Counsel, Caley Wray, Toronto
D. Fulton – General Chair, CTY W, Calgary
J. Hnatiuk – Senior Vice General Chairperson, Calgary
V. Siedler, – Local Chair Winnipeg, *via Zoom*
T. Persoage, – Grievor, *via Zoom*

AWARD OF THE ARBITRATOR

Summary

[1] The Grievor was discharged in March 2021, following a positive urinalysis substance test on February 26, 2021. The test was required on the "reasonable suspicion" that he was impaired while at work.

[2] That suspicion was raised by several unusual cognitive, emotional and behavioural actions of the Grievor, including showing agitation, a "nervous shake"; lack of focus; aggressiveness; talking excessively; extremely restless; loud and boisterous; bouncing from subject to subject; inability to focus during a meeting with Company personnel; and stating that his "head was not in the game" and his colleagues had also suggested he go home.

[3] The oral fluid test result for marijuana was "negative". The urinalysis test result was ultimately positive for marijuana metabolite at 119 ng/ml, which is almost eight times the limit of the confirmed cut off concentration in the Company's Alcohol and Drug Policy and

Procedures (HR203 and HR203.1) (the "Policy"), which was 15 ng/ml. That Policy is currently under grievance in an *ad hoc* process (the "Policy Grievance").

[4] For the reasons which follow, the Investigation was fair and impartial and the failure to mention Rule G does not prevent consideration of whether the Grievor was impaired at work. The issue of the impact of the 2010 Agreement is live before another arbitrator and any remedy for such breach can be addressed by that arbitrator, in that process.

[5] The Company has established – on a balance of probabilities – that it had cause to discipline the Grievor when his positive substance test result confirmed their reasonable suspicion – from their observations and his behaviour – that he was impaired at work from the residual impact of marijuana. Dismissal was the presumptive – and reasonable – result. The Grievance is dismissed.

Facts

[6] At the time of his discharge, the Grievor was working as a Brakeperson, which is considered a safety critical position. He had approximately 12.5 years of service, having started with the Company in 2008. On February 26, 2021, approximately 45 minutes into his shift, the Grievor complained his "head was not in the game" and requested to go home. He stated his colleagues working with him had also noticed that his "head was not in the game" and said that he should go home.

[7] The Trainmaster arranged for him to be picked up and to come to the office of the Assistant Superintendent to meet with both of them. Their evidence was they were confused as to what the Grievor's comment that his "head was not in the game" actually meant. Both men created Memoranda regarding their impressions of the Grievor that day. The Trainmaster's Memorandum stated the Grievor was "…not himself, as he typically is alert and coherent of what is going on around him and he was rather agitated, short fused with a temper and he had a nervous shake to him which are all things that Tim never is when he reports for duty" and that he became "more agitated" during the conversation. While the Assistant Superintendent's Memorandum was consistent with this evidence, it provided greater detail regarding this meeting. He noted the Grievor was:

> …talking rapidly, and not always understandable, talked excessively, was loud and boisterous, his legs were constantly moving, he kept adjusting

> himself in the chair from one sitting position to another over and over and overall was extremely restless, and he wasn't making eye contact. He kept jumping for one point to a different point but managed to tell me he was having a hard time at home and that he had reached out to EFAP….He said he didn't feel safe out working and even his crew members told him he should go home and shouldn't be out there today.

[8] The Assistant Superintendent had never met the Grievor before, so he stepped out and confirmed with the Trainmaster – who knew the Grievor – that the Grievor's behaviour was abnormal. The decision was made to test the Grievor on a reasonable suspicion of drug use.

[9] When he was told he would be tested, the Grievor became very agitated and "very aggressive" and tried to leave by going downstairs and out to his vehicle. I am satisfied the Grievor was very agitated and pacing back and forth and was being very loud as described by the Assistant Superintendent was "telling everyone around that I was harassing him and intimidating him by sending him for a drug test", at this point. He indicated his concern that he would pass his oral test but would "fail his urine test". He was told by Company personnel that it would be an automatic positive if he did not test and that he should not be driving in his current state. The Grievor tried to leave in his vehicle, but the Assistant Superintendent blocked him from leaving. The Grievor then drove back into the parking spot and then waited for the DriverCheck personnel to come administer the test.

[10] An Investigation was undertaken. During his Investigation, the Grievor admitted to using half or one full "joint" of marijuana 3 to 4 times per week, and that he last used marijuana in this manner approximately 11.5 hours before reporting for duty on February 26, 2021, which was approximately 14 hours before he was tested. The Grievor maintained he was not agitated, loud or boisterous but was calm and measured in explaining his difficulties to Company personnel, which included that he was a single father; schools were closed with COVID19; he had broken up with his long-term girlfriend, and he "broke". He maintained he was not acting agitated or trying to avoid a substance test when he wanted to leave, but that he was having a bad panic attack and was going to get medical attention. He explained he was not in control of railway equipment or moving equipment on the day of the test; that he did not have a drug and alcohol problem

and that he considered he was "fit for duty" on February 26, 2021 and had not come to work impaired.

Arguments

[11] The Company maintained its decision to test was appropriate; its Investigation fair; and its discipline warranted. It noted the Grievor's unusual symptoms and maintained it had cause to dismiss the Grievor. It pointed out the Grievor had multiple opportunities to return to work under various reinstatement offers made to him in 2021, which he failed to do. It urged that any damages even if the Grievor were to be reinstated are limited to the period from March 23, 2021 to September 11, 2021.

[12] The Union argued the Company did not raise Rule G in the Joint Statement of Issue but dismissed the Grievor only for his positive drug urinalysis result. It argued impairment is an issue that cannot be raised now as it was not included in the JSI. Alternatively, it argued the Company did not have reasonable suspicion to test the Grievor; the investigation was not fair and impartial so the discipline should be *void ab initio;* that dismissing the Grievor for a positive urinalysis result was not consistent with the weight of jurisprudence and a previous agreement between the parties (the "2010 Agreement"), regardless of the Company's Policy, which is under grievance; and the Grievor had a full and reasonable explanation for his actions on February 26, 2021. It also urged the Grievor did not fail to mitigate his losses by refusing to sign what were unreasonable reinstatement agreements.

Analysis & Decision

[13] Before turning to a discussion of whether discipline was warranted and its reasonableness, the Union has relied on what I will describe as three "preliminary" issues to attack this discipline (as distinct from the merits): the unfairness and impartiality of the Investigation itself; the lack of reference to Rule G in the JSI; and the impact of a 2010 Agreement between the parties.

Was the Investigation Fair and Impartial?

[14] I cannot agree with the Union that the Investigation was either unfair or impartial or demonstrated bias. Reviewing the Investigation transcript, the bulk of the Union's initial

objections were largely in the nature of argument, which is to be reserved for this hearing, Entering the Report of Dr. Snider into the Investigation was appropriate as the Company intended to rely on that evidence. The Union objected to almost all of the questions asked of the Grievor, including when he last consumed marijuana. It took issue with any question that might reveal guilt of the Grievor.

[15] The Investigation is a "fact-finding" process. Certain of the facts of a particular situation may well establish a grievor's guilt. It is not the case that a Grievor cannot be asked questions which may demonstrate his own guilt. There is no protection from "self-incriminating" questions in Canadian law, or in the Investigation process under the collective agreement. That does not make those questions – or the Investigation itself – unfair or not impartial.

[16] The Grievor was given opportunity to describe what happened in his own words, without interruption from the Investigating Officer; was asked whether what was stated in the Memoranda was correct and was given the opportunity to rebut that evidence with his own evidence, which he did. The Grievor was given an opportunity to refute his test result or raise issues if there were any regarding his understanding of Company policies, which is reasonable in a fact-finding process.

Failure to Refer to Rule G in the JSI

[17] To resolve this issue, it is necessary to consider an arbitrator's broader jurisdiction when addressing the reasonableness of discipline under the analysis in *Wm. Scott*, as well as the Memorandum of Agreement Establishing CROA[1] (the "CROA Agreement").

[18] The CROA Agreement provides the structure for this expedited arbitration process. Item 14 of that Agreement states that the decision of an arbitrator "shall be limited to the disputes or questions contained in the joint statement submitted by the parties…or where the collective agreement itself defines and restricts the questions". I am satisfied this is to avoid "trial by ambush" of one party over another, and to ensure the parties have narrowed the issues as far as possible before they reach the hearing stage.

[1] As amended January 10, 2023 and further amended (without amending item 14 on this issue) in November of 2023

[19] As in **AH843,** I am prepared to accept that broad arbitral jurisprudence supports that employees are not to be impaired on the job, *regardless* of the existence of Rule G. Rule G is not the sole source of an employee's obligation not to work impaired. It cannot be said that without that Rule, employees could come to work impaired. That obligation is fundamental to the employment relationship and evident in employment jurisprudence generally. In other words, it is not specific to this industry. There are some aspects of Rule G which are unique, such as the obligation to be aware of the impacts of using a substance. It is those aspects that cannot be relied upon if Rule G is not mentioned in the JSI.

[20] This result is consistent with the analysis an arbitrator must undertake to address any discipline grievance, as contained in *Re Wm. Scott & Co.* when no drug dependency is alleged (as in this case).[2] The questions to be addressed in a *Wm. Scott* analysis (cause and reasonableness of discipline) require an arbitrator to consider the global facts and circumstances of each case. A positive "reasonable suspicion" test result cannot be considered in isolation. It must be recalled that in this case the Company alleged it had a suspicion that the Grievor *was* impaired while at work, due to his cognitive, emotional and behavioural responses displayed to both the Trainmaster, the Assistant Superintendent and – as admitted by the Grievor – the concerns of his colleagues who were working with him, and his own concerns, that his "head was not in the game".

[21] This is the context in which the test was arranged by the Company. That test allegedly confirmed the Company's suspicions. The Union relied on **CROA 3668** for the proposition that "no Rule G violation exists due to the mere "presence in the body" of intoxicants. However, that case does not support that proposition. In that case, the arbitrator found the evidence did not support the Company's allegation the grievor was "suffering from after-effects or any impairment by reason of his consumption of marijuana two days before" his test. That case can be distinguished from these facts, where workplace evidence does exist.

[22] Whether or not Rule G is specifically mentioned in the JSI, I am satisfied that under a *Wm. Scott* analysis – which requires a global consideration of facts and circumstances

[2] [1976] B.C.L.R.B.D. 98

– the positive test result and the fact it was ordered on reasonable suspicion of impairment due to evidence of unusual behaviour consistent with residual impairment has placed the fact of whether the Grievor was impaired when his reasonable suspicion test was positive squarely in issue between the parties. Both parties argued that issue in this hearing.

[23] Any other impact would allow technicality to trump substance. I cannot accept that was the parties' intent in drafting the CROA Agreement, and in particular item 14.

The Impact of the 2010 Agreement

[24] The Union has argued the Investigation violated what will be called the "2010 Agreement" and this renders the discipline *void ab initio*. It has noted in its submissions that it has raised the applicability of that issue in the Policy Grievance. The application of the 2010 Agreement to the Company's current Policy has arisen in several cases before this Office. In many cases, it has not been necessary to opine on the applicability of that Agreement, for various reasons. The same is true in this case.

[25] The Union has taken issue with the Company providing the Grievor's medical information to the Investigative Officer as being in breach of that Agreement. Even if the Agreement was breached, the Union has not established that such a breach would render the discipline in this case *void ab initio*, which result is usually reserved for fundamental representation issues. In any event, as the parties are addressing the applicability of the 2010 Agreement in the Policy Grievance, that arbitrator has the ability to provide any global remedy which may be appropriate for its breach, if it is determined that Agreement continues to apply to the Policy. As that issue is live in another Grievance, it is properly addressed before that arbitrator, once that issue is resolved, rather than in this hearing.[3]

The Merits

[26] It is well-accepted that an employee cannot engage in drug or alcohol use while on the job in *any* industry, whether that drug is ingested during the work day or that employee has come to work impaired from use on their own time. The concerns for privacy – and the need for a balancing of privacy interests of the employee and safety

[3] See also **CROA 4725** where the Arbitrator ruled that a remedy or any breach of the Policy was most appropriately addressed in the Policy Grievance (at paras. 25-27)

interests of an employer – arise when the impact of drug and alcohol use by an employee – undertaken on his or her own time – impacts their performance in the workplace.

[27] As was noted by Arbitrator Picher in **CROA 3900**, "[r]ailways are among the most highly safety sensitive industries in Canada". He pointed out that railway employees "…operate in a system of complex signals and switches where alertness in the control of a train free of distractions is a paramount importance". He also emphasized that railway employees "operate in unsupervised conditions, frequently hauling dangerous goods through various kinds of territory, including both environmentally sensitive countryside and densely populated areas". The impact of the danger inherent in the movement of goods by rail was keenly felt by Canadians with the disaster in Lac Megantic.

[28] As discussed in *CEP, Local 30 v. Irving Pulp & Paper*[4], **SHP 530** and in more recent cases from this Office, even in highly safety sensitive industries, there remains a need for a balancing of these privacy and safety interests. The Supreme Court in *Irving* discussed this balance as a "delicate" one. It is a balance that has been developed from years of litigation.

[29] Where the boundaries lie regarding the impact of drug and alcohol use in the workplace remains a contentious issue in this industry. Drug testing – under certain and limited circumstances – is one way the Company establishes impairment. As noted by this arbitrator in **CROA 4836**, the reasonable suspicion that an employee is working under the influence of drugs and/or alcohol is one of the limited situations in which a Company can require its employees to submit to drug testing.[5]

[30] The Company has implemented a Policy regarding drug and alcohol use. That Policy includes a 28 day ban on cannabis use and various "cut off concentration" levels for positive drug tests for various drugs, administered by both urinalysis and oral swab, including cannabis. The Union has launched a grievance against that Policy (the "Policy Grievance"), arguing that it breaches the collective agreement; a June 16, 2010 Agreement between the parties (the "2010 Agreement"); and the Company's human

[4] 2013 SCC 34

[5] As recognized by the Supreme Court of Canada in *CEP, Local 30 v. Irving Pulp & Paper Ltd.* 2013 SCC 34, para. 30.

rights obligations. That grievance is being heard this fall on an *ad hoc* basis and not by this Office. It is scheduled to proceed over multiple days, extending into 2024.

[31] While the Policy Grievance is ongoing, grievances continue to be filed, scheduled and heard by this Office, regarding drug and alcohol testing and its impact, with many of the same arguments raised by the parties as are proposed to be raised in the Policy Grievance. However, unlike in an *ad hoc* process, hearings before this Office proceed as part of an expedited arbitration process, where cases are heard in one hour and oral evidence is rare. Evidence is presented through documentation.

[32] This is a case that addresses discipline in a situation where there was a negative oral fluid test result for marijuana, unusual cognitive, emotional and behavioural symptoms in the workplace, and a positive urinalysis test for cannabis ordered as a result of a “reasonable suspicion” the Grievor was impaired.

[33] For this case, well over 1000 pages of materials were filed by the parties. All authorities were reviewed, although not all may be mentioned in this analysis.

[34] The Company relied on Dr. Snider-Adler’s 2019 Report as expert evidence. Unlike in **CROA 4754**, the Union did not file any expert evidence of its own.

[35] Like other arbitrators before me, I am prepared to accept Dr. Snider-Adler’s Report as expert evidence relating to certain aspects of drug use[6]. That evidence is not irrelevant because it is not specific to this Grievor, or because it was prepared before the events in this Grievance occurred. As noted in **AH843,** certain aspects of drugs and their use noted in that Report do not change over time or depend on which individual takes those drugs. This includes whether drugs can cause both acute and residual impairment for those working in highly safety industries, with safety critical roles.

[36] As noted by Dr. Snider-Adler, THC is the primary psychoactive constituent of cannabis. She stated:

> THC is known to impair cognitive functions that range from basic tasks (motor coordination) to more complex tasks such as problem solving, decision making, memory, judgment and ability to plan. Executive functions are

[6] As did the Arbitrator in **CROA 4798** and as was accepted **in AH843**

> impacted by THC resulting in impaired decision-making abilities, especially in novel, or emergency situations.[7]

[37] She noted that the acute phase of THC intoxication can cause an increase in panic and anxiety; impaired attention and concentration; impairment in short term memory; impaired motor coordination, executive function changes (including divided attention); paranoia; and psychomotor impairment. High doses can lead to paranoia and other signs of psychosis.[8]

[38] Dr. Snider-Adler opined that individuals may feel a “drug effect” or “high” for 4 to 12 hours, depending on various factors, but they can “also be continued to be impaired on neurocognitive testing for many hours after these drug effects wear off”[9].

[39] Regarding residual impairment generally, Dr. Snider-Adler stated:

> As will be reviewed in detail below, use of a substance outside of the workplace, including before or after work, during days off, or while on vacation may cause a significant risk of impairment upon return to work due to the substances’ residual impairment (carry-over effects, hangover or “crash”); due to the additive effects of a drug when used chronically and frequently; due to the impact of withdrawals from a substance after cessation of use; and/or due to the neurotoxic effects from the use of substances which are known to cause damage to brain tissue…It is due to the potential for prolonged impairment that occurs even after the acute intoxication has worn off, that safety-critical and safety-sensitive workplace’s alcohol and drug programs often prohibit the use of alcohol, cannabis and illicit drugs.[10]

[40] Regarding residual impairment from cannabis specifically, Dr. Snider-Adler stated:

> Residual impairment from cannabis is a concern in safety-critical and safety-sensitive workplaces and for those individuals performing any safety-critical and safety-sensitive duties. The length of time of residual impairment, the extent of impairment, as well as the severity of the impact on functioning differ between individuals. The effects as well as the length of time of the impact are unpredictable and non-linear, differentiating cannabis from alcohol.[11]

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[7] At p. 12
[8] *Ibid.*
[9] At p. 12.
[10] At p. 4
[11] At p. 13.

[41] Dr. Snider-Adler opined that "residual impairment is a significant factor in safety-critical and safety-sensitive environments due to the necessity of an individual to have intact cognitive abilities including decision making, attention, memory, and judgment that are all impacted after the use of cannabis…"[other drugs are also mentioned]. She noted:

> Unlike other tasks, safety-critical and safety-sensitive tasks require a greater cognitive ability and even minor changes have the potential for detrimental impacts…allowing an employee to work in safety-critical and safety-sensitive position with hazardous job demands with recent use of substances is dangerous.[12]

[42] She noted a study where even one joint of cannabis resulted in prolonged effects, including persistent memory impairment, as well as the results of a 2011 study indicating residual impairment of executive functions – such as attention and concentration – even though tolerance does develop in heavy users.

[43] This makes evidence of signs and symptoms of significance when considering the facts of each case, and determining whether – on a balance of probabilities – residual impairment from cannabis has been established.

[44] Several decisions on drug and alcohol testing have been issued by this Office recently, seeking to provide guidance to the parties.[13] The following is a summary of the key principles from the jurisprudence:

a. The ingestion or inhalation of drugs can cause both an "acute" impairment and a "crash" (residual) impairment that can impact an employee's ability to perform their employment duties in highly safety-sensitive industries, especially when those duties are considered to be "safety critical";

b. It is *impairment* from drug use – and not *some use of drugs* – that tips the balancing of interests in an employer's favour and provides cause for discipline.

c. The standard of proof to establish impairment is a "balance of probabilities"; which means it is "more likely than not" that the employee was impaired from the ability to safely perform his or her duties;

d. An oral fluid (swab) test measures "acute" impairment from marijuana; it does not provide measurement of the "crash" phase of impairment;

[12] At p. 16
[13] Including over the last six months by this Arbitrator in **CROA 4826**, **4836** and **AH843**

e. The “crash” phase of marijuana use is non-linear - unlike the “crash” phase of cocaine or of alcohol [14]. Whether that “crash” impairment exists will be a matter of evidence;

f. The weight of the jurisprudence – including from this Office - has established that a positive urinalysis substance test – “standing alone” – is “some” evidence of impairment but does not provide to the Company cause for discipline for impairment from the use of drugs;

g. This is the case *regardless* of whether the drug is a legal one – like alcohol and now cannabis; or an illegal one – like cocaine.

h. However, it is not the mere *fact* of a positive urinalysis result that is problematic, but its use *in isolation*;

i. The Company may combine a positive urinalysis test with other evidence so that result does not “stand alone”; This evidence can involve such facts as the timing of ingestion and evidence of unusual and unexplained cognitive, emotional or behavioural actions while at work;

[45] This is the type of case mentioned in (i).

[46] However, the first broad question raised by the JSI is whether it was reasonable to test the Grievor at all (i.e. was there a “reasonable suspicion” that he was impaired at work to support that testing)?

Was it Reasonable to Test the Grievor?

[47] The Company must provide evidence to substantiate it had a “reasonable suspicion” the Grievor was impaired on the job, to support its requirement of a substance use test. This must be established on a “balance of probabilities” standard. The fact that a grievor may ultimately test positive on such a test does not itself substantiate that suspicion itself was reasonable. This is largely an evidentiary question, so precedents are of limited value as each situation will be factually unique.

[48] From a careful and thorough review of all of the evidence, I am prepared to find that the Company has met its burden to substantiate its suspicion the Grievor was

[14] See pp. 12 forward.

impaired was a “reasonable” one. It has demonstrated cause to test the Grievor. I am satisfied the Grievor was exhibiting significant bizarre and unusual signs as earlier outlined, which were evident to both Company personnel as well as to other employees. I do not find convincing or satisfactory the Grievor’s explanation that all of these unusual signs and symptoms were reasonably explained by issues in his personal life of being a single father; his recent breakup with a girlfriend; “depression”; the impact of COVID19, or with a “bad panic attack” unrelated to drug use.

[49] I am satisfied the Grievor was trying to leave without permission because he was aware he would fail a substance test. I do not find it convincing that he wanted to get medical attention for a “panic attack”, which attack suddenly resolved when he accepted he was going to be prevented from leaving and would have to submit to a substance test. I am further satisfied this was not usual behaviour for this Grievor, to the Company’s knowledge. I find these signs and symptoms were consistent with the residual impact of marijuana use on the Grievor and that this behaviour justified the Company’s suspicion that the Grievor’s judgment and ability to perform his safety critical work was impaired by the use of alcohol and/or drugs. I am satisfied the Grievor was displaying these signs and symptoms to both his colleagues in the field (whom he admitted told him his “head was not in the game” and with whom he agreed that he should not be at work); and to the Trainmaster and the Assistant Superintendent, whose evidence was recorded and which I accept.

[50] The reasonableness of the Company’s suspicion having been established, the *Wm. Scott* analysis must next be applied to determine whether there was cause for some discipline.

Wm. Scott Queston 1: Was Cause for Discipline Established?

[51] While the weight of the jurisprudence supports that a urinalysis result “standing alone” does not support discipline, it is not always the case that a urinalysis result “stands alone”. Sometimes – as in **AH843** – a urinalysis result “stands” cumulatively with other

evidence which – when considered in combination – can support a finding of impairment on a balance of probabilities standard.[15]

[52] This possibility was in fact recognized by Arbitrator Picher in 2000 in *CN Railway Company v. CAW – Canada, et al*[16].

[53] The case before me is not a "discipline due to the mere presence of drugs" type of case, unlike most of the Union jurisprudence.

[54] In **CROA 4400, 4709; 4712; 4706; 4729; 4754; 4792; 4799; 4812** and **CROA 3691** there was no objective evidence of impairment – in addition to the positive test result – to support discipline. Those cases can be distinguished. Those cases did not consider the impact of the "crash" phase of impairment and whether signs and symptoms could cumulatively lead to an inference of impairment. For example, **CROA 4792** is a post-incident testing case. It was noted there was no "behavioural or appearance indicators of the Grievor's alleged impairment" (at para. 22); and the positive urinalysis result was 3 ng/ml. Not surprisingly, it was found the Grievor was not impaired while on duty.

[55] This is not that case.

[56] Neither is this a case where drug use was one time and occurred "days" before the test or a situation where marijuana use was occasional and was not a habit.[17] There is evidence this Grievor was a chronic cannabis user.

[57] The bulk of the Company's jurisprudence also has limited application, however.

[58] Certain of the jurisprudence the Company relied on involved *positive* oral fluid tests, in addition to a positive urinalysis test. That is not this case. For example, **CROA 4789** involved a positive oral fluid result, but no expert evidence on what that result meant, and no "signs of impairment" shown (at para. 12). The Company's burden of proof was not discharged in that case. In **CROA 4392** and **SHP 726**, the Grievor was positive for marijuana using both urine and oral fluid; and positive for cocaine in the oral fluid sample.

[15] See also **AH861** for the cumulative impact of evidence which may include a positive urinalysis result.
[16] (200). No citation provided by the Company; at Tab 10; p 335 and 336 of the Company's materials/
[17] As in **CROA 4754**.

[59] The only case which had signs and symptoms of impairment that was provided to this arbitrator was *Re Coast Mountain Bus Co. and CAW Local 111,* provided by the Company. That case involved a transit operator who showed up late to work, in the clothes he had been wearing the day before and smelling of alcohol. He failed an alcohol screening test administered after an injury to a passenger. The operator administering the screening test noted he looked unkempt, his eyes were glassy and he smelled of alcohol. He blew between .5 and .99%, which was a "warn" in that province and so he received a 24 hour suspension of his driver's licence. His discharge by the employer was upheld.

[60] No other jurisprudence was provided to this arbitrator where "reasonable suspicion" testing occurred due to signs and symptoms of impairment, which led to discipline.

[61] Specific evidence will be crucial when considering cases involving allegations of residual impairment. Turning to that evidence, the Grievor's oral fluid result was negative. It is well-established this result meant the Grievor was not "acutely" impaired. However, that result does not foreclose a finding that the Grievor's ability to perform the safety-critical job was not – on a balance of probabilities standard – impaired by the residual effects of his cannabis use. All of the evidence must be considered. I am satisfied that in this case, the positive urinalysis test result does not "stand alone". There was other evidence to "corroborate" the positive test result and substantiate a concern the Grievor was impaired at work.

[62] The Grievor indicated that he had used marijuana three to four times a week, including approximately 11.5 hours prior to attending at work on February 26, 2021. There was expert evidence of Dr.Snider-Adler regarding residual impairment, including issues with concentration and attention, and anxiety and paranoia, which were exhibited by this Grievor. The Grievor was tested based on a "reasonable suspicion" of drug use *because* the Grievor demonstrated these objective symptoms of drug use to more than one Company officer, as summarized above. I have found no reasonable explanation for those unusual and bizarre signs and symptoms other than residual impairment from his admitted drug use. The Grievor himself considered his ability to perform his safety critical

functions that day were impaired and he should not be working as a result. This is evidence that can be considered. I am satisfied this was his recognition of his own impairment from the residual impact of drug use. The Grievor stated his colleagues had the same concerns, which is also relevant. Although hearsay, an arbitrator can accept hearsay evidence. I am satisfied the signs and symptoms displayed by the Grievor were consistent with symptoms of residual impairment from the Grievor's cannabis use.

[63] The Grievor also tested positive for marijuana metabolite at 119 ng/ml on the urinalysis test. That result is almost eight (8) times the cut-off level noted in the Company's Policy. While it can be understood without expert evidence that eight (8) times greater than a cutoff level is more than one (1) times greater than a cut off level, and while that is "some evidence", the Company did not provide expert evidence on the significance of that level, which impacts the weight to be given to that evidence.

[64] When all of the evidence is considered *in totality*, I am satisfied – on a balance of probabilities – that the Grievor was suffering from impairment from the residual or "crash" effects of his cannabis use during his workday on February 26, 2021 and that the Company had cause to discipline the Grievor for impairment from his cannabis use.

[65] That raises the second question from the *Wm. Scott* analysis, which is whether the discipline of discharge was warranted.

Wm. Scott Question 2: Was Dismissal a Just and Reasonable Response?

[66] Impairment is one of the most serious offences an employee can demonstrate in this industry. Arbitrators are united in considering that the presumptive remedy when the Company has established impairment – by any drug – is dismissal. The analysis regarding that presumption is outlined in **AH843** and is adopted in this Award.

[67] This presumption is not easily displaced.

[68] The Grievor is an employee with significant service twelve and half years (12.5). That is his only mitigating fact.

[69] This was not a situation involving provocation or resulting from a one time decision. The Grievor consumed marijuana of his own free will and had a habit of regular consumption.

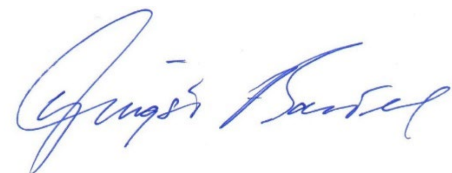
[70] This is also not an action for which there was remorse or which the Company can be satisfied this event will not be repeated, in view of the Grievor's consumption habit and the fact that – when speaking with the Driver Check personnel – the Grievor described the legalization of cannabis as a "windfall". This demonstrated a lack of insight regarding drug use. The legalization of cannabis is no more a "windfall" than the legalization of alcohol, which does not allow an individual to come to work when their abilities are impaired.

[71] The Grievor's discipline record is not mitigating and could be considered as aggravating. Just considering the last five years, he has had several suspensions (ranging from seven (7) days to twenty (20) days, as well as 30 demerits, which is halfway to dismissal under the Brown System).

[72] Considering all of these factors and giving due weight to the presumptive remedy of dismissal, I do not consider this to be an appropriate case to exercise my jurisdiction to relieve against the discipline imposed by the Company.

[73] The Grievance is dismissed. The discharge is upheld.

[74] While this decision is more expansive than those generally issued by this Office in this expedited process, it is hoped this analysis will assist the parties in resolving other grievances which may have similar facts and circumstances.



December 5, 2023

CHERYL YINGST BARTEL
ARBITRATOR