CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4857

Heard in Montreal, August 10, 2023

Concerning

CANADIAN PACIFIC KANASAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the 30-day suspension assessed to Locomotive Engineer D. Kessler.

THE JOINT STATEMENT OF ISSUE:

Following an alleged rules violation, Engineer Kessler was taken for Post Incident substance testing. The results of the test were positive for marijuana metabolite in his urine at 45 ng/ml and positive for marijuana parent in his saliva at 3 ng/ml.

Following an investigation, Engineer Kessler was issued a thirty-day suspension described as:

> "For your violation of CP Alcohol and Drug Policy #HR 203 and 203.1 as evidenced by your positive results in your oral fluid and urine when subjected to a post incident test on March 23, 2022 at Golden BC. Violations of: CROR General Rules Section G, CP Rule Book for Train and Engine Employees Item 2.2(d)(i),(ii),(iii), and Policy HR#203 and 203.1."

UNION'S POSITION:

The Union asserts that Engineer Kessler was never in possession of or under the influence of any substances while subject to duty and the Company failed to provide any evidence that would prove otherwise. The policies that the Company relies on to justify its actions in this case are the subject of a separate grievance and remain disputed by the Union.

The Union submits Mr. Kessler was forthright and honest from the time of the incident and throughout the investigation process and conducted himself in a professional manner. His test results were a clear indication he was not impaired at the time of the incident giving rise to the testing. Mr. Kessler was disciplined heavily for his role in an incident (under separate grievance), that led to the testing, and he should not be punished any further for his choice to utilize a legal substance while on his off-duty hours.

The Union contends that the Company is aware of all CROA arbitration awards such as CROA 4355, 4240, 4296 and AH 717, that all support our position that discipline is not appropriate for a positive urine test for THC. The issuance of an arbitrary 30-day suspension for violating a policy that has been ruled against on multiple occasions is unfounded and egregious.

The Union requests that the Arbitrator expunge the thirty-day suspension issued to Engineer Kessler and that he be made whole for wages and benefits lost with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

COMPANY POSITION:

The Company disagrees with the Union's positions and denies the Union's requests.

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

The Company's Policy relating to the 28 day ban is clear and has been clearly communicated to all employees. The Grievor made a choice to violate this Policy and Procedure. The Company took the necessary steps by drug testing the grievor after a significant work related incident occurred. Based on the Alcohol and Drug Policy and Procedures Canada, employees in a safety critical position are prohibited from consuming cannabis for a minimum 28 days before being on or subject to duty. The grievor knew the rules and still chose to consume marijuana.

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.

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.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) G. Lawrenson	**(SGD.) F. Billings**
General Chairperson	Assistant Director, Labour Relations

There appeared on behalf of the Company:

T. Gain	– Counsel CPKCR, Calgary
J. Bairaktaris	– Director Labour Relations, Calgary
L. McGinely	– Director Labour Relations, Calgary

And on behalf of the Union:

R. Church	– Counsel, Caley Wray, Toronto
G. Lawrenson	– General Chairperson, Calgary
C. Ruggles	– Vice General Chairperson, Calgary
R. Finnson	– Vice President, TCRC, location
B. Plant	– Local Chairperson, L? (on Zoom)
D. Kessler	– Grievor, location (on Zoom)

AWARD OF THE ARBITRATOR

Background

1. The grievor is a Locomotive Engineer with fourteen and a half (14.5) years of seniority with the Company.

2. He was subject to post incident testing following a March 23, 2022 incident.

3. The testing showed a positive result for cannabis in his oral fluid drug test at 3 ng/mL and in his urine test at 45 ng/mL.

4. The post incident testing and the results therefrom are not contested by the Union.

Update on Drug and Alcohol Policy and Procedures

5. The applicable version of the Company Alcohol and Drug Policy and Procedures was version 1.5, effective September 1, 2019 (see Tabs 1 and 2, Company documents). The Policy and Procedures are the subject of a policy grievance, to be heard beginning in October, 2023.

6. The new version of the Policy and Procedures makes multiple changes to the status quo. For the purposes of the present matter, the most significant changes are in the amended Procedures, where an oral fluid sample or a urine sample showing the presence of less than 10 ng/ml THC will result in a deemed violation of the 28-Day Cannabis Ban, with progressive discipline of between 15 and 30 day suspensions for a first time violation.

7. The Policy sets out the “screening” and “confirmation” processes for testing:

> * Screening
> All drug tests, whether urine, oral fluid or hair tests are first tested at the laboratory with a screening test called immunoassay testing. This test is quick, inexpensive, and it is a qualitative test, meaning that it is either negative or positive. This screening test screens for multiple different substances and metabolites (break down products) in that class of drugs and does not specify which one may be present. If the screening test is negative, no other test is conducted at the laboratory. The test is simply negative. If the screening test is positive, the test is sent for more detailed, specific, quantitative testing using mass spectrometry confirmation testing (either gas or liquid – also referred to as GC/MS or LC/MS testing).
>
> ** Confirmation
> Confirmation testing is precise and determines which specific substance is there (or not) and at what concentration (above a set cut-off level). This type of testing takes longer and is a more detailed and expensive test. If

this confirmation test is positive, it confirms the presence of a specific substance and the quantity (usually measured in ng/mL for urine and oral fluid testing).

8. The screening testing levels are set out in the Policy;

> "The laboratory-testing cut off levels for Cannabis/Marijuana in saliva samples will now be screened at 4ng/ml and confirmation testing for Tetrahydrocannabinol, THC (the psychoactive component of Marijuana/Cannabis) will be at 2ng/ml. Drug testing levels will be subject to ongoing review and adjustment to reflect minimum detection levels."
> (see page 2 of Tab 3)

ORAL FLUID SALIVA		
Drugs or classes of drugs	*Screening concentration equal to or in excess of ng/ml	**Confirmation concentration equal to or in excess of ng/ml
Marijuana (THC)	4	2

(See page 34 of Tab 3)

9. The screening and testing levels have therefore been changed from 10 ng/mL and 10 ng/mL to 4 ng/mL and 2 ng/mL, effective September 1, 2019. The grievor, through his Union, was informed of the change (see Tab 10, Company documents).

Facts arising from the investigation

10. Most of the facts in this matter are not contested. The grievor, Mr. Kessler was forthright in his responses to questions put to him during the investigation. The employer Brief has a helpful summary of the uncontested facts:

> The Investigation
>
> 41. During Mr. Kessler's statement on or about April 5, 2022 with respect to his rule violations, he admitted:
>
> i. familiarity with the rules and regulations as contained in the CROR, GOI, Train and Engine Safety Rule Book, Time Table 42 and the current Pacific Division Summary Bulletin, and all Operating Bulletins and Company Policies as they pertain to his duties as an Engineer, including:
>
> (i) Item 2.2(a)(c)(v)(vi)(viii), (d) which reads;

2.2 WHILE ON DUTY

(a) Safety and a willingness to obey the rules are of the first importance in the performance of duty. If in doubt, the safe course must be taken.

(c) You must:

(v) be conversant with and comply with this manual, the CROR, the GOI and each applicable time table, operating bulletin, safety rule, policy and instruction;

(vi) provide every possible assistance to ensure every rule or instruction is complied with, contact the proper authority for clarification if in doubt and promptly report any violation;

(viii) be vigilant to avoid the risk of injury to yourself or others;

(d) It is prohibited to:

(i) use intoxicants or narcotics while subject to duty, or to possess or use such while on duty or when an occupant of facilities furnished by, or which will be paid for by the company;

(ii) use mood altering agents subject to duty, or to possess or use while on duty, except as prescribed by a doctor;

(iii) use drugs, medication or mood-altering agents, including those prescribed by a doctor, which, in any way, will adversely affect your ability to work safely, while subject to duty, or on duty. You 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 your ability to work safely.

(ii) CROR General Rule G, which reads;

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

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

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

(iv) Employees must know and understand the possible effects of drugs, medication or mood-altering agents, including those prescribed by a doctor, which, in any way, will adversely affect their ability to work safely.

(iii) Appendix E, in Item 1.2 of HR203 Policy which states;

Employees also have a responsibility to maintain a safe workplace and minimize the risk of unsafe and/or unsatisfactory performance due to the use or adverse effects of alcohol, medications, cannabis/cannabidiol (CBD)/marijuana (whether for medical or recreational use), legal, illegal or illicit drugs or the use of any mood-altering substance, referred to afterwards in this document and in the Procedures as "Alcohol and/or drugs.

(iv) Appendix E, in Item 2.7 of Policy HR203 which states;

All employees are accountable for their actions and are expected to comply with the Policy and Procedures, including those who may have an alcohol and/or drug use problem.

Employees who have an alcohol and/or drug use problem or an emerging problem are required to seek advice, to follow appropriate treatment and to disclose appropriately within CP their issues including any restrictions and/or limitations. This ensures that appropriate restrictions and limitations can be implemented before a workplace incident occurs before safe job performance is impacted or before violations of this Policy and Procedures occur.

(v) Appendix E in Item 4.3 that states that;

Post Incident alcohol and drug testing may be required after a significant work-related incident; a safety related incident or a near miss as part of an investigation.

(b) He was called for duty on March 22, 2022 as an Engineer at 2145 to work Train 883-067. He reported for duty at Sparwood BC;

(c) It is not disputed that Locomotive Engineer is a Safety Critical position;

(d) To being distracted when he and his crew performed a job briefing during the review of the Windermere Sub TGBO limits and missed the fact that the limits were not correct, specifically that the Windermere Sub limits did not go to SNS Purcell and only went to mile 22.3;

(e) that a "mistake happened and we missed the limits";

(f) that he and his crew operated 883-067 from mile 22.3 Windermere Sub to Fairmont or approximately 32.28 miles without the correct TGBO covering these limits;

(g) that by not having the proper limits on his TGBO covering the specific territory he operated over, he may not have been aware of serious concerns governing the safe operation of his movement such as GBO slow orders and Rule 42 Engineering track protection;

(h) that any non-negative Breath, Oral Fluid or Urine Point of Collection test result is consideration for removal from service;

(i) that Appendix E in Item 3.4 of Policy HR203 states that disciplinary action up to and including dismissal will be taken where the Company has determined that violations of the Policy and Procedures have occurred;

(j) that 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. This requires that all employees remain free from the adverse effects of alcohol and/or drugs including acute, chronic, hangover and after-effects of such use;

(k) that employees who are qualified in the CROR are governed by those rules including Rule G. The requirements of the Alcohol & Drug Policy and Procedures align with and supplement the requirements of Rule G, which include:

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

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

iii. The use of drugs, 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.

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.

(l) that the *Criminal Code* of Canada makes it an offence to operate railway equipment in a manner which is dangerous to the public, and to operate or assist in the operation of railway equipment while impaired by alcohol and/or drugs. A police officer or other peace officer may require a person to provide a blood, urine or breath sample as part of an investigation into possible impairment from alcohol and/or drug use, including cannabis. Employees must comply immediately with all such requirements;

(m) that he consented to provide breath, urine, and oral fluid swab samples in accordance with the Canadian Pacific Alcohol and Drug

test program, and such samples were obtained from him on March 23, 2022 at 09:11 am for the purpose of post incident drug and alcohol testing, yielding the following results:

i. Breath Alcohol Test – Negative;
ii. Oral Fluid Drug Test – Positive result for marijuana, with a quantitative level of 3 ng/mL;
iii. Urine Drug Test – Negative for the Point of Collection (**POCT**) Drug Test, and Positive for the Non-DOT Drug Test, with a quantitative level of 45 ng/mL;

(n) that the results of the drug and alcohol tests from the samples obtained from him on March 23, 2022 confirm the presence of a potentially intoxicating substance in his body at the time of testing;

(o) that he consumed cannabis on Tuesday March 22, 2022 at approximately 5AM MDT, approximately 17 hours and 45 minutes prior to reporting for duty;

(p) that the positive result for cannabis in his oral fluid drug test of 3 ng/mL was above the cut off level of 2 ng/mL as required by the Canadian Pacific Alcohol and Drug test program;

(q) that his use of cannabis on March 22, 2022 represented a violation of the Alcohol & Drug Policy and Procedures;

(r) that a positive test for cannabis constitutes a violation of Policy and Procedures;

(s) that as a Company responsible for the movement of goods in a safety-critical environment, CPKC has an obligation to eliminate the risk of impairment, or residual effects from the consumption of cannabis in the workplace in the interests of public safety and that of its customers and employees;

(t) that he does not regularly consume cannabis, and the last time he did was approximately fifteen (15) years ago.

A. Did the grievor breach any or all of CROR General Rules Section G, CP Rule Book for Train and Engine Employees Item 2.2 (d) (i, ii and iii) and HR 203 Alcohol and Drug Policy and HR 203.1 Alcohol and Drug Procedures?

B. Was the Grievor Impaired and is the Discipline Appropriate?

Submissions of the parties

Company submissions

11. The Company notes that the grievor could have been called for duty as early as 12:00 on March 22, some 7 hours after he admits having consumed cannabis. He in fact reported for duty some 17 hours and 45 minutes after his last usage of cannabis.

12. The Company notes that the grievor committed a major-life threatening violation, operating under an incorrect Tabular General Bulletin Order. The matter is set out at detail by Arbitrator Yingst Bartel in **CROA 4837**, in which she upholds discipline against the grievor, but reduces his suspension from 40 to 20 days.

13. The Company argues that a positive oral swab test has been uniformly accepted as a reliable determinant of recent substance use and impairment warranting discipline up to and including termination. It argues that a 30 day suspension to the grievor is reasonable in the circumstances. It relies on **CROA 4742, 4775, 4751** and **3733**.

14. The Company cites a 2019 expert report from Dr. Snider-Adler, who states:

> Scientific evidence demonstrates that drug use and cannabis use specifically, has a continuing impact on an individual's decision-making ability. For a safety-sensitive/critical employee, this continuing impact on decision-making ability can have life-threatening consequences. At page 13 of her expert report, Dr. Snider-Adler states:
>
> > 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 the time of impact are unpredictable and non-linear, differentiating cannabis from alcohol. This is part of the reason that, despite legalization of recreational cannabis, there continues to be a concern about the use of cannabis for those individuals working in safety-critical and safety-sensitive workplaces.

15. The Company highlights the fact that the grievor knowingly breached the Company's Drug and Alcohol Policy and that the discipline imposed is both necessary and reasonable.

Union Submissions

16. It argues the grievor was forthright in the investigation and admitted cannabis use late Monday March 21 and early Tuesday March 22, while the grievor was on strike.

17. The grievor did not in any way feel impaired and was rested and fit for duty.

18. The union cites **CROA** cases **4789**, **4792** and **Ad Hoc 717** and **711B**, in which the grievors all had 3 ng/mL testing results, identical to the present grievor, none were found to be impaired and all were reinstated.

19. The Union notes that the levels found were not only at less than one third of the level set by the previous Procedure, but were below the screening level set by the current Procedure. It argues that if the level is below the screening level, the Company can hardly be concerned about issues of impairment.

20. The Union argues that the Policy could not apply in any event, as the grievor was on strike at the time of his consumption of cannabis.

21. The Union argues that CROA jurisprudence is consistent that the mere presence of drugs or alcohol in the system of an individual is not determinative of impairment (see **CROA 4754**, **4799** and **4826**). It argues that the jurisprudence is consistent that a stand alone positive drug test cannot be just cause for discipline (see **CROA 4400**, **4365** and **4399**).

22. The Union concludes that the Company has not met its onus of establishing clear, cogent and convincing evidence that the grievor was impaired or deserving of discipline.

Decision

23. CROA jurisprudence has repeatedly noted that the railway industry is a highly safety sensitive one, where the Company, the Union and the employee all share a responsibility. Each case, however, necessarily turns on its own facts. As Arbitrator Yingst Bartel noted in **CROA 4826**:

> 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 work[1].
>
> 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).
>
> 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

[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.

> the employer's favour, even for conduct which the individual chooses to engage in on their own time[2].
>
> 31. In determining impairment, each case will turn on its own facts.

24. The facts in this matter are unique.

25. The grievor consumed cannabis while he was on strike. However, the Union and the Company had already signed a Return to Work Agreement a day earlier indicating a return to operations as of noon, March 22, 2022. He therefore knowingly consumed cannabis on the day he was to work, some eighteen (18) hours after his last usage. He could have been called, and was therefore "subject to duty" some seven (7) hours after his last consumption of cannabis. This demonstrates a shocking lack of judgment on the part of the grievor, working as he does, in a safety critical environment.

26. The issue remains, however, was the grievor impaired when he reported for duty? His testing revealed THC levels at 3 ng/mL on his oral swab and 45 ng/mL on his urine test, both below the screening levels set out in the Procedure. The grievor maintains that he was rested and fit for duty.

27. The Company relies on the report of Dr. Snider-Adler, as to the after-effects of cannabis consumption. However, that report is from 2019 and relies on studies from several years ago. Her opinions were not tested in cross examination in this matter.

28. Her opinions were directly tested in **AH 717**, heard before Arbitrator Moreau (see Tab 16, Union documents). He sets out the debate between the experts on oral fluid levels and impairment:

> "A central area of debate between the two experts is the time the cannabis remains in the body system in order to reach the threshold of "at or above" the cut-off level of 2 ng/mL…Dr. Snider-Adler's conclusion, based on her analysis indicates recent cannabis use (12-24 hours) by the grievor. That recent use, as demonstrated by the readings from the oral fluid test, leads

[2] See for example **AH729**, which lists multiple CROA cases for this point, including **CROA 4584**

> Dr. Snider-Adler to conclude that "…there was high likelihood of impairment at the time of the test".

29. Dr. Rosenbloom disagreed: "I also disagree with the inference that should a person have smoked within 12-24 hours they would still be impaired and I have reviewed the literature that brings me to that conclusion"

30. The Arbitrator ultimately came to the conclusion that he preferred the opinions of the Union expert, Dr. Rosenbloom:

> "With all due respect to Dr. Snider-Adler I find the conclusions of Dr. Rosenbloom to be more persuasive on the facts of the case. I am more convinced by Dr. Rosenbloom's supporting studies which indicate that oral THC can remain in the oral cavity for some 24, or even 36 hours, after an oral swab test…Neither the results of the oral fluid test, standing alone, nor the actions or testimony of the grievor lead on balance to a conclusion of recent cannabis use, which is a requisite foundation for any finding of impairment".

31. Arbitrator Moreau ultimately concludes on the issue of oral swab testing and impairment:

> "The facts in this case are different in that there is no admission of recent use by the grievor; no evidence of a combined positive oral swab and urine test; and, what I find to be persuasive expert evidence of Dr. Rosenbloom over that of Dr. Snider-Adler regarding the absence of a reliable link between an oral swab test reading of 4 ng/mL (using a cut-off of 2 ng/mL) and impairment".

32. Clearly the facts in **AH 717** are different from the present matter. Here there is no contestation about recent cannabis use. That is admitted by the grievor. However, the question of impairment and the evidence of low levels of THC in an oral swab reading remains. Arbitrator Moreau found on the basis of testimony from the two experts, that there was no such link.

33. The issue of impairment and the new screening and confirmation levels set out in the 2019 procedures was also squarely before Arbitrator Cavé in **CROA 4789** (see Tab 14, Union documents). In that case, the grievor admitted having consumed cannabis

14.5 hours before reporting for duty. After a post-incident test, he was found to have an oral swab level of 3 ng/mL. He was not responsible for the safety incident which resulted in the test.

34. Ultimately, she found that she would not depart from the long line of CROA jurisprudence which establishes that impairment is a necessary precursor to discipline. She also found that it was appropriate to await the outcome of a full examination of the question in the upcoming policy grievance on the 2019 Policy and Procedures:

> "In the circumstances and in the absence of a ruling on the pending policy grievance relating to the 2 ng/mL revised cut-off level for impairment, I have no reason to depart from the relevant jurisprudence of this Office, which has consistently recognized 10 ng/mL as a cut off indicative of impairment. The Grievor's quantitative level of 3 ng/mL alone is not proof of impairment."

35. Arbitrator Cavé came to a similar conclusion in **CROA 4792** (see Tab 15 of the Union documents), in which the grievor's oral swab test showed a 3 ng/mL level:

> 19. First, the evidence is that the Grievor did not use marijuana while subject to duty, as prohibited by Rule G, paragraph (i). He consumed marijuana approximately one hour after a tour of duty, knowing he was on 24-hour rest.
> 20. Secondly, there is no evidence that the use of marijuana adversely affected the Grievor's ability to work safely, as prohibited by Rule G, paragraph (iii). The Company argues that the very presence of marijuana in the Grievor's system demonstrates that he was unfit to work safely, without regard to whether or not he was impaired. I cannot accept that position. This Office has repeatedly stated that the sole presence of drugs or alcohol in an employee's system is not sufficient to warrant discipline. Being impaired or not in the context of drug use is what determines whether a person is fit to work safely or not. For the purposes of the workplace, "being under the influence of drugs" must also be subject to an analysis on impairment. Contrary to the Company's assertion, impairment is the key element to determining this case.
> 21. Here, the Grievor's drug test result does not provide evidence of impairment, as his quantitative level of 3 ng/ml was well below the applicable cut-off of 10 ng/ml, which was in effect at the time of the incident, and which has been consistently used by this Office. The revised cut-off level of 2 ng/ml is currently the subject of the policy grievance referenced above. Unless and until this Office's jurisprudence evolves by way of

> thorough scientific review, I see no reason to depart from the consistent principles established and followed by this Office.
>
> 22. Moreover, the Company has presented no behavioural or appearance indicators of the Grievor's alleged impairment. In fact, as pointed out by the Union, the Grievor spent considerable time with Company Officers on the day of the incident and none of them questioned his fitness for duty, or otherwise suspected impairment.

36. The matter before Arbitrator Cavé does differ from the present matter, in that the earlier 10 ng/mL continued to apply and the grievor had last consumed cannabis some 23 hours before his next tour of duty. Here the new level of 2 ng/mL was in place and the grievor had last consumed cannabis some 18 hours before he reported for duty. However, the reasoning of Arbitrator Cavé remains persuasive.

37. The Company has not established that his appearance or behaviour were indicative of impairment. The oral swab and urine testing levels found in the grievor have not been established as being proof of impairment, in and of themselves. The expert report provided by the Company was both generic and from 2019. It is my view that the Company has not established on the facts presented in this matter that the grievor was impaired.

38. Given this finding on impairment, I now consider the impact on the allegation of violations of CROR General Rules Section G, CP Rule Book for Train and Engine Employees Item 2.2 (d) (i, ii and iii) and HR 203 Alcohol and Drug Policy and HR 203.1 Alcohol and Drug Procedures. These matters are set out in the Company brief at paragraph 41a.

39. Rule G, s. 3.1.5 i refers to "the use of narcotics by employees subject to duty…is prohibited". Here, the grievor did not take narcotics while subject to duty. Sub-section iii refers to "the use of drugs…which, in any way, will adversely affect their ability to work safely… is prohibited". Again, if the grievor is not impaired, his ability to work safely is not affected. Appendix E, in Item 1.2 of HR203 Policy states that "Employees also have a responsibility …to minimize the risk of unsafe and/or unsatisfactory

performance due to the use or adverse effects of …cannabis". Again it has not been established that there has been unsafe or unsatisfactory performance due to cannabis.

40. Impairment is the thread which runs through the jurisprudence as being the dividing line between acceptable and unacceptable levels of drug or alcohol consumption. The Company, the public and fellow employees are entitled to unimpaired railway employees.

41. We do not have sufficient evidence that this grievor was impaired.

42. It is entirely possible, however, that the Company will establish in the upcoming policy grievance or other cases, that the new, lower confirmation levels are indicative of impairment. A full hearing, with appropriate expert witnesses on both sides, together with a fulsome review of the most recent[3] scientific evidence behind the appropriate confirmation levels is imperative. We simply do not have that clear and cogent evidence in this matter.

43. Accordingly, the grievance is upheld.

44. I remain seized of any issues concerning the implementation of this Award.

September 18, 2023

JAMES CAMERON
ARBITRATOR

[3] According to the National Library of Medicine, in 1950, total medical knowledge doubled every 10 years. In 2020, it is estimated that total medical knowledge doubles every 73 days.