CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4874

Heard in Montreal, October 17, 2023

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the dismissal of Conductor L. Morley, of Sparwood, British Columbia.

JOINT STATEMENT OF ISSUE:

Following an investigation, Mr. Morley was dismissed on March 8, 2022, for the following:

"Your refusal to participate in post incident substance testing while working as the Conductor on Train 881-018 on the Cranbrook Subdivision on January 28, 2022; a violation of CP's Alcohol and Drug Policy HR 203 and CP Procedure HR 203.1."

Union's Position:

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 the negative oral fluid sample provided confirmed, and the Company agreed, there was no violation of General Rule G. The only negative inference to be drawn from the refusal to provide a urine sample is a non-negative urine test. A non-negative urine test has no basis in determining impairment; therefore, there is no just cause for discipline.

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

The Union submits that Mr. Morley was improperly held from service in violation of Collective Agreement Article 39.06.

The Union requests that Mr. Morley be reinstated without loss of seniority and benefits, and that he be made whole for all lost earnings with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

Company's Position:

The Company disagrees and denies the Union's request.

The Company maintains the Grievor's culpability as outlined in the discipline letter was established following a fair and impartial investigation and that the Grievor was properly held out of service, pursuant to Article 39 of the Consolidated Collective Agreement and Company policy and process. Discipline was determined following a review of all pertinent factors, including those that the Union describes, the severity of the violation and the Grievor's service and

discipline record. The Company's position continues to be that the quantum of discipline assessed was just, appropriate and warranted in all the circumstances.

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

FOR THE UNION:
(SGD.) D. Fulton
General Chairperson, CTY-W

FOR THE COMPANY:
(SGD.) F. Billings
Assistant Director, Labour Relations

There appeared on behalf of the Company:

D. Zurbuchen	– Manager Labour Relations, Calgary
A. Cake	– Manager, Labour Relations, Calgary

And on behalf of the Union:

D. Ellickson	– Counsel, Caley Wray, Toronto
D. Fulton	– General Chair, CTY-W, Calgary
J. Hnatiuk	– Vice General Chair, CTY-W, Calgary
B. Knight	– Local Chair, Sparwood, *via Zoom*
L. Morley	– Grievor, Sparwood, *via Zoom*

AWARD OF THE ARBITRATOR

Context

1. The grievor, Conductor Logan Morley, was terminated for failure to provide a urine test in post incident testing, a violation of CP's Alcohol and Drug policy HR 203 and CP Procedure HR 203.1. He had provided a breath and oral fluid sample, which were negative. At the time of his termination, he had approximately four years of service and a discipline record which included a 30 day suspension.

Position of the Parties

Company Position

2. The Company submits that post incident testing was entirely appropriate, as there had been an entry by his train into the limits of a Track Occupancy Permit without authority, thereby endangering a night utility crew.

3. The refusal to provide a urine test is the misconduct which warrants discipline, not the test result itself. Section 3.4. of the Policy notes that disciplinary action up to and including dismissal will be taken where violations of the Policy or Procedure have occurred. Section 4.6 of the Alcohol and Drug Procedure notes that a refusal to test is a

violation of the Policy and Procedure. If there had been any doubt, the grievor had to "obey now, grieve later".

4. The Company submits that a non-negative urine test would not only show that the grievor had consumed marijuana. It could also have shown the existence of other substances, as was the case in the Derek Adams Ad Hoc award.

5. Finally, the Company objects to the Union advancing an argument concerning a failure to provide a fair and impartial investigation, when this was not brought forward in the JSI.

Union Position

6. The Union contends that there was not a fair and impartial investigation, based on the questions posed and the delay before the investigation occurred. Accordingly, the discharge should be considered void ab initio.

7. The Union submits that the grievor did provide an oral swab sample, which is more precise than urinalysis. It notes that a positive urine test, standing alone, is not proof of impairment.

8. It notes that there is no allegation of impairment. It submits that if there is no impairment, there can be no discipline.

9. It submits that the Company's own Policy does not contemplate dismissal for a refusal to test, but merely a "negative inference" that the test would be positive. This was reiterated by Superintendent Gingras who informed the grievor that if he didn't do the test there would be an inference that the test would have been positive.

10. In the alternative, the Union submits if the refusal to test is considered insubordination, then the discipline should not be termination, but rather 10 demerits, as was the case in SHP 618.

Issues

A. Is the Union entitled to argue that there was not a fair and impartial investigation?

B. Were there grounds for discipline?

C. If there were grounds for discipline, was termination appropriate? If not, what discipline was appropriate?

A. Is the Union entitled to argue that there was not a fair and impartial investigation?

11. The Union argues that there was not a fair and impartial investigation, as the Notice to Appear was too broad, certain questions of the Investigating Officer were leading and would result in self-incriminating answers, and that there was not a timely investigation. As such, it argues that the discipline should be found to be void ab initio.

12. The Company objects to the Union's submissions, beginning at paragraph 42, to the effect that there was not a fair and impartial investigation. It submits that this argument was not part of the JSI and that the Union is not entitled to bring forward this argument in its Brief.

13. The Company notes that while this allegation was present in the initial draft JSI (see Tab 3, Company Reply documents), it is not found in the signed JSI (see Tab 2, Company documents).

14. The Company argues that the expansion of the Union arguments is contrary to the CROA Rules and should not be allowed.

Decision

15. The CROA Rules read as follows:

> 6(A) disputes respecting the meaning or alleged violation of any one or more of the provisions of a valid and subsisting collective agreement between such railway and bargaining agent, including any claims,

related to such provisions, that an employee has been unjustly disciplined or discharged; and;

7. A request for arbitration of a dispute shall be made by filing notice thereof with the Office of Arbitration not later than the first day of the month preceding that in which the hearing is to take place and on the same date a copy of such filed notice shall be transmitted to the other party to the grievance.
A request for arbitration respecting a dispute of the nature set forth in section (A) of clause 6 shall contain or shall be accompanied by a "Joint Statement of Issue".

10. The signatories agree that for the Office to function as it is intended, good faith efforts must be made in reaching a joint statement of issue referred to in clause 7 hereof. Such statement shall contain the facts of the dispute and reference to the specific provision or provisions of the collective agreement where it is alleged that the collective agreement had been misinterpreted or violated. In the event that the parties cannot agree upon such joint statement either or each upon forty-eight (48) hours notice in writing to the other may apply to the Office of Arbitration for permission to submit a separate statement and proceed to a hearing. The scheduled arbitrator shall have the sole authority to grant or refuse such application.

14. The decision of the arbitrator shall be limited to the disputes or questions contained in the joint statement submitted by the parties or in the separate statement or statements as the case may be, or, where the applicable collective agreement itself defines and restricts the issues, conditions or questions, which may be arbitrated, to such issues, conditions or questions. The Arbitrator's decision shall be rendered in writing, together with written reasons therefor, to the parties concerned within 45 calendar days following the conclusion of the hearing unless this time is extended with the concurrence of the parties to the dispute, unless the applicable collective agreement specifically provides for a different period, in which case such different period shall prevail.
The decision of the arbitrator shall not in any case add to, subtract from, modify, rescind or disregard any provision of the applicable collective agreement.

16. The CROA process agreed to by the Parties, envisages “good faith efforts must be made in reaching a joint statement of issue …”. The importance of this effort is underlined by the fact that an Ex Parte Statement of Issues requires the approval of the

arbitrator (Rule 10). Such good faith efforts are designed to narrow and particularize the disputes between the parties, in order to ensure an efficient and brief hearing (Rule 11). All of these efforts would be for naught if parties could then bring forward new arguments not found in the JSI.

17. In **CROA 4744**, Arbitrator Hornung deals with a similar issue and objection:

> 9. As discussed in CROA 4739, it is vital to the efficient operation of the CROA process that the parties be compelled to abide by the laudable procedures they agreed to in the CROA MOA, to restrict their submissions and documentation to the specific facts and issues contained in the JSI or Ex Parte Statements – where such Ex Parte's have been appropriately filed pursuant to Article 10 of the CROA MOA.
> 10. that is not to say in filing a JSI or Ex parte (pursuant to Article 10) parties can throw in the proverbial "kitchen sink" so as to cover any issues that might arise or that they prefer to leave open to argue before the CROA board. The required mutual agreement for a JSI – and the subsequent necessity to comply with Article 10 in order to file an Ex Parte – are designed to provide checks and balances to prevent that from occurring. The provisions related to JSI's and Ex Parte's clearly demonstrate that the signatories to the CROA MOA intended the parties to narrow in and focus, on the relevant determinative facts, issues, and arguments as envisaged by the CROA process.
> 13. The Company's objections to the remaining issues raised by the Union are well founded. The Union having failed –in the JSI – to identify the remaining issues, as objected to by the Company, is precluded from raising them at arbitration.

18. Here there is nothing in the signed version of the JSI relating to a failure to provide a fair and impartial investigation. The Union is accordingly precluded from advancing that argument at arbitration.

19. Even if I am wrong in this, I would not have found the investigation to be unfair or partial. The Notice to Appear is not, in my view, "hopelessly broad". On the contrary, it points to: "Your Post Incident Testing on January 29, 2022 conducted at Sparwood BC, specifically an alleged violation of CP Alcohol and Drug Policy (Canada) #HR203." It refers to Appendix C, Email from Alcohol Drug Program Admin dated Friday February 4, 2022 which details a refusal to take the Urine Drug Test. It also refers to Appendix E

and F, the Alcohol and Drug Policy and Procedure and Appendix G, Memo to File from Supt. Chris Gingras, which reviews his exchange with the grievor concerning the urine test refusal. The grievor was clearly on notice about the purpose and content of the upcoming investigation.

20. Nor do I agree that there was evidence of a closed mind of the Investigating Officer. In **CROA 2934,** the Investigating Officer called the grievor a liar and shouted at him repeatedly. There is nothing akin to those issues here. The three questions to which the Union objects are part of more than fifty questions posed by the IO. I would not have found evidence of a biased process.

21. Finally, I cannot agree that a 34 day delay between the incident and the investigation makes the question untimely. Nowhere is there any suggestion of failing memories or any other prejudice to either party.

22. Accordingly, I would not have found the investigation to be unfair or partial.

B. Were there grounds for discipline?

23. For the reasons which follow, I find there were grounds for discipline.

24. The Union argues that the Company never took the position that the grievor was impaired at the time of the infraction. Neither the termination letter nor the JSI make any allegation that the grievor was impaired. Indeed, the breathalyzer and oral swab tests, which are both more accurate than urinalysis, confirm that the grievor was not impaired.

25. The Union argues that the Policy and Procedures foresee a “negative inference” if an employee refuses to do testing. Such a negative inference would be a positive result on the urinalysis. The grievor has already admitted to using marijuana some two weeks before the incident (see Q and A 34). However, an extremely lengthy line of CROA cases has uniformly rejected a finding of impairment based solely on a urinalysis

test (see para. 63, Union Brief). The same cases have found that discipline is not appropriate, as impairment cannot be established. The Union therefor argues that there should be no discipline in the present matter.

26. The Company argues that a refusal to test is a violation of both the Policy and Procedure and as such, merits discipline.

27. The Company points to Ad Hoc D. Adams, in which Arbitrator Yingst Bartel found that a urinalysis showing the presence of cocaine metabolite, did not stand alone when considering whether the grievor was impaired at the time of the incident. The grievor in was found to be impaired by being in the "crash" phase of having ingested cocaine some 24 hours earlier and was properly terminated. Here, the refusal to test precluded the Company from establishing the presence of drugs other than the admitted marijuana.

28. The relevant portions of the Policy and Procedure read as follows with respect to the obligation to test and the consequences of a refusal to test:

> 3.1 CP recognizes that the use of alcohol and/or drugs can adversely affect judgement, work performance, the work environment and the safety of employees and the public, including members of the communities in which we operate. Failure to comply with the Policy and Procedures can also place integrity and safety of CP facilities and operations at risk.
> 3.4 Disciplinary action up to an including dismissal will be taken where CP has determined that violations of the Policy and Procedures have occurred.
> 4.6 Refusal to Participate in an Alcohol and/or Drug Test – "Refusal to Test"
> Refusing to participate in an alcohol and/or drug test is a violation of the Policy and Procedure. Refusal to Test violations include, but are not limited to the following:
> - failure of an employee to report directly for a test;
> - Refusal to submit to a test;
> - Failure to provide a valid specimen;
> - An attempt to tamper with a test sample;
> - Refusal to agree to disclosure of a test result in accordance with this Procedure;

> • Attempting to avoid a test by failing to report involvement in an incident which may require testing or by avoiding management following involvement in an incident;
> • Failing to advise when released from hospital if testing is delayed for medical reasons;
> • Failing or refusing to attend a medical assessment as required under the Policy and Procedure;
> • Any attempt to disrupt the testing process as described in the Policy and Procedure.
>
> Employees cannot be forced to submit to an alcohol and/or drug test as it requires informed consent. However, refusal to submit to an alcohol and/or drug test is considered a violation of the Policy and Procedure. If an employee refuses to submit to an alcohol and/or drug test, management must document the events surrounding the Policy and Procedures violations. This documentation should include documentation about the triggering incident, identification of any witnesses, and observations about the employee's condition at the time or around the time of the triggering incident. Refusal to test may be taken as a negative inference by the Company in its subsequent investigation.

29. The Policy clearly states that discipline up to and including dismissal can be imposed for a violation of the Policy or Procedure.

30. The Procedure states that "Employees cannot be forced to submit to an alcohol and/or drug test as it requires informed consent". The Procedure continues: "However, refusal to submit to an alcohol and/or drug test is considered a violation of the Policy and Procedure." The Procedure later continues: "Refusal to test may be taken as a negative inference by the Company in its subsequent investigation."

31. The Procedure is clear that a refusal to test is a violation of the Policy and Procedure. It goes further and states that the refusal may be taken as a negative inference during the investigation. A plain reading of the Procedure indicates that a refusal, in and of itself, is a violation of the Policy and Procedure. The fact that there could be a further consequence, that of a negative inference, does not negate the initial violation.

32. Here, the grievor clearly refused a urine test. The Company is entitled to test following an incident. A urine test can provide useful information in some cases (see Ad Hoc D. Adams). I find that the refusal is a violation of the Policy and Procedure and therefore the Company has established grounds for discipline.

C. If there were grounds for discipline, was termination appropriate? If not, what discipline was appropriate?

33. The Company submits that the refusal to test was the grievor's third major infraction and his fourth disciplinary assessment in his three years of service. It submits that this short tenure and extensive disciplinary record make the decision to terminate a reasonable one.

34. The Company cites a number of cases which support this disciplinary decision.

35. In **CROA 3609,** the termination of a twenty-one (21) year employee was upheld by Arbitrator Moreau for a refusal to test and a lack of frankness by the grievor.

36. In **CROA 4364**, Arbitrator Albertyn imposed a disciplinary suspension without compensation until the employee would be eligible for his pension after thirty-four (34) years of service. The arbitrator found that the employee had acted wrongfully when he refused the test.

37. In **CROA 4487**, Arbitrator Sims dismissed the grievance of an employee on a Last Chance Agreement who refused to test. The arbitrator found the grievor less than credible.

38. In **CROA 4476**, Arbitrator Flynn upheld the termination of a fourteen (14) year employee who refused testing prior to returning to a safety sensitive position.

39. In **CROA 4378**, Arbitrator Silverman reinstated without compensation a thirty-three (33) year employee who refused testing.

40. The Company relies on **CROA 3841** for the Safety Critical nature of the industry and the role as a running trades employee as relevant considerations when determining quantum of discipline.

41. Finally, it cites *Sheet Metal Workers' International Association, Local 473 v. Bruce Power LP,* 2009 Canlii 31586 (ON LRB) for the proposition that arbitrators should not disturb an assessment of discipline if the penalty imposed is within the range of appropriate assessments.

42. The Union notes that the grievor's discipline record is over stated by the Company, due to certain discipline falling off (see para 15, Union Reply Brief).

43. The Union submits that the Company's cases are distinguishable, as none of them deal with the case of an employee who did provide breathalyzer and oral swab tests, while refusing a urinalysis. It further submits that many of the cases involve other evidence of impairment (**CROA 4028**) or a refusal of all testing (**CROA 4364**).

44. The Union primarily relies on SHP 618, in which Arbitrator Albertyn imposed 10 demerits on an employee who provided a breathalyzer sample but refused urinalysis. There, the arbitrator found:

> 33. In this context, the Grievor was not entitled to refuse to undergo urinalysis because, by doing so, he impeded the Company's investigation into the cause of the accident. His refusal to undergo the test was therefore an act of misconduct because it prevented the Company from doing a thorough analysis of what might have caused a serious accident.
> 34. What is the appropriate discipline for the Grievor's refusal? In some circumstances a termination will be warranted for a refusal to undergo urinalysis. This is not such a case. The Grievor's misconduct in refusing to undergo the test was ameliorated because he had shown himself to have had no trace of alcohol in his system. There were no other signs of impairment. He is also not a person who has shown any signs of drug or alcohol dependence or abuse and it was at least arguably reasonable for him to have believed, at the time, that the urinalysis was unnecessary

> and excessive. He was also significantly influenced by the Union in refusing. (This factor will, of course, not be mitigation in future because the union is on notice that a urine test is legitimate in cases of a significant, unexplained accident). In these circumstances, I find that the Grievor's refusal to undergo urinalysis should result in him being issued 10 demerits.

45. The Union further relies on Vancouver Shipyards Co. Ltd. v CMAW, Local 506 Marine and Shipbuilders (see Tab 18, Company documents), in which Arbitrator McPhillips reduced a 10 day suspension to 6 days for an employee who refused testing. The arbitrator held the following:

> In my view, and contrary to the Union's suggestion, a failure to comply with drug and alcohol testing requests is not an action where the normal rules of progressive discipline apply and simply merits a "verbal warning" as a first step. Importantly, there is the deterrence aspect to consider here: Steward v. Elk Valley Coal Corp. (2017) SCC 30 (S.C.C.); Fraser Surrey Docks. 147 C.L.A.S. 37 (Sullivan). If only very minor discipline was imposed in a situation such as this, an employee with a clean record (as was the case with the Grievor) or even an acceptable disciplinary history, who actually was impaired at work and was involved in a significant incident, could simply refused to take a test and incur "a slap on the wrist" rather than submit to the test and potentially get a positive result with all that might follow. That approach would have the practical effect of destroying the purpose of many sections of drug and alcohol polices. It would also undermine both the need for timely compliance with a demand for a test and the importance of following the "comply now – grieve later" principle in drug and alcohol cases. Therefore, discipline with respect to violations of a drug and alcohol policy are somewhat unique and should be treated accordingly.

46. Here, I find that termination is an excessive penalty in the circumstances. This was not a case of a refusal of all testing, or where there were other signs of impairment. The grievor was forthright during the investigation, unlike in CROA 4487 and 3609. While his discipline record is not clean, it does not disclose any other drug or alcohol related discipline, or any other refusal of testing.

47. I find the analysis in SHP 618 by Arbitrator Albertyn compelling, as set out in paragraph 44 above. The arbitrator imposed discipline of 10 demerits for a refusal to

undergo urinalysis, where the grievor had participated in a breathalyzer test. There were no other signs of impairment. In that case, the grievor had 30 years of service. A further mitigating factor was that the grievor had been significantly influenced by the Union in his refusal to test.

48. Here, the grievor had significantly shorter service at 4 years and the Union influence factor was not present. He did provide both breathalyzer and oral swab samples. As in SHP 618, there were no signs of impairment. In all the circumstances, I find that discipline of 15 demerits is appropriate.

49. In consequence, the grievor is reinstated in his employment, without loss of seniority.

50. I remain seized with respect to any issues of interpretation or implementation of this Award.

November 21, 2023

JAMES CAMERON
ARBITRATOR