CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4891

Heard in Montreal, January 10, 2024

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE
MAINTENANCE OF WAY EMPLOYEES DIVISON

DISPUTE:

Dismissal of T. Vandrunen.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

On August 27, 2020, the grievor, Mr. T. Vandrunen, was advised by the Company that he was dismissed from Company service for the "positive drug test results (methamphetamines) that (he) supplied to the Company on July 16, 2020." A grievance was filed on October 4, 2020 and was denied by the Company on November 6, 2020.

The Union contends that; On July 16, 2020, the grievor tested positive on his urine test but negative on his oral fluids test. These results proved that he was not impaired at work and that, as a consequence, it was wrong for the Company to assess discipline of any kind much less dismissal; The grievor's dismissal was improper and illegitimate.

The Union requests that; The Company be ordered to reinstate the grievor into active service immediately without loss of seniority and with full compensation for all wages and benefits lost as a result of this matter.

The Company denies the Union's contentions and declines the Union's request.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

On August 27, 2020, the Grievor, Mr. T. VanDrunen, was advised by the Company that he was dismissed from Company service "For positive drug test results (methamphetamines) that you supplied to the Company on July 16, 2020, a violation of Alcohol and Drug Policy HR 203 and Alcohol and Drug Procedures HR 203.1."

The Union Position:

The Union has filed their own Ex Parte Statement of Issue.

The Company Position:

The Company denies the Union's contentions and declines the Union's request. The Company maintains that the Union's position in their Ex-Parte Statement of Issue is overly broad and maintains the Company's right to object in the event the Union raises new arguments or expands upon arguments made through the grievance procedure, as to do so

prejudices the Company's ability to properly consider and respond.

The Company maintains that the Grievor's culpability was established through the fair and impartial investigation. Discipline was determined following a review of all pertinent factors including the Grievor's service and his past discipline record. Further, before discipline was assessed the Company duly considered all mitigating and aggravating factors, which included the credibility of the Grievor.

The Company maintains that during an investigation in connection with "your alleged arrest and criminal charges laid by the RCMP and the events surrounding same" evidence was submitted which suggested the Grievor attended work under the influence of methamphetamines. The Grievor, in the presence of his Union Representative, voluntarily agreed to a substance test. The Grievor's positive test result was in violation of the Company's Alcohol and Drug Policy and Procedures (HR 203 & HR 203.1).

The Company's position continues to be that the dismissal assessed was just, appropriate, and warranted in all the circumstances. Accordingly, the Company cannot see a reason to disturb the discipline assessed and requests that the Arbitrator dismiss the Union's grievance in its entirety.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) W. Phillips	**(SGD.) L. McGinley**
President MWED	Director Labour Relations

There appeared on behalf of the Company:

S. Oliver	– Manager, Labour Relations, Calgary
A. Harrison	– Manager, Labour Relations, Calgary

And on behalf of the Union:

W. Phillips	– President, MWED, Ottawa
T. Vandrunen	– Grievor, *via Videoconferencing*

AWARD OF THE ARBITRATOR

Context

1. The grievor has roughly three years of service with the Company as a Group 3 Machine Operator, which is a safety sensitive position. Prior to the summer of 2020, he had a completely clean discipline record.

2. This record changed dramatically in the June-August period, in which he was dismissed for conduct unbecoming arising from charges of assault, on August 28, 2020. This dismissal is dealt with in **CROA 4890**. On the same day, he was dismissed for a separate reason, namely a positive drug test result (methamphetamines) and violation of Alcohol and Drug Policy and Procedures 203/203.1. The two matters are linked by the fact that a drug test was taken in the first matter which determined the presence of

methamphetamines in the urine but not the oral swab test of the grievor. This case will determine whether the second dismissal is upheld.

Preliminary Objections

Union Objections

3. The Union argues that the drug test done on June 16 was in effect a random test, done while the employee was not on duty, and should be excluded from the evidence considered.

4. The Company argues that the grievor agreed to take the test, his Union representative was present and did not object to the testing, and only raised a concern once the test was revealed to be positive for methamphetamines. It relies on CROA 2571 for the proposition that the Union may not "wait in the weeds" and object after the fact.

5. In my view, the fact that the grievor agreed to take the test, in the presence of his Union representative, is a complete answer to the objection. The situation might have been otherwise if the grievor or the Union had objected, but this is not the case.

6. The Union further argues that the transcript of the initial investigation in **CROA 4890** was not given to the grievor and the Union 48 hours in advance of the investigation and hence should be excluded under articles 15.1 and 15.2 of the Collective Agreement.

7. The Company argues that the grievor had read, signed and been provided a copy of the transcript from the initial investigation, so the requirement had been met. There could have been no surprise or prejudice to the grievor from the entry into evidence of the transcript from the initial investigation. It relies on the informal and expeditious process in the context of "a fair and impartial hearing" as set out in **CROA 4732**.

8. The Company further notes that the objection on which the Union relies is made in the initial investigation (Appendix 4) and not repeated in the later investigation concerning the positive test result. It argues that the Union position is thus inherently contradictory, as the only place where the objection was made and recorded is in the very document it now seeks to exclude.

9. In my view, the Company arguments here are persuasive. The grievor and the Union participated in and were provided a copy of the transcript of the initial investigation (Appendix 4). There can have been no surprise when portions of it were referred to in the second investigation. The grievor was provided an opportunity to respond and did so, as will be detailed below.

10. The Union objections are therefore dismissed.

Company Objections

11. The Company objects to the Union arguments found at paragraphs 18-24 of the Union Brief that the grievor was not “on duty”, as the term has been interpreted by the jurisprudence. The Company argues that CROA Rules prevent new arguments being advanced at this stage, when not raised in the grievance of JSI.

12. The Union maintains that the grievor was not on duty at the time of the drug testing on June 16, 2020.

13. In my view, a review of the grievance and JSI, make it clear that this is not a new argument. In the Step 2 grievance, the Union objects to what it sees as a random drug test, as the grievor was not on duty and highlights “Brother Vandrunen had been held out of service since June 8, 2020”. The Response from the Company notes the Union argument that the grievor was not on duty, but argues that the test was voluntary. The Union JSI specifically pleads “that he was not impaired at work”.

14. Accordingly, I find that this is not a new argument, and the Company objection is dismissed.

Merits of the Case

Company Position

15. The Company relies on the fact that the Machine Operator position held by the grievor is a Safety Sensitive one, where impaired or diminished performance may result in a significant incident affecting the health and safety of employees, the public, property and the environment.

16. It relies heavily on statements that the grievor is alleged to have made to an investigating RCMP officer concerning a domestic assault, the subject of **CROA 4890**. The grievor is alleged to have admitted to being under the effects of methamphetamine while at work. While the grievor denies having made this admission, he also denied having used methamphetamine for five years, which is demonstrably false, given the urine test results. The Company notes that there is no reason for the RCMP to have invented these statements, while there is every reason for the grievor to lie. It argues that the lack of credibility of the grievor, together with the credibility of the RCMP statement, confirm that the grievor had recently attended work under the effects of Methamphetamines. It argues that the positive urine test is not stand alone evidence, given the admission of the grievor, similar to the situation in **CROA 4845-M** and Ad Hoc Dismissal of D. Adams.

Union Position

17. The Union argues that the Form 104 dismissal letter is clear-the Company relies only on the positive urine test for the dismissal of the grievor and it may not expand the reasons for dismissal now.

18. It notes the categorical denial of the grievor to using or being affected by drugs while at work. It notes that the drug testing was done some one and one half months

after the grievor was removed from the workplace, when the grievor admitted methamphetamine use some one week before the test.

19. The Union argues that clear and cogent evidence is required for a dismissal and that the statement of the RCMP is contested. The Company could have called the RCMP officer concerning the statement to reconcile the dispute, but failed to do so.

Issues

A. Has the Company met its burden of proof to establish that the grievor was impaired while at work by using methamphetamines?

B. Should the dismissal be upheld?

Analysis and Decision

20. I find that a brief chronology is helpful to understand the sequence of events:

a. April 2016 Grievor starts work
b. June 2, 2020 Domestic Assault
c. June 3, 2020 RCMP contacts CPKCR re information from grievor concerning methamphetamine use and being under the effects while at work
d. July 16, 2020 Investigation by Company. Denial by grievor of methamphetamine use for previous five years and denial of being under the effects of drugs while at work
e. July 16, 2020 Drug test taken by grievor
f. July 21, 2020 Positive urine test, negative oral swab
g. July 28, 2020 Second investigation by Company. Admission by grievor of methamphetamine use “a week earlier” to the drug test
h. August 28, 2020 Form 104 Dismissal for positive drug results (methamphetamine)
i. August 28, 2020 Form 104 Dismissal for conduct unbecoming

A. Has the Company met its burden of proof to establish that the grievor was impaired while at work by using methamphetamines?

21. The jurisprudence is clear that a positive urine test, standing alone, does not demonstrate impairment while at work. As noted by Arbitrator Picher in CROA 4240:

> "The arbitral jurisprudence in respect of drug testing in Canada is now extensive. It has been repeatedly sustained by the courts and is effectively the law of the land. Part of that law, …is that a positive drug test, conducted by urine analysis, standing alone, does not establish impairment at a point in time which corresponds with an employer's legitimate business interests and, standing alone, cannot be viewed as just cause for discipline."

22. It is equally clear, however, that a positive urine test, in conjunction with other evidence, can be taken as evidence of impairment. As noted by Arbitrator Yingst-Bartel in **CROA 4845-M:**

> "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".

23. The issue here, therefore, is whether there is sufficient other evidence, together with the grievor's positive urine test, to enable the Company to meet its burden of proof to show impairment? For the reasons that follow, I find that it has not met this burden.

24. Firstly, the statements that were allegedly made by the grievor to the RCMP are hearsay and likely multiple hearsay. I am certainly able to consider such statements, but must give these statements the appropriate weight. The Company quotes the following from the notes of CPPS Inspector Kelly Dennison (see Tab 5 Company documents):

> – Sgt. Minty stated that during the course of the investigation it was revealed that Vandrunen had recently made statements that he would harm himself at work and had made suicidal comments.

> – No indication was given how Vandrunen may attempt to harm himself in the workplace.
> – Sgt. Minty revealed that Vandrunen admitted to Methamphetamine use.
> – Sgt. Minty revealed that Vandrunen admitted to being under the effects of Methamphetamine while in the workplace recently.
> – Sgt. Minty revealed that the statements Vandrunen had made to harm himself did not come to her attention until he had already been released as she was reviewing the file.

25. Sgt. Minty does not appear to have been the investigating officer, in light of her final statement that the self-harm comments only came to her attention upon a review of the file.

26. The statements on which the Company relies are therefore from an unknown investigating officer, reported to Sgt. Minty, who in turn reported them to Inspector Kelly Dennison. Neither the investigating officer nor Sgt. Minty were called by the Company to testify, nor were any original notes produced.

27. Secondly, the admission is flatly denied by the grievor at Q and A 6, 30-32:

> 6Q: Do you wish to rebute any of the information within these documents?
> 6A: I have never admitted to be under the influence of Methamphetamine while in the work place. I have never made statements that I would harm myself at work or made suicidal comments.
>
> 30Q: Document 3 states that you admitted to being under the effects of methamphetamine in the workplace recently?
> 30A: I never admitted anything like that and it is inaccurate.
>
> 31Q: Have you ever used methamphetamine while on duty?
> 31A: No.
>
> 32Q: Would you be willing to supply a Drug and Alcohol substance test sample?
> 32A: Any time or place.

28. Thirdly, the alleged statements must have been in relation to a time period prior to the domestic assault on June 2, 2020. The urine test which resulted in a positive finding for methamphetamine occurred on July 16, 2020, more than five weeks after the domestic assault, and an unknown time after the incident referred to in the alleged statement.

29. Fourthly, the grievor admitted to drug use in the week prior to the July 16, 2020 investigation:

> Q15: What explanation can you provide as to the reasons for this positive test result on July 16, 2020?
> A15: The actions which lead to the positive result took place the week before and I was not aware of any upcoming duty as it was before I was advised I would be coming in for the statement.

30. The grievor's statement about recent drug use is not contested. Therefore the positive test results taken on July 16, 2020 are likely the result of drug use on or about July 9, 2020, about five weeks after the domestic assault and alleged statement.

31. Fifthly, even if the grievor's credibility is questionable as the Company alleges, his credibility is not a stand alone ground for dismissal. The Form 104 mentions only a positive test result, not a lack of truthfulness.

32. Sixthly, I am doubtful that the grievor could be considered "on duty" on July 28, 2020 when he was questioned for a second time. He had not been at work since June 3 and Q and A 15, quoted above, show that he had no reason to believe he would be working shortly, at the time of the admitted drug use.

33. For the above reasons, I am not able to conclude that the Company was able to establish that the grievor was impaired while at work.

Should the dismissal be upheld?

34. Given that the Company was unable to establish impairment of the grievor while at work, the jurisprudence is clear that discipline for off duty drug use will not be upheld (see **CROA 4240**). Consequently, the Company is not entitled to discipline the grievor and reinstatement is appropriate.

35. This is not to excuse the conduct of the grievor. His admitted use of methamphetamines is not only illegal, but incredibly dangerous to both himself, his colleagues, and members of the public. As noted by the Government of Canada: "Methamphetamine is a powerful synthetic stimulant. It is illegal, highly addictive and **very** dangerous to your health". As set out in Company Exhibit 16, methamphetamines have short and long term consequences to the individual, including brain damage, suicide and accidental death. The consequences for those around the individual are also extremely problematic.

36. Here the grievor has admitted to methamphetamine use in the past (see Q and A 28-29, July 16 investigation), is the subject of contested statements about being under the influence of drugs while at work, has a confirmed urinalysis result showing use of methamphetamine use, and admitted to recent drug use (see Q and A 15, July 28 investigation). In light of the extremely dangerous nature of this drug and the possible consequences to fellow workers and the public, I would be inclined to make any reinstatement subject to random testing.

37. At issue, however, is whether I have the jurisdiction to impose random testing as part of an order to reinstate, when there has been no proof of impairment while at work. The Parties were asked to provide additional submissions on this issue.

38. The Union argues that the jurisprudence is clear that employers have no right to regulate the private morality of employees unless their behaviour affects the legitimate business interests of the employer (see **SHP 530**). It argues that the jurisprudence is constant that there is no right to discipline employees for drug or alcohol use, if

impairment at work cannot be established. The Union candidly noted one exception to this general rule, set out in **AH 787**, where the grievor was not forthright during the investigation. Here, the Union argues that the grievor was forthright and was not impaired while on or subject to duty.

39. The Company argued that I do have jurisdiction to impose random testing, even in the absence of proven impairment at work. It points to the arbitrators' general discretionary power in the case of dismissals under s. 60 (2) of the Canada Labour Code. It referred me to a lengthy list of cases in which arbitrators exercised their discretion to overturn a dismissal but to impose conditions for a return to work, taking into account the rights and responsibilities of both the Company and the grievor. These cases usually involve drug or alcohol issues at work or addiction issues, but also include chronic attendance issues. Common to all the cases is a proven work-related issue where discipline has been imposed (see AH 703, SHP 539, CROA 3355, AH 793, AH 810, AH 725, CROA 3336 and CROA 3973).

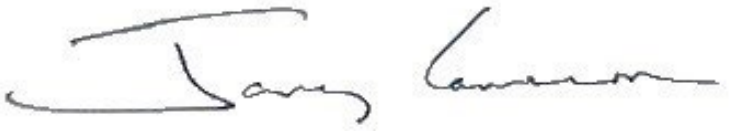
40. It is clear that the evidence has not established impairment at work. The Company is not entitled to discipline the grievor as a result of the positive urine test. I find that the grievor was candid during the investigation, including volunteering to be drug tested. The one statement made which was demonstrably not accurate concerned the use of methamphetamines in the recent past, which he denied. However, he stated to the testing officer: "Donor admitted to last use of powder that he thought was cocaine one week prior to the test" (see Tab 7, p. 51, Company documents). It is therefore possible that the grievor was truthful, although mistaken, about his recent use of methamphetamine. Overall, I do not find that the exception in AH 787 to be applicable here.

41. It is possible that this jurisdictional issue will evolve as a result of the current in depth review of the Company Drug and Alcohol Policy. Until a decision is made on that Policy grievance, however, the constant jurisprudence continues to apply. In the absence of proven impairment at work, be it from the acute, crash or chronic effects of

drugs and alcohol, I do not have jurisdiction to impose random testing as a condition of a return to work.

42. Accordingly, I uphold the grievance. The grievor is to be reinstated without loss of seniority, together with compensation from the end of his suspension set out in **CROA 4890.**

43. I retain jurisdiction for all questions of interpretation or application of this Award.



February 20, 2024

JAMES CAMERON
ARBITRATOR