CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5030

Heard in Calgary, April 10, 2024

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

UNIFOR – LOCAL 101–R

DISPUTE:

The issue giving rise to this dispute concerns the dismissal of Rail Car Mechanic J. Deimuth of Winnipeg, MB on June 14, 2019.

THE JOINT STATEMENT OF ISSUE:

On May 9, 2019, Mr. Deimuth was directed to assume the role of track mobile operator during his shift at Weston Shops. He refused to perform the work, and also refused a subsequent reasonable suspicion alcohol and drug test.

Following an investigation Mr. Deimuth was dismissed on June 14, 2019 as follows:

> "Following the fair and impartial investigation conducted May 21st, 2019, you are hereby advised that you have been DISMISSED from Company service for the following reasons:
>
> 1. Your refusal to participate in the alcohol and drug testing process on May 9, 2019 after you refused to perform assigned track–mobile duties May 9, 2019. A violation of Policy HR 203 – Alcohol and Drug Policy (Canada), specifically;
>
> a. Appendix 2, section 5.2.5 – Reasonable Suspicion Testing in Procedure HR203.1, Policy HR203."

UNION POSITION:

The Union maintains the Company's decision to terminate Mr. Deimuth was unsupported. Mr. Deimuth's refusal of an alcohol & drug test was reasonable and established by the Company's refusal to supply in writing to Mr. Deimuth or the Union, "for cause" when forcing Mr. Deimuth to participate in a drug & alcohol random test. It shall be noted, Mr. Deimuth was compliant in informing the Company of his restriction of operating Company vehicles that require safety sensitive duties, informing his Manager on April 15th, 2019, while on "speaker" conference with the CP Rail Occupational Health & Safety Department to seek clarification of his restrictions.

The Company did not establish that Mr. Deimuth was involved in a "significant event" or identify any reasonable suspicion of impairment, and so testing for drug and alcohol use was not a reasonable line of inquiry in the circumstances, additionally, the Company did not balance its

desire to test for drugs and alcohol against the effect of such testing on Mr. Deimuth's interest. The decision to test did not therefore meet the minimum requirement of the balancing of interests.

The Union requests the Arbitrator direct CP Rail to reinstate Mr. Deimuth and retroactively reactivate all of Mr. Deimuth's benefit and insurance plans, including compensation for all benefits he would have been entitled to. This is in addition to making him entirely whole in every respect for lost wages and all lost overtime opportunities.

The Union further requests the Arbitrator direct CP Rail pay to Mr. Deimuth, the sum of $10,000 compensation per Section 53(2) (c), 53(2) (d), 53(2) (e) and 53(3) of the Canadian Human Rights Act, in punitive damages stemming from CP Rail's aggressive intimidation and harassment towards Mr. Deimuth by CP Rail's local management. In addition, any account of discipline assessed, shall be completely expunged from Mr. Deimuth's personal record.

The Union further contends that a violation of Rule 43 of the Collective Agreement 101R was established in the Company's behaviour against the Grievor. Mr. Deimuth was subjected to harassment and intimidation as demonstrated by the Company's behaviour when demanding he perform duties outside his restrictions and provide a drug and alcohol random test.

COMPANY POSITION:

The Company disagrees and denies the Union's request.

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.

As a Rail Car Mechanic, qualified in Shop Track and track mobile operations, the Grievor held a Safety Sensitive position and was governed by, and required to adhere to the Company's Drug & Alcohol Policy and Procedures. Any assertion by the Union to the contrary is without merit.

The Union's contention that there is a requirement to give them a written reason for the testing is confusing. Further, memorandums were provided within the investigation that confirm the rationale for the reasonable suspicion testing was repeatedly provided.

The Company maintains the decision to require a reasonable suspicion alcohol and drug test was appropriate under the circumstances and within Company Policy and Procedures.

The Union has made a request for damages and have alleged a violation of Rule 43 of the Collective Agreement. Within the grievance correspondence, they have provided no rationale as to why the Grievor would be entitled to damages, nor have they provided any evidence to support the alleged violation of Rule 43. The Company maintains the Union has not met the burden of proof to sustain such allegations.

The Company maintains there has been no violation of the Collective Agreement, or the Canada Human Rights Act as alleged.

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:
(SGD.) R. Raso
President, Unifor 101–R

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

There appeared on behalf of the Company:

S. Oliver	– Manager, Labour Relations, Calgary
L. McGinley	– Director, Labour Relations, Calgary

And on behalf of the Union:

J. Kennedy	– National Rail Director, Winnipeg
R. Raso	– President, Local 101R, Toronto

AWARD OF THE ARBITRATOR

Background Facts

[1] The Union is the bargaining agent for 1200 shopcraft employees working at the Company, across sixteen mechanical "running" repair facilities across Canada. It also represents two–hundred employees who work at the "Weston Shops" in Winnipeg. The bulk of those employees are skilled tradespeople, who inspect, maintain and repair the Company's fleet of locomotives and freight cars.

[2] The Grievor was hired in 2005 as a Trades Helper in the Weston Shops. He was promoted to Rail Car Mechanic ("RCM") and became a journeyperson RCM in September of 2011. Since May 2018, the Grievor has worked as an 08K Painter, which falls under a RCM. However, the Grievor was also certified to be a track mobile operator, which was a safety–sensitive position. He was aware that track mobile operations worked on live tracks with moving equipment. He was also aware that track mobile operations could fall under RCM duties.

[3] On May 9, 2019 the Grievor was directed to work as track mobile operator at Weston Shops. The Grievor refused to perform the work, stating he was concerned he would not pass an alcohol and drug test ("A/D Test") if he was involved in an on–track incident, or if he had a rules violation, given his recreational cannabis use.

[4] The Company considered it had a reasonable suspicion that the Grievor was not fit for work. It chose to require the Grievor to undergo what is called a "reasonable suspicion" A/D Test. The Grievor refused to submit to that test and was held out of service pending an Investigation, held on May 21, 2019.

[5] After that Investigation, the Grievor was dismissed for his refusal to participate in the A/D testing process, after his refusal to perform track mobile work, which was a violation of the Company's Alcohol and Drug Policy and Procedures (Canada), HR #203 and 203.1 (referred to, together, as the "Policy").

[6] There were several preliminary disclosure issues raised by the Union at this hearing. I am satisfied that at least two of the three requests were made shortly before the hearing was scheduled to be heard, and very close in time to when the written submissions were due.

[7] Given that this particular Grievance is *years* old, requesting this disclosure at the 11th hour, was not reasonable. Given the age of the Grievance, the Company was not in any event able to produce one of the requested documents[1]. Regarding the other document – the "reasonable suspicion" checklist – the Company stated it had earlier advised the Union that this document would need to be sought directly from Health Services, given privacy issues with the labour relations department requesting it for the Union.

[8] In view of the disposition of this Grievance, as outlined below, nothing turns on the Union's failure to obtain that document.

Issues

[9] The issues are:

a. Can the Company reasonably require the Grievor to participate in the A/D Drug Testing after his refusal to perform track mobile work?: and, if so

b. Was dismissal was a reasonable disciplinary response for his refusal to do so?

[10] For the reasons which follow, the Grievance is dismissed. The Company's suspicion that the Grievor was impaired from the use of drugs was reasonably held. Therefore, he was required to submit to this A/D Test. His refusal to do so was a violation of the Policy. Given the circumstances of this case, the Company's decision to dismiss the Grievor for his refusal to test was just and reasonable, as the Arbitrator is entitled to draw a negative inference from that refusal that the Grievor was impaired.

[1] The hours of the track mobile

Facts

[11] Several memos were filed into the Investigation regarding the Grievor's comments on May 9, 2019, and his earlier conversations with Company officials, in April of 2019. Those memos were from Lisa Kennedy, Production Supervisor, Car Repair, Marc Philippot, Production Manager, Rolling Stock and Rui Botelho, Director, Production Facility. The memos from the latter two individuals are extensive.

[12] To Lisa Kennedy, the Grievor was recorded as stating on May 9, 2019 he could not perform the work operating the track mobile and that this "was a conversation that he had discussed with Marc Philippot and Rui Botelho before". This was a reference to conversations which occurred on April 2, 2019 and April 15, 2019, previous occasions when the Grievor was assigned duty as a track mobile operator.

[13] The Grievor's evidence is that on April 2, 2019, he conveyed to Mr. Philippot, Production Manager, Rolling Stock, that he had some confusion how the Company was applying its substance testing policy, given its investigation the day before of a minor incident involving the track mobile. His evidence was he asked Mr. Philippot at that time if it was permissible to operate on–track equipment with "non–impairment levels" of recreational cannabis in his system. The Grievor stated Mr. Philippot was unable to answer that question, so the Grievor stated he escalated his concern to Mr. Botelho, the Director, Production Facility, who he said advised him not to operate the track mobile until he received direction on how he should proceed. The Grievor indicated he also was not comfortable operating that equipment without that answer (Q/A 12),

[14] On April 15, 2019, he was again asked by Mr. Philippot to operate the track mobile. With Mr. Philippot beside him – and on speaker phone – the Grievor's evidence was he contacted the Company's OH&S department to seek direction on how to proceed. His evidence was "they made it clear that even if I consumed in the last few weeks, that I should not be operating equipment". He then stated he "…refused to break policy as per OHS and he was sent home". It was the Grievor's evidence that Mr. Philippot was not pleased with this answer from OH&S and stalked out.

[15] The Grievor was unaware that Mr. Philippot and Mr. Botelho also had a conversation with Mr. Leavey (health and safety chair and Union member) and Union grievance chair Joe

Vergel on April 15, 2019 – that that same day – about the Grievor's comments to Ms. Kennedy. A memo of that conversation from Mr. Philippot to Mr. Botelho, was also filed as evidence in this hearing.

[16] That memo stated that Ms. Kenney had approached Mr. Philippot on April 15, 2019 to state that the Grievor did not wish to operate the track mobile that morning "until he had gotten some clarification from OH&S regarding the Policy and whether or not he would be subject to testing and the effects of the use of marijuana while operating the track mobile…". It was stated the Grievor used one of the office phones to contact an OH&S nurse and that he:

> …***wanted to know that if he had used marijuana within the last 48 hours, but not within the last 8 hours <u>that he would not be</u> subject to testing if he was involved in a derailment***. He also stated that he felt comfortable to drive at the time however did not want to be drug tested in case an incident had occurred as there was already one employee off currently because of a similar situation. He stated that the occupational nurse had told him if he had informed his direct supervisor that he had used drugs in the past 48 hours, but if not used in that last 8 hours that he would be ok to drive. However, he would be subject to the testing provisions if a derailment were to occur and there would still be evidence of the drugs in his system, so he would be subject to the provisions as listed in policy 203 and 203.1. She also stated, according to Jason, that she said that he should state that he wasn't comfortable driving that day and refuse the work (emphasis added).

[17] The memo went on to state:

> At approximately 11:15, I met with Director Rui Botelho, union grievance chair Joe Vergel and Health and Safety co–chair Ran [sic] Leavey to discuss what had transpired and what the next set of approaches would be with this individual ***who was being insubordinate by refusing to perform work, but not because of a union issue and not because of a safety concern, but rather because of a policy discrepancy in his opinion*** (emphasis added)***.***

[18] It should be emphasized that Mr. Leavey was the health and safety chair and a union representative, whose name will come back into this narrative a month later, in May of 2019.

[19] The Memo continued:

> At 12:30, I approached Jason Demuth on the shop floor with production supervisor Lisa Kennedy and ***explained what our next steps would be. I again asked if he was refusing to perform work because of a safety concern or because of a union***

> ***issue to which he stated no. <u>He stated that he did not want to be subject to post incident testing</u> in case he was operating the track mobile and a derailment occurred. He did not want to be subjected to the same issues as what had happened to another unionized employee earlier in the month. At that point, I told Jason that I had no other choice other than to send him home because of insubordination.*** I also stated that this decision was final for the time being as we were still investigating what the next steps would be which could also lead up to a formal investigation. I told him that a decision would be made within a 24–48 hour period as to what would happen next, but to return to work on Tuesday April 16, 2019 for his regularly assigned shift. At that point, Jason packed up his tools and left the premises (emphasis added).

[20] Not surprisingly, the Company could not give the Grievor any assurances that if he was involved in a derailment, he would not be tested.

[21] While the Grievor stated later in May of 2019 that he did not know what the Company's position was, this was not entirely true. Mr. Botelho had told him in April of 2019 that he was being sent home for insubordination for refusing to perform work. There was no "pass" from the impacts of the Policy or assurances he would not be tested if a derailment occurred.

[22] During the Investigation, the Grievor stated he did not agree that being qualified to drive the track mobile meant he was in a safety–sensitive position, as "If I was going to be moved to a SSP position I should have been given sufficient notice" (Q/A 12). When questioned further regarding this issue, he stated he felt he should be given 30 days' notice of operating in a safety–sensitive role, since cannabis can remain in the system that length of time. (Q/A 11, 12)

[23] Apparently, the Grievor felt that he should still be able to consume recreational cannabis and not be required to perform all of the safety sensitive elements of his job, for which he was qualified, without notice, so he could stop using drugs.

[24] The Grievor's evidence was that while he had been given a copy of the Policy, when looking at it on the day of the Investigation, he "did not understand the levels for testing and what they mean" (Q/A 15).

[25] Back to May of 2019, when the Grievor made his comments to Ms. Kennedy about not being able to operate the track mobile, she then involved Mr. Philippot.

[26] The Grievor stated that he was told by Lisa Kennedy to wait in her office and then she went to talk to Mr. Philippot, after which he came to the Grievor and "said something along the lines you feel OK to operate by you're just worried that your urine may not be clean, I responded, yes, I'm not sure". The Grievor stated he did not request a fitness assessment. He stated in the Investigation that he "didn't know I could" and also that he "didn't think it was necessary given that I just learned from OHS before that, I thought my manager would be more understanding".

[27] The Grievor is recorded in Mr. Philippot's memo as saying he "felt he was OK to drive the trackmobile", but if something were to happen he "would likely not fend well against some of the post incident testing". At that point, Mr. Philippot stated the matter should be discussed with Mr. Botelho, as well and the two went to Mr. Botelho's office. On the way, the Grievor requested Union representation. Mr. Ryan Leavey was asked to join the meeting.

[28] While waiting for Mr. Leavey, Mr. Philippot explained the situation to Mr. Botelho, who reminded the Grievor that he and the Grievor had a similar conversation about two weeks prior to this (presumable referring to the April 15, 2019 conversation), and that the Grievor knew the limitations of the policy, which had been explained to him in the past. He also asked the Grievor very directly if he was using drugs at that particular time, and the Grievor said he was not. He was also asked if he was using marijuana for medicinal purposes, which he also denied. He also asked if he had a prescription for the use of marijuana, and denied that as well. The Grievor was asked if he only used marijuana for recreational purposes, and he stated "yes" . The Grievor was also recorded as stating it was "legal to use marijuana nowadays and that it was no worse than having a few drinks the night before coming to work or on a weekend, but that there was no effects present from alcohol left in the system, but with marijuana, there was". At that point, he also stated he did not want to say anymore until his union representation came into the office.

[29] When the Union representation arrived, it was explained to the Grievor that:

> …there was enough evidence from what Jason has stated that he was going to conduct a drug and alcohol test under reasonable suspicion as he felt that Jason may not be safe to work in the environment he was assigned as he had admitted to

> "smoking up" very recently and that Policy 203 and 203.1 did not allow for this considering he is in a safety sensitive position as a trackmobile operator.

[30] During the Investigation, the Grievor denied using the terminology "smoking up" as he stated those were not words that he used. He indicated that he made no admissions about using cannabis recently, and that there was no mention of when the last time was that he used cannabis in the discussion.

[31] He also stated that he asked several times to see the forms that the Company was required to complete to demonstrate why he was being tested, and that both Mr. Philippot and Mr. Botelho refused to show him these forms. The Grievor said he was "fine to operate the trackmobile but was worried about the consequences if something went wrong that could have been out of his control.

[32] That worry was well–placed, given the terms of the Policy.

[33] The Grievor's expectation of the manager's "understanding" is confusing, as It is not clear what the manager was to be understanding "of" – but it appears the Grievor expected the manager to understand his desire to keep consuming cannabis and to only perform safety sensitive duties if given sufficient "notice" so he could clear his system of marijuana, as well as an "understanding" of his desire not be subject to testing, given that recreational use was legal and marijuana stayed in the system longer than alcohol.

[34] The Grievor also stated that Mr. Philippot did not question him regarding whether it was a safety or union issue, but rather he stated – as had Mr. Botelho in the past – that "they know I'm cognitively OK to operate but they agreed with me if I was unsure If I could pass a urine test if an incident occurred". It is unclear how the Grievor thought that Mr. Philippot or Mr. Botelho would know the Grievor was 'cognitively ok', or could agree the Grievor was "unsure if he could pass a urine test" when the Grievor himself had no idea how he would test; and neither Mr. Philippot or Mr. Botelho were aware of how much cannabis was consumed – or when.

[35] I do not find credible that either Mr. Philippot or Mr. Botelho would have stated they were satisfied the Grievor was "cognitively fine" once he disclosed his drug use.

[36] The Grievor stated that after talking with OH&S (in the conversation earlier quoted), he was also thinking he would not pass a urine test if an incident occurred, if he had used

cannabis in the past 30 days. However, he denied saying he would "fail" such a test, as all he knew was it remains in his system for up to 30 days. He agreed he may have said he did not want to miss time from work, or be out of pay, like some unionized employees that had similar circumstances happen to them.

[37] He also stated he was unsure how to know if he was clean enough to operate or not.

[38] The Grievor acknowledged he was asked if he had used drugs and was feeling the effects of them at that point in time and that he told them he had not used "as it says in the memo", but stated again there was no timeline of use for the last time he had used (Q/A 40). He stated he felt that alcohol was a worse drug than cannabis, as its "effects are more negative and can have a bigger impact on peoples lives".

[39] The Grievor indicated "I am within my rights as it's legalized federally, and I don't hold a SSP.

[40] This was not entirely accurate, since operation of the track mobile is a duty that falls within the Grievor's job as an RCM and is safety sensitive, and the legality or illegality of a substance does not mean that an individual can come to work impaired.

[41] The crux of this matter is the Grievor disagreed there was enough information to drug test him, as he had not admitted to any recent cannabis use and the Policy requires reasonable grounds, and relies on signs and symptoms, not admission of past use (Q/A 42).

[42] The Grievor indicated he looked over the Policy multiple times with Mr. Botehlo and that each time he pointed out that the Company did not have reasonable grounds to test him. However, he also agreed *he was not sure what an outcome may show for him under a test, as he didn't know "how long it would last in my system*" (Q/A 43, emphasis added).

[43] It is difficult to understand how the Grievor was so confident that he was not impaired and was "cognitively fine" when he did not know the impact of the drug on his system and was unsure how he would test.

[44] When asked whether he consumed cannabis in the weeks prior to May 9, the Grievor noted he had not admitted to *when* he used, "no specific date or time" (Q/A 43). When asked in the Investigation for the last time he used, the Grievor indicated he didn't have

it “written down”. The Grievor indicated he did not have a regular pattern of cannabis use and that he would “never use prior to coming to work, I never come impaired to work, I deal with management on a daily basis and I’m vocal with the Union” (Q/A 44). However, it is not clear what time period the Grievor would include in the phrase “prior to coming to work”.

[45] The Grievor stated he was in disagreement with the testing, because the testing “did not fall into the reasonable grounds per CP policy” and that he contacted his lawyer, the CP police and the RCMP, who all believed “my rights were being infringed upon so I made the tough decision to refuse the unnecessary and out of line request to submit to the testing” (Q/A 45). He was also asked if he stated “OK I’ll piss – I have done nothing wrong” and then left the office”, which he agreed he did, but then he “re–thought it and on the advice of my lawyer there was no reasonable grounds to test me” (Q/A 46), he refused to test.

Arguments

[46] The Company argued the Grievor confirmed that his qualifications categorized him as safety sensitive, which categorization is not up to the individual but to the Company; that “RCM – Qualified” is a safety sensitive position; that there is no doubt the Grievor was qualified; that the assignment of safety sensitive duties was at the discretion of the Company and the Grievor was appropriately assigned those duties; and that the Grievor was aware that he could be assigned safety sensitive duties. It also argued that a “failure/refusal” to test is also a violation under the Policy; and that a negative inference can be drawn from refusal to test, as recognized by this Office.

[47] Its position was that any marijuana residue from April 2019 should have been gone by early May 2019, 37 days later, under the Grievor’s own understanding, yet he still refused to test in May 2019; that the Grievor’s restrictions were self–imposed and not condoned; and that the Grievor had ample time to seek answers to his questions regarding his marijuana use, first raised April 2, 2019.

[48] The Company argued the Grievor was required to report to work in a condition to perform the work assigned; that the Union has recognized that it is the 'actions, appearances or conduct of an employee while on or subject to duty' which can indicate possible use of alcohol or drugs; that this Grievor's actions demonstrated that risk; that the Grievor was not forthcoming in the Investigation; and was unsure of his ability to pass a urine substance test; that he told management he would "not" pass a drug test, which was a deliberate action, which – when paired with his insubordinate conduct – led to a reasonable suspicion of drug use which reasonably led to the request for a D/A Test; that the Grievor violated the Policy by refusing to submit to that test; and his dismissal was just and reasonable under the analysis in *Re Wm. Scott & Co.*[2]

[49] For its part, the Union pointed out the factual context, that in early April of 2019, the Grievor asked the Company whether it was permissible to operate with "non impairing" levels of cannabis in this system under the Company's Policy and its revisions, and that Company officials were unable to answer his questions. It argued he was advised by Mr. Botelho not to operate the track mobile until direction was given on how to proceed. On April 15, 2019, he was again asked to operate that equipment and it then made inquiries to OH&S on "how to proceed", which was that he should not be operating the equipment, and he was sent home, resuming his duties the next day.

[50] Without receiving that answer, on May 9, 2019, the Grievor was again asked to operate the equipment and told his supervisor that he could not do so. It was noted he was concerned with how the Company had investigated a recent track incident, and that even if he consumed 'weeks ago' he could fail a urine test. The Union argued the Grievor stated he was 'cognitively fine' and that Company officials agreed that was the case.

[51] The Union argued the Grievor reviewed with the third–party D/A testing company the authorization form and then chose to 'stand up for his own substantive rights to privacy and protected his own dignity by refusing the test'; that the Grievor chose not to sign something he could not agree with, as the document did not include a "triggering incident",

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

or other observations about his condition; and that he concluded there was "no reasonable grounds for testing".

[52] It was the Union's position the Company had confirmed that insubordination was not a ground of discipline or dismissal. It argued there was no triggering event or any signs and symptoms exhibited by the Grievor, so there was no "reasonable suspicion" to substantiate the D/A Test.

[53] It urged the request was unreasonable, violated the Policy, and was an intrusion into the Grievor's privacy rights; that the Company had no cause to discipline the Grievor, let alone terminate him; that the Grievor conducted himself with honesty and complied with the Policy, as he disclosed his cannabis use on his own time, in compliance with the Policy, that the Grievor was not rewarded for that; that the Grievor had "zero" signs and no symptoms of impairment and there was no accident to trigger a D/A Test, but the Company chose to violate the Policy by requiring testing; that the Union and the Grievor requested the documentation of signs and symptoms and was not provided same; and that the Grievor "over and over" had inquired what would constitute impairment under the Company's testing regime.

[54] It argued the Grievor was not impaired while at work that day or any day; that the Company knew he was not impaired; and that his manager and Director told him so; that the Grievor did everything right under the Policy; that he voluntarily disclosed his use of recreational cannabis; and that he did not give the Company a legitimate and valid reason to refer the Grievor for intrusive testing. It was the Union's position that testing was unwarranted and would have violated the Grievor's right to protect his own personal human rights and would have violated his privacy and dignity; and that this was not an "obey now, and grieve later" as it was not a minor violation of the Collective Agreement.

[55] The Union argued that drug and alcohol testing is *prima facie* discriminatory under Canadian human rights laws and that there are only limited situations where such testing is warranted.

[56] It was also the Union's position that termination would only be appropriate if the employment relationship was "so fundamentally breached as to render it devoid of any possible future viability" and that this situation did not meet that standard, even if the

Grievor's refusal was deemed to be worthy of discipline. It argued that penalty would be grossly excessive, and that progressive discipline should have been followed.

Analysis and Decision

[57] Before resolving the merits, a comment is appropriately made regarding the Investigation transcript.

[58] The Investigation is intended to support this expedited process as an important fact–finding instrument for an arbitrator. It is the forum for the *Grievor* to tell his story and to hear and respond to the evidence against him. It is the *hearing* that is the forum for the *Union* to present its arguments. During this Investigation, the Union representative made numerous comments, which were "argument", and also expanded on the Grievor's answers by providing that representatives' *own* evidence to explain and elaborate upon the information given by the Grievor, presumably from what the Grievor had told *him*.

[59] An Investigation is to hear the *Grievor's* evidence and not the second–hand evidence of what the Grievor may have told a Union representative. That evidence – and the Union's argument is – is not appropriately placed on the transcript at the Investigation stage, and serves to clutter that document.

The Law Relating to "Reasonable Suspicion" Testing

[60] Turning to the issues in this case, as was noted by Arbitrator Picher in **CROA 1703**, involvement with drugs – including marijuana – "poses a dangerous threat to health and safety". He referenced decades of experience with "accidents, both industrial and non–industrial, sometimes tragic in their proportions"[3], including in the rail industry.

[61] That has reality has not changed just because marijuana has been legalized.

[62] As was also noted in that case, "[t]he incompatibility of habitual drug use or dependence by employees in the transportation industry, whose activities impact readily on the lives

[3] At p. 3

and safety of many, is scarcely debatable". While that decision was issued in 1987, that same statement also holds true today.

[63] As also noted in that case, the problems stemming from issues of drug and alcohol use for the workplace led employers to an interest in drug testing, and to the development of jurisprudence on when that testing was justified. Arbitrator Picher was at the forefront of the early development of that jurisprudence, writing what the Supreme Court of Canada described as the "blueprint for dealing with dangerous workplaces"[4] in his decision in *Imperial Oil Ltd. and C.E.P., Loc. 900.*[5]

[64] In **CROA 1703**, the following statement was made:

> Where, as in the instant case, the employer is a public carrier, and the employee's duties are inherently safety sensitive, any reasonable grounds to believe that an employee may be impaired by drugs while on duty or subject to duty must be seen as justifying a requirement that the employee undergo a drug test. Given contemporary realities and the imperative of safety, that condition must be seen as implicit in the contract of employment, absent any express provision to the contrary.[6]

[65] In **CROA 1703**, the Arbitrator noted that "Canadian public policy reflects a clear concern for the dangers of drug use within the transportation industry"[7]. The Arbitrator also noted the following "general principles":

> The first is that as an employer charged with the safe operation of a railroad, the Company has a particular obligation to ensure that those employees responsible for the movement of trains perform their duties unimpaired by the effects of drugs. To that end ***the Company must exert vigilance and may, where reasonable justification is demonstrated, require an employee submit to a drug test.…The refusal by an employee to submit to such a test, in circumstances where the employer has reasonable and probable grounds to suspect drug use and a risk of impairment, may leave the employee liable to removal from service.*** It is simply incompatible with the obligations of a public carrier to its customers, employees and the public at large, to place any responsibility for the movement of trains in the hands of an employee whom it has reasonable grounds to suspect is either drug–dependant or drug–impaired. In addition to attracting discipline, the refusal of an employee to undergo a drug test in appropriate circumstances may leave that employee vulnerable to adverse inferences respecting his or her impairment or involvement with drugs at the time of the refusal…However, where good and sufficient grounds for administering

[4] *Irving Pulp & Paper, infra,* at para. 32
[5] (2006) 157 L.A.C. (4th) 224
[6] At para. 5.
[7] At p. 5

> a drug test do exist, the employee who refuses to submit to such a test does so at his or her own peril.[8]

[66] **CROA 1703** noted that testing would be permitted where "in the opinion of at least two trained members of management, *it is established that there are grounds for reasonable suspicion that an employee is involved in the use of a prohibited drug*"[9].

[67] This is an early description of what has come to be termed "reasonable suspicion" testing.

[68] As was also noted by Arbitrator Picher in **CROA 1703**, the interests to be balanced are the "…interest of the railway to ensure safe operations with the interest of the employee not to be unduly deprived of rights of personal dignity and privacy". That "balancing of interests" analysis was later adopted by the Supreme Court in its seminal decision in *CEP, Local 30 v. Irving Pulp & Paper Irving Pulp & Paper*[10].

[69] More than two decades after **CROA 1703** was decided, the Supreme Court of Canada decided *CEP, Local 30 v. Irving Pulp & Paper.* It confirmed there are four situations where drug testing is reasonably requested by an employer in this country. "Reasonable cause to believe the employee is impaired while on duty" is one of those bases.[11] This is referred to generally as "reasonable suspicion" testing.

[70] With that background, the Policy must next be considered[12], as it incorporates this basis for testing. The Policy states that disciplinary action "up to and including dismissal" can occur for violations of the Policy.

[71] The Procedure requires that:

> All employees must report for work in a condition that enables them to safely and effectively perform their duties. To minimize the risks of unsafe and/or unsatisfactory performance due to the use or adverse effects of alcohol and/or drugs, employees are required to report fit for work and to remain fit for work. Adverse effects may include acute, chronic, hangover and after–effects.[13]

[8] At p. 6., emphasis added.
[9] At p. 3, emphasis added.
[10] 2013 SCC 34.
[11] At para. 30
[12] That Policy is currently under grievance.
[13] Section 3.1; Alcohol and Drug Procedure #HR 203.1

[72] Article 3.1.3 of the Procedure prohibits "reporting for work or remaining at work under the effects of cannabis from any source, including acute, chronic, hangover or after–effects of such use". Article 3.3.1 states;

> If there are grounds to believe that any employee is unfit to be at work, the employee will be escorted by a Supervisor to a safe and private place, interviewed, and given an opportunity to explain their behaviour or condition.

[73] It also notes in Section 3.1.5 that employees "must *know and understand the possible effects of drugs, medication or mood altering agents…which, in any way, will adversely affect their ability to work safely"* (emphasis added).

[74] Under Section 3.4.2 of the Procedure, a "failure/refusal to test" is considered a violation, for those holding safety critical or safety sensitive positions.

[75] Section 5.2.1 is titled "Reasonable Suspicion (Signs and Symptoms) Testing". In that section, "Reasonable Suspicion" testing is stated to be required where "…the supervisor has *reasonable grounds* to believe that the *actions, appearance or conduct* of an employee while on or subject to duty are indicative of possible use of alcohol and/or drugs"[14].

[76] While the list does contain several 'signs and symptoms', it also includes the statement "any other observations that suggest the employee may be unfit to be working on Company premises due to the use of alcohol and/or drugs".

[77] It also requires the basis for that decision to be documented, which in this case occurred in the memorandums filed into evidence, which set out why the Grievor was to be tested.

Application to the Facts

[78] Several preliminary points require determination.

[79] The Grievor is expected to be fit for duty when arriving at work. He is *not* entitled to take a position that – while he is "cognitively fine" and "not impaired" – he does not want to perform directed work, because he does not want to be tested for cannabis use.

[14] Emphasis added.

[80] I cannot agree with the Union that it is only "minor" violations of the Collective Agreement that result in the "work now, grieve later" principle. That principle is equally applicable to drug and alcohol testing, as noted in **CROA 3581**:

> ***When confronted with the order to take a drug and alcohol test, whatever his own feelings, it was the grievor's obligation to "obey now – grieve later" if he felt that the directive was somehow unfair***. By refusing to undergo a drug test, in the Arbitrator's view, [the grievor] radically changed the nature of his own infractions over the course of these events, and rendered himself liable to more severe degree of discipline. Whatever his personal feelings, his refusal to take an alcohol and drug test in the circumstances does leave him open to the drawing of adverse inferences, and does little to bolster his credibility.[15]

[81] After quoting this excerpt, the Arbitrator in **CROA 3727** noted that the "…importance of adhering to this principle ***cannot be emphasized enough***, particularly in this industry where employees like the grievor are required to be constantly vigilant …"[16].

[82] This Office has dealt with multiple cases where individuals did not feel a positive urinalysis test demonstrated their impairment, and the result was grieved. As in those cases, the Grievor remained able in this case, to submit to the test and grieve that test result – no matter what it demonstrated – and argue that urinalysis does not establish impairment, as has been argued in many of those cases. If – instead – a grievor makes his own assumptions and conclusions about his perceived requirement for the Company to first explain impairing levels to him; and/or the reasonableness of the test – as was done in this case – that can have significant consequences.

[83] In this case, the Grievor did not "work now; grieve later".

[84] I am satisfied the safety sensitive work was appropriately directed by the Company, and that the Grievor was aware he could be required to perform that work. The Company was entitled to require the Grievor to operate the track mobile, as an RCM who was qualified to do so.

[85] Even if the Union were correct and insubordination was <u>not</u> properly put in issue (even though it was referred to in the JSI), it is not necessary to resolve this issue to resolve this

[15] As quoted in **CROA 3727**, at p. 5, emphasis added.
[16] Emphasis added.

Grievance, given my findings on the reasonableness of the requirement to test, as outlined below.

[86] Upon a review of the evidence as a whole, the Grievor believes he can simply refuse to perform work that is appropriately connected to his role as an RCM without consequences, because he does not understand the Policy, and because the Company did not explain impairing levels appropriately.

[87] The Grievor was proceeding under the incorrect assumption that the Company was required to 'clarify' whether he would or would not test positive, or could or could not operate equipment under their Policy, or should give him a "pass" even if positive, due to his recreational cannabis use and how long marijuana "stays in the system". However, the *Company* was not the appropriate or required source of information on the impacts of cannabis use for this Grievor. That is not its role.

[88] The Company was not required to provide the Grievor the assurances he was seeking, or help him determine what he could safely consume and when. It was not for the OH&S nurses of the Company to give the Grievor the assurances that he sought. That department was not required to educate him.

[89] As a recreational user, it was up to the Grievor to know – and ***not*** the Company to educate – about the impact of his cannabis use ***or a risk testing positive***. The OH&S department of the Company had no obligation to provide the Grievor with information before he was willing to operate the track mobile. To take an example from the use of alcohol, it is not for the *Company* to tell an employee whether he will or won't blow over .08 if he comes to work with a strong hangover.

[90] If an employee chooses to consume drugs – legal or illegal – it is up to *that employee* – and not the Company – to determine the impact of those drugs on his system, what levels he could consume to not run afoul of the Company's Policy, how much he was willing to *risk* consuming, and also to *accept* – and not avoid – the consequences of a positive test result under the Policy.

[91] When reviewing the evidence as a whole, I also cannot agree with the Union's argument that the Grievor was being "honest and forthright" with the Company regarding disclosing

his use as required. Rather, when viewed holistically, it is clear that the Grievor was disclosing his use *in order to gain a "pass" from the Company for testing, if a derail occurred.* His basis for doing so was because cannabis was 'legal" and because it stayed "in the system" longer than alcohol; and because he felt the Company was *required* to tell him what its testing levels meant and what level of cannabis he could consume and when and the Company had not made that clear, so he was entitled to refuse that work. The Grievor was also under the mistaken belief that he could just "tell" the Company he did not want to work in a safety sensitive position, to avoid testing and this position would be considered as "reasonable", if he was a recreational cannabis user.

[92] It was unreasonable for the Grievor to take a position he would not work a safety sensitive job as directed until he received those assurances.

[93] It is confusing how the Grievor could expect the Company to provide him with "notice" before he was to perform the safety sensitive aspects of his job, so he could clean himself up from his cannabis use and make sure it was gone from his body. That would be like an individual who over–indulged in alcohol coming to work on Monday saying 'don't expect me to drive a train today, I tied on one last night and could still have alcohol in my system; I don't want to test positive". That is easily recognized as a ludicrous proposition, yet that is what the Grievor expected. Neither can the Grievor seek a dispensation from performing safety sensitive work due to his decision to consume cannabis on his off hours and a mistaken belief he could not be subject to testing.

[94] If the Grievor did not want to test positive for cannabis while operating the track mobile, it is curious why he felt he could continue to consume cannabis after April 2019 when he was assigned that work, and continue think that since he told the Company of his use, he would *not* be asked to perform that work again, and would not be subject to testing.

[95] This is a bizarre and confounding position, and is also an assumption that is incorrect.

[96] A key aspect of the Union's argument is the Grievor's belief there was a lack of "signs and symptoms" of impairment to support a "reasonable suspicion" test[17] and therefore his choice to refuse that test was reasonable.

[97] With respect to the Grievor's trust in his ***own*** conclusion on this point, a determination of what constitutes a "reasonable suspicion" is contextual. What constitutes a "reasonable suspicion' will always be a question of fact, which must be assessed in the specific context of each case. While it is true that it is often the specific "signs and symptoms" that are relied upon to support a 'reasonable suspicion' of drug use, that is not the only or the exclusive basis on which that suspicion can be based.

[98] The basis for the testing is that there is a "reasonable suspicion" of drug use which is impairing. This is not a case where an accident has triggered a test which may or may not demonstrate some level of drug use by that employee. In this case, the Grievor has admitted his use of an impairing drug to the Employer on more than one occasion; and has also admitted that was concerned he would not pass a D/A Test.

[99] It is unusual in the jurisprudence for an employee *to state* to his employer that he *does not believe* he will pass a substance test, due to his use of drugs. However, that is what occurred in this case. That admission and sated concern is part of the relevant context for determining whether the Company's suspicion was "reasonable".

[100] It is curious how the Grievor made the self–determination that he did *not* have impairing levels of marijuana in his system, and he was "cognitively ok", while at the same time said he was *not* aware of how he would test, should a test be taken.

[101] The Company was not required to "take the Grievor's word for it" that he was "cognitively ok" and "fine" when he admitted his drug use to them and expressed worry he would not pass a drug test, on multiple occasions. The Grievor's own judgment could not be expected to provide any assurance to the Company that he was not impaired from cannabis use when he was insubordinate *for the third time*. It is not unusual or unexpected

[17] See **CROA 4836** for a discussion of the four bases on which drug and alcohol tests are reasonably sought.

that an individual consuming a drug – legal or illegal – may not have sound judgment of their capability.

[102] Rather than performing the work as requested – and chance a positive test if an accident occurred – the Grievor chose not to perform the work, and he did so three different times over approximately a one month period. It was the Grievor's position during all of those times, that the *reason* he was not going to perform the work was because he was worried he would not pass a D/A Test. The Company required a test for that refusal in May 2019.

[103] When an employee has ***admitted*** that he believes he will not pass a drug test, that in and of itself leads to a "reasonable" suspicion that the Grievor could be impaired from drug use, regardless of the lack of signs or symptoms that are usually relied upon[18]. Such "signs and symptoms" are not necessary if the Grievor admits that yes, he has used drugs and he is also concerned he will not pass a D/A test. This unusual evidence of an *employee's own concern* with the impact of his *admitted* drug use caused the Company to have an understandable and reasonable suspicion that the Grievor could be impaired from that drug use. By that admission, the Grievor is himself admitting to drug use in circumstances that could affect a test result, which is what the "signs and symptoms" are meant to support.

[104] If the Grievor *himself* doubts his ability to pass a drug test, the Company is entitled to draw that same conclusion.

[105] Such an unusual statement and concern qualifies as an "action" or "conduct" of an employee that would raise a reasonable suspicion for the Company of drug use by an employee that could impact his fitness to work and would form a basis for requiring a "reasonable suspicion" D/A Test. It also qualifies as "any other observations" that the employee may be unfit for work, under the Policy. Given this unusual fact – and its repetition over three different assignments which is also relevant context to that determination – it *was* reasonable for the Company to have a suspicion that the Grievor was impaired, which supported its request for a D/A Test based on that "reasonable suspicion", to determine if that was the case.

[18] Which can themselves be difficult to determine.

[106] At the point when testing was requested, the Grievor had two choices: “submit now and grieve later” or “refuse to test and suffer what consequences may follow from that decision, which would include any negative inference that may be drawn – either by the Company or the Arbitrator – regarding that refusal, including that he was impaired at work.

[107] The other option was for the Grievor to stop using cannabis, or to became well–versed in its effects and impact on his body.

[108] I am satisfied the Grievor breached the Policy by refusing to submit to a reasonably requested D/A Test.

[109] The Union relied on **CROA 1926**. In that case, 30 demerits and discharge for accumulation was assessed to an individual who had a positive test result for marijuana. He had previously admitted he had used marijuana on a “social basis” and that he had once tried cocaine, and had agreed to undergo periodic drug testing after that every three months for two years. The Grievor was ordered to undergo a drug test a week after a tragic accident in which his foreman was killed, but had difficulty complying due to his Engineering course work that he was pursuing during the day. He was assessed 30 demerits for not doing so. Not surprisingly, that discipline was set aside as it was not found the Company had reasonable and probable grounds to require that testing, and that his regular testing was to be arranged for a convenient date. That case does not shed light on the appropriate considerations or discipline when a failure to take a drug test in “reasonable suspicion” circumstances is at issue.

[110] As noted in **CROA 4707**, the Company has a legitimate concern with sending a ‘wrong signal’ to employees in safety–sensitive positions. In that case, the signal was to employees who deliberately consume a toxic drug; in this case, the signal is to employees who refuse to submit to a reasonably requested D/A Test.

[111] To provide the Grievor the benefit of the doubt he was *not* impaired when he refused to submit to a reasonably requested test would send the wrong signal to employees, who would be encouraged to refuse a test when they are concerned with impairing levels, rather than submit to what the jurisprudence has determined is a proper and reasonable request when a reasonable suspicion is raised.

[112] Arbitrators are entitled to draw reasonable inferences from the evidence filed. As noted in **CROA 3727**, quoting **CROA 3581**, **CROA 1703** and **CROA 4865**, a refusal to test leaves an employee open to a negative inference of drug use and impairment. The chance of dismissal was noted decades ago, in **CROA 1703**.

[113] By refusing to submit to a reasonably requested test, the Grievor opened himself up to a risk that a *negative* inference would be drawn from that refusal. I am satisfied that a negative inference of impairment is reasonably drawn in this case.

[114] Following from that inference, as was noted in **AH807** and **CROA 4700,** "railway arbitrators apply a presumption that termination constitutes the appropriate penalty for employees who work while impaired".[19]

[115] I therefore cannot agree with the Union that progressive discipline should have been appropriately considered, in this case. The dismissal of the Grievor is warranted for violating the Company's Policy and failing to submit to the reasonably requested D/A test.

[116] The Grievance is dismissed.

I remain seized for any questions regarding the implementation or application of this Award. I also remain seized to correct any errors and address any omissions, to give this Award its intended effect.

June 4, 2024

CHERYL YINGST BARTEL
ARBITRATOR

[19] See also **AH843**