# CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

# CASE NO. 5068

Heard in Montreal, July 17, 2024

Concerning

**CANADIAN PACIFIC KANSAS CITY RAILWAY**

And

**TEAMSTERS CANADA RAIL CONFERENCE**

**DISPUTE:**

Appeal on behalf of Locomotive Engineer J. Downey of Saskatoon, SK, regarding him being assessed with a 30-day suspension.

**JOINT STATEMENT OF ISSUE:**

Following an investigation, Engineer Downey was assessed with a 30-day suspension on April 22, 2022, described as:

"This Discipline Letter is in connection with the positive result for THC in your urine sample from your post-incident substance test performed on March 30, 2022 (in connection with a train securement incident for which you were found culpable and assessed a 40-day suspension) and your confirmation during your formal investigation of having consuming marijuana a reported 16.5 hours prior to the start of your shift.

A violation of:

- CP's Alcohol and Drug Policy HR203
- CP's Procedure HR203.1
- CP's 29-day cannabis Ban

Company records indicate this is your first violation of the Drug and Alcohol Procedure 28-Day Cannabis Ban. As a result, your record is assessed a 30 (Thirty) Day Suspension and upon return to service you will be subject to 6 (six) months of unannounced substance testing. The six-month period will be extended by an amount equal to a period in which you are not in active service with the Company"

Note that this assessment is independent of the discipline assessed for your train securement incident. The 30-day suspension for your violation of the Company 28-day Cannabis Ban outlined in Alcohol and Drug Procedure HR203.1 will be served subsequent to your 40-day suspension (effective May 11 to 29, 2022 and from June 6 to 16, 2022)...

UNION'S POSITION:

The Union does not dispute that Engineer Downey had a non-negative urine test for marijuana in this instance. The non-negative urine test does not constitute impairment but rather that a legal substance was in his system. The assessment of discipline by the Company that amounts to an excessive fine is unnecessary and provides no additional prohibitive value in this instance. The Union asserts this was an isolated incident for Engineer Downey, as evidenced in

the investigation, he has had two drug and alcohol tests in the past and the tests were negative.

The Union challenges the application of Policy HR203 and Procedures HR203.1 to Mr. Downey in these circumstances. Specifically, the Union asserts that a positive urinalysis result for marijuana, standing alone, does not prove impairment, and without proven impairment no assessment of discipline can be sustained. Likewise, in these circumstances the Company cannot justifiably impose Drug & Alcohol random testing to Mr. Downey as a consequence of violating the purported 28-day ban.

Within the Form 104 the Company has mandated that Engineer Downey will undergo random testing and stated, "you will be subject to 6 (six) months of unannounced substance testing. The six-month period will be extended by an amount equal to any period in which you are not in active service with the Company." The Union objects to this mandate from the Company and assert that this declaration is a violation of Mr. Downey's statutory and Collective rights.

The Union contends that the Company continues to ignore arbitral jurisprudence on this subject, and that Mr. Downey's discipline is unjustified, unwarranted and excessive in all of the circumstances. The Union further contends that the Company is aware of recent CROA Arbitration Awards such as CROA 4355, 3668, 3691, 4240, 4296, AH 717 and the recent 4792 that have all supported the Union's position. Arbitrators have mirrored the Union's position agreeing that a positive urine test cannot be linked to present impairment.

The Union requests that the discipline be removed in its entirety, and that Mr. Downey is made whole for all associated loss with interest. Further, an order that the Company rescind all assessments of mandatory unannounced substance testing regarding Mr. Downey. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

COMPANY POSITION:

The Company disagrees and denies the Union's request.

The Company maintains that culpability was established and that the Grievor's culpability as outlined in the discipline letter was established following the fair and impartial investigation and that the discipline was determined following a review of all pertinent factors, including those described by the Union. The Grievor admitted in the investigation statement to have consumed a THC substance which resulted in his positive post incident test, approximately 15 hours between when he consumed and when he started his shift.

The Company maintains that the Grievor did not have his statutory nor collective rights violated. The requirement for unannounced substance testing in his disciplinary letter was warranted and consistent with Company policies, procedures as well as arbitral jurisprudence. Unannounced substance testing provides the Company with confirmation of the Grievor's ongoing compliance and clear understanding of the Company's Alcohol and Drug Policy and Procedure.

The discipline assessed was appropriate, warranted and just in all the circumstances. It was in no way excessive nor severe. Accordingly, the Company cannot see a reason to disturb the discipline assessed and requests that the Arbitrator be drawn to the same conclusion.

| **For the Union:** | **For the Company:** |
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| **(SGD.) G. Lawrenson** | **(SGD.) F. Billings** |
| General Chairperson, LE-W | Director, Labour Relations |

There appeared on behalf of the Company:

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| A. Cake | – Manager, Labour Relations, Calgary |
| E. Carrier | – Manager, Labour Relations, Calgary |

And on behalf of the Union:

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|---|---|
| A. Stevens | – Counsel, Caley Wray, Toronto |
| G. Lawrenson | – General Chairperson, LE-W, Calgary |

H. Makoski – Senior Vice General Chairperson, Winnipeg
J. Keen – Local Chairperson, via Zoom
J. Downey – Grievor, via Zoom

## AWARD OF THE ARBITRATOR

### Context and Issues

1. The grievor was post-incident tested following a failure to properly secure his train. The testing from an oral swab and breathalyzer were negative, but urinalysis showed that he was positive for cannabis metabolites. During his investigation he admitted having consumed a marijuana candy some 16.5 hours before his tour of duty.

2. The grievor was assessed with a 30 day suspension and six months of random testing, pursuant to the Company Drug and Alcohol Procedure 28 Day Cannabis Ban.

3. At issue is whether the discipline and testing are appropriate in the circumstances. The grievor had twenty-eight (28) years of seniority at the time and had been the subject of 5 suspensions prior to the present matter, although none were related to drug or alcohol issues.

### Position of Parties

4. The Company takes the position that employee and public safety are critical and that the grievor holds a safety critical position as a Locomotive Engineer. There is no dispute that testing was appropriate in light of the grievor's failure to properly secure his train. His urine tested at a quantitative level of 53 ng/ml for marijuana.

5. The Company relies on the 2021 notice given to all Union leaders regarding the "Application of Hybrid Discipline and Accountability Guidelines-Positive Substance Tests" (see Tab 11, Company documents). Pursuant to this notice, a first time violation attracts a15-30 day suspension, together with six (6) months of unannounced substance testing.

6. The Company relies on several cases which have upheld both discipline and testing for urine testing showing levels of cannabis metabolites, given the critical importance of safety.

7. The Company argues that testing is appropriate in the circumstances for safety reasons, even if no discipline is imposed.

8. The Union takes the position that the negative oral swab and breathalyzer results show that the grievor was not impaired while on duty. The urinalysis positive result merely shows that he had cannabis metabolites in his system, but not when or in what quantity the cannabis was consumed.

9. The Union submits that the jurisprudence is clear that the presence of drugs or alcohol in a grievor's system do not permit the employer to impose discipline. The grievor has a duty to be fit for duty and in no way impaired, but he does not have a duty to be free of trace amounts of drugs or alcohol.

10. The Union further submits that as no discipline can be imposed based on the urinalysis results, there is no good reason to impose 6 months of random testing.

**Analysis and Decision**

11. The Parties agree that railroading is an inherently dangerous occupation which requires a constant attention to safety (see **SHP 530, AH 807**).

12. The Parties further agree that employees must be fit for service and remain so while at work.

13. The Parties also accept the position that testing is appropriate in certain circumstances, as set forward by the Supreme Court of Canada in **Communications,**

**Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp and Paper** 2013 2 SCR 458:

> This approach has resulted in a consistent arbitral jurisprudence whereby arbitrators have found that when a workplace is dangerous, an em- ployer can test an individual employee if there is reasonable cause to believe that the employee was impaired while on duty, was involved in a work-place accident or incident, or was returning to work after treatment for substance abuse. In the latter circumstance, the employee may be subject to a random drug or alcohol testing regime on terms ne-gotiated with the union.

14. Here, there was a failure to secure a train, so testing was appropriate.

15. The Parties do not agree as to the consequences flowing from the test results. The grievor had a negative oral swab and breathalyzer result, while testing positive in urinalysis.

16. CROA jurisprudence for many years has been consistent that the issue is impairment, not the presence of drugs or alcohol in the system of an employee. As Arbitrator Picher held in **CROA 3701**:

> Dealing specifically with the issue of a positive drug test, it is well established that such a test does not, of itself, establish impairment. At most, a positive urinalysis test would indicate that the subject ingested marijuana at an earlier point, perhaps days or weeks in the past, without any indication as to the precise time, place or quantity of the consumption. Standing alone, therefore, a positive drug test cannot be just cause for discipline, even if it may, technically, be a violation of some provision of the Company's Policy #HR203.

17. More recently, Arbitrator Sims in **CROA 4584** canvassed many of the cases with respect to the need for a finding of impairment, where an oral fluid drug test is indicative of impairment, whereas a positive urine test is not:

> Several CROA cases discuss the consequences of a positive urine test, without more, and in the face of negative tests for impairment. The Union refers to CROA 4524, 4311, 4039, 3668, 3691, 3701, 4240, 4298 and Ad Hoc SHP 530. It is sufficient to note Arbitrator Clarke's comments in the most recent decision.

> 24. CP had the burden of proof to demonstrate that Mr. Playfair was impaired at the time of the November 15, 2015 incident. As numerous CROA decisions have already noted, it is not enough to show that a urine test indicates an employee may have traces of marijuana in his/her system. Those results do not demonstrate impairment at the material times. In Mr. Playfair's situation, he tested negative for the more specific oral fluid drug test.
> 25. CP's position, as set out in its policy and as argued, posits that employees should never take illegal drugs. But the case law has not upheld a policy that extends that broadly.
>
> The Company in its brief acknowledges these cases, but still says there is a violation of the Drug and Alcohol Policy which is "worthy of some discipline". That view conflicts with paragraph 25 quoted above. The Company argues that the admitted use of marijuana should still incur a disciplinary response and is ancillary to, and an aggravating factor in respect to, the Rule 42 incident. In my view the case law does not support that position. Clearly it is not a mitigating factor. The grievance in respect to the second Form 104 is allowed and that discipline is to be expunged from the grievor's record."

18. Urinalysis has repeatedly been found by arbitrators to be incapable of assessing when or in what quantity drugs were consumed, and whether the employee was impaired. This lengthy line of cases was upheld by the Ontario Divisional Court in **Canadian Pacific Rail Company v. Teamsters Canada Rail Conference**, 2020 ONSC 6683:

> [36]The arbitrator found that the grievor tested negative for breath alcohol and oral fluids, but positive on the urine drug test, and admitted in the investigation to smoking marijuana off-duty the night before the incident. The arbitrator found that the grievor was not impaired, although the positive urine test revealed that there were "residual traces of marijuana" in the grievor's body. As the parties agreed that traces of marijuana may remain in the body for a month or more, the arbitrator held that by itself a positive urine test does not establish impairment where negative breath alcohol and oral fluid tests strongly indicate there was no impairment. He found as a fact that there was no suggestion that the grievor's conduct, movement or verbal behaviour revealed impairment. He concluded on all of the evidence that the grievor was not impaired during his shift and did not violate the Drug Policy. The arbitrator stated that this conclusion was consistent with arbitral jurisprudence in the railway sector, citing a CROA decision that "a positive urine drug test, standing alone, does not establish impairment."

> [38] The arbitrator's analysis, based on the facts before him, shows a line of analysis leading from the evidence to the conclusion. His reliance on arbitral caselaw was reasonable. The Union relies on eight CROA decisions, from 2008 to 2019, which all state that a failed urinalysis test is not by itself sufficient proof of impairment. Oral fluid testing, on the other hand, can reliably show impairment. In basing his decision on the CROA caselaw, on the facts found by the arbitrator, the arbitrator's analysis was reasonable.

19. The Company cites the 2019 expert opinion paper of Dr. Snider-Adler (see Tab 4B, Company documents). The paper provides a good overview of the risks of substance use in the workplace. However, this paper, unlike many other reports prepared by Dr. Snider-Adler, is not specific to the grievor and does not comment on the facts of this case.

20. Here, the facts of this case show that while the grievor showed a positive urine test, the more accurate oral swab was negative. He exhibited no other signs of impairment. Accordingly, I find that the grievor was not impaired at the time of testing.

21. The jurisprudence is also overwhelmingly in agreement that if the grievor is not impaired, discipline is not appropriate. As Arbitrator Picher noted in **CROA 4240**:

> "In these circumstances the Arbitrator cannot responsibly conclude that the employer had just cause for the assessment of any discipline against the grievor, merely by reason of his having registered a positive result to a urine analysis drug test, or by his admission that he did consume marijuana in a social setting while off duty."

22. Arbitrator Clarke came to the same conclusion in **CROA 4524**.

23. The Company applied their 28 day cannabis ban and Hybrid Discipline Policy, which is currently the subject of an exhaustive review before Arbitrator Clarke. Until such time as the science, legislation or jurisprudence changes, I see no reason not to follow the existing CROA and Court jurisprudence. Accordingly, I find that the 30 day suspension imposed by the Company must be struck down and the grievor made whole.

24. Given that the grievor is no longer the subject of discipline for the test results, was it nonetheless reasonable for the Company to impose a six month regime of random testing?

25. Typically, random testing has been imposed for employees returning to work after a finding of impairment on the job or with an addiction. Absent one of these scenarios, it is extremely rare to see random testing being suggested by the Company, let alone imposed by the arbitrator.

26. The Company cites several cases in support of its position that random testing is appropriate here.

27. It cites **CROA 3632**, where a post incident test following a collision revealed a positive drug test, although the grievor was found not to be impaired at the time. Arbitrator Picher reinstated the grievor without compensation and imposed 2 years of random testing. It is noteworthy, however, that the decision was made some 9 months after the introduction of the Company's Drug and Alcohol Policy, such that the arbitrator would not have had the benefit of the many CROA decisions which followed. It is also noteworthy that there was a finding that the grievor had not been truthful during the investigation.

28. The Company also cites **Quong v Lafarge Canada Inc**., 2024 ABKB 340, in which the Court upheld the dismissal of the plaintiff for a refusal to test. An obvious distinction between Quong and the present matter is that the plaintiff tested positive from an oral fluid test, indicating impairment at work. That is not the case here.

29. The Company cites **AH 787**, in which Arbitrator Hodges orders an assessment by a Substance Abuse professional, together with random testing for 6 months for a grievor who tested negative for oral fluids but positive in urinalysis for MDMA-ecstasy. The notable difference between **AH 787** and the present matter, however, is that the grievor there invoked an addiction. In addition, Arbitrator Hodges found the grievor not to be forthright in his testimony.

30. Other cases, both those cited by the Company and by the Union, underline how uncommon it is for random testing to be required in the absence of one of the scenarios set out above.

31. In **CROA 4826**, Arbitrator Yingst Bartel found that the grievor was not impaired from the use of cocaine some four days earlier. There was a negative oral fluid result, but a positive urine test. She accordingly set aside the dismissal. She also declined to impose any conditions on the grievor's reinstatement:

> 49.The Union has urged that no conditions should be attached to the Grievor's reinstatement nor should he be subject to a lengthy suspension, as he was not impaired on the job.
> 50.Conditions have been imposed under certain circumstances, and discharge has been converted to suspensions. The facts in each case are determinative.
> 51.This case is distinguishable from AH787 and AH729. In AH787, the Grievor was not forthright and accountable regarding his drug use, but stated he had "no idea" how he tested positive. It was this lack of forthrightness and accountability which supported the application of conditions on his reinstatement.
> 52.The facts in this case are distinguishable. While there were questions the Grievor refused to answer during the Investigation – such as how he had ingested cocaine -he did not try to hide or cover that cocaine use had occurred, or when.
> 53.In AH729, Arbitrator Moreau reinstated the Grievor without compensation, which resulted in a lengthy suspension, because the grievor had given misleading answers at his Investigation. That case is also distinguishable. The Grievor did decline to answer certain questions in the Investigation, but he did not mislead.

32. This follows the decision of Arbitrator Silverman in **CROA 4400**, who declined to impose conditions on reinstatement:

> *"*As an alternative submission, the Company asked that conditions be imposed on the grievor if he is reinstated. The suggested conditions are similar to the ones recognized as appropriate by this Office in the accommodated reinstatement of employees who suffers from substance dependence. There is no evidence or law provided by the Company as to why these conditions are appropriate given the relevant jurisprudence of

> this Office. Accordingly, there is no reason to impose conditions on the grievor and I decline to do so."

33. The "Canadian model" of drug and alcohol testing has always been alive to the need to balance competing concerns: safety in the workplace versus privacy rights of individuals. In **Irving**, the Supreme Court of Canada took note of a lengthy arbitral history of balancing these rights:

> A substantial body of arbitral jurisprudence has developed around the unilateral exercise of management rights in a safety context resulting in a carefully calibrated "balancing of interests" proportionality approach. Under it, and built around the hallmark collective bargaining tenet that an employee can only be disciplined for reasonable cause, an employer can impose a rule with disciplinary consequences only if the need for the rule outweighs the harmful impact on employees' privacy rights. This approach has resulted in a consistent arbitral jurisprudence whereby arbitrators have found that when a workplace is dangerous, an employer can test an individual employee if there is reasonable cause to believe that the employee was impaired while on duty, was involved in a workplace accident or incident, or was returning to work after treatment for substance abuse.

34. Privacy rights will bend to the need for workplace safety in the face of either workplace or personal conditions which require testing. Absent those workplace or personal conditions, bodily integrity will be respected.

35. In **CROA 3632** and **AH 787**, there were findings that the grievor had not been candid during the investigation. This lack of candor led to the decisions to impose random testing. Here, however, the grievor was candid during the investigation about his consumption of a marijuana candy. During an initial meeting with the testing agency, the grievor had mentioned the possibility of second hand marijuana smoke inhalation and did not mention the candy. The Company asserts that this demonstrates a lack of candor. However, the earlier statement was not made in the context of a formal investigation, and was done without union representation. In **CROA 4400,** Arbitrator Silverman declined to give any weight to questions and answers given prior to the formal investigation.

36. Given the grievor's candor during the formal investigation, I find that **CROA 3632** and **AH 787** are distinguishable.

37. As the grievor was not impaired at work, does not have an addiction issue, and was candid during the investigation, I can see no reason to impose on-going random testing. To do so would fly in the face of the decision of the Supreme Court of Canada in **Irving** and CROA jurisprudence.

38. Accordingly, the Company's decision to impose a six (6) month random testing period on the grievor is hereby quashed. The grievor is to be made whole.

39. I retain jurisdiction with respect to any issues of interpretation or application of this Award.

September 16, 2024

**JAMES CAMERON**
**ARBITRATOR**