CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5069

Heard in Montreal, July 17, 2024

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the assessment of dismissal to Locomotive Engineer John Downey of Sutherland, SK.

JOINT STATEMENT OF ISSUE:

Following an investigation, Engineer Downey was dismissed from Company service on January 28, 2023, as described as:

"In connection with your required unannounced substance testing; your positive alcohol test results on December 5, 3022, while subject to duty.
A violation of:

- Alcohol and Drug Policy (Canada) #HR 203
- Alcohol and Drug Procedures (Canada) #HR 203.1."

Union's Position:

The Union asserts the Company, by choosing to not provide a response, has not fulfilled the requirements of Article 40.03 and the Letter Regarding Management of Grievances & The Scheduling of Cases at CROA. Despite the fact the Union has progressed the grievance the Company still has a responsibility to follow the requirements of the Consolidated Collective Agreement.

The April 22, 2022, Form 104 states in part that "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-Day Suspension and upon your return to service you will be subject to 6 months of unannounced substance testing." The January 10, 2023 investigation evidenced that Mr. Downey had no THC or other narcotics in his system. It was Mr. Downey's impression that he was not restricted from drinking alcohol and that the test on December 5, 2022, was for THC or other narcotics. Further on the day of the test, Mr. Downey was not lined up to work for another 11 hours.

The Union asserts that had the Company properly educated Mr. Downey when they assessed the discipline on April 22, 2022, this incident would not have occurred. Mr. Downey was cooperative during the investigation and made it clear that he was not intentionally violating the six month of unannounced substance testing. Mr. Downey misunderstood that he was required

to abstain from alcohol during his personal time, instead he had the understanding that he was only to abstain from using marijuana. The Company has a duty to ensure their employee has a clear understanding of the expectations of discipline requirements to prevent misunderstandings like this.

The Union further asserts that Mr. Downey was not lined up to go to work until the morning of December 6, 2022. According to the record, Company expert Melissa Snider- Adler states that BAC levels decline at a rate of .015 to .02% per hour. This means that at 1708, 2 hours and 45 minutes, after the test Mr. Downey's BAC would be under the company's standards of 0.02 and by 1808 his BAC level would be at zero. Mr. Downey would be within company standards of .02%, 10 hours prior to reporting for duty.

The Union contends that the events that took place were not an attempt to circumvent or violate any agreements, policies, or procedures. In-fact this was a simple misunderstanding, his impression was that he was not allowed to have cannabis at any time but was unaware he couldn't have alcohol in his system. This is of course, the reason he had no issue being administered a test.

For the foregoing reasons the Union requests that the Arbitrator reinstate Engineer Downey without loss of seniority and that he be made whole for all lost earnings and benefits with interest. 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 cannot agree with the Union's allegations that it did not respond to the grievances. Notwithstanding this, the collective agreement Article 40.04 is clear in that the remedy for failing to respond is escalation to the next step. Based on the Union's submission of the grievance to CROA&DR, it is also clear that the Union acknowledges Article 40.04 and has progressed to the final step of the dispute resolution process.

The Company maintains the Grievor's culpability as outlined in the discipline letter and that culpability was established following the fair and impartial investigation.

The Grievor was subject to 6 months of unannounced substance testing due to a previous incident and subsequent failed post incident substance test, as per the Company's Alcohol and Drug Policy and Procedures. On December 5, 2022, at approximately 14:52, the Grievor was administered an unannounced substance test while subject to duty. His results were non-negative for breath alcohol content screening at 0.051% with a subsequent lab confirmation positive at 0.046% BAC. This positive result is a clear violation of CROR Rule G and the Company's Alcohol and Drug Policy HR 203 and 203.1

The Grievor was acutely impaired while subject to duty.

The Grievor's claim that he was under the assumption that his unannounced testing was for THC or other narcotics only is not credible nor acceptable.

Following the fair and impartial investigation, it was confirmed that the Grievor had in fact consumed alcohol while he was subject to duty. Given such, the discipline assessed was appropriate, warranted and just in all the circumstances and 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:
(SGD.) G. Lawrenson	**(SGD.) F. Billings**
General Chairperson, LE-W	Director, Labour Relations

There appeared on behalf of the Company:

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

And on behalf of the Union:

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

1. The grievor is a locomotive engineer with twenty-eight (28) years of seniority when he was terminated for violations of the Alcohol and Drug Policy HR 203 and 203.1 while subject to duty. His testing was done pursuant to an order for random testing for six months, which is the subject of a decision in **CROA 5098**.

Issues

A. Can the Company rely on the test results made pursuant to the order for random testing?

B. Can the Company rely on statements made by the grievor during the investigation with respect to when and how much he was drinking?

C. Was the grievor subject to duty when he was drinking?

D. Is termination appropriate in the circumstances, and if not, what discipline is appropriate?

A. Can the Company rely on the test results made pursuant to the order for random testing?

2. In **CROA 5068**, a determination was made that the 30 day suspension and six (6) months of random testing ordered, following a positive urinalysis but negative oral swab test, should be quashed:

> 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.
> 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.
> 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.

3. The testing which was done here was therefore done unlawfully. If the testing was unlawful, the Company may not rely on the results of such a test.

B. Can the Company rely on statements made by the grievor during the investigation with respect to when and how much he was drinking?

4. In the investigation, the grievor candidly set out his activities during the evening of December 4, 2022 and the morning of December 5, 2022:

> Q22. What date and what time was the last time you consumed alcohol prior to this sample being provided on December 5, 2022?
> A22. I went to a Christmas party late the night before just before midnight and I was just going to stop in and say hi. There was a bunch of people that I hadn't seen in a while and they told me to stay and have some drinks. I told them no as I was driving and I was offered a spare bedroom downstairs to sleep so I wouldn't have to drive. So I had a few drinks from approximately midnight to 0600-0700 in the morning.
>
> Q23. How many ounces of alcohol did you consumer and what was the alcohol proof of the alcohol consumed?
> A23. I don't know how much I consumed. It started off with a couple of beers and then went to hard liquor at 40 proof.
>
> Q24. What time did you go to sleep after consuming the alcohol?
> A24. I really don't know. Approximately 0700 December 5.

> Q25. Company records indicate in Appendix A, your last trip prior to being booked off for Company Business to participate in the unannounced testing was December 4, 2022 called for 0141. Is that correct?
> A25. Yes.

5. An argument can be made that the only reason that the grievor was being questioned during the investigation was because he had been illegally required to randomly test, and that the questions and answers should accordingly be disregarded.

6. However, I think the better view is that investigations are held in order to understand and clarify the facts of a particular matter, whether it is an accident, a collision or a rule violation. The questions are not intended to be biased and indeed, there are multiple CROA decisions where discipline has been quashed because the investigation was not impartial or fair. However, the answers are also expected to be truthful, and CROA arbitrators have made many unfavourable decisions when the answers have been found to be dishonest. In any investigation, some questions may be objectionable and those questions and answers will not be relied on by the arbitrator.

7. Here, the initial questions and answers of the investigation clearly set out the expectations of both Parties:

> 3Q. Do either of you or your accredited representative have any procedural concerns that need to be addressed before continuing?
> 3A. The following is entered on request of Union Representative: Jim Keen.
> *John Downey takes part in this investigation without prejudice. He retains his rights and the rights on the union to grieve discipline imposed (if any) under the collective agreement and/or any applicable statutes, legislation, acts or policies.*
> *The Union requests full disclosure of all evidence, photographs, voice recordings, audio and video records, including any documentation whether paper or electronic, that has been utilized, or is in possession of the company and which may have a bearing on determining responsibility.*
>
> ***Company Officer states:*** *"All investigations are "with prejudice" and used to determine the facts as it related to any given situation in accordance with the Collective Agreement. If an investigation supports a finding a culpability, any resulting discipline shall be determined in accordance with*

> *the Collective Agreement and CP's Hybrid Discipline and Accountability Guidelines. The grievance procedure in the investigation is to ensure the rights of your member under the Collective Agreement are observed.*
>
> 4Q. Do either of you or your accredited representative have any further procedural concerns that need to be addressed before continuing?
> 4A. no.
>
> 5Q. Do you understand that investigation are conducted in an effort to get to the facts of any given situation or incident?
> 5A. Yes
>
> 6Q. Do you understand Canadian Pacific expects its employees to answer all questions in a truthful manner to give false or misleading information in an investigation will result in the appropriate disciplinary action being taken?
> 6A. Yes.

8. Here, I do not intend to rely on the questions or answers relating to the testing or results therefrom, for the reasons set out in **CROA 5068**. However, the Company is entitled to ask questions and rely on the truthful answers given with respect to when and how much the grievor had been drinking as it relates to at least a potential rule violation.

C. Was the grievor subject to duty when he was drinking?

9. The rules prohibit the consumption of alcohol at all, while subject to duty:

> 2.0 Policy Statement
> The Policy and Procedures apply to all employees at all times while working, on duty, subject to duty, on Company premises and worksites, on Company business and when operating Company vehicles and moving equipment (whether on or off duty). To minimise the risk of unsafe or unsatisfactory performance due to alcohol and/or drugs employees are expected to meet the following standards:
> 2.1 Employees must report for work in a condition that enables them to safely and effectively perform their duties.
> 2.2 Employees must report fit for work and remain fit for work. All employees must remain free from the adverse effects of alcohol and/or drugs including acute, chronic, hangover and after-effects of such use.
> 2.3 Employees are prohibited from being in control of a CP vehicle, railway equipment or moving equipment, (whether on or off duty). Or any vehicle on CP property or roads, while under the adverse effects of alcohol and/or drugs.

2.4 Employees are also subject to the provisions of the Canada Labour Code, the Railway Safety Act, the Canadian Rail Operating Rules, General Operating Instructions, the Criminal Code of Canada and all other applicable laws.
2.5 Employees must comply with and meet the alcohol and drug standards as outlined in the Policy and Procedures.
2.6 Employees will also be subject to workplace alcohol and/or drug testing as outlined in the Procedure HR 203.1. Employees are required to advise CP of any use of alcohol and/or drugs that may affect their ability to work safely prior to commencing work (including medical cannabis or any cannabis product (including CBD) and all other prescription drugs). CP may request information from an employee's health care provider regarding the employee's use of alcohol and/or drugs. Employees are required to comply with all reasonable requests made by CP in order to assess their fitness to safely and effectively perform their duties.
2.7 All Employees are accountable for their actions and are expected to comply with the Policy and Procedures, including those who may have an alcohol and/or drug use problem. Employees who have an alcohol and/or drug use problem or an emerging problem are required to seek advice, to follow appropriate treatment and to disclose appropriately within CP their issues including any restrictions and/or limitations. This ensures that appropriate restrictions and limitations can be implemented before a workplace incident occurs, before safe job performance is impacted or before violations of this Policy and Procedure occur.
2.8 Employees who voluntarily request assistance with an alcohol and/or drug use problem will not be disciplined or dismissed for requesting assistance. However, this voluntary request and disclosure must be made before a workplace incident occurs, an investigation is initiated, a violation of the Policy and Procedures occurs, and before unsafe or unsatisfactory performance is identified. Subsequent disclosure or requests for assistance after an event (as detailed above) will not prevent an employee from being subject to an investigation(s) and discipline up to and including dismissal. CP Company Officers and Co-workers, under Procedure HR 203.2 are responsible for reporting employees who appear to be unsafe or have unsatisfactory work performance due to the possible use of alcohol and/or drugs.

Procedure #HR 203.1 Alcohol and Drug Procedures (Canada)
3.1.1 Alcohol
The following are prohibited at all times while an employee is working, on duty, subject to duty, on Company premises and worksites, on Company business and when operating Company vehicles and moving equipment (whether on or off duty):

- The use, possession, distribution, offering or sale of beverage alcohol;

- Reporting for work or remaining at work under the effects of alcohol from any source, including acute, chronic, hangover or after-effects of such use;
- Consumption of any product containing alcohol (including beverage alcohol) during meals and breaks.

10. The investigation sets out the facts and issues surrounding whether the grievor was subject to duty when he had been drinking:

> 26Q. Company records indicate in Appendix A, your last trip prior to being booked off for Company Business to participate in an unannounced testing was December 4, 2022 called for 0141. Is that correct?
> 26A. Yes.
>
> 27Q. Company records indicate in Appendix B you were off duty at 0435 on December 4, 2022.and booked 24 hours rest. Is that correct?
> 27A. Yes.
>
> 28Q. This would put you off rest and subject for duty at 0435 on December 5, 2022. Is that correct?
> 28A. Off rest yes, but I was not lined up to go to work for another day and half. And according to Appendix A my plug did not go out until December 6 at 0330. I booked 24 hours off so I would have went to the bottom of the Engineer Pool and stayed there until my rest was up. There was no possible way that I would be going to work on December 5th, if there was even the slightest possibility that I was going to work I wouldn't have consumed alcohol at the Christmas party.
>
> 29Q. Even though you thought you were not initially lined up to go to work December 5, 2022, you were still subject for duty at 0435 on December 5, 2022. Is that correct?
> 29A. Yes.
>
> 31Q. Do you understand Appendix E 3.1.1 Alcohol?
>
> **3.1.1 Alcohol**
>
> The following are prohibited at all times while an employee is working, on duty, subject to duty, on Company premises and worksites, on Company business and when operating Company vehicles and moving equipment (whether on or off duty):
>
> - The use, possession, distribution, offering or sale of beverage alcohol;
> - Reporting for work or remaining at work under the effects of alcohol from any source, including acute, chronic, hangover or after-effects of such use;

- Consumption of any product containing alcohol (including beverage alcohol) during meals and breaks.

31A. Yes

32Q Do you understand because you were subject for duty when you tested positive for alcohol on your BAC reporting at 0.051, you are in non-compliance of #HR203.1?

Union Note – As per appendix H Dr. Melissa Snider-Adler which is CP's own expert referenced in Appendix H, that BAC levels decline at a rate of .015 to .02% per hour. With Mr. Downey's BAC taken at 1508, being .046 which is referenced in Appendix C declining rate of .15% per hour. That means by 1708 he would be under the Company's standard of .02 ad by 1808 he would be at zero.

Company Officer response – the subject matter of this investigation is to determine if Mr. Downey was allegedly over the Company minimum standard of .02 BAC while subject for duty. The declining rate of BAC levels is not relevant to this investigation.

Union Officer Response – declining at a rate of .015% per hour is relevant as Mr. Downey was not lined up to work for another 9 hours after his level would have been at zero.

32A. Yes. I wasn't lined up to go to work, I didn't take a call to go to work, but I complied with the request to go in for drug testing as I felt I was fine. I knew I had not consumed any narcotics, I was unaware that I still had alcohol in my system and I thought the test was for THC.

33Q. Do you understand that even though you were not lined up for work after rest was completed, the line ups can change for various reasons and given that you are subject to duty the Company's expectation is that you are fit and ready for duty?

33A. Yes I understand, but the fact is my plug went out at 0330 the next morning.

11. After booking 24 hours rest on December 4, 2022, the grievor did not expect to be actually back at work until December 6, 2022. This estimate proved to be accurate, as he was not called until 0330 on December 6, 2022.

12. The grievor acknowledges that he was drinking in the morning of December 5: "So I had a few drinks from approximately midnight to 0600-0700 in the morning" (see Q and A 22). He also admits that he was subject to duty at 0435 on December 5, 2022 (see Q and A 29).

13. At issue, however, is whether the grievor was legally "subject to duty" or not. Arbitrator Weatherill noted in **CROA 557** that the grievor's statement that he was subject to duty is not determinative of the issue: "In this case, the grievors acknowledgment that they were subject to duty is not determinative of that question, which is one of substance in these proceedings".

14. What constitutes being "subject to duty" is surprisingly complex. It is not defined in either the CROR Rules or the Alcohol and Drug Policy and Procedures HR 203 and 203.1

15. The simplest interpretation is that of an employee who is not on booked rest, who has the possibility of being called into work, even though his scheduled work is in the future. This interpretation was adopted by Arbitrator Hornung in **CROA 4540.** There the grievor was drinking for approximately 30 minutes after he was no longer on rest, although unlikely to be and in fact not called for some 11 hours after he stopped drinking. The Arbitrator found that he had breached the Rule Book for Train and Engine Employees, section 2.2 (d), which provides:

> "It is prohibited to:
>
> (i) <u>use intoxicants</u> or narcotics <u>while subject to duty</u> or to possess or use such while on duty or when an occupant of facilities furnished by, or which will be paid for by the company."(underlining added)

16. Arbitrator Hornung found as follows:

> That said, an interpretation of that aspect of Section 2.2 (d) is not required for my purposes here in that the section makes it clear that the prohibition specially extends to periods where an employee is "subject to duty". By his own admission, the Grievor was subject to duty at 00.1 hours on January 23, 2016. I am satisfied that the evidence establishes that he was

> consuming intoxicants after that point in time and was only "cut off" from consuming any more at 00:30 on January 23, 2016. In the result, he is in breach of the Section 2.2 and clearly subject to discipline.

17. The Rule Book prohibition about the use of alcohol while subject to duty cited in **CROA 4540** essentially mirrors the Alcohol and Drug Policy and Procedure cited here.

18. Other arbitrators have taken a different view of the meaning of "subject to duty", finding that it refers to an employee who has an imminent requirement to work, rather than merely the possibility of being called.

19. Arbitrator Weatherill in **CROA 557** dealt squarely with the proper interpretation of the phrase nearly fifty (50) years ago. In a closely reasoned decision, he found as follows:

> The question whether or not the grievors were "subject to duty" is a difficult one. The expression does not appear to be defined in the Uniform Code. The grievors might, as they acknowledged, have received a call at any time, and in this sense they were "subject to duty". On the other hand, their status was certainly one of being "off duty" at the material times. Once they had received and accepted a call, then I think it is clear they would be "subject to duty". But it is by no means clear that, having gone off duty, and having no reason to expect a call before the morning, they should be considered as subject to duty and thus prohibited from drinking.
>
> The cases on this question in the Canadian Railway Office of Arbitration do not set out any definition of the phrase "subject to duty". In a number of cases there has been held to be a violation of Rule G by employees actually on duty. In **Case No. 128** a yard foreman reported for work under the influence of alcohol, clearly it can be said that he had been using intoxicants while subject to duty, but that does not suggest what limits there may be to the proper use of the term. In **Case No. 269** an employee did not report because he was in a drunken sleep. There too it seems clear that he had been using intoxicants at a time when he was subject to duty on any reasonable interpretation of the phrase. In **Case No. 58** a claim was made for holiday pay, and a question arose whether the grievor was "available for duty" on the holiday. The Arbitrator indicated that even if the grievor had booked rest, he might nevertheless be "subject to call" in certain circumstances. That is, he could not be said to have been "unavailable" merely because he had booked rest. It does not follow, however, that because the Company might be entitled to call the grievor he was therefore "subject to duty", and I see nothing in **Case No. 58** which would bear on the interpretation that expression should have for purposes of Rule G.

> There have been certain American cases dealing with provisions analogous to our Rule G. In **Award No. 1761** it is said that "it is well established that drinking by railroad employees on the job or on Company property or in such a manner that they are under the influence of alcohol when they are supposed to be working or available for work is a safety hazard which cannot be tolerated". In that case the board held that the evidence was insufficient to establish that the grievor had been drinking.
>
> There, the grievor had booked off work shortly after midnight, had been called at 7:30 p.m. for 9:30, which call was subsequently cancelled, and then advised he would be going out at about 4.00 the next morning. The Company's evidence as to his condition related to the time of about 9.20 p.m. As to this, the board said, "He stated at the investigation that he was due to go out at 4 a.m. and there is no other evidence to the contrary. If that is so and he had been drinking prior to 9 p.m. but had retired, there is a serious question whether under those circumstances he was guilty of the use of alcoholic beverages while subject to duty".
>
> N.R.A.B. First Division Award No. 16570, after referring to the conflicting opinions which have been expressed about Rule G in its American form (which is not identical) set out the view that even employees who are off duty were under an obligation to keep themselves fit to take out their runs. As I have indicated earlier in this award, I believe that employees are under such an obligation, even if it is not one created by the strict terms of Rule G. That case, however, does not deal with the expression "subject to duty" which did not appear in that version of Rule G. Award No. 1579 upholds the discharge of an employee who was arrested for drunkenness while "subject to duty". That was the grievor's third offence in five months service. He would clearly be subject to discharge in the circumstances. The case does not describe the circumstances by which the grievor could be considered "subject to duty", and accordingly is not helpful.

20. More recently, Arbitrator Picher in **CROA 3616** also had to interpret "subject to duty". There, the grievor "was not then working on a spareboard or out of a pool in which he might be subject to call at any given time". The Arbitrator found that the grievor was not, in these circumstances, "subject to duty" while being publicly intoxicated:

> The Arbitrator deals with the rule G allegation first. I have some difficulty with the evidence as presented by the Company. Rule G reads as follows:
>
> **G. (a)** The use of intoxicants or narcotics by employees subject to duty, or their possession or use while on duty, is prohibited.
>
> **(b)** The use of mood altering agents by employees subject to duty, or their possession or use while on duty, is prohibited except as prescribed by a doctor.

> On the evidence before me it is clear that at all material times the grievor was not on call or subject to being called, but that he was scheduled to commence work at 08:00 on November 20, 2005. I find it difficult to conclude that he could at any time prior to 08:00 on November 20 be fairly characterized as "subject to duty". The record indicates that by the Crown's own admission the breathalyser readings taken of the grievor at or about 06:00 were not such as could be relied upon. As a result, it is at best speculative as to whether the grievor might or might not have been under the influence of alcohol at the scheduled time of the commencement of his tour of duty at 08:00. From that standpoint, the evidence is simply not sufficient to establish a violation of rule G.

21. In **SHP 713** Arbitrator McFetridge dealt with a grievor who was called in to work overtime to re-rail a derailed freight car. He smelled of alcohol, but the Company was unable to perform a breathalyzer test. He was dismissed for consuming alcohol while subject to duty, a violation of Rule 6.11 of the collective agreement, which requires employees to be "fit for duty". A violation of the Alcohol and Drug Policy was also alleged. The arbitrator found that the facts did not support the allegation that the grievor was not "fit for duty", although the grievor did admit to having consumed two beers prior to being called in. The arbitrator ultimately found that Rule 6.11 was applicable and that the Alcohol and *Drug Policy could not override the provisions of the collective agreement:*

> 45. it is a longstanding principle of labour relations that a Company cannot unilaterally enforced rules if they conflict with the terms of the Collective Agreement. (see *Lumbar & Sawmill Workers' Union, Local 2537 v. KVP Co.* (1965), 16 L.A.C. 73, [1965] O.L.A.A. No.2 (Ont. Arb.) Drug and Alcohol Policy OHS 5100 prohibits employees who directly affect or are involved in Operations or are present a an Operations site, from consuming any product containing alcohol, not just during working hours and when they are on duty (including during breaks) but also when on call or on scheduled call. Although it is not clear that Supplementary Service Employees would be covered by the Policy as there appears to be a distinction between being "on call" or "on scheduled call" and being "available for call". However, if they must comply, it is doubtful that they could ever consume a product that contains alcohol and must abstain from alcohol at all times. This is a higher standard than Rule 6.11 which only requires Supplementary Service employees to be available for call and fit for duty within one hour of being called.
>
> 47. in its notice of dismissal (Form 104). The Company included as grounds for dismissal, his "consumption of alcohol while subject to duty

> on March 20, 2013" which it alleged was a "a violation of OHS Policy 5100 – Drug and Alcohol Policy". The OHS Policy 5100 is a unilateral rule imposed by the Company and not agreed to by the Union. It is not consistent with the Collective Agreement as it purports to raise the standard required of Supplementary Service Employees from "fitness for duty" to what amounts to "total abstinence". Total abstinence is not the standard that the parties agreed to in the Collective Agreement, it is not reasonable and cannot be the basis for discipline.
>
> 48. Rule 6.12 and specifically OHS Policy at 2.1.6 contemplates the possibility that an employee, not on call, might receive a request to perform unscheduled services after consuming alcohol. In such circumstances it is the responsibility of the employee to decline the work if his ability to perform the duties is impaired by drugs or alcohol. There was uncontested evidence that Supplementary Service Employees who have consumed alcohol while off duty and then receives a call, can refuse the assignment without fear of discipline if he believes he is unfit for duty.
>
> 51. The words "subject to duty" and "on call" appear in OHS 5100 but not in Rule 6.11. Based on my finding that the grievor met the requirements of Rule 6.11 and that a violation of OHS 5100 could not, without more, be the basis for discipline, it is unnecessary for me to make any further findings on this issue.

22. In **CROA 4343**, Arbitrator Stout dealt with the discharge of a grievor for an alleged violation of CROR Rule G and the Company's Alcohol and Drug Policy. At issue is whether the grievor had been "subject to duty" when he consumed alcohol prior to his shift:

> The issue to be determined was whether or not the grievor violated CROR Rule G and the Company's Drug and Alcohol policy.
> CROR General Rule G prohibits the use of alcohol and or drugs by employees who are on duty or "subject to duty". The relevant paragraph reads as follows:
>
> (i) the use of intoxicants or narcotics by employees subject to duty, or their possession while on duty is prohibited.
>
> The term "subject to duty" is not defined in CROR Rule G. Neither does CROR Rule G prohibit employees from consuming alcohol for a specific period of time prior to one's scheduled shift.

23. Ultimately, the arbitrator found that there was not objective or subjective evidence necessary to show that the grievor was impaired or that his earlier consumption affected his ability to work.

24. In the present matter, the grievor could have been called after 0435 on December 5, 2022. However, he testified that he would not have been called on December 5, because he would have been at the bottom of the Engineer Pool:

> 28A. Off rest yes, but I was not lined up to go to work for another day and half. And according to Appendix A my plug did not go out until December 6 at 0330. I booked 24 hours off so I would have went to the bottom of the Engineer Pool and stayed there until my rest was up. There was no possible way that I would be going to work on December 5th, if there was even the slightest possibility that I was going to work I wouldn't have consumed alcohol at the Christmas party.

25. The Company advances two documents in its Reply Brief, in which it alleges that the grievor could have been called earlier. The Union objects, as these documents were never put to the grievor during his investigation, nor were they advanced during the grievance process.

26. I find that the Company did state in its Step 3 response: "As a RTE he ought to have known line ups change, other crew members book off sick and he could have been called at any time" (see Tab 7, Union documents). It did not, however, advance the actual crewing documents at any time prior to its Reply. This leaves the Union with absolutely no ability to respond to the documents and is contrary to the disclosure process foreseen by the CROA Rules.

27. Accordingly, while I take note of the possibility of changes to the line up due to various circumstances, I do not rely on the Reply documents advanced by the company.

28. The best evidence of whether the grievor would be called on December 5, after coming off rest, is what in fact took place. The grievor checked the line up and did not believe he would be called until December 6. He in fact was called at 0330 December 6.

29. In **CROA 4540**, Arbitrator Weatherill found that grievors who could have been called in, were not "subject to duty". In **SHP 713**, Arbitrator McFetridge found that the grievor was only required to be "fit for duty", which did not prohibit all consumption of alcohol prior to reporting to work. In **CROA 4343**, Arbitrator Stout notes that the consumption of alcohol prior to the start of shift is not contrary to the Rules, provided that the person is not impaired when they begin work.

30. Even in **CROA 4540** relied on by the Company, Arbitrator Hornung, while finding that the grievor was "subject to duty", found as a significantly mitigating factor that he had stopped drinking well prior to being called to operate a train and that there was no suggestion that he was impaired when he did so:

> Ordinarily, following that reasoning, the Grievor's conduct would result in his dismissal. However, there are mitigating circumstances in this case that militate against an outright dismissal. While it does not provide a reasonable excuse for his conduct, it is apparent that the Grievor spent a considerable amount of time ensuring that he would not, in fact, be called to operate a train until at least 11:40 on January 23, 2016. There was no suggestion that the Grievor reported for service or operated the train in an impaired state. Again, although neither an excuse nor an exception to the prohibition contained in Section 2.2, it is reasonable to assume that the alcohol he had consumed up to 00:30 would not have left him impaired when operating the train at 11:40.

31. Given that the term "subject to duty" is not defined, it makes sense to consider the object of a restriction on employee behaviour. Here, the obvious concern is for safety arising from impairment on the job. If "subject to duty" is interpreted to mean imminent or probable duty, a prohibition on consuming intoxicants during the time prior to actually working furthers that goal. A majority of the jurisprudence has adopted this approach, as set out above. Even the minority view, holds a less imminent or less probable duty to be a strongly mitigating factor.

32. Here the grievor was not called for work for some 23 hours after his rest period ended and some 20.5 hours after he stopped drinking. There is no suggestion he would have been impaired when he was actually called to work. As such, the weight of the

jurisprudence indicates that the grievor in these circumstances, cannot be considered to have been "subject to duty".

33. However, as Arbitrator Stout noted in **CROA 4343**: "employees should be very wary about consuming alcohol prior to their shift. This is because they may violate the Policy if the effects of consuming alcohol prior to their shift are such that it impairs their ability to perform their work in a safe manner". This is still more true when employees are in a pool, and the precise time they will be called is uncertain.

Conclusion

34. The grievance is therefore allowed. The grievor is to be reinstated without loss of seniority and made whole for the loss of wages and benefits, less mitigation.

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

September 16, 2024

JAMES CAMERON
ARBITRATOR