CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5070

Heard in Montreal, July 17, 2024

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

UNITED STEELWORKERS LOCAL-1976

DISPUTE:

The dismissal of Mr. R. Ayers.

JOINT STATEMENT OF ISSUE:

The dismissal of Mr. Rick Ayers from Canadian Pacific Kansas City for reasons as follows: "In connection with your tour of duty on November 2, 2023 where following a Motor Vehicle Accident you departed property without authorization, thereby failing to participate in Post-Incident testing. It is in violation of the following rules and Policies:

- CPKC Alcohol and Drug Policy - #HR203
- CPKC Alcohol and Drug Procedures - #HR 203.1
- CP IMS Rule Book – "Rights and Responsibilities"

Joint Statement of Issue:

- On November 7th, 2023 Mr. Ayers attended an Investigation in connection with "Your refusal of Post-Incident Drug & Alcohol Testing following your incident on November 2, 2023".
- On November 15, 2024 Mr. Ayers was issued a disciplinary form 104 advising him that he was being dismissed from Company service effective immediately.
- The Union filed a grievance. The Company declined the Union's grievance.

Union Position

The Union takes the following position:

- No evidence introduced by the Company definitively demonstrated that Mr. Ayers was impaired or under the influence during his tour of duty. No signs or symptoms of being impaired were witnessed by any colleagues during the shift.
- Mr. Ayer's did make attempts to rectify the situation by contacting the Supervisor after his departure to take the Post-Incident test, however was advised that the timeline to take the test has elapsed.
- Other forms of discipline and the inclusion of education, rather than dismissal would be more appropriate especially when taking into considering the long service of Mr. Ayers with CPKC encompassing nearly 24 years.
- Mr. Ayers has demonstrated and shown a true willingness to take whatever steps are deemed necessary to maintain gainful employment with Canadian Pacific Kansas City.

- As a full and final resolve, the Union requests Mr. Ayers be reinstated with Canadian Pacific Kansas City with full benefits and seniority, and that he be reimbursed for all lost wages.

Company Position

The Company cannot agree with the Union's contentions nor the requested remedy.

The Company maintains that culpability was established following a fair and impartial investigation. The Grievor's unauthorized departure from Company property following an MVA resulted in the Company not being able to perform a Post-Incident test and as such, a negative inference was drawn. The Company maintains that the Grievor's actions led to the bond of trust, essential to the employment relationship, being broken. Post-Incident testing has strict timelines for which it must be completed and as such, when the Grievor called his supervisor to take the test, he was appropriately advised that the timelines to complete Post-Incident testing had elapsed.

Discipline was assessed in line with the Company's Hybrid Discipline and Accountabilities Guidelines and was determined following a review of all the pertinent factors including those the Union describe. The Company maintains that dismissal was appropriate, warranted and just in all the circumstances.

Accordingly, the Company respectfully requests the Arbitrator dismiss the Union's grievance in its entirety.

For the Union:	**For the Company:**
(SGD.) J. Howell	**(SGD.) L. McGinley**
Chair Board of Trustees	Director, Labour Relations

There appeared on behalf of the Company:

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

And on behalf of the Union:

N. Lapointe	– Area Coordinator, Montreal
N. Lapointe	– President, USW-1976, Montreal
L. Constanzo	– Unit Chair, Montreal
R. Ayers	– Grievor, Montreal

AWARD OF THE ARBITRATOR

Context

1. This matter concerns the discharge of the grievor, a Top Lift operator in Vaughan Yard, for a refusal to submit to post incident testing. The grievor is a twenty (20) year employee whose record, prior to the incident and testing issue, consisted of 10 DMs from 2013 and none since 2019.

Preliminary Objection

2. The Company makes a preliminary objection to the argument advanced by the Union in its Brief that testing was not warranted in the circumstances, as the accident in

which the grievor was involved was not a “serious incident”, nor were there other signs of impairment.

3. The primary ground for the objection is that these arguments were never raised during the grievance process, nor in the JSI, and doing so now is therefore contrary to CROA Rules. The Union did not seriously contest the objection.

Analysis and Decision concerning the Preliminary Objection

4. In **CROA 4874** at paragraphs 15-18, I reviewed the CROA Rules and the rationale behind holding the Parties to their agreement to only advance issues previously raised with the other side. To do otherwise is to compromise the entire CROA arbitration system, which is predicated on early disclosure and review of issues.

5. Given that the issue as to whether the testing was warranted was never raised by the Union prior to it’s Brief, CROA Rule 14 expressly prohibits such issues to be raised:

> “Rule 14 The decision of the arbitrator shall be limited to the disputes or questions contained in the joint statement submitted by the parties or in the separate statement or statements as the case may be….”.

6. Accordingly, the objection of the Company is maintained.

Position of Parties on the Merits

7. The Company takes the position that the grievor left the property after a MVA and failed to participate in Post Incident Testing in violation of Alcohol and Drug Policy and Procedures HR 203 and 203.1.

8. The Company notes that the grievor violated the Policy and Procedures consciously believing that there was a possibility that he would test positive. His refusal to test continued despite being told by his Supervisor that the Company could make a negative inference from the refusal. It notes further that if the grievor had accepted testing at the time of the call from his Supervisor, the testing could have been done within the

requisite times for proper testing. Instead, the grievor only offered to accept testing after the delays for testing had passed.

9. The Company submits that it is entitled to take a negative inference with respect to impairment from the refusal to test. Impairment on the job typically results in dismissal, as has been repeatedly upheld in the jurisprudence. If the grievor had concerns about the testing, he should have abided by the principle of "work now, grieve later".

10. The Union argues that the grievor is a good employee with a virtually clean discipline record. He has twenty years of service, which should weigh in the balance when considering whether termination is appropriate. It argues that this was a "moment of panic" on the part of the grievor.

11. The Union notes that the grievor is fifty-two years old, does not habitually use drugs and has offered to be tested every day if necessary. It proposes that a six month suspension, together with random testing for two years should be substituted for the termination.

Analysis and Decision

12. The Company's Alcohol and Drug Policy and Procedure (HR 203 and 203.1), sections 4.1 and 4.6 deal with drug testing and a "refusal to test":

> **4. Drug Testing Procedures for All Employees**
> **4.1 Standards and Consequences**
> All employees are required to comply with the standards set out in Section 3, Alcohol and Drug Procedures, which includes remaining free from the adverse effects of alcohol and/or drugs including acute, chronic, hangover and after-effects of such use. For those holding Safety Critical or Safety Sensitive Positions, this also includes the minimum 28-day Cannabis Ban. Failures to comply with these standards will constitute a violation of the Policy and Procedure.
> The following will also constitute violations of the Policy and Procedure:
> - A positive drug test as determined through the Company testing program, (a drug level equal to or in excess of the Company drug concentration test levels* where a Medical Review Officer has verified the results as a positive test);

- An alcohol test result of 0.02 BAC or higher as determined through the Company testing program;
- A failure/ refusal to test as determined through the Company testing program.

*Details on the Company drug concentration test levels can be found in Appendix 2. These testing levels are intended to reflect minimum drug detection levels based on currently available technology and are subject to ongoing review and modification by the Company at its discretion.

For clarity, while drug and alcohol testing is an indication of an employee's violation of the Policy and Procedure, employees remain bound by the broader obligation to report for work and remain at work free from the effects of drugs and/or alcohol from any source, including acute, chronic, hangover or after-effects of such use. This includes the minimum 28-day Cannabis Ban for employees in Safety Critical Positions or Safety Sensitive Positions.

Company Safety Critical Aviation Positions are also subject to any Department of Transportation, Federal Aviation Administration, and Canadian Aviation regulatory requirements related to alcohol and/or drugs.

4.6 Refusal to Participate in an Alcohol and/or Drug Test – "Refusal to Test"

Refusing to participate in an alcohol and/or drug test is a violation of the Policy and Procedure. "Refusal to Test" violations include, but are not limited to, the following:

- Failure of an employee to report directly for a test;
- Refusal to submit to a test;
- Failure to provide a valid specimen;
- An attempt to tamper with a test sample;
- Refusal to agree to disclosure of a test result in accordance with this Procedure;
- Attempting to avoid a test by failing to report involvement in an incident which may require testing or by avoiding management following involvement in an incident;
- Failing to advise when released from hospital if testing is delayed for medical reasons;
- Failing or refusing to attend a medical assessment as required under the Policy and Procedure;
- Any attempt to disrupt the testing process as described in the Policy and Procedure.

Employees cannot be forced to submit to an alcohol and/or drug test as it requires informed consent. However, refusal to submit to an alcohol and/or drug test is considered a violation of the Policy and Procedure. If an employee refuses to submit to an alcohol and/or drug test,

> management must document the events surrounding the Policy and Procedure violations. This documentation should include documentation about the triggering incident, identification of any witnesses, and observations about the employee's condition at the time or around the time of the triggering incident. Refusal to test may be taken as a negative inference by the Company in its subsequent investigation.
> Further details on the Alcohol and Drug Testing Process, testing methodology and drug concentration level can found in Appendix 2. (underlining added).

13. Section 3.4.1 notes: "Violations of the provisions of the Policy and Procedure will result in an investigation and discipline up to and including dismissal".

14. It is clear that the grievor's refusal to test, given my finding with respect to the preliminary objection, constitutes a violation of the Drug Policy and Procedure. Pursuant to s. 4.6, a refusal to test "may be taken as a negative inference by the Company".

15. The Union argues that despite such an inference, termination in the circumstances is excessive.

16. It points to **CROA 4874**, where I imposed 15 demerits on a grievor who refused to provide a urine sample. However, in **CROA 4874**, the grievor had provided a breath and oral swab sample, whereas here the grievor refused all testing at the relevant times.

17. The Union cites **Rio Tinto and USW, Local 5795**, 281 LAC (4^{th})1, where a termination was replaced with a six month suspension. However, in the Rio Tinto matter, there had been a finding that the employer was not entitled to test and there was no violation of the SAPP, unlike here.

18. In **FirstBus Canada Ltd. v ATU, Local 279**, 2007 CLAD No 166, there was nothing in the employer policy about a negative inference, unlike here. There was also Union influence to refuse the test, again unlike here.

19. In **Sterling Crane** 2009 OLRD 4623 there was a finding that there was no right to test, again unlike the facts here.

20. In **Certainteed Insulation Canada v. CEP Union** 214 LAC (4th) 278, the matter is distinguishable, as there was a finding that the grievor was not impaired.

21. In **Tolko Industries Ltd. v. United Steel et al Union, Local 1-425**, 283 LAC (4th) 134, there was a finding that testing was appropriate, but that the Policy at the time did not specify levels of metabolites which would be considered impairing. Here, the Policy does specify such levels.

22. In my view, the cases cited by the Union are not directly applicable, as either the facts or the Policy differ from the present matter.

23. I find the cases cited by the Company more applicable to the case at hand, dealing directly with grievors who refused testing when such testing was required. The cases point out that the actions of the grievors prevent a timely assessment of impairment.

24. As noted by Arbitrator Picher in **CROA 1707**:

> **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**. On the other hand, it is not within the legitimate business purposes of an employer, including a railroad, to encroach on the privacy and dignity of its employees by subjecting them to random and speculative drug testing. **However, where good and sufficient grounds for administering a drug test do exist, the employee who refuses to submit to such a test does so at his or her own peril**." (**Emphasis Added**)

25. Much more recently, Arbitrator Yingst-Bartel in **CROA 5030** upheld the dismissal of an employee who refused a Post Incident Test:

> "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. **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.** 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. **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. 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**" (**Emphasis Added**)

26. Arbitrator Schmidt, in **CROA 4339,** highlighted that the grievor had refused testing even after being informed of the consequences of a refusal:

> **The grievor refused to submit to testing even after he was informed very clearly and very specifically of the implications that could follow if he chose to refuse testing**…By refusing to undergo testing in the circumstances of this case, only one reasonable conclusion can be drawn: the grievor was not being truthful in his denial of any involvement in drinking at the time he was confronted by Trainmaster McRobbie in the Hotel lobby and by Superintendent Ross in his truck. Nor was he being truthful in the subsequent investigation or, for that matter, in the hearing of this case**. In these circumstances there is little basis upon which I can consider substitution of a lesser penalty (see CROA 2994) irrespective of the grievor's length of service and his commendable disciplinary record." (Emphasis Added)**

27. It is noteworthy that the grievor here was also directly informed by his Supervisor of the consequences of a continuing refusal to test.

Conclusion

28. Pursuant to the William Scott approach, I have taken note of the mitigating factors argued by the Union, including the length of service, clean discipline record, no history of drug problems of the grievor and clear remorse.

29. However, the aggravating factors are that he consciously and intentionally refused to Post Incident Test, even when given a later opportunity to do so by his Supervisor. The Company is entitled to take a very negative inference from this wrongful refusal and to infer that the grievor was impaired at work (see **CROA 1701**, **CROA 4339** and **CROA 5030**).

30. Reluctantly, despite the grievor's mitigating factors, I am unable to conclude that the Company decision to terminate was unreasonable in the circumstances.

31. Accordingly, the grievance is dismissed.

September 16, 2024

JAMES CAMERON
ARBITRATOR