CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5079

Heard in Edmonton, September 11, 2024

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the assessment of a 30–day suspension to Conductor S. Whitty.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Mr. Whitty was assessed a suspension as shown in his Form 104 as follows,

"Formal investigation was issued to you in connection with the occurrence outlined below:

"The result of your post incident drug testing January 9, 2024."

Formal investigation was conducted on January 19, 2024, to develop all the facts and circumstances in connection with the referenced occurrence. At the conclusion of that investigation, it was determined the investigation record as a whole contained substantial evidence that you were in violation of the Alcohol and Drug Policy (Canada) (HR203) & Alcohol and Drug Procedures (Canada) (HR203.1).

In consideration of the decision stated above, you are hereby assessed a thirty (30) Day Suspension.

As a matter of record, a copy of this document will be placed in your personnel file."

UNION POSITION

For all the reasons and submissions set forth in the Union's grievances, which are herein adopted, the Union contends that the discipline assessed, the Union contends that the discipline assessed is excessive, has been done in violation as Mr. Whitty has not received a fair and impartial process (violation of 2010 agreement) and thus Article 39.05 has been violated and any discipline should be void.

As noted by Mr. Whitty's discipline he was never shown as impaired (and nor should it) but shown to be in violation of the unilateral Company D&A Policy. Mr. Whitty had a positive urine test but negative oral swab test. These results proved that he was not impaired at work and that, as a consequence, it was wrong for the Company to assess discipline of any kind, countless Arbitration Awards agree to this as well. There are no facts presented that have ever shown that

Mr. Whitty was ever impaired. Mr. Whitty admitted to having partook in recreational marijuana use but while he was not subject to duty, this as well was not shown to be incorrect in the investigation.

The Company has and continues to invade employees private time away from work where they may use legal recreational drugs, unless impairment is to have been found without question, no discipline of any kind should be forth coming simply account an employee's urine shows traces.

Mr. Whitty has never been personally interviewed and medically handled by the Company's expert witness who is part of DriverCheck.

The Company will state it is the Union's responsibility to show that the 2010 Agreement is still in place, simply put where is document that the Union (this Office) signed or agreed to cancel the 2010 Agreement, it is nowhere as it was not cancelled and thus the aspect of the quantitative amounts to not be shown stands.

The Company did not respond to the Union's Step 1 or Step 2 grievances in violation of the Collective Agreement Letter Re: Management of Grievances & The Scheduling of Cases at CROA as well as CROA 4870, the Union does not have a position of the Company.

Further it must be noted by many of the Company's arbitration briefs and statements of issue where they state the following:

"Consolidated Collective Agreement Article 40.04 is clear in that the remedy for failing to respond is escalation to the next step. Based on the submission of the Union's final step grievance, it is also clear the Union acknowledges Article 40.04 and has progressed to the next step of the grievance procedure." OR

"In regards to the Union's allegations regarding the grievance correspondence, as per the grievance procedure the remedy for a failure to respond is escalation to the next step. This has occurred and the Company's position has been provided."

In this case there is no position provided at either step within the mandatory timelines of the Collective Agreement. The Company had every opportunity to request an extension if needed but simply chose to ignore the agreed upon terms of the CBA.

The Union will retain all its' rights (objections) if the Company now puts forward any arguments where none were provided within the mandatory timelines.

The Union request the 30–day suspension be expunged, Mr. Stephen Whitty be compensated all loss of wages with interest, no loss of benefits, and recalculation of AV/EDO's.

In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

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Formal investigation was issued to you in connection with the occurrence outlined below:

"The result of your post incident drug testing January 9, 2024."

Formal investigation was conducted on January 19, 2024, to develop all the facts and circumstances in connection with the referenced occurrence. At the conclusion of that investigation, it was determined the investigation record as a whole contained substantial

evidence that you were in violation of the Alcohol and Drug Policy (Canada) (HR203) & Alcohol and Drug Procedures (Canada) (HR203.1).

In consideration of the decision stated above, you are hereby assessed a thirty (30) Day Suspension.

As a matter of record, a copy of this document will be placed in your personnel file.

Company's Position:

The Company disagrees with the Union's position and denies the Union's request.

The Company relies upon the positions outlined in its grievance replies.

The Company maintains that the 2010 Agreement referenced by the Union was no longer in effect and the Union has failed to provide a rationale for the allegation that the investigation was not fair and impartial.

Further, without prejudice to the Company's position that the 2010 Agreement no longer has application, the Company objects to the 2010 Agreement being argued through the instant grievance. Not only is a policy matter not appropriate to be dealt with through an expedited forum such as CROA, the Union has filed a grievance on the Company's Alcohol and Drug Policy (Canada) which is currently being heard before an Arbitrator. No reference to the 2010 document can be found within the agreed upon Joint Statement of Issue. This supports the position that the Union recognizes the Company's A&D Policy as they have advanced it to be heard at arbitration and not the 2010 Agreement.

With respect to Step 1 grievance response, the Union advanced the grievance to the final step in accordance with Article 40.04.

As seen on the record a Step 2 grievance response was provided to the Union.

The Union does not dispute the test results but only the quantum of discipline assessed.

Discipline was determined following a review of all pertinent factors, both mitigating and aggravating, and maintains the Grievor's culpability for this incident was established following the fair and impartial investigation into this matter. Moreover, the Company maintains the discipline was properly assessed in keeping with the *Hybrid Discipline and Accountability Guidelines*.

The Company's position continues to be that the discipline assessed was just, appropriate and warranted in all the circumstances.

Based on the foregoing, the Company cannot see a reason to disturb the discipline assessed and requests the Arbitrator be drawn to the same conclusion.

For the Union:	**For the Company:**
(SGD.) W. Apsey	**(SGD.) F. Billings**
General Chairperson	Director, Labour Relations

There appeared on behalf of the Company:

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

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
W. Apsey	– General Chairperson, CTY–E, Montreal
S. Whitty	– Grievor, Video Conferencing

AWARD OF THE ARBITRATOR

Introduction & Issue

[1] In January of 2024, the Grievor was employed as both a Locomotive Engineer in Training, and a Conductor. Both positions are safety critical in this industry.

[2] The Grievor had been hired in March of 2019, initially as a Conductor. He qualified in June of 2019. He was laid off for several months in 2020; transferred to Smiths Falls in the Fall of 2022; and had entered the Locomotive Engineer training program in September of 2023.

[3] This Grievance arises from an incident which took place 3.5 months after the Grievor entered that training, while he was operating a Train, under the supervision and coaching of another Locomotive Engineer.

[4] On January 9, 2024, a Train operated by the Grievor failed to stop at a red signal at the East end of Bolingbroke MP 29.3, on the Belleville Subdivision. The Train passed the signal by 460 feet (described in the evidence as approximately 5 car lengths).

[5] According to the download evidence, the Train was operating at over 23 miles per hour at the time it passed the signal.

[6] Passing a red stop signal is known in this industry as a "Rule 439" violation which is a reference to the Rule Number in the Canadian Operating Rule ("CROR"). Those rules are not unique to the Company, but apply to all railroads. That Rule requires a Train to stop "at least 300 feet *in advance* of the STOP signal".[1]

[7] As a result of that violation, the Grievor was dismissed. The Union grieved that dismissal, and the reasonableness of that decision is the subject of **CROA 5080**, heard during the same CROA session. The outline of the facts below will apply to both Awards: As background to the testing of the Grievor in this Grievance; and as applicable to the merits in **CROA 5080**.

[8] As a result of this incident, the Grievor was required to submit to a drug and alcohol test, under the Company's Alcohol and Drug Policy #HR203 and Alcohol and Drug

[1] Emphasis added.

Procedures #HR203.1 (together the “Policy”). The Grievor was tested at 12:25 a.m. on January 10, 2024.

[9] While the breath and oral fluid test were negative, the urine test was positive for cannabis, at a level of 209 ng/ml. That level is more than 13 times the Company’s “cut–ff” for initial detection in the Policy, at 15 ng/ml; and over 4 time greater than the confirmation cut–off of 50 ng/ml.

[10] On January 27, 2024, the Grievor was issued a 30 day suspension.

[11] On April 20, 2024, the Union filed a Grievance against this discipline, noting that the Grievor was not impaired at work and that it was wrong for the Company to assess any discipline against him. It also took issue with the failure of the Company to respond to the Grievance, the timeliness of its response when it did so, the fairness of the investigation and the application of a 2010 agreement regarding whether the Company was entitled to share the Grievor’s test results with the Investigating Officer.

[12] The issue between the parties reduces to whether the Grievor consumed cannabis when “subject to duty”, on January 8, 2024. If so, that use is prohibited by both the CROR and the Policy and is culpable conduct, warranting discipline, leading to the second question under a *Wm. Scott* analysis of whether the discipline was excessive.

[13] For the reasons which follow, the Grievance is dismissed. The Grievor’s consumption of cannabis on January 8, 2024 was consumption at a time when he was “subject to duty” as not being on either rest or personal leave and being available for work. As the CROR Rules prohibit consumption of drugs while an individual is “subject to duty”, the Grievor’s actions were culpable. Discipline of a 30 days’ suspension for such serious misconduct was warranted and was not excessive.

Relevant Provisions

> *CROR*
>
> *Rule G(i):*
>
> The use of intoxicants or narcotics by employees subject to duty, or their possession or use while on duty, is prohibited.
> *Rule 439*

> [a diagram of signals used] “Stop”….a movement not authorized by Rule 564 must stop at least 300 feet in advance of the STOP signal.
>
> *The Policy*
>
> 2.0 Policy Statement
>
> This Policy and Procedures applies to all employees at all times while working, on duty, when subject to duty, at all times when on Company premises and worksites, when on Company business and when operating Company vehicles and moving equipment (whether on or off duty).
>
> 2.4
>
> Employees are also subject to the provisions of the Canada Labour Code, the Railway Safety Act, the Canadian Rail Operating Rules [CROR], General Operating Instructions, the Criminal Code of Canada and all other applicable laws.

Facts

[14] The Grievor was hired as a Conductor in March of 2019 and qualified as such in June of 2019. Nine months later, in April of 2020, he was laid off. He was recalled in September of 2020. He then transferred to Smiths Falls in July of 2022. Approximately one year later, in September of 2023, he entered the Engineer–in–Training program. This Grievance arose from his actions in that capacity 3.5 months later, on January 9, 2024.

[15] On that day, the Grievor was acting as Engineer–in–Training, being coached and supervised by Locomotive Engineer M. Tilford. Also part of the Crew that day was Mr. A. Gray, serving as Conductor.

[16] The Grievor was operating Train 529–738 on the Belleville Subdivision, as part of his training. The Train weighed 4382 tons, and was 5854 feet in length. It was powered by one Locomotive. The Grievor referred to the Train in his statement as being “underpowered”, as it was operated “conventional” with one locomotive at the end. This Arbitrator understands that to be in contrast to distributive power, where extra locomotive engineers are included in the consist, which understanding was confirmed at this hearing. No crew member raised any issues with management regarding how the Train was powered, prior to proceeding to execute this work.

[17] During this trip, the RTC had advised the crew of a “meet” with Train 132, which would occur at Bolingbroke. The crew job briefed that meet, including siding speed; the

uphill grade before that signal; that there were longer blocks between signals leading up to the signal at mile post 29.3; and the “lack of power of the train had based on operating conventional with only 1 unit on the head–end on the subdivision”.

[18] The Grievor did not recall discussing “conditioning” the brakes before the meet, during this job briefing.

[19] It was established in evidence the Grievor had faced a series of three signals which began six miles prior to the red signal at Bolingbroke. The first two signals (“Advanced Clear to Stop” and “Clear to Stop”) were showing that the third signal at Bolingbroke would indicate a stop.

[20] I am satisfied the Advanced Clear to Stop and Clear to Stop signals are used in this industry to provide advanced notice of a need to stop, given that a 5000 foot Train takes considerable time to bring to a stop. I am further satisfied that the Advance Clear to Stop and the Clear to Stop signals should have indicated to the Grievor that his Train would be required to stop at Bolingbroke and that he was to proceed his operations on that information, unless or until one of those signals changed.

[21] There was evidence there was a snowstorm at the time of this incident, and that visibility was impacted. Pictures of what the crew would have seen of the signals was also filed into evidence.

[22] Upon review of the evidence, I am satisfied the red signals were capable of being seen by the Grievor.

[23] While the Grievor’s statement was that he was aware there was a “possibility” of a red stop signal upcoming at Bolingbroke, it is unclear why he only considered that to be a “possibility”, given that the first two signals were in fact demonstrating that a stop ***would*** be required at the third signal.

[24] It was determined in the Road Foreman Report, also filed into evidence, that the Grievor should have “conditioned the automatic brake at an earlier time or approached at a reduced rate of speed, to avoid this violation.

[25] As earlier noted, the train exceeded the stop signal by 460 feet and was able to stop in what the Grievor described as the “controlled” location.

[26] Fortunately for both crews, Train 132 had not yet reached that location.

[27] This was what is known in this industry as a Rule 439 violation, for failing to stop at a red signal. As a result of this Rule 439 violation, the Grievor was given what is known in arbitral jurisprudence as a "post–incident" test for drugs and alcohol.

[28] A "post–incident" test is one of four valid reasons an employer can require an employee to submit to such a test, in this country. It does not require there be any "reasonable cause", which would be a suspicion of impairment; rather it is given due to the fact that an incident has occurred which meets certain criteria, hence the term "post–incident" test.

[29] The Grievor's breath and oral fluid test result was negative, however his urinalysis result was not. It was positive for cannabis.

[30] When asked during the Investigation why he would have tested positive, the Grievor indicated he suspected that it "would be related to my consumption of Marijuana on December 31, 2023" (Q/A 25); and that he "ingested marijuana cookies recreationally" (Q/A 26), which was approximately 9 days prior to this tour of duty (Q/A 27).

[31] When asked how often he consumed marijuana, the Grievor answered:

> I may have sometimes smoked legalized Marijuana but I never let it affect my capability to perform my duties. I always ensured to never attend work in an impaired state. I ensure I adhere to the rules specifically General Rule X – When reporting for duty, be fit rested and familiar with their duties and territory over which they operate (Q/A 28).

[32] He described his use of marijuana in the next question as "recreationally – very infrequently" (Q/A 29).

[33] At Q/A 33, he was asked what this answer meant. He stated "[r]ecreational being non–medical, infrequent would mean I cannot provide you the frequency in which I consume". It is not clear how his description of "infrequent" meant he was unable to say how often he consumed Marijuana and his answer is considered to be non–responsive to that aspect of the question.

[34] At Q/A 34, the Grievor was asked how many times a month he consumed and his answer was “In the past at time when I expected to have extended period of time off”. Again, that is not responsive to that question.

[35] In the next question when asked how many times per week he consumed, he stated “I don’t take it on a weekly basis”.

[36] The Grievor also noted that his “oral swab test shows I was fit” when asked how he determined if he was fit for duty on January 9, 2024 (Q/A 37).

[37] The evidence demonstrates that the Grievor’s last trip prior to January 9, 2024 was on January 5th, 2024 out and January 6, 2024 back in (Q/A’s 30, 31). While the Grievor stated that he would have been next subject to duty on January 5, 2024, that was the date of his next trip he *actually* worked and not necessarily whether he was subject to duty when he consumed. Whether he was “subject to duty” during the period of time when he was consuming “edibles” is in fact the issue before this Arbitrator.

[38] He was also asked why there was 5 days “from the time he consumed marijuana to the next trip you took on January 5?” (Q/A 32). He answered “I found it difficult to find people to go train with heading West. I had just flipped from going from East to West. I made several attempts to contact people as of January 3rd (Q/A 32). I am satisfied this is a reference to the Grievor’s attempts to obtain training runs as an Engineer–in–Training.

[39] I am further satisfied that the Grievor was not booked off on rest days or on personal leave between December 31, 2023 – when he stated he consumed Marijuana “edibles” – and the time of this incident on January 9, 2023. In fact, the Grievor’s own evidence was that he was trying to find trips to work. While his “attempts” to find work were not made between December 31, 2023 and January 3, 2023, I am satisfied he was not booked off on rest days or leave during this time period.

[40] I am further satisfied this would have indicated to the Company that he was available to accept work. As he was not on leave or on rest days, I am further satisfied he was requesting – and receiving – payment during this time period, for being an Engineer–in–Training who was available for work.

[41] The Form 104 stated the Company assessed this suspension because the "investigation record as a whole contained substantial evidence that you were in violation of the [Policy]".

Arguments

[42] While the Grievor admitted to partaking in recreational marijuana, the Union argued he did so on his own private time, at a point when he was not subject to duty, and that the Company was not entitled to direct what the Grievor did on his own private time, noting that the Grievor consumed during the Christmas holidays. It urged there was no evidence he was ever impaired at work, or showed any symptoms of impairment, and that this Office has determined a positive urinalysis result does not – standing alone – determine impairment. It pointed out the Grievor felt fit and rested when he came to work on January 9, 2024. It argued the Grievor was not subject to duty or on duty when he admitted to having used Marijuana, and that the Company had not provided any evidence of a breach of Rule G, as no violation occurs just because of a presence of marijuana metabolites in urine and no impairment is established from that test. It argued a positive urinalysis drug test could not support discipline. It pointed out this Arbitrator has noted that it is "impairment" and not "some use" of drugs which give just cause to discipline an employee. It argued the Grievor did not drink or use any drugs which made him unfit for duty, and that there was no evidence to establish impairment. The Union also argued that a 2010 Agreement between the parties prevented the Company from sharing the qualitative testing results with the Investigating Officer, and also pointed out the Company had not responded to the Grievance initially, which was in breach of the Collective Agreement.

[43] The Company argued that the remedy for failure to respond to the Union's Step 1 or Step 2 Grievances was the ability of the Union to escalate the Grievance to the next step, which has occurred. While its Step 3 response was six days outside of this time limit, it argued there was no prejudice to the Union. It argued the 2010 Agreement does not apply to the current Policy and is an obsolete document; and that it was not referred to in the JSI as an issue, so it is not properly before this Arbitrator. Regarding the merits, the Company argued that cause to discipline was established and the discipline was just

and reasonable. It noted the importance of safety and its requirement to accept dangerous and hazardous goods for transport. It argued the railway is an inherently dangerous undertaking; it must be extremely vigilant; and has a statutory duty to protect its employees, including ensuring its employees are fit for work – and remain fit for work. It pointed out the Grievor is in a safety–critical role, as designated by Transport Canada and that employees were required to comply with specific standards, outlined in both the Policy and the CROR, as well as the Federal work/rest rules. It argued the Grievor was in violation of its Policy, specifically its 28–day cannabis ban for employees working in safety critical positions. The Company argued the Grievor was "subject to duty" on December 31, 2023, which was the same day he consumed Marijuana edibles, and that – based on his pay – he was subject to duty up until his incident on January 9, 2024, and had worked on January 5th and 6th. It noted the Company was consistent in its discipline response. While the Grievor was remorseful, it noted his focus was that he was not impaired.

[44] In its Reply, the Union argued the Company had not demonstrated the Grievor was unfit to work his duties on January 9, 2024 or that he reported in an impaired condition. It pointed out the Company's 28 day cannabis ban is currently under grievance. It argued it was an alteration of the grounds of discipline to suggest the Grievor was "subject to duty" on December 31, 2023 and that this position was not advanced anytime before September 5, 2024. It argued the Grievor was not presented with any evidence in his Investigation that he was on or subject to duty. If that had been the evidence, the Union could have explained certain details of how the Grievor would have been called. It argued the Company has not filed any evidence of the Grievor receiving engineer training pay in the Investigation, and that this pay would not be evidence he was subject to duty, as Trainees claim pay for every day they are not sick or on a leave. It argued the Grievor properly expressed remorse. It also argued there was no basis for an inference the Grievor was impaired. It also distinguished the Company's authorities.

[45] For its part, the Company argued in Rebuttal that there was no rationale given for the Union's argument that the investigation process was not fair and impartial. It noted the Union has not established any prejudice and noted the Union received the Grievance reply. It argued the Arbitrator should exercise her discretion under Article 60 of the *Canada*

Labour Code to extend the timelines, if necessary. It argued the Grievor was subject to duty on the date of his marijuana use, contrary to the Grievor's statements in Q/A 44 and 45 that he was not "subject to duty" and could have been called to work on the days he received payment, as EIT's receive pay when they are available for duty. It argued he could have been called to attend work at any time and that any day he was paid, he was subject to duty. It also distinguished the Union's authorities. It noted the Grievor's prior suspensions were active and he was not free from discipline.

Analysis and Decision

[46] For the reasons which follow, I am satisfied the Grievor consumed Marijuana when he was "subject to duty"; that this conduct was culpable as being in breach of Rule G of the CROR, which Rule is reflected in the Company's Policy and was encompassed in its Form 104 statement; and that a suspension of 30 days for doing so was not excessive or unwarranted, given the highly safety sensitive industry in which the Grievor was employed.

[47] I am further satisfied that – while the Company breached the Collective Agreement in not responding to the Grievance – the remedy for that breach was one which has been *agreed to* between the parties themselves, which was that the Grievance would be advanced to the next step. That is the remedy for that breach. As that remedy was applied, no further remedy is required from this Office for that breach.

[48] Even were I wrong in this determination, like in **CROA 4870**, I would have determined the time period missed was *de minimus* at six days. It would have been an appropriate case for the exercise of jurisdiction given by the *Canada Labour Code* to extend the time period for responding.

[49] Turning to the merits, the Union's jurisprudence focused on cases where this Office has determined that a positive urinalysis test result – standing alone – does not indicate impairment. See for example **CROA 3691**; **3701**; **4240**; **4296**; **4365**; **4399**; **4400.** I have no difficulty with the proposition that this principle is "well established" or and sits "heavy" in the jurisprudence of this Office.

[50] However, that is not the question at issue in this case.

[51] Whether the Grievor consumed to the point of impairment is irrelevant to the issue in this case. Neither is it necessary to opine on the 28–day cannabis ban in the Company's Policy. This Grievance can be resolved without reference to that ban.

[52] At issue in this case, is whether the Grievor consumed cannabis when he was "*subject to duty*". If so, that consumption would be in breach of the CROR Rule G, which Rule is mandatory and binding and is reflected in the Company's policy under section 2. It is Rule G of the CROR which sets out that individuals must not consume drugs when "subject to duty". None of the cases tabled by the Union involved a Grievor who consumed drugs while "subject to duty", or provided any guidance on the meaning of that phrase.

[53] The Union has argued the Company did not place into issue the application of Rule G. I cannot agree. Rule G is binding on railroad employees as a force of law. It is also reflected in the Company's Policy, in section 2. The Policy on which the Company relied on its Form 104 reflects the CROR, encompassing the prohibition in Rule G not to consume drugs – whether legal or illegal – while subject to duty, and that the Grievor was being disciplined for his positive test result.

[54] The Union argued the Employer had not provided enough information for it to determine the Employer would argue the Grievor was "subject to duty" and that this argument was therefore prejudicial to the Union. It argued the Company should have provided the evidence the Grievor was receiving pay for being an Engineer–in–Training.

[55] I do not find this argument compelling. In this expedited procedure, Arbitrators have access to Grievance documents, which is considered as evidence. This is unusual in labour arbitration. In the Union's Grievance materials, it specifically argued that the Grievor was not "subject to duty" when he consumed Marijuana edibles. The Grievor's evidence in the Investigation is clear that he did not feel he consumed his edibles while he was "subject to duty" and he consistently brought his statements back to the fact he was not impaired while on duty. Given this focus in its own Grievance proceedings for whether the Grievor was – or was not – subject to duty, I cannot agree that the Union is either surprised or has suffered any form of prejudice by the Employer's response to its argument, being that the Grievor ***was*** subject to duty and had received pay for being an

Engineer–in–Training during the time period in question. The issue of whether the Grievor was “subject to duty” was live in the Investigation.

[56] The Company provided documentary evidence to refute the Grievor’s statements and the Union’s argument. To address the Union’s position – and the Grievor’s assertions – the Company maintained the Grievor was not on booked rest; was not on leave; and was in fact receiving pay for being an Engineer–in–Training, when he consumed cannabis. It was not reasonable or unfair or prejudicial for it to do so, given that the Union in fact raised that argument in its Grievance materials, and the Grievor also stated he was not “subject to duty” during his Investigation.

[57] In the CROA process, an Arbitrator is also entitled to solicit evidence. During the hearing, this Arbitrator allowed the Union to address the issue it raised in its Reply regarding evidence of how the Grievor could be called, given that he was not yet attached to a Locomotive Engineer. However, that evidence – which addressed the likelihood of a call – did not serve to rebut the Company’s argument that the Grievor was “available” to be called for work by the Company on December 31, 2023, when he chose to consume cannabis. The Union has not provided any evidence the Grievor had booked rest, was ill, was on leave, or was not being paid for being available to work during this time period, to address the Company’s argument. It has itself noted these are the situations where a Grievor is not available to the Company for work.

[58] The CROR lists several definitions and phrases, beginning at page 8. However, it does not define the phrase “subject to duty”. It is therefore left to an Arbitrator to interpret that phrase, giving it a plain and ordinary meaning, under the modern principle of interpretation. That principle was summarized by this Arbitrator in **CROA 4884**, and that analysis is adopted – although not repeated – here.

[59] The context of the industry in which a phrase is used is relevant to its interpretation, under this principle. In this industry, employees do not work a “9 to 5” Monday to Friday type of job. They often do not have established times in which they work and do not work, especially in the early stages of their career. They can be “called” to work and can be waiting for work to be assigned. When they are “called” to come to work, that call includes a short “window” of time for them to report.

[60] Further, the word "*subject*" in the phrase "subject to duty" must be given meaning. It is not a state where the Grievor is physically "working", but a state where the Grievor is "available" for work. I am satisfied that in this industry, times when an employee is "not" subject to duty would include booked rest periods, times when booked off ill, or leave periods. Those are times when an employee is not holding themselves out to the Company as being available to take a call to come to work. Assuming they have not booked a period of rest, are not booked off sick, or are not on leave, an employee must therefore be prepared to report to work when called and would be "subject to duty" while so waiting. The Company could assign such an employee to work, with the appropriate call time window.

[61] I am satisfied that during the period of time when an employee is holding himself out to the Company as available to work, he is "*subject*" to duty. He may or may not be called to work during that time period, but he is holding himself – or herself – out as being available to be called to work on short notice and so is "*subject*" to that duty. This time of being "subject to duty" is therefore not part of an employee's "personal time" in which he can consume what drugs he wants as part of his or her rights to "privacy".

[62] Whether the Grievor was actually called or not during the period of time he held himself out as "available" is not the question; the question is whether he was *subject* to that duty. That is a time when Rule G prohibits the use of legal or illicit drugs. That makes logical and practical sense, as there would not be time for any drug to clear itself from an employee's system during the short call time window, had they consumed drugs, thinking they would not *in fact* be called to work during their availability period. I am satisfied the Grievor had not booked rest December 31, 2023. Neither had the Grievor sought leave for that day, and neither was he sick. The Company provided evidence to rebut the Grievor's position that he was not "subject to duty", which he stated in his Investigation and which argument was made in the Grievance documentation of the Union. The Company was not prohibited from responding to an issue raised by the Grievor himself and his Union, of whether he was – or was not – subject to duty when he chose to consume cannabis.

[63] I am satisfied the Grievor chose to consume cannabis on New Year's Eve, despite the fact he was holding himself out to the Company as available to work that day. Whether or not the Grievor was actively looking for work, or the likelihood he would or would not be called during this time period, is not the question. This is not therefore a case where the Company is seeking to interfere with the Grievor's ability to consume drugs "on his own time" and therefore interfering with his own privacy rights to do so. No privacy rights are in conflict. The question is whether he was "available" to the Company for work during this time period, such that he was "subject to duty". I am satisfied he was. The Grievor was in breach of Rule G. His conduct was culpable.

[64] The second question under a *Wm. Scott* analysis requires an Arbitrator to assess whether the penalty assessed was just and reasonable, or excessive and unwarranted. I am satisfied the penalty in this case was just and reasonable and am not inclined to exercise my discretion to interfere with that penalty.

[65] There are several factors considered by an Arbitrator in assessing this question. The first is the nature of the offence. In this highly safety sensitive industry, and in the Grievor's safety critical position, consuming drugs – whether legal or illicit – during the time he was "subject to duty" is very serious and significant misconduct on the part of the Grievor. It demonstrates a significant lack of insight for the level of attention that must be brought to bear on operating a Train, and the impact of drugs on the ability to bring that level of attention and care to the requirements of that job. It warrants a correspondingly serious and significant discipline.

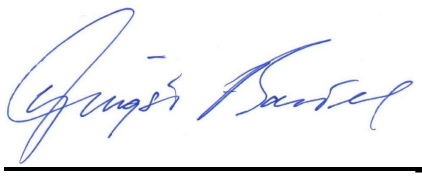
[66] A review of mitigating factors does not demonstrate factors in the Grievor's favour. The Grievor was a short–service employee. His disciplinary record was significant for such a short–service employee. In a one year period between May of 2021 and May of 2022, he was assessed a 20 day suspension for leaving equipment foul; a 40 day suspension for a derail during of equipment during a shoving movement; and 10 demerits for applying a handbrake above his head.

[67] While he expressed remorse, it was clear in his Investigation that his focus regarding his own conduct was on whether he considered himself to be impaired, and not on whether or not he complied with Rule G, which prohibited his use of impairing drugs

while “subject to duty”. That he was drawing pay but did not consider himself to be “subject to duty” demonstrated a considerable lack of insight into his own misconduct. It is not surprising that lack of insight caused concerns for the Company.

[68] There are no significant mitigating factors in the Grievor’s favour, in this case. Given the very serious misconduct of consuming cannabis as an Engineer–in–Training when he could have been called to operate a Train and the lack of mitigating factors in his favour, this is not a case which reasonably attracts discretion to interfere with the penalty assessed.

[69] I remain seized for any questions of interpretation or application of this Award.



December 2, 2024

CHERYL YINGST BARTEL

ARBITRATOR