CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5084

Heard in Montreal, October 8, 2024

Concerning

CANADIAN PACIFIC KANSAS RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE
MAINTENANCE OF WAY EMPLOYEE DIVISION

DISPUTE:

Dismissal of Mr. L. Bencharski.

JOINT STATEMENT OF ISSUE:

On September 26 2023 the grievor, Mr. Loghan Bencharski, was issued a Form 104 advising him of his dismissal from Company service as follows:

> *A formal investigation was held in connection with the results of the post incident Alcohol and Drug test you submitted to on August 23, 2023 (in connection with your involvement in a vehicle accident in Winnipeg MB on August 23, 2023 for which you were assessed a 10-day suspension) which showed positive results for cocaine and marijuana as follows:*
> *Urine:*
> *• Positive for Marijuana – marijuana/THC metabolite. Quantitative Level = 142 ng/mL*
> *• Positive for cocaine – cocaine metabolite. Quantitative Level = 129 ng/mL*
> *Oral Fluid:*
> *• Positive for Marijuana – THC Parent. Quantitative Level = 2 ng/mL*
>
> *Following a fair and impartial investigation your culpability was established for violating the following:*
> *• HR 203 Alcohol and Drug Policy*
> *• HR 203.1 Alcohol and Drug Procedures (Canada)*
> *As a result you are hereby dismissed from Company service effective immediately.*
> *Note: This assessment is independent of the discipline assessment for your involvement in the vehicle accident in Winnipeg MB, on August 23, 2023.*

The Union objected to the discipline assessed and filed a grievance on October 18 2023. The Company provided a response on November 17, 2023.

The Union contends that: 1) On August 23rd, 2023, Mr. Bencharski was operating a CPKC vehicle in Winnipeg. While attempting to make a left hand turn at a signaled intersection the 3rd party vehicle in front of Mr. Bencharski stopped suddenly. This took Mr. Bencharski by surprise and the vehicle he was driving came into contact with the rear of the 3rd party vehicle causing minor damage. No injuries occurred. Mr. Bencharski was issued a 10-Day suspension for the

collision which has been separately grieved; 2) As a result of the incident, the grievor underwent substance testing and was found not to be impaired at work. As stated above, his oral test results were (1) negative for cocaine and (2) 2ng/ml for THC;3)The Company has provided no reason or why it dismissed the grievor when, as the Company well knows, there are numerous CROA&DR decisions that hold that the Company has no right to discipline employees who are tested and found not to have been impaired at work. 4) The grievor's dismissal was improper and unwarranted.

The Union requests that, the Company be ordered to reinstated the grievor into active service immediately without loss of seniority and with full compensation for all wages and benefits lost as a result of this matter.

The Company's Position:

The Company denies the Union's contentions and declines the Union's request.

The Company maintains that culpability was established through a fair and impartial investigation. Discipline was determined following a review of all pertinent factors including the Grievor's service and past discipline record.

The discipline assessed for the motor vehicle collision is the subject of a separate and distinct grievance and not before this Arbitrator. The Union has not alleged in either grievance correspondence that the testing was unwarranted, nor are the results of the test under dispute. Should the Union attempt to raise such an argument, it would be an expansion of position and objected to by the Company.

The Grievor was dismissed for his positive test results, which are in violation of the Company's Alcohol and Drug Policy and Procedures. Despite this, the Union has alleged that discipline was not in keeping with CROA decisions. This assertion is not correct.

The Company's position continues to be that the discipline assessed was just, appropriate, and warranted in all the circumstances. Accordingly, the Company cannot see a reason to disturb the discipline assessed and requests that the Arbitrator dismiss the Union's grievance in its entirety.

For the Union:	**For the Company:**
(SGD.) W. Phillips	**(SGD.) L. McGinley**
President-MWED	Director Labour Relations

There appeared on behalf of the Company:

S. Oliver	– Manager, Labour Relations, Calgary
F. Billings	– Director Labour Relations, Calgary

And on behalf of the Union:

W. Phillips	– President, MWED, Ottawa

AWARD OF THE ARBITRATOR

Context and Issues

1. The grievor had slightly more than one year of service with the Company as a member of a Utility Crew. On August 23, 2023, he was the driver of a Stake Truck which collided with a car, causing minor damage to both vehicles. At his post-incident test his oral fluids test was positive for marijuana at 2 ng/ml while his urine test was positive for

both marijuana and cocaine. At the investigation, the grievor stated he used marijuana "Not very often, couple times a month" and cocaine "once every couple months".

2. The Parties disagree on the following issues:

A. Was the grievor impaired while at work?
B. Was the grievor properly subject to discipline, and was termination appropriate?
C. If termination is not appropriate, what are the appropriate terms of reinstatement?

A. Was the grievor impaired while at work?

Position of the Parties

3. The Company takes the position that the grievor has clearly infringed the Company's Alcohol and Drug Policy, which sets out a 28 day ban on cannabis use (see Tab 4, App 5-7, Company documents). It notes that the grievor's oral swab test showed 2 ng/ml of the THC parent and his urine showed positive for marijuana/marijuana metabolite at 142 ng/ml and positive for cocaine/cocaine metabolite at 129 ng/ml. Confirmation levels are set by the Company at 15 ng/ml and 100 ng/ml respectively. It is clear that any use of cocaine is illegal (see Tab 8, Company documents).

4. Both expert opinion (see Tab 4, App. 4, Company documents) and the jurisprudence point to the dangers of the "crash phase" of drug use (see **AH 861**).

5. The Union takes the position that the Company, which has the burden of proof, has failed to establish that the grievor was impaired while at work. It submits that a breach of the Company Alcohol and Drug Policy is not proof of impairment. It notes that the oral swab level of 2 ng/ml is not indicative of impairment. Finally, it submits that urine testing, standing alone, has been consistently rejected by the jurisprudence as proof of impairment.

Analysis and Decision

6. CROA and other jurisprudence has been clear for many years that the legitimate concerns for safety must be balanced with the employee's right to privacy. The "Canadian model", enunciated by Arbitrator Picher in **SHP 530**, set out the following:

> In the result I am taken back to the contest between an employer's right to manage and an employee's right to individual privacy that is dealt with in the drug and alcohol testing awards that are cited herein. Simply put, absent express language in the collective agreement, both the employee's right to individual privacy (with all that that entails) and the employer's right to make rules for the purpose of furthering its business objectives (with all that that entails) are accepted as legitimate and valued, albeit sometimes competing rights. In circumstances where these rights are competing, such that employees may be disciplined for non-compliance, resolution is achieved by weighing or balancing the competing impacts. In respect of drug and alcohol testing of employees the balance has been struck in favour of protecting individual privacy rights, except where reasonable and probable grounds exist to suspect the drug and alcohol impairment or addiction of an employee in the workplace and except where there is no less intrusive means of confirming the suspicion. Conversely, the balance has been struck in favour of management's right (as part of its general right to manage) to require drug or alcohol testing, where the two aforementioned conditions exist. It follows that each case must be decided on its own facts…
>
> The real conflict between the Company's drug and alcohol policy and the collective agreements of both the Union and the Intervener is the contradiction between substantial parts of the language of the policy and the just cause provisions of the agreements. For example, at p. 20 of the policy the Company states that "presence in the body … of illegal drugs is prohibited while on duty". At page 16 of the policy employees are advised that any violation of the policy by an employee in a risk sensitive position "… will result in dismissal". However, it is common ground (and on this all of the expert witnesses are in agreement) that a positive drug test gives no indication as to when or in what amount the drug in question was ingested. More specifically, it cannot, standing alone, establish impairment while an employee is on duty, is subject to duty or is on call. In that context, if parsed literally, the rule expounded by the employer is that if an employee has ingested an illegal drug, for example marijuana, during a scheduled leave or holiday, and tests positive some weeks later, he or she will be discharged. In the Arbitrator's view, that rule is unreasonable on its face as there is no nexus between a positive drug test, standing alone, and impairment while on duty. So construed the rule would purport to regulate

> the private morality of employees, without reference to any clearly demonstrated legitimate employer interest.
> Under the collective agreements, which contain extensive provisions for the investigation of disciplinary infractions, employees are to be discharged or disciplined only for just cause. To the extent that the policy stipulates that for unionized employees a positive drug test is, of itself, grounds for discipline or discharge, it must be found to be unreasonable, and beyond the well accepted standards of the KVP decision.

7. This model was later adopted by the Supreme Court of Canada in **Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp and Paper** 2013 SCC 34 and has been followed thereafter by the vast majority of arbitrators.

8. The thread which runs through the jurisprudence, as I set out in **CROA 4857**, is as follows:

> Impairment is the thread which runs through the jurisprudence as being the dividing line between acceptable and unacceptable levels of drug or alcohol consumption. The Company, the public and fellow employees are entitled to unimpaired railway employees.

9. Oral swab testing has usually been used as the definitive test of recent drug use and possible impairment at work. For marijuana, the testing level had been set at 10 ng/ml for many years by the Company. Evidence of levels at or above this level have been accepted by many arbitrators as proof of impairment (see **AH 727, CROA 4857**). The Company has since introduced a new Alcohol and Drug Policy which set testing levels at 2ng/ml (see Tab 4, App. 5-7, Company documents). This Policy and the new levels it contains are the subject of an on-going Policy grievance before Arbitrator Clarke.

10. Urine testing, standing alone, has universally been rejected as proof of impairment at work. However, urine testing in conjunction with other evidence, such as admissions of recent drug use or abnormal behaviour, have been found to be proof of impairment (see **AH 861**).

11. Here, there is no evidence advanced that the grievor was behaving abnormally. The evidence of possible impairment comes from three sources only: 1) oral swab testing; 2) urine testing; and 3) his testimony as to drug use and the incident.

12. His oral swab testing at 2 ng/ml is at the new testing level set by the Company, and significantly under the previous testing level of 10 ng/ml. Many cases have decided that grievors were not impaired, even at higher testing levels than that found here (see **CROA 4789, 4792, 4857).** As was decided in **CROA 4857**, I decline to find today impairment based on this level of testing. The result of the policy grievance before Arbitrator Clarke, with extensive current expert evidence, will be highly instructive about the validity of the new levels.

13. The grievor's urine testing results, standing alone, cannot be determinative of impairment. This is the consistent view of CROA arbitrators (see **CROA 4355, 4584**).

14. His testimony serves to determine the time of marijuana and cocaine consumption. While the Company attempts to cast doubt on this timeline, the only evidence before me as to the time of consumption is that of the testimony of the grievor. Nor has the Company provided any expert evidence, such as testing levels, which calls into question the veracity of this testimony.

15. The marijuana consumption was at approximately 5pm the preceding evening, some 13 hours prior to the start of his next shift. His testimony is that his use: "Was a couple of puffs off a joint. Inhaled" (Q and A 31, Tab 4, Company documents). This time and level of consumption are not indicative of impairment at the start of his shift, although his levels were undoubtedly higher at the start of his shift than when tested some eleven (11) hours later.

16. His testimony is that he consumed cocaine the Friday prior to his Wednesday shift, or some 4.5 days prior to the day of the incident (Q and A 29-30, Tab 4, Company documents). This would be near the outer limit of the possible crash phase of one to five

days, according to the Company expert, Dr. Snider-Adler (see Expert Opinion Paper Regarding Substance Use in the Workplace, Dr. Snider-Adler, Tab 4(4), p. 14, Company documents). The grievor's testimony with respect to cocaine use tends to confirm both the negative oral swab results and the positive urine results.

17. Taking all three indicators of possible impairment into account, I cannot find that the Company has established on the balance of probabilities that the grievor was impaired at the start of his shift or at the time of the incident from his use of marijuana or cocaine.

B. Was the grievor properly subject to discipline, and was termination appropriate?

18. Given the above findings with respect to the grievor not being impaired while at work, the Company is not entitled to discipline the grievor for his off-duty consumption of drugs. The jurisprudence is extensive that a positive drug test, in the absence of impairment, does not permit the Company to impose discipline. As noted in multiple CROA decisions:

> **CROA 3691** - It is, of course, open to the Company to argue that a positive drug test coupled with an accident and other objective facts may support the inference that an employee is in fact impaired at the time of an accident or incident. Is there any such evidence in the case at hand? Other than the fact that the grievor was involved in a motor vehicle mishap which might have befallen anyone, and that he violated the rule against crossing over the area reserved for parked cars, there is nothing to sustain the position of the Company that the grievor was in fact impaired by the consumption of marijuana. …In my view the Company knew, and reasonably should have known, that it did not have evidence to justify the conclusion that the grievor was impaired and to terminate his employment on that basis. Much less could it terminate him on the theory that merely testing positive for marijuana constitutes a violation of the Company's drug policy that justifies discharge (grievance allowed with full compensation).
>
> **CROA 4240** - The arbitral jurisprudence in respect of drug testing in Canada is now extensive. It has been repeatedly sustained by the courts and is effectively the law of the land. Part of that law, as stated in the passage quoted above is that a positive drug test, conducted by urine analysis, standing alone, does not establish impairment at a point in

> time which corresponds with an employer's legitimate business interests and, standing alone, cannot be viewed as just cause for discipline.
> That is precisely what the instant case involves. The Company seeks to punish an employee for activity which occurred while he was off duty, off Company premises which, in and of itself, posed no threat or harm to the Company's operations or its legitimate business interests. In these circumstances the Arbitrator cannot responsibly conclude that the employer had just cause for the assessment of any discipline against the grievor, merely by reason of his having registered a positive result to a urine analysis drug test, or by his admission that he did consume marijuana in a social setting while off duty.
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> **CROA 4891** – It is clear that the evidence has not established impairment at work. The Company is not entitled to discipline the grievor as a result of the positive urine test. I find that the grievor was candid during the investigation, including volunteering to be drug tested…

19. The jurisprudence is also clear that a violation of the Company Alcohol and Drug Policy, in and of itself, does not warrant discipline:

> **CROA 4296** - The Company does not dispute the fact that the grievor was not impaired or under the influence of any substance during his tour of duty. Nevertheless, the Company asserts that the grievor was in violation of its alcohol and drug policy and procedures, and that for the violation the grievor's dismissal was justified. The Company's view is that using a prohibited substance while employed in a safety critical position warrants the grievor's dismissal.
> The Company's position has no merit. No discipline can be sustained against the grievor. To the extent that a policy stipulates that for unionized employees a positive drug test is, of itself, grounds for discipline or discharge, it is unreasonable and beyond the well accepted standards set out in KVP…
> This law is settled. It has been for some time.

20. As has often been noted, each case must be decided on its facts. The Company invokes **AH 787**, a decision of Arbitrator Hodges, who imposed a 60 day suspension despite finding that the grievor was not impaired. However, he also found that the grievor was not truthful during the investigation, which is not the case in the present matter. It also relied **on International Brotherhood of Electrical Workers, Local 1620 and Lower Churchill Transmission Construction Employers' Association** 2019 NLSC 48 in which the Court upheld the termination of an employee who was prescribed and

consumed cannabis on a daily basis. It is noteworthy, however, that the arbitrator had found that there was no way to establish residual impairment. That pattern of use or argument is not at issue here.

21. Accordingly, I find that discipline was not appropriate in the circumstances and therefore nor was termination.

C. If termination is not appropriate, what are the appropriate terms of reinstatement?

22. I remain troubled by the grievor's admitted pattern of drug use, even if there is a finding that he was not impaired on the day of the incident.

23. Marijuana is now legal and must be treated on the same footing as any other legal drug, such as alcohol. As noted above, impairment is the dividing line between privacy rights and the need for safety in a highly dangerous industry. The grievor is obligated to ensure that he is not impaired when subject to or on duty. If he is found to be impaired, including at the new levels set out by the Company, subject to review by Arbitrator Clarke, his employment will be in jeopardy.

24. Cocaine is in a different category. It is a hard, addictive drug, which is illegal. The effects of cocaine can be long lasting in the crash phase. I am especially troubled by the fact that the grievor has a pattern of using cocaine every couple of months. It is entirely possible that the delay between his consumption of cocaine and working has been less than the 4.5 days found here. Indeed, the grievor worked on the day before the incident in question, such that the delay would have been only 3.5 days (see Q and A 18, Tab 4, Company documents).

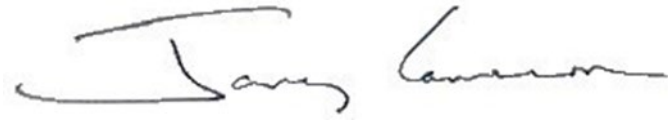
25. The grievor appears to now understand that the use of such drugs is not acceptable:

> "Yes, I value my career at CPKC and I will stay abstinent from any drugs and I am willing to sign an agreement for random testing for a period of time" (Q and A 69, Tab 4 Company documents).

26. Given the imperatives of safety in the railway industry, I find that the grievor should be tested by a substance abuse professional prior to a return to work and subject to unannounced testing for illegal drugs for a period of two years. He will obviously remain subject to any post-incident testing for all drugs and alcohol.

27. Subject to these terms, the grievor should be reinstated without loss of seniority and made whole, less mitigation.

28. I remain seized with respect to any issues of interpretation or application of this Award.



November 21, 2024

JAMES CAMERON
ARBITRATOR