CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5100

Heard in Edmonton, November 12, 2024

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal on behalf of Conductor S. Urbanovitch, concerning the assessment of discharge for" *violation of the Company's Drug and Alcohol Policy whereby on October 11, 2022, you reported for a scheduled statement/investigation on Company premises while under the influence of alcohol."*

THE UNION'S EXPARTE STATEMENT OF ISSUE:

On 11 October 2022, Conductor S. Urbanovitch (the Griever) appeared at the office of Walker Yard to attend a scheduled Formal Investigation. While discussing the investigation in the office of the Investigating Officer, the Griever was observed by Transportation Manager Mahir Abdulle, who identified signs of alcohol consumption in the Griever. The Griever was required to undergo Reasonable Cause drug and alcohol testing pursuant to the Company's Policy to Prevent Workplace Alcohol and Drug Problems (the "D&A Policy"). The test results confirmed the presence of alcohol in the Griever's breath sample indicating a BAC of 0.057 and 0.052.

Subsequently, the Griever was required to attend a formal investigation into this matter. The investigation was completed on October 24, 2022, and on November 1, 2022, the Griever was assessed with discharge for *"violation of the Company's Drug and Alcohol Policy whereby on October 11, 2022, you reported for a scheduled statement/investigation on Company premises while under the influence of alcohol."*

It is the Union's position that the Griever should be made whole for the time held out of service to the date of discharge, that the investigation was unfair and impartial, that the Griever should have been offered a Rule G By-pass, and that the discipline assessed was arbitrary and unwarranted and, in any case, excessive and should be expunged or, in any case, reduced and the Grievor's record made whole.

The Company disagrees with the Union's position and has denied grievance. It argues that the Grievor was in violation of CROR Rule G and the Policy to Prevent Workplace Drug and Alcohol Problems, did not accept responsibility or even acknowledge impairment, and has not indicated a dependency concern.

For the Union:	**For the Company:**
(SGD.) R. S. Donegan	**(SGD.) N. James**
General Chairmen CTY-W	VP, Western Region

There appeared on behalf of the Company:

R. Singh – Senior Manager, Labour Relations, Vancouver
C. Baron – Manager, Labour Relations, Edmonton

And on behalf of the Union:

M. Church – Counsel, Caley Wray, Toronto
R. Donegan – General Chairperson, CTY-W, Saskatoon
J. Thorbjornsen – Vice General Chair, Saskatoon
A. Christine – Local Chair, Edmonton
S. Urbanovitch – Grievor, Edmonton

AWARD OF THE ARBITRATOR

Background, Issue & Summary

[1] The Grievor had fifteen (15) years of pensionable service with the Company when he was Investigated on October 11, 2022, for an incident which was ultimately settled by the parties. This Grievance arises out of that Investigation process.

[2] As a preliminary argument, the Union argued the Investigation interview was unfair and impartial and the discipline resulting from it is therefore *void ab initio* – or "void from the start". This is not an uncommon allegation in this expedited process, given the importance of the Investigatory process, as discussed below.

[3] For the following reasons, the Union's preliminary argument is successful. The discipline is rendered *void ab initio.*

[4] The Grievance is therefore upheld.

Collective Agreement Provisions

> Article 117 – Discipline
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> …
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> 117.1 No employee will be disciplined or dismissed until the charges have been investigated; the investigation to be presided over by the employee's superior

> officer. The employee may, however, be held off from investigation not exceeding 3 days, and will be properly notified, in writing and at least 48 hours in advance, of the charges against the employee. Investigations, as contemplated in Article 117.2, will only be scheduled to start between 0800 and 1700 hours, where employee being investigated normally reports for duty or otherwise if mutually agreed upon between the Local Chairperson and the Company
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> …
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> 117.2 (b) Employees may have an accredited representative appear with them at investigations, they will also have the right to hear all the evidence submitted and will be given an opportunity through the presiding officer to ask questions of witnesses whose evidence may have a bearing on the employee's responsibility. Questions and answers will be recorded and the employee will be furnished with a transcript or recording of the statement taken at the investigation.

Analysis and Decision

[5] Given my findings, it is unnecessary to outline the arguments of the parties regarding the merits. This Grievance can be resolved on the basis of the application of this Office's well-established jurisprudence regarding the importance of the Investigation process to certain clear and undisputed facts.

[6] On October 11, 2022 the Grievor was called in for a Formal Investigation. He and his Union representative were in the office of the Company's Investigating Officer (the "IO"). The Trainmaster for Walker Yard came into the office to pick up some documents he had printed and noticed a distinct smell of alcohol. He left the office and came back again and he also now noticed the Grievor now chewing gum.

[7] The Memorandum of the Trainmaster was filed into the Investigation which subsequently occurred for the Grievor's alleged breach of the Company's Drug & Alcohol Policy. He stated that at this point he requested the IO step outside the office with him and he relayed his suspicions to the IO. He indicated in his memo that "Supervisor Baker [the IO] agreed that a smell of alcohol was coming from the vicinity…" of the Grievor.

[8] The Trainmaster then proceeded to question the Grievor alone. He stated the Grievor acknowledged he had a couple of drinks the night before. He stated he also questioned the Grievor as to why he began to chew gum. The Grievor stated it was nicotine gum and that he had no alcohol in his system.

[9] It is undisputed that both the Trainmaster and the IO then executed the "Reasonable Cause" testing form, as two Company officials who believed there was reasonable cause to subject the Grievor to drug and alcohol testing, and that the Grievor was then subject to drug testing.

[10] That involvement – and their underlying suspicions as noted in the Trainmaster's memorandum – made <u>both</u> individuals potential witnesses at any subsequent investigation which may occur, if those suspicions were realized.

[11] That was what ultimately occurred.

[12] The Grievor was subject to a drug testing as a result of the suspicions of the Trainmaster and the IO. His blood alcohol concentration was tested at 0.57 and also retested at .052 and .053. The Grievor was then called to an Investigative interview for that test result.

[13] So far, that recitation of facts is not problematic or unusual.

[14] However, I pause at this point to address the importance of the Investigation process to the expedited grievance resolution process followed in this industry.

[15] The Canadian Railroad Office of Arbitration and Dispute Resolution ("CROA") is a grievance adjudication process where the fact-finding is based primarily on documentary evidence. That process will celebrate its 70th anniversary in 2025.

[16] To accommodate an expedited process where multiple cases are heard in only an hour each, the fact-finding role of an Arbitrator under this process is assisted by an Investigative Interview. Certain protections have been negotiated into that process – and determined by this Office – given its importance to the Arbitrator's fact-finding. This Office has determined that when that process is not undertaken in a fair and impartial manner in a substantive way, any discipline assessed is *void ab initio,* or "void from the start" and a Grievance must be upheld, no matter that the underlying incident could support discipline. As recently noted by this Arbitrator in **CROA 5080**, which was filed by and relied upon by the Union:

> [t]he expedited arbitration regime of CROA depends for its validity on the integrity of two key components: the Grievance procedure and the Investigation. The

> Investigation…is intended to largely displace the fact-finding role of the arbitrator [footnote omitted], since witness evidence in this process is rare…With the Investigation transcript assisting the fact-finding process, multiple cases can be heard in one day, and decisions are written expeditiously. The trade-off negotiated by the parties, is that there are "harsh consequences for actions, however innocent, which prejudice the [CROA] process [quoting from **AH809-M**]".
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> …In order for this expedited regime to operate as intended, and to ensure the integrity of their decisions, arbitrators have been jealous to guard the integrity of the Investigation process, given their reliance on its findings. Where the failure of that process is substantive, discipline is set aside as *void ab initio*, which means "void from the beginning". [1]

[17] As noted in **CROA 3322**[2]:

> If the credibility of the expedited hearing process in this Office is to be preserved both the parties and the Arbitrator must be able to rely, without qualification, on a fair adherence to the minimal procedural requirements which the parties have placed into the Collective Agreement to facilitate the grievance and arbitration process in discipline cases.

[18] As both of these cases demonstrate, one key document for the success of that process is the Investigation transcript.

[19] According to Article 117.2(b), any witness whose evidence has a bearing on the Grievor's responsibility can be interviewed, as part of the Investigation. While both **CROA 3322** and **CROA 5080** involved issues of disclosure, issues of the impartiality of the IO as an individual *who is not also a witness* is a basic protection.

[20] Otherwise, Article 117.2(b) could not be followed.

[21] The Union filed and relied on **CROA 4558**, a decision between these same parties, which was ultimately upheld on appeal up to the Saskatchewan Court of Appeal. It is a series of decisions familiar to this Arbitrator from work in this industry. That Court

[1] At paras. 22-24.

[2] Relied on in CROA 4558, filed by the Union. That decision was reviewed and subsequently that review was appealed to the Saskatchewan Court of Appeal: *TCRC and Sims* v. *Canadian National Railway* 2021 SKCA 62, see para. 21.

confirmed that the concept of *void ab initio* is applicable to CROA jurisprudence arising from investigative interviews where substantive rights are not provided.

[22] That case involved a Grievor who was alleged to have published very offensive, racist comments on Facebook. [3] In that case, the Grievor was not provided copies of the complaints during the Investigation, despite the Company's assurances of full disclosure, and was only later provided that disclosure, shortly before the hearing. The Arbitrator determined there to have been a substantive failure of fairness, relying on **CROA 3322** as a clear expression of the principle. It was held the standards adopted by the parties "to define the elements of a fair and impartial hearing are mandatory and substantive, and a failure to respect them must result in the ensuing discipline being declared null and void", based on "due process and fairness concerns inherent in the structure of the CROA arrangement".

[23] While a breach could be cured, it had to be done either at the investigative stage, or at least where a supplement investigation could be convened, and not through the CROA hearing process.

[24] While his decision was overturned on appeal to the Saskatchewan Court of Queen's Bench (as it then was), the Court of Appeal restored his Award. That Court recognized the "unusual and expedited" nature of the CROA process, and that fundamental breaches of the pre-discipline due process provisions "go to the core of the CROA process".[4]

[25] The Court also recognized the "extremely broad investigative powers" of arbitrators of this Office, and the need to "protect the integrity of the unique CROA system that the parties agreed to adopt".

[26] With that background, I return to the facts of this case.

[27] It became clear at this hearing that the IO who conducted the Investigation into the Grievor's breach of the Drug & Alcohol Policy was the ***same IO*** who was also a witness to the Grievor's alleged impairment and the ***same*** individual who executed the

[3] Which has been upheld on judicial review by the Saskatchewan Court of Appeal: *TCRC and Sims v. Canadian National Railway Company* 2021 SKCA 62.
[4] At para. 59

"Reasonable Cause" testing form, along with the Trainmaster, to support the test that was under Investigation.

[28] She was not, therefore, an impartial individual.

[29] The Union objected to the IO conducting the Investigation into the breach of the D & A Policy, stating that IO was not impartial and as a result, the Investigation was unfair. Those objections were noted in the transcript, *but did not result in the IO recusing herself* from conducting the Investigation, which is what should have occurred. A further issue occurred when the Union requested the opportunity to question the IO, given her involvement as the second supervisor who determined that a D & A test should be undertaken, which was a right protected by Article 117.2(b) of the Agreement. That request was *also* denied by the IO, as she stated "*the Investigating Officer will not be answering any questions*".

[30] The Union again appropriately objected to the Investigation as not being unfair or impartial, when this request was denied.

[31] While that denial alone rendered the Investigative process to be fundamentally unfair and in breach of the Agreement – as the Union was entitled to question witnesses "whose evidence may have a bearing on the employee's responsibility" - I have no difficulty in concluding that the Investigation was not conducted in an impartial manner on a more basic level. The IO was not impartial; she was part of making a determination the concerns against the Grievor were substantiated. Given that the IO was not impartial as she was not only witness to the alleged misconduct, but also a witness who had determined there was already "reasonable cause", she was not impartial. .

[32] Since the IO in this case was a witness to the alleged breach of the Company's Policy; and had already determined reasonable cause existed, it was inappropriate for her to act as IO – given either capacity.

[33] For either reason, she could have been questioned by the Union, as in either capacity her evidence had a bearing on the Grievor's responsibility. In fact, the Union sought to question her and were denied that right.

[34] The IO denied the Union an important and fundamental protection which was also agreed to by the parties, which is that witnesses can be questioned by both parties. She denied that option to the Union, in this case, because she was that witness.

[35] An IO cannot be a witness; an alleging individual and an IO. The positions are incompatible.

[36] On these facts, I have no difficulty in determining the Investigation in this case was not fairly or impartially conducted; that there was a fundamental and substantial denial of procedural fairness and due process, integral to the CROA process, and that the discipline rendered is therefore rendered *void ab initio*, regardless of the seriousness of the Grievor's underlying conduct.

[37] As was stated in **CROA 5080**, in this case there was an issue which

> … worked an unfairness on the Grievor that was in breach [of the collective agreement provision] and was fundamental, substantive and fatal to the Investigation process. It negatively impacted the Grievor's ability to defend against the allegations made against her.[5]

[38] It should be emphasized there is no suggestion the Company's representative who argued this case at the hearing was at any way involved in this incident or in giving advice to the IO. She was in the unenviable position of advancing the Company's position, which was unsustainable. She was unable to offer any explanation for why the IO did not act appropriately and recuse herself when questioned by this Arbitrator. She focused on the Company's concern with the Grievor's breach of its D & A Policy and the seriousness of that misconduct, as well as the Grievor's poor disciplinary record and his lack of truthfulness in admitting he had consumed alcohol.

[39] While those facts would normally be important information for an Arbitrator, the level of the misconduct does not cure a fundamental and substantive denial of fairness during the investigative process, which was amply demonstrated in *TCRC and Sims v. CN*.[6]

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[5] At para. 29
[6] See *TCRC and Sims* v. *CN* at para. 6 for the same recognition.

Conclusion

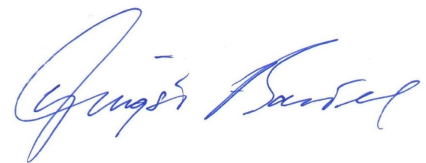
[40] The Grievance is upheld and the discipline set aside as *void ab initio.*

[41] The Grievor is ordered to be reinstated, with full compensation and benefits, less any amounts earned or received in mitigation of his damages.

[42] The calculation of that amount is remitted to the parties. Should there be any issues in that determination, I retain jurisdiction and direct the parties to have that issue set down on a stand-alone basis at a CROA session over which I preside. The Office is hereby directed to schedule that issue on an expedited basis.

[43] As the Grievor should not suffer any impact on his pension from the Company's substantive failures towards him in the Investigatory process, I also find and declare the Grievor's reinstatement to be effective on a retroactive basis, as of October 20, 2024. However, the Grievor's wage loss directed above is to be determined in the ordinary course and not on the basis he would have worked at a certain level of income from October 21, 2024 forward, as that is not the intent of this declaration.

I retain jurisdiction for any questions relating to the implementation of this Award; for any issues of remedy or arising from my directions on which the parties are unable to agree; to correct any errors; and to address any omissions, to give this Award its intended effect.



December 13, 2024

CHERYL YINGST BARTEL
ARBITRATOR