CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5102

Heard in Edmonton, November 13, 2024

Concerning

VIA RAIL CANADA INC.

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal the 25 Demerit Marks assessed to Mr. R. Orton (or the Employee) for the alleged failure to comply with the VIA Rail Drug and Alcohol Policy.

JOINT STATEMENT OF ISSUE:

The Union contends that the Employee was unaware that an incident had been reported and that he would be required to submit to a drug and alcohol analysis. The Corporation made a point to mention that the Employee began consumption immediately upon his arrival at his domicile, but this was because in addition to helping him relax it allowed him to comply with the time parameters outlined in the policy related to periods of abstinence prior to reporting for duty. The Corporation did not prove that the Employee 'knowingly' violated that part of the policy. In addition, the Union contends that the discipline was additional to other discipline assessed for the alleged initial incident under investigation and as such is considered punitive in nature. The Union requests that the 25 Demerit Marks be removed from the Employee's personal record.

The Corporation contends that the Employee was in fact aware that the incident, a significant speeding infraction, had occurred and as such, he was obligated to abstain from consumption of alcohol or drugs until advised by the proper authority of the Corporation that testing would or would not be required per the *VIA Rail Drug and Alcohol Policy and Procedure.* The Corporation also asserts that the Employee knowingly violated the policy by consuming alcohol and drugs immediately after the incident and prior to when any testing could occur, and this in order to obfuscate any results from testing and their relation/impact on the incident in question. Further, it contends that the discipline was not being 'piled on', but was a separate incident addressed on its own with separate corrective action. Finally, the Corporation asserts that the discipline assessed was reasonable in the circumstances. The Corporation therefore denied the grievance.

For the Union:
(SGD.) P. Hope
General Chairman

For the Company:
(SGD.) R. Coles
Senior Advisor, Employee Relations

There appeared on behalf of the Company:

C. Trudeau	– Counsel, Fasken, Montreal
Y. Montplaisir	– Human Resources Business Partner, Montreal

And on behalf of the Union:

M. Church	– Counsel, Caley Wray, Toronto
D. Dunn	– Senior Vice General Chair

AWARD OF THE ARBITRATOR

Background & Issue

[1] This Grievance is taken against the issuance of 25 demerits to the Grievor for alleged failure to comply with VIA Rail Drug and Alcohol Policy (the "Policy). It is alleged the Grievor failed to abstain from drug and alcohol use after an incident which could lead to such testing.

[2] This is one of two Grievances heard in the November CROA session involving the same Grievor. The second Grievance is **CROA 5101**, involving a 30 day suspension.

[3] The parties filed one book of materials for both Grievances (but separate Replies), although the matters were each given one slot in the CROA schedule and were not argued as one case.

[4] Both Awards are directed to be read together for any future precedential use.

[5] The issue between the parties in this Grievance are:

a) Is the Grievor culpable for violating the Company's Policy?; and, if so
b) Was the assessment of 25 demerits just and reasonable?

[6] Upon review of all of the evidence, I am satisfied both questions must be answered "yes". Given that result, the third question under a *Wm. Scott* analysis of the appropriate substitution of discipline does not arise.

[7] The Grievance is dismissed.

Facts

[8] The Grievor was hired January 16, 2015 as a locomotive engineer ("LE"). At the time of this Grievance, he had six years and ten months of service.

[9] On November 14, 2022, the Grievor was a locomotive engineer on Train No. 2. This Train carries passengers and runs between Vancouver and Toronto ("The Canadian"). The incident at issue in this Grievance follows from the operation of the Grievor's Train between Hornepayne and Capreol. The Grievor was familiar with the territory over which this Train was operating.

[10] The crew was aware – and had job briefed – a General Bulletin Order ("GBO") for a speed restriction – a "Temporary Slow Order" or TSO – at mile 180.5 (CROR Rule 43) of 30 miles per hour. The speed on the track without the TSO would be 55 miles per hour. The crew was also made aware that signals ("flags") may not be in place. The Train download demonstrated the crew did not obey the TSO. The failure to do so was reported by the Grievor's crew member and not by the Grievor. The Grievor was assessed 30 demerits as a culpable disciplinary event, which was not grieved to arbitration.

[11] The two Grievances at issue in this case do not directly result from this "speeding" incident, but rather from actions taken by the Grievor ***after*** the Grievor got off the Train.

[12] Culpability has already been established for the Grievor missing the TSO – and discipline assessed. That culpability assumes both knowledge of that requirement and failure to abide by it.

[13] However, both parties' arguments placed reliance on the Investigation transcript for that particular discipline for the Grievor's evidence for *why* he acted in manner he did *subsequent* to that event and what he knew – or did not understand – at the time he left the Train.

[14] It is in that context that evidence is used in this Award. All emphasis is added.

[15] In that Investigation, the Grievor was asked if he complied with the requirements of CROR Rule 43 at mile 180.5 Rule Sub on November 14, 2022 as indicated in the TGBO. The Grievor stated:

> At the time I guess I didn't realize we were on it and we applied it right away *and I can't say for sure and at the time I didn't think we were on it and I complied with the rule as best I could….I guess we missed it*, the download shows we did so I guess we didn't but at the time *I was not sure if we did*" (Q/A 37).

[16] When questioned regarding the requirement to broadcast the "Slow Order" restriction, the Grievor said that "Will called it out slow order coming up". In Q/A 25 when asked if he communicated "at the green signal for the [R]ule 43…", the Grievor said:

> There was no green signal *and when I realized we had a slow order I yelled at Wil to get it down and we reduced till we could figure out where we were whether we were in it or on it. I had my head down doing paperwork and told him to reduce it for at least a train length. Without the flags it was tough to tell where the condition was, there was nothing out of the ordinary about it*".

[17] When asked whether it was "fair to conclude you were operating as though the 30 mph GBO speed restriction was not in place", the Grievor answered "I wouldn't say we would operate like that *we knew it was there and looked for it and saw mud spots and told will to shut it down till I could figure out where we were*" (Q/A 28).

[18] At Q/A 35 is the discussion between the crew in the cab at this point:

> We reduced our speed and I looked at will and he looked at me and we got down to speed and one of us said what do you want to do *he asked if I wanted to call the RTC and I said I'd prefer not to till we knew where we were and I said everything seemed ok and I believe I told Will do what you got to do and said if you gotta call the RTC go ahead".*

[19] At Q/A 38, the Grievor stated that "*It's not that we didn't comply we didn't know we broke it, I guess we went into it hot but at the time I wasn't worried about it. It wasn't rough or anything I guess I should have paid better attention. As for 43 we did out [sic] best to see and get the train down*".

[20] When asked in Q/A 45 what he did "once you realized you had not complied with GBO 3581 30 mph at mile 180.5", the Grievor's answer was "*Like I say I left that up to*

Will and asked if I wanted to call it in and I said you gotta do what you need to do. It wasn't intentional and was nothing out of the ordinary and was just another day nothing out of whack". At Q/A 57, the Grievor also stated did not feel what was done by this crew was "dangerous". At Q/A 49, the Grievor stated he believed the crew had complied with the GBO "at the time".

[21] However, given the evidence, It is not clear on what basis the Grievor actually made that determination, given that statement is contradictory with other evidence that the crew was not aware of whether they were in compliance or not; and that – since everything "seemed ok" and was not "dangerous" – the Grievor was "not worried" about not being in compliance.

[22] The Train download demonstrated that the Train operated in excess of the permissible speed over the TSO. The Grievor was therefore disciplined 30 demerits for not complying with the TSO – for "speeding". As noted above, that penalty was not advanced to arbitration and is not disputed. Given that discipline, the Grievor cannot maintain he complied with the TSO.

[23] The Grievor's evidence was that when he arrived home after this tour, he engaged in the consumption of alcohol and vaping of marijuana, to help him relax after work. While at home, the Grievor received a call instructing him to come to Sudbury for a D&A test under the Policy. It is not disputed the Policy required the Grievor to abstain from the use of drugs and alcohol after an incident that could lead to testing, at least until being informed that no testing would be pursued (at p. 5).

[24] Whether that Policy applied to these particular circumstances is, however, contested.

Arguments

[25] The Company argued the Grievor had contravened CROR 43, for which 30 demerits was issued, which was not grieved to arbitration. That was his "first fault". It argued the Grievor was aware an incident had occurred and pointed out that discipline for that incident was not in fact challenged; that this was a passenger Train; and that the

Grievor was familiar with both the territory and the GBO and the maximum speed and that restrictions would not be in place (discussed at the job briefing). It argued the Grievor committed a "second fault" when he chose to go home and engage in the consumption of alcohol and drugs, before he was aware there would not be D&A testing, which was a breach of the Policy and culpable behaviour; that he chose to consume both "right after the end of his shift"; that the purpose of that obligation is to avoid a disruption of post-incident testing; and that the D&A testing – having taken place after the CROR 43 contravention – was not "piling on"; that there was an issue with compliance with the TSO during this trip, from the issue with the crew's compliance with the TSO and his crew member's concern that the incident should be reported to the RTC; and that the Grievor's comment of "do what you have to do" indicated he was aware of that possibility and should have complied with the Policy. It argued the Grievor breached the Policy when he chose to consume alcohol and drugs and that its discipline choice for that conduct was just and reasonable. In Reply, it argued there was no "piling on" but two separate contraventions; that the disciplinary measure for failing to obey the TSO confirms the occurrence of the incident and the failure to report it; and it distinguished the Union's case law.

[26] The Union argued the Company was "piling on" since it imposed multiple penalties for the same offence. It also argued that – at a point in time when the Grievor felt he was not subject to duty – he consumed alcohol and a "couple of puffs" from his THC vape pens. While the Union noted the Policy speaks to the consumption of alcohol and drugs "after an incident before being tested or informed that a test is not required" (at p. 5), it argued the word "incident" is not defined in the Policy or in that requirement and that this requirement fails the *KVP* test for unilateral policies. The Union maintained that the Grievor did not know there was a violation until he received the download information as part of the Investigation into that incident. It argued the Grievor's comments at the time to his crewmate did not indicate an admission he knew the rule had been breached; only that he was not going to stand in his crewmate's way if he chose to make a report based on his belief, "which the Grievor did not share". The Union also argued the Grievor simply had trouble figuring out which territory was covered by the TSO, since there was no flag identifying it and that "without the flags, it was tough to tell where the condition was, there was nothing out of the ordinary about it" (Q/A 25). It therefore maintained the Grievor had

"no reasonable justification to believe that any investigation was going to occur, or even if it did, that it would be an incident which created reasonable grounds for a drug and alcohol test" (para. 16), and so he was not in prohibition of the Policy when he consumed "a couple beers and THC puffs when he got home". It argued the Grievor was entitled to any benefit of ambiguity in the Policy surrounding which incidents would result in testing. The Union noted the Grievor was off duty for 36 hours and maintained the Company has not met its burden of proof to establish the Grievor knowingly violated the Policy.

[27] The Union argued in Reply that the Company's case was predicated on the Grievor's awareness that an incident requiring testing had occurred, which it argued was untrue and unproven. It argued none of the examples given by the Company resulted from "speeding". It urged that at the time the Grievor went home, the Company had not exercised any discretion to test the Grievor. It also distinguished the Company's case law.

Decision

[28] The limited use that can be made of this Investigation transcript must be reinforced at this point. The Grievor's culpability for this event has been established. That culpability would include his knowledge the TSO was not complied with.

[29] The Union's allegation of "piling on" must first be assessed.

[30] I cannot agree this was multiple penalties for the "same offence", as alleged by the Union; resulting in "piling on". The discipline assessed against the Grievor in this case arises from several different actions, which led to different results. Multiple rules were not violated in one action by the Grievor.

[31] The first action was the Grievor's lack of attention to the TSO – "speeding" - which resulted in 30 demerits (not challenged).

[32] That is distinct from the Grievor's actions taken *after* he left the Train involving the consumption of drugs and alcohol, which are the subject of this 25 demerits.

[33] While the testing resulted from the failure to obey or perhaps even report the incident, it was not the *same* incident. The issue of the 30 day suspension is addressed in **CROA 5102.** For the purposes of this argument, that 30 day suspension was for a

further and different action of the Grievor in using the Company vehicle and allowing his wife to also drive the Company vehicle to bring him to the testing location.

[34] Turning to the merits, this Grievance raised issue with the level of knowledge that must be established for the Company to demonstrate the Grievor breached its Policy "after an incident before being tested or informed that a test is not required", including what constitutes an "incident" and whether it must be of the same nature used by the Company in the examples used.

[35] I agree with the Company that the Grievor's culpability for the speeding incident cannot be challenged, given it was not advanced to arbitration. It is not appropriate at this late stage to "look behind" that discipline to suggest the Grievor was unaware that a culpable incident even had occurred. That argument is no longer available. That incident did occur and he was disciplined for that occurrence.

[36] While culpability cannot be challenged, there *are* statements in the Investigation of that incident relating to the Grievor's explanation for consuming drugs and alcohol that the Union argues are relevant.

[37] The Grievor's evidence demonstrated inconsistencies that impact his credibility and cause considerable doubt for his version of events. On the Grievor's own evidence, he was aware that there had been a problem with the crew complying with the TSO, because they were unsure where it was. Being confused about the TSO does not excuse not determining where that TSO *was*. In fact, the Grievor's evidence was that the train should slow down so that could be figured out, so he was aware there were problems for this crew for complying with that TSO. Unfortunately, those instructions did not result in the TSO being followed. It cannot be argued the Grievor was "unsure" of compliance and also was unaware he had *not* complied, which was argued by the Union. The two states cannot co-exist. It is inconceivable that the Grievor can maintain he was not even aware of whether there *was* an infraction, given his answers to Q/A 37 that he "couldn't say for sure" that things "seemed ok" and "not dangerous"; that he "complied with the rule the best I could"; and that he told his crewmate to slow down until it could be "figured out"; and also given that he was found culpable and that culpability was not challenged to arbitration.

[38] The Union's arguments of the Grievor's lack of knowledge of any infraction cannot be supported given the evidence. The Grievor was aware of his crewmate's concern; he was found culpable for a CROR 43 violation; and was aware of the possibility that the matter could be reported to the RTC. That is all that need be established.

[39] The question raised by this Grievance is whether the Grievor complied with the Policy relating to testing.

[40] As I am satisfied from the Grievor's evidence that this crew was aware there had been an infraction relating to the TSO and there was a possibility it could be reported to the RTC, which was discussed, I cannot agree with the Union's argument that the Grievor's comments to his crewmate are not an admission of that understanding. First, as noted above, the Grievor's evidence he was not aware there was a possible infraction is not credible. Second, the Grievor had the requisite knowledge to understand there was a concern the crew had not complied with the TSO (which the download evidence supported) and that the issue of reporting to the RTC was raised by his crewmate to him (which it was). Third, the Grievor told his crewmate to "do what he had to do" regarding reporting the matter to the RTC.

[41] The Grievor was aware the issue of reporting was "live" at the time he left this Train, and his crewmate may very well have "done what he had to do" and reported the infraction.

[42] Given that finding, the only remaining issue is whether the Grievor should have understood testing was a possibility in this circumstance.

[43] The Union argued that the *KVP* test has been offended. That test imposes requirements for unilateral policies imposed by an employer, including clear communication. I cannot agree that test was offended in this case. The list in the Policy relied upon by the Union is specifically stated to be a "non-exclusive" list by its use of the word "may". It is not an exhaustive list which limits the Company to only conducting a post-incident test if the matter is addressed in the list. That an "incident" is not specifically defined in this Policy is therefore not a determinative factor.

[44] I am further convinced the Grievor knew or should have known that this type of incident could be subject to D&A testing and that he accepted that risk when he consumed alcohol and drugs in breach of the Company's Policy. The possibility of discipline up to and including dismissal is express. This is not a situation where a minor rule infraction has occurred that is being tested. It is a situation where a serious and significant infraction of failure to slow a train carrying passengers from 55 mph down to 30 mph – for which the Grievor has accepted a 30 demerit penalty, which is halfway to dismissal. I cannot accept that the Grievor – with his level of experience – would not have considered he *could* be subject to a D&A test for such a serious and significant event.

[45] The law imputes knowledge that "should be" known, even if an employee alleges they did not in fact know it. Employees cannot escape liability through what the law describes as "wilful blindness". Whether the Grievor actually knew or only *should have* known that an incident of this calibre could be properly subject to D&A testing and caught by the Policy, in these circumstances he is imputed with the reasonable knowledge it was a possibility for an event that could attract 30 demerits as a reasonable discipline measure. Given that there was a serious and significant "speeding" infraction, when a TSO had been issued to the crew, and given that the Grievor did not bring his own culpable conduct to the Company's attention, it was not unreasonable for the Company to consider a post-incident test was warranted. That the Grievor failed to report a culpable incident worth 30 demerits does not excuse him from knowledge it was a significant and serious incident under the Policy.

[46] Further, I am satisfied that the Grievor was aware that his crewmate indicated to him that he wanted to notify the RTC of the speeding infraction, and that the Grievor indicated to him "do what you got to do and if you got to call the RTC go ahead". Even *with* this knowledge, the Grievor chose to go home and have a "few" beers and vaped marijuana. In making that choice, he placed himself within breach of the requirements of the Policy, and put himself at risk that the Company could consider the Policy had been breached.

[47] The Company has argued by analogy from "refusal to test" cases. While the analogy is imperfect, I do accept that both refusing a test, and choosing to engage in

consumption *before* a test can be performed, can lead to the same inference: That the avoidance/consumption was because a positive result was expected had the test been performed *without* that interference: See **CROA 5070** and **5030**, which both upheld discharge for refusal to test.

[48] Given the jurisprudence, and having reviewed the authorities filed by both parties, when the Grievor chose to engage in consumption of drugs, including alcohol, *before* being advised a test would not be required – in circumstances where I am satisfied he knew or should have known that testing was a possibility – the same inference can be supported: Had the test not been obstructed by the Grievor's behaviour, a positive result leading to significant discipline may well have been supported. In this case, I consider that the Grievor was fortunate the Company did not dismiss him for choosing to consume drugs and alcohol at a time when that consumption was to be avoided, which actions interfered with a legitimate request for a test.

[49] Turning to discussion of *Wm. Scott* factors, even length of service when combined with a "virtually" clean record does not protect an employee who chooses to interfere with legitimate testing obligations: **CROA 5070**: dismissal upheld; twenty year employee with a "virtually clean discipline record"; **CROA 5030**: fourteen year employee; dismissal upheld when refusal to test is in issue.

[50] While the Grievor has length of service in his favour, the Grievor in this case does not enjoy a clean record. His record was precarious. While the Union focused on the Grievor's record *prior to* November 14, 2022, it is a fact the Grievor was sitting at 30 demerits – or halfway to dismissal – as a result of his initial speeding infraction. The record for that underlying offence is relevant.

[51] While the Grievor admitted his use of marijuana and alcohol, that is not a significant "credit" to him in terms of remorse, given that he was about to be subject to a drug and alcohol test, which would have made that use evident.

[52] It is difficult to argue lack of intention to breach the Policy, as argued by the Union, when the Grievor's culpability for speeding has already been established, and given his comment which demonstrated he was aware the issue of reporting that infraction was "live" between he and his crewmate at the time he left the Train and chose to consume.

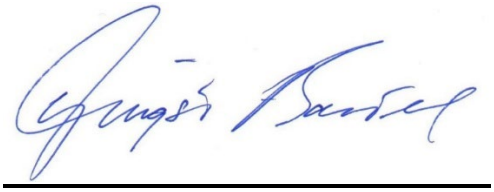
[53] Regarding the nature of the offence, obstructing the ability to test post-incident is recognized as serious misconduct in this industry.

[54] Considering all of the circumstances, the Company had already addressed mitigating factors in its decision to allow this Grievor to keep his employment. The Company's assessment of 25 demerits for this misconduct was neither unjust nor unreasonable.

[55] A final word: The statements made in **CROA 5030** by this Arbitrator that drugs and alcohol do not mix with the safety-sensitive industry of the railroad are also applicable to this case, as is the comment made by Arbitrator Picher in **CROA 1703** that "Canadian public policy reflects a clear concern for the dangers of drug use within the transportation industry". The stakes are high; the consequences serious and potentially catastrophic. As discussed in **CROA 5030**, should an Arbitrator exercise discretion to reduce this penalty in these circumstances, the "wrong signal" would be sent to employees.

[56] The Grievance is dismissed.

I retain jurisdiction for any questions relating to the implementation of this Award; and to correct any errors; and address any omissions, to give this Award its intended effect.



February 11, 2025

CHERYL YINGST BARTEL
ARBITRATOR