CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5143

Heard in Montreal, February 12, 2025

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE
MAINTENANCE OF WAY EMPLOYEE DIVISION

DISPUTE:

Dismissal of A. Saulnier.

JOINT STATEMENT OF ISSUE:

On September 24 2023 the grievor underwent post-incident substance testing following a run through switch. On November 22 2023 the grievor was issued a Form 104 that provided the following:

Formal investigations were held in connection with your post incident substance test and results related to your substance test samples taken on Sept 24, 2023. The post incident test was following your involvement in run through switch on September 24, 2023 for which you were assessed a 10-day suspension. You tested positive for Marijuana (marijuana/THC metabolite) in your Urine and positive for Marijuana (THC Parent) in your Oral Fluid.

Your culpability was established for violating the following:

- *HR 203 Alcohol and Drug Policy*
- *HR 203.1 Alcohol and Drug Procedures (Canada)*
- *CROR Rule G*

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 run through switch on September 24, 2023

The Union objected to the dismissal and filed a grievance on December 7 2023. The Company denied the grievance by way of letter dated January 9 2024.

The Union contends that:

1. The grievor's oral fluid test results were: Phencyclidine-Negative, Opioids-Negative, Amphetamine-Negative, Cocaine-Negative, Marijuana-Positive 9ng/ml;
2. Based upon these results, and the absence of any other indicators, the Company was and is unable to prove that the grievor was impaired at work. Thus, no discipline could legitimately be assessed;

3. Given the circumstances, the Company had no right to test the grievor at all;
4. The grievor's dismissal was improper and illegitimate.

The Union requests that: The Arbitrator order the Company to reinstate the grievor immediately without loss of seniority and with full compensation for all wages and benefits lost.

THE COMPANY 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. The Grievor was the Foreman in charge of the contractor and as such, was relied on to be a leader on site, representing CPKC and keeping everyone safe.

The conditions for post-incident testing were met and no violation of the Company's Policy has occurred.

The Company maintains that the laboratory confirmed, and Medical Review Officer reviewed substance test results were unquestionably positive for marijuana. Further, it is clear that had the Grievor been tested at the beginning of his shift, he would have tested above 10ng/ml in his oral fluid and therefore impairment during his shift has been established.

The Company's position continues to be that the dismissal 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:
(SGD.) W. Phillips
President, MWED

For the Company:
(SGD.) L. McGinley
Director Labour Relations

There appeared on behalf of the Company:

S. Scott – Manager Labour Relations, Calgary
D. Zurbuchen – Manager Labour Relations, Calgary

And on behalf of the Union:

W. Phillips – President, Frankford, Ontario
M. Foster – Director, Belleville, Ontario

AWARD OF THE ARBITRATOR

Context

1. The grievor was a Track Maintenance Foreman with 11 years of seniority when he was fired in December, 2023 for having breached HR 203/203.1 Alcohol and Drug Policy and Procedures and CROR Rule G. At the time of his dismissal, his discipline record was entirely clear.

2. The Company Alcohol and Drug Procedure #203.1 calls for Post Incident Testing in the following circumstances:

> Post Incident alcohol and drug testing may be required after a significant work related incident, a safety related incident or a near miss as part of an investigation.
>
> Employees are expected to participate fully in an investigation. Failure to report an incident is a violation of the Canadian Internal Control Plan for Incident Reporting.
>
> A significant work related incident, safety related incident or near miss might involve any one of the following:
>
> - a fatality;
> - any number of serious injuries or multiple injuries to Company personnel or the public requiring medical attention away from the scene or lost time injuries to Company personnel; or an incident or near miss that creates this risk;
> - significant loss or damage to Company, public or private property, equipment or vehicles or an incident or near miss that creates this risk;
> - an incident with serious damage or implications to the environment, or an incident or near miss that creates this risk.
>
> The decision to refer an individual for testing will be made by the Supervisor investigating the incident after consultation with and agreement of an Experienced Company Operating Officer (ECOO), i.e. Senior Vice President (SVP), Assistant Vice President, (AVP), General Manager (GM), Superintendent, Director or Chief Engineer. Unionized employees will be entitled to union representation provided this does not cause undue delay.
>
> Post Incident testing is not justified if it is clear that the act or omission of the individual(s) could not have been a contributing factor to the incident e.g. structural, environmental or mechanical failure or the individual clearly did not contribute to the situation.

Issues

A. Was there a “serious incident”?

B. Was the grievor “involved” in the incident?

C. Was testing of the grievor appropriate?

D. Has the Company demonstrated that the grievor was impaired while at work?

E. Should the termination be upheld?

F.

A. Was there a “serious incident”?

Position of Parties

3. The Company argues that a run-through of a switch is a serious incident, which could result in serious damage to property and safety of employees. This incident was made more serious by the fact that the run-through was not noticed by those on the Loram train, and was only discovered by the crew of a subsequent train.

4. The Union argues that not all accidents constitute serious incidents for the purposes of drug and alcohol testing. Here the switch itself was not seriously damaged, being repaired in a brief period of time, and there was no damage to any train or any consequences to the safety of any employee.

Analysis and Decision

5. The jurisprudence has had multiple occasions to consider what facts constitute a “serious incident”.

6. In **CROA 3841**, Arbitrator Picher dealt with a run-through: “While the damage in the case at hand was relatively minor, it is well known that running through a switch can cause more serious damage, including a possible derailment”.

7. In **CROA 4840**, Arbitrator Yingst Bartel dealt with the derailment of a Tamper, which was put back on the tracks without damage. She found that: “The incident was not “significant” but rather “minor” and was treated by the Company as minor. Derailing of equipment is potentially dangerous, but it is not only potential that must be considered but what actually occurred: “there must be more at stake than trivial damage”.

8. In **CROA 4841**, this arbitrator found that a falling heavy door which blocked access to a maintenance truck and could have caused injuries amounted to a “serious incident”: “The falling door could have severely injured either the contractor or other employees. The damage to the door itself, and the loss of access to the truck and the ability to maintain the track are also a significant loss or damage”.

9. Here, there was little damage to the switch and no damage otherwise to property or personnel. However, I agree with Arbitrator Picher that a run-through has the potential for serious damage. This run-through, unlike the run-through discussed in **CROA 4840**, was not immediately noticed and corrected. It occurred in “dark territory”, where the signals would not have identified the issue. It was not noticed immediately and remained in its run-through state until a subsequent train crew discovered the problem. The potential for serious damage was clearly much greater in these circumstances.

10. As such, I find that the facts of this case do amount to a “significant incident” within the terms of the Alcohol and Drug Procedure #203.1.

B. Was the grievor “involved” in the incident?

Position of the Parties

11. The Company argues that the grievor was involved in the incident, as he was the Company representative on the contractor train and responsible for getting it safely out of the Yard. It argues that the grievor was the foreman of the Track Maintenance crew and as such, had a duty to supervise his employees to ensure that they properly performed their tasks. It submits that the grievor should either have been at the rear of the train, so he could observe the track, or ensured that his employees were present at the switch. As he did none of these things, he was clearly “involved” in the incident.

12. The Union argues the grievor was not involved in the incident. There had been a clear division of tasks and he was responsible for obtaining the TOPS, while Foreman Santos De Guzman was responsible for the tracks. His only involvement was to pass on confirmation from the other foreman that the switch had been properly lined, which he did. The Union argues that he had no responsibility to change positions to the rear on the contractor train and was entitled to rely on the confirmation from an experienced foreman that the switch had been properly lined.

Analysis and Decision

13. Both the Courts and arbitral jurisprudence have considered when employers are permitted to test for drugs and alcohol.

14. Arbitrator Clarke in **AH 732** reviewed some of the factors to be considered in assessing a decision to test:

> "34. The Supreme Court of Canada has summarized generally when an employer can randomly test for drugs and alcohol and the need for reasonable grounds or reasonable cause[6]:
>
> > [5] This approach has resulted in a consistent arbitral jurisprudence whereby arbitrators have found that when a workplace is dangerous, **an employer can test an individual employee if there is reasonable cause to believe that the employee was impaired while on duty, was involved in a workplace accident or incident, or was returning to work after treatment for substance abuse**. In the latter circumstance, the employee may be subject to a random drug or alcohol testing regime on terms negotiated with the union.
> >
> > [45] But, as previously noted, the fact that a workplace is found to be dangerous does not automatically give the employer the right to impose random testing unilaterally. **The dangerousness of the workplace has only justified the testing of particular employees in certain circumstances: where there are reasonable grounds to believe that the employee was impaired while on duty, where the employee was directly involved in a workplace accident or significant incident, or where the employee returns to work after treatment for substance abuse.** It has never, to my knowledge, been held to justify random testing, even in the case of "highly safety sensitive" or "inherently dangerous" workplaces like railways (Canadian National) and chemical plants (DuPont Canada Inc. and C.E.P., Loc. 28-O (Re) (2002), 105 L.A.C. (4th) 399), or even in workplaces that pose a risk of explosion (ADM Agri-Industries), in the absence of a demonstrated problem with alcohol use in that workplace. That is not to say that it is beyond the realm of possibility in extreme circumstances, but we need not decide that in this case.
>
> 35. An accident, by itself, is usually not enough to justify testing. In *Saskatchewan Health Authority v Health Sciences Association of Saskatchewan*7, Arbitrator Ish summarized some of the general principles in this area:
>
> > • Past arbitration awards disclose the following with respect to the post- incident justification for mandatory testing:

- The fact of an accident, near miss or other potentially dangerous incident is not, of itself, sufficient reason to breach an employee's right to privacy. There must be more than an accident, near miss or potentially dangerous incident to justify an alcohol and drug test. (Suncor 2008 para. 92)

- There must be more at stake than trivial damage absent other issues such as an injury or serious injury concern. (Fording Coal 2003 para. 124)

- A statement that any property damage will suffice and that no thresholds apply goes too far. (Weyerhaeuser 2006 para. 170)

- The amount of damage done or the magnitude of the incident must remain a factor to be weighed (Weyerhaeuser 2006 para. 176)

- There must be sufficient gravity to the event in a near miss (where, by definition, there is no damage) to justify mandatory testing – serious damage must almost have occurred (Weyerhaeuser 2006 para. 176)

- It is necessary to investigate whether the actions or omissions of the employee contributed to or caused the accident. (Weyerhaeuser 2012) The investigation must incorporate the employee's explanation of the incident. (Weyerhaeuser 2012)

36. CP's DAPP is alive to these important principles. The IBEW cited the post incident testing principles and examples CP included in its DAPP8:

> 5.2.2 Post Incident Testing
>
> **Post Incident alcohol and drug testing *may* be required after a significant work-related incident, a safety related incident or a near miss as part of an investigation**.
>
> Employees are expected to participate fully in an investigation. Failure to report an incident is a violation of the Canadian Internal Control Plan for Incident Reporting.
>
> **A significant work-related incident, safety related incident or near miss may involve any one of the following**:
>
> - a fatality;
> - any number of serious injuries or multiple injuries to Company personnel or the public requiring medical attention away from the scene or lost time injuries to Company personnel; or an incident or near miss that creates this risk;
> - significant loss or damage to Company, public or private property, equipment or vehicles or an incident or near miss that creates this risk;

> - an incident with serious damage or implications to the environment, or an incident or near miss that creates this risk.
>
> **The decision to refer an individual for testing will be made by the Supervisor investigating the incident after consultation with and agreement of an Experienced Company Operating Officer (ECOO),**
>
> **i.e. Senior Vice President (SVP), Assistant Vice President, (AVP), General Manager (GM), Superintendent, Director or Chief Engineer. Unionized employees will be entitled to union representation provided this does not cause undue delay**.
>
> Post Incident testing is not justified if it is clear that the act or omission of the individual(s) could not have been a contributing factor to the incident e.g. structural, environmental or mechanical failure or the individual clearly did not contribute to the situation."

15. Arbitrator Picher in **CROA 4256** considered the managerial decision to test a Yardmaster, when a collision had taken place in the Yard:

> "After a careful review of the facts the Arbitrator is compelled to agree with the Union. I must agree with the Union as to the appropriateness of the comments made by Arbitrator Sims in *Weyerhaeuser Company Ltd. v. C.E.P., Local 447 [2006], 154* L.A.C. (4th) 3, in respect of the thresholds for properly invoking post-incident or post-accident drug and alcohol testing. In that award Arbitrator Sims took issue with the approach taken by the employer. He commented, in part, as follows:
>
> There are 3 elements to the post-incident testing discussed in the cases of particular significance here. They are the threshold level of incident needed to justify testing, the degree of inquiry necessary before the decision is made, and the necessary link between the incident and the employee's situation to justify testing.
>
> In the view of Arbitrator Sims, which this Arbitrator shares, there must be a genuine exercise in judgement by the employer to justify post-incident testing, meaning more than the mere application of a checklist. At page 54 of his award Arbitrator Sims further commented in that regard: However, as was obviously the case in Fording (Kryderman), and as is the case here with the use of the "Quick Guide" if such a device too readily leads to the attitude that "if we tick off the boxes we can test" it is harmful because it distracts from judgment that inevitably needs to be exercised based on the entire circumstances. It is not enough to say, "Ok – we have enough to test" if important factors have been ignored or avoided. The individual to be tested should, unless the circumstances preclude it, be asked for their explanation. If they are sufficiently close to the incident to justify finding out whether their

> being impaired might be part of the cause, their explanation of events must also be relevant to the decision as to whether testing is justified."

16. In **CROA 4841**, this arbitrator reviewed **CROA 4256** and the facts of the case and concluded that there was "involvement" on the part of the grievor:

> "Here, however, Mr. Park was responsible for the actions of the contractor and the placement of the truck and had specifically provided an instruction to the contractor concerning the operation of the door. In my view, Mr. Park was "involved" in the incident, for the purposes of s. 4.03 of the Policy."

17. In **CROA 4840**, Arbitrator Yingst Bartel noted that testing cannot be automatic and the decision-making process must be examined:

> "Testing cannot be a "foregone conclusion" in the words of the arbitrator in **AH 732**. Rather, an arbitrator must consider the Company's evidence regarding its assessment when that decision is challenged, to ensure that testing was not directed "as a matter of course" resulting in an invasion of an employee's right to privacy."

18. Here the decision to test was made by Bob Wincheruk and Scott Paradise. Mr Wincheruk was examined during the October 20, 2023 investigation of the grievor (see Tab 3, Company documents):

> "Q52. Who made the decision to drug and alcohol test Aaron?
>
> A52. Myself and Scott Paradise.
>
> Q53. Why was the decision made to drug and alcohol test Aaron?
>
> A53. It was a human factor incident and we didn't know who was at fault.
>
> Q54. Did you consider this reasonable suspicion or post incident testing?
>
> A54. Post incident testing.
>
> Q55. Are you familiar with HR 203.1 procedures?
>
> A55. Not verbatim. But I have seen it.
>
> Q56. Did you follow these procedures when deciding to test Aaron?
>
> A56. Yes, those procedures were followed, it was a post incident test and we didn't know who was at fault?
>
> Q57. Are you aware that a run through switch is listed as a minor offense in CPKC's hybrid discipline policy?

> A57. Yes, I am.
>
> Q58. Did you consider this incident a significant work-related incident and if so, why?
>
> A58. I did consider this a significant incident, because no one knew what occurred until we did a drill down with the cameras.
>
> […]
>
> Q62. Was Aaron given a chance to explain his nervous behaviour before your decision to test.
>
> A62. No."

19. The reference to a "human factor incident" by Mr. Wincheruk appears to be a reference to s. 4.3 of the Alcohol and Drug Procedure, which states:

> "Post-Incident testing is not justified if it is clear that the act or omission of the individual(s) could not have been a contributing factor to the incident e.g. structural, environmental or mechanical failure or the individual clearly did not contribute to the situation." (underlining added)

20. While it is true that the run-through was the result of human error rather than an engineering or environmental problem, there does not appear to have been any further examination of which humans were responsible for what actions or omissions. Instead, a blanket decision was made to test all of the individuals present. Indeed, Mr. Wincheruk admits that the Company had no idea who was responsible for the run-through when the decision to test was made (see Q and As 61):

> Q61 What led you to believe that Aaron's actions were a contributing factor in the incident,
> given that he was not piloting the grinder, did not handle the switches, and was in fact on the opposite end of the grinder at the time the incident occurred?
> A61 We are a part of one crew as everyone was working with the grinder, until we did the drill down and determined everyone's positions.

21. This blanket approach is contrary to the judgment call which is required by the jurisprudence, in which the balancing of privacy rights and the need for safety are to be evaluated. Indeed, even the Company Policy makes reference to "the individual" rather than to groups of people.

22. It is not evident from the evidence that Mr. Wincheruk ever sought an explanation from the grievor as to his level of involvement, prior to ordering testing. Had he done so, the grievor would have provided the facts he provided in his October 12, 2023 investigation into the run-through (see Tab 3 (3), Company documents:

> Q11 Did you consume cannabis at any other point on Sep 23 2023?
> A11 No.
> Q12 For what reason did you consume cannabis on Sep 23 2023?
> A12 For going to sleep and to relieve pain and discomfort.
> Q13 You used cannabis before going to sleep on Sep 23 2023?
> A13 Yes before I went to sleep in the morning after the shift before.
> Q14 What time did you finish the shift on the morning of Sep 23 2023?
> A14 0630, around there. I don't remember exactly.
> […]
>
> Q29 Item 2.7 of Policy HR203 states:
>
> > 2.7 All Employees are accountable for their actions and are expected to comply with the Policy and Procedures, including those who may have an alcohol and/or drug use problem.
> > Employees who have an alcohol and/or drug use problem or an emerging problem are required to seek advice, to follow appropriate treatment and to disclose appropriately within CP their issues including any restrictions and/or limitations. This ensures that appropriate restrictions and limitations can be implemented before a workplace incident occurs, before safe job perfom1ance is impacted or before violations of this Policy and Procedures occur.
>
> Do you understand this?
> A29 Yes.
> Q30 Item 2.8 of Policy HR203 states:
>
> > 2.8 Employees who voluntarily request assistance with an alcohol and/or drug use problem will not be disciplined or dismissed for requesting assistance. However, this voluntary request and disclosure must be made before a workplace incident occurs, an investigation is initiated, a violation of the Policy and Procedures occurs, and before unsafe or unsatisfactory perfom1ance is identified. Subsequent disclosure or requests for assistance after an event (as detailed above) will not prevent an employee from being subject to an investigation(s) and discipline up to and including dismissal.
>
> Do you understand this?
> A30 Yes.
> Q3 I Item 3.4 of Policy HR203 states:
>
> > 3.4 Disciplinary action up to and including dismissal will be taken where CPKC has determined that violations of the Policy and Procedures have occurred.
>
> Do you understand this?
> A31 Yes.

Q32 Item 3.1 of Alcohol and Drug Procedure HR203.1 states:

- Standards

  All employees must report fit for work and remain fit for work and in a condition that enables them to safely and effectively perform their duties. This requires that all employees remain free from the adverse effects of alcohol and/or drugs including acute, chronic, hangover and after-effects of such use.

Do you understand this?

A32 Yes.

Q33 Item 3.1.3 of Alcohol and Drug Procedure HR203. I states:

- Cannabis

  For purposes of this Procedure, all references to cannabis includes cannabidiol (CBD). Recreational Cannadis

  The following are prohibited at all times while an employee is working, on duty, subject to duty, on Company premises and worksites, on Company business and when operating Company vehicles and moving equipment (whether on or off duty):

- The use, possession, distribution, offering or sale of recreational cannabis;
- Reporting for work or remaining at work under the effects of cannabis from any source, including acute, chronic, hangover or after-effects of such use;
- Consumption or use of any product containing cannabis (including but not limited to smoking, vaporizing, ingestible oils, food products, tinctures, capsules, topicals etc.) including during meals and breaks.

Do you understand this?

A33 Yes.

Q34 item 3.1.3 of Alcohol and Drug Procedure HR203. I further states:

28-Day Cannabis Ban

Employees in or subject to a Safety Critical Position or Safety Sensitive Position are further prohibited from using or consuming cannabis from any source for a minimum 28 days before being on duty or subject to duty. This 28-Day Cannabis Ban is in addition to and does not in any way limit the prohibitions set out in the above three bullets or other employee obligations set out in the Policy or Procedure. For clarity, an employee is still required to report to work and remain at work free from the effects of cannabis regardless of the last date of use or consumption. For example, chronic use of cannabis may create adverse effects that impair an employee's fitness for work beyond the 28-day period.

Do you understand this?

A34 Yes.

Q35 Item 3.1.5 of Alcohol and Drug Procedure HR203.1 states:

3.1.5 Canadian Rail Operating Rules (CROR) - Rule G

Employees who are qualified in the CROR are governed by those rules including Rule G. The requirements of the Policy

and Procedures align with and supplement the requirements of Rule G, which include:

- The use of intoxicants or narcotics by employees subject to duty, or their possession or use while on duty is prohibited.
- The use of mood-altering agents by employees subject to duty, or their possession or use while on duty, is prohibited except as prescribed by a doctor.
- The use of drugs, mood altering agents or medications, including those prescribed by a doctor, which, in any way, will adversely affect their ability to work safely, by employees subject to duty, or on duty, is prohibited.
- Employees must know and understand the possible effects of drugs, medication or mood-altering agents, including those prescribed by a doctor, which, in any way, will adversely affect their ability to work safely.

Do you understand this?
A35 Yes.
Q36 Item 3.1.6 of Alcohol and Drug Procedure HR203. I states:

- Criminal Code of Canada

The Criminal Code makes it an offence to operate railway equipment in a manner, which is dangerous to the public, and to operate or assist in the operation of railway equipment while impaired by alcohol and/or drugs. A police officer or other peace officer may require a person to provide a blood, urine or breath sample as part of an investigation into possible impairment from alcohol and/or drug use, including cannabis. Employees must comply immediately with all such requirements.

Do you understand this?
A36 Yes.
Q37 Item 3.1.7 of Alcohol and Drug Procedure HR203.1 states:

- Canada Labour Code Part II

Under the Canada Labour Code, CP has a duty to protect the health and safety of every person employed by CP. In addition, employees have a duty to report to the employer any circumstance in a workplace that is likely to be a hazard to their own health or safety, or to the health or safety of other employees or other persons granted access to the work place by the employer.

Do you understand this?
A37 Yes
Q38 Item 3.2.2 of Alcohol and Drug Procedure HR203.1 states:

3.2.2 Disclosure and Requests for Assistance

The Company recognizes that substance use disorders are medical conditions and that early intervention and ongoing monitoring and accountability greatly improves the effectiveness and success of treatment.

Employees who suspect they have a substance use disorder, an emerging issue or problem related to alcohol and/or

drugs, or restrictions and/or limitations related to alcohol and/or drugs, are required to report, seek assistance, and to access and follow appropriate treatment promptly before a workplace incident occurs, an investigation is initiated, a violation of the Policy or Procedures occurs, or before unsafe or unsatisfactory job performance is identified. Subsequent disclosure or requests for assistance after an event (as detailed above) will not prevent an employee from being subject to an investigation and discipline up to and including dismissal, and failure to disclose may result in disciplinary action up to and including dismissal.

Do you understand this?

A38 Yes.

Q39 Item 3.4.l of Alcohol and Drug Procedure HR203. t states:

- General Provisions

Violations of the provisions of the Policy and Procedure wiU result in an investigation and discipline up to and including dismissal. In all situations, there will be a documented investigation to verify that a violation has occurred before disciplinary action is taken.

Pending the results of the investigation management has the authority and discretion to administratively hold out of service any individual who is believed to be involved in conduct that may lead to discipline.

Do you understand this?

A39 Yes.

Q40 Item 4.1 of Alcohol and Drug Procedure HR203.1 states in part:

- Standards and Consequences

All employees are required to comply with the standards set out in Section 3, Alcohol and Drug Procedures, which includes remaining free from the adverse effects of alcohol and/or drugs including acute, chronic, hangover and after-effects of such use. For those holding Safety Critical Positions or Safety Sensitive Positions, this also includes the minimum 28-day Cannabis Ban. Failure to comply with these standards will constitute a violation of the Policy and Procedure.

The following will also constitute violations of the Policy and Procedure:

- a positive drug test as determined through the Company testing program, (a drug level equal to or in excess of the Company drug concentration test levels* where a Medical Review Officer has verified the results as a positive test);
- an alcohol test result of 0.02 BAC or higher as detem1ined through the Company testing program;
- a failure/refusal to test as determined through the Company testing program.

* Details on the Company drug concentration test levels can be found in Appendix 2. These testing levels are intended to reflect minimum drug detection levels based on currently

available thermology and are subject to ongoing review and modification by the Company as its discretion.

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

Do you understand this?
A40 Yes.
Objection from Maclean:

The minimum 28 day cannabis ban is currently under review at arbitration for being unreasonable.
Q41 Item 7.1 of Alcohol and Drug Procedure HR203. l states:

- Roles and Responsibilities
- Employees

Employees are expected to perform their job in a safe manner and in all ways consistent with established Company practices. In addition, it is expected that employees will:

• read and understand the Policy and Procedures and their responsibilities under it;

• report fit for work and remain fit for work;

• be fully in compliance with the Policy and Procedures if called in when scheduled on call;

• disclose any restrictions and/or limitations and take appropriate action if medication use presents a safety risk;

• prior to compromising workplace safety, disclose, seek advice and follow appropriate treatment if they have a current or emerging alcohol and/or drug
problem and follow recommended monitoring programs after attending treatment;

• co-operate with any medical assessment or recommendations made by a health care professional and/or CP Health Services including following monitoring or
aftercare programs required after primary treatment for substance use disorders;

• co-operate with any work modification related to safety concerns;

• intervene as appropriate to encourage a co-worker to access assistance before an alcohol and/or drug problem impacts safe perforn1ance of their work;

• in the interest of safety, advise their supervisor if they believe another employee, contract worker or visitor is on a job site in an unfit condition;

• abide by any additional fitness for duty policy provisions including those that govern alcohol and/or drug use in other operating jurisdictions; and

• co-operate with an investigation into a violation of the Policy and Procedures.

Do you understand this?

A41 Yes.

Q42 The current policy (HR203) and accompanying Alcohol and Drug Procedure (HR203.I) and A&D Assistance through Company Officer and Co-Worker Reporting Procedure (HR.203.2) were in effect on September 1, 2019 and were distributed throughout the Company via a comprehensive employee information strategy of job briefings, information sessions and a mass mail out of Alcohol and Drug Policy and Procedures sent directly to employees' homes and were posted on CP Station. An updated online training course was also created for new hires and for all employees.

How did you receive the information?

A42 I didn't. That's one of the worst things about this company, are the training and getting infom1ation out to its people.

Q43 Were you aware of the 28-day cannabis ban prior to your shift on Sep 23 2023?

A43 Yes.

Q44 Given, all of the provisions of the Company Policies referred to in thus investigation and as we)1as information in the Expert Report about the impairing after-effects of Cannabis why did you use Cannabis before your shift of Sep 23 2023?

A44 To be able to go to sleep.

Q45 In Summary, based on your testimony in this investigation, you:

1. Worked a shift starting at 1900 on Sep 23 2023.

11. Sometime between 0630 and 0830 on Sep 23 2023 you took a hit off a vape pen and used a topical THC balm on your skin.

• At 0540 on Sep 23 2023, you provided urine, oral fluid and breath samples to the designated DriverCheck Inc Agent for the purposes of substance testing.

1v. The confirmatory laboratory test result indicated:

Positive for THC metabolite in your urine with 650 ng/ml indicated.

Positive for THC in your oral fluid with 9 ng/ml Is that correct?

A45 Yes.

Q46 Do you understand that, based on the above, the company is concerned that you were subject to the impairing effects of cannabis while subject to duty and while on duty as an Engineering employee?

A46 No.

Q47 Why do you not understand that?

> A47 I just don't.
>
> […]
>
> Q57 Are you aware that a run through switch is listed as a minor offense in CPKC's hybrid discipline policy?
> A57 Yes, I am.

23. The Company has argued that the grievor should have been at the rear of the Locam train or ensured that Foreman Guzman De Santos was present at the switch. However, the grievor was never questioned in either of the two investigations about these arguments. No opportunity was given to the grievor to respond.

24. The jurisprudence is clear that the fact of holding a position of authority is insufficient to justify testing. In **CROA 2456**, the Yardmaster clearly held a position of authority, yet Arbitrator Picher found that this was insufficient to justify testing. It was found that he was not “involved” in the collision. In **CROA 4840**, Foreman Pilger had overall authority on the job, yet Arbitrator Yingst Bartel found that he was not “involved” as he was not present at the incident, and testing was found to be inappropriate. Here too, Foreman Saulnier held a position of authority, but that authority did not, in and of itself, make him “involved”.

25. An examination of what the grievor actually did would reveal only the transmission of information from Foreman Santos De Guzman that the switch had been lined for the main line, to the Loram locomotive engineer.

26. In **CROA 4840**, Arbitrator Yingst Bartel noted:

> 9. At the time of the incident, Mr. Pilger was walking back toward the tail end with the labourers. Just before the derail, Mr. Brown broadcast the switch position, that it was lined, locked and checked for the reverse position. Mr. Pilger acknowledged the broadcast.
>
> 10. I am satisfied the purpose of the broadcast requirement was so that Mr. Brown could make a ‘double check’ that what he himself had just said over the radio was in fact what he had done. It was not Mr. Pilger’s responsibility to view the switch and ensure Mr. Brown had lined it as broadcast. This is demonstrated by the fact that the RTC can also acknowledge the broadcast, if no one else is

> available to do so. Even as Foreman, I am satisfied Mr. Pilger was entitled to rely on Mr. Brown's statement that he had properly aligned the derail and was aware of its location.
> […]
>
> 28. Had the Company asked only a few questions of Mr. Pilger, they would have realized that while it was true Mr. Pilger did have 'radio communication" with Mr. Brown before the incident, that radio contact was not to provide any directions or oversight but was only an acknowledgement of Mr. Brown's broadcast. Mr. Pilger was not required to verify the information in that broadcast – nor did he.

27. In my view the grievor was equally entitled to rely on the information provided by Foreman Santos De Guzman. His sole involvement was to pass on this information to the Loram engineers, which he did.

28. For the above reasons, I do not find that the Company has established that the grievor was "involved", for the purposes of the application of testing under the Alcohol and Drug Procedure #203.1.

C. Was testing of the grievor appropriate?

29. In **CROA 4841**, I found that the Company had established that a serious incident had occurred, and that the grievor, Mr. Park, was involved. I nonetheless found that testing of Mr. Park was not appropriate. An examination of the Policy and the jurisprudence demonstrated the following:

> 13. Finally, the Policy notes: "Post incident testing is not justified if it is clear that the act or omission of the individual(s) could not have been a contributing factor to the incident e.g. structural, environmental or mechanical failure or the individual clearly did not contribute to the situation".
> 14. In my view, the final paragraph of s. 4.03 clearly states when testing will not be appropriate. It does not, however, state when testing will be appropriate. For that, discretion will have to be exercised under the initial paragraph: "Post incident testing may be required…".
>
> 15. The CROA jurisprudence is clear that this process cannot be a mechanical one, or a matter of simply checking a box on a form. (See **CROA 4256**).
> 16. Instead, that discretion must be exercised pursuant to both the Court and CROA jurisprudence, and a balancing of privacy rights and safety concerns be made (see SHP 530, **CROA 4668**). In addition to the necessary balancing of interests, there must be

> a "necessary link between the incident and the employee's situation to justify testing" (see Weyerhaeuser Company Ltd v. CEP, Local 447 (2006), 154 LAC (4^{th}) 3, cited in **CROA 2456**).

30. In that matter, Mr. Park had been directly involved in the decision not to move the truck by warning the contractor about a potential danger:

> 17. Here, Mr. Park had been involved in a decision not to move either the truck or the rail. Rather, a warning was issued to the contractor and Mr. Park left the area.
> 18. Had Mr. Park operated the door himself, or observed the contractor operating the door and failed to react, the balance might well tip towards the need for testing. If Mr. Park had noticed a potential danger and failed to do anything about it, this action might well be so inexplicable that testing would be appropriate. As noted by Arbitrator Picher in **CROA 3841**:
> "There is no good explanation for the grievor's failure to avoid the run- through of the switch. By his own account he had a clear view as his locomotive progressed forward towards the switch, a switch he had passed many times before…by (his) own admission he can give no explanation for how or why he ran through the switch in violation of CROR 114B".
> 19. Here, however, a warning was issued, which if it had been properly followed by the contractor, no incident would have occurred. It can be argued that Mr. Park made a poor managerial decision in warning the operator of the door, rather than moving the truck or rail.
> 20. However, Mr. Park was neither directly involved in the operation of the door, nor was his decision to warn so inexplicable, as to raise concerns about his judgment and possible impairment. In these circumstances, some form of managerial counselling might well be appropriate, but not post incident testing. The "necessary link", referred to above, has not been met.
> 21. I find, therefore, that the post incident testing on Mr. Park was not justified and to this extent, the grievance is upheld.

31. Here there are multiple issues with the Company decision to test the grievor.

32. Firstly, the Policy itself was mis-applied. After engineering and environmental reasons were ruled out, a decision was made that the "human factor" applied and hence testing was appropriate. In my view, this is an incorrect application of the Policy, as set out in **CROA 4841**, as the Policy still requires that discretion and judgement be exercised.

33. Secondly, the jurisprudence and the Policy call for a balancing of privacy and safety concerns, to be done on an individual basis. No such individual assessment was done, which is clearly contrary to both the jurisprudence and the Policy.

34. Thirdly, had an individual assessment been done, it would have shown that the grievor was not “involved”, for the purposes of the Policy, for the reasons given above.

35. For these reasons, I find that the testing of the grievor was not appropriate and therefore the Company may not rely on the drug testing results.

D. Has the Company demonstrated that the grievor was impaired while at work?

36. The Company has relied on the drug testing results and the testimony of Dr. Snider- Adler to establish that the grievor was impaired while at work.

37. The testing results showed 9 ng/ml of THC from his oral swab and 650 ng/ml THC Metabolite from his urine sample, some 11 hours after the grievor began work. The grievor admits having used cannabis as follows (see Q and A 45, Tab 3 Company documents):

> Q45. In Summary, based on your testimony in this investigation, you:
>
> i. Worked a shift starting at 1900 on Sep 23 2023.
>
> ii. Sometime between 0630 and 0830 on Sep 23 2023 you took a hit off a vape pen and used a topical THC balm on your skin.
>
> iii. At 0540 on Sep 23 2023 you provided urine, oral fluid and breath samples to the designated DriverCheck Inc Agent for the purposes of substance testing.
>
> iv. The confirmatory laboratory test result indicated:
>
> Positive for THC metabolite in your urine with 650 ng/ml indicated.
>
> Positive for THC in your oral fluid with 9 ng/ml Is that correct?
>
> A45. Yes.

38. Dr. Snider-Adler concludes in her report that the grievor would have tested over 10 ng/ml at the start of his shift and that he would have been impaired on the job:

> 1. Can the MRO comment on whether Mr. Saulnier would have been over 10 ng/ml at the start of his shift and/or during his shift.
>
> An oral fluid test collected just over 11 hours after the start of the shift was reported by the laboratory as positive at a quantitative level of 9 ng/mL. With the knowledge that the oral fluid declines over time, the quantitative level in the oral fluid would have been above 9 ng/mL. In other words, the level would have been at or above 10 ng/mL While an exact retrograde analysis cannot be confirmed, over more than 11 hours, the oral fluid levels decline substantially and therefore the levels at the start of the shift (19:00 pm) would no doubt be above 9 ng/mL, which is therefore 10 ng/mL or higher. This conclusion is based on the knowledge of the rate and consistent decrease in quantitative oral fluid levels after the use of cannabis based on numerous studies, some of which are reviewed above.

39. The report and testimony of Dr. Snider-Adler are based on the admissibility of the drug testing results. Had the results been admissible, I would have found that the grievor was impaired for the same reasons given in **CROA 5022**:

> Common sense would indicate that someone who tests positive for cannabis at 8 ng/ml at 1:45 March 7, 2022, having admittedly consumed cannabis at 04:00 March 6, 2022, likely had higher levels at earlier points in time. Whether those levels were over 10 ng/ml at 17:30 at the start of the grievor's shift and whether such levels were impairing is the subject of Dr. Snider-Adler's report and testimony. Based on the evidence in this matter, I accept that on a balance of probability, if the grievor had been tested at the beginning of his shift, he would have tested over 10 ng/ml. Given the consistent CROA jurisprudence, and the expert evidence, such a level is indicative of impairment and I find that the grievor was impaired while on duty.

40. However, there has been a determination that drug testing was not permitted in the circumstances of this case, as set out above.

41. As such, the only evidence properly before me is the testimony of the grievor. While he admits the use of cannabis some 11 hours prior to his shift, this is insufficient to demonstrate impairment on the job. There is no evidence that he was visibly impaired. The jurisprudence is consistent that impairment is the test to be met when considering discipline for drug or alcohol use (see **AH 807** and **Dismissal of Derek Adams**, Tab 12, Company documents).

E. Should the termination be upheld?

42. Given that the Company has not met its burden to show that the grievor was impaired on the job, the decision to terminate the grievor cannot stand.

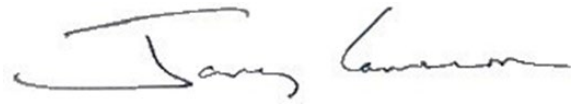
Conclusion

43. Accordingly, the grievance is upheld, the grievor is reinstated without loss of seniority and he is to be made whole, less mitigation.

44. The grievor should be acutely aware that if the facts had been slightly different, his termination would have been upheld. He should consider further cannabis use prior to work very carefully.

45. I retain jurisdiction with respect to any issues of interpretation or application of this Award.

March 19, 2025



JAMES CAMERON
ARBITRATOR