CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5178

Heard in Montreal, May 15, 2025

Concerning

ALSTOM TRANSPORTATION CANADA INC.

And

TEAMSTERS CANADA RAIL CONFERENCE
MAINTENANCE OF WAY EMPLOYEES DIVISION

DISPUTE:

Dismissal of Mr. Antonio Matthews (Union file 14-837; Company file Unknown).

JOINT STATEMENT OF ISSUE:

On September 26 2024 the grievor, Mr. Antonio Matthews, was issued a letter that stated in part as follows:

This letter is in reference to an investigation that was conducted on September 18, 2024, for an alleged violation of Alstom's Drug and Alcohol Policy on August 23. 2024.
The results of the investigation revealed, and by your own admission, that you were in violation of Alstom's Drug and Alcohol Policy on August 23, 2024, and the Company has no alternative but to terminate your employment effective September 27, 2024.

The Union objected to the dismissal and filed a grievance on October 2 2024. The Company denied the grievance by way of letter date October 23 2024.

The Union contends that:

1) The grievor smoked marijuana when he was home after work and not subject to duty. The grievor was called at home and required to return to the workplace for testing. The grievor had positive oral fluids result only because he had consumed marijuana while at home and before he was called for testing. The grievor was never “unfit for duty;”
2) Jurisprudence has repeatedly held that in the absence of impairment at work no discipline may be assessed. Since the grievor was never impaired while on or subject to duty, no discipline could legitimately be assessed;
3) The grievor was never disciplined for the incident that occurred on August 23 2024, no damage occurred, and the train set was untouched. The grievor was allowed to complete his day. No objective indicators of impairment were ever recorded or alleged. In view of all this, it is clear that the Company had no right to test the grievor in the first place and, in fact, violated his privacy rights by requiring him to do so;
4) The Company is unable to prove on the basis of clear, cogent and convincing evidence that the grievor warranted the assessment of discipline much less dismissal;

5) The grievor was never offered the chance to contact his Union representative. In fact, the Company attempted to have the grievor questioned multiple times without Union representation. This constituted a clear violation of the grievor's rights.

6) The grievor's dismissal was improper and illegitimate.

Company Position:

Alstom has a zero tolerance when it comes to the violation of the Company's Drug and Alcohol policy.

It is the Company's position that Mr. Matthews admits to smoking marijuana after leaving the property without permission and prior to coming back to the property, knowing he was still subject to the Drug and Alcohol test. Section 4.1 of the Alstom's Drug and Alcohol Policy clearly states that employees cannot be unfit for duty while in the workplace or be present on the company property while under the influence of Drugs and Alcohol. Mr. Matthews did not have permission to leave the site before going home to consume marijuana. He was told that he 'would' be tested as a result of the collision with the platform. At no point was he told that he would not be tested. On the contrary, he chose to return to the site on his own, to await Driver Check's arrival to conduct the D & A Testing.

The Union claims that there was no damage to the property after the incident, where in fact there was damage to the mobile platform and photographs were taken.

After the incident occurred, Mr. Matthews stopped but did not inform his manager of the incident. He continued to work on his own accord. In the investigation into the incident Mr. Matthews admitted that he did not inform his managers right away, and that the members of the management team came on their own. When Mr. Matthews was asked who cleared him to continue to work, he was unable to name the person.

The subject of the investigation was around the violation of the Drug and Alcohol Policy, which in fact Mr. Matthews has admitted to. Therefore, the Company believes that this termination is not subject to grievance or arbitration as it is a direct violation of the Drug and Alcohol Policy.

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 as a result of this matter.

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

For the Union:
(SGD.) W. Phillips
President

For the Company:
(SGD.) A. Ignas
Industrial Relations Canada

There appeared on behalf of the Company:

C. Trudeau	– Counsel, Fasken, Montreal
E. Jonasson	– Industrial Relations Canada, Montreal
A. Khikhlovskyy	– Human Resources Business Partner, Montreal
M. Yucel	– Production Manager, Montreal

And on behalf of the Union:

W. Phillips	– President, TCRC-MWED, Frankford
G. Pompizz	– Assistant President, TCRC-MWED, Laval

AWARD OF THE ARBITRATOR

Context

1. The Grievor is a very short service employee, with only 5 months of service at the time of the incident. His disciplinary record appears to have been clean.

2. He drove a Reach Truck, which is a large forklift, capable of lifting and stacking up to five levels of pallets. It is a safety sensitive position, requiring the operator to lift heavy loads in confined spaces, while driving near other working employees.

3. On August 23, 2024, he hit a heavy metal platform, used by employees to work on the roofs of trains. The platform is heavy enough that 4-5 employees are used to move it. When the platform was struck, the grievor estimates that it moved backwards some 7-10 feet.

4. The Grievor was drug tested some three hours after the incident. The saliva test was positive for marijuana at 25 ng/ml, while the urine test showed marijuana/THC metabolite at 800 ng/ml (see appendix 7-8, Company documents). Positive levels are set by the Company Policy at 10 ng/ml for saliva and 15 ng/ml for urine testing (see appendix 1, Company documents). The Grievor testified that he had used marijuana at home some 1.5-2 hours prior to the test (see Q and A 13, Tab 6, Company documents).

Issues

A. Was the investigation conducted fairly and impartially?

B. Was the drug testing of the grievor proper in the circumstances?

C. Was the discharge of the grievor proper in the circumstances?

A. Was the investigation conducted fairly and impartially?

Position of Parties

5. The Union objects to the fact that the grievor was not provided with Union representation during the initial investigation of the incident. It submits that this is such a fundamental flaw that the discipline must be quashed ab initio (see **CROA 550**, **AH 517** and **AH 595**).

6. The Union further argues that several documents were only provided to the Grievor during the course of the formal investigation, rather than prior to it, as is required.

7. The Company submits that the need for Union representation only begins once the investigation is a disciplinary hearing. The initial meetings concerned a safety investigation to determine what had happened, rather than to impose discipline. As such, Union representation was not required. It submits that the additional documents presented at the formal investigation were relatively minor documents.

Analysis and Decision

8. The Collective Agreement provides at article 19.13:

> "In all cases where discipline is to be assessed, the employer shall perform an investigation."

9. In such cases, article 19.16 provides that 48 hours notice must be given in writing and: "He may, if he so desires, have a fellow employee and/or an accredited Representative of the TCRC MWED, present during the investigation meeting."

10. The Union relies on **CROA 550**, **AH 517** and **AH 595** with respect to the imperative requirement for the provision of Union representation, the failure of which leads to a finding that the discipline is void ab initio (see **CROA 4753**).

11. However, these cases deal with a lack of Union representation at a discipline hearing pursuant to collective agreement requirements identical or similar to article 19.16. Here, the Grievor did have Union representation at his formal discipline hearing.

12. The Union is seeking to extend this requirement to an investigation which occurred prior to the formal discipline hearing, while the Company notes that this was a safety investigation which does not require such representation.

13. In my view, the Company is correct in asserting that the initial investigation was done to ascertain the facts of the situation. It could not have been a disciplinary investigation, as the facts were not yet known. No decision had yet been made that discipline would likely be assessed.

14. One of the cases cited by the Union, **AH 517**, deals expressly with this pre-discipline investigatory phase:

> "Finally, I would note that there exists no indication in Article 9.01 when an "investigation" shall begin after an alleged offense occurs.

> What appears to be contemplated by this language is that when an employer becomes aware of a possibly disciplinable incident, the employer can enter into a preliminary examination of facts relating to it. This is reflected in the part of the Poulin award set out above. Once this initial phase leads the employer to continue further, the requirement for a "fair and impartial investigation" comes into effect. At this point the employee involved is given notice of the date for the investigation…(and) the employee is entitled to representation at the hearing…" (underlining added)

15. I note further that the Collective Agreement foresees initial meetings without Union representation. Article 18.3 notes: "Before a complaint becomes a grievance, the affected employee must discuss the complaint with the authorized supervisor." Articles 19.13 and 19.14 speak to a fair and impartial investigation: "in all cases where discipline is to be assessed". In the initial safety investigation phase, no such disciplinary decision could have been made and no Union representation was required.

16. The Union also objects to inclusion by the Company of Appendices 12 and 13, which refer to damage caused to the mobile platform and minimum and maximum time windows for detection for urine and oral fluid testing methods. It notes that both were available to the company prior to the investigation and should have been provided to the grievor. To do otherwise is to render the investigation less than fair and impartial, and hence the discipline should be found void ab initio.

17. It is clear that there is a requirement to provide all relevant documents to the grievor prior to the investigation. A failure to provide critical, or keystone, documents, will render the investigation unfair and partial. Here, however, I do not find these documents to be essential to the investigation and do not constitute keystone documents. It would be unfair, however, for the Company to be able to rely on such documents in the circumstances, and I will not consider them in my deliberations.

Conclusion

18. I therefore conclude that the investigation was fair and impartial, subject to the exclusion of two Company documents. The Union objection is therefore partially maintained.

B. Was the drug testing of the grievor proper in the circumstances?

Preliminary objection and decision

19. The Company makes a preliminary objection in its Reply that the Union did not raise in the JSI the argument that post-incident testing was not justified, and therefore cannot now, pursuant to the CROA Rules, bring forward this new argument. It then argues in the alternative that such testing was justified.

20. I find the Company's initial objection to be unfounded. The Union specifically noted in paragraph 3 of the JSI: "In view of all this, it is clear that the Company had no right to test the grievor in the first place and, in fact, violated his privacy rights by requiring him to do so." I find that the issue of whether the post-incident testing was permitted was squarely raised by the Union in the JSI and must now be addressed.

21. The Company's preliminary objection is therefore dismissed.

Position of the Parties on whether post-incident testing was proper in the circumstances

22. The Union argues that testing was not appropriate in the circumstances, as there was little to no damage to either the Reach Truck or the platform, the Grievor himself was uninjured and no other employee was injured. The Grievor completed his shift without incident. It cites a number of decisions for the proposition that not every accident warrants a post-incident test, as otherwise the invasion of privacy caused by the test would not be warranted (see, for example, **CROA 4840**, **CROA 4841** and **AH 732**).

23. The Company argues that there was a serious incident, as the heavy platform was suddenly bumped 7-10 feet, when an employee could have been on the platform or in the immediate area. The Grievor was the only employee involved and it was entirely appropriate to ascertain if the accident had been caused or influenced by drugs or alcohol.

Analysis and Decision

24. In **CROA 4841**, I reviewed the competing interests of the employee to protect his privacy with the employer interest to take reasonable steps to ensure safety of employees, company property and the public. The jurisprudence has clearly established that these competing interests must be carefully analyzed and balanced (see, for example, **SHP 530** and **CROA 4668**).

25. The Supreme Court of Canada in **Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp and Paper Ltd**, 2013 SCC 34 noted the restrictions on when an employer would be entitled to drug or alcohol test an employee:

> [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. (underlining added)

26. The Court clearly permits testing in the case of a workplace accident or significant incident.

27. Here the Company Drug and Alcohol Policy prohibits employees being in the workplace or working while not Fit:

> - It is forbidden for any employee or non-employee to be in the Workplace while he or she is not Fit for duty, subject to sub-paragraph 4.7 of this Policy.
> - It is forbidden for any employee or non-employee to be Working while he or she is not Fit for duty, subject to sub-paragraph 4.7 of this Policy.
> - It is forbidden for any employee or non-employee occupying a Vital safety occupation/work to use Drugs, including cannabis, at any time reasonably likely to create the risk of a Positive Test at work and/or attending at work not Fit for duty, subject to sub-paragraph 4.7 of this Policy.
>
> […]
>
> - Any violation of the provisions of this Policy, including a positive test result or a refusal to test, may result in discipline up to

> and including termination of employment. Each violation of the Policy will be assessed on a case-by-case basis. The appropriate discipline in each particular case depends on the nature of the Poli cy violation and the circumstances surrounding the situation. In all situations, an investigation will be conducted and documented to verify whether a violation has occurred.

28. The Policy also clearly sets out that post-incident testing may be required after an Accident:

> "Art 3.9 "Accident": An accident is a significant error, incident or near miss affecting and/or with the potential to affect the health and safety of the employee and/or persons and/or material damage to plant or equipment.
> Art. 6.6 Accident: After an Accident, any employee or non-employee who is directly involved may be required to submit to a Drug or Alcohol test. The decision to require that a test be completed will be made by the immediate supervisor and/or Human Resources." (underlining added)

29. The jurisprudence is clear that a less than significant accident will not permit drug or alcohol testing for those involved (see **CROA 4840**). It is also clear that the decision to test may not be a rote or "check the box" decision, but one requiring significant judgment (see **CROA 4840**, **CROA 4841**). Finally, if a determination is made that there was no right to test, any positive drug or alcohol results will be thrown out (see **CROA 5143**, **AH 807**).

30. In **CROA 4841**, the following tests were applied to determine whether testing was permissible:

- Was there a "serious incident"?
- Was the employee involved in the incident?
- Was testing appropriate here?

Was there a "serious incident"?

31. For the reasons that follow, I find that there was a serious incident.

32. In the investigation of the Grievor, he confirms that the mobile platform was struck hard enough to move it some 7-10 feet, in an area where employees work:

> 0013. Were there other employees in close proximity to the mobile platform?
>
> Ao13. At the time of the collision, no.
>
> O014.Could there have been employees present on or around the platform?
>
> Ao14. In any case, but at that particular time there wasn't.

> 0015. How far did the mobile platform move, in your estimation, after you struck it?
>
> Ao15. Maybe 7-10 feet maybe less.

33. The Grievor admits that the incident fell within the meaning of the term “Accident”:

> O016.Are you familiar with Alstom's Drug and Alcohol Policy?
>
> Ao16. Yes.
>
> 0017. Appendix 1, Alstom's Drug and Alcohol Policy, Definitions, Section 3, Item 3.9 defines an accident as "Accident": An accident is a significant error, incident or near miss affecting and/or with the potential to affect the health and safety of the employee and/or other persons and/or material damage to plant or equipment." Is this correct?
>
> Ao17. Yes.
>
> O018.Would you agree that the incident described by you in Appendix 2 would fall within this definition?
>
> Ao18. Yes.

34. In my view, this incident was clearly a “near miss” with the strong potential to have caused harm to other employees. The mobile platform is used by employees and could have been in use at the time of the incident. After the collision, many employees congregated around the platform within seconds of the incident. They were clearly in close proximity to the platform (see Video, Tab 9, Company documents). Had the employees happened to be on or slightly closer to the platform at the time of the collision, serious harm could easily have resulted.

Was the employee involved in the incident?

35. It is clear that the Grievor was the driver of the Reach truck involved in the collision, which he does not contest (see Q and A 11, Tab 6, Company documents).

Was testing appropriate here?

36. Even if a serious incident occurs, and the Grievor is involved, the Policy and the jurisprudence still require that judgment be exercised, keeping in mind the balancing of the competing interests between privacy and safety. As the Policy notes at article 6.6, the “employee who is directly involved may be required to submit to a Drug or Alcohol test.” The facts of the case must be ascertained to determine whether testing is appropriate. Sometimes the facts do not tip in favour of testing (see **CROA 4841**). On other occasions, the facts militate in favour of testing (see **CROA 5070** and **CROA 5030**).

37. Here, the video clearly shows the Grievor hitting the mobile platform. Afterwards, he stops the Reach truck and is then able to manoeuvre around the platform. It was clearly possible to drive carefully around the platform, or to stop and move the platform before

proceeding. The fact that neither option was followed by the Grievor, and that a serious incident occurred, would lead a reasonable person to have concerns about the condition of the Grievor.

38. In my view, testing was appropriate in these circumstances.

C. Was the discharge of the grievor proper in the circumstances?

Uncontested Facts

39. There are a number of uncontested facts concerning the events on the day of the incident:

- The Grievor was told he would be tested;
- He refused off-site testing;
- He was permitted to leave the workplace prior to the testing on two occasions, once to pick up his daughter from school, and then to return home;
- He knew when he went home that he was subject to testing, although he believed it would not take place;
- He consumes marijuana on a virtually daily basis;
- He consumed marijuana approximately 90 minutes prior to the testing;
- His tested levels of THC were well above permitted levels according to the Drug and Alcohol Policy (oral fluids at 25 ng/ml, permitted levels 10 ng/ml; urine test at 800 ng/ml, permitted levels at 15 ng/ml.

Position of Parties

40. The Company emphasizes that the Grievor consumed marijuana, knowing that he was subject to a Drug Test to verify levels of impairment, as a result of a serious incident. He presented at the workplace in an Unfit state, contrary to the Drug and Alcohol Policy, by his own admission. The Company further argues that the Grievor consuming marijuana was done in order to invalidate testing results.

41. The Union argues that the Grievor was not subject to duty when he consumed marijuana and did not expect to have to test, given the multiple delays created by the Company. The Company is not entitled to discipline the Grievor for the consumption of a legal drug, consumed on his own time.

Analysis and Decision

42. Article 4.1 of the Company Drug and Alcohol Policy states:

> "It is forbidden for any employee or non-employee to be in the Workplace while he or she is not Fit for duty …."

43. By the Grievor's own admission, he was not Fit for duty when he was in the Workplace:

> O033. Were you fit for duty after consuming marijuana?
> Ao33. No.
> O034.Why would you come back to the site under the influence of drugs?
> Ao34. I was told to come back to do a drug test.

44. His testing results clearly confirm that he was well over the oral fluid level of 10 ng/ml and urine 15 ng/ml.

45. This grievance is not a policy grievance contesting the validity of article 4.1 of the Company Drug and Alcohol Policy under KVP principles. Arguments could be made that picking up a cheque, for instance, should not be caught by the prohibition found in article 4.1.

46. Here, however, I cannot agree with the Union argument that the Grievor was not subject to duty, at least to the extent of coming to work for the purposes of the drug test. The Grievor knew that the Company expected him to return for testing:

> Q006.According to Appendix 4, memo to file from Manav Joshi dated August 23, 2024, it states that you were informed that drug and alcohol testing would be conducted. Is this correct?
> A000. Yes.
> Q007. According to Appendix 4, it indicates that you were told that you were to remain on site until the testing was concluded. Is this correct?
> A007. Yes.
>
> O016.Why did you consume marijuana before a drug and alcohol test knowing that you would be tested?
> Ao16.To be honest, that day, 1 didn't even think that I would be called back to do the testing because there were two occasions where Alstom or I guess the EHS manager contacted the drug test people and they said two times they weren't going to here at a proper time so the first time was when I left to get my daughter and then the second time was when I got back and they explained to me that they wouldn't be here until 6:30.
>
> 0046.What if anything, would you do differently in the future?
> Ao46.My attitude. 1 wouldn't have smoked before the test. The way I conducted myself.

47. The explanation of the Grievor that he did not expect the test to happen cannot justify his decision to consume marijuana, in the face of clear directions that he was expected to return to the Workplace for testing.

48. The Grievor is clearly subject to discipline for being Unfit in the Workplace.

49. I also find that the Grievor is subject to discipline, for having interfered with the testing process, for the reasons that follow.

50. The Union has argued that this second argument may not be advanced, as the issue of interfering with testing results was never raised by the Company. I cannot agree with this argument, as the Grievor was specifically questioned during his investigation on this point:

> O021.Did you consume marijuana at home in an attempt to show that you were not under the influence of marijuana at the time of the incident?
> Ao21. No.

51. It was raised again in the JSI in the Company position:

> "It is the Company's position that Mr. Matthews admits to smoking marijuana after leaving the property without permission and prior to coming back to the property, knowing he was still subject to the Drug and Alcohol test" (underlining in the original).

52. An employee that he has been given clear instructions to test (see Q and A 11) and even a time for testing (18:00) (see Q and A 10) must know, or is being wilfully blind, to the prospect of test results being falsified, should he smoke marijuana in the interim.

53. In **CROA 5101/5102**, Arbitrator Yingst-Bartel upheld discipline of 25 Demerits for an employee who consumed alcohol and drugs after a serious CROR violation, but before a post incident test had been ordered:

> 49. In case no. 5101 (Company's Book of Authorities; Tab 1), an employee was imposed 25 demerits for a drug and alcohol policy contravention. The employee was involved in a CROR contravention. When he got home, the employee consumed alcohol and drugs. This was before the company had informed him whether or not a post-incident drug test would be conducted. Arbitrator Yingst- Bartel dismissed the grievance. The arbitrator concluded that the Grievor was trying to avoid the drug test, and interfered with it. Arbitrator Yingst-Bartel concludes 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":

> 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 CROA&DR 5102 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.
>
> 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.

54. Here, the situation is worse, as a post incident test had been ordered.

55. Refusal to test cases have resulted in inferences that the test results would have shown impairment, but for the refusal to test (see **CROA 5070** and **CROA 5030**).

56. The Union has argued that the Company has chosen not to discipline for the original incident. As in **CROA 5101/5102**, the Company could have chosen to impose discipline for that ground as well. However, the fact that discipline was not imposed for the original infraction does not mean that the Grievor can ignore the consequences of his later actions.

57. I find therefore that discipline is appropriate for a breach of the Drug and Alcohol Policy.

58. Based on the William Scott matter, and the many arbitral cases which have followed it, I must now consider mitigating and aggravating factors to determine whether the Company decision to terminate was appropriate in the circumstances.

59. In mitigation, the Grievor does recognize that he should not have smoked up prior to the test and that his attitude needs to change (see Q and A 46). Against this must be set multiple aggravating factors. He has committed two breaches of the Drug and Alcohol Policy, while holding a safety sensitive position. He has admitted to using marijuana every

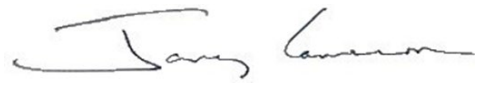
day or every other day (see Q and A 29). He has not claimed a dependency requiring accommodation. The jurisprudence recognizes impairment on the job is extremely serious (see **CROA 1028** and **CROA 2531**). He is an extremely short service employee. On balance, I cannot find good reasons to overturn the Company decision to terminate.

Conclusion

60. The grievance is therefore dismissed.

61. I remain seized for any questions of interpretation or application of this Award.

July 18, 2025



JAMES CAMERON

ARBITRATOR