

IN THE MATTER OF AN ARBITRATION

BETWEEN:

CANADIAN PACIFIC RAILWAY COMPANY

(the "Company")

- and -

**INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
(SYSTEM COUNCIL NO. 11)**

(the "Union")

**Re: Crawford
Dismissal**

Arbitrator

Richard I. Hornung, Q.C.

For the Company

Diana Zurbuchen – Manager Labour Relations

Francine Billings – Manager Labour Relations

Jodie Sokolosky – Assistant Director S&C Operations

Cory Wogrinc – Assistant General Manager S&C Operations

For the Union

Denis Ellickson – Counsel

Lee Hooper – General Chairman

Brad Kauk – Regional Representative

Randy Roberts – Local Representative

Erin Crawford - Grievor

Hearing

September 24, 2020

December 1, 2020

Calgary, Alberta

COMPANY/UNION EX PARTE STATEMENTS OF ISSUE

DISPUTE:

The dismissal of S&C Maintainer Erin Crawford.

Following her involvement in a deactivation failure on June 27, 2019 Ms. Crawford was required to submit to Post Incident Substance Testing. The results of the oral fluid swab were positive for marijuana with a reading of 3 ng/ml.

Following statements taken on July 8 and 16, 2019 Ms. Crawford was dismissed from Company Service for the following:

For the Positive Oral Post Incident Testing Results performed on June 27th, 2019 which is a violation of Company Policy HR203.1

COMPANY POSITION:

The Company maintains the Grievor, while working her tour of duty on June 27, 2019, was found culpable of violation Policy and Procedures HR 203.1, which includes failure to medically disclose, when she was found culpable of testing positive oral for marijuana/THC while on duty.

The Company maintains after a fair and impartial investigation was conducted, culpability was established and the quantum of discipline of the Grievor's dismissal was appropriate, given the circumstances that the Grievor tested positive oral for marijuana while on duty, a Rule G violation. Further, the Grievor failed to medically disclose her prescription use for medical marijuana to the Company, as required to as a Safety Sensitive employee. The Company maintains the incident and breach in policy was worthy of dismissal in and of itself.

Notwithstanding the aforementioned, the Company also maintains that dismissal was assessed within the appropriate timelines in accordance with Article 12.4 and the Company properly notified the Union pursuant to Article 12.6.

Accordingly, the Company maintains no violation of the Wage Agreement has occurred and as such, the dismissal should not be disturbed.

UNION EX PARTE STATEMENT OF ISSUE

DISPUTE:

The dismissal of S&C Maintainer Erin Crawford; the failure to comply with Article 12.4; and failure to comply with Article 12 of Wage Agreement No. 1

UNION POSITION

Following her involvement in a deactivation failure on June 27, 2019, Ms. Crawford was required to submit to drug and alcohol testing. The results on the urine test were negative for all substances. The results of the oral fluid swab were positive for marijuana with a reading of 3ng/ml.

Following statements taken on July 8 and 26, 2019, Ms. Crawford was dismissed from employment with the Company for a violation of the Company's Drug and Alcohol Procedures on August 13, 2019.

The Union contends, first, that the discipline imposed is void ab initio as a result of a failure to comply with Article 12.4.

Further, the Union contends that Ms. Crawford was not impaired by drugs or alcohol; was not in violation of any requirements or policies; and her termination was therefore without just cause. To the extent the Company relies on its Drug and Alcohol Policy, the Union has previously grieved that Policy and contends portions of it are, inter alia, unreasonable for the reasons given in its grievance.

The Union requests the termination be rescinded; Ms. Crawford reinstated to her former position without loss of seniority or benefits; and with full compensation for all losses suffered whatsoever. The Union also reserves the right to seek further remedies as may be appropriate, including an award of damages, and the Arbitrator seized of his Award.

The Company has not responded to the Union's contentions in the manner required by Article 12 of the Collective Agreement.

I

AWARD

1. As described in award **AH 711(A)**, on June 27, 2019 the Grievor was involved in a major safety violation wherein she failed to properly re-activate a crossing warning system. As a consequence, she was subject to Post Incident Testing.
2. After the incident, Cory Wogrinc (Assistant General Manager S&C Operations), transported the Grievor from the site to the testing location. According to the testimony of Mr. Wogrinc, the test results taken there were "*negative*". Accordingly, he took her back to the site where she completed her work. Following which, she was asked to drive a Company vehicle approximately 14 miles to provide an incident report. Thereafter, she returned to headquarters where she was met by a Company official who removed her from service.

3. Mr. Wogrinc stated that over the period of time that he was with her, the Grievor did not show any visible signs of impairment. He said that: *"I would not send someone out to drive a Company vehicle if I suspected they were impaired"*.
4. Following the tests, and after the commencement of her statement, the Grievor advised a Company official of her use of medical marijuana. The Grievor has diagnosed medical conditions which her physician is treating with prescribed medical marijuana. She ingests marijuana to alleviate the symptoms when required. She has a permit from Health Canada to use medical marijuana and only purchases it from a Health Canada approved licenced distributor.
5. During her investigation (which began on July 8 and concluded on July 16, 2019), the Grievor (Q.17-22) explained the results of the oral fluid test on June 27, 2019. She said that some 5 days earlier she ingested marijuana because of her medical condition and volunteered that she was *"surprised that it showed up on the test results"*.
6. In her investigation, she also admitted that she had never told anyone in the Company that she had been prescribed medical marijuana or that she ingested it for a medically prescribed purpose.
7. The Grievor's Post Incident Test taken pursuant to *Procedure #203.1* of the *Company's Alcohol and Drug Policy HR 203* (the *"Policy"*) revealed that her test results were negative for marijuana in her urine. The oral fluid swab results showed the presence of *3ng/ml* of THC. Pursuant to *Appendix 2* of the *Policy*, the cut off limit for the concentration of THC used by the Company to determine a *"positive"* test result in an oral fluid swab is *10 ng/ml*. Based on the same, the Grievor's oral swab test was below the cut off point and would, ordinarily, be deemed to be negative and below the concentration limit imposed by the *Policy*

8. That fact notwithstanding, the Company directed that the Grievor's test result was to be registered as "*positive*". The explanation for the same – as it relates to the accuracy of the testing results – can be found in the "*Additional MRO Notes*" of Medical Review Officer (MRO) who verified the test (as per the provisions of *Section 3.4.2 of Procedure #203.1*). The "*Notes*" state as follows:

*Advised the donor that **the company wishes verification but still wants reported as positive**. Positive for marijuana. The donor is a registered user of medicinal cannabis under the federal program and appropriate documentation was provided and reviewed by the MRO. She has a valid prescription and has recently purchased from a Health Canada approved Licensed Distributor. **As per the direction of the company, the test has been reported as positive.***

(Emphasis added)

9. Following the investigation, the Grievor received a letter from the Company advising her that she was terminated effective August 13, 2019 for:

The positive Oral Post-Incident Testing Results performed on June 27, 2019 which is a violation of Company Policy HR203.1

10. Although the Company attempted, at the hearing, to additionally argue that the Grievor had breached CROR-Rule G, the Company's attempt to do so was denied as set out in AH 711(P).

II

11. The relevant provisions of the Company Policy HR 203.1 are as follows:

3.1.3 Cannabis

Recreational Cannabis

[...]

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

- *The use or possession of medical cannabis without a Company approved accommodation supported by current medical clinical practice guidelines;*
- *Reporting for work or remaining at work under the effects of medical cannabis, including acute, chronic, hangover or after-effects of such use;*

[...]

Employees who choose to access cannabis for medical purposes are required to disclose appropriately within CP prior to using cannabis at a time or manner which could affect their fitness to work. Employees who fail to disclose their use of medical cannabis will be subject to an investigation, and to discipline up to and including dismissal.

CP reserves the right to confirm the nature and validity of the medical cannabis use and authorization or prescription or recommendation for cannabis use for therapeutic or medical purposes. This will include confirmation of the medical authorization and dosage, any impact on fitness to work, and the nature and duration of any work modifications, limitations and/or restrictions, through the Disability Management Policy and Procedure and/or through the Fitness to Work Medical Policy and Procedure.

3.4.2 Safety Critical Positions and Safety Sensitive Positions

For those holding Safety Critical Positions or Safety Sensitive Positions in addition to all other standards the following are a violation 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 limits where a **Medical Review Officer has verified the results as a positive test**);*

[...]

- *a failure/refusal to test as determined through the Company testing program.*

Details on the Company drug concentration limits can be found in Appendix 2.

III

Was the Grievor in Violation of Rule 3.4.2

12. The Company's *Policy Rule 3.4.2* specifically sets out that a drug test must be positive "...as determined through the Company testing program". The sub-section then goes on, in parenthesis, to expand on the meaning of the word "positive" by stating that it must be: "**a drug level equal to or in excess of the Company drug concentration limits where a *Medical Review Officer has verified the results as a positive test***". It would be untenable for me to conclude, as argued, that the language intends that a "positive" drug test could be whatever the MRO verifies in his/her Report irrespective of the scientific analysis.
13. For the *Policy* to be accepted it is critical that the determination of a positive test result stemming from a post incident test – and the verification of the same - be arrived at in a transparent, fair, accurate and independent process based on recognized scientific testing procedures; and, that the enforcement of that *Policy* be carried out within the specific strictures of the *Policy* itself.
14. In this case, it is clear that the Grievor's verified test results indicated a level of THC below that prohibited in the Company's *Policy (Appendix 2)*. The MRO's additional notes make it apparent that the Grievor's "positive" results as reported were done pursuant to "...the direction of the Company..."
15. Given the MRO's notes, I am unable to accept the evaluation of the Grievor's test results as positive and therefore am unable to conclude that there was a breach of *sub-section 3.4.2* of the Company's *Policy*.

IV

Was the Grievor in Breach of Company Policy 3.1.3

16. Alternatively, the Company argues (citing **CROA 4490; CROA 4733** and **SHP 718** in support) that the Grievor had an obligation to disclose any prescription use for medical cannabis. A review of those decisions reveals both that they relate to the requirements of disclosure in employment applications (or otherwise as required during the course of employment) and/or that a significant consideration involved the Grievor's credibility.
17. Although clearly required to disclose her use of medical marijuana in the situations enumerated within section 3.1.3, I am not convinced that the Grievor, in this case, was required to broadly disclose the use of her medical cannabis in the same fashion as arises in a truthful employment application or similar disclosures required during the course of employment.
18. In the present case, the Grievor had a valid medical marijuana prescription which, she says, she used some 5 days prior to attending at work.
19. In my experience, a positive oral fluid test reflects a more recent use of marijuana, most likely within a 24-48 hour period. However, my skepticism with respect to her answer is of no moment. Here, The Grievor is alleged to have been in breach of *Policy 3.1.3*. The Policy prohibits the use of marijuana in enumerated circumstances which include, *inter alia*:

... at all times while an employee is working, on duty, when subject to duty, ... on Company premises and worksites, when on Company business and when operating Company vehicles...
20. The results of her Post Incident drug test (at *3ng/ml* as determined) are dispositive of an allegation of a breach of the paragraph while she was on duty. Furthermore, no evidence was called to suggest that she used the prescribed medication within

the time frame where she may have been “*subject to duty*” as referred to in *sub-section 3.1.3*. Accordingly, the circumstances do not establish a breach of the first paragraph of *sub-section 3.1.3* as quoted above.

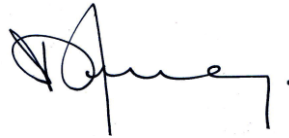
21. Nor do they establish a breach of the second paragraph of *sub-section 3.1.1*. That paragraph makes it clear that employees “... *are required to disclose appropriately within CP prior to using cannabis at a time or manner which could affect their fitness to work*”.
22. While the Grievor acknowledged the use of her medical marijuana prescription, there was no evidence on which it could be concluded that she used it while she was subject to duty or at a time or manner which could *affect* her fitness to work.
23. In the present case the issue of the Grievor’s fitness to work is answered by the evidence of Mr. Wogrinc who testified that she showed no signs of being impaired and that he would not have allowed anyone to drive a Company vehicle who he “*suspected*” of being impaired. Applied to the facts, Mr. Wogrinc’s evidence can be fairly taken to say that he did not suspect that the Grievor’s ability to work was *affected* by her ingestion of marijuana.
24. I am not convinced, in the circumstances, that she was required to “*disclose appropriately within CP...at a time or manner which could affect her fitness to work*”.
25. Accordingly, I conclude that, in the circumstances, there was no breach of *Company Policy 3.1.3*

V

26. In the result, the grievance is allowed. The Grievor’s record regarding the dismissal shall be expunged; and, she shall be made whole.

27. I will retain jurisdiction with respect to the interpretation, application and implementation of this award.

Dated this 23rd day of December 2020.

A handwritten signature in black ink, appearing to read "R. Hornung", with a stylized initial "R" and a trailing flourish.

**Richard I. Hornung, Q.C.
Arbitrator**