IN THE MATTER OF AN ARBITRATION

BETWEEN:

CANADIAN NATIONAL RAILWAY COMPANY
(The "Company")

-And-

UNITED STEELWORKERS, LOCAL 2004
(The "Union")

AH 727

RE: Grievance concerning the discharge of Permanent Machine Operator Paul McInnis for a positive post-incident/accident test following a collision while operating a CN966 Cat Loader with a signals and communications pole at Painsec Centre on July 21st, 2020.

ARBITRATOR: CHRISTINE SCHMIDT

APPEARANCES FOR THE COMPANY:

Craig Lawrence	**- Counsel**
Larysa Workewych	**- Counsel**
Simon-Pierre Paquette	**- Director, Disputes Resolution and Labour Standards**
Gina Stirpe	**- Manager, Occupational Health Services (Canada)**

APPEARANCES FOR THE UNION:

Daniel Daigle	**- Counsel**
Richard Leblanc	**- USW Area Coordinator**
Jean Francois Migneault	**- President USW Local 2004**
Paul McInnis	**- Grievor**
Claude Arguin	**- Chief Steward, USW Local 2004**

A hearing in this matter was held via videoconference on March 15, 2021.

AWARD

1. The nature of the dispute before me is reflected in the statement of dispute and joint statement of issue filed, which reads as follows:

> Dispute:
>
> The dismissal of Paul McInnis, PIN 162738, effective August 7, 2020, for "Violation of the Company's Policy to Prevent Workplace Alcohol and Drug Problems on July 21, 2020 while working in a safety sensitive capacity."
>
> Joint Statement of Issue:
>
> On July 21, 2020, Mr. McInnis was on duty at 0700. At approximately 1030 he was involved in an accident whereas he struck an S&C pole while backing up with a Cat Loader. In his statement, Mr. McInnis explained that he was focusing on clearing the signal case opposite of the pole, and that he forgot about the pole and struck it. A urine sample was collected at approximately 1300. The urine test result was positive for cannabis and, following a formal investigation, the employee was dismissed for the above-noted reason.
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> Union Position:
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> The Union takes the position that Mr. McInnis was not impaired or under the influence while on duty. It submits that the Company failed to comply with its own Policy and following the job aid.
>
> The Union also contends the investigation was not fair and impartial because the Company failed to include the negative saliva test into evidence, did not pay attention to the test after the Union introduced it and the investigating officer declined answering a question from the grievor.
>
> Finally, the Union claims that the Company treated Mr. McInnis differently because of his role as a union representative and standing in the Union.
>
> The Union requests that the grievor be reinstated and made whole. The Union also claims punitive damages for violating Mr. McInnis human right and dignity.
>
> Company Position:
>
> The Company disagrees with the Union's contentions and declines the Grievance.

FOR THE UNION	FOR THE COMPANY:
Mr. Jean François Migneault	François Daignault
President – USW Local 2004	Senior Manager, Labour Relations

Introduction

2. The parties to this arbitration are members of the Canadian Office of Arbitration and Dispute Resolution ("CROA"). This grievance was heard pursuant to CROA rules of procedure – an expedited arbitration system which has been used successfully by the members of CROA for decades.

3. On March 15, 2021 this *Ad Hoc* arbitration was held. In anticipation of the hearing, in which the parties agreed no *viva voce* would be adduced, they exchanged briefs. The briefs included extensive expert reports pertaining to the interpretation of the positive urine test and the negative oral fluid test in the circumstances of this case. The expert reports filed by the Company include reports from Dr. Melissa Snider-Adler, dated February 26, 2021, Dr. Leo Kadehjian, dated February 28, 2021, and Dr. Mace Beckson, dated March 3, 2021. The Union's expert, Dr. David Rosenbloom, authored his initial report on February 27, 2021. His rebuttal report is dated March 5, 2021.

4. The circumstances of the accident referenced in the JSI, which led to post-incident testing, are not in dispute.

5. What is at issue is the Company's decision to discharge the Grievor, having determined that he was impaired, contrary to the Company's Policy to Prevent Workplace Alcohol and Drug Problems ("D&A Policy"). What is unique about this case is that, unlike other **CROA** cases, at the hearing the Company did not assert that the Grievor was likely impaired during the "acute" phase of intoxication due to cannabis consumption. That was hardly surprising given what Arbitrator Hornung aptly describes in **CROA&DR 4729** as the "well cultivated jurisprudence" in similar cases. More on that below.

6. Fully cognizant of that jurisprudence (mostly involving Canadian Pacific Railway), the Company argues that the Grievor was impaired after the acute phase – when he was allegedly “residually” impaired. To support its position, the Company is unable to rely on the expert reports submitted, and instead relies heavily on the Grievor’s account of the accident itself acquired in formal statements taken on July 31, 2020, after it summoned him to appear to give statements in connection with the accident and in relation to the post-incident D&A testing performed on July 21, 2020.

7. For the reasons that follow, the discipline imposed is void *ad initio* because the Company failed to conduct a fair and impartial hearing. If I am incorrect in so finding, the Company’s evidence falls well short of meeting its onus to demonstrate impairment on the balance of probabilities. The grievance must therefore succeed.

8. By way of a bottom-line oral decision issued on March 23, 2020, I ordered that the Grievor be reinstated forthwith with compensation of all wages and benefits lost and without loss of seniority, while retaining jurisdiction to address the issues raised by the parties in their briefs, including but not limited to damages sought by the Union.

Chronology of Relevant Facts

9. By way of background, the Grievor began working for the Company in April 2012. He was employed as Permanent Machine Operator (PMO). At the time of the accident, the Grievor had no discipline on his record. In respect of his responsibility for the accident itself, and quite aside from the issue of alleged impairment, the Grievor received 30 demerit points.

10. At the commencement of shift on July 21, 2020, the Grievor attended a morning briefing at 07:00 hours conducted by a Track Supervisor, Mr. Aaron Stiles

("Track Supervisor Stiles") and the Assistant Track Supervisor, Mr. Allen Hurley. The Grievor's crew on that day consisted of four other employees including Mr. Jacob Girouard ("JG"), Mr. Ryan Landry ("RL"), Mr. Darren Whalen ("DW") and Mr. Jarvis Loga ("JL").

11. After the briefing the crew made its way to Painsec Junction, in two pickup trucks. A Cat Loader ("Loader") and Brandt truck were on site.

12. The accident itself is best summarized by the Grievor in his own words in a formal statement he made on July 31, 2020:

> On July 21 2020 Myself and 4 other employees had been tasked with unloading ballast cars at Painsec siding. We had a Brant Truck and CN 433-00 966 Cat loader on site prior to our arrival. We unloaded the cars without issue and then I was tasked with reloading the cars using the Loader. It was very hot that day so after performing my fluid check and starting the loader I cooled down in the truck. The brant truck and the foreman disconnected from the cars and left the job site to turn the brant truck so it would be facing west on the next dump.
>
> I returned to the loader and filled the ballast car without issue. I then noticed one of the small roadways to our right of way was in disrepair and went to back drag and repair it. As I approached the road the vegetation was overgrown so I began pushing it back with the large loader upending the bushes and encroaching trees with ease.
>
> I did note the code line was on my left hand side at this time and I was working in a westward direction adjacent to the track. Toward the end of the road is a signals cut case on my left hand side and I moved past it and put the bucket down to back drag the road. At this same time the Brant truck passed next to me on my left hand side.
>
> I began back dragging the road with my focus on the front bucket to ensure I did not damage or destroy the cut case that was on my left. After passing the cut case I heard a Crack and pulled ahead and found that I had contacted a pole that was on my right side.
>
> Despite my low speed at the time I did not feel when I contacted the pole due to the back dragging action.
>
> I returned to the TFO truck with the loader and informed Jarvis Loga and Darren Whalen I hit a pole and asked Jarvis to contact Chris Richard the signal maintainer to ensure the signals did not go down after talking with Chris I asked Jarvis to call Aaron Stiles our direct supervisor.
>
> I ensured the plant safety and reported the incident without delay.

13. The Grievor's statement reproduced above in its entirety is consistent with the short written account he provided on July 21, 2020:

> After filling a ballast car at painsec Jct with the 966 Cat loader, I began repairing a road on the right away.
>
> I pushed back some of the brush around the road that was encroaching and back dragged the road. I approached a cut case next to the track and as the bucket came near I was watching to make sure I didn't hit it when back dragging. I was moving about 1 mph at the time. I heard an audible crack and seen I had come into contact with a pole that was located behind me. I returned to the crossing and had Jarvis Loga call the signal maintainer to ensure I didn't break the code line an ensure the [illegible] was safe. I asked Jarvis to call Aaron Stiles to notify him. We spoke to Aaron on the speaker and notified him of the situation.

14. A careful review of the very brief written statements of JL and DW taken on July 21, 2020, confirm that the Grievor returned to the crossing in the Loader and spoke to JL explaining what had happened (JL and DW were not in the immediate vicinity of the Grievor at the time of the accident). JL and DW had been in their truck at around the time of the accident and had gotten out to speak with a pedestrian they had noticed. According to JL, after speaking with the pedestrian, he heard the loud crack and both he and DW saw the wires supported by the broken pole shaking above.

15. Track Supervisor Stiles arrived on site shortly before noon. His typewritten one-page note dated July 21, 2020 with "Key Notes" and "Timeframe of events" indicates that he conferred with colleagues and proceeded to engage the post-incident alcohol and drug testing process. He contacted CN Police dispatch and his call was forwarded to DriverCheck, the Company's testing agent, to conduct the testing.

16. The parties agree that no damage was sustained to the Loader, there were no personal injuries as a result of the accident, and though the pole was damaged, the overhead wires were not.

17. Track Supervisor Stiles drove the Grievor approximately 20 minutes to the testing site. Prior to the Point of Collection Testing ("POCT") conducted by a DriverCheck collector ("Collector"), Track Supervisor Stiles completed the CN Supervisor Form ("Supervisor Form"). It indicates that the Supervisor must document signs and symptoms for impairment for each incident/accident by completing the form "Reasonable Cause or Rule G." Track Supervisor Stiles' observations about the Grievor in the categories of speech, balance/walking, eyes, mood/behaviour, other, skin and awareness are, without exception, identified as normal at pages 7 and 8 of the 14-page Supervisor Form. Preliminary drug and alcohol testing results on page 4 of the Supervisor Form completed by the Collector indicate a non-negative result for drugs and Blood Alcohol Concentration ("BAC") results of 0.000.

18. At approximately 13:20 hours the Grievor's urine was collected and thereafter the Collector administered an oral fluid (or saliva) test. Given the non-negative POCT for drugs result, the Grievor was held out of service. The Collector sent the urine and oral fluid samples to its certified laboratory for final results.

19. On July 22, 2020, the laboratory confirmation test results from the oral fluid test were verified as negative for marijuana at a cut off level of 10 ng/mL. On July 25, 2020, the urine test was verified as positive for the inactive metabolite in marijuana – THC – at a quantitative level of 197 ng/mL. That same day, DriverCheck contacted the Grievor and informed him that his oral fluid test was negative. It may very well be that the Grievor was also informed of the quantitative level of 197 ng/mL result for the THC metabolite from his urine test; however, the Union's grievance letter is silent on that point.

20. On July 27, 2020, the Grievor contacted the Company asking for the results of the oral fluid test, to no avail.

21. On July 28, 2020, the Company issued to the Grievor two Notices to Appear on July 31, 2020 to provide formal investigation statements. The first meeting was to commence at 09:00 hours to address the facts surrounding the accident itself. The second meeting was to commence at 13:20 hours to inquire into the results of the post-incident D&A testing performed on July 21, 2020.

22. On July 30, 2020, the morning before the investigation statements were taken, the Company received the test results for both the oral fluid test and the urine test. The grievance letter filed by the Union reveals the Grievor had obtained a copy of the oral fluid test results that same day.

23. In the morning meeting on July 31, 2020, the Company disclosed to the Union JL's and DW's brief written statements, Track Supervisor Stiles' one page note referenced in paragraph 15 above, together with other relevant evidence. Although the note indicates that the Supervisor Form is appended to the note, in fact the Supervisor Form was not appended to the note and was not provided to the Union on July 31, 2020. The Supervisor Form was not provided to the Union until well after the Joint Statement of Issue was deemed executed by the parties on October 30, 2020.

24. In the afternoon meeting, the Company entered into evidence the Grievor's formal statement taken at the earlier morning meeting (reproduced above), the urine test that was positive for the inactive metabolite in marijuana – THC – at a quantitative level of 197 ng/mL, the D&A Policy and Rule G of the Canadian Railway Operating Rules ("CROR") as well as a page from the Company's Code of Conduct. The Company did not provide and enter into evidence the negative oral fluid test results at the outset of the meeting. The Company asked the Union whether it had other evidence it sought to enter. The Union entered the negative oral fluid test results and the Company's Reasonable cause Job Aid ("Job Aid"), which explains in detail the process to be followed when

reasonable cause and post-accident/post incident drug testing is initiated by the Company.

25. The Union voiced its objection to the Company taking the Grievor's statement in the circumstances of a negative oral fluid test for marijuana – which meant, in its view, that the Grievor was not impaired at work. The Union asserted that the Grievor had the right to privacy and further, that the Company, by carrying out the investigation, was not following its own policy in compliance with the Job Aid.

26. In response to the Company's questions, the Grievor told the Company that he had begun consuming marijuana a few months after it had become legal, that he consumed it as frequently as two to four times weekly, or not at all for months at a time. The Grievor informed the Company that he had consumed a "pinch" or small dose - using a pipe – at about 19:00 or 19:30 hours on July 20, 2020 and that most recently the cannabis he had purchased had a concentration of THC of 10%. The Grievor explained that he only uses marijuana responsibly, acknowledged its impairing effects, asserted that he knows when he is impaired, and that he was fit for duty on July 21, 2020.

27. The Grievor was discharged effective August 7, 2020 for violating the Company's D&A Policy on July 21, 2020.

Policy Provisions

28. The relevant D&A Policy provisions are as follows.

> **Policy Statement**
>
> All employees are required to report and remain fit for duty, free from the negative effects of alcohol, cannabis and other drugs. It is strictly prohibited to be on duty or be in control of a CN vehicle or equipment while under the influence of alcohol or other drugs, including the after-

> effects of such use. Specifically, the use, possession, presence in the body, distribution or sale of illegal drugs while on duty (including during break), on or off company premises, in company vehicles and equipment, or while on company business is prohibited. … .
>
> ……
>
> **Available Means to Assess and Monitor Policy Compliance**
>
> **3 REASONABLE CAUSE AND POST ACCIDENT TESTING**
>
> Biological testing for the presence of drugs in urine and oral fluids or alcohol in the breath is conducted where reasonable cause exists to suspect alcohol or drug use or possession in violation of this policy, including after an accident or incident. Post-accident testing is done after any significant accident or incident where an experienced operating officer, upon consideration of the circumstances, determines that the cause may involve, or is likely to involve a rule violation and/or employee judgment. In cases of reasonable cause or post-accident testing, any employee whose breath alcohol concentration is over 0.04, and/or who tests positive for legal or illegal drugs (without medical justification) in oral fluids, and/or where impairment is demonstrated, will be considered to be in violation of this policy.
>
> **ALCOHOL & DRUG**
> **Reasonable cause and post-accident/post-incident drug and alcohol testing**
> **Reasonable cause Job Aid**

29. The Job Aid is a two-page Company document. It consists of a flow chart and an information sheet. Under the heading of "Drug and Alcohol testing" the information sheet stipulates:

> Drug and alcohol testing is done by mobile collector or at the nearest collection site which will provide a preliminary, immediate result. In case of a non-negative preliminary drug result, the collector will arrange for collection of oral fluids and will send the samples to a certified laboratory for final results.
>
> For non-negative drug or positive alcohol results (over 0.04), the employee must be held out of service pending receipt of final results and investigation. For negative preliminary drug or alcohol test results (under 0.04), the employee may be returned to service.

30. The corresponding flow chart indicates that an employee is to be held out of service pending a “final” positive drug test result. If the “final” drug result is positive, the next step is an investigation. If there is no final positive drug or alcohol result, the chart reads: “End of the testing process, employee may be returned to service.”

Procedural Objections

No reasonable cause for post-incident testing

31. At no time prior to the hearing did the Union take the position that the accident was not significant or that post-incident testing was unwarranted. At the hearing, however, the Union asserted that the Company did not have reasonable cause to subject the Grievor to post-incident testing.

32. This objection can be summarily dismissed by reference to paragraphs 10 and 14 of the Memorandum of Agreement Establishing the CROA&DR which binds the parties in proceedings of this kind. Those provisions read as follows:

> 10. The joint statement of issue referred to in clause 7 here of shall contain the facts of the dispute and reference to the specific provision or provisions of the collective agreement where it is alleged that the collective agreement has been misinterpreted or violated. …
>
> …
>
> 14. The decision of the arbitrator shall be limited to the disputes or questions contained in the joint statement submitted by the parties ….

33. The CROA jurisprudence has repeatedly held that an arbitrator's jurisdiction under the Memorandum of Agreement is limited to those matters contained in the JSI. **CROA&DR 3488** and **4624** submitted by the Company in reply submissions at the hearing are two of many decisions that stand for this proposition. Accordingly, paragraphs 68 through 77 of the Union’s brief will not be considered. Nor will the

Union's request for damages stemming from the Company's decision to test the Grievor post-incident be entertained.

Failure to Conduct a Fair and Impartial Investigation

34. The relevant Collective Agreement provision governing the discipline and grievance procedure which outlines the formal investigation procedure is article 18.2. It is reproduced below, in part:

> **Formal Investigation**
>
> **18.2**
>
> **(a)**
>
> **…**
>
> **(d)** Where an employee so wishes an accredited representative may appear with him at the hearing. **Prior to the commencement of the hearing, the employee will be provided with a copy of all of the written evidence as well as any oral evidence which has been recorded and which has bearing on his involvement.** The employee and his accredited representative will have the right to hear all of the evidence submitted and will be given an opportunity through the presiding officer to ask questions of the witnesses (including company officers where necessary) whose evidence may have a bearing on his involvement. The questions and answers will be recorded and the employee and his accredited representative will be furnished a copy of the statement.

(emphasis added)

35. The Union argues that the Company withheld key documents, namely the oral fluid drug test results and the Supervisor Form, the latter of which includes the information pertaining to the existence or absence of any behavioural or observable indicia of impairment. The Grievor's discharge should therefore be void *ab initio*, in the Union's submission.

36. The Company's brief is essentially silent pertaining to its disclosure obligations in the formal investigation process. It identifies the Union's allegation

that it had engaged in “various unfair practices” including the Company's refusal to agree with the Union’s assertion that the Grievor’s negative oral fluid test was conclusive evidence that he was not impaired. The brief also mentions the Union’s allegation – a bald assertion - that the Grievor was unfairly targeted because of his role as a Union steward. (I note that the Union made no effort to pursue this latter allegation in its brief or at the hearing.)

37. At the hearing, and pertaining to the issue of the Company’s disclosure obligations pursuant to article 18.2 (d) of the Collective Agreement, I referred the Company to its response to the grievance where, on October 30, 2020 it had written:

> Regarding the Union's allegations regarding saliva test results, the Company notes that the saliva test was presented by the Union without inducing any related evidence or asking any questions of Mr. McIinnis; with respect, if the Union considered that the test results had any bearing on the investigation, it held the burden of demonstrating it. In the circumstances, the Company relied on available evidence to assess Mr. McInnis's conduct, in particular the high levels detected in his urine test and his admission of frequent cannabis use.

38. The Company submits that its obligation to disclose information was limited to that information on which the Company sought to rely upon in the investigation process. I disagree. The Union is correct when it asserts that the expedited process engaged by these parties is premised on the complete disclosure of all material evidence which “has a bearing” on the Grievor’s involvement in the matter under investigation.

39. In a case where the Company is investigating an alleged violation of its D&A Policy, and where it is well aware of the extensive and settled jurisprudence that requires the Company to demonstrate impairment on the balance of probabilities, it is untenable for the Company to assert that it had no obligation to

disclose the negative oral fluid drug test results it received, together with the urine drug test results.

40. I am cognizant that the investigative meetings were scheduled when the Company had not yet received the laboratory confirmation test results from the urine and oral fluid samples collected on July 21, 2020. The Company decided to go ahead with the investigation despite the process outlined in its Job Aid, a document that appears to take into account recent CROA jurisprudence which, without exception, has determined that an employer does not meet its burden of proof in circumstances where there is a positive urine test result for the marijuana metabolite and a negative oral fluid test result for marijuana. Of particular note is that the Company made no reference to the Job Aid in its brief or in its oral submissions at the hearing.

41. The importance of the disclosure obligation in an expedited hearing process cannot be overstated. In **CROA 1734**, Arbitrator Picher captures the importance of full and fair disclosure in the investigative process:

> In the Arbitrator's view this case raises issues fundamental to the integrity of the process of expedited hearings that is vital to the operation of the Canadian Railway Office of Arbitration. By long established practice, this Office relies on written briefs, including the transcript of investigations conducted by the Company the content of which forms the basis of the decision to assess discipline against an employee. If the credibility of the expedited hearing process in this Office is to be preserved both the parties and the Arbitrator must be able to rely, without qualification, on a fair adherence to the minimal procedural requirements which the parties have placed into the Collective Agreement to facilitate the grievance and arbitration process in discipline cases. Needless to say, irregularities at the investigation stage, particularly those which depart from the standard of full and fair disclosure reflected in Article 18.2(d) have the inevitable effect of undermining the integrity of the entire grievance and arbitration process so vital to the interests of both parties.

42. There can be no doubt that the success of the expedited arbitration process used for decades in the railway industry depends largely on the reliability of the record of proceedings taken prior to hearing. As a result, and articulated by Arbitrator Picher in **CROA&DR 306:**

> …any significant flaw in the procedures which substantially compromise the integrity of the record which emerges from that process goes to the integrity of the grievance and arbitration process itself. Consequently, in keeping with general jurisprudence in this area, it is well established that a failure to respect the mandatory procedures of disciplinary investigations results in any ensuing discipline being ruled void *ab initio*.

43. The Company was obliged to disclose every piece of evidence bearing on the Grievor's possible violation of the D&A Policy regardless of whether the Company intended to rely on only certain portions of the evidence. In saying this, I appreciate that the record was not compromised, because the Union obtained the negative oral fluid test results without the assistance of the Company (in fact DriverCheck had contacted the Grievor about the results) and entered the test results into evidence. In such circumstances, the Company cannot be said to have been "hiding" the evidence as alleged by the Union.

44. The Company's suggestion, however, that it was up to the Union to demonstrate that a negative oral fluid test result for marijuana had any bearing on the investigation is plainly incorrect. Further, on my reading of the Company's response to the grievance, the Company's submission at the hearing that it gave weight to the oral fluid test result is contradicted. It is untenable to assert, in the face of the history of CROA jurisprudence, that a negative oral fluid test result has no bearing on the investigation undertaken.

45. As for the Supervisor Form, the Company's failure to produce it may have well been inadvertent since Track Supervisor Stiles' note referring to it was disclosed. Both parties could have come to the realization that the Supervisor Form had not been attached to the note, if not during the meetings held on July 31, 2020, then soon thereafter and well before the exchange of briefs. Also, I would expect that the Union would be well aware that the Supervisor Form is required to be filled out in all cases in which the Company sends an employee for reasonable cause or post incident testing, particularly as that requirement is expressly stated

on the Supervisor Form itself. Having said that, it remains the fact that the Company was obliged to provide the Supervisor Form and failed to do so.

46. To the extent that the Union relies on Arbitrator Keller's decision in **CROA 3452**, which it asserts is very similar to the case at hand, to support its position that the Grievor's discharge is properly voided *ab initio*, I do not entirely agree. In that case, the issue of the reasonableness of testing in the first instance was raised by the trade union in its *Ex Parte* Statement. Here, for the reasons stated above, the appropriateness of the Company's decision to test the Grievor was not raised by the Union in the JSI and cannot therefore be raised at the hearing. However, in an impairment case, just as the negative oral fluid test is highly relevant, the Supervisor Form is a key document because it has bearing on the issue of impairment and therefore must be disclosed by the Company.

47. In my view, the Company's decision not to disclose the oral fluid test at the outset of the afternoon July 31, 2020 meeting, its defense of its conduct as articulated by its response to the grievance and its negligent omission of the Supervisor's Form resulted in an investigation that was unfair and not impartial, and this compromised the integrity of the grievance and arbitration process itself, so vital to the interests of both parties.

48. The Grievor's discharge, is therefore void *ab initio*.

49. If I am incorrect in determining that the Grievor's discharge is void *ab initio* for the flaws identified above, I now turn to the merits of the Company's case.

Merits – Impairment/Dismissal

50. As aptly stated by Arbitrator Hornung in **CROA&DR 4729**: “There is nothing to be gained by re-telling the well cultivated jurisprudence which has addressed marijuana testing and impairment cases.” It was instructive in that case, as it is here, to quote from **CROA&DR 4706,** a decision released by Arbitrator Moreau in December of 2019. In that case, like this one, the Grievor tested negative for both the breath alcohol test and oral fluid test but positive for the marijuana metabolite in the urine test. Of note is that expert evidence was adduced in that case.

51. Before quoting extensively from **CROA&DR 4706,** of importance to note is that the jurisprudence referred to therein developed with full knowledge of the safety risks inherent to the work undertaken by the Company. As articulated by Arbitrator Picher in the seminal case of **SHP 530**:

> Few enterprises in Canada can more credibly argue the safety sensitive nature of their operations than a national railway. With maintenance facilities, yards, industrial spurs and main line operations extending across the continent, with responsibility for the operation of trains by unsupervised crews whose work includes the hauling of trains of enormous length and weight, the content of which frequently includes hazardous chemicals and other dangerous goods, sometimes through populated areas, the Company’s status as a safety sensitive enterprise is self-evident.

52. This has been the case as acknowledged through the evolution of the “Canadian Model” to drug and alcohol testing, which stands in contrast to the United States, as mentioned by the Company in its brief. The risks posed in this sector, as both parties to the collective agreement are acutely attuned to, could not be more serious, which is clearly recognized by the courts, adjudicators and **CROA**, through its extensive jurisprudence.

53. At paragraph 16 of the **CROA&DR 4706** decision Arbitrator Moreau canvasses the jurisprudence with which these parties are intimately familiar:

I note that this Office has dealt with numerous cases where a bargaining unit member has been dismissed for testing positive for the presence of THC in their urine. In two recent awards, **CROA 4707 & 4712**, I summarized the consensus view expressed in numerous awards of this Office that a positive urine test alone does not support a finding of impairment:

> In **CROA 4240**, an award issued in 2013, Arbitrator Picher referred to his earlier 100-page seminal decision of **SHP 530** where he found that a positive drug test standing alone is not proof of impairment:
>
> > However, it is common ground (and on this all of the expert witnesses are in agreement) that a positive drug test gives no indication as to when or in what amount the drug in question was ingested.
> >
> > …The fact that a disciplinary investigation confirms that a policy has been violated by the mere fact of positive drug test does nothing to make the rule any more reasonable or justifiable on a legitimate business basis. A positive drug test, which is not proof of impairment while on duty, while subject to duty or while on call, cannot, standing alone, be just cause for discipline.
>
> He concludes in reference to the state of the law at that time: The arbitral jurisprudence in respect of drug testing in Canada is now extensive. It has been repeatedly sustained by the courts and is effectively the law of the land. Part of that law, as stated in the passage quoted above, is that a positive drug test, conducted by urine analysis, standing alone, does not establish impairment at a point in time which corresponds with an employer's legitimate business interests and, standing alone, cannot be viewed as just cause for discipline.
>
> The views expressed by Arbitrator Picher in **CROA 4240** has [sic] been confirmed by numerous decisions of this Office since that time.
>
> In **CROA 4296**, issued in 2014, Arbitrator Schmidt dealt with a Locomotive Engineer who, similar to the grievor in this case, tested negative for an oral fluid test, negative for breath alcohol and positive for his urine test. Arbitrator Schmidt agreed with Arbitrator Picher's view of the law as he had set out in his previous decisions, beginning with **SHP 530**:
>
> > The Company's position has no merit. No discipline can be sustained against the grievor. To the extent that a policy stipulates that for unionized employees a positive drug test is, of itself, grounds for discipline or discharge, it is unreasonable and beyond the well accepted standards set out in KVP Co. Ltd. and Lumber & Sawmill Workers' Union, Local 2537 (1965) 16 L.A.C. 73 (Robinson).
> >
> > This law is settled. It has been for some time.
>
> Arbitrator Albertyn, in 2015, was also faced with similar facts involving a Locomotive Engineer who had a negative oral fluid test and a positive

urine test. After referencing a number of supporting decisions of this Office, he concluded in **CROA 4365**:

> A positive oral fluid test will likely result in a finding of actual impairment, but proof only of past use, as occurred with the Grievor, does not. In the circumstances, I can find no breach of the Grievor's responsibilities to perform his work without impairment by drugs or alcohol. In the 2015 awards of **CROA 4399 and CROA 4400,** Arbitrator Silverman upheld the grievance of a Locomotive Engineer and Conductor, respectively, citing the same jurisprudence and "…noting that the law on the issue is settled".

In 2017, Arbitrator Clarke followed the lengthy line of cases in this area and concluded in **CROA 4524**:

> CP had the burden of proof to demonstrate that Mr. Playfair was impaired at the time of the November 15, 2015 incident. As numerous CROA decisions have already noted, it is not enough to show that a urine test indicates an employee may have traces of marijuana is his/her system. Those results do not demonstrate impairment at the material time. In Mr. Playfair's situation, he tested negative for the more specific oral fluid drug test.

Arbitrator Sims followed Arbitrator Clarke and came to the same conclusion in **CROA 4584**.

Most recently, Arbitrator Weatherill, in **CROA&DR 4695-M**, dealt with a dismissal grievance involving a foreman who was subject to a substance abuse test after a derail incident. The results were a negative breath alcohol and oral fluid test and a positive urine test, results which are similar to a number of these cases including the one before this arbitrator. Citing Arbitrator Picher in **CROA 4240**, Arbitrator Weatherill noted that having marijuana in one's body is not conclusive of impairment. He states:

> Having traces of marijuana in the body may raise a question of whether there is impairment, but that bit of evidence by itself is not enough to establish impairment, whereas the negative breath alcohol and oral fluid tests strongly indicate that there was not. There is no suggestion whatever that the grievor's conduct, movements or verbal behaviour were indicative of impairment.

I have no difficulty arriving at the same conclusion reached by Arbitrator Weatherill, as have other arbitrators from this Office before him, that a urine drug test that uncovers traces of marijuana is not conclusive of impairment. As he succinctly put it "…that bit of evidence by itself in not enough to establish impairment, whereas the negative breath alcohol and oral fluid tests strongly indicate there was not". Apart from the stand-alone unreliability of the urine test as an indicator of impairment, it is noteworthy that Arbitrator Weatherill cited the contradictory results between the oral fluid test and the urine drug test as further support for his finding of insufficient evidence of impairment.

54. More recently, in August of last year, days before the Grievor in this case was terminated by the Company, Arbitrator Clarke in **AH 704** re-affirmed these well-established principles in an award in which the grievor had consumed marijuana approximately 12 hours before his shift. The grievor's urine tested positive for the marijuana metabolite THC at a level of 79ng/mL and, like here, he had tested negative for all drugs on the oral fluid test.

> The facts do not support BTC's suggestion that the "impaired" line of cases apply to Mr. Ouimet's situation. Unlike in **CROA&DR 4527**, Mr. Ouimet's oral swap test came back negative. Railway arbitrators have consistently concluded that this test result signifies the individual was not impaired. BTC had to demonstrate that the "impaired" line of cases applied to Mr. Ouimet. It failed to meet this burden when it referred to its amended 2018 *Policy* but without providing evidence of impairment as well.
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> […]
>
> Similarly, BTC did not persuade the arbitrator that it had just cause to terminate Mr. Ouimet when he had tested negative for the more specific oral swab test. It remains an employer's responsibility to prove impairment in these cases. A positive urine test and a negative oral swab test do not satisfy that burden.

55. The scientific research which is referenced in the expert reports before me, and the opinions presented in those reports, do not contradict the principle that a positive urine test and a negative oral swab test are insufficient to satisfy the Company's responsibility to prove impairment.

56. Having carefully reviewed all of the reports before me, and the jurisprudence provided by both parties, it is beyond controversy that a positive urine test indicates consumption from days to weeks prior to a test, but such test cannot pinpoint the exact timing of use, and conclusions regarding the degree of risk of impairment cannot be drawn.

57. In this case, the experts agree that the negative oral fluid test and the positive urine test are consistent with the Grievor's reported use of cannabis between 19:00 and 19:30 hours the evening before reporting for duty.

58. Very significantly and given the scientific research on the issue before me, none of the experts was able to opine on the Grievor's likelihood of residual impairment having regard to his positive urine test. That appears to be the case whether or not the Grievor was, in fact, being entirely forthright about all of the information he shared with the Company about his cannabis use.

59. In my view, the Company is taking an end-run attack at the longstanding jurisprudence knowing full well what the end result must be. It is doing so in the context of marijuana having become lawful and in the context of recently unilaterally imposed D&A Policies in the railway sector being challenged as unenforceable based on existing standards and jurisprudence. Of note is that the Company's oral fluid cut off level of 10ng/mL has been accepted as a reasonable level for cut off since about 2008 (shortly after the issuance of Arbitrator Picher's decision in **CROA 3668** referred to above).

60. The Company's case that the Grievor was impaired relies heavily on of the nature of the accident itself gleaned from the Grievor's interview taken on July 31, 2020 and in particular his description of the accident, reproduced above. The Company argues that the cognitive deficits exhibited by the Grievor align so closely with what residual impairment looks like, that I should determine that he was impaired.

61. The Company submits that the facts set out in the two brief written statements of JL and DW, the written note from Track Supervisor Stiles, the undisclosed Supervisor's Form, and all of the activities engaged in by the Grievor in the presence of his colleagues and supervisors prior to the accident, including the early morning briefing, which reveal no observable indicators of impairment, are nevertheless consistent with residual impairment.

62. The Company emphasizes the Grievor's admitted focus as he was back dragging with the Loader to avoid contact with the signals case. That apparent singular focus, even though the Grievor was well aware of the pole's whereabouts, is but one example of the Grievor's lack of situational awareness to the hazards in the vicinity at the time of the accident, in the Company's submission. The Grievor also did not detect the impact of the Loader hitting the pole, and only realised that he had made contact with it when he heard a cracking sound, which too suggests impairment in the Company's view. Furthermore, the Company submits that the Grievor failed to notice the pedestrian to whom JL and DW were speaking as he was back dragging and made no mention in his account of an effort to shoulder-check as he back dragged, or of the shaking wires attached to the broken pole. The Company says that these facts and the omissions in the Grievor's account prove impairment.

63. There is no question that the Grievor's focus on the Loader's front bucket most certainly led to his hitting the pole as he back dragged. Though I candidly admit I do not know what it is like to operate a Loader, I do not find it strange that the Grievor would be particularly concerned with avoiding the signals case. Furthermore, given the slow speed at which the Grievor was back dragging, and given that there was no visible damage to the Loader on contact, and given further that there was no suggestion of any significant time lag between contact and the audible crack, it does not strike me as peculiar that the Grievor did not feel the contact when the Loader collided with the pole. Also, a careful review of the Grievor's statements, together with those of JL and DL, reveal that the Company appears to have been mistaken as to the Grievor's proximity to his co-workers and the pedestrian at the time of the accident. Finally, I also have difficulty finding any significance in the Grievor's failure to mention "swinging wires" given his vantage point inside the Loader and JL and DW's entirely different vantage point at the time of contact.

64. The facts upon which the Company relies are, to be blunt, flimsy. They are no more probative of impairment than they are of an otherwise sober worker who momentarily failed to take notice of the entirety of his surroundings. By this measure, virtually every workplace accident would be attributable to impairment.

65. At its height, in her Executive Summary, Dr. Snider-Adler opines that residual impairment after the acute phase can impact performance of safety-sensitive duties for up to 24 hours, is variable in duration due to multiple factors at play, and there is no way to predict how long an individual will be impaired. Her comments specific to residual impairment, at page 20 of her report are worth citing, without the need to address Dr. Rosenbloom's rebuttal report on some of the studies cited in that section:

> The data on residual impairment however is very mixed. Some suggest that it does occur and lasts for hours to days and other studies do not find any evidence of residual impairment. It is true that some of the studies that find evidence of impairment have limitations and biases.

66. Having regard to expert reports before me, I have no difficulty finding, and there appears to be consensus by the experts whose reports are before me, that it is scientifically untenable for the Company to claim that the Grievor was more likely than not impaired by cannabis use while on duty on July 21, 2020.

Damages

67. The Union claims general damages for an alleged breach of the Grievor's privacy rights, aggravated damages for the Company's failure to conduct a fair and impartial investigation and punitive damages for the Company's harsh and malicious decision to terminate the Grievor. The claim for general damages is not supported having regard to my finding with respect to the issues in dispute before me as set out in the JSI, deemed executed by the parties on October 30, 2020.

68. I am, however, persuaded that aggravated damages in the amount of $5000 are warranted. I make this order in the face of the Company's blatant disregard of its disclosure obligations under article 18.2 (d) of the collective agreement, and its apparent failure to follow its own Job Aid, notwithstanding the final result of the oral fluid test in the face of CROA jurisprudence. Though the Company submits that it weighed the evidence before it appropriately, I find that claim to be somewhat disingenuous having regard to all the circumstances.

69. Like Arbitrator McFetridge in **SHP 713**, 2014 CarswellNat392, I find it difficult to accept that the Company could possibly believe it had grounds to dismiss the Grievor. Though the facts are not directly on point with those in **SHP 713**, the Company conduct is sufficiently analogous to warrant the quantum of damages awarded in that case. Punitive damages, however, are unwarranted here, particularly having regard to my award of aggravated damages.

70. Given my bottom-line decision issued on March 23, 2021, the Grievor will have been reinstated with compensation of all wages and benefits lost and without loss of seniority. I order the Company to pay the Grievor $5000 in aggravated damages within 30 days of the date of this decision, and I remain seized of the implementation of this award.

Dated at Toronto this 15th day of April 2021.

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Christine Schmidt, Sole Arbitrator