

**IN THE MATTER OF AN ARBITRATION**

**(AH 729)**

**BETWEEN**

**TEAMSTERS CANADA RAIL CONFERENCE**

**Maintenance of Way Division**

(the "Union")

AND

**CANADIAN PACIFIC RAILWAY**

(the "Company")

**RE: Grievance of Steven Masi**

**ARBITRATOR:** John M. Moreau QC

**Appearing for The Union:**

David Brown	-Counsel, TCRC MWED
Wade Phillips	-President, TCRC MWED
Gary Doherty	-Vice-President, TCRC MWED
Dr. Scott Macdonald	-Expert Witness

**Appearing for The Company:**

Ian Campbell	-Counsel, Fasken LLP
Laura Epplett	-Co-counsel, Fasken LLP
Dave Guerin	-Senior Director, Labour Relations
Trisha Gain	-Legal Counsel Litigation
Francine Billings	-Labour Relations Manager
Dr. Melissa Snider-Adler	-Expert Witness

A virtual hearing was held on April 12, 2021

## **Joint Statement of Issue:**

On November 5, 2019, the Grievor Mr. Steven Masi, was formally advised that he was dismissed from Company service effective November 5, 2019, for the following reason(s):

- *“Positive post incident test results that were supplied to the company on September 4, 2019, following an on track rule violation that occurred with you being the Foreman in charge.*

*As a result, you have violated the following:*

- *HR Procedure 203.1, 3. Alcohol and Drug Procedures for All CP Employees 3.1 Standards*

*All employees must report for work in a condition that enables them to safely and effectively perform their duties. To minimize the risk of unsafe and/or unsatisfactory performance due to the use or adverse effects of alcohol and/or drugs, employees are required to report fit for work and to remain fit for work. Adverse effects may include acute, chronic, hangover and after-effects*

- *Procedure HR 203.1, 3.1.3 Cannabis, 28 – Day Cannabis Ban.*

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

The Union objected and a grievance was filed.

## **Union Contends That:**

1. The Grievor’s results on all three Point of Collection Tests were negative (urine, saliva and breath alcohol). Despite this, his results were sent for further analysis after which his breath alcohol and saliva results were still negative but his urine sample revealed the presence of marijuana metabolite in the amount of 22ng/ml. As the Grievor was not impaired at work, none of this warranted or supported the assessment of any form of discipline whatsoever;

2. The Grievor's urine Point of Collection Test (the "screening" test) produced a negative result. Therefore, according to the Company's own Policy, the Grievor's urine sample should not have been subjected to further testing or analysis (a "confirmation" test). By taking this step, the Company acted unreasonably, illegally and in violation of HR 203.1, in particular, Appendix 2 "Alcohol and Drug Testing Process";
3. The discipline assessed the Grievor was improper, unfair and unwarranted.

**The Union Requests That:**

The Grievor be reinstated immediately without loss of seniority and with full compensation for all losses incurred as a result of this matter. The Union also requests that the Grievor be compensated for damages in an amount commensurate with the deliberate, unjust, and egregious treatment he has received from CP Rail.

**Company Position:**

1. The Company denies the Union's contentions and declines the Union's request.
2. The Union and all Company employees received advance notice of the September 1, 2019 CP Alcohol and Drug Policy and Procedures changes.
3. The Grievor's samples he supplied on September 24, 2019 were tested and analyzed as per HR 203 – Alcohol and Drug Policy and Procedures Canada.
4. HR 203 Alcohol and Drug Policy, is clear in that any employee who fails to comply could be subject to disciplinary action up to and including dismissal.
5. The Grievor elected to disregard Company Policy for which the consequences of doing so could have been severe and as such is deserving of dismissal.
6. Employees have an obligation to comply with the Policy's terms and conditions until such time as the Union proceeds to arbitration should they so desire regarding the September 1, 2019 Alcohol and Drug Policy.
7. Unless an Arbitrator rules otherwise, employees are bound by the terms and conditions outlined in the Policy, including but not limited to the 28 day ban from using or consuming cannabis from any source.
8. Previous case law regarding positive urine dismissals has no application under these circumstances.

The Company maintains that the discipline assessed was appropriate in all the circumstance.

Gary Doherty  
President  
TCRC MWED

Dave Geurin  
Sr. Director Labour Relations  
Canadian Pacific

# AWARD

## INTRODUCTION

The grievor began his employment with the Company on March 5, 2012. He was the Extra Gang Foreman on the Cranbrook Subdivision on September 24, 2019. He began his shift that morning at 3:30 a.m. As the Foreman, he was responsible for the Track Occupancy Permit (“TOP”) and to communicate with the Rail Traffic Controller to ensure safety on the track. While the crew was setting off equipment and getting the consist ready for the following day, the grievor authorized more track to a sub-foreman than was available under his TOP. By doing so, the grievor left the sub-foreman unprotected while on the track in violation of Rule 7.0 of the Rule Book for Engineering Employees as well section 41 of the Maintenance Worker Rules (Foreman Safety Rules). As a result of the incident, and pursuant to the Company’s *Drug and Alcohol Policy and Procedures* (the “policy”), the grievor was taken for post-incident testing in Cranbrook, B.C.

The Point-of-Collection drug and alcohol test was conducted by the firm of DriverCheck on September 24, 2019. The grievor’s Point-of-Collection results from both the urine and oral fluid tests were negative. His urine and oral fluid test samples were then sent for further substance testing, as is the practice, to DriverCheck’s laboratory who provided their results to the Company on October 2, 2019. The oral fluid test was reported as negative. The urine test was reported as non-negative for THC metabolite, as well as “DILUTE”. The THC metabolite in the urine was measured at 22ng/ml. The creatinine, which is a marker to determine how diluted or concentrated the urine specimen is, was reported by the laboratory to be 19.8 mg/dl and the specific gravity (SpGr) at 1.0027.

The grievor's letter of termination of November 5, 2019, as indicated in the Joint Statement, states that he was dismissed for violating section 203.1 of the policy: 3.1 Standards; and, 3.1.3 28-day Cannabis Ban ("the ban"). The 28-day ban, as set out in the policy (the latest version came into effect on September 1, 2019) prohibits employees in a safety-critical or safety-sensitive position from using or consuming cannabis from any source for a minimum of 28 days before being on duty, or subject to duty.

The grievor maintained at his statement of October 15, 2019 that he had last smoked marijuana on August 16, 2019 and that marijuana use "*was not his usual habit*".

### **RULING: THE 28-DAY CANNABIS BAN IN THE COMPANY'S POLICY**

Both counsel, as required under the CROA rules for virtual hearings, filed their initial written briefs through the CROA office on April 6, 2021 and their Reply written briefs on April 9, 2021. The Union properly addressed both grounds for termination in their initial brief. The Company indicated in their initial brief that the Union had filed a policy grievance challenging certain provisions of the policy, including the 28-day ban provision, but the grievance had not yet been scheduled for hearing.

The Company identified in its initial brief that the broad questions for determination were whether the grievor breached the policy; and, if so, was termination the appropriate consequence for violation of the policy. The Company also provided a rationale in their brief for the 28-day policy. The Company based this portion of the policy on the current body of expert scientific literature in the area of drug and alcohol testing. The Union, for its part, provided an extensive submission on the 28-day ban in its brief. The Union maintained that the 28-day ban portion of the policy was without scientific support and violated the *KVP* principles, leading to a breach of the collective agreement.

At the arbitration hearing, counsel for the Company indicated that he would not be making further submissions on the 28-day ban as a basis for the grievor's termination. As noted in the Company's initial brief at paragraph 26, he reiterated at the outset of his oral submissions that the issue would be dealt with in due course in the Union's policy grievance. Counsel for the Union maintained his position at the arbitration hearing that the 28-day ban should be declared by the Arbitrator to be in breach of the *KVP* principles and the collective agreement.

Given that the issue of the 28-day ban is part and parcel of a separate Union policy grievance, and the fact that the Company was no longer relying on it as grounds for termination, the Arbitrator ruled that the 28-day ban would be adjudicated as part of the policy grievance and not as part of these proceedings.

#### **EXPERT EVIDENCE: DR. SNIDER-ADLER AND DR. SCOTT MACDONALD**

The Company retained the services of Dr. Melissa Snider-Adler, a medical doctor with a specialty in addiction medicine, to provide an expert opinion report regarding the grievor's assertion at his investigation of October 15, 2019 that he last smoked marijuana on August 16, 2019 and that he was not a frequent user of marijuana.

Dr. Snider-Adler noted in her initial report to the Company of October 21, 2019 that quantitative levels of THC would be deflated due to the dilution of the samples. Absent dilution in the grievor's urine specimen, Dr. Snider-Adler stated at p. 6 that "*...the level of urine would have been 111.1 ng/mL and not 22ng/mL (which is an artificial deflation of the actual quantitative level)*". She also stated in the Summary portion of her report that the positive urine test indicates that the grievor was either an infrequent user and his last use of cannabis was no more than 5 days prior to the test; or, that he was using larger

quantities of cannabis, and that he discontinued use on August 16, 2019 as he stated in his statement of October 15, 2019.

The Union, for its part, then retained the services of Dr. Scott Macdonald, an expert in the field of epidemiology, with a specialty in substance use and abuse, to review and comment on Dr. Snider-Adler's expert report of October 21, 2019 and the grievor's laboratory drug test results from DriverCheck of October 2, 2019. Dr. Macdonald provided an initial expert report to the Union on August 31, 2020.

In a follow-up request by the Company, Dr. Snider-Adler was asked to comment on how dilute sample results and adjustments account for abnormal creatinine levels. Dr. Snider-Adler addressed this question and other related issues in a second report dated October 1, 2020.

Dr. Macdonald, at the request of the Union, then wrote a second report on October 15, 2020 regarding his opinion of the views expressed by Dr. Snider-Adler in her report of October 1, 2020.

Finally, Dr. Snider-Adler, at the request of the Company, provided a third report on March 21, 2021 which addressed the opinions expressed by Dr. Macdonald in his report of October 15, 2020.

All of the expert reports were introduced into evidence at the hearing, in conjunction with the testimony of Dr. Snider-Adler and Dr. Macdonald.

## THE GRIEVOR'S STATEMENTS: OCTOBER 15, 2019 AND OCTOBER 29, 2019

The grievor indicated at his October 15, 2019 statement that August 16, 2019 was the last occasion he had smoked marijuana prior to the incident of September 24, 2019.

His statement reads in part:

Q5: Refer to article 2, Email from Drug Program Administrator that was collected on September 24, 2019. Subject Steven Masi 97545.

Can you please explain in detail the positive result found in the Urine Drug Test that you supplied to the Company?

A5: No, I cannot, the last time I had a marijuana cigarette was on August 16<sup>th</sup>, that I shared with my girlfriend while camping. I have not smoked since that date because of the September 1<sup>st</sup> policy.

...

Q9: How often do you use marijuana?

A9: Not at all now, the last time was stated in my previous answer on August 16<sup>th</sup> .

...

Q 12: August 16<sup>th</sup> was the last time you used marijuana prior to the incident on September 24, 2019?

A 12: That's correct.

Q13: How much do you normally consume when using?

A 13: At the time it was just one marijuana cigarette, it is not a usual habit, it is now a complete abstinence.

...

Q 18: Referring to article 3 with 22 ng/ml of marijuana in your urine drug test, how can you be sure when reporting to work there were no signs of impairment or hangover symptoms?

A 18: After a month and a bit, I did not think it would be in my system. I did not feel impaired in any way.

...

Q 19...Do you understand [the] rule? (*Note: grievor answers question in reference to Rule G*)

A 19: I fully understand this rule and I agree with it. The work we do is dangerous enough as it is, there is absolutely no room for someone to be impaired. The only marijuana I have every consumed was when it became legal and now with the company's new policy, I will abstain completely. I have never reported for work unfit for duty.



...

Q 22: Do you have anything you wish to add to this investigation?

A 22: I take my job very seriously. It is an honor and a privilege to work for CPR. I would never do anything to jeopardize that. But more importantly, I would never do anything to jeopardize the safety of my fellow employees. Though I do not feel I have ever come to work impaired in the past, and to ensure that I never will, I have stopped all use of marijuana for good. I apologize for any inconvenience this incident may have caused, but you can be sure it will never be repeated.

The grievor was then asked to provide a further statement on October 29, 2019 in connection with the post-incident test results administered by DriverCheck on September 24, 2019. (Dr. Snider-Adler's report and the Medical Review Officers' notes were provided to the Union and the grievor prior to the questioning). His statement reads in part:

Q6: In Q&A #7 of the investigation taken from your October 15 he stated that driver check told you the results, you stated, "everything stated in article #3 was discussed".

Can you explain why you stated to the MRO that the last time you smoked marijuana was prior to September 1, 2019 and you stated on record that the last time you smoked marijuana was while camping on August 16, 2019 during your mentioned investigation on October 15?

A6: When talking to the medical professional while being put on the spot, I was unsure of the specific date and gave them a rough date of when it was prior to. After time to trace my steps and looking at a calendar I was able to pinpoint a real answer and time frame.

Q12: Refer to article 6; Dr. Adler explains that if you were an occasional user that it is very unlikely for you to have a positive test in the timelines you have given.

Are you maintaining that the last time you consumed marijuana was August 16<sup>th</sup> ?

A12 (*After discussions between the Union and Company representatives*).

I have not knowingly consumed marijuana since then. I am not a medical expert so I cannot properly refute what the doctor is saying.

Q13: The last time you smoke marijuana was August 16 is this correct?

A: That is correct.

Q18: Do you have anything you wish to add to this investigation?

A: I want to apologize to the Company and everyone involved in this incident. I take pride in my career at CP rail and regret this whole situation. I consider myself to be an exceptional employee, and take the safety of my fellow employees and my job very

seriously. I will assure you that when given another chance, because of my complete abstinence from marijuana in all forms this will never be an issue again.

## **SUMMARY OF THE EXPERT REPORTS:**

Dr. Snider-Adler, as noted, prepared an initial report for the Company on October 21, 2019 where she addressed the August 16, 2019 date provided by the grievor as the last time he smoked marijuana and that his use prior to September 1, 2019 “*was not a usual habit*”. She commented, beginning at p. 5 of her report, on the diluted laboratory sample analyzed by DriverCheck on October 2, 2019:

The result of a confirmation laboratory urine tests was a quantitative level of THC metabolite of 22 ng/mL and a result that was reported as dilute with creatinine of 19.8 mg/dL and a specific gravity (SpGr) of 1.0027....

A positive dilute sample is considered a positive test. However the quantitative levels would be artificially deflated due to the dilution of the sample. Essentially, the urine sample contains more water content than usual, however not in the range of that of a substituted or adulterated urine sample.

With respect to THC metabolite, when analyzing the quantitative level, it is important to correct for creatinine. A very high creatinine level may artificially raise the level of THC metabolite found whereas a low creatinine may lower it. There have been a number of studies that look at this correction factor and studies have confirmed that this can be used for interpretation purposes.

For this result the corrected level would be 111.1 ng/mL. Meaning that if the creatinine levels were normal, and this was not a dilute sample, the level in the urine would have been 111.1 ng/mL and not 22 ng/mL (which is an artificial deflation of the actual quantitative level).

Dr. Snider Adler also commented on the urinary excretion of the THC metabolite in marijuana at p.8 of her report:

When using a cut-off level of 15 ng/mL (confirmation testing and the same cut-off used in workplace testing and the urine drug test conducted on Mr. Masi), the longest positive tests at or above the cut-off were 68.5 hours for the low dose THC cigarette and 122.3 hours for the higher dose THC cigarette. The average was 33.7+/-9.2 hours for the low dose THC cigarette and 88.6+/-9.5 hours for the higher dose THC cigarette.

Chronic daily users of cannabis however will test positive for a longer period of time when using the same cut-off levels with time frames of 24 days to 29.6 days.

Dr. Snider Adler concludes in the summary portion of her report at page 9:

In summary, Mr. Masi had a positive dilute test for THCC00H (THC metabolite) on September 24, 2019. The corrected quantitative level is described above and speaks to the fact that his actual quantitative level corrected for creatinine (dilute urine) is not a low quantitative level. Either way, his history of use is inconsistent with the findings of a positive test, unless he was using cannabis much more frequently (heavy, daily, frequent cannabis use) prior to his stated last use. His history [o]f occasional use and last use are inconsistent with the findings of the urine drug test.

When considering the positive urine drug screen test, the following conclusions can be drawn:

1. He does not use cannabis frequently and his last use was no more than five days prior to the test (with the knowledge that the average person would only test positive for 88.6 hours – or just over three days)
2. He was using larger quantities of cannabis daily for a prolonged period of time and discontinued use on the stated dates of his last use of cannabis.

The Union, as noted, then retained the services of Dr. Macdonald to respond to Dr. Snider-Adler's report of October 21, 2019. With respect to the bumping up of the grievor's test results from 22ng/mL to 111.1 ng/ml, Dr. Macdonald had this to say in his first report of August 31, 2020 at p. 3:

I was surprised to see Dr. Snider Adler provided an estimate of carboxy THC (THCCOOH) in a urine sample that was analyzed as dilute, as I was unaware that a valid extrapolation method exists for this purpose. I reviewed US guidelines for reporting drug test finding from the Substance Abuse and Mental Health Services Administration (2018) to see if they recommend revised THCCOOH estimates based on dilute samples. In this manual it says "a dilute finding may be reported in conjunction with a positive or negative drug test" (p. 5-9) and an explanation for dilute sample is provided.

"A donor may produce urine that meets the program criteria for dilution under some conditions, including the following:

- Working in hot weather conditions and drinking large amounts of fluid;
- Taking a diuretic; or
- Drinking large volumes of fluid immediately before providing the specimen" (SAMHSA, 2018; p.5-9)

I could not find any recommendations in the SAMHSA manual or the U.S. DOT guidelines for estimating (i.e. extrapolation) undiluted THCCOOH levels in urine based on a dilute sample. Dr. Snider Adler indicates that Driver Check follows U.S. DOT guidelines. I was

unable to find any recommendation from any other source of a formula for providing an estimate of THCCOOH concentration of an individual using a ratio with creatinine. Dr. Snider-Adler does not provide the formula she used to estimate the undiluted THCCOOH concentration level for Mr. Masi. I suspect she divided THCCOOH by the creatinine level which results in 111.1 (i.e.  $22 \text{ ng/mL} / .198 \text{ mg/mL} = 111.1$ ).

He further states the following at p. 5 of his first report in reference to Dr. Snider Adler's conclusions regarding the grievor's last use of marijuana:

In terms of Dr. Snider-Adler's conclusions regarding when Mr. Masi last used marijuana assuming he is an occasional user, I am also in agreement with her interpretation of existing research. For occasional smokers, THCCOOH levels above 15ng/mL are unlikely to occur beyond a few days after use. Concentration levels at this cut-off could occur for a much longer detection period among daily users.... Dr. Snider-Adler's concludes that based on a positive test at a cut-off of 15ng/mL, Mr. Masi is either an occasional user that used recently, or a frequent user that did not use past September 1, 2019. This conclusion is consistent based on current epidemiological knowledge of elimination of THC in urine.

He then goes on to say importantly in the next paragraph on p.5:

Regardless, a positive test cannot be interpreted as impairment. If Mr. Masi used cannabis in the previous five days, this cannot be interpreted that he was impaired.

...

Conclusions of impairment or a safety risk cannot be made from a positive urine test. The metabolite detected with these urine tests (THCCOOH) is not psychoactive. Urinalysis test for THCCOOH cannot be accurately used to diagnose impairment or a safety risk of employees. A drawback of urinalysis is its inability to confirm impairment when the drug was taken or how much was taken (Kapur, 1994). Dr. Snider-Adler does not interpret a positive test as impairment in her report.

Dr. Snider Adler's second report of October 1, 2020 addressed several issues related to the grievor's test results. The arbitrator notes in particular her comments on impairment found in her executive summary at p. 6:

Impairment from cannabis is variable and there are many factors that play a role in determining the length of time one is impaired, the extent of the impairment and the risks when performing safety-sensitive and safety-critical duties. There is no way to predict who will have impairment that lasts 24 hours or 28 days.

Dr. Macdonald's comments on residual impairment in his second report of October 15, 2020 (where he was asked to review and comment on Dr. Snider-Adler's report of October 1, 2020) at. p: 15:

Several conclusions can be drawn from the epidemiological research on residual long-term effects of cannabis. With respect to 24-hour effects, the preponderance of the research evidence, based primarily on randomized double-blind studies, show no 24-hour deficits. If no deficits are found, then conclusions of impairment cannot be drawn.

With respect to withdrawal effects from cannabis, evidence shows there can be withdrawal symptoms from cannabis. The scientific evidence is weak that withdrawal symptoms result in meaningful performance deficits that constitute performance deficits that could be classified as impairment. While it is possible that some people may experience withdrawal effects, the magnitude of these effects is likely similar to withdrawal from other commonly used substances such as cigarettes or caffeine.

And at p. 18 regarding drug testing and the issue of safety:

Overall, case control and culpability studies, weighing the quality of methods, show testing positive from urine tests is not significantly related to crash risk... This conclusion indicates that urine tests are not useful for identifying employee drug use that impacts workplace safety. Since positive drug tests have not been shown to be related to safety risks, it cannot be concluded that their use improves safety.

The Company summarized in its initial brief the main points in Dr. Snider-Adler's March 21, 2021 report (where she was asked to comment on Dr. Macdonald's report of October 15, 2020), as noted in part below:

53. Notably, Dr. Snider Adler explained that "normalizing" the creatinine, and therefore the quantity of the substance in the urine is done to demonstrate the impact of dilution on the quantity of the substance found, which in this case was the THC metabolite. Dr. Snider-Adler confirmed that there is a very large range of acceptable creatinine levels ranging from 20 mg/nL to 400 mg/nL. Any creatinine level below 20 mg/nL is considered dilute.

*(The Company then set out the formula used by Dr. Snider-Adler for interpreting a dilute urine sample)*

54. Dr. Snider Adler used the same formula to normalize the creatinine in Mr. Masi's sample:

The original quantitative level of THC metabolite was 22 ng/mL which was multiplied by the  $(CR_{reference}) / (CR_{specimen}) (100mg/dL / 19.8 mg/dL) = 111.1 ng/mL$

As Dr. Snider Adler explained, this step is taken “to prevent a false-negative result due to dilution of the result and concomitant reduction of the quantitative level of the substance which may result in a negative test” and to provide an accurate reading of an individual’s THC metabolite.

55. In response to Dr. McDonald’s assertion that Mr. Masi’s creatinine level was only marginally lower than the normal range at 19.8 ng/dL, Dr. Snider Adler clarified that an individual must consume a very large quantity of water in order to produce a urine sample with the amount of water content that would cause it to fall below the normal range of creatinine levels. According to Dr. Snider-Adler, Mr. Masi’s urine sample constituted a “highly dilute urine specimen” such that studies have determined an individual consumed 1 gallon of fluids before being tested. However, Dr. Snider Adler confirmed that it was not uncommon for individuals to “consume large volumes of water in order to dilute the sample and diminish the quantitative level of a substance in the urine.”

Dr. Snider Adler, as counsel for the Company summarized below, disagreed with Dr. Macdonald on the reliability of urine testing as an indicator of the *risk* of impairment.

56.... Dr. Snider Adler also correctly distinguished safety sensitive and safety critical positions as requiring a higher standard regarding impairment as the industry in which these positions are found is vastly different compared to, for example, an individual driving a personal vehicle, due to the potential for catastrophic incidents. Even small deficits in impairment may result in catastrophic consequences in these workplaces. Although urine testing cannot confirm impairment, it indicates whether an individual has used cannabis and is an indicator of the *risk* of impairment.

## **ANALYSIS**

The Arbitrator notes that neither expert disputes the fact that the presence of a trace amount of THC metabolites alone in the urine is insufficient evidence to establish impairment. As the Union pointed out, this conclusion has been upheld in numerous decisions issued by arbitrators from this office, including in **CROA 4584** where Arbitrator Sims stated:

Several CROA cases discuss the consequences of a positive urine test, without more, and in the face of negative tests for impairment. The Union refers to **CROA 4524, 4311, 4039, 3668, 3691, 3701, 4240, 4298 and Ad Hoc SHP 530**. It is sufficient to note Arbitrator Clarke’s comments in the most recent decision. (*i.e* **CROA 4584**).

24. 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 in his/her system. Those results do not demonstrate impairment at the material times. In Mr. Playfair's situation, he tested negative for the more specific oral fluid drug test.

25. CP's position, as set out in its policy and as argued, posits that employees should never take illegal drugs. But the case law has not upheld a policy that extends that broadly.

The Company in its brief acknowledges these cases, but still says there is a violation of the Drug and Alcohol Policy which is "worthy of some discipline". That view conflicts with paragraph 25 quoted above. The Company argues that the admitted use of marijuana should still incur a disciplinary response and is ancillary to, and an aggravating factor in respect to, the Rule 42 incident. In my view the case law does not support that position. Clearly it is not a mitigating factor. The grievance in respect to the second Form 104 is allowed and that discipline is to be expunged from the grievor's record.

The late Arbitrator Weatherill stated in **CROA 4695-M**:

The positive urine drug test indicates that there were residual traces of marijuana in the grievor's body at that time. The parties agree that traces of marijuana may remain in the body for a prolonged period – a month or more – following consumption of the drug. 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. From all of the material before me I find as a fact that the grievor was not impaired during the course of his shift on August 17, 2017.

This arbitrator heard expert evidence in **CROA 4706** where both experts, similar to the experts in this case, also stated that a positive urine test alone is unable to determine the level of impairment of an employee who has consumed cannabis.

There was no evidence led to suggest that the grievor showed physical signs of impairment nor was there a positive test result indicated from the oral swab. As Arbitrator Clarke indicated in **AH 706**:

It is 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.

On the basis of the above expert evidence and case law regarding urine testing and impairment, and bearing in mind that the second ground for termination involving the 28-day ban before being on duty is a separate policy grievance, I find that the disciplinary response of termination was without foundation given the absence of evidence of the grievor's impairment or that he was otherwise unfit for duty at the time of the incident on September 24, 2019.

That brings into issue whether the grievor is guilty of any culpable behaviour worthy of discipline based on the Company's assertion he consumed cannabis prior to August 16, 2019 and the issue surrounding the possible intake of water affecting the laboratory result of 22ng/ML of THC. The expert evidence, as noted, addressed these issues in detail.

The Company maintained in its brief that, based on the expert evidence of Dr. Snider-Adler, that *"...any notion that Mr. Masi consumed cannabis prior to the September 1, 2019 effective date of the Company's revised Alcohol and Drug Policy and Procedures cannot be true"*. The Union responded to this allegation in its Reply brief where it maintained that *"...[A]n allegedly dishonest employee can only be found guilty of blameworthy conduct if he or she is found to have lied in order to cover up some kind of inappropriate behaviour"*.

Both experts dealt with the issue of whether the metabolite results from the DriverCheck laboratory test indicates that the grievor, who maintained in his statements to being an infrequent user, was likely to have consumed cannabis subsequent to August 16, 2019. In addition, the experts also commented on whether the dilution documented in



the drug test was an indicator that the grievor had consumed a large amount of water, which in turn could have affected the DriverCheck laboratory result of 22 ng/mL of THC.

Dealing first with whether the grievor consumed cannabis after August 16, 2019, the arbitrator notes the conclusions of both experts on the likelihood of recent cannabis use of an infrequent user whose post-incident drug testing indicates a quantitative level of 22ng/mL marijuana metabolites in a diluted urine specimen. Dr. Snider-Adler concludes in the Summary portion of her report of October 21, 2019 at p. 9:

1. He does not use cannabis frequently and his last use was no more than five days prior to the test (with the knowledge that the average person would only test positive for 88.6 hours – or just over three days)

Dr. Macdonald did not disagree with Dr. Snider-Adler regarding the grievor's last use of cannabis, assuming infrequent use as the grievor himself asserted in his two statements.

As noted above, he states in his August 31, 2020 report at p. 5:

In terms of Dr. Snider-Adler's conclusions regarding when Mr. Masi last used marijuana assuming he is an occasional user, I am also in agreement with her interpretation of existing research. For occasional smokers, THCCOOH levels above 15ng/mL are unlikely to occur beyond a few days after use. Concentration levels at this cut-off could occur for a much longer detection period among daily users.

Dr. Snider-Adler indicated that one could extrapolate from the diluted creatinine and specific gravity levels in his urine that the grievor's THC metabolite levels could be corrected from the actual reading of 22ng/ML to a higher reading of 111.1 ng/mL, based on U.S. Department of Transport regulations. Although Dr. Macdonald agreed with Dr. Snider-Adler that an undiluted sample at the same point in time would result in a higher metabolite concentration, he listed several ways dilution could occur in a urine sample including: working in hot weather, taking a diuretic, or drinking large volumes of fluid. He also states at p. 3 of his August 31, 2020 report that he was "*...unable to find any*

*recommendations from any other source of a formula for providing an estimate of a THCCOOH concentration of an individual using a ratio with creatinine”.*

The arbitrator notes that the grievor was never asked any questions in the October 29, 2019 interview about the “Positive-Dilute” result set out in the DriverCheck laboratory test results of October 2, 2019, as interpreted by Dr. Snider-Adler in her October 21, 2019 report where she addresses the issue of water content in the urine at p. 6:

A positive diluted sample is considered a positive test. However, the quantitative levels would be artificially deflated due to the dilution of the sample. Essentially, the urine sample contains more water content than usual, however not in the range of that of a substituted or unadulterated urine sample.

Given the alternate explanations provided by Dr. Macdonald for a diluted urine sample other than water consumption (i.e. a diuretic, or working in hot weather), and in the absence of any questions being put to the grievor in that regard at his October 29, 2019 interview, I am not prepared to draw the conclusion that the grievor purposely consumed a large quantity of water prior to being drug tested in order to avoid detection of THC metabolites in his urine.

On the other hand, the expert evidence before me indicates recent consumption of cannabis by the grievor, and not some 40 days before as he claimed at his two statements in October 2019.<sup>1</sup> The grievor first indicated to the Medical Review Officer, after the results of the drug test results were disclosed to him, that he had not smoked marijuana prior to September 1, 2019. He then stated at his October 15, 2019 interview

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1. The scientific literature indicates that THC metabolites only leaches, even in a chronic daily user, for up to 30 days. As noted by Dr. Snider-Adler in her report of October 1, 2020 at p. 13 “In summary, after the use of cannabis in an individual who is not a frequent user of cannabis, the studies consistently report short detection windows. Taking into account that Mr. Masi may have used a higher dose of THC reported in these studies, his history of use of cannabis 40 days prior to the test (August 16, 2019 to September 24, 2019) is not consistent with the results reported by the laboratory”.

that he had a marijuana cigarette on August 16<sup>th</sup> and added “*I have not smoked since this date because of the September 1<sup>st</sup> policy*”. The grievor then stated at his October 29, 2019 interview that he could not remember the exact date of August 16, 2019 when he first spoke to the Medical Review Officer, but was later able to pinpoint the exact date after re-tracing his steps and looking at the calendar.

The grievor’s testimony is not only inconsistent with the evidence of recent use, as adduced through expert testimony, but is also undermined by his own reference at his October 15, 2019 interview to the September 1, 2019 policy. The September 1, 2019 policy introduced the 28-day ban prohibiting consumption for 28 days before being on duty, or subject to duty. The grievor stated in that regard:

Q5: Can you please explain in detail the positive result found in the Urine Drug Test that you supplied to the Company?

A5: No, I cannot, the last time I had a marijuana cigarette was on August 16<sup>th</sup>, that I shared with my girlfriend while camping. *I have not smoked since that date because of the September 1<sup>st</sup> policy.*

In my view, an inference can be drawn from the evidence that the grievor’s reference to the August 16, 2019 date was an excuse to avoid being found culpable of violating the 28-day ban set out in the policy. I am reinforced in my view given that the grievor had also mentioned to the Medical Review Officer that he had smoked marijuana prior to September 1, the effective implementation date of the 28-day ban. Clearly, in my view, the September 1, 2019 policy implementation date was at the forefront of his mind when he falsely claimed that the last time he smoked marijuana was on August 16, 2019.

Honesty is a bedrock principle of any employment relationship. All employees are expected to be truthful when questioned about incidents at their investigations. The

grievor, in the arbitrator's view, elected not to come clean during his two statements about the timing of his last use of marijuana in the hopes of avoiding possible disciplinary consequences from violating the 28-day ban.

A disciplinary response is warranted in the circumstances. There must be a clear message sent that misleading answers at an investigation have no place in this or any employment relationship, particularly where safety is so critical. The arbitrator finds that a lengthy suspension is appropriate for the grievor's cavalier answers about the last time he smoked marijuana when those questions were put to him directly at his two interviews.

## **CONCLUSION**

The grievor shall be reinstated to his position without compensation but without loss of seniority. His period between his termination and his reinstatement shall be recorded as a suspension. The arbitrator shall retain jurisdiction should any issues arise out of the implementation of this award.

Dated at Calgary, this 26<sup>th</sup> day of April, 2021



**JOHN M. MOREAU, Q.C.**

**ARBITRATOR**