**AH732**

**IN THE MATTER OF AN AD HOC RAILWAY ARBITRATION**

**BETWEEN**

**CANADIAN SIGNALS AND COMMUNICATIONS SYSTEM COUNCIL NO. 11 OF THE IBEW (IBEW)**

**And**

**CANADIAN PACIFIC RAILWAY COMPANY (CP)**

**S&C Maintainer David Brydson - Termination**

**Date:** August 4, 2021
**Arbitrator:** Graham J. Clarke

**Appearances**

**IBEW:**

| | |
|---|---|
| D. Ellickson | Counsel, CaleyWray, Toronto |
| S. Martin | Senior General Chairman |
| L. Hooper | General Chairman |
| D. Brydson | Grievor |

**CP:**

| | |
|---|---|
| D. Zurbuchen | Manager, Labour Relations – Calgary |
| F. Billings | Labour Relations Manager – Calgary |
| D. Shannik | Manager S&C |
| S. Watkins | T&E Audit Specialist |
| A. Brayman | Asst. Chief Engineer Testing Commission |

Arbitration heard on July 22, 2021 via videoconference.

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# Award

## BACKGROUND

1. On June 30, 2020, S&C Maintainer Brydson derailed his hi-rail truck when he drove through a switch incorrectly lined for his route. CP alleged the derailment occurred because Mr. Brydson had failed to observe the switch's points which were lined against his movement.

2. CP conducted a drug and alcohol test for Mr. Brydson, who occupied a safety sensitive position, which showed marijuana metabolite in his urine. The alcohol and oral swab tests were negative.

3. CP imposed 3 disciplinary measures. First, it terminated Mr. Brydson on the basis that he had violated both CROR Rule G and CP's drug and alcohol policy/procedures (DAPP)[1]. Second, CP terminated Mr. Brydson for his failure to disclose that he had been ingesting prescription cannabis oil nightly since around April 21, 2020.

4. Finally, CP imposed a 20-day suspension for the switch run through and derailment (CP Brief, Tab 4). The parties did not include this third disciplinary measure in this arbitration.

5. CP argued that it had just cause to terminate Mr. Brydson for both incidents. First, it alleged that his test results violated his obligations under both the CROR and the DAPP. Second, it alleged cause due to Mr. Brydson's failure to disclose his nightly use of cannabis oil, despite the DAPP's explicit requirements.

6. The IBEW argued that CP had no cause to test Mr. Brydson for the first incident. Moreover, the lack of a positive oral swab test showed that he had not been impaired at the time of the derail. For the failure to disclose prescribed cannabis, the IBEW argued at best the incident was minor and merited nothing beyond a caution.

[1] The Policy # HR 203 Alcohol and Drug Policy (Canada) and Procedure # HR 203.1 Drug and Alcohol Procedures will be referred to collectively as DAPP unless the context requires otherwise (CP Brief, Tabs 7 and 9).

7. The parties exchanged their Briefs well in advance of the arbitration and completed their arguments in roughly 3 hours.

8. For the reasons which follow, the arbitrator concludes that CP, based on the evidence placed in the Record, did not demonstrate it had reasonable grounds to test Mr. Brydson. Moreover, those results did not demonstrate impairment, which is required before imposing discipline.

9. CP did demonstrate that it had just cause to discipline Mr. Brydson for his failure to disclose his nightly use of prescribed cannabis. However, the arbitrator has replaced the dismissal with a 60-day suspension, given the specific circumstances of this case.

## FACTS

10. CP hired Mr. Brydson on April 30, 2012. He started as a Helper and in 2014 qualified as a Maintainer. He is 60 years old. His disciplinary record contained one 14-day deferred suspension from June 2016 (CP Brief, Tab 4).

11. While on sick leave for an unrelated matter, Mr. Brydson sought assistance from CP's Employee and Family Assistance Program (EFAP) for his insomnia. LifeWorks by Morneau Shepell (LifeWorks) provides EFAP services to CP employees (IBEW Brief; Tab 15). The registered psychologist Mr. Brydson saw recommended a specific type of medical marijuana. A Nurse Practitioner with Avail Cannabis Clinics prescribed the medical cannabis (IBEW Brief; paragraph 9).

12. Mr. Brydson returned to work on or about April 14, 2020. The incident leading to the multiple disciplinary measures occurred on June 30, 2020. While Mr. Brydson was clearing a sub foreman through his track occupancy permit (TOP), he reversed his hi-rail truck. He went through a switch which was incorrectly lined for the route he intended to take resulting in a derailment.

13. CP alleged that Mr. Brydson failed to check the switch to ensure it was set correctly for his movement. Mr. Brydson rerailed his hi-rail truck and informed his supervisor of the incident.

14. CP advised Mr. Brydson it would test him under its DAPP. Two CP managers wrote in their contemporaneous memoranda (CP Brief; Tab 5) that "Dave then advised that he

is on prescribed cannabis pills that may affect the results of the test" and "David then advised us both that he may fail his test as he is on prescribed cannabis pills".

15. The breathalyser test results were negative for alcohol. Mr. Brydson's urine sample tested positive for marijuana metabolite at 167 ng/ml. An oral fluid swab test was negative. Mr. Brydson advised Driver Check that the marijuana metabolites in his urine came from a prescription he had for medical marijuana to treat insomnia (CP Brief; Tab 5 D&A Results).

16. As mentioned, CP issued three disciplinary measures flowing from the June 30, 2020, but the parties placed only two of them before the arbitrator. CP conducted a first investigation interview dealing with the derailment on July 20, 2020. The arbitration Record only contained this document because the IBEW included it in its Brief (IBEW Brief; Tab 3). The arbitrator highlights the following points:

- Mr. Brydson thought the switch was acting unusual. However, he checked it and it "appeared to be in the normal position" (QA 12);

- "As I backed up th truck derailed I noticed the switch was in the reverse position. I rerailed the truck" (sic) (QA 12);

- Mr. Brydson reported the incident to the RTC and contacted an S&C manager (QA 12) though the reporting took place at least an hour after the incident (QA 40-41);

- In answer to the question how he could visually inspect the switch and then immediately drive over it and derail, Mr. Brydson commented "I checked everything. I backed up and the switch may have moved while I was walking back to my truck" (QA 27);

- In answer to a question how in backing up he could meet the requirement for switches[2] which states "track units must approach switch(es) prepared to stop until it can be determined that they are lined for the intended route", Mr. Brydson answered "Before entering the truck I observed the switch was in the normal position. As I reversed I was checking my mirrors to make sure there was nothing in the way. As a reflex I was only moving 50 feet" (QA 34).

17. CP conducted a second investigation interview of Mr. Brydson on July 21, 2020 (CP Brief, Tab 5) which contained the following facts:

[2] Engineering Rule Book – 10.2 Track Unit Operation

- As a maintainer, Mr. Brydson was required to be on call (QA 11);

- Mr. Brydson indicated that he did not receive the amended September 1, 2019 DAPP when he was absent on sick leave and did not know of any changes which had been made (QA 19-25);

- The test results showed i) Breath alcohol test – negative; ii) Oral fluid drug test – negative; and iii) Urine drug test – positive (QA 27);

- Mr. Brydson explained the positive urine test resulted from his medical marijuana prescription (QA 28-36);

- Mr. Brydson indicated he was unaware of a new DAPP requirement[3] at item 3.1.3 which instituted a 28-day cannabis ban prior to being on duty or subject to duty for employees in safety critical or safety sensitive positions (QA 39);

- Mr. Brydson started taking the prescribed cannabis oil sometime between April 14 and 20, 2020 and did so every evening (QA 45).

18. CP's third investigation interview occurred on July 22, 2020 (CP Brief, Tab 6). The main points were:

- Mr Brydson acknowledged that he had not advised either his manager or CP's Occupational Health department about his medical cannabis prescription and consumption (QA 15-16);

- He acknowledged the requirement at Item 3.1.3 of Policy HS 203.1 which dealt with the obligation to disclose the use of medical marijuana (QA 17);

- An individual at LifeWorks recommended medical cannabis. The nurse practitioner who prescribed it worked at the Avail Cannabis Clinic (QA 19);

19. On August 11, 2020, CP issued the two Form 104s (CP Brief, Tab 1). The first Form 104 dismissed Mr. Brydson for violating CROR Rule G as well as the DAPP. The second Form 104 dismissed Mr. Brydson for the non-disclosure of his prescribed medical marijuana.

20. On September 17, 2020, the IBEW grieved Mr. Brydson's two dismissals (IBEW Brief, Tab 10). The IBEW noted that it was the EFAP counsellor who suggested medicinal Cannabidiol (CBD) to Mr. Brydson. Similarly, it alleged that CP had never made Mr.

[3] The parties agreed this requirement came from the September 1, 2019 DAPP amendments.

Brydson aware of its September 1, 2019 DAPP changes, which included the 28 day Cannabis ban. Moreover, it contested that CP had no proper grounds for DAPP testing under either “reasonable suspicion” or “post incident testing”.

21. The IBEW’s grievance also noted that the evidence did not prove impairment. It further argued that Mr. Brydson should not be disciplined for following the recommendations of CP’s own EFAP provider for medicinal cannabis. Mr. Brydson expressed his remorse and indicated he had ceased using the prescribed marijuana oil.

22. CP did not respond to the IBEW’s Step 2 grievance. The IBEW referred the matter to arbitration (IBEW Brief; Tab 11).

23. The IBEW asked CP to identify the specific areas of the DAPP which it alleged Mr. Brydson had violated (IBEW Brief, Tab 7). CP merely sent new copies of the two Form 104s. After being obliged to dig through the materials to decide this point, the arbitrator is satisfied that the Record, including the investigation interviews, identify the DAPP areas in issue. This is not a case where an employer has added a completely new ground for the discipline or dismissal. If that had occurred, the arbitrator would not consider the newly added grounds[4].

## ISSUES

24. The arbitration raises the following issues for determination:

1. Did CP have cause to test Mr. Brydson and, if so, dismiss him based on the results? and

2. Did CP have cause to dismiss Mr. Brydson for working without disclosing his medical marijuana prescription?

25. The arbitrator will deal with each issue in the above order.

[4] International Brotherhood of Electrical Workers System Council No. 11 v Canadian National Railway Company, 2021 CanLII 41839 at paragraphs 27-35.

## ANALYSIS AND DECISIONS

26. This award is as much about evidence, or lack thereof, as it is about the appropriate legal conclusions. For whatever reason, CP did not provide a detailed response to some of the key issues that the IBEW raised. The fact that the parties are scheduling an arbitration to deal with CP's DAPP, or that the arbitrator is not seized with one of the three grievances arising from Mr. Brydson's June 20, 2020 derail incident, does not relieve CP of the obligation to respond to the IBEW's legal arguments.

27. Alcohol and drug testing policies, and their application, are among the most current and challenging labour cases today[5].

28. The IBEW clearly put CP on notice that it would contest the decision to test Mr. Brydson. The Step 2 grievance clearly spelled this out. CP did not respond to the Step 2 grievance. The IBEW also raised the testing issue in its ex parte statement and in its Brief. The parties exchanged Briefs more than one week before the arbitration.

29. The IBEW also clearly highlighted its position that a positive urine test did not show impairment and that CP had not brought the 2019 DAPP changes to Mr. Brydson's attention.

30. Evidently, an arbitrator can only decide cases based on the evidence in the Record as will be expanded upon below.

### Did CP have cause to test Mr. Brydson and, if so, dismiss him based on the results?

31. The arbitrator concludes that CP did not demonstrate it had grounds to test Mr. Brydson and, moreover, it also failed to prove impairment.

[5] See, as just a few recent examples, International Brotherhood of Electrical Workers, Local 1620 v Lower Churchill Transmission Construction Employers' Association Inc., 2020 NLCA 20, Amalgamated Transit Union, Local 113 v Toronto Transit Commission, 2017 ONSC 2078; Ottawa Macdonald-Cartier International Airport Authority v Ottawa Airport Professional Aviation Fire Fighters Association, 2021 CanLII 44861; Saskatchewan Health Authority v Health Sciences Association of Saskatchewan, 2020 CanLII 25719; and Office and Professional Employees International Union v Cougar Helicopters Inc., 2019 CanLII 125448;

**Did CP have cause to test Mr. Brydson?**

32. CP did not justify its decision to test Mr. Brydson.

33. The facts surrounding Mr. Brydson's derail are relevant to this arbitration, even though the 20-day suspension is not before the arbitrator. CP did not include Mr. Brydson's investigation interview for the derail in its Brief, but the arbitrator did find it in the IBEW's materials. Neither party led any oral evidence at the hearing about an S&C Maintainer's work which might have provided further helpful context surrounding Mr. Brydson's derail.

34. The Supreme Court of Canada has summarized generally when an employer can randomly test for drugs and alcohol and the need for reasonable grounds or reasonable cause[6]:

> [5] This approach has resulted in a consistent arbitral jurisprudence whereby arbitrators have found that when a workplace is dangerous, **an employer can test an individual employee if there is reasonable cause to believe that the employee was impaired while on duty, was involved in a workplace accident or incident, or was returning to work after treatment for substance abuse**. In the latter circumstance, the employee may be subject to a random drug or alcohol testing regime on terms negotiated with the union.
>
> …
>
> [45] But, as previously noted, the fact that a workplace is found to be dangerous does not automatically give the employer the right to impose random testing unilaterally. **The dangerousness of the workplace has only justified the testing of particular employees in certain circumstances: where there are reasonable grounds to believe that the employee was impaired while on duty, where the employee was directly involved in a workplace accident or significant incident, or where the employee returns to work after treatment for substance abuse.** It has never, to my knowledge, been held to justify random testing, even in the case of "highly safety sensitive" or "inherently dangerous" workplaces like railways (Canadian National) and chemical plants (DuPont Canada Inc. and C.E.P., Loc. 28-O (Re) (2002), 105 L.A.C. (4th) 399), or even in workplaces that pose a risk of explosion (ADM Agri-

[6] Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd., 2013 SCC 34.

> Industries), in the absence of a demonstrated problem with alcohol use in that workplace. That is not to say that it is beyond the realm of possibility in extreme circumstances, but we need not decide that in this case.
>
> (Emphasis added)

35. An accident, by itself, is usually not enough to justify testing. In *Saskatchewan Health Authority v Health Sciences Association of Saskatchewan*[7], Arbitrator Ish summarized some of the general principles in this area:

> 68. Past arbitration awards disclose the following with respect to the post-incident justification for mandatory testing:
>
> • The fact of an accident, near miss or other potentially dangerous incident is not, of itself, sufficient reason to breach an employee's right to privacy. There must be more than an accident, near miss or potentially dangerous incident to justify an alcohol and drug test. (Suncor 2008 para. 92)
>
> • There must be more at stake than trivial damage absent other issues such as an injury or serious injury concern. (Fording Coal 2003 para. 124)
>
> • A statement that any property damage will suffice and that no thresholds apply goes too far. (Weyerhaeuser 2006 para. 170)
>
> • The amount of damage done or the magnitude of the incident must remain a factor to be weighed (Weyerhaeuser 2006 para. 176)
>
> • There must be sufficient gravity to the event in a near miss (where, by definition, there is no damage) to justify mandatory testing – serious damage must almost have occurred (Weyerhaeuser 2006 para. 176)
>
> • It is necessary to investigate whether the actions or omissions of the employee contributed to or caused the accident. (Weyerhaeuser 2012)
>
> • The investigation must incorporate the employee's explanation of the incident. (Weyerhaeuser 2012)

36. CP's DAPP is alive to these important principles. The IBEW cited the post incident testing principles and examples CP included in its DAPP[8]:

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[7] 2020 CanLII 25719

[8] Different numbering appears in the 2019 DAPP compared to earlier versions. However, the description of "post incident testing" appears to be the same: IBEW Brief Tab 12 and CP Brief Tab 7.

5.2.2 Post Incident Testing

**Post Incident alcohol and drug testing *may* be required after a significant work related incident, a safety related incident or a near miss as part of an investigation**.

Employees are expected to participate fully in an investigation. Failure to report an incident is a violation of the Canadian Internal Control Plan for Incident Reporting.

**A significant work related incident, safety related incident or near miss may involve any one of the following**:

• a fatality;

• any number of serious injuries or multiple injuries to Company personnel or the public requiring medical attention away from the scene or lost time injuries to Company personnel; or an incident or near miss that creates this risk;

• significant loss or damage to Company, public or private property, equipment or vehicles or an incident or near miss that creates this risk;

• an incident with serious damage or implications to the environment, or an incident or near miss that creates this risk.

**The decision to refer an individual for testing will be made by the Supervisor investigating the incident after consultation with and agreement of an Experienced Company Operating Officer (ECOO), i.e. Senior Vice President (SVP), Assistant Vice President, (AVP), General Manager (GM), Superintendent, Director or Chief Engineer. Unionized employees will be entitled to union representation provided this does not cause undue delay**.

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

(Emphasis added)

37. The IBEW then argued in its Brief that CP failed to justify its decision to test Mr. Brydson given the terms of the DAPP:

37. The “incident” on Jun 30, 2020 was not a “significant work related incident, a safety related incident or near miss”. There were no injuries (let alone a

> "fatality" or "serious or multiple injuries"); no loss or damage to Company property or equipment (let alone "significant loss or damage"); and no impact whatsoever to the environment (let alone "serious damage or implications to the environment").
>
> …
>
> 39. Further, it does not appear that the Company engaged in consideration or investigation of the incident prior to demanding the Grievor undergo testing (and certainly no evidence of the steps leading to the decision to demand a test was entered at any of the Grievor's three (3) statements). Rather, it appears the Company simply, as a matter of course, made the demand to test. In the Union's very respectful submission far more is required of the Company to support such an intrusion into an employee's privacy and dignity.

38. Given the arbitration Record, the arbitrator agrees with the IBEW. The Record before the arbitrator does not contain the evidence relied on to support CP's decision to test Mr. Brydson. Situations exist where testing may be obvious, but this case is not one of them.

39. Arbitrators consider the parties' evidence when determining if reasonable grounds for testing exist. In CROA 4256, Arbitrator Picher considered not only CN's conclusion regarding testing, but the reasoning process leading to it[9]:

> It is of interest, as stressed by counsel for the Union, to note that there was nothing suspicious suggested in the Reasonable Cause/ Post Incident Report Form filled out by Trainmaster Cheema. In that form under "behaviour observed" he noted the grievor's speech, balance / walking and eyes all to be "normal". He made a similar assessment of the grievor's mood / behaviour as well as the condition of his skin and the level of his awareness. **In the result, on the face of the report form there is nothing unusual or irregular reported with respect to the actions or conditions of the grievor as observed by Trainmaster Cheema**.
>
> …
>
> **What the material before the Arbitrator establishes is that a collision occurred in the yard while the grievor was on duty as Yardmaster. With respect, that of itself does not justify requiring an employee to undergo a drug and alcohol test in the wake of a collision or other accident. There is no evidence to suggest that the Company's officers who conducted the**

[9] See also CROA 4726

> **preliminary investigation of the collision believed or had reason to believe that any act or omission of the grievor contributed to the collision which occurred**. There is no suggestion that there was anything improper in his having placed a consist of cars in NF-52 or that he was under any particular obligation to alert yard crews about the presence of cars in that track. Nor, as noted above, was there anything to suggest to the Company's supervisors that Yardmaster M was in any way involved in the minute to minute operations of the yard movement which became involved in the collision due to the apparent carelessness of its locomotive engineer.
>
> (Emphasis added)

40. A consideration of when reasonable grounds exist for testing comes before arbitrators in many different contexts. In *GCT Canada Limited Partnership v International Longshore And Warehouse Union Ship & Dock Foremen, Local 514*[10], Arbitrator Sullivan focused on the parties' evidence when concluding if reasonable grounds existed to suspect impairment:

> In arriving at my conclusion, I accept that whether there is or is not reasonable cause to require an employee to undergo drug and alcohol testing is a decision that inevitably involves a degree of subjectivity, and some degree of deference must be given to supervisors who exercise that judgment in a real-life context that is often time- sensitive. The fact that the Grievor passed his drug and alcohol test does not in itself confirm whether reasonable grounds exist for a test. **However, in the present case the evidence does not support a conclusion that the observations of Mr. Shawaga and Mr. Smith were reasonably accurate and were such to raise a reasonable question as to whether Mr. Hietanen was to some degree impaired by alcohol**.
>
> (Emphasis added)

41. In the instant case, the IBEW contested the grounds for testing. CP did not provide the evidence on which it based its conclusion to test. CP's Brief contains memoranda from managers (CP Brief, Tab 5), but the testing seemed already to be a foregone conclusion. Those memoranda refer to "incident drill down" and "an incident form", but those documents, if they exist, are not in the Record before the arbitrator.

[10] 2020 CanLII 108870

42. In the absence of such evidence, and given that the incident, albeit involving a switch and a hi-rail derail, appears to fall at the far end of the severity spectrum, CP did not demonstrate it met its DAPP criteria to test Mr. Brydson[11].

43. In any event, even if CP had demonstrated that testing was appropriate, the evidence did not show impairment.

**CP provided no evidence that Mr. Brydson was impaired**

44. The current arbitral case law consistently holds that a positive urine test, but a negative oral swab test, do not demonstrate impairment. Arbitrators have consistently required evidence of impairment in these cases. The arbitrator examined this standard recently in AH706[12] by distinguishing between impaired and non-impaired cases.

45. AH706 also involved an employer policy prohibiting the use of cannabis. The trade union argued, as the IBEW did here, that that recent policy change had never been brought to the employee's attention:

> 10. BTC amended the Policy in 2018. **The TCRC highlighted that BTC never provided Mr. Ouimet with the 2018 amendment to the Policy on which it had relied in support of termination. The 2018 Policy prohibited employees in safety sensitive positions from using drugs like cannabis at any time, even when off work**:
>
> > 4.3. Il est totalement interdit à tout employé ou non-employé occupant un Poste/tache où la sécurité constitue un élément essentiel de faire usage de toute Drogue, y compris le cannabis, en tout temps, même si l'employé ou non-employé n'est pas Au travail ou sur les Lieux de travail, sous réserve du sous-paragraphe 4.6 de cette Politique. (sic)
>
> (Emphasis added)

46. CP did not demonstrate that it had brought to Mr. Brydson's attention the amended 2019 policy. But even if it had, AH706 also noted that arbitrators have not upheld this type of policy rule which fails to focus on impairment (Footnotes omitted):

[11] See also CROA 4754.
[12] Bombardier Transportation Canada Inc. v Teamsters Canada Rail Conference, 2020 CanLII 53040

28. BTC argued at paragraph 54 of its Brief that its Policy allows it to terminate employees regardless of whether they were impaired at work:

> As in Tolko and Elk Valley, the Grievor in the present matter was in a safety sensitive environment and he knew he should not do drugs. **Bombardier submits that the central consideration leading to the Grievor's dismissal, was not whether he was impaired, but rather that he breached the Alcohol and Drug Policy, in an environment where such a breach can result in dangerous consequences**.
>
> (Emphasis added)

29. Railway case law has focused on whether an employee was impaired. But this focus is not wholly separate from the consideration of a unilaterally imposed employer drug and alcohol policy. The two are linked, as noted in SHP 530:

> The real conflict between the Company's drug and alcohol policy and the collective agreements of both the Union and the Intervener is the contradiction between substantial parts of the language of the policy and the just cause provisions of the agreements. For example, at p. 20 of the policy the Company states that "presence in the body … of illegal drugs is prohibited while on duty". **At page 16 of the policy employees are advised that any violation of the policy by an employee in a risk sensitive position "… will result in dismissal". 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. More specifically, it cannot, standing alone, establish impairment while an employee is on duty, is subject to duty or is on call. In that context, if parsed literally, the rule expounded by the employer is that if an employee has ingested an illegal drug, for example marijuana, during a scheduled leave or holiday, and tests positive some weeks later, he or she will be discharged. In the Arbitrator's view, that rule is unreasonable on its face as there is no nexus between a positive drug test, standing alone, and impairment while on duty**. So construed the rule would purport to regulate the private morality of employees, without reference to any clearly demonstrated legitimate employer interest.
>
> Under the collective agreements, which contain extensive provisions for the investigation of disciplinary infractions, employees are to be discharged or disciplined only for just cause. **To the extent that the policy stipulates that for unionized employees a positive drug test is, of itself, grounds for discipline or discharge, it must be found to be unreasonable, and beyond the well accepted standards of the KVP decision**.

> 30. It is for this reason that CROA case law can be placed in two distinct categories: “impaired” and “unimpaired”.

47. As noted in AH706, arbitrators adopt a rebuttable presumption that termination is the appropriate penalty if an employer demonstrates that an employee worked or was subject to duty while impaired:

> 31. CROA jurisprudence regularly imposes significant sanctions, including a rebuttable presumption of termination being the appropriate penalty, for a railway industry employee who works when impaired through drugs or alcohol. Cases have also noted the importance of deterrence.

48. But employers do not meet this burden for showing impairment based solely on a urine test, especially when the oral swab test comes back negative:

> 35. BTC referenced CROA&DR 4527 as support for its decision to terminate Mr. Ouimet for cause. The difficulty with that reliance is that that decision falls within the “impaired” category of cases. Arbitrator Flynn highlights that key factual point:
>
> > The Grievor provided a urine sample which tested non-negative in a point of collection test and thus had to also provide an oral fluid sample. Both samples were sent to Driver Check, Physical Exams and Drug Testing for further and more detailed analysis.
> >
> > On January 26, the results came back, **the Grievor’s samples tested positive and indicated recent use of marijuana and impairment at the time of the incident**.
> >
> > (Emphasis added)
>
> 36. 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.

49. CP did not demonstrate that Mr. Brydson worked while impaired. His oral fluid test came back negative. Based on existing case law, and in the absence of any medical

evidence impacting those longstanding principles regarding impairment, CP had no just cause to impose discipline.

## Did CP have cause to dismiss Mr. Brydson for working without disclosing his medical marijuana prescription?

50. Complex recent decisions have explored the issue of a potential or current employee working in a safety sensitive position while on prescribed medial marijuana.

51. The Newfoundland Court of Appeal, in three separate sets of reasons, one in dissent, recently examined the challenges medical marijuana presents in *International Brotherhood of Electrical Workers, Local 1620 v Lower Churchill Transmission Construction Employers' Association Inc.*[13]. The reasons of Welsh, J.A. set out the context for the Court reviewing an arbitrator's decision which had found that the employer could not accommodate the grievor without undue hardship:

> [1] The International Brotherhood of Electrical Workers filed a grievance on behalf of one of its members who was refused employment when he failed to pass a drug test. The grievor, a general labourer, had disclosed that he used medically authorized cannabis to manage chronic pain. The focus of this appeal is the employer's duty to accommodate the grievor's disability.
>
> [2] The proceedings began with a hearing in which a labour arbitrator concluded that, while the grievor had been discriminated against, the employer was not able to accommodate the grievor without undue hardship. Accordingly, the grievance was denied. An application for judicial review of the arbitrator's decision, brought by the Union, was dismissed. The Union appeals that decision.

52. A majority of the NLCA returned the matter to the arbitrator on the basis that the full accommodation analysis had not been conducted. For example, Welsh, J.A. concluded:

> [36] The conclusion follows that the arbitrator's decision was unreasonable insofar as he failed to address the employer's onus to establish that to accommodate the grievor by means of individual assessment of his ability to

[13] 2020 NLCA 20

> perform the job safely, regardless of the absence of a scientific or medical standard, would result in undue hardship.

53. In concurring reasons, Butler J.A. concluded:

> [85] Instead, this case deals with no more than the right to be accommodated subject to undue hardship; it does not decide that the grievor had the right to be hired. The discrimination in this case lies not in the refusal to give the grievor the job for which he applied, "but in the refusal to even permit him to attempt to demonstrate that his situation could be accommodated without jeopardizing" the employer's goal of reasonable site safety. This decision stands for the proposition that employers subject to the Human Rights Act, 2010 "must adopt standards that accommodate people with disabilities where this can be done without sacrificing their legitimate objectives and without incurring undue hardship" (Grismer, at paragraph 44).

54. The recent award of Arbitrator Ish in *Gibson Energy (Moose Jaw Refinery Partnership) v Unifor, Local (Mike Chow)*[14] (*Gibson Energy*) examined multiple issues including drug and alcohol testing and an employee's failure to disclose a prescription for medical marijuana. The arbitrator held a 6-day Zoom hearing given the complexity of the issues. Arbitrator Ish concluded the employer did not have grounds to test the employee, given the facts of that case, and that the employee had failed to disclose his prescription for medical marijuana.

55. Despite Arbitrator Ish agreeing with the employer that the employee's actions in obtaining the prescription were intended to obscure the investigation, he reduced the dismissal to a six-month suspension given the facts of that case. Arbitrator Ish commented as follows regarding an employee's obligation to disclose a medical marijuana prescription when working in a safety sensitive position:

> [95] **The prescription for marijuana for two grams per day for an employee working in a safety-sensitive position is clearly a matter that must be revealed to the employer**. **This should have been done by the grievor on or about February 18, 2020 when he received the prescription rather than two or three weeks later in his conversation with Mr. Cust. The mitigating factor, as argued by the union, is that the grievor was not working during that time because he was on an employer-imposed leave of absence**. The leave of absence does not release the grievor from his employment obligations;

[14] 2021 CanLII 16446

> thus, the failure to reveal the prescription at the earliest opportunity is a breach of the policy. It may still have been important for the employer to have this information because there was an ongoing investigation. **The suspicion of the employer is that obtaining a prescription for marijuana, while there was an ongoing investigation because he tested more than the policy's concentration limits, was intended to further obscure the investigation. Also, the grievor was undergoing an assessment by Homewood Health at that time. The employer's suspicion is one that I share**.
>
> (Emphasis added)

56. While neither party referred to it in their Briefs, the recent Supreme Court of Canada decision in *Oak Valley*[15] has a peripheral relevance to the issue of disclosure, as noted by Arbitrator Ish[16]:

> [79] In Elk Valley 2012 the Court inferentially endorsed a current link between an employee's work performance and the use or abuse of alcohol or drugs to justify a requirement to disclose. The issue of disclosure was not the primary issue before the Court, or the lower tribunals. A perusal of the decision of the Alberta Human Rights Tribunal, 2012 AHRC 7, the Court of Queen's Bench appeal decision, 2013 ABQB 756 and of the decision of the Supreme Court of Canada does not disclose the wording of the policy in issue that required disclosure. However, the employee's failure to disclose was the failure to disclose his current use of drugs and the impact it was having on his work. The Supreme Court said at para. 32: "The Tribunal found, based on the evidence before him, that Mr. Stewart was terminated 'due to the failure of Mr. Stewart to stop using drugs and failing to disclose his use prior to the accident'." The Alberta Human Rights Tribunal at para. 122 said, "…he chose not to stop his drug use or disclose his drug use".

57. Mr. Brydson advised CP prior to any testing that he would likely fail a test due to his use of medical cannabis. The arbitrator also agrees with Arbitrator Ish's comments in *Gibson Energy* regarding the "fruit of the poisonous tree" argument despite testing later being found to be unreasonable:

> [87] The union argued that if the imposition of the February 10th test was improper (as I have found it to be), that nothing flowing from it should be valid. **This argument is a variation of the so-called "fruit of the poisonous tree"**

[15] Stewart v. Elk Valley Coal Corp., 2017 SCC 30
[16] Saskatchewan Health Authority v Health Sciences Association of Saskatchewan, 2020 CanLII 25719

> **doctrine, which is a legal metaphor to describe evidence that is obtained illegally. The logic of the terminology is that if the source (the "tree") of the evidence or evidence itself is tainted, then anything gained (the "fruit") from it is tainted as well**. This applies in criminal law in the United States and to some extent in Canada. **However, in my view, it is not determinative in employment and labour law. While the imposition of an improper test by an employer is a significant factor, it does not relieve an employee from the important and ongoing responsibility to be forthright and honest in their relationship with the employer.** The alleged dishonesty of the grievor was relied upon by the employer in the termination letter and ultimately in its final submissions. It is to these allegations I will now turn and in that context will also deal with the breaches of the policy also relied upon to justify the termination of Mr. Chow.
>
> (Emphasis added)

58. CP's DAPP requires employees to disclose if they take medical cannabis. The 2018 DAPP, which Mr. Brydson knew about, read (CP Brief, Tab 9):

> 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.

59. The contested 2019 DAPP (CP Brief, Tab 7) reads:

> Employees who choose to access cannabis for medical purposes are required to disclose this proposed use though the Disability Management Policy #4100 and Procedure #5100 and receive written authorization prior to using cannabis at a time or manner that could affect their fitness to work. Employees who fail to properly disclose their use of medical cannabis will be subject to an investigation, and to discipline up to and including dismissal.

60. The IBEW argued that the testing evidence demonstrated that Mr. Brydson was not impaired and therefore had not violated CP's DAPP (IBEW Brief, paragraphs 47-49). The issue, however, is not impairment but instead concerns a safety sensitive and "on call" employee who failed to disclose a prescription for medical marijuana despite using the drug every evening from, at the latest, April 20, 2020.

61. Based on this information, CP noted that prior to the June 30, 2020 incident, Mr. Brydson had “ingested cannabis oil on forty-nine (49) separate occasions while he was on call and subject to duty and called out on seven (7) of those occasions” (CP Brief, paragraph 29).

62. In the alternative, the IBEW suggested that Mr. Brydson obtained his prescription for medical marijuana on the advice of CP’s “own EFAP counsellor” (IBEW Brief; paragraph 50). The IBEW did not convince the arbitrator that the EFAP process, which is confidential and not conducted by CP itself, somehow absolves Mr. Brydson from complying with his obligations under the DAPP.

63. CP had just cause to discipline Mr. Brydson for his failure to disclose his prescription for medical marijuana and his consistent use, despite working in a safety sensitive position and being regularly “on call”. The issue becomes whether the arbitrator should modify the penalty of dismissal which CP imposed.

64. Given the overall context of this case, including the unreasonableness of the original drug testing, the arbitrator has decided to substitute a 60-day suspension for the dismissal. Mr. Brydson’ failure to disclose is not a trivial event which would warrant just a caution, as the IBEW requested at the hearing. It is a serious policy violation which put everyone, including Mr. Brydson, at potential risk. Fortunately, no event occurred.

65. A safety sensitive employee’s failure to disclose the use of prescribed medical marijuana prevents CP from conducting its crucial analysis about potential safety issued. It may also jeopardize an employee’s entitlement to accommodation in circumstances which would otherwise require it.

66. The arbitrator has considered Mr. Brydson’s length of service and his relatively clean disciplinary record. Unlike the situation in *Gibson Energy*, Mr. Brydson showed candour throughout, albeit after finding himself in a situation where he knew he was going to be tested. Mr. Brydson apologized, immediately stopped using medical marijuana and has found other ways to deal with his insomnia.

67. The parties did not raise any railway cases on the specific issue of disclosure of prescribed marijuana. If this is the first such case, then the parties can analyze the issue in greater detail in future cases, if any, including the appropriate penalty for violations of

the DAPP. CP's DAPP notes that a failure to disclose may lead to "discipline up to and including dismissal".

## DISPOSITION

68. For the reasons expressed in this decision, the arbitrator overturns Mr. Brydson's dismissals. CP did not demonstrate it had grounds to test Mr. Brydson.

69. Moreover, CP, despite knowing of the arbitral jurisprudence and the need to show impairment, did not provide any evidence suggesting that standard no longer applies. The fact that another arbitration will examine its DAPP in detail does no relieve CP of its obligation in Mr. Brydson's case to demonstrate that it had just cause to discipline him based on the results of his urine test alone.

70. However, CP did demonstrate it had just cause to discipline Mr. Brydson for his failure to disclose his prescription for medical marijuana. Despite taking it every evening, he still worked in a safety sensitive position and was on call during this period. The arbitrator has substituted a 60-day suspension for the termination CP imposed for Mr. Brydson's failure to disclose his prescription for medical marijuana.

71. The arbitrator orders CP to reinstate Mr. Brydson in his position with full compensation, other than for the 60-day suspension. The arbitrator remains seized for any issues arising from this award.

SIGNED at Ottawa this 4th day of August 2021.

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Graham J. Clarke
Arbitrator