IN THE MATTER OF AN ARBITRATION
(AH 737)

BETWEEN:

TEAMSTERS CANADA RAIL CONFERENCE
(Maintenance of Way Employees Division)

(the "Union")

AND

CANADIAN PACIFIC RAILWAY

(the "Company")

RE: Grievance of Hugues Chabot

ARBITRATOR: John M. Moreau QC

Appearing for The Union:

David Brown -Counsel, TCRC-MWED
Wade Phillips -President, TCRC-MWED

Appearing for The Company:

Francine Billings - Labour Relations Manager
Ivette Suarez - Labour Relations Officer

A hearing was held on August 26, 2021 (Virtual)

DISPUTE:

Claim on behalf of Mr. Hugues Chabot (Union file 14-608)

JOINT STATEMENT OF ISSUE:

On April 10, 2018, the Grievor, Mr. Hugues Chabot, attended an investigation in relation to a positive drug test. The Grievor was subsequently dismissed on April 25, 2018 as a result of testing positive in his oral fluid and urine drug tests supplied on November 15, 2017. A grievance objecting to the dismissal was filed on April 27, 2018.

Subsequently, the Grievor accepted a Conditional Offer of Reinstatement on Last Chance Terms on July 10, 2018. On September 27, 2018, the Grievor failed his return to work urine substance test and as a result the Union was informed by Company that the Grievor remained dismissed.

The Union contends that:

1. The July 10, 2018 RTW Agreement settled the dismissal of April 25, 2018. A failed substance test after the signing of the RTW Agreement on September 27, 2018 could not properly result in the grievor "remaining dismissed."

2. Section 9 of the RTW provided that only a "fair and impartial investigation" could determine whether a violation of the RTW had occurred, and not simply the opinion of an LRO. No such investigation ever occurred. The grievor simply remained dismissed. This violated the RTW.

3. Despite the fact that the Union and the Company settled the grievance in this case by entering into the July 10, 2018 RTW Agreement, the Company unilaterally reneged on that resolve by unjustifiably and unilaterally concluding without investigation that the grievor remained dismissed long after the fact.

The Union requests that:

The Company be ordered to reinstated the grievor into active service immediately without loss of seniority and with full compensation for all wages and benefits lost as a result of this matter.

Company Position:

1. The Company denies the Union’s contentions and declines the Union’s request.

2. The Grievor tested positive in his urine and oral fluid samples on November 15, 2017 and was subsequently dismissed. As an act of managerial leniency, the Company offered the Grievor an Offer of Reinstatement on Last Chance Terms and he, with Union endorsement, accepted on July 12, 2018.

3. As per item 1.e of his reinstatement agreement, the Grievor must pass a return to work substance test prior to before return to service takes place.

4. As per item 2. of his reinstatement agreement, the Grievor must comply with and meet the terms and conditions above before being returned to service and any of the terms and conditions below are applicable.

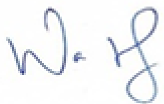
5. The Company maintains that due to the Grievor’s positive return to work drug test he failed to comply with item 1.e of his offer of reinstatement on last chance terms. As he failed to comply with item 1.e, item 2. of his agreement was not met and therefore the remainder of the clauses are not applicable.

6. Notwithstanding the Company’s position above, item 5. of the Grievor’s clearly states that any positive test during the term of this clause will be consider a violation of this Agreement.

7. The Company maintains that the Grievor failed to comply with the terms and conditions of his reinstatement agreement on last chance terms and therefore rightfully remained dismissed.

8. In addition, item 10, of the Grievor’s agreement states that there shall be no grievance advanced in respect to this agreement. As such, the Union has improperly filed a grievance regarding the same.

FOR THE UNION:



Wade Phillips
President
TCRC MWED

FOR THE COMPANY:

Dave Guerin
Managing Director, Labour Relations
Canadian Pacific

AWARD

BACKGROUND

The grievor entered into the service of the Company in April 2012 as an Extra Gang Labourer in the Engineering Services Department. At the time of his dismissal, he was working as a Track Maintainer Truck Driver, a Safety Sensitive Position in the St. Luc subdivision in Québec. Employees occupying a Safety Sensitive Position, as the Company notes, must be both physically and mentally fit and report to work in a condition that enables them to safely and effectively perform their duties.

The grievor tested positive in his oral and fluid samples for marijuana and amphetamines after an incident on November 15, 2017 involving his failure to obtain a track permit. The grievor attended an investigation concerning his failed substance tests on December 27, 2017 and then a supplementary investigation on April 10, 2018. The grievor admitted to smoking marijuana while subject to duty at his investigation on December 27, 2010. In his supplementary investigation, on April 10, 2018, the grievor also admitted to taking amphetamines. The grievor was subsequently dismissed on April 27, 2018.

The grievor entered into a "Offer of Last Chance Reinstatement Agreement ("the Agreement") on July 10, 2018. One of the terms of the Agreement was that the grievor was required to pass a substance test before his return to work went into effect. On

November 9, 2018 the Union was notified in an email that states: *"As per our conversation Mr. Chabot has not complied with his reinstatement agreement dated July 18, 2018. As a result Mr. Chabot remains dismissed".*

THE REINSTATEMENT AGREEMENT

WITHOUT PREJUDICE WITHOUT PRECEDENT

July 10, 2018

VIA EMAIL

Mr. Patrick Gauthier
Director, Atlantic Region
TCRC MWED

RE: OFFER OF LAST CHANCE REINSTATEMENT AGREEMENT
Hugues Chabot (#975517)

Dear Mr. Gauthier:

This is further to the dismissal of Mr. Chabot in connection with the events surrounding his violation of the Canadian Pacific Policy OHS 4100 ALCOHOL & DRUG POLICY and as evidenced by the positive result of Mr. Chabot's Substance test on November 15, 2017. The Company views that it had just cause to terminate the employment of Mr. Chabot.

While the Company considers it had every right to terminate the employment of Mr. Chabot the company is willing to offer Mr. Chabot continued employment on certain terms and conditions, including that this is a last chance for Mr. Chabot to prove his redeemability as an employee. Should Mr. Chabot wish to continue his employment with the Company, he will be required to comply with the following terms and conditions:

1. Before return to service takes effect Mr. Chabot must:

    a. Contact Health Services (Cathy Liu @ 403-319-6811) within one week of the signing of this agreement to commence his return to work or this Agreement will be considered null and void.

    b. Submit to a Safety Sensitive medical assessment, which may include a return to duty substance test, and any other medical assessment deemed necessary under the terms and conditions directed by the Health Services Department (HS). This may include a Substance Abuse Professional (SAP) assessment or an Addictions Medicine Physician (AMP) assessment in compliance with the Fitness to Work Medical Policy &

Procedure. Arrangements for these assessment(s) will be made as soon as possible through HS.

c. Comply with any medical requirements HS determines to be necessary.

d. Be determined to be medically fit to return to service in a Safety Sensitive position by the Chief Medical Officer or his designate.

e. Pass a return to work substance test.

2. Mr. Chabot must comply with and meet the terms and conditions prior to his return to work. The terms and condtions below are also applicable.

3. Mr. Chabot must comply with and meet the terms and conditions above before being reinstated to service in a safety sensitive position.

4. Once the terms and conditions above have been complied with, subject to the terms and conditions below, arrangements will be made for the return to service of Mr. Chabot.

5. In addition to any terms and conditions arising from the above, the employment of Mr. Chabot will be subject to the following additional terms and conditions:

a. Before reinstatement to active service Mr. Chabot will be required to successfully complete a screening interview with his local manager concerning his ongoing employment. The purpose of this interview will be to review the Company's ongoing performance expectations regarding the return to work of Mr. Chabot and to provide full understanding and clarity regarding these expectations. If he wishes, an accredited representative may accompany Mr. Chabot to this interview.

b. Mr. Chabot shall strictly comply with all of Company's policies, procedures and work practices, including, without limitation:

i. Alcohol & Drug Policy & Procedure
ii. Canadian Rail Operating Rules
iii. The Book of Engineering Employees
iv. Engineering Safety Rule Book
v. SPC 41 M/W Rules and Instructions

c. Before a resumption of active service is recommended for Mr. Chabot will be required to successfully complete any necessary training and/or rules re-qualification. Mr. Chabot is entitled to compensation and/or expenses associated for such training and requalification activities only if he successfully passes all requalification examinations.

d. Mr. Chabot shall be restricted to performing Track Labourer or Trackman duties for a minimum period of one (1) year as of the date of his return to work. This one (1) year period will be extended by a period equal to that during which he is not in active service with the Company. After Mr. Chabot has completed one (1) year of his restricted position the Vice President of Engineering and the Union will jointly review

Mr. Chabot current performance to determine whether he is able to resume his original position.

e. Mr. Chabot will be subject to Mandatory unannounced substance testing for a minumum period of two (2) years as of the date of his return to work. This two (2) year period will be extended a period equal to that during which he was not in active service with the Company. This condition does not remove Mr. Chabot from being tested for cause or post incident/accident at any time. Any substance test showing a positive during the timeframe specified herein will be considered a violation of this Agreement.

6. The dismissal of Mr. Chabot will be removed from his discipline record and replaced with a time served suspension. Mr. Chabot will not recieve any compensation or benefits. Mr. Chabot will maintain all his seniority rights for the time he was not in active service.

7. Should OHS or EFAP become aware of any noncompliance by Mr. Chabot regarding the requirements of this Agreement, such information will be provided to Labour Relations via OHS for the purpose of conducting an investigation.

8. Any alleged violation of or failure to comply with any of the terms of this Agreement will result in Mr. Chabot's removal from service and an investigation.

9. If, following a fair and impartial investigation, the Company determines that Mr. Chabot violated or failed to comply with any of the terms and conditions of this Agreement:

   a. It may invoke this violation or failure as just cause for the termination of the employment of Mr. Chabot;

   b. It may, in its discretion, elect to dismiss Mr. Chabot from Company service or impose a lesser disciplinary measure;

   c. Any grievance regarding the disciplinary measures imposed shall only be for the purpose of determining whether Mr. Chabot violated or failed to comply with the terms and conditions of this Agreement; and

   d. With regard to any such grievance, the arbitrator will not have jurisdiction to substitute a lesser penalty for any discipline imposed if he or she finds that Mr. Chabot violated or failed to comply with any of the terms and conditions of this Agreement.

10. No grievance shall be submittedin connection with this Agreement.

11. Should OHS and/or EFAP become aware of any noncompliance by Mr. Chabot regarding the requirements of this Agreement, such information will be provided to Labour Relations via OHS for the purpose of conducting an investigation.

12. This Agreement does not set a precedent as to position that the Company or the Union in similar circumstances involving other employees and in no way be used in future grievances or arbitrations or as a precedent in cases involving other employees. It is

expressly understood that this Agreement is based upon the unique facts of Mr. Chabot's case.

13. Mr. Chabot agrees that he has had an opportunity to consider the terms of this Agreement and consult with his Union. Mr. Chabot also confirms that he understands the terms of this Agreement, that he was not under the influence of any drugs or alcohol at the time of review or signing of this Agreement, and he has signed this Agreement freely and voluntarily.

14. This Agreement will remain on the employment record of Mr. Chabot and may be used in the event that he appears before an arbitrator regarding this Agreement or any other future proceeding.

If Mr. Chabot wishes to continue his employment with the Company and agrees that he will comply with the terms and conditions above, and the TCRC MWED also agrees, please provide a copy of this letter duly executed below by Mr. Chabot and yourself prior to noon (MST) on July 13, 2018.

Sincerely,

William McMillan
Officer, Labour Relations

For: David Pezzaniti
Assistant Director, Labour Relations

By signing this document, I acknowledge that I have read, understand and agree to all conditions noted in this agreement this ______ day of ____________________, 2018.

Employee:	Union:
____	____________________________________
Hugues Chabot, #975517	Patrick Gauthier Director Atlantic, TCRC MWED

____
Current Phone Number

c.c. Employee Services
Justin Meyer, Vice President of Engineeri

SUBMISSIONS OF THE UNION

The Union notes that section 1 (a) to (e) of the Agreement sets out a number of conditions that the grievor must comply with before he returns to work. Section 5 (a) to (e) of the Agreement also sets out that a number of other conditions the grievor is required to meet in order to continue his employment. Sections 8 and 9 of the Agreement speak directly to the need for the Company to hold an investigation in the event of an alleged violation of "any" of the terms of the Agreement. The requirement to hold an investigation, the Union submits, is therefore equally applicable to those terms and conditions set out in section 1 and section 5.

The Union submits that prior to taking any action against the grievor for an alleged violation of the Agreement regarding his failure to pass a substance test, the Company was required first and foremost to hold a fair and impartial investigation in order to prove that the grievor had in fact violated the Agreement. Had the Company done so in this case, and the grievor was proven to be in non-compliance subsequent to the investigation, the Company may have then been in a position to assess discipline for violation of the Agreement. In this case, no investigation was held and no new discipline assessed. The Union notes that the cases from the **CROA** office are legion that an unfair or non-existent investigation, as occurred here, will render any discipline assessed void *ab initio*. The Union therefore submits that the Company's decision to deem the grievor as "remaining

dismissed" in the absence of an investigation for an alleged violation of section 1 (e) of the Agreement was improper and a clear breach of the requirement to hold a fair and impartial investigation in the event of an alleged breach of "any" term of the Agreement, as set out in sections 8 and 9 of the Agreement. A declaratory Order should issue that the grievor be reinstated into active service without loss of seniority and with full compensation for all wages and benefits lost as a result of this matter.

SUBMISSIONS OF THE COMPANY

The Company maintains in reply that the grievor clearly failed to comply with section 1(e) of the Agreement which required him to pass a substance test before returning to active service. Section 2 confirms that the grievor must comply with all the terms in that provision, including section 1(e), *"before his return to work goes into effect".*

This case, in the Company's view, is distinguishable from the Authorities submitted by the Union where employees were actively employed and it was determined they did not receive a fair and impartial investigation. In this case, the Company submits that the grievor failed to comply with one of the pre-conditions of his conditional offer of reinstatement to pass a substance test. His failure to do so meant that he was precluded from returning to active service. In the end, the grievor failed to comply with an agreed pre-condition to his return to work and therefore properly remained dismissed

ANALYSIS

The focus of this arbitration is on the alleged breach of the Agreement. The closest case to the facts here is found in **CROA 2632** where Arbitrator Picher was also dealing with circumstances where the employee failed to meet a condition of his reinstatement set out in a Memorandum of Agreement that was signed by the Company, the Union and the employee. Similar to the facts in this case, one of the pre-conditions set out in the Memorandum of Agreement in **CROA 2632** was that the employee *"…will be required to successfully complete the Company's rule and medical examinations including a drug test".* The employee tested positive in the drug test and the Company declined to implement the reinstatement agreement. In dismissing the grievance, Arbitrator Picher concluded:

> The Arbitrator can see no basis to interfere with that decision. To do so would be tantamount to disregarding or amending the conditions agreed to between the parties, as reflected in the settlement relating to Mr. Haydock's reinstatement. As a matter of general policy, such settlements should be encouraged. As reflected in Canadian arbitral jurisprudence, arbitrators do not interfere with the terms of such settlements, as to do so would tend to discourage parties from resorting to them and, ultimately, undermine their utility as an important instrument for resolving disputes. For reasons which the parties best appreciate, they fashioned the terms and conditions which had to be met by Mr. Haydock as part of his reinstatement, and he failed to meet those terms. The Company was therefore entitled to deny him reinstatement, as agreed. *(emphasis added)*

As noted, arbitrators do not interfere with the terms of a reinstatement agreement given that they reflect a contractual three-party agreement fashioned by the parties

themselves. Such agreements, as Arbitrator Picher succinctly points out, are *"…an important instrument for resolving disputes".*

The grievor in this case was denied reinstatement given his failure to pass a substance test. Similar to the result in **CROA 2632**, the grievor's failure to pass the substance test entitled the Company to invoke the terms of Agreement. On that basis, the Company maintained in its email to the Union of November 9, 2018, that the grievor would "remain dismissed" given his inability to meet a specific term of the Agreement.

In **CROA 2632,** there was no argument presented by the Union of an alleged violation of a provision like sections 8 or section 9 which speak to the matter of a fair and impartial investigation within the context of the Agreement itself.

The right to a fair and impartial investigation, as the Union submits, has become an article of faith in this industry under the **CROA** model for the resolution of grievances. The importance of a fair and impartial investigation in the context of a collective agreement was recently addressed by Arbitrator Clarke in **CROA 4663**:

> This Office further emphasized in **CROA&DR 3221** that a faulty investigation is not just a minor "technical" issue:
>
> For reasons elaborated in prior awards of this Office, the standards which the parties have themselves adopted to define the elements of a fair and impartial hearing are mandatory and substantive, and a failure to respect them must result in the ensuing discipline being declared null and void (CROA 628, 1163, 1575, 1858, 2077, 2280, 2609 and 2901). While those concerns may appear "technical", it must again be emphasized that the integrity of the investigation process is highly important as it bears directly on the integrity of the expedited form of arbitration utilized in this Office, whereby the record of

> disciplinary investigations constitutes a substantial part of the evidence before the Arbitrator, and where the testimony of witnesses at the arbitration hearing is minimized.

The jurisprudence relating to the requirement and importance of a fair and impartial investigation stems from alleged breaches of this kind in the context of a collective agreement within the CROA system. The jurisprudence relating to the right to a fair and impartial investigation, however, is not automatically applicable to a conditional return to work agreement as we have here.

Unlike a collective agreement in this industry where the parties are sophisticated negotiators, this Agreement was drafted to address the particular circumstances of an employee who was originally dismissed for testing positive for marijuana and amphetamines while he was on duty. It is worth highlighting in that regard the last line in the last paragraph of this Agreement which states:

> It is expressly understood that this Agreement is based upon the unique facts of Mr. Chabot's case.

The Agreement contains a number of strict pre-conditions that the grievor was required to meet before his return to work. The mandatory nature of those pre-conditions to a return to work for the grievor is identified in the phrase introducing those conditions where it states: *"Before the return to work goes into effect, Mr. Chabot must:…".* Sections 1 (a) through to (e) then lists those requirements which include the grievor being medically fit to return to work by the Chief Medical Officer and passing a work substance test.

Article 2 of the Agreement then reinforces the requirement for the grievor to first meet the conditions set out in sections 1 (a) through to 1 (e) by stating: *"Mr. Chabot must comply with the above terms and conditions prior to his return to work".* The requirement for the grievor to comply with the terms set out in sections 1 (a) through to 1(e) is confirmed a third time in section 3 where it states: *"Mr. Chabot must comply with the above terms and conditions prior to being reinstated for service in a safety sensitive industry".*

Section 4 of the Agreement then once again states that the grievor must comply with sections 1 (a) through to 1(e) before arrangements will be made for his return to work. The grievor is also required to observe a host of other conditions identified in section 5 before his *"reinstatement to active service" [5(a)] or "resumption of service is recommended for Mr. Chabot" [5(c)].*

I do not read and interpret sections 8 and 9 of the Agreement, as the Union argues, as requiring a fair and impartial investigation after the grievor is found to be in breach of a provision dealing with a pre-condition to his return to work. Those pre-conditions are absolute requirements that the grievor must fulfill before being returned to active service.

Further, in my view, the parties did not intend articles 8 and 9, when read

together, to mean that a fair and impartial investigation was required for all the provisions in the Agreement. Section 8, in particular, states that a failure to comply with the Agreement *"will result in Mr. Chabot's removal from service and an investigation".* The removal of the grievor from service, as set out in section 8, pre-supposes that the grievor is back in active service to begin with. In those circumstances, he would be clearly entitled to an investigation if, for example, he failed a substance test during the two-year period *"after his return to work",* as per section 5(e). The grievor, in this case, was never returned to work or in active service after he was dismissed on April 27, 2018.

In terms of section 9, I interpret this provision in conjunction with section 8 bearing in mind once again the overall context that it addresses conditions involving an employee's return to work. In my view, section 9 speaks to what remedies are available to the Company after it has determined that an employee on active duty has violated or failed to comply with any of the terms of the Agreement. The Company is permitted to take action such as terminating an employee who is on active duty under section 9 (a), for example, but only *"…following a fair and impartial investigation".* The Company is not required nor does it make sense under the terms of this Agreement to order a fair and impartial investigation when the grievor has failed to fulfil an agreed pre-condition to his return to work. It is also important to underline the overall context that the requirement for a negative drug test is of utmost significance in cases like this involving

an employee seeking reinstatement to a Safety Sensitive Position

CONCLUSION

For all the above reasons, the Arbitrator agrees that the grievor failed to comply with the prescribed terms and conditions of his Reinstatement Agreement by failing to pass one of the pre-conditions to his return to work: *“Pass a return to work substance test”* [1 (e)]. The Company did not violate the terms and conditions of the Reinstatement Agreement by not holding an investigation after the grievor failed to pass the substance test. The grievor therefore remains dismissed.

JOHN M. MOREAU, Q.C.
September 3, 2021