IN THE MATTER OF AN ARBITRATION

BETWEEN

TEAMSTERS CANADA RAIL CONFERENCE MAINTENANCE OF WAY EMPLOYEES DIVISION
(the Union)

And

CANADIAN PACIFIC RAILWAY COMPANY
(the Company)

AH 758

DISPUTE:

Dismissal of Mr. Christian Dumouchel (Union file: 14-672; Company file: CAN-CP-MWED-2019-00011205).

JOINT STATEMENT OF ISSUE:

On September 18, 2019, the Grievor, Mr. Christian Dumouchel, was issued a Form 104 that advised himthat he was dismissed from Company service for:

> "Violating the general safety rule point 2 (substance abuse), rule 2.1 of the Engineering ServicesSafety Book and Procedure HR 203.1, when you were working as a Foreman on June 10, 2019."

The Union objected to the dismissal and a grievance was filed.

The Union contends that:

1. The Form 104 is wrong. No incident of any kind occurred on June 10, 2019 and the grievor was not an Extra Gang Foreman. Furthermore, the Company had already decided to discharge the grievor before a fair and impartial investigation was conducted. All of this violated section 15.1 of the CA and renders the discipline assessed void *ab initio*.

2. The investigation commenced at the latest on June 3, 2019 but discipline was not formallyissued to the grievor issued until September 18, 2019, a violation of section 15.3 of the CA that also renders the discipline assessed void *ab initio*.

3. The grievor's actions were uncharacteristic of his 14 years as a Company employee. In addition, mitigating factors, as outlined in the Union's grievance, were not taken properly into account. The Company failed to accommodate the grievor. The grievor's dismissal was excessive and unwarranted.

The Union requests that:

The Company be ordered to reinstate 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 reference to the date June 10, 2019 on the Form 104 was simply an administrative typo, all statements and associated evidence state the correct date of April 22, 2019 as the date of the incident and the Grievor was in fact working as a Foreman at that time. Furthermore, this is confirmed by the Union within their grievance correspondence were they state, "the Union would like to point to the Company that on the form 104 there's a big mistake".

3. The Company maintains that the Union's reference to the Company deciding to discharge the Grievor prior to an investigation is false. The Union refers to internal correspondence that references sending the investigation to determine the appropriate discipline, no decision had been rendered at this time. Furthermore, the Company's request for disclosure as to how the Union obtained internal correspondence has not been complied with.

4. An investigation commenced on June 3, 2019 and a supplemental investigation was conducted on September 3, 2019 in which the Grievor's quantitative test results were entered into evidence. Neither the employee nor his Union representative objected to this evidence nor that the supplemental statement was being conducted at the time. As the Union failed to promptly object to any alleged procedural issues, they waived the right to do so after the fact. Discipline was assessed on September 18, 2019 which was within 28 days of the statement being completed as per Section 15.2 of the collective agreement.

5. On April 22, 2019, the Grievor was sent for post-incident testing and there is no dispute between the parties concerning the testing itself. There is no dispute between the parties that the Grievor tested positive in his saliva and urine for cocaine.

6. As per the Grievor's positive tests, he was unfit for duty and subsequently in violation of general safety rule point 2 (substance abuse), rule 2.1 of the Engineering Services Safety Book and Procedure HR 203.1, all of which warrant discipline up to and including dismissal.

7. The Company maintains that no violation in regards to duty to accommodate has occurred as the Grievor had never sought medical consultation, nor did he ever request for an accommodation with the Company prior to the incident, in order to substantiate any alleged medical disability and/or substance use disorder.

8. The Company maintains that the Grievor was rightfully dismissed given the circumstances and thatthe dismissal should not be disturbed.

FOR THE UNION:

Wade Phillips
President TCRC MWED

FOR THE COMPANY:

David Pezzaniti
Director Labour Relations

Hearing: November 24, 2021 - By Videoconference

APEARING FOR THE UNION:

David Brown, Counsel
Wade Phillips , President, TCRC MWED

APEARING FOR THE COMPANY:

Diana Zurbuchen, Manager Labour Relations
Francine Billings, Assistant Director Labour Relations

AWARD OF THE ARBITRATOR

JURISDICTION

1. This is an Ad Hoc Expedited Railway Arbitration pursuant an agreement between the parties. The parties provided for submission of detailed briefs filed and exchanged in advance of the hearing. At the hearing, the parties reviewed the documentary evidence and made final argument. The parties agree I have all the powers of an Arbitrator pursuant to Section 60 of the *Canada Labour Code*.

BACKGROUND

2. On April 22, 2019, the Grievor was working as a Foreman with a crew on the Lacolle Subdivision in southern Quebec. As the Foreman, the Grievor held a Track Occupancy Permit (TOP) #1003 that, when the Crew had finished its work, he wished to cancel. The Grievor contacted the Rail Traffic Controller (RTC) and a discussion began regarding the number on the TOP. This apparently created a suspicion with the RTC Officer and he reported it to a supervisor.

3. The Company maintained that the Grievor wrote down the incorrect number. It views Track Occupancy violations as major life threatening offence under CP's Hybrid Discipline & Accountability Guidelines as having incorrect information and occupying track without authority could have fatal consequences. Given the Company's concerns for the serious nature of this incident, the Grievor was post-incident substance tested that day. The collection test confirmed cocaine and cocaine metabolites (benzoylecgonine) with the following:

- Negative Breath Alcohol Test
- Positive Oral Fluid Drug Test
- Positive Urine Drug Test

4. The Grievor's test results showed that he had 3406 ng/ml of cocaine-cocaine metabolite in his urine. The cut off level in the Company's policy is 100 ng/ml as outlined in HR203.1. In his saliva, he showed 23 ng/ml of cocaine and cocaine metabolite. The cut off level in the Company's policy is 8ng/ml.

5. On May 28, 2019, he was given notice to attend a disciplinary investigation in Montreal on May 31, 2019, in connection with the failed drug and alcohol test. The date of the investigation was changed by mutual consent of the parties to June 3, 2019.

6. On September 3, 2019, the Grievor was required to attend a supplemental investigation regarding noncompliance with Company Policy HR 203 during the April 22, 2019, shift.

7. On September 18, 2019, the Grievor was advised by the Company that he was dismissed from Company service for testing positive on a post-incident substance test while working as an Extra Gang Foreman on June 10, 2019, a violation of Rule 2.1 and procedure HR 203.

8. In addition to claiming that the dismissal was extreme and unwarranted, the Union submitted:

a. The date of the incident on the notice of dismissal was wrong
b. The investigation was not completed and discipline assessed within the time limits.
c. The investigation was not held in a fair and unbiased manner

9. I will address the three procedural matters before turning to whether the discipline was extreme or unwarranted.

10. From the outset, the Union argues that the dismissal letter is wrong in stating that the incident occurred on June 10, 2019. The incident was on April 22, 2019, and the dismissal must be viewed as null and void.

11. The Company submits that the Union has attempted to cloud the issue and the fact that the Grievor was impaired while on duty by alleging procedural issues. The Union claims that the Company erroneously dismissed the Grievor given there was no incident on June 10, 2019. It argues that the Union was well aware that this was simply an administrative typo and that all statements and associated evidence have the correct date of April 22, 2019 as the date of the incident. Also on April 22, 2019, the Grievor was in fact working as a Foreman. The Union's actions proceeding the issuance of the form 104, which dismissed the Grievor, confirm the fact that they understood that form 104 merely contained a typo and that the Grievor was not dismissed for an incident that had never occurred.

12. Further, the Union filed a grievance on September 24, 2019 wherein they acknowledged that the reference to June 10, 2019 is an error and that it should have read April 22, 2019. The Company submits that typos or small errors are not uncommon and have been accepted by Arbitrators as just that, typos.

13. The Company points me to SHP 638 and the Comments of Arbitrator C. Schmidt:

> ….the Union argued that errors regarding the date on an MRO report constituted fatal flaws in the chain of custody. Arbitrator Schmidt ruled that those minor errors do not cast into doubt the test results. This case is no different; the minor error regarding the date of the incident does not cast any doubt on the test results nor the date of the incident itself.

14. In SHP 638, the issue regarding the wrong date on the drug custody and control form or the insertion of the wrong date on the initial Medical Review Officer's (MRO) report were not found to cast into doubt the test results. The facts in the case before me are somewhat different.

15. I have thoroughly reviewed the documentation provided by the parties. I find no prejudice to the Grievor and the Union in this case as a result of the wrong date on the termination notice. The proper date of the incident was given in the notice to attend the investigations. The related documents and references in the investigation related to April 22, 2019. The Grievor and the Union

in this situation had the opportunity to make their case in the investigation based on the incident of April 22, 2019. The Grievor had a Union representative at the investigation.

16. Further, in the Union's grievance on behalf of Mr. Dumouchel dated September 24, 2019, clearly stated:

> While the facts of what occurred on April 22, 2019 are not substantially in dispute, the Company's reaction to them has been improper and inappropriate.

TIMLINESS OF THE INVESTIGATION

17. The Union argues that the Company failed to assess discipline within 28 days of the investigation being completed. Section 15 of the collective agreement addresses:

> INVESTIGATIONS, GRIEVANCES AND FINAL DISPUTE RESOLUTION
> ….
> 15.3 The investigation will be completed within twenty eight (28) calendar days from the date it is commenced. If the investigation is not completed within twenty eight (28) calendar days it will be deemed to have found no cause for the assessment of discipline or for further investigation.
>
> A decision will be rendered as soon as possible but not later than twenty-eight (28) calendar days from the date the investigation is completed.
>
> Time limits stated above may be extended upon mutual agreement which will not be unreasonably withheld.

18. The Company does not agree to a timeliness violation. It maintains that an investigation commenced on June 3, 2019 and a supplemental investigation was conducted on September 3, 2019. The Company maintains that it had an obligation to ensure that all evidence was put before the Grievor and his Union during the investigation process. During the September 3, 2019, supplemental statement, the Grievor's quantitative substance test results were entered into evidence and neither the employee nor his Union representative objected to this evidence nor that the supplemental statement was being conducted at the time.

19. The Company submits that the Union failed to object to any alleged procedural issue at the time thus waiving their right to do so after the fact. The Company maintains that arbitrators have long rejected such objections when the objecting party's failure to raise them in a timely fashion has led the other party to violate some procedural requirement that it might otherwise have satisfied. The Company submits that allowing procedural objections to be raised after the fact substantially prejudices the Company. It relies on CROA 2036 in which Arbitrator Picher states:

> In my view, however, her claim that the procedures are a nullity cannot succeed. The record discloses that Ms. Reid attended at the hearing, with Union representation, and raised no objection with respect to any procedural irregularity regarding the notice which she had received. The Company then proceeded with the investigation, and assessed discipline, part of which it relied upon in support of her eventual discharge. No objection was raised by the Union until after the grievor's discharge, in June 1989. To allow the Union to now plead a procedural irregularity not raised at the appropriate time would cause substantial prejudice to the Company in the circumstances.

> I am satisfied that Ms. Reid and the Union must be taken to have waived her right to assert any procedural irregularity by not raising that issue at the investigation itself.

20. The Union submitted that, in this case, I should consider the failure of an uninformed and mostly inexperienced Union Officer to make an objection at the investigation held on September 3, 2019. It argued that the Union's Director for the Region, Patrick Gauthier, was on sick leave in September, 2019, and an inexperienced replacement was filling in for him, Mr. Pompizzi.

21. The Union submitted that Director Gauthier made an objection based on an alleged violation of Section 15.3 on June 3, 2019 when he was the Union Representative at the Grievor's investigation. Consequently, it is certain that Director Gauthier, a far more experienced Officer, would have made the same objection on September 3, 2019 had he not been on sick leave. The Director restated his objection in his Step 2 appeal letter of September 24, 2019. However, his letter clearly stated that in his opinion:

> **The investigation started on April 22, 2019** after Mr. Dumouchel failed the Drug tests at 5:55 and the investigation was held on June 3, so 40 days after the investigation started. **Emphasis Added**

22. After review of the collective agreement I cannot find that the investigation started on April 22, 2019. I find a strong argument is made that the Union cannot have it both ways. It can scarcely rely on time limits when it has agreed to each Step of the process. The incident occurred April 22, 2019. On May 28, 2019, he was given a formal Notice to attend a disciplinary investigation in Montreal on May 31, 2019. The date was changed by mutual consent to June 3, 2019.

23. The Investigation began June 3, 2019 a date agreed to by the parties. The Supplementary investigation began September 3, 2019. A date also agreed to by the Union.

24. In considering the Union's position, it is significant that the Notice of the Supplementary Investigation was copied to the Director of the Region, Patrick Gauthier. It was not copied to Gaetano Pompizzi. The Union gave no explanation or documentation to establish how it was agreed that Mr. Pompizzi would replace Mr. Gauthier. The fact is that he did so without record of any objection.

25. In this case, the Grievor was removed from service pending investigation of a serious incident and a failed drug test. The Grievor was on pay during the investigation. The Supplemental Investigation provided the Grievor with the opportunity to hear all the information that would be considered in the assessment of discipline. Had he not been provided that additional information presented at the second investigation and given opportunity to respond, an objection could have been made by the Union. The Union representative who attended the second investigation did not give evidence before me.

26. I have difficulty with the Union's argument regarding the Union representative's inexperience being a factor. He had time to prepare for the second investigation. Requests for further documents or requests for change of investigation dates and supplementary investigations are not unprecedented or prohibited. In this case, the original date of the first investigation was also delayed by agreement between the parties. On September 3, 2019 there was no request to reschedule or objection to the Supplemental Investigation by the Grievor or his representative.

27. The Supplementary Investigation commenced on September 3, 2019. The Grievor was dismissed on September 25, 2019. I find that the Grievor was disciplined within the time limits of

the collective agreement following the investigation of September 3, 2019.

FAIR AND IMPARTIAL INVESTIGATION

28. The Union also alleged violation of section 15.1 in connection with the Company's lack of fairness and impartiality during the investigation. The Union acquired a copy of an email written by a Supervisor to another Company Officer, on June 3, 2019. The subject line of the email is Investigation and Recommendation for Christian Dumouchel. It says the following:

> Hello Joanne,
> This discipline was just entered last week by Craig and the investigation was completed today. The transcript is in French and would like for it to be translated to English for executive review/sign off for the dismissal decision.
> Derek

29. The Union submitted that it is hard to imagine a situation where a greater lack of fairness and impartiality existed. It regards the email as a proverbial smoking gun telling that the Grievor's discipline had been entered a week before the investigation had even began. It submitted that this reveals a clear lack of impartiality on the part of the Company. The Union argued that this is a surprising revelation for two reasons. First, as already submitted, the Grievor's first investigation took place on June 3, 2019, which was the same day the email was written. Yet the email states that the Grievor's discipline was entered last week. It is submitted that it is hard to imagine a situation where a greater lack of fairness and impartiality existed.

30. The Company strongly objected to the introduction of the email on the basis that it was not mentioned as relevant at any point in the supplementary investigations. The Company submitted that the Union relied upon internal correspondence dated June 3, 2019, which refers to the Grievor's discipline recommendation being sent to an executive for review/sign off. It also notes that at the time of the email, an initial fair and impartial investigation had in fact been completed. The Company maintains that this correspondence clearly outlines that any discipline to be issued had not yet been determined, hence the review. CP's internal process for any major discipline is that it has to be reviewed and signed off by the executive level prior to issuance. Moreover, the Grievor's dismissal was not issued until after the September 3, 2019 fair and impartial supplemental statement wherein responsibility was established. The Company maintains that as such, no violation of Section 15.1 occurred.

31. This arbitration is conducted pursuant to long established rules and procedures of the Canadian Railway Office of Arbitration and the Canada Labour Code. In cases of dismissal and discipline, I have the authority and the responsibility to hear evidence regarding the Union's argument that the dismissal was assessed after an unfair investigation. In that regard, I find the email arguably relevant. As the Union noted it obtained the email as part of an email thread sent by Supervisor Craig Kincaid, Director of Track and Structures, to Union Director Patrick Gauthier on August 15, 2019. It was not raised at the September 3, 2019 supplementary investigation.

32. Notwithstanding the Company's objection that this is an improper expansion of the grievance, I will address the contents of the email based on the very specific circumstances in this case.

33. The facts in this case support the Company's position regarding the email exchange. The email appears to be indicative of the appropriate complexity existing before a decision is made to

dismiss an employee.

34. Clearly, the email was a bullet point communication of the process at that specific time. At the time, disciplinary investigation was underway. The June 3rd investigation was a disciplinary investigation. It had just been completed and documents were being prepared for executive review and decision. The Grievor was not disciplined following the June 3rd investigation.

35. The Company submitted that it had an obligation to ensure that all evidence was put before the Grievor and his Union during the investigation process. As a result, the September 3, 2019 Supplemental Investigation was scheduled. The notice of investigation was sent to Union Director Patrick Gauthier. He did not object or ask that it be rescheduled because he was sick. It was agreed that Mr. Pompizzi would replace Mr. Gauthier.

36. During the September 3, 2019, supplemental statement, the Grievor's quantitative substance test results were entered into evidence. Neither the employee nor his Union representative Mr. Pompizzi objected to this evidence nor that the supplemental statement was being conducted at the time.

37. The Grievor was dismissed on September 18, 2019 for reasons as follows:

> For violating the general safety rule point 2 (substance abuse), rule 2.1 of the Engineering Services Safety Book and Procedure HR 203.1, when you were working as a Foreman on June 10, 2019 (sic).

ANALYSIS AND DECISION

38. The Grievor was dismissed on September 18, 2019, for violating the general safety rule point 2 (substance abuse), rule 2.1 of the Engineering Services Safety Book and Procedure HR 203.1, when he was working as a Foreman on June 10, 2019. The Company's Alcohol and Drug Policy and Procedures at 3.1.4 provides:

> The following are prohibited at all times while an employee is working, on duty, when subject to duty, at all times on the Company premise and worksites, when on Company business, when operating Company vehicles and moving equipment (whether on or off duty).
> The use, possession, cultivating, manufacture, distribution, offering of sale or illegal or illicit drugs, mood altering substances and drug paraphernalia;
> Reporting to work or remaining at work while under the effects of illegal or illicit drugs, and mood-altering substances, including acute, chronic, hangover or after-effects of such use.

39. The Union submits that should I find the dismissal was within the time limits of the collective agreement and that the investigation was conducted in a fair and impartial manner, I should view the Company's decision to terminate the Grievor as an over reaction.

40. The Grievor is a long service employee who entered service with CP Rail in January 2007. While his discipline record has not been perfect, the Union maintains that he was never before disciplined for drug use or abuse and, as a fourteen-year employee, that should have caused the Company to give him much greater consideration. In addition to this, the Grievor has sought and received help with what was finally determined to be drug dependency, a disability that, at the very least, constituted a substantial mitigating factor since it is rooted in the legal duty to

accommodate.

41. The Company argues that the Grievor's use of the illicit substance, is a clear violation of the CROR Rule G and on its own, substantiates the Grievor's dismissal as he tested positive for cocaine in his urine and oral fluid samples. The Company has a responsibility to maintain a safe workplace, as outlined under the Canada Labour Code, Part II, Section 125 (1) (y). Limiting the ability for the Company to assess appropriate disciplinary consequences to employees who undermine safety would greatly restrict the Company's ability to meet its statutory obligations under the Code and renders the safety of their employees, and the public, at risk. Limiting the ability of the Company to deliver appropriate disciplinary consequences to employees who undermine safety, restricts the Company's ability to meet its statutory obligations within the Canada Labour Code and leaves the safety of their employees and the public in potential peril.

42. The Union submitted that in recent years, the Company has taken a very hard line position with employees who have failed drug tests. Many employees have been dismissed for simply failing urine tests, though that has never been viewed as acceptable by the Arbitrators. In this regard it pointed me to CROA 3596, 1660 638, 896, 1720, 1733, 1758, 2152, 2255, 2431, 2466, 2767, 2839, 2868, 2992, 3026, 3336, 3596, 3616, 3632, 3668, 3701, 4030, 4047, 4059, 4064, 4143, 4200, 4291, 4375, 4388, 4400, 4652, 2036 and 2911.

43. The Union submitted that in CROA 1882, the Arbitrator noted the principle that any violation of Rule G is a matter of degree. The Grievor was found in an obviously intoxicated state prior to the commencement of his tour of duty and the only issue in the case was the appropriate measure of discipline. In reinstating the Grievor the Arbitrator ruled that:

> It is well established that violations of Rule G are among the most serious of disciplinary infractions. By the same token, however, any violation of Rule G is necessarily a matter of degree. In that regard all pertinent factors must be taken into account, including the nature of the employee's duties. By way of example, in the case of a locomotive engineer as disclosed in CROA 1852, removal from duty for intoxication on short notice can cause substantial disruption to the Company's operations. In the instant case the Arbitrator is satisfied that the circumstances fall more closely within the precedent of the discipline imposed by the Company on Track Maintenance Labourer Ives (referred to earlier in the decision).
>
> Both the grievor and Mr. Ives were at the relevant time relatively junior employees with minor disciplinary infractions registered against their prior records. I am satisfied, on balance, that the imposition of a measure of discipline short of discharge in the case of the grievor is an appropriate outcome in the circumstances.

44. The Union submitted that a reading of the case law dealing with Rule G violations reveals that, generally, discharge grievances are denied only when there are no mitigating factors weighing in the Grievor's favour. It relied on CROA 3417, 4339 and 4059. During the investigation, Mr. Dumouchel was very forthcoming throughout the investigation and was not confrontational at any point. He told the investigator that he used cocaine the night before (Sunday) at home before going to bed at approximately 21:00 PM. Mr. Dumouchel told the investigator that on Monday April 22, 2019, he never thought at any point that he would be under the influence and if he knew he would

never report to work.

45. The Union submitted that this is a matter for accommodation. It relied on CROA 4051, a case that involved a Grievor who had been involved in a collision and had tested positive for cocaine. In reinstating the Grievor, the Arbitrator M. Picher said:

> While the grievor was discharged for his rules' violations in relation to the collision of February 6, 2011, following a separate disciplinary investigation the Company registered a further discharge for the grievor's violation of the Workplace Drug & Alcohol Policy. I consider it important to stress that at the time of the grievor's discharge for his rules' violations the Company had no knowledge of his use of cocaine. In fact, it only clearly emerged at the arbitration hearing that the grievor suffered from an addiction to cocaine. That is confirmed by documented evidence presented at the arbitration confirming that since his discharge the grievor fully participated and successfully completed a six week program at the Vancouver Daytox Centre. It appears that he has attended some Narcotics Anonymous meetings and continues to have support through the Daytox program, if needed. The Arbitrator accepts the submission of the Union, made on behalf of the grievor, that he has successfully controlled his addiction since March of 2011.
>
> It is trite to say that drug addiction is a disability protected under the Canadian Human Rights Act. As with any disability, it triggers an obligation of reasonable accommodation on the part of an employer and a union, to the point of undue hardship.
>
> In the Arbitrator's view the Company cannot, on the facts of the instant case, be faulted with respect to its apparent failure to have accommodated the grievor, as the extent of his cocaine use and the fact of his addiction was not in fact disclosed to it in clear terms prior to the arbitration hearing.
>
> Nevertheless, the grievor's medical condition is a substantial mitigating factor which must be taken into account in the present case. While I am satisfied that the grievor did, as alleged by the Company, violate its drug and alcohol policy, I am not persuaded that the termination of the employee, who had some thirty-one years exemplary service at the time, is appropriate in all of the circumstances. This is, in my view, an appropriate case for fashioning a remedy which gives the grievor a measure of accommodation while protecting the Company's legitimate interests.

46. The Company argues that Rule G is considered one of the most serious violations for employees in safety sensitive positions at CP. Violations of Rule G not only put the employee and their safety at significant risk but the health and safety of employees, the public, property and the environment. The Company maintains that the discipline assessed was not excessive.

47. I find that the facts in this case are quite distinguishable from CROA 4051. The comments of Arbitrator Moreau in CROA 4707 are more applicable to the facts in this case where he states:

> The evidence in this case is clear that the Grievor tested positive for cocaine

> in both his urine test and the oral swab shortly after the incident. I conclude with the comment that cocaine is an illegal substance which can easily lead to devastating health and addiction consequences. To uphold the grievance in the face of the clear evidence that the Grievor willingly took cocaine prior to starting work would be both contrary to recent arbitration awards of this Office and send the wrong signal to other employees in safety-sensitive positions who deliberately consume a toxic drug like cocaine before reporting for duty.

48. Similarly, in a case of consuming illicit drugs before reporting for duty Arbitrator Schmidt in SHP 726 states:

> The overwhelming evidence in this case is that the grievor consumed both cocaine and marijuana immediately before he commenced his shift on March 21, 2015 or shortly thereafter. I find that he was impaired during his shift and there is simply no other rational conclusion to be drawn having regard to the evidence before me.
>
> An individual in the grievor's position who causes himself to become impaired on the job merits the most severe discipline, absent very compelling mitigating factors. Not only was the grievor impaired, I must conclude that he has been dishonest about when he had last used marijuana and about his denial of cocaine use. The Company's decision to discharge the grievor in these circumstances was entirely appropriate and should not be disturbed.

49. The Union relies upon case law that is distinguishable from the situation at hand. Unlike the case at hand, in CROA 1882 the Grievor was a Labourer who was working in a non safety sensitive position. In this case, the Grievor was the Foreman working a safety sensitive position responsible for taking track protection and was impaired with cocaine in his system while on duty.

50. The Union maintains that the Grievor ought to have been accommodated. The Union has the burden of proof in alleging a substance use or abuse disorder after an incident occurs. CP Policy HR 203.1, 3.2.2 and 7.1. clearly states that employees who suspect they have a substance use disorder or an emerging issue or problem related to alcohol and/or drugs are required to report, seek assistance and to access and follow appropriate treatment promptly before an incident occurs and before safe job performance is affected or violations of the Policy and Procedures occur. It goes on to state that failure to disclose an issue or restrictions and/or limitations related to alcohol and/or drugs may result in disciplinary action up to and including dismissal.

51. The Grievor acknowledged knowing and understanding his obligations under HR 203.1 and failed to comply. The Grievor did not seek medical consultation for any disability nor did he ever request an accommodation prior to the incident.

52. Arbitrator R. Hornung's review of the evidenciary requirements are set out in CROA 4754 and 4762. Following a review of all the facts, I cannot find the Grievor himself nor his actions identified that he had a disability and required an accommodation before the incident or investigation process.

53. As in this case, CROA 4654 addressed post-incident treatment for drug abuse. Arbitrator Hornung stated:

> The Union presented evidence that showed that the Grievor went to great

lengths, post incident, to obtain counseling and treatment and support for his drug use. It is apparent that, following his dismissal, the Grievor clearly appreciated the value of his job and went above and beyond to illustrate to the Company both that he was drug free and his obvious desire to be re-instated to his previous position. However, as Arbitrator Flynn observed in CROA 4527:

> It is not enough to simply claim that one may have substance abuse or is facing challenges with substance abuse and that one visited the EAP a few times. As arbitrator H. Kates explained in CROA&DR1341:
>
> > … in order for an employee to take proper advantage of the Company's EAP Program, that employee must come forward and voluntarily submit to it prior to any incident that may give rise to a legitimate disciplinary response on the employer's part. The EAP Program is not designed to be used as a "shield" for a breach of Rule 'G' after the fact. At that time the threat to the safety of the company's railway operations has occurred and such risks should not be seen to be condoned by a belated recourse to the Company's EAP program.

54. The Grievor is a long service employee. However, that service does not mitigate in his favour. There are over 10 incidents for being absent without permission, leaving early without permission, violating safety rules, inappropriate language and sleeping during training.

55. After carefully reviewing the submissions of the parties, I can find no reason to change the dismissal penalty assessed by the Company. Counsel for the Union presented a thorough and vigorous case on behalf of the Grievor. However, in view of all of the forgoing the grievance is dismissed.

Dated this 3rd, day of January 2022.

Tom Hodges
Arbitrator