**AH807**

**IN THE MATTER OF AN ARBITRATION UNDER THE *Canada Labour Code, RSC 1985, c L-2.***

**BETWEEN:**

**Teamsters Canada Rail Conference**

**(TCRC)**

**-and-**

**Canadian Pacific Railway Company**

**(CP)**

**Grievance Of Conductor Willard Calibaba (Dismissal – Drug and Alcohol Policy)**

**Arbitrator**: Graham J. Clarke
**Date**: December 20, 2022

**Appearances**:

**TCRC:**

| | |
|---|---|
| K. Stuebing: | Legal Counsel |
| D. Fulton: | General Chairman, CTY West, Calgary |
| D. Edward: | Sr. Vice General Chairman, CTY West, Medicine Hat |
| J. Kiengersky: | Vice General Chairman, CTY West, Revelstoke |
| W. Calibaba: | Grievor, Revelstoke |

**CP:**

| | |
|---|---|
| L. McGinley: | Assistant Director Labour Relations, Calgary, AB |
| T. Gain: | Legal Counsel Litigation & Labour, Calgary, AB |
| A. Cake: | Manager Labour Relations, Calgary, AB |
| R. Araya: | Coordinator Labour Relations, Calgary, AB |

Arbitration held via videoconference on December 14, 2022.

# Award

## BACKGROUND

1. On March 22, 2022, the parties signed a Memorandum of Settlement revising the arbitration process in Article 41 of their collective agreement. The arbitrator agreed to hear 4 Ad Hoc cases in 2022 and a further 8 in 2023 on the condition that the parties would plead no more than 2 cases per day.

2. On November 6, 2020, CP terminated Conductor Calibaba's employment for "Your violation of the CP Alcohol and Drug Policy and Procedure (HR 203 and 203.1) – Canada"[1]. CP had received an anonymous tip on its Alert Line[2] (A-Line) about Mr. Calibaba's alleged marijuana consumption and an intent to "clean his system" in the event of a urine test. Based on this information, CP conducted drug and alcohol testing.

3. Among other grounds raised to justify the dismissal, CP referred to certain events which occurred during Mr. Calibaba's testing.

4. The TCRC contested the dismissal on several grounds including the lack of reasonable grounds for drug testing and, alternatively, the fact the test results demonstrated that Mr. Calibaba had never been impaired at any material time.

5. For the reasons which follow, the arbitrator orders CP to reinstate Mr. Calibaba with full compensation and seniority. CP failed to demonstrate how an anonymous tip from its A-Line provided it with reasonable grounds to test Mr. Calibaba for drugs and alcohol. The Record also did not disclose any steps CP took under its Drug and Alcohol Policy[3] (Policy) to ensure it had reasonable grounds before proceeding with testing. Even if there had been grounds for testing, the results showed that Mr. Calibaba was not impaired when subject to duty.

## CHRONOLOGY

6. **July 30, 2018**: CP hired Mr. Calibaba.

[1] Ex-2; Tab 1.
[2] Ex-2; Tab 5
[3] Ex-5; Tab 13; Ex-2; Tab 7b

7. **March 20, 2019**: The only disciplinary notation on Mr. Calibaba's record[4] is 10 demerits "In connection with booking sick on Sunday, March 10, 2019, while employed as a Conductor in Moose Jaw, SK. A violation of the Canadian Pacific Attendance and Availability Standards".

8. **May 17, 2020**: CP laid off Mr. Calibaba[5].

9. **July 31, 2020**: Mr. Calibaba used cocaine during a celebratory event[6].

10. **August 17, 2020**: Mr. Calibaba was deemed fit for non-safety sensitive modified duties.

11. **August 18, 2020**: Mr. Calibaba was recalled from layoff.

12. **August 31, 2020**: Mr. Calibaba was deemed fit for full safety critical duties[7].

13. **August - September 2020**: At some unknown point, CP had become aware of an anonymous A-Line report[8] the details of which stated:

> On August 18, 2020, Willard, who is also known as "Wlli" stated to the caller that he was going to use some sort of urine device to clean his system just in case the company requires a urine sample on August 27, the day in which Willard was told to return to work as he had a doctor's note that stated that he stopped using marijuana 28 day prior to this day. Willard stated to the caller what he intended to do over the phone. It seemed that Willard was probably smoking marijuana during their phone conversation. The caller decided to report this situation because what Willard is going to do is against the company's guidelines and code of conduct. The caller would like the company to review this matter as soon as possbile. (sic)

14. **September 23, 2020**: Based on the A-Line report, CP cancelled Mr. Calibaba's call for duty and conducted drug and alcohol testing.

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[4] Ex-2; Tab 4.
[5] Ex-2; Tab 9 QA65
[6] Ex-2; Tab 9 QA75. Mr. Calibaba clarified the date as being July 31, 2020: QA78.
[7] Ex-2; Tab 9 QA66
[8] Ex-2; Tab 6.

15. **September 23, 2020**: Superintendent Brad Templeton prepared a memo[9] about the events of the day. Mr. Templeton, who had never been physically present with Mr. Calibaba, indicated in part:

> I then explained to Mr. Calibaba that he was being removed from service and we were going to perform a reasonable suspicion test on him at the facility in Golden. I then explained to Trainmaster Jones to stay with Mr. Calibaba and when the testing was complete to call me and I would arrange for a ride home for Mr. Calibaba.
>
> Approximately 20:50 I received a text from Trainmaster Jones stating the testing had been completed and Mr. Calibaba was then transported to the home terminal.

16. **September 23-24, 2020**: The parties did not dispute that Mr. Calibaba tested negative on the breath alcohol, oral fluid and urine drug tests[10]. Mr. Calibaba, who said he agreed to a hair sample test under duress, tested non-negative for cocaine[11]:

> Cocaine quantitative level = 29.0 ng/10 mg
>
> Cocaine metabolite (benzoylecgonine) quantitative level = 1.08 ng/10 mg.
>
> Cocaine metabolite (cocaethylene) quantitative level= 0.81 ng/10 mg.

17. **October 2020**: CP conducted its investigative interview of Mr. Calibaba on October 17, 19, 20 and 21.

18. **October 17, 2020**: At QA13 for Mr. Calibaba[12], the TCRC objected to the A-Line report:

> OBJECTION Union: John Kiengersky – Local Chairman TCRC 657 – The Union objects to Appendix J, the A-Line report details. The document does not include a date when the alleged matter was reported. The document does not include the date when it was completed, and by who, and who took or received the call reporting the allegation, rendering this an Incomplete document, questioning its integrity and credibility. As such, the union will object to any reference towards this document throughout this investigation. Furthermore, it is the position of the union that this investigation is no longer fair and impartial, which also would

[9] Ex-2; Tab 7e
[10] Ex-4; TCRC Brief paragraph 51; Ex-5; Tab 4
[11] Ex-4; TCRC Brief paragraph 52; Ex-5; Tab 4
[12] Ex-2; Tab 9.

suggest a predetermined outcome. The union objects to this investigation in its entirety.

19. The Investigating Officer (IO) responded with the following information about the A-Line report:

> Company officer note: In regards to the union's objection relating to Appendix J, the individual who reported the alleged phone conversation cannot be made available for questioning as their identity is not known. The complaint was filed anonymously via a third party contractor which handles "A-Line" complaints. The contents of Appendix J are a complete excerpt of the information provided by the third party.

20. **October 17, 2020**: During Mr. Calibaba's statement[13], the TCRC posed certain questions to Trainmaster Lance Jones, who had joined by phone, about his October 13, 2020 memo[14]:

> Q14: In your memo you state you were contacted by Supt. Brad Templeton and informed to take Mr. Calibaba to elite nutrition for testing. Mr. Calibaba has provided evidence into this investigation that on two occasions he asked you what was going on and you responded, "I don't know". Is this correct?
>
> A14. Yes.
>
> Q15: Were you aware that Mr. Calibaba was going to Golden to be subjected to substance testing.
>
> A15: Yes.
>
> …
>
> Q17: When Mr. Calibaba was in your company vehicle, or while he was in the premise where the substance test was to be performed, did you observe any of the six indicators as listed in CP HR 203.1 Item 4.2.
>
> A17: I stand behind my memo, I was told to pick this gentleman up, and that's what I did.
>
> Q18: Did he show obvious signed of impairment and/or adverse effects?
>
> A18: No.

[13] Ex-5; Tab 5
[14] Ex-2; Tab 7d

21. **October 17, 2020**: During Mr. Calibaba's investigation[15], the TCRC also had the opportunity to pose these questions to Superintendent Templeton about his September 23, 2020 memo[16]:

> Q29 At any time did you ask Lance Jones about personal observations regarding indicators of Mr. Calibaba for signs of impairment and/or adverse effect?
>
> A29 No.
>
> …
>
> Q33 Why was Mr. Calibaba asked to be subjected to a hair follicle test?
>
> A33 I stand by the contents of my memo. I'm not at liberty to discuss anything other than my memo.

22. **December 1, 2022**: The parties signed a detailed Joint Statement of Issue (JSI) setting out their positions[17].

## ANALYSIS AND DECISION

### Introduction

23. This case is not about CP's legitimate concerns over safety. A railway is an inherently dangerous undertaking. There have been tragic deaths in this industry. The Criminal Code and the Canada Labour Code have been amended in recent years to increase everyone's safety obligations.

24. The arbitral jurisprudence has long reflected the serious consequences for railway employees who work while impaired. As AH734[18] indicated, railway arbitrators apply a presumption that termination constitutes the appropriate penalty for employees who work while impaired [footnotes omitted; bold text from original award]:

> 17. In AH633, the arbitrator upheld an LE's termination due to his testing positive for cocaine when at work. Arbitrator Moreau came to a similar conclusion for impairment in CROA 4733:
>
> > For all the above reasons, I regrettably must dismiss the grievance. **There is simply too much risk to the Company and the public when an employee in a safety- sensitive position like the grievor reports to**

[15] Ex-5; Tab 5
[16] Ex-2; Tab 7e
[17] Ex-2; Tab 2.
[18] Teamsters Canada Rail Conference v Canadian National Railway Company, 2022 CanLII 583.

> **work in an impaired condition, in violation of the Company's drug and alcohol policy and CRO Rule G, and then goes on to carry out his assigned duties. The grievor's long service, coupled with his forthright answers throughout this matter, is unfortunately insufficient for the arbitrator to consider reinstatement**. The grievance is dismissed.
>
> (Emphasis added)

18. In all these cases, arbitrators consider whether compelling circumstances outweigh the prima facie disciplinary response of dismissal and the importance of deterrence:

> 54. The IBEW did not persuade the arbitrator to intervene in the instant situation where a short service employee, working in a safety sensitive position, consumed alcohol and then drove two of CN's vehicles. The standard disciplinary response for such conduct is termination, absent compelling grounds for mitigation.

19. Despite its best efforts, the TCRC did not persuade the arbitrator that compelling grounds existed to change Mr. Moore's termination into a lesser penalty.

20. While Mr. Moore no doubt regrets the August 1, 2020 event, the arbitrator concludes that his actions have irreparably broken the essential bond of trust that CN must have in its generally unsupervised LEs. Mr. Moore put himself, his colleagues, CN and the general public at risk by operating his train while impaired by cocaine.

21. The suggested mitigating factors of regret, an apology and 15 years service remain insufficient to counter the seriousness of operating a train in this condition. Similarly, Mr. Moore had 55 demerit points, including the August 1, 2020 "failure to properly secure your power" incident, which provides no support for mitigating the penalty.

25. The applicable legal analysis changes if a person suffers from a disability, a scenario which involves, *inter alia*, the burden to demonstrate that undue hardship exists[19].

26. But no matter how legitimate CP's safety concerns may be, the courts have established a legal framework which governs employee testing for drugs and alcohol.

[19] Teamsters Canada Rail Conference v Canadian National Railway Company, 2022 CanLII 102424 (AH793)

## Law

27. The legal principles in this area appear well established, though the parties are encouraged in these types of cases to update the arbitrator on any nuances from recent decisions.

28. Canadian law does not allow for random drug and alcohol testing. Instead, the law requires a balancing approach given the importance of both safety and employees' privacy rights, as the Supreme Court of Canada noted in *Irving*[20]:

> [4] A substantial body of arbitral jurisprudence has developed around the unilateral exercise of management rights in a safety context, resulting in a carefully calibrated "balancing of interests" proportionality approach. **Under it, and built around the hallmark collective bargaining tenet that an employee can only be disciplined for reasonable cause, an employer can impose a rule with disciplinary consequences only if the need for the rule outweighs the harmful impact on employees' privacy rights. The dangerousness of a workplace is clearly relevant, but this does not shut down the inquiry, it begins the proportionality exercise.**
>
> [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), 2002 CanLII 79097 (CA LA), 105 L.A.C. (4th)

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

> 399), or even in workplaces that pose a risk of explosion (ADM Agri-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)

29. The SCC made it clear that an employer cannot test first to see if it has reasonable grounds. Rather, an employer must first gather the evidence and then decide if it has reasonable grounds before any testing can take place.

30. In *AH732*[21], which involved an accident and not an anonymous report, the arbitrator considered whether CP had shown "reasonable grounds" to proceed with a drug and alcohol test [footnotes omitted; bold text from original award]:

> 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:
>
> > 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**

[21] Canadian Signals and Communications System Council No. 11 of the IBEW v Canadian Pacific Railway Company, 2021 CanLII 69959

> **accident. There is no evidence to suggest that the Company's officers who conducted the 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, 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.

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.

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

31. A similar analysis applies in this case. The SCC in *Irving* has described the governing principles. An arbitrator may analyze this non-exhaustive list of considerations when deciding employee drug and alcohol testing cases:

> 1. A dangerous workplace by itself does not justify random testing in the absence of a demonstrated problem with drug/alcohol use;
>
> 2. Instead, a proportionality exercise applies when balancing a legitimate safety rule requiring testing with employees' privacy rights:
>
> 3. If reasonable grounds exist to believe that an employee was impaired while on duty then drug and alcohol testing may take place;
>
> 4. An employer must preserve the evidence on which it concluded that reasonable grounds existed;
>
> 5. In appropriate cases, some degree of deference may be given to those who make this decision "in a real-life context that is often time-sensitive"[22].
>
> 6. Drug and alcohol testing may also take place if an employee was directly involved in a workplace accident or significant incident, or where the employee returns to work after treatment for substance abuse;
>
> 7. An employer must respect the procedure found in its own drug and alcohol policy[23].

32. The arbitrator will apply these considerations to the facts of this case.

## Can an anonymous allegation provide reasonable grounds for a drug and alcohol test?

33. No.

34. These days, social media and others may treat allegations as fact. But the proportionality exercise for drug/alcohol testing requires facts not anonymous allegations. Allegations may be true. But they may also be false or made maliciously for some ulterior motive. The arbitrator has difficulty thinking of any scenario where an anonymous allegation alone would justify depriving an employee like Mr. Calbaba of his privacy rights.

[22] CT Canada Limited Partnership v International Longshore And Warehouse Union Ship & Dock Foremen, Local 514, 2020 CanLII 108870

[23] This presumes the policy respects the applicable legal principles.

35. An allegation[24] may lead to an employer investigating a matter, but cannot, by itself, trump an employee's privacy rights given the invasiveness of drug and alcohol testing.

36. In addition, the Record does not contain any evidence about CP conducting a proportionality exercise for Mr. Calibaba. Superintendent Templeton did not observe Mr. Calibaba on the day in question. Neither did he ask Trainmaster Jones to do so. During Mr. Calibaba's investigation, Trainmaster Jones candidly agreed with the TCRC that he did not observe any obvious signs of impairment and/or adverse effects.

37. The instant case appears even further removed from the situation the arbitrator had to evaluate in AH732. In that case, a minor accident occurred, but CP provided no evidence supporting why testing should take place.

38. CP suggested in its Reply that an accepted practice existed where it would conduct testing based on an anonymous report. It suggested that an estoppel now prevented the TCRC from contesting this practice[25]. The TCRC disputed this position.

39. The arbitrator dismisses CP's argument. CP provided no evidence that the TCRC, even on the assumption that it could do so which is doubtful, had agreed that anonymous reports constituted sufficient grounds to warrant drug/alcohol testing for its members.

40. In CROA 4606, the arbitrator noted that acting inconsistently with legal obligations does not create a past practice or an estoppel[26]:

> 24. Nothing similar exists in the instant case. At no time could the arbitrator find a meeting of the minds to the effect that both CN and the USW agreed that Appendix VIII was a posting provision. It is one thing to demonstrate several instances where something was done which may have been inconsistent with the collective agreement's wording. It is quite another to demonstrate that the other party knew of it, and agreed with it through its words or conduct.

[24] An employer can have a reporting mechanism. The Canada Revenue Agency has something similar to the A-Line: CRA Anonymous Internal Fraud and Misuse Reporting Line
[25] Ex-3; CP Reply paragraphs 19-20.
[26] See also International Brotherhood of Electrical Workers Council No. v Toronto Terminals Railway Company, 2019 CanLII 29083 at paragraphs 42-47.

41. In this case, the only basis from the Record for testing comes from an anonymous allegation. That is not enough.

## Did CP respect its drug and alcohol policy?

42. CP's Policy contains safeguards when analyzing whether drug testing can take place. The TCRC highlighted article 4.2.1 which provides for "reasonable suspicion" testing.

43. At first glance, Superintendent Templeton's memo seems to equate drug testing with the "reasonable suspicion" test:

> I then explained to Mr. Calibaba that he was being removed from service and we were going to perform a reasonable suspicion test on him at the facility in Golden.

44. Nothing in the Record suggests a reasonable suspicion test took place before the drug testing. Neither Superintendent Templeton nor Trainmaster Jones referred to any facts which would support testing. It appears instead that they were following other people's directions to test Mr. Calibaba.

45. CP's Policy contains important safeguards, presumably to respect the requirement for a "proportionality exercise" before testing can take place. An extract from article 4.2 describes supervisors' obligations[27]:

> **If there are grounds to suspect that an employee is unfit to be at work, the employee will be escorted by a Supervisor to a safe and private place, interviewed, and given an opportunity to explain why they appear to be in a condition unfit for work**. Unionized employees will be entitled to Union representation provided this does not cause undue delay.
>
> …
>
> If immediate medical attention is not required, **during the interview the employee should be able to provide a reasonable explanation for their behavior or condition**. If a Supervisor still has concerns about the employee, the Supervisor should consult with another member or the management team (on site if possible) and an Experienced Company Operating Officer (ECOO) i.e. Senior Vice President (SVP), Assistant Vice President (AVP), General Manager (GM), Superintendent, Director or Chief Engineer.

[27] Ex-2; Tab 7b Page 52/264.

> The Supervisor and ECOO will determine whether to proceed with Reasonable Suspicion alcohol and drug testing:
>
> > • For Safety Sensitive Positions and Safety Critical Positions, **Reasonable Suspicion alcohol and drug testing will be required if the supervisor has reasonable grounds to believe that the actions, appearance or conduct of an employee while on or subject to duty are indicative of possible use of alcohol and/or drugs**.
>
> …
>
> **The basis for this decision will be documented. The referral for a test will be based on specific, personal observations and indicators including but not limited to** [bullets omitted]:
>
> (Emphasis added)

46. The Record contains no facts which suggest that CP followed any of these safeguards before obliging Mr. Calibaba to take a drug and alcohol test. Instead, CP seemingly relied solely on the anonymous A-Line report. The arbitrator rejects CP's suggestion that the words "including but not limited to" would somehow justify testing Mr. Calibaba in the circumstances of an anonymous A-Line report.

47. The text of the A-Line report suggests that Mr. Calibaba's alleged comments re a urine test were made on August 18, 2020, more than a month before the September 23 testing. The A-Line report does not appear to suggest anything about possible impairment on September 23:

> On August 18, 2020, Willard, who is also known as "Wlli" stated to the caller that he was going to use some sort of urine device to clean his system just in case the company requires a urine sample on August 27, the day in which Willard was told to return to work as he had a doctor's note that stated that he stopped using marijuana 28 day prior to this day.

48. There is nothing in the A-Line report, or in the Record, to suggest that Mr. Calibaba appeared unfit when preparing to work on September 23, 2020. CP did not demonstrate it had reasonable grounds to test under the provisions of its own Policy.

## FINAL OBSERVATIONS

49. Evidently, since there were no grounds to test Mr. Calibaba in the first place, none of the other issues the parties raised need to be examined in detail. The TCRC did not persuade the arbitrator that the IO who conducted the investigation was biased. A review

of the investigation reveals that CP had an opportunity to ask about the facts. The TCRC had a full opportunity to put any objections it had on the Record. CP also provided the TCRC with an opportunity to ask its own questions of Superintendent Templeton and Trainmaster Jones.

50. CP objected to the TCRC, 2 days before the hearing, filing a December 12, 2022 note from Mr. Calibaba's doctor providing information about his medications[28]. During the investigation, Mr. Calibaba had refused to consent to providing verifying documentation about his use of diuretics, despite relying on them as an explanation for certain events which occurred[29].

51. The arbitrator ultimately does not need to resolve this objection given the lack of reasonable grounds to test Mr. Calibaba. However, the arbitrator reminds both parties of the importance of the Record in these matters and the systemic harm the late filing of information can have on this expedited arbitration process[30].

52. Given the fact that no grounds existed for testing, the arbitrator will not review the particulars of Mr. Calibaba's testing and CP's suggestion that he attempted to tamper with the results. The arbitrator expresses no opinion in this award regarding what might happen in a future case if, in circumstances where CP had reasonable grounds to test, an employee's actions raised concerns about an attempt to undermine the testing process.

53. Similarly, the arbitrator agrees with the TCRC that the drug test results demonstrate that Mr. Calibaba was not impaired on September 23, 2020. As noted in AH731[31], numerous railway awards have confirmed that the focus is on impairment at the material times and not whether an employee might have traces of drugs in his system [footnotes omitted]:

> 56. The arbitrator will not review the numerous awards which stand for the proposition that a urine test is not sufficient, in the absence of a positive oral swab result, to conclude that an employee was impaired on the job.

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[28] Ex-11

[29] Ex-2; Tab 9 QA92

[30] AH793: Teamsters Canada Rail Conference v Canadian National Railway Company, 2022 CanLII 102424 at paragraphs 48-66.

[31] Canadian Signals and Communications System Council No. 11 of the IBEW c Canadian Pacific Railway Company, 2021 CanLII 70484. See also AH706: Bombardier Transportation Canada Inc. v Teamsters Canada Rail Conference, 2020 CanLII 53040 and AH663: Teamsters Canada Rail Conference v Canadian Pacific Railway, 2019 CanLII 89682.

> 57. Not surprisingly, as CP has proved in the past in an impairment case involving cocaine, severe consequences follow for employees who work in safety sensitive positions when impaired. But in the absence of evidence showing impairment at work, CP had no grounds to discipline Ms. Daniher.

## DISPOSITION

54. For the above reasons, the arbitrator concludes that CP had no reasonable grounds to test Mr. Calibaba. Consequently, it had no grounds to impose any discipline.

55. The arbitrator grants the TCRC's remedial request that Mr. Calibaba be reinstated to his position with no loss of seniority and full compensation for all lost wages and benefits. Mr. Calibaba is entitled to interest on these amounts.

56. The arbitrator remains seized for any issues which result from this award.

SIGNED at Ottawa this 20th day of December 2022.

_____

Graham J. Clarke
Arbitrator