IN THE MATTER OF AN ARBITRATION

BETWEEN:

CANADIAN PACIFIC KANSAS CITY RAILWAY COMPANY

(the "Employer")

AND:

CANADIAN SIGNAL AND COMMUNICATIONS SYSTEM COUNCIL NO. 11 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

(the "Union")
(together the "Parties")

(Grievances of S&C Technicians Ted Hunter and Ajaypal Dod)

ARBITRATOR:	Vincent L. Ready
COUNSEL FOR THE EMPLOYER RE HUNTER CASE:	Diana Zurbuchen and Poonam Sheemar
COUNSEL FOR THE EMPLOYER RE DOD CASE:	Rene Araya for the Employer
	Ken Stuebing for the Union
HEARING:	July 23, 2024 Calgary, Alberta
DECISION:	August 27, 2024

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The Parties agree I am properly constituted as arbitrator with jurisdiction to determine the two grievances before me.

The issue in each centers around whether the Company was justified in having the respective employees, Messrs. Theodore Hunter and Ajaypal Dod, (collectively, the "Grievors") submit to a drug test following a collision on January 17, 2019 between a vehicle they were both in and another vehicle that hit them.

Both the Grievors passed the impugned drug tests, and no discipline was issued to either of them in respect of the January 17, 2019 incident. Thus, the only issue in each of the grievances is whether the Employer had the right to request that the Grievors each submit to a drug test.

Although the Parties argued the cases separately, I decided to couple them together in this award because the facts of both are almost identical in their entirety with the exception that Mr. Dod was a relatively new employee and not licensed to operate the vehicle he was in unless under the supervision of an S&C Technician, i.e., Mr. Hunter.

BACKGROUND

The Parties in this dispute are the Canadian Signal and Communications System Council No. 11 of the International Brotherhood of Electrical Workers (the "Union") and the Canadian Pacific Kansas City Railway Company (the "Employer").

The dispute referred to the arbitrator involves employees governed by Wage Agreement No. 1 between the Union and the Company, which governs the service of S&C Foreman, S&C Assistant Foreman, S&C Senior Technician,

S&C Technicians, S&C Leading Maintainers, S&C Maintainers, S&C Maintainers' Helpers, S&C Wireman, S&C Helpers and S&C Labourers.

The Ex Parté Statements of Issue for each of the grievances give context and accurately describe the accident and the issues to be determined:

> ***Theodore Hunter***
> ***Company Statement***
>
> On January 17, 2019, a suburban hi-rail track unit was stopped short of the East Palliser Switch when it was struck by a reversing pickup hi-rail track unit, resulting in an on track collision and damage to both track units. Following the incident, S&C Technician Theodore Hunter was requested to participate in a post incident substance test. Mr. Hunter underwent the substance testing with a negative result.
>
> The Union has taken the position that the Company had no grounds to request Mr. Hunter submit to a drug and alcohol test and as such, violated its own Drug and Alcohol Policy. The Union seeks a declaration of this violation and $35,000 in damages for the alleged violation of Mr. Hunters' dignity.
>
> The Company's decision to request Mr. Hunter submit to post incident substance testing was reasonable and just in all the circumstances including that the request was in line with the Company's Policy and Procedure HR 203 and 203.1. The Union has failed to provide sufficient information to establish grounds for its request for damages and has expanded its allegations in its Statement of Issue. The Company requests the Union be held to the allegations properly advanced through the grievance procedure. The Company requests the Arbitrator dismiss the Union's grievance in its entirety.
>
> ***Theodore Hunter***
> ***Union Statement***
>
> Wrongful demand of S & C Technician Ted Hunter to submit to a drug and alcohol test and failure to comply with Article 12 of Wage Agreement No. 1.
>
> On January 17, 2019, S & C Technician Ted Hunter was operating a Company vehicle which was stopped short of the east switch

Palliser when the vehicle was struck by another Company vehicle reversing along the same track. After the incident Company Officer Jeff Switzer ordered Mr. Hunter to submit to drug and alcohol testing. All test results were negative, and Mr. Hunter was not issued any discipline.

The Union filed a grievance on behalf of Mr. Hunter on February 21, 2019, but the Company failed to provide any response to the grievance.

UNION STATEMENT OF ISSUE:

The Union adopts and relies on its submissions throughout the grievance process.

The Union contends that the Company had no grounds to demand Mr. Hunter submit to a drug and alcohol test. Further, the Company was in violation of its own Drug and Alcohol Policy, the requirement to test only if just and reasonable cause exist and the Parties' June 16, 2010, agreement when it demanded such a test. The Union seeks a declaration to this effect; damages including damages for a violation of Mr. Hunter's privacy, personal integrity and dignity; and such other relief as appropriate.

Ajaypal Dod
Company Statement

On January 17, 2019, a suburban hi-rail track unit was stopped short of the East Palliser Switch when it was struck by a reversing pickup hi-rail track unit, resulting in an on track collision and damage to both track units. Following the incident, S&C Technician Ajaypal Dod was requested to participate in a post incident substance test. Mr. Dod underwent the substance testing with a negative result.

The Union has taken the position that the Company had no grounds to request Mr. Dod submit to a drug and alcohol test and as such, violated its own Drug and Alcohol Policy. The Union seeks a declaration of this violation and $40,000 in damages for the alleged violation of Mr. Dod's dignity.

The Company's decision to request Mr. Dod submit to post incident substance testing was reasonable and just in all the circumstances including that the request was in line with the Company's Policy and Procedure HR 203 and 203.1. The Union has failed to provide sufficient information to establish grounds for

its request for damages and has expanded its allegations in its Statement of Issue. The Company requests the Union be held to the allegations properly advanced through the grievance procedure. The Company requests the Arbitrator dismiss the Union's grievance in its entirety.

Ajaypal Dod
Union Statement

Wrongful demand of S & C Technician Ajaypal Dod to submit to a drug and alcohol test and failure to comply with Article 12 of Wage Agreement No. 1.

On January 17, 2019, S & C Technician Ajaypal Dod was a passenger in a Company vehicle which was stopped short of the east switch Palliser when the vehicle was struck by another Company vehicle reversing along the same track. After the incident Company Officer Jeff Switzer ordered Mr. Dod to submit to drug and alcohol testing. All test results were negative, and Mr. Dod was not issued any discipline.

The Union filed a grievance on behalf of Mr. Dod on February 21, 2019, but the Company failed to provide any response to the grievance.

UNION STATEMENT OF ISSUE:

The Union adopts and relies on its submissions throughout the grievance process.

The Union contends that the Company had no grounds to demand Mr. Dod submit to a drug and alcohol test. Further, the Company was in violation of its own Drug and Alcohol Policy, the requirement to test only if just and reasonable cause exist and the Parties' June 16, 2010, agreement when it demanded such a test. The Union seeks a declaration to this effect; damages including damages for a violation of Mr. Dod's privacy, personal integrity and dignity; and such other relief as appropriate.

The Evidence

In addition to the documented evidence before me, the Company called *viva voce* evidence from Mr. Jeff Switzer, General Manager, Signal and Communications for the Company.

Mr. Switzer testified he considered the following factors when he directed the testing of the grievors: significance of the incident; act or omissions of the employees involved in the incident; and the safety of the employees involved. Based on these factors, he deemed the accident to be significant such that he ordered the testing.

Although Mr. Switzer acknowledged in his direct evidence there are times when testing is not done after an incident, such as where an employee is not involved or did not contribute to the event, he indicated during his direct evidence that at the time he ordered the testing of the grievors, the information he had was that there was a two vehicle collision and that a vehicle had attempted to move out of the way to avoid the collision and there was a question if the vehicle that was struck had moved out of its protected limits in the way of an oncoming train.

In cross examination, however, Mr. Switzer acknowledged he received information from Mr. Essery advising that the operator of the oncoming vehicle that collided with the Grievors' vehicle had acknowledged and admitted fault due to his being engaged on his cell phone while his vehicle was moving – causing him to strike the Grievors' vehicle. Mr. Switzer had trouble recalling with specificity a number of the details surrounding what occurred or what he was told.

Mr. Switzer testified he did not talk to either of the Grievors prior to having them tested.

Preliminary Objection

At the commencement of each of the hearings, the Employer raised an objection alleging the Union has expanded its argument to include an allegation that the Company violated the June 16, 2010 Agreement – an argument it says is absent from the grievance correspondence.

I find it unnecessary to determine that issue in light of my findings explained later in this Award.

Alcohol and Drug Policy and Procedures

The Company's Alcohol and Drug Policy and Procedures (the "Policy") provides:

> 5.2.2 Post Incident Testing
>
> Post incident alcohol and drug testing may be required after a significant work related incident, a safety related incident or a near miss as part of an investigation.
>
> Employees are expected to participate fully in an investigation. Failure to report an incident Is a violation of the Canadian Internal Control Plan for Incident Reporting.
>
> A significant work related incident, safety incident or near miss may involve any one of the following:
>
> - a fatality;
> - any number of serious injuries or multiple injuries to Company personnel or the public requiring medical attention away from the scene or lost time injuries to Company personnel; or an incident or near miss that creates this risk;

- a significant loss or damage to Company, public or private property, equipment or vehicles or an incident or near miss that creates this risk;
- an incident with serious damage or implications to the environment, or an incident or near miss that creates this risk.

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

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

POSITIONS OF THE PARTIES

The Union continues to rely on its arguments and position set out in its grievance letter and Ex Parté Statements of Issue.

Put succinctly, it argues the Company has failed to establish on a balance of probabilities and through clear and cogent evidence that there were any grounds to request a drug and alcohol test in the circumstances surrounding the events of January 17, 2019. The Union writes at para. 61 of its brief:

> It is trite at this point but bears noting that an employer must prove in every case that it had just cause to require a test. There is no inherent right on the part of management to require that an employee submit to substance screening testing. The requirement for cause for such testing is based on the fundamental privacy and dignity of individual employees and the right to be free from unreasonable invasion of those strongly-held Canadian values.

According to the Union, there is no evidence supporting the need to test either grievor for the following reasons:

- the Employer was aware of the circumstances leading up to the incident;
- aware the operator of the colliding vehicle was at fault and accepted such;
- no supervisor had attended the scene on January 17, 2019 to determine if there was any act or omission on the Grievors' part;
- the preliminary investigation into the incident occurred some 60 to 90 minutes post accident;
- both Grievors were compliant with the duties, rules and obligations at the material time.

In the submission of the Union, the Company's actions are so extraordinary that they are deserving of both sanction and dissuasion in the form of additional damages. While the Union recognizes that damages are generally an exceptional remedy, it argues that this particular case falls into that exceptional category and that I have jurisdiction to award aggravated and punitive damages at common law and under the *Canada Labour Code*. In further support of its position, the Union relies on the Supreme Court decision in *Alberta Union of Provincial Employees v. Lethbridge*, 2004 SCC wherein the Court stated:

> As noted earlier, the purpose of this grievance arbitration scheme, like all others, is to "secure prompt, final and binding settlement of disputes" arising out of the collective agreement: see *Parry Sound, supra*, at para. 17. Finality in the resolution of labour disputes is of paramount significance both to the parties and to society as a whole. Grievance arbitration is the means to this end;

> see Brown and Beatty, *supra*, note at s. 2:1401, that "[t]his legislative framework has been recognized and accepted as establishing an arbitral mandate to fashion effective remedies, **including the power to award damages**, so as to provide redress for violations of the collective agreement beyond mere declaratory relief." (emphasis added)

The Union also relies on the decision of the Ontario Divisional Court in *Re Greater Toronto Airport Authority v. Public Service Alliance of Canada, Local 0004*, [2011] O.J. No. 358:

> The arbitrator concluded that he had jurisdiction to award punitive damages. While other arbitrators have been reluctant to find such jurisdiction, he could reasonably come to this conclusion given his broad remedial power under the Code and the collective agreement….
>
> 117. The Supreme Court of Canada in both *Whiten* and *Keays*, *supra*, emphasized that an award of punitive damages is exceptional in a breach of contract case. In *Keays*, the Court stated at para. 68,
>
> > …this Court has stated that punitive damages should "receive the most careful consideration and the discretion to award them should be most cautiously exercised" (*Vorvis*, at pp. 1104-5).
>
> 118. In order to award punitive damages for breach of contract, there must be an independent actionable wrong. In *Keays*, the Court stated that "[t]he independent actionable wrong requirement is but one of many factors that merit careful consideration by the courts in allocating punitive damages" (at para. 68).
>
> 119. In *Whiten, supra*, the Supreme Court held that an independent actionable wrong was not limited to a tort, but **could include the breach of a distinct contractual provision, such as a breach of a contractual duty of good faith, or breach of another duty, such as a fiduciary obligation** (at paras. 79 and 82). The Court found at para. 79 that breach of an insurer's contractual duty of good faith is "independent of and in addition to the breach of contractual duty to pay the loss".

> 120. In addition to an independent actionable wrong, an award of punitive damages must be rational. **This requires a determination as to whether the wrongdoer's misconduct is so outrageous as to require punitive damages for purposes of retribution, deterrence and denunciation**. As well, the quantum must be rational, as the Court stated at para. 109 of *Whiten*: (emphasis added)
>
> > If the award of punitive damages, when added to the compensatory damages, produces a total sum that is so "inordinately large" that it exceeds what is "rationally" required to punish the defendant, it will be reduced or set aside on appeal.

It is the Company's position that its decision to send the Grievors for post incident testing was reasonable and just in all of the circumstances and in line with its Policy.

In support of its position, the Company placed significant reliance on CROA Case #4841 – a case arbitrated by Arbitrator Cameron in which he adopted a balance of interests test in considering the question of whether drug testing was appropriate, and set out the following framework for this analysis:

A. Was there a "serious incident"?
B. Was the employee "involved" in the incident?
C. Was testing appropriate here?

Following the Cameron framework, the Company argues the present incident was unquestionably serious – "it was a significant work related incident, safety related incident and near miss".

With respect to the second question, the Company submitted the following in respect of Mr. Hunter's case:

> Based on the detailed description of the incident above, Mr. Hunter was involved in the incident. Mr. Hunter (1) was a

> subforeman operating on the Palliser signaled siding under Mr. Randall's TOP 120, (2) broadcast his intent to stop at Palliser East, (3) stopped short of signal 216D such that he could see the signal in his drivers' side mirror, (4) attempted to communicate with Mr. Randall and reverse his hi-rail truck so as to avoid the collision, and (5) made a decision to operate his hi-rail truck following the incident to the crossing at mile 19.24. The foregoing list is not intended to be exhaustive, but rather to highlight Mr. Hunter's undeniable involvement in the incident in question.

Similarly, with respect to Mr. Dod, the Company submitted the following:

> Based on the detailed description of the incident above, Mr. Dod was involved in the incident. Mr. Dod (1) was aware of the authority under which his track unit was being operated - subforeman under Mr. Randall's TOP 120, (2) was party to Mr. Hunter's broadcast of his intent to stop at Palliser East, (3) understood Mr. Hunter stopped short of signal 216D, (4) heard Mr. Hunter's attempt to communicate with Mr. Randall and reverse his hi-rail truck so as to avoid the collision, and (5) made a decision alongside his colleagues failing to freeze the scene and moving the track units to the crossing at mile 19.24. The foregoing list is not intended to be exhaustive, but rather to highlight Mr. Dod's undeniable involvement in the incident in question.

Relying on Arbitrator Cameron's award in CROA #4841, "was testing appropriate":

> Arbitrator Cameron identified a discussion with an "experienced Company Operating Officer (ECOO)" as a procedural step. This step was met when Assistant Director Essery spoke with Director Dunn who in turn also spoke with General Manager Switzer. This is not in dispute.
>
> Arbitrator Cameron then considered the final paragraph of s. 4.03 of the A&D Policy finding that discretion cannot be a mechanical process or "a matter of simply checking a box on a form." He concluded that:
>
> > Instead, that discretion must be exercised pursuant to both the Court and CROA jurisprudence, and a balancing of privacy rights and safety concerns be

> made (see SHP 530, CROA 4668). In addition to the necessary balancing of interests, there must be a "necessary link between the incident and the employee's situation to justify testing" (see *Weyerhaeuser Company Ltd v. CEP, Local 447* (2006), 154 LAC (4th) 3, cited in CROA 2456).

The final paragraph of s. 4.03 of the A&D Policy provides:

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

While Arbitrator Cameron found this paragraph was not sufficient for the balancing of interests approach, it is a start. With respect to the incident in question, there is absolutely no evidence of any structural, environmental or mechanical failures (e.g. rail damage directly on the intended path of travel, or a snowstorm causing poor visibility, or brake failure causing the collision). By all reports this was an entirely preventable incident caused by human interactions.

As a passenger in one of the track units involved in the collision, it was not clear prior to the investigations that Mr. Dod's act(s) or omission(s) combined with act(s) or omission(s) of Mr. Randall and Mr. Hunter could not have been a contributing factor for a significant rule violation. This is confirmed as a consideration in Assistant Director Essery's memorandum (**Tab 5**) wherein he stated, "Rob and I talked a bit about the substance test and thought at this point it was tough to tell what happened so arrangements would be made."

At para. 44 of the Company's brief, it is argued:

Clearly the balancing of interests approach is not as simple as: Mr. Randall says it was his fault so he is the only one who should be substance tested. Rather, at a high level, the Company had to consider the following:

a) Nowhere within the memorandums or initial incident reports is it confirmed that Mr. Hunter repeated his communication that he was stopping or stopped until it was acknowledged

by Mr. Randall. Nor is there any indication that Mr. Dod questioned this. This raised the question of whether Mr. Dod fulfilled his obligations, contributing to the incident?

b) Mr. Dod recalled Mr. Hunter's broadcast. As you've just heard in Mr. Hunter's case, this raised the question of whether Mr. Hunter had adequately broadcast his location such that Mr. Randall knew or ought to have known where Mr. Hunter was stopped. In turn, this raised the question of whether Mr. Dod fulfilled his obligations, contributing to the incident?

c) Mr. Dod failed to freeze the scene and was party to moving the track unit following the collision. This raises the question of whether the track unit exceeded the limits of the TOP and action was taken following the incident to cover up such a fact.

The Company rejects the Union's claim for damages for each of the Grievors, arguing the Union has provided no rationale as to why either of the Grievors would be entitled to damages. Moreover, it asserts that the remedial request must be dismissed as the Union has failed to provide sufficient information to establish grounds for damages or for that matter either Grievors' privacy rights or personal integrity.

In sum, the Company asserts there has been no violation of the Policy in respect of its decision to test, and that there is no evidence to demonstrate that either of the Grievors experienced humiliation or loss of dignity beyond a standard substance abuse testing experience.

DECISION

As noted at the outset, the central issue to be decided is whether the Employer had a reasonable basis for requiring the Grievors to submit to post incident testing after the accident on January 17, 2019.

There is no dispute over the facts pertaining to the accident itself. Both parties agree there was no wrongdoing by either of the Grievors in this case. The evidence is that the two employees were sitting in their vehicle waiting for clearance of the track when the other vehicle collided with them. I accept that the Grievors' actions in no way contributed to or caused the accident.

The jurisprudence is clear that an employer must have reasonable grounds or reasonable cause for requesting a substance screening test. For instance, the Supreme Court in *Communications Energy and Paper Union of Canada, Local 30 v. Irving Pulp and Paper Ltd.*, 2013, SCC 34 affirmed and adopted this principle set out in Arbitrator Picher's decision in *Imperial Oil Ltd. and C.E.P., Local 900 (Re)* (2006), 157 L.A.C (4th) 225 as follows:

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

The case law has developed to make clear that the fact that an employee is involved in some type of an accident is not, in-and-of-itself, enough to justify testing. In R*e Fording Coal Ltd. And U.S.W.A., Loc. 7884 (2003) 119 L.A.C. 4th 165,* for example, Arbitrator Devine found that an employer was not justified in requiring an employee to be drug tested simply because he damaged the employer's truck by driving over a rock at night.

Finding that employers are required to investigate prior to requiring an employee involved in an accident be drug tested, Arbitrator Devine held:

> The determination that the facts are sufficiently egregious so as to focus on the conduct of the employee as the "root cause" requires a **careful elimination of other causes. Sufficient care must be taken to exhaust other realistic possibilities**

In allowing the grievance, Arbitrator Devine concluded:

> I am not satisfied that the facts in this case were sufficiently investigated to rule out environmental or mechanical causes. I find demand for a urine test in this case was not a reasonable line of inquiry, and so the Grievance must be allowed.

In *Saskatchewan Health Authority v. Health Sciences Association of Saskatchewan* 2020 CanLII 25719, Arbitrator Ish summarized some of the general principles in this area:

> 68. Past arbitration awards disclose the following with respect to the post incident justification for mandatory testing:

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

In the present case, it will be recalled that Mr. Essery was informed shortly following the accident that the operator of the colliding vehicle had acknowledged it was his fault and that he was using his cell to try and make a call at the time the truck he was driving collided with the Grievors' vehicle.

The information provided to Mr. Essery is reflected in his memorandum, which reads as follows:

Memorandum – Jan 17 2019

Collision between L11107 operated by S&C Maintainer Wallace Randall and L08221 operated by S&C Technician Ted Hunter with passenger Ajaypal Dod.

12:40 – Call from Wallace Randall that he had just collided with Ted Hunter in Suburban. Palliser East switch mile 21.6 – they were in the siding. I inquired about injuries – none. **Wally indicated it was all his fault and that he was using his cell phone to try and make a call when he got back into cell service somewhere around backtrack switches at Palliser.** We talked about the trucks being on the track still and operational. They wanted to clear them at mile 19.24 crossing.

12:50 – I called Rob Dunn and told him the storey. He was in contact with Jeff Switzer and relayed we need substance tests for all involved. Rob and I talked a bit about the substance test and thought at this point it was tough to tell what happened so arrangements would be made.

13:15 – contacted Josh Applequist about possibly being an extra driver – he was busy but that Justin White could likely help. I contacted Justin and was good to go. I also contacted Patrick Hogan about driving a vehicle and he also agreed to come with me.

Wally called about this time and indicated they had cleared vehicles at 19.24 crossing.

13:29 – contacted driver check to arrange for substances testing. They would call back when arranged.

13:39 – contacted Ted Hunter to advise that he and Ajay will substance tested and to stay where they were. Don't operate vehicles.

13:45 – confirmed arrangement with driver check for about 15:15pst.

13:47 – contacted Wally to advise he would be substance tested and to stay where he was and not operate vehicle.

About 13:50 leaving town with Justin and Pat – travelling to mile 19.24 crossing where trucks have cleared track.

14:10 – arrive at crossing 19.24. Ask Pat and Justin to stay in my vehicle while I talk with the guys. Wally approached as I got out and grabbed my note book. I asked how he was doing. Said he was shaken a little. He looked and acted OK. **We stood by Wally's truck and I asked him about the incident.**

He started with "it's all my fault. Ted didn't do anything wrong". I asked to start from when they were at Palliser. They had successfully changed the hand throw mechanism on the Palliser West switch and were happy with the way things went. They tested the switch and then spoke about travelling to the clear. There was westbound train coming so they would be in the siding for short time before they could clear back to 19.2. Ted left Palliser west and Wally heard Ted broadcast location at back track switches. He responded to that and then he heard Ted broadcast he was stopped at Palliser east. Wally said he heard it but didn't respond to it. He was trying to make a phone call when at the last minute he saw Ted's truck parked just before he struck it. he got out to be sure everyone was OK, had a quick look at the trucks and then called me.

I told Wally again we would be substance testing all of them and he would have to ride with me to town. Pat would drive his truck if it was OK for highway. We quickly looked at the truck and it appeared Ok for travel.

14:17 – I approached Ted's vehicle and when I got to it he was the back seat on left side. Driver's door could not be opened without a bunch of further damage so he exited on passenger's side. I asked Ajay to stay in vehicle and Ted got out.

I asked how they were doing. They were OK but Ted though Ajay may have got a bump somewhere. Ted then moved to front of Suburban where it had impacted the back of Wally's pickup to show the damage. Comments about highrail still works – they had tried it before they were on the mainline to ensure they could use it when they got to crossing.

I asked about the incident – he was backing up in the siding to Palliser East. They were down for 1 westbound train. he made track unit broadcast on CP1 that he had stopped at Palliser East. Shortly after stopping they saw Wally coming toward them at good clip. **Ted mentioned brake test had shown good traction so initially he wasn't concerned but as he got closer it became clear he was going to hit them. He broadcast on two radio channels – CP1 and CP73 he thinks – for Wally to stop. He**

> **then put the suburban in reverse to try and give Wally some room but was hit before he could move.** Ajay got out and Ted exited passenger side to converse with Wally. He wasn't sure how I was notified – I told him Wally had called me.
>
> I advised Ted again he would be substance tested and he would have to ride back into town with me. Justin White would take his suburban back to town. We looked at the damage again with an eye for road travel and decided it was OK.
>
> About 14:25 – spoke quickly Ajay about the collision. I asked him if he was alright and that Ted thought he may have bumped something. He indicated his knees bumped the dash a little but otherwise he was fine. His knees were OK. about collision he said they were working at west switch Palliser then backed up to east switch Palliser. He remembered Ted saying on radio they had stopped at East switch. He they saw Wally coming toward them too fast. Ted called on radio and tried to reverse but they got hit.
>
> I told Ajay he was also being substance tested and he would riding with Justin in suburban back to town.
>
> About 14:55 – everyone arrives at Administration building. I tell Wally, Ted and Ajay to stay around and don't leave.
>
> About 15:15 - Driver Check shows up and starts processing with Wally.
>
> About 15:30 – as the guys are cleared by Driver Check, I get them to complete the initial incident forms. Driver check finishes up about 16:30.

Despite the fact that Mr. Randall had accepted full responsibility for the accident, and that, by all accounts, the Grievors had done nothing wrong and had no fault in causing the accident, the Employer decided to have them tested anyway.

In the circumstances, I cannot find the Employer had reasonable cause to test for impairment. While it did conduct an investigation into the accident, the Employer did not utilize the information obtained in that investigation to make a sound judgment as to whether the Grievors should be tested. In no way

were the Grievors the “root cause” of the incident giving rise to the testing, nor could their actions or omissions be said to have contributed to or caused the accident. I declare the Employer’s decision to drug test the Grievors violated the Collective Agreement and the Policy.

In respect of remedy, I find that the Employer’s decision to drug test the Grievors without a reasonable basis for doing so constitutes a breach of their privacy. The Employer knew, or certainly ought to have known, that it did not have the right to require the Grievors to submit to testing after learning that their actions were not responsible for the accident. In light of that, I order the Employer to pay each of the Grievor’s $5000 as aggravated damages, which I hope will act as a deterrence for future breaches of this nature.

I retain the necessary jurisdiction to resolve any issues arising out of the implementation of this Award.

It is so awarded.

Dated at the City of Vancouver in the Province of British Columbia this 27th day August, 2024.

Vincent L. Ready