CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4706

Heard in Calgary, November 12, 2019

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE
MAINTENANCE OF WAY EMPLOYEES DIVISION

DISPUTE:

Claim on behalf of P. Obenauer.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

The issue giving rise to this dispute involves bargaining unit employee Patrick Obenauer who was issued two Form 104s on April 8, 2019. The first advised him that he was assessed a 20-day deferred suspension for a rule violation allegedly committed at Maple Meadows on February 10, 2019 while working with Utility 7. The second advised him that he was being dismissed from Company service because of the "the post incident accident non-negative substance test results that you supplied to the company on February 10, 2019 at Dr. Kenefick's office in Surrey BC after an incident that occurred while working with Utility 7," an alleged violation of CROR Rule G. A grievance was filed.

Union Position:

Mr. Obenauer did not receive a fair, impartial or complete investigation; Mr. Obenauer's dismissal was unwarranted, improper and in violation of sections 15.1 and 15.2 of the Collective Agreement.

Mr. Obenauer was assessed a 20-day deferred suspension for a violation of a rule that he has not yet been qualified in.

Mr. Obenauer was dismissed for a violation of Rule G that was not supported by the evidence and the company failed to complete the investigation into this alleged violation therefor rendering the investigation as unfair and partial.

The Company policy regarding "the possible effects of drugs, medication or mood-altering agents…" is fatally flawed because it is based upon the assumption that a failed urinalysis test is, by itself, evidence of impairment while at work. It is not, and a wealth of jurisprudence stands for the proposition that, in the absence of impairment, no discipline can be assessed.

The company failed to meet the burden of proof necessary to show that Mr. Obenauer was impaired while on duty. Therefore, in these circumstances, no discipline may be assessed.

The company violated the wage agreement by not responding to this grievance as prescribed in article 15.7 of wage agreement 41.

The Union requests that, The Company be ordered to reinstate Mr. Obenauer into company service immediately without loss of seniority and with full compensation for all wages and benefits lost as a result of this matter.

Company Position:

The Company denies the Union's contentions and declines the Union's requests.

THE COMPANY'S EXPARTE OF ISSUE:

The issue giving rise to this dispute involves Engineering employee Patrick Obenauer who was issued two Form 104s on April 8, 2019. The first form 104 stated the following:

Please be advised that you have been assessed a 20-day deferred suspension. This assessment of discipline is a result of a rule violation you were involved in at Maple Meadows on February 10, 2019 while working with Utility 7

Summary of Rules violated:	SECTION	SUBSECTION	DESCRIPTION
Rule Book for Engineering Employees	7.1	Protection by TOP; Before Acting on a TOP	(a) The foreman in charge of a single track unit must: (i) read the TOP to employees in the track unit; (ii) require those to read and initial the TOP (b) The foreman in charge of multiple track units must: (i) read the TOP to at least one employee involved in the work; (ii) when conditions permit, have those employee(s) read and initial the TOP
Rule Book for Engineering Employees	2.0	2.2	WHILE ON DUTY (a) Safety and a willingness to obey the rules are of the first importance in the performance of duty. If in doubt, the safe course must be taken.

The second form 104 stated: Please be advised that you have been DISMISSED from Company service effective April 8, 2019, for the following reason(s): The post incident accident non negative substance test results that you supplied to the Company on February 10, 2019 at Dr. Kenefick's Office in Surrey BC after an incident that occurred while work with Utility 7." As a result you have violated the following CROR, General Rule, G.

Company Position:

The Company maintains that the grievor was afforded a fair and impartial investigation.

Mr. Obenauer failed to uphold his responsibilities of operating in a safe manner and with care and diligence towards his duties on February 10, 2019 thus violating the Rule Book for Engineering Employees.

Mr. Obenauer was dismissed from Company service following a complete investigation that was both fair and impartial. It was determined through this fair and impartial investigation that Mr. Obenauer violated Rule G and the Company's Drug and Alcohol policies for his failed drug test on February 10, 2019.

The Company maintains that the burden of proof necessary to sustain discipline was met based on the failed drug test conducted on February 10, 2019.

The Company maintains that the Union has not advanced any grievance in relation to the Drug & Alcohol Policy and as a result cannot expand on the grievance of Mr. Obenauer's suspension and subsequent dismissal.

Mr. Obenauer was offered a voluntary reinstatement agreement on June 7, 2019 to which the Company had not heard a response from the Union.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) G. Doherty	**(SGD.) W. McMillan**
President	Labour Relations Manager

There appeared on behalf of the Company:

W. McMillan	– Manager, Labour Relations, Calgary
L. McGinley	– Assistant Director, Labour Relations, Calgary
I. Greenwald	– Medical Expert, Toronto
A. Jensen	– Manager Labour Relations, Calgary

And on behalf of the Union:

H. Helfenbein	– Vice President, Medicine Hat
D. Brown	– Counsel, Ottawa
D. Rosenbloom	– Expert Witness, Hamilton
G. Doherty	– President, Ottawa
W. Phillips	– Director, Eastern Region, Frankford
T. Marshall	– Director, Pacific Region, Maple Ridge

AWARD OF THE ARBITRATOR

The grievor entered the service of the company on April 23, 2018 as an Extra Gang Labourer.

On February 10, 2019, the grievor was a member of the "Utility 7" crew operating in the Maple Ridge area of British Columbia. The five-person crew consisted of: the grievor as the Extra Gang Labourer, a Foreman, a Truck Driver, a Speedswing Operator and a Group Machine Operator. The crew was dispatched at 06:00hrs on February 10, 2019 to continue preparing the site for the replacement of the Maple Meadows Crossover.

The Supervisor, Nick Beyer, initially met up with Foreman Josh Miller at the beginning of the shift and they decided that the crew would work on the south track moving ties. The Foreman then returned to his BTMF truck to obtain the required Track Occupancy Permit ("TOP") from the RTC.

The Supervisor was walking around the area shortly after the crew began their track work when he noticed train headlights approaching eastbound on the south track. He observed that the east crossover was lined for reverse, as if the RTC was directing the eastbound train onto the north track. The Supervisor then ran over to the Foreman at his BTMF truck in order to verify the TOP limits. Upon reading the TOP, the Supervisor realized that the crew and Speedswing were outside (west) of the protected limits. The Supervisor called for the crew and Speedswing operator to get out of the way and clear the tracks. The eastbound train then passed without incident.

All five of the Utility 7 crew had signed off on the TOP. The grievor admitted in that regard at his interview that he did not consult his timetable for Maple Meadows before initialing the TOP.

All five employees were substance tested following the incident. The grievor tested negative for both the breath alcohol and oral fluid test but positive for marijuana. The grievor admitted at his investigation that he would occasionally smoke marijuana on his days of rest but would never do so at or before work. The grievor, as noted, was issued two From 104 letters of discipline on April 8, 2019. The first letter was for a rule violation

as a result of his rule breach at Maple Meadows for which he received a 20-day Deferred Suspension. The second letter was for testing positive for marijuana for which he was dismissed, the Company citing the “non negative substance test results” as well as a violation of CROR, General Rule, G.

There is no dispute between the parties that the central reason for the grievor’s termination was for testing positive for marijuana. The grievor stated as follows in that regard at his investigation:

> Q5 Can you please explain in detail the positive result found in the Urine Drug Test that you supplied to the company?
> A5 I was substances and a small trace of THC found to be in my urine.
>
> Q6 Can you explain why THC was found in your urine?
> A6 Occasionally on my rest days I have smoked marijuana, I would never smoke marijuana or do any other drugs or alcohol at or before work.
>
> Q16 Do you feel you have a drug or alcohol problem?
> A16 No absolutely not.
>
> Q17 Do you have anything you would like to add to this investigation?
> A17 I would like to make it clear I do not have a drug dependency nor do I abuse marijuana, I come to work fit for duty every day and I believe I am a model employee by my work performance.

The Company maintains that it is a major offence under Company rules and policies for an employee in a safety-sensitive position like the grievor’s to consume or be under the influence of alcohol or drugs, including its after-effects, while on duty or subject to duty. See: HR Procedure 203.1 *Alcohol and Drug Procedures* for all CP Employees 3.1.3 & 3.1.4, *Canadian Rail Operating Rules (CROR),* Rule G. The Company submits, based on the grievor’s answer to Question 5 above, and his lack of care towards his assigned duties, that he was in violation of the Company’s drug procedure policy.

In support, the Company called on Dr. Iris Greenwald, a Medical Review Officer for DriverCheck Inc., a firm which specializes in drug testing, to provide expert evidence. DriverCheck Inc, it should be noted, was the firm retained by the Company to perform the drug and alcohol testing on the grievor. Dr. Greenwald has extensive experience in the field of post-incident drug testing, as indicated in her curriculum vitae. The Union also retained an expert, David Rosenbloom, PhD, who also has extensive experience in the area of post-incident drug testing[1]

The parties agreed to put a series of eight questions to each expert. The answers to each of those questions are found, respectively, in the initial Expert Report of Dr. Greenwald (dated November 12, 2019) and the rebuttal report of Dr. Rosenbloom (dated December 9, 2019).

The Questions/Answers of Dr. Greenwald reads as follows:

1) *What can the current science say about the connection between the use of cannabis and prolonged impairment risk?*

   It is clear, based on the medical science outlined above, that the use of THC containing cannabis, will result in impairment that leads to issues with divided attention, time distortion, poor judgment, poor concentration, and impairment of executive functions for 24 hours or longer. All of these have an impact on safety sensitive work, and all can result in impairment that impacts the safety sensitive work.

2) *What can be said about the effects of cannabis on an individual who smokes on their rest days? Would there be continuing effects from cannabis as they were to resume active duty the days following use?*

   The possibility of prolonged impairment lasting 24 hours or longer from time of use of cannabis is a documented phenomenon. Residual cognitive deficits may be seen in an individual who used cannabis on rest days and then

[1] Both Dr. Greenwald and Dr. Rosenbloom prepared initial expert reports. They also prepared final expert rebuttal reports after reviewing each other's initial expert reports.

returns to active duty days after use. The risk is dependent on multiple factors including potency of THC use, pattern of use and quantity of use.

3) *Is there any difference in the marijuana that exists today compared to the marijuana of previous years?*

The concentration of THC in cannabis available today is significantly higher than it was two decades ago. Whereas THC concentration of cannabis over twenty years ago was generally in the range of 1-5%, legal cannabis is available for sale today with >25% THC content. We have also seen cannabis concentrate products with THC potency >95%. The increased potency of cannabis products available correlates with longer periods of impairment after use than was quoted in studies from twenty years ago.

4) *What do some of the current medical studies currently say about THC specific impairment, including initial impairment as well as the nature of after effects of THC?*

There are several different ways that a substance can be impairing. In the acute phase shortly after THC use, when there is direct effect of the drug on the brain, users can experience a multitude of symptoms including: euphoria, perceptual disturbance, decrease in reaction time, impaired motor co-ordination, decrease in concentration and divided attention and impaired memory, learning and judgment.

Residual impairment can be seen following cannabis use, which reflects persistent disturbance of brain function. The amount of impairment can vary based on the factors previously mentioned in this report. This cognitive impairment as evidenced by issues with: divided attention, time distortion, poor judgment and concentration, and impaired cognitive function and problem solving.

5) *Can you speak to the ability of an individual to assess their own level of impairment and residual impairing effects following the use of marijuana as well as their ability to assess their capability to perform safety sensitive work?*

It is very difficult for an individual to be able to assess their ability to perform safety sensitive work after use of cannabis. This difficulty extends even to well-trained professionals, as impairments may be subtle and may not be noticeable in low stress or non-urgent situations.

6) *Is it safe to allow someone to work in safety sensitive position the day after and even the days following his or her use of marijuana?*

Because of the potential for prolonged impairment after cannabis use, there would be an increased risk of workplace injuries or accidents by allowing someone to perform safety sensitive duties after using marijuana.

7) *The Union has raised concern regarding the Companies 50 ng/ml threshold for screening concentration. The Union has argued that the Urinalysis of Mr. Obenauer should not have continued to the confirmation test. Could you*

please explain the science behind this testing and how Mr. Obenauer moved to the confirmation test.

Urine tests are screened for drugs of abuse using a laboratory process known as immunoassay. In the case of THC testing, this process identifies various different metabolites or breakdown products of THC. If the total of all of those metabolites is 50 ng/ml or higher, the laboratory will then proceed to confirmation testing of the sample using a different process called chromatography. If the total measurement on the screening test is less than 50 ng/ml, then no further testing will be done and the result would be reported by the laboratory as negative for THC.

With confirmation testing using chromatography, the laboratory measures only the one main metabolite from THC, 11-hydroxy-delta-9-tetrahydrocannabinol. If that one metabolite measures 15 ng/ml or higher, then the result will be reported by the lab as positive for THC.

Mr. Obenauer's screening test for cannabis use must have been higher than 50 ng/ml, otherwise the lab would not have proceeded to confirmation testing. Because the THC metabolite concentration on the confirmation test was 21 n/ml (and therefore higher than the cut off of 15 ng/ml), the result was reported as positive for THC.

8) *Mr. Obenauer had a negative Oral Swab. Could you please indicate what a negative oral swab means?*

As mentioned previously in this report, a negative oral fluid swab with a laboratory cut-off of 10 ng/ml, as in the case of Mr. Obenauer, indicates only that cannabis was not used within 4-8 (and in some cases up to 12) hours prior to the sample being taken. This window of detection cites a range of time prior to the test when cannabis may have been used if an oral fluid result is positive for THC.

It is possible for Mr. Obenauer to have used cannabis within 12-24 hours of the sample being taken, provide a positive urine result and still provide a negative oral fluid result when using a cut-off of 10 ng/ml.

Given that the skills required for safety sensitive duties requires even more attention, concentration, cognitive abilities, reaction time, and ability to divide attention, the most minimum of recommendations (to avoid driving for 4-12 hours after use of cannabis depending on route of administration) are not meant for safety sensitive workplaces.

The Questions/Answers of Dr. Rosenbloom read as follows:

1) *What can the current science say about the connection between the use of cannabis and prolonged impairment risk?*

While the evidence that cannabis can cause impairment acutely (lasting 3-4 hours) is accepted, there is much more controversy about the duration of this effect, with poorly conducted studies, invalid measures, small subject size, lack of baseline measures among the fatally flawed methodologies in these studies. Mr. Obenauer has admitted to smoking days before he went to work and there would be no ongoing impairing effect when the urine sample was taken.

2) *What can be said about the effects of cannabis on an individual who smokes on their rest days? Would there be continuing effects from cannabis as they were to resume active duty the days following use?*

Although Dr. Greenwald states that prolonged impairment from cannabis can last 24 hours or longer, this is based on very poorly conducted studies and it is clearly stated in the studies she cites to be controversial, as stated above. Poor choice of controls, invalid measures and confounding explanations that cannot be ignored, all play a role in obfuscating this issue. It is highly unlikely that cannabis' effects last longer than about 3-4 hours, even with more potent cannabis.

3) *Is there any difference in the marijuana that exists today compared to the marijuana of previous years?*

While I agree that marijuana today is more potent than was used in the original studies, that does not alter the duration of effect - the half-life remains the same - and while there will likely be a bigger high, the duration of the high remains the same as previously.

4) *What do some of the current medical studies currently say about THC specific impairment, including initial impairment as well as the nature of after effects of THC?*

While there is no dispute about the acute effects (3-4 hours) of marijuana, there is major controversy about prolonged effects (3-4 hours and into the following days) with the allegedly positive evidence coming from very poorly conducted studies methodologically.

5) *Can you speak to the ability of an individual to assess their own level of impairment and residual impairing effects following the use of marijuana as well as their ability to assess their capability to perform safety sensitive work?*

While I generally agree with the statements about it being difficult to assess impairment by both the impaired individual and even a trained outside observer, people who smoke marijuana do know that they are impaired at the time and tend to compensate by driving more carefully, for example.

6) *Is it safe to allow someone to work and safety sensitive position the day after and even the days following his or her use of marijuana?*

Because the studies claiming to show delayed impairment (the day after smoking) are so flawed methodologically and those that do not show delayed

impairment have much stronger research designs, it is safe to allow someone to perform safety sensitive duties the day after smoking.

7) *The Union has raised concern regarding the Companies 50 ng/ml threshold for screening concentration. The Union has argued that the Urinalysis of Mr. Obenauer should not have continued to the confirmation test. Could you please explain the science behind this testing and how Mr. Obenauer moved to the confirmation test.*

   I cannot comment on a result that I have not seen. Dr. Greenwald states that the combined metabolites had to exceed 50mg/ml or further testing would not have proceeded but does not show that this was the case. I also do not know how one can go from the measurement of an inactive metabolite of marijuana to adduce impairment at a previous occasion. The science simply does not allow one to make that giant leap.

8) *Mr. Obenauer had a negative Oral Swab. Could you please indicate what a negative oral swab means?*

   While I agree that Mr. Obenauer would have smoked marijuana many hours before the negative test, any effects of marijuana would have worn off by the time the negative swab was taken. While there is no dispute that marijuana can cause impairment within 3-4 hours there is no valid scientific evidence that this impairment would last into the following or subsequent days.

The Company, in argument, cited the *Stewart v Elk Valley Coal Corp* [2017] S.C.R. 591 decision of the Supreme Court of Canada. The Company noted that the Court emphasized the importance of deterrence in circumstances where an employee occupies a safety-sensitive position. The Court stated in that regard at para 55:

> [55] In our view, it was reasonable for the Tribunal to conclude that Mr. Stewart's immediate termination was reasonably necessary, so that the deterrent effect of the Policy was not significantly reduced. Elk Valley's coal mining operation was a "safety-sensitive environment" (Tribunal reasons, at para. 75). In such a workplace, it was crucial to deter employees from using drugs in a manner that could negatively affect their work performance and potentially lead to devastating consequences.

The Company also cited two cases outside the railway industry that dealt with the accommodation of individual employees who were medically-dependent on cannabis and

used it regularly: *Epcor Utilities & CUPE Local 30* (Petraschuk) (September 5, 2016) and *Lower Churchill Transmission Construction Employer's Association Representing Vallard Contstruction v. IBEW, Local 1620 (Tizzard),* (April 30, 2018). The Company noted in its brief the following comments from the *Epcor* decision:

> [117] The Union refers to the decisions of Arbitrator Picher in the *Canadian National* and *Canadian Pacific* cases (set out in paras. 81 and 82 above) in support of the position that the presence of marijuana metabolite in the test results is not evidence of impairment while the Grievor was at work. The evidence on possible impairment here is limited. In any event as Employer counsel points out in argument, the railway case involved application of a unilaterally imposed policy and Arbitrator Picher refused to follow the Alberta Court of Appeal in the *Chiasson* decision. There, the Court said that the drug and alcohol policy was aimed at safety and the policy perceived any level of the proscribed substance to be a safety risk.

The Company further noted in its brief the following comments from Arbitrator Roil in the *Lower Churchill* decision at p. 58:

> I am satisfied that the lack of reasonable ability to measure impairment in persons using cannabis-blood and urine tests do not measure current impairment plus the lack of specially trained individuals who can observe and measure impairment in one's judgment, motor skills and mental capacity-presents a risk of harm that cannot be readily mitigated.

The Company also asserts in its brief "…that the jurisprudence within CROA regarding positive urine cases is an anachronism when compared with the case of *Kellogg Brown & Root (Chiasson)(Court of Appeal of Alberta)* (2007) ABCA 426 and *Epcor Utilities"*.

The Union submits in reply that the current jurisprudence is unanimous that, in the absence of impairment at work, employers do not have the right to impose discipline of

any kind on employees. The Union notes that the CROA jurisprudence in particular is clear that the mere presence of THC in a worker's urine sample is not enough to establish impairment.

The Union further submits that the Company, which has the burden of proving impairment, is unable to do so in this case. The Union points out in that regard that not only did the grievor pass the oral fluids test, he also demonstrated no signs of impairment. It is noteworthy, in the Union's view, that the amount of cannabis in his urine was small, 21 ng/ml, and could have been consumed at any time during the previous 30 days.

I note that this Office has dealt with numerous cases where a bargaining unit member has been dismissed for testing positive for the presence of THC in their urine. In two recent awards, **CROA 4707 & 4712,** I summarized the consensus view expressed in numerous awards of this Office that a positive urine test alone does not support a finding of impairment:

> In **CROA 4240**, an award issued in 2013, Arbitrator Picher referred to his earlier 100-page seminal decision of **SHP 530** where he found that a positive drug test standing alone is not proof of impairment:
>
> > However, it is common ground (and on this all of the expert witnesses are in agreement) that a positive drug test gives no indication as to when or in what amount the drug in question was ingested.
> >
> > …The fact that a disciplinary investigation confirms that a policy has been violated by the mere fact of positive drug test does nothing to make the rule any more reasonable or justifiable on a legitimate business basis. A positive drug test, which is not proof of impairment while on duty, while subject to duty or while on call, cannot, standing alone, be just cause for discipline.
>
> He concludes in reference to the state of the law at that time:
>
> > The arbitral jurisprudence in respect of drug testing in Canada is now extensive. It has been repeatedly sustained by the courts and is effectively

> the law of the land. Part of that law, as stated in the passage quoted above, is that a positive drug test, conducted by urine analysis, standing alone, does not establish impairment at a point in time which corresponds with an employer's legitimate business interests and, standing alone, cannot be viewed as just cause for discipline.

The views expressed by Arbitrator Picher in **CROA 4240** has been confirmed by numerous decisions of this Office since that time.

In **CROA 4296,** issued in 2014, Arbitrator Schmidt dealt with a Locomotive Engineer who, similar to the grievor in this case, tested negative for an oral fluid test, negative for breath alcohol and positive for his urine test. Arbitrator Schmidt agreed with Arbitrator Picher's view of the law as he had set out in his previous decisions, beginning with **SHP 530**:

> The Company's position has no merit. No discipline can be sustained against the grievor. To the extent that a policy stipulates that for unionized employees a positive drug test is, of itself, grounds for discipline or discharge, it is unreasonable and beyond the well accepted standards set out in *KVP Co. Ltd. and Lumber & Sawmill Workers' Union, Local 2537* (1965) 16 L.A.C. 73 (Robinson).
>
> This law is settled. It has been for some time.

Arbitrator Albertyn, in 2015, was also faced with similar facts involving a Locomotive Engineer who had a negative oral fluid test and a positive urine test. After referencing a number of supporting decisions of this Office, he concluded in **CROA 4365**:

> A positive oral fluid test will likely result in a finding of actual impairment, but proof only of past use, as occurred with the Grievor, does not. In the circumstances, I can find no breach of the Grievor's responsibilities to perform his work without impairment by drugs or alcohol.

In the 2015 awards of **CROA 4399 and CROA 4400**, Arbitrator Silverman upheld the grievance of a Locomotive Engineer and Conductor, respectively, citing the same jurisprudence and "…noting that the law on the issue is settled".

In 2017, Arbitrator Clarke followed the lengthy line of cases in this area and concluded in **CROA 4524**:

> CP had the burden of proof to demonstrate that Mr. Playfair was impaired at the time of the November 15, 2015 incident. As numerous CROA decisions have already noted, it is not enough to show that a urine test indicates an employee may have traces of marijuana is his/her system. Those results do not demonstrate impairment at the material time. In Mr. Playfair's situation, he tested negative for the more specific oral fluid drug test.

Arbitrator Sims followed Arbitrator Clarke and came to the same conclusion in **CROA 4584**.

> Most recently, Arbitrator Weatherill, in **CROA&DR 4695-M**, dealt with a dismissal grievance involving a foreman who was subject to a substance abuse test after a derail incident. The results were a negative breath alcohol and oral fluid test and a positive urine test, results which are similar to a number of these cases including the one before this arbitrator. Citing Arbitrator Picher in **CROA 4240**, Arbitrator Weatherill noted that having marijuana in one's body is not conclusive of impairment. He states:
>
> > Having traces of marijuana in the body may raise a question of whether there is impairment, but that bit of evidence by itself is not enough to establish impairment, whereas the negative breath alcohol and oral fluid tests strongly indicate that there was not. There is no suggestion whatever that the grievor's conduct, movements or verbal behaviour were indicative of impairment.
>
> I have no difficulty arriving at the same conclusion reached by Arbitrator Weatherill, as have other arbitrators from this Office before him, that a urine drug test that uncovers traces of marijuana is not conclusive of impairment. As he succinctly put it *"…that bit of evidence by itself in not enough to establish impairment, whereas the negative breath alcohol and oral fluid tests strongly indicate there was not*". Apart from the stand-alone unreliability of the urine test as an indicator of impairment, it is noteworthy that Arbitrator Weatherill cited the contradictory results between the oral fluid test and the urine drug test as further support for his finding of insufficient evidence of impairment.

Turning to the expert reports submitted as evidence in this grievance, Dr. Greenwald comments as follows on the relationship between a positive THC result and impairment risk, at page 25 of her initial report (Q/A 1):

> > It is clear, based on the medical science outlined above, that the use of THC containing cannabis, will result in impairment that leads to issues with divided attention, time distortion, poor judgment, poor concentration and impairment of executive functions for 24 hours or longer. All of these have an impact on safety sensitive work and all can result in impairment that impacts the safety sensitive work.

Dr. Greenwald, however, does not disagree with Dr. Rosenbloom that a positive urine test alone is not determinative of the level of impairment nor can it identify the exact time of cannabis use. She notes at p. 5 of her rebuttal report:

> **Mr. Obenauer's Results:**
> Dr. Rosenbloom is correct in his assertion that exact level of impairment cannot be determined from a positive urine test alone. As mentioned previously, a negative oral fluid test at a cut off of 10 ng/ml can only tell us that cannabis was not used 4-8 (or up to12) hours prior to the sample collection. While it is not possible to identify exact time of cannabis use based on a positive urine test, a positive result can identify "recreational" THC use within a few days of urine collection or "chronic" THC use within days to weeks of the collection. As outlined earlier in this report, cognitive impairment can occur as either an acute or a more persistent phenomenon, and as such both "recreational" and "chronic" users are potentially at risk when working in a safety sensitive environment.

Dr. Greenwald summarized the same point in her Conclusions at p. 7 of her rebuttal report:

> While a positive THC result alone cannot itself diagnose actual impairment conclusively, it is more consistent with increased likelihood of impairment than had that employee tested negative on a urine drug test.

Dr. Rosenbloom, for his part, is of the view that the grievor's THC result is not enough to conclude he was impaired. He states at p. 5 of his initial report:

> Mr. Obenauer tested positive for the pharmacologically inactive metabolite of THC at 21ng/ml. From this result, it is impossible to establish impairment. This is because THC-COOH is a breakdown product and there is no research I am aware of that can link this result to impairment or time of consumption. As stated above, it can take months to test clean for THC-COOH. Because of the complicated pharmacokinetics of THC, one cannot estimate when the smoking took place and how that related to impairment.

He concludes, at p. 6 of his initial report, that a urine test result can never in his opinion be used as an indicator of impairment:

> The assumption that anyone who tests positive for the presence of THC i[n] his or her urine must be impaired is untrue for a number of reasons. First, the effects of cannabis wear off in a matter of hours but the urine can test positive for weeks. Second, the psychoactive components of cannabis, THC, is deposited in body fat and slowly leaches out for up to 30 days. Over this time the concentrations are too low to be psychoactive. Hence a person could have smoked 30 days prior to testing. Third, the major metabolite of cannabis, THC-COOH, is inactive pharmacologically. And since it is the THC-COOH that is measured when testing occurs, test results can only ever be legitimately viewed as indicators of either past use or past exposure, never impairment.

Dr. Rosenbloom also comments on the relationship between a positive THC result and impairment risk, at page 3 of his rebuttal report (Q/A 1):

> While the evidence that cannabis can cause impairment acutely (lasting 3-4 hours) is accepted, there is much more controversy about the duration of this effect with poorly conducted studies, invalid measures, small subject size, lack of baseline measures among the fatally flawed methodologies in these studies. Mr. Obenauer has admitted to smoking days before he went to work and there would be no ongoing impairing effect when the urine sample was taken.

While Dr. Greenwald disagrees with Dr. Rosenbloom's opinion that the lingering acute effects of marijuana are limited to 3-4 hours, there is common ground between the two experts that a positive urine test alone is unable to measure or determine the level of impairment of an individual who has consumed cannabis. As Dr. Greenwald notes at p. 5 of her rebuttal report cited above: "Dr. Rosenbloom is correct in his assertion that exact level of impairment cannot be determined from a positive urine test alone".

The current expert opinions are therefore still consistent on this point with the conclusions of Arbitrator Picher cited above in **SHP 530**:

> However, it is common ground (and on this all of the expert witnesses are in agreement) that a positive drug test gives no indication as to when or in what amount the drug in question was ingested.

Arbitrator's Picher's comments are also consistent with the reasoning found in the Ontario Court of Appeal decision of *Entrop v. Imperial Oil Ltd,* which he cited with approval in **CROA&DR 3668**. In **CRO&DR 3668**, Arbitrator Picher took issue with the findings of the Alberta Court of Appeal in the *KBR (Chiasson)* decision (which declined to follow the reasoning in *Entrop*) preferring the reasoning of Madame Justice Martin (now of the Supreme Court of Canada) in the same *KBR (Chiasson)* case, argued before her in the Court of Queen's Bench of Alberta:

> Significantly, for the purpose of this grievance, the judgement of Madam Justice Martin includes a relatively extensive analysis of the issue of the possible residual effects of marijuana. In that regard she makes the following comment:
>
> > [135] The evidence in the case at bar also supports the approach used in *Entrop.* The Court of Appeal of Ontario found at para 99 that:
> >
> > > …urinalysis is a reliable method of showing the presence of drugs or drug metabolites in a person's body. But drug testing suffers from one fundamental flaw. It cannot measure present impairment. A drug test shows only past drug use. It cannot show how much it was used or when it was used.

The grievor's positive drug test, similar to the evidence in **SHP 530** and a legion of other CROA cases, also does not measure when and in what amount the cannabis was ingested. The only evidence as to the timing of the consumption of cannabis is from the grievor himself who readily admitted at his investigation to having smoked cannabis on his rest day.

As Dr. Rosenbloom attests, the THC content “leaches out for up to 30 days” which supports the finding that 21ng/ml of THC remained in the grievor’s urine at the time he was tested. That result alone, as the CROA cases have determined, does not lead to a finding of impairment. There is no other evidence that the grievor demonstrated any physical signs that would lead to the conclusion that he was impaired at the time the incident occurred. Indeed, the grievor tested negative on the oral fluid tests. Accordingly, after consideration of the prevailing case law, particularly from this Office, and the expert evidence adduced in this case, I find that the Company has not met the onus of demonstrating that the grievor was in violation of CROR Rule G, as alleged in his Form 104 dismissal letter of April 8, 2019.

As to the Grievor’s 20-day deferred suspension, I note that the grievor acknowledged at his investigation that he held an E-Card and that he initialed the TOP as instructed by his Foreman. The grievor maintained at his investigation that there was no explanation provided to him when he initialed the TOP nor did he ask for one. He admitted to being “complacent” but said that he was “just trying to get in there and follow the rules” (A-19).

The Company noted that a portion of the material covered as part of the E-Card certification, which the grievor obtained on April 27, 2018, deals with the proper taking and implementation of a TOP and that, overall, the deferred suspension is warranted when all the circumstances are considered. The Union submits that the grievor’s role in the incident was negligible and that he should not have been disciplined at all when one

considers his inexperience, and the fact that he gave little thought to initialing the TOP when he was asked to do so by his Foreman.

I note that the grievor admitted at his interview to being responsible for his actions in his initialing of the TOP. He further indicated at that time that he would not sign anything in the future without knowing what protection was in place. Noting that the grievor was a junior employee with less than a year of service; that he was honest and forthright throughout the investigation; and, finally, that he had no prior discipline on his record, I find that the appropriate discipline for this first offence is a written warning.

Accordingly, the 20-day deferred suspension issued to the grievor on April 8, 2019 will be removed from his record and substituted with a written warning. I also direct that the grievor's dismissal on April 8, 2019 be removed from his record. The grievor, for the reasons outlined, shall be reinstated to his position forthwith and be compensated for all lost wages and benefits. I shall retain jurisdiction should any matters require resolution as a result of the implementation of this award.

December 19, 2019

JOHN MOREAU
ARBITRATOR