CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4707

Heard in Calgary, November 12, 2019

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE
MAINTENANCE OF WAY EMPLOYEES DIVISION

DISPUTE:

Dismissal of Mr. B. Van Den Boom.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

On January 31, 2019, the grievor, Mr. Bram Van Den Boom, was formally advised that he was dismissed from Company service for a Rule G violation after the Company received "positive post incident test results that were supplied…on December 20, 2018 at Doctor Kenefick's office in Surrey BC after you reported an incident to your supervisor." The Union objected to the dismissal and a grievance was filed.

The Union contends that; (1) mitigating factors were not taken into account and progressive discipline was not used. (2) The dismissal was unfair, unjustified and excessive.

The Union requests that: The grievor be reinstated forthwith without loss of seniority and with full compensation for all losses incurred as a result of this matter.

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

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) G. Doherty	**(SGD.)**
President	

There appeared on behalf of the Company:

A. Jansen	– Labour Relations Manager, Calgary
L. McGinley	– Assistant Director, Labour Relations, Calgary
W. McMillan	– Labour Relations Manager, Calgary

And on behalf of the Union:

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

AWARD OF THE ARBITRATOR

The grievor entered into the service of the Company in July 2014 as an Extra Gang Labourer. He held the position of Group 1 Machine Operator in December 2018.

On December 20, 2018 the grievor was the speed swing operator on a production crew working around Pitt Meadows, B.C. At around 4:30 p.m., the grievor inadvertently struck a parked Company hi-rail truck while turning his speed swing, resulting in a dent to the passenger right fender of the hi-rail truck. He reported the incident to his Supervisor, Production Manager J. Daley.

Following the incident, the grievor was required to undergo substance testing. The grievor tested positive for the presence of cocaine in his urine and on an oral swab test. His breath alcohol test was negative. The grievor explained during his investigation that he was not feeling well on December 20, 2018. He drove to a Tim Horton's and noticed a small amount of cocaine in the console of his truck when he paid for his coffee. The grievor explained that the cocaine was left over from a Halloween party he attended in October. He said that he ingested the cocaine at that time "to wake himself up". The grievor indicated in his statement that he regretted his decision and wished "…he could take the day back". He also indicated that he did not have a cocaine dependency and that "he made a horrible judgment".

The Union takes the position that dismissal of the grievor was an excessive disciplinary response. It notes in particular that the grievor was cooperative and displayed

remorse throughout the investigation. Further, the Union notes that there were no corroborating signs of the grievor's impairment at the time of the incident. The Union also points out that the grievor had no prior history of substance abuse, absenteeism, insubordination or assessments of discipline during his $4^{1/2}$ years of service to the Company. In the absence of a disciplinary record, the Union maintains that principles of progressive discipline should have been applied. In the end, the Union submits that this one incident is insufficient to conclude that the grievor has permanently severed the employer/employee bond of trust.

The arbitrator notes that the Company's *Alcohol and Drug Policy and Procedures (Canada)* (revised October 17, 2018) states as follows at 3.1.4:

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

There is no dispute that cocaine fits within the definition of an "illegal" drug, as set out in the Company's *Alcohol and Drug Policy and Procedures*. Further a person who is found to be impaired by a drug, such as cocaine, and operates railway equipment, is subject to prosecution under the Criminal Code of Canada (s. 253).

Taking drugs and then operating a motor vehicle or railway equipment, such as the case here, is of serious public concern. That concern is reflected in the railway industry by the incorporation of General Rule G, as set out in the *Canadian Rail Operating Rules* ("CROR") which reads in part:

> • (i) The use of intoxicants or narcotics by employees subject to duty, or their possession or use while on duty, is prohibited.
>
> • (ii) The use of mood altering agents by employees subject to duty, or their possession or use while on duty, is prohibited except as prescribed by a doctor.
>
> • (iii) The use of drugs, medication or mood altering agents, including those prescribed by a doctor, which, in any way, will adversely affect their ability to work safely, by employees subject to duty, or on duty, is prohibited.
>
> • (iv) Employees must know and understand the possible effects of drugs, medication or mood altering agents, including those prescribed by a doctor, which, in any way, will adversely affect their ability to work safely

The significance of a violation of CROR Rule "G" is reflected in an award of Arbitrator Kates in **CROA 1536**, cited by the Company, where he states in reference to the operation of trains and vehicles:

> The Company has treated infractions of Rule G as a strict liability prohibition that may result in discharge irrespective of whether the aggrieved employee is "under the influence" or otherwise intoxicated. The mere consumption and/or possession of a prohibited substance, particularly involving employees in the running trades or who operate Company vehicles are treated as capital offences for disciplinary purposes.

More recently, Arbitrator Schmidt commented in **SHP 776** how the consumption of cocaine shortly before commencing a shift leads to the logical conclusion of impairment while on duty:

> The overwhelming evidence in this case is that the grievor consumed both cocaine and marijuana immediately before he commenced his

> shift on March 21, 2015 or shortly thereafter. I find that he was impaired during his shift and there is simply no other rational conclusion to be drawn having regard to the evidence before me.
>
> An individual in the grievor's position who causes himself to become impaired on the job merits the most severe discipline, absent very compelling mitigating circumstances.

The seriousness of reporting to work while under the influence of cocaine was underlined in **CROA&DR 4653 & 6654** by Arbitrator Hornung:

> Even leaving aside the fact that the imposition of 15 demerits for the breach of Rule 104 put him over the top subject to dismissal, his coming to work under the influence of cocaine represents a serious offense deserving of severe discipline. In both instances herein, I conclude that discipline was warranted and the discipline imposed was reasonable in the circumstances.

More recently, in **Ad Hoc 663**, Arbitrator Clarke, in dealing with a locomotive engineer who had consumed cocaine close to the time he was operating a train, noted at para 134:

> "The extreme seriousness of Mr. A's action is beyond doubt."

The evidence in this case is clear that the grievor tested positive for cocaine in both his urine test and the oral swab shortly after the incident. Similar to the comments of Arbitrator Hornung above, the grievor's decision to show up for work after using cocaine, in whatever amount, was a reckless decision which calls for a severe disciplinary response. The safety risks posed by an employee running heaving equipment like the grievor while under the influence of cocaine could lead to catastrophic results. To borrow from Arbitrator Clarke's words, the "extreme seriousness" of the incident "is beyond doubt".

I find the facts here are similar to those in the *Coast Mountain Bus Co. 2009 CarswellBC 111,* a case cited by the Company involving a bus driver impaired by alcohol, where the arbitrator found at para. 257 that it would take *"…the most compelling exculpatory circumstances to persuade an arbitrator to find dismissal excessive in the circumstances."* The grievor's $4^{1/2}$ years of service and otherwise clean record do not provide a sufficient basis to reduce the dismissal penalty under the circumstances.

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

For all the above reasons, I must dismiss the grievance.

December 4, 2019

JOHN MOREAU
ARBITRATOR