CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4726

Heard in Calgary, February 11, 2020

Concerning

CANADIAN PACIFIC RAILWAY

and

TEAMSTERS CANADA RAIL CONFERENCE
MAINTENANCE OF WAY EMPLOYEES DIVISION

DISPUTE:

Dismissal of R. Haveman.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

On June 11 2019, the grievor, Mr. Ryan Haveman, was formally advised that he was dismissed from Company service effective June 11, 2019 for "Positive/post incident drug test that was supplied to the Company on May 13, 2019 at Occusafe Testing Services in Langley BC following an on track collision." A grievance was filed.

The Union contends that the grievor tested negative on both the breath and oral swab tests, was not impaired, and could not be the subject of any form of discipline.

The machine that the grievor was operating was struck by another machine. The grievor was not issued any discipline for the incident. Since he was the victim of the collision, the Company's demand that he be subjected to testing was unreasonable, arbitrary and illegal.

The grievor's dismissal was unfair and unwarranted.

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.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

Following a formal investigation, the Grievor, Ryan Haveman was formally advised that he was dismissed from Company service effective June 11, 2019 for: *"Positive post incident drug test that was supplied to the Company on May 13, 2019 at Occusafe Testing Services in Langley BC following an on track collision."*

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

Company Position:

1. The Grievor tested positive in his urine for marijuana which constitutes a clear violation of HR 203.1 and Rule G.

2. As per the positive test the Grievor was not free from acute, chronic, hangover and after-effects as indicated in HR 203.1.

3. The Grievor was involved a collision which constitutes a serious incident and therefore subject to post-incident drug and alcohol testing.

4. The Grievor's dismissal was a violation of HR 203.1 and Rule G which warrants discipline up to and including dismissal.

The Company maintains that the discipline assessed was appropriate in all the circumstances.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) G. Doherty	**(SGD.) F. Billings**
President	Manager, Labour Relations

There appeared on behalf of the Company:

D. McGrath	– Manager, Labour Relations, Calgary
W. McMillan	– Manager, Labour Relations, Calgary
D. Pezzanitti	– Assistant Director, Calgary

And on behalf of the Union:

H. Helfenbein	– Vice President, Medicine Hat
D. Brown	– Counsel, Ottawa
G. Doherty	– President, Brandon

AWARD OF THE ARBITRATOR

1. The Grievor began employment with the Company on April 10, 2017. At the time of the incident in question, his position was that of a Machine Operator.

2. On May 13, 2019, he was working as a Group 1 Machine Operator on the Mission Subdivision, BC. Having been instructed to do so, the Crew bunched up its machines at the Marshall Road Crossing and began travelling southward. The lead spiker which the Grievor was operating, rolled over a rough joint and his back pack, fell off its storage hook and landed on the emergency shut off switch, shutting the machine down. The Grievor immediately tried to contact the trailing machine by radio to warn them to stop. He then jumped off the spiker and to flag the following machine. It was too late. The rear spiker ran into the Grievor's spiker.

3. The Grievor was called to an investigation (Company Tabs 7/8) *"… in connection with the … collision you were witness to on May 13, 2019*." At the investigation the Company's representative stated:

> *… the following statement is informational surrounding the incident and no discipline will be assessed to Ryan Haverman in regards to the collision*

4. In fact, no one was disciplined for the incident, including the operator of the trailing spiker.

5. While it is apparent that the Company, at the outset, did not regard the Grievor to be culpable for the incident - in fact it investigated him only as a "witness" (Company Tab 7) - and, there were no objective signs of impairment, it nevertheless required the Grievor to undergo post-incident substance testing.

6. He tested negative for Oral Fluid Drug Test and positive (37 ng/ml of marijuana) for the Urine Drug Test.

7. At the investigation, in response to a question in relation to the date that he ingested the marijuana which was found in his urine, the Grievor explained that he did not recall: "*…the exact date, but it was prior to the incident, off duty and not subject to duty."*

8. Following the investigation, he was dismissed (Form 104; Company Tab 1) on June 11, 2019, for:

> *Positive post incident drug test results that were supplied to the company on May 13, 2019 at Occusafe Testing Services in Langley BC following an on track collision.*

9. The Company maintains that dismissal was a reasonable response both to a violation of the Drug and Alcohol Policy HR 203.1, as well as a violation of Canadian Railway Operating Rules (CROR) General Rule G.

10. On July 9, 2019 the Union filed a grievance asserting, *inter alia,* that the Company was unable to prove that the Grievor was impaired at work and, accordingly, his dismissal was illegitimate. It stressed the fact that the Grievor's oral fluid test was negative proving conclusively that he was not impaired at work and, as such, could not be properly disciplined, much less dismissed (Union Tab 6).

11. The Union also took issue with the legitimacy of testing the Grievor at all. It argues that requiring the Grievor to undergo testing was improper, constituted a breach of his privacy and a violation of the Company's own drug testing policies. It states:

> *While it is true that an incident occurred, it was not one that the Grievor had any responsibility for and under our law, post-incident testing can be properly carried out only when an employee's actions or lack of actions have contributed to the cause of the incident. Since the Company did not deem it worthy to discipline or even formally investigate the Grievor for the incident on May 13, it cannot be concluded that the Company considered him to have contributed in any way to the cause of the incident.*

12. It asserts that its position is confirmed by the Company's own Alcohol and Drug Policy - section 5.2.2 of Policy #HR203.1 – which 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.* (Emphasis added)

13. In this case, the Grievor drove the lead machine and was rear-ended by the trailing spiker. He made every effort to warn the driver of the trailing machine that his was stopped.

14. The Memorandum of Alina Killough reflects that she made enquiries immediately after the incident pursuant to the request of her manager who: "*… told me to gather more information via incident reports".* There is nothing in her memo that suggests any act or omission of the Grievor could have been a "contributing factor to the incident".

15. In fact, her memo (Company Tab 8) makes it apparent that Mr. MacLean, the driver of the trailing unit, took responsibility for following too close and consequently it was he who "screwed up" and caused the collision.

16. There is nothing in the evidence which makes it clear that Ms. Killough (or anyone on behalf of the Company) concluded that an act or omission of the Grievor could have been a contributing factor to the incident.

17. This is consistent with the Company's position at the investigation of the incident, wherein the Grievor was notified that he was to attend an investigation *"… in connection with the … collision* ***you were witness to*** *on May 13, 2019*."

18. At the investigation the Company's representative stated:

> *… the* ***following statement is informational surrounding the incident*** *and no discipline will be assessed to Ryan Haverman in regards to the collision*

19. The above two paragraphs reasonably infer that, at that stage, the Company had clearly concluded that no "… *act or omission of the (Grievor) could have been a contributing factor to the incident…"*

20. At the subsequent investigation, regarding the post incident test, the Union emphasized its position when it stated:

> *The Union would like to place a preliminary objection to the evidence that has been provided in the form of the substance testing results. Company policy is clear that post incident testing is appropriate only in situations that are serious or major in nature. The situation that brought rise to the testing and that they have treated it as a minor incident with the employee who was operating the equipment, it is not reasonable for the company to suggest that any omission of Mr. Haveman's at the time of the incident lead to the ultimate incident…*
>
> *It is the position of the TCRC MWED that given that the company did not have grounds to test Mr. Haveman in the first place on the day of the incident, the results must be precluded and ignored. In the previous statement in regards to the incident where the substance testing was required, the statement was for information and quote "following statement is informational surrounding the incident and no discipline will be assessed to Ryan Haveman in regards to the collision." It is essentially evidence that was obtained through improper procedure and Mr. Haveman's rights were violated by having to submit to testing in the first place.*

21. In **CROA 4256** Arbitrator Picher, notes as follows:

> *Arbitrator Sims took issue with the approach taken by the employer. He commented, in part, as follows:*
>
> *There are 3 elements to the post-incident testing discussed in the cases of particular significance here. They are the threshold level of incident needed to justify testing, the degree of inquiry necessary before the decision is made, and the necessary link between the incident and the employee's situation to justify testing.*
>
> *In the view of Arbitrator Sims, which this Arbitrator shares, there must be a genuine exercise in judgement by the employer to justify post-incident testing, meaning more than the mere application of a checklist. At page 54 of his award Arbitrator Sims further commented in that regard:*
>
> *However, as was obviously the case in Fording (Kryderman), and as is the case here with the use of the "Quick Guide" if such a device too readily leads to the attitude that "if we tick off the boxes we can test" it is harmful because it distracts from judgment that inevitably needs to be exercised based on the entire circumstances. It is not enough to say, "Ok – we have enough to test" if important factors have been ignored or avoided. The individual to be tested should, unless the circumstances preclude it, be asked for their explanation. If they are sufficiently close to the incident to justify finding out whether their*

> *being impaired might be part of the cause, their explanation of events must also be relevant to the decision as to whether testing is justified.*

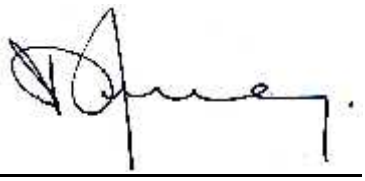
22. In the circumstances I agree with the Union that the Company's officers did not have a sufficient basis to conclude that the grievor had any likely responsibility for the collision which occurred. Nor did it establish the necessary link between the incident and the situation of the Grievor so as to have justified the requirement that he undergo drug and alcohol testing. *(**CROA 4256)***

23. Accordingly, I conclude that the Company exceeded the bounds of its Policy by requiring the Grievor to undergo a drug and alcohol test.

24. The grievance is allowed.

25. The Grievor shall be re-instated forthwith and be made whole without loss of seniority or benefits.

26. I will retain jurisdiction with respect to the interpretation, application and implementation of this award.



April 15, 2020

RICHARD I. HORNUNG, Q.C.
ARBITRATOR