

# CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

## CASE NO. 4751

Heard in Montreal with Video Conferencing, July 14, 2020

Concerning

**CANADIAN NATIONAL RAILWAY COMPANY**

And

**UNITED STEELWORKERS - LOCAL 2004**

### **DISPUTE:**

Discharge of Extra Gang Foreman — Level III Richard L. Lefebvre effective February 11, 2019 for "Violation of CNS Policy to Prevent Workplace Alcohol and Drug Problems and the violation of CROA Rule G for operating a track Unit while under the influence of marijuana on January 7, 2019."

### **JOINT STATEMENT OF ISSUE:**

On January 7, 2019, the grievor was involved in a collision with broom 613-07 when he was at control of pick-up 175205 at Burwash. As a result of the incident, post incident/accident testing for the presence of drugs or alcohol was done on the grievor. The results of the testing were positive for the presence of marijuana. The grievor was then notified to attend a formal investigation on January 18, 2019, in connection with circumstances surrounding his alleged violation of CN's Policy to Prevent Workplace Alcohol and Drug Problems and the alleged violation of CROR rule G with respect to the results of drug and alcohol testing during the work day of January 7, 2019. Further to the completion of the investigation, the grievor was discharged effective February 11, 2019.

The Union contends that the discipline is unwarranted and excessive. The Union maintains that the grievor was not impaired at work and that there was no smoking of marijuana at work. The Union requests that the grievor be reinstated into his regular position without loss of seniority and that he be made whole for any loss of earnings and cumulative compensated service.

The Company disagrees with the Union's contentions and has declined the Union's grievance.

**FOR THE UNION:**  
**(SGD.) J. F. Migneault**  
President

**FOR THE COMPANY:**  
**(SGD.) S. Blackmore**  
Senior Manager, Labour Relations

There appeared on behalf of the Company:

V. Paquet – Manager Labour Relations, Toronto  
S. Blackmore – Senior Manager Labour Relations, Edmonton

S. P. Paquette – Director, Dispute Resolution and Labour Standards, Montreal  
F. Daignault – Manager, Labour Relations, Montreal

And on behalf of the Union:

T. Lundblad – Staff Representative, Toronto  
J.F. Migneault – President Local 2004, Montreal  
R. Demers – Chief Stewart, Great Lakes  
R. Lefebvre – Grievor, Toronto

### **AWARD OF THE ARBITRATOR**

1. This case concerns Mr. Lefebvre's dismissal arising from a positive drug test administered post-incident, after a collision between the hi-rail vehicle he was operating and a "broom" (heavy piece of work equipment used to plow and clear the snow from the tracks). The oral fluid test performed on Mr. Lefebvre showed a result of 22ng/ml for Tetrahydrocannabinol ("THC").
2. No retesting was requested, and the results are not in dispute.
3. The Company takes the position that the positive oral fluid test, alone, is conclusive evidence of impairment while on duty and is sufficient to uphold the dismissal.
4. The Union disputes the dismissal, alleging Mr. Lefebvre was not impaired while on duty. It claims his off-duty cannabis consumption was not a cause of the accident and the dismissal is excessive considering the context. According to the Union, the Company failed to discharge its burden of proof to establish impairment. Mr. Lefebvre does not have a cannabis dependence, nor does he suffer from a drug related disability requiring

accommodation. The Union requests that the discharge be vacated, and that Mr. Lefebvre be reinstated immediately.

5. After thoroughly reviewing the evidence, materials and submissions presented, I find that the Company has established, on a balance of probabilities, that Mr. Lefebvre was impaired while on duty. The discharge is therefore upheld. This decision addresses the relevant arguments proffered by the parties and which support my findings.

6. Mr. Lefebvre held the position of a Level III Extra Gang Foreman and had approximately eighteen (18) years of service at the time of the incident. Mr. Lefebvre leads a production gang. This is a safety-sensitive position entailing a high level of responsibility, including securing track protection and ensuring the safety of employees.

7. Mr. Lefebvre reported to work at 9 P.M. on January 6, 2019. He was on “winter assignment”, operating a hi-rail vehicle. The assignment required him to work with a Broom Operator to clear snow from the tracks and switches on the mainline track running North-South near Burwash, Ontario.

8. Mr. Lefebvre followed the broom which was plowing to the South switch. Finding there was no further snow to plow heading southbound, the Broom Operator backed up heading northbound, colliding with Mr. Lefebvre’s hi-rail vehicle. The incident which occurred on January 7, 2019 at approximately 3:15A.M prompted a post incident/accident drug and alcohol test.

9. As part of the testing protocol, Mr. Lefebvre provided a urine sample at 8:52 A.M. Given the positive THC test, he was required to provide an oral fluid sample at 9 A.M. The Company uses an independent testing facility to preform drug tests and subsequent analysis. The test results indicate a THC quantitative level at 72ng/ml for the urine sample and 22ng/ml for the oral swab.

10. After positive testing occurs, a Medical Review Officer (“MRO”) interviews the individuals being tested to obtain an explanation for the presence of drugs in their system. On January 11, 2019, the MRO interviewed Mr. Lefebvre. Mr. Lefebvre stated his last consumption of cannabis was smoked on New Year’s Eve (7 days prior to the incident). After being provided with additional information about the testing and retesting processes, Mr. Lefebvre provided a different version as to when he had last smoked cannabis. On January 18, 2019, during his investigation interview, Mr. Lefebvre “swore” the last time he smoked cannabis was at 8 A.M. on January 6, 2019, 13 hours before commencing of his shift.

11. Rule G of the Canadian Railway Operating Rules (CROR) sets out clear and unequivocal standards which employees must follow. Essentially, the use of drugs, narcotics or intoxicants is prohibited on duty. Employees must have the ability to work safely. During the investigation, Mr. Lefebvre confirms he understands the policies and their application.

**Does the evidence support a finding of impairment?**

12. The Company bears the onus to establish, on a balance of probabilities, that Mr. Lefebvre was impaired while on duty. The Company provided a report prepared by Dr. Snider-Adler, a recognized expert and clinician in the field of workplace drug testing. The Union disputed the company's evidence and presented a report prepared by Dr. MacDonald, a researcher with a background in epidemiology and psychology. The Company objected to Dr. MacDonald's qualification as an expert due to a lack of appropriate academic and professional credentials.

13. Assuming but not deciding that Dr. MacDonald qualifies as an expert, I am persuaded by the compelling medical evidence presented by the Company and find, on a balance of probabilities, that Mr. Lefebvre was impaired while on duty.

14. Dr. Snider-Adler has been qualified as an expert for Drug Testing Interpretation in arbitration hearings and court cases across Canada, including previous CROA&DR. She is a licenced physician and the Chief Medical Review Officer with DriverCheck.

15. According to Dr. Snider-Adler, who testified at the hearing, there is no true impairment test for cannabis. Oral fluid testing can detect recent use of cannabis. The test provides information to ensure that the individual has not consumed cannabis at a time when they are at the highest risk of impairment. The cut-off level used by the Company to determine a "positive" result for THC in an oral fluid test is 10 ng/ml, which has consistently been deemed to be indicative of impairment. She explains that over the

years, there has been a significant increase in concentration of THC in cannabis. THC is the psychoactive component of cannabis. Dr. Snider-Adler writes: “the higher the concentration of THC used, the more impairing the drug is and the longer the impairment is thought to last.”

16. According to evidence adduced by the Company, an oral fluid test when using a cut-off of 10ng/ml, is consistent with consumption of cannabis within a timeframe of approximately 12 hours prior to the oral swab sample being administered. Mr. Lefebvre’s levels were more than double that cut-off level.

17. Mr. Lefebvre never disclosed he was a regular user of cannabis until the hearing. Chronic, daily users of cannabis may have a prolonged timeframe of detection on an oral fluid test in comparison to infrequent users. For most individuals, the oral fluid results will fall below the cut-off level of 10ng/ml well before 12 hours. Presented with the scenario that Mr. Lefebvre may use large quantities of cannabis daily and has been doing so for many years, Dr. Snider-Adler writes: *“In either situation, there is no doubt that Mr. Lefebvre was impaired at the time of incident as well as during his work shift”*.

18. During Dr. Snider-Adler’s cross-examination, she was questioned about Mr. Lefebvre’s lack of physical or behaviour signs of intoxication. She explained that although physical or behavioural symptoms are reliable indicators of impairment, the lack of such symptoms does not, on its own, mean that the individual was not impaired. In other words,

impairment could be present despite the lack of physical symptoms, especially if the individual in question is a chronic cannabis smoker.

19. I find that Mr. Lefebvre was impaired while working his safety-sensitive duties. The test findings demonstrate that it is highly likely that Mr. Lefebvre smoked cannabis at approximately 9 P.M. on January 6, 2019. This coincides with the commencement of his shift. Assuming that Mr. Lefebvre is a regular cannabis smoker, it is possible that the THC use may have occurred prior to his shift. According to Dr. Snider-Adler, the period of impairment stemming from Mr. Lefebvre's consumption extended for a period of 4 to 8 hours. There can be little doubt about the accuracy of the positive drug test which confirms, in this instance, that Mr. Lefebvre was impairment while on duty.

20. The evidence supports the finding that Mr. Lefebvre consumed cannabis either immediately prior to or during his shift. Either way, it is inconsistent with the versions presented by Mr. Lefebvre about when the consumption took place.

21. Dr. MacDonald's report did not disclose any information that would change my view about the testing process or my finding of impairment. The main difference between his view and Dr. Snider-Adler's relates to the period of impairment after smoking cannabis. According to Dr. MacDonald, impairment may extend up to four (4) hours after consumption. I have accepted that Mr. Lefebvre consumed cannabis within 12 hours of the testing, which coincides with the beginning of his shift. Applying Dr. MacDonald's

assertion with respect to impairment, the conclusion remains the same: Mr. Lefebvre was impaired while at work.

### **Appropriateness of the discipline assessed**

22. I find there is no reason to intervene in the discipline as the aggravating factors outweigh the mitigating factors. Mr. Lefebvre's failure to offer direct and forthcoming explanations relating to his cannabis consumption raised serious concerns about his continuing employment with the Company in a safety sensitive role.

23. As described in detail in SPH 530, a railway constitutes an exceedingly dangerous working environment for someone whose faculties are impaired. The consequence of errors stemming from impaired judgement can be extreme. The Company owes a duty to all its employees and the public in general to operate its railway in a safe and responsible manner.

24. Mr. Lefebvre accepted no responsibility for the incident. His disciplinary record stood at 15 demerits. While he may have eighteen (18) years of service at the time of termination, I find the seriousness of the misconduct cannot be mitigated by that fact alone. I see no reason to justify a lesser penalty. The discharge is upheld, and the grievance denied.

August 10, 2020



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**AMAL GARZOUZI  
ARBITRATOR**