

**CANADIAN RAILWAY OFFICE OF ARBITRATION  
& DISPUTE RESOLUTION**

**CASE NO. 4789**

Heard in Gatineau, via Video Conference, July 14, 2021

Concerning

**CANADIAN PACIFIC RAILWAY COMPANY**

And

**TEAMSTERS CANADA RAIL CONFERENCE**

**DISPUTE:**

Appeal of the dismissal from Company Service assessed to Conductor A. Bellavance.

**JOINT STATEMENT OF ISSUE:**

Following an Investigation Conductor Bellavance was dismissed from Company Service as shown in his Form 104 as follows:

“On September 21, 2019 you were involved in an incident where post incident drug and alcohol testing was conducted which produced non-negative results in accordance with Policy HR203.

A formal investigation was conducted on October 9, 2019 to develop all the facts and circumstances in connection with the referenced occurrence. At the conclusion of that investigation it was determined the investigation record as a whole contained substantial evidence proving you violated the following: Policy # HR 203 Alcohol and Drug Policy (Canada) effective January 1, 2012 and revised September 1, 2019.

*Please be advised that you are dismissed from Company Service, effective October 29, 2019, for failing to ensure that at all times while working, on duty, or subject to duty you were fit to work and free from adverse effects of prohibited and illegal substance as evidenced by your positive Post Incident Oral Fluid Drug test and your positive Post Incident Urine Drug test collected on September 21, 2019.”*

The Company further provided with Mr. Bellavance’s Form 104 a letter/future reinstatement agreement conditions titled “Re: Post Dismissal Actions”.

**Union’s Position:**

The Union first provides in regards to the “incident” that Mr. Bellavance was not investigated or received any discipline in said matter.

For all of the reasons and submissions set forth in the Union’s grievances, which are herein adopted, the Union’s position is that the Company has dismissed Mr. Bellavance in violation of the Collective Agreement, Company Policy for Workplace Accommodation, the *Canadian Human Rights Act*, The Commission’s Workplace Accommodation, and the policy requirements under CHRC alcohol and drug testing, as well as any other policy, law, past practice/prejudice, right, or regulation that may apply.

The Union has shown in our grievances provided that initially Mr. Bellavance was cleared to return to work with negative results on all tests. Approximately six days later Mr. Bellavance was advised under extremely low thresholds CP removed him from service. These preliminary and secondary testing levels taken on by CP are currently under grievance. The urine levels drop from 50 to 15 ng/ml while the key fact is that the oral swab threshold of 4ng/ml and 2ng/ml for initial and secondary tests are remarkably lower than what CP's policy was only a year prior, 10ng/ml and 10 ng/ml. The Union continues to question the validity of the testing and the test results. Any discipline in this case must be void based on this alone.

Mr. Bellavance has sought help with an addiction problem. This information was provided during his investigation but the Company chose to ignore and outright dismiss him. The Company dismisses him we say in violation but they do acknowledge at the time of dismissing him a letter advising him to seek help and they will look at future reinstatement. The Company by law was to allow Mr. Bellavance to continue with getting help and during that process he should have been on Weekly Indemnity Benefits. Once cleared an accommodation until he would be able to fully work his position as Conductor. Instead the Company wrongly dismissed him. The Company's own CMO has stated;

*"For example, the CMO noted that 10% of employees will have a substance use disorder. In addition, the CMO commented that a job termination can lead to financial and other stressors which may lead to a substance use disorder. Comments were also made that reliance cannot be had on employee medical forms since they may lie about substance abuse."*

As noted instead the outright dismissal, how did that help Mr. Bellavance's condition/disorder which is recognized as a disease. The Union believes based on the Company's actions Mr. Bellavance has been discriminated against based on his disability, or any other ground prohibited by the Charter.

Further as outlined in the Union's grievance Mr. Bellavance did not receive a fair and impartial process and should not have been tested. This is backed that he never was investigated for the actual incident.

As provided Mr. Bellavance advised he was seeking help, has sought help and continues on this road even with the Company ignoring his basic rights as shown throughout our grievances.

The Union believes the Company has wrongfully dismissed Mr. Bellavance as they were aware of his disease and chose to ignore it and outright dismiss him, instead of allowing him to "get better" and find an accommodation then return to his position as Conductor. The Union requests that Mr. Bellavance be reinstated to his position of Conductor, and he be compensated all loss of wages with interest, benefits, and without loss of seniority or pensionable service.

The Union further requests Mr. Bellavance be accommodated as per Company Policy for Workplace Accommodation, the Canadian Human Rights Act, The Commission's Workplace Accommodation, and the policy requirements under CHRC alcohol and drug testing, as well as any other policy, law, past practice/prejudice, right, or regulation that may apply.

Based on the Company's actions the Union is further requesting damages as provided in the Union's Step 1 grievance.

In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

#### Company's Position:

The Company disagrees and denies the Union's request.

The Company has reviewed the Union's grievance, the statement and investigation in its entirety and cannot agree with the Union's contentions. The Company maintains the Grievor was appropriately dismissed, following a Fair and Impartial investigation on October 9, 2019. The Grievor was found culpable of being in violation of Policy #HR 203 Alcohol and Drug Policy.

The Grievor's samples he supplied on September 21, 2019 were tested and analyzed in compliance with Policy HR 203. The Company maintains the Grievor was properly required to submit an Alcohol and Drug test, following an incident. The Grievor tested positive for Marijuana in his urine and oral fluid samples, which constitutes a clear violation of Rule G and Policy HR 203. As per the positive tests, the Grievor was unfit for duty.

The Company maintains no violation of the Workplace Accommodation policy, the *Canadian Human Rights Act*, the Commission's Workplace Accommodation or policy requirements under CHRC Alcohol and Drug Testing were violated as the Grievor had never sought medical consultation, nor did he ever request for an accommodation with the Company prior to the incident, in order to substantiate any alleged medical disability and/or substance use disorder.

The Union provides no rationale as to why the Grievor would be entitled to damages. Damages are reserved for conduct which is found to be harsh, vindictive, reprehensible and malicious, as well as extreme in its nature, as established in the notable *Honda v. Keays* Supreme Court of Canada decision. The Union failed to allege such action on behalf of the Company in its Step 2 grievance; as such, the Company maintains the request for damages is without merit.

The Company maintains the discipline assessed was appropriate, warranted and just in all the circumstances. The dismissal remains a reasonable response to a violation of Company policy and procedures. Accordingly, the Company sees no reason to disturb the discipline assessed.

**FOR THE UNION:**  
**(SGD.) W. Apsey**  
General Chairman

**FOR THE COMPANY:**  
**(SGD.) D. Guerin**  
Senior Director, Labour Relations

There appeared on behalf of the Company:

D. Zurbuchen	– Manager Labour Relations, Calgary
S. Oliver	– Manager Labour Relations, Calgary

And on behalf of the Union:

R. Church	– Counsel, Caley Wray, Toronto
W. Apsey	– General Chairman, Smiths Falls
A. Bellavance	– Grievor, Smiths Falls

### **AWARD OF THE ARBITRATOR**

1. The Grievor was employed as a Trainman (Conductor), a safety-critical position. He was dismissed for violating the Company's *Alcohol and Drug Policy (Canada) – Policy # HR 203 (Alcohol and Drug Policy)*.

2. On September 20, 2019, the Grievor was working as part of a crew. In the evening, the crew's train ran over a derail, causing a locomotive derailment. As a result, the crew was subject to post incident testing for drugs and alcohol, conducted in the morning of September 21, 2019.

3. The Grievor's crew mate who was working as the Locomotive Engineer on September 20, 2019, eventually took full responsibility for the train incident. Therefore, the grievor was never investigated or disciplined for that incident.

4. While the Union questions the drug testing process and preliminary results (under a separate grievance), the Grievor's oral fluid test ultimately returned positive for marijuana (cannabis) at a quantitative level of 3 ng/ml.

5. After receiving his drug test results, the Grievor reached out to the Union for guidance, contacted the Employee Assistance Program (EAP), sought medical care and put himself on a wait list for an abstinence program with an addiction centre.

6. The Grievor was investigated for his positive drug test result on October 9, 2019. During his statement, he admitted to smoking marijuana around 0630 hours on September 20, 2019, approximately 14.5 hours before reporting for duty. He explained that he had become dependent on the use of marijuana to cope with anxiety and sleeping issues, which were due to personal circumstances. He indicated that he suspected he had a substance abuse problem for approximately eight months prior to

the incident but was embarrassed to seek advice, as required by the *Alcohol and Drug Policy*, until he received his test results. He stated he was not aware of ever attending work unfit as a result of his substance abuse problem.

7. Further to the investigation, the Grievor was dismissed for violating the Company's *Alcohol and Drug Policy*. Specifically, the dismissal letter states, in part, the following:

Please be advised that you are dismissed from Company Service, effective October 29<sup>th</sup>, 2019, for failing to ensure that at all times while working, on duty, or subject to duty you were fit to work and free from adverse effects of prohibited and illegal substance as evidenced by your positive Post Incident Oral Fluid Drug test and your positive Post Incident Urine Drug test collected on September 21<sup>st</sup>, 2019.

This is a direct reference to Rule G of the *Canadian Rail Operating Rules* (CROR), incorporated in the *Alcohol and Drug Policy*. In its hearing submissions, the Company also argued that the Grievor violated the Company's 28-day cannabis ban and failed to disclose his substance abuse disorder promptly, notably as per the *Alcohol and Drug Procedures – Procedure # HR 203.1 (Alcohol and Drug Procedure)*, referenced in the *Alcohol and Drug Policy*.

8. The Union argues that the Company has not met its onus of proving a Rule G violation, and therefore the grievance should be dismissed. In the alternative, it raises the following issues: whether the Grievor was properly subjected to post-incident testing; whether the drug testing results were valid; whether the Grievor was entitled to accommodation for a drug addiction, in lieu of dismissal.

**Did the Grievor violate Rule G?**

9. Rule G, incorporated in the *Alcohol and Drug Policy*, sets out the standards relating to intoxicants, narcotics, drugs, medication or mood altering agents. It reads as follows:

(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.

(Emphasis added)

10. In support of its argument of a Rule G violation, the Company relies exclusively on the Grievor's drug test result of 3 ng/ml. The Company analyses this result against a cut-off of 2 ng/ml, which it established as indicative of impairment upon review of its *Alcohol and Drug Policy* in September 2019. The parties have indicated that the revised cut-off level of 2 ng/ml is the subject of a pending policy grievance.

11. The Company provided no expert evidence to support that the Grievor's quantitative results may be indicative of impairment, based on his personal circumstances, including the specifics of his consumption.

12. Similarly, the Company does not allege that the Grievor showed signs of impairment while at work, engaged in abnormal behaviour, was responsible for a safety incident or accident, or anything else which could support a finding of impairment.

13. In the circumstances and in the absence of a ruling on the pending policy grievance relating to the 2 ng/ml revised cut-off level for impairment, I have no reason to depart from the relevant jurisprudence of this Office, which has consistently recognized 10 ng/ml as a cut off indicative of impairment. The Grievor's quantitative level of 3 ng/ml alone is not proof of impairment.

14. The cases cited by the Company are distinguishable from this case. In most cases, a higher quantitative level of cannabis or impairment while on duty was indicated, which in some cases contributed to a safety incident. That is not the case here.

15. For these reasons, the Company did not discharge its burden of proving that the Grievor was impaired while at work, or otherwise violated Rule G on September 20, 2019. As such, dismissal on the ground of a Rule G violation is not warranted.

**Does the 28-day cannabis ban violation warrant dismissal?**

16. At the hearing, the Company invoked the Grievor's violation of the 28-day cannabis ban set out under section 3.1.3 of the *Alcohol and Drug Procedure*, which reads, in part, as follows:

Employees in or subject to a Safety Critical Position or Safety Sensitive Position are further prohibited from using or consuming cannabis from any source for a minimum 28 days before being on duty or subject to duty. (...)

17. This was not identified as a ground for termination in the dismissal letter and therefore cannot be raised at this late stage.

**Did the Grievor's failure to disclose his substance abuse disorder before the investigation warrant dismissal?**

18. Similar to the 28-day cannabis ban violation, the Grievor's failure to disclose his substance abuse disorder earlier was not identified as a ground for termination in the dismissal letter and therefore cannot be raised to that end at this stage.

19. Nonetheless, the failure to disclose a substance abuse disorder is a relevant consideration in determining the remedy further to my finding that there was no Rule G violation.

20. The starting point must be whether the Grievor was disabled with a substance abuse disorder at the time of the investigation, which the Company disputes.

21. The documentary evidence filed by the Union includes a letter dated May 26, 2020, from a physician, indicating that the Grievor has been seeing her regularly since the fall of 2019 for his marijuana and alcohol use. In another letter, dated August 29, 2020, the same physician states she believes the Grievor no longer meets the criteria for substance abuse disorder, that he is finding healthier ways of managing his stress



and anxiety, that he is “receiving appropriate and effective medical treatment”, and that he continues to engage in counselling in support of his continued sobriety. The Union also filed correspondence from an addiction services centre confirming that the Grievor sought assistance on October 2, 2019, was put on a waitlist for treatment and attended more than 25 group and individual sessions from January to July 2020, when he graduated from a 10-week group counselling program called Choices and Changes, followed by completion of a two-phase 24-week Adult Abstinence program in June 2021, while pursuing individual counselling.

22. In light of this evidence, I accept, on a balance of probabilities, that the Grievor suffered from a substance abuse disorder in September 2019 and has since taken significant steps to address it. The Grievor has demonstrated sustained dedication in dealing with his disability.

23. The Company's *Alcohol and Drug Policy* and *Alcohol and Drug Procedure* set out an expectation for employees to disclose substance abuse disorders and to seek assistance promptly. The relevant provisions read, in part, as follows:

*Alcohol and Drug Policy*

2.7 All Employees are accountable for their actions and are expected to comply with the Policy and Procedures, including those who may have an alcohol and/or drug use problem.

Employees who have an alcohol and/or drug use problem or an emerging problem are required to seek advice, to follow appropriate treatment and to disclose appropriately within CP their issues including any restrictions and/or limitations. This ensures that appropriate restrictions and limitations can be implemented before a workplace incident occurs, before safe job performance is impacted or before violations of this Policy and Procedures occur.

- 2.8 Employees who voluntarily request assistance with an alcohol and/or drug use problem will not be disciplined or dismissed for requesting assistance. However, this voluntary request and disclosure must be made before a workplace incident occurs, an investigation is initiated, a violation of the Policy and Procedures occurs, and before unsafe or unsatisfactory performance is identified. Subsequent disclosure or requests for assistance after an event (as detailed above) will not prevent an employee from being subject to an investigation(s) and discipline up to an including dismissal.

*Alcohol and Drug Procedure*

- 3.2.2 The Company recognizes that substance abuse disorders are medical conditions and that early intervention and ongoing monitoring and accountability greatly improves the effectiveness and success of treatment.

Employees who suspect they have a substance use disorder, an emerging issue or problem related to alcohol and/or drugs, or restrictions and/or limitations related to alcohol and/or drugs, are required to report, seek assistance, and to access and follow appropriate treatment promptly before a workplace incident occurs, an investigation is initiated, a violation of the Policy or Procedures occurs, or before unsafe or unsatisfactory job performance is identified. Subsequent disclosure or requests for assistance after an event (as detailed above) will not prevent an employee from being subject to an investigation and discipline up to an including dismissal, and failure to disclose may result in disciplinary action up to and including dismissal.

(...)

(Emphasis added)

24. As discussed above, the Grievor admitted during the investigation that he believed he had a substance abuse problem approximately eight months before he was tested but chose not to report it. During that entire period, he failed to comply with the *Alcohol and Drug Policy* and the *Alcohol and Drug Procedure* and, in turn, failed to allow the Company to implement appropriate measures to ensure safe job performance. That

cannot be ignored in the process of determining the appropriate remedy in this case. It is important to stress to the Grievor, an employee with relatively short service (eight years), the importance of abiding by the *Alcohol and Drug Policy*. This includes the employees' duty to report substance abuse and to seek assistance promptly, to avoid catastrophic consequences to themselves, their coworkers and the public.

25. I note that the Grievor claims to be unaware of ever reporting unfit for duty, that this was his first occurrence of a positive drug test and that there is no evidence to suggest that he was ever impaired at work. Upon receiving his test results, the Grievor realized he needed help and addressed his issue diligently: he reached out to his Union for guidance, sought assistance through the EAP and got medical care. During the investigation, the Grievor was forthcoming about his knowledge of the Company's policy and procedures regarding drugs and alcohol, his consumption on the day of the incident, and the fact that he suspected he had a substance abuse disorder for eight months. The Grievor showed remorse for his actions. Finally, he attended addiction counselling and programs. The Union states, and the evidence before me is, that the Grievor has now gained sobriety.

26. Ultimately, the testing and investigation into the Grievor's drug test results that followed the train incident (derailment) provided an opportunity for the Grievor to face the reality of his substance abuse disorder and disclose it before an incident occurred due to his impairment, which is in part the stated purpose of the *Alcohol and Drug Policy* and the *Alcohol and Drug Procedure*.

27. Considering the events that followed, I am persuaded by the diligent reaction and measures taken by the Grievor that he can be trusted to report any future substance abuse issue promptly and proactively. Therefore, the accommodation of the Grievor's disability does not constitute undue hardship for the Company.

### **Remedy**

28. In view of the circumstances of this case, I order that the Grievor be reinstated in his employment without loss of service, with compensation and benefits, while taking into account the fact that he disclosed a substance abuse disorder on October 9, 2019. Specifically, the compensation and benefits shall reflect the steps that would have been taken by the Company had the Grievor's disclosure occurred, on October 9, 2019, outside the context of post incident testing. The Company may take all reasonable steps required to ensure the Grievor's safe return to work, including, for example, medical clearance, training, terms and conditions.

29. I remain seized with respect to the implementation of this decision.

September 22, 2021

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**JOHANNE CAVÉ**  
**ARBITRATOR**