

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

CASE NO. 4812

Heard via Video Conference and in Ottawa, Ontario, April 12, 2022

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the dismissal of Conductor D. McKenzie of Cranbrook, BC.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Following an investigation, Mr. McKenzie was dismissed which was described as "For your non-negative for cause drug and alcohol test completed December 11, 2019 in Cranbrook, BC. A violation of CROR General Rule G, CP Rule Book for Train & Engine Employees item 2.2 D (i),(ii),(iii) and Policy #HR203 - Alcohol & Drug Policy (Canada)." The Company did not respond to the Union's grievances.

UNION POSITION:

The Union submits that the investigation was not conducted in a fair and impartial manner per the requirements of the Collective Agreement. The Union also asserts that the Company breached the June 16, 2010 Substance Test Agreement in its conduct of this investigation. As a result, the Union contends that the discipline is null and void and ought to be removed in its entirety and Mr. McKenzie be made whole.

The Union contends the Company has failed to meet the burden of proof required to sustain formal discipline related to the allegations outlined within the discipline assessment. In the alternative, the Union contends that Mr. McKenzie's dismissal is unjustified, unwarranted, discriminatory, and excessive in all of the circumstances, including significant mitigating factors evident in this matter.

The Union requests that Mr. McKenzie be reinstated without loss of seniority and benefits, that the discipline be removed in its entirety, and that Mr. McKenzie be made whole for all lost earnings with interest. Further, the Union seeks damages, in amounts to be determined, resulting

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

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

Following an investigation, Mr. McKenzie was dismissed as follows: "For your non-negative for cause drug and alcohol test completed December 11, 2019 in Cranbrook, BC. A violation of CROR General Rule G, CP Rule Book for Train & Engine Employees item 2.2 D (i),(ii),(iii) and Policy #HR203 - Alcohol & Drug Policy (Canada)."

The Company disagrees with the Union's allegations and has denied the Union's request. The Company maintains as follows:

The Grievor's culpability was established through a fair and impartial investigation. Discipline was determined following a review of all pertinent factors. Further, before discipline was assessed the Company duly considered all mitigating and aggravating factors. The discipline assessed was appropriate and warranted under the circumstances.

Given that the Grievor had a Positive Urine Drug test, he was indeed in violation of the Company's Alcohol and Drug Policy and Procedures and the 28-day Cannabis ban. These policies, which were clearly communicated to all Train and Engine Employees, state: "Disciplinary action up to and including dismissal will be taken where CP has determined that violations of this Policy and Procedures have occurred."

With respect to the Union's claim for damages, the Company maintains that the Union's claims are unsubstantiated. Damages are reserved for conduct which is found to be harsh, vindictive, reprehensible and malicious, as well as extreme in its nature such that by any reasonable standard it is deserving of full condemnation and punishment, as established in the notable *Honda Canada Inc v. Keays* Supreme Court of Canada decision. In CROA 4605, Arbitrator Clarke distinguished in his award that in order to claim for damages, the party claiming such must make a compelling argument to support this claim: "...the burden remains on a party claiming such damages to provide argument and case law supporting its remedial request. A neutral arbitrator is not in a position to develop a party's legal arguments."

The Union has failed to allege such conduct on behalf of the Company or supply sufficient details to support such an allegation. As such, the Company maintains the request for damages is without merit.

The Union further contends a violation of the June 2016, 2010 Agreement. As previously communicated to the Union, this agreement no longer has application – a fact, which was confirmed by TCRC CTY General Chairman D. Fulton on October 10, 2019.

The Grievor was offered reinstatement to Company Service on December 3, 2021 and declined.

With respect to the Union's allegations that the Company has discriminated against the Grievor; the Company maintains that Union failed to prove such action throughout the grievance process.

Accordingly, the Company cannot see a reason to disturb the discipline assessed and requests the Arbitrator be drawn to the same conclusion.

FOR THE UNION:

(SGD.) D. Fulton
General Chairperson

FOR THE COMPANY:

(SGD.)
Assistant Director Labour Relations

There appeared on behalf of the Company:

L. McGinley	– Assistant Director Labour Relations, Calgary
T. Gain	– Legal Counsel Litigation and Labour, Calgary
C. Clark	– Manager Labour Relations, Calgary

D. Pezzaniti – Director Labour Relations, Calgary
E. Allen – Labour Relations Officer, Calgary

And on behalf of the Union:

M. Church – Counsel, Caley Wray, Toronto
D. Fulton – General Chairperson, Calgary
D. Edward – Senior Vice General Chairperson, Calgary
R. Finnson – Vice General Chairperson, Calgary
G. Smith – Vice Local Chairperson, Fort Steele
D. McKenzie – Grievor, Fort Steele

AWARD OF THE ARBITRATOR

1. This grievance concerns the Grievor's dismissal, following a urine drug test that was positive for THC.
2. The Grievor was hired on April 6, 2015 and had approximately five years of service at the time of his dismissal on January 3, 2021. At that time, the Grievor was working as a Conductor based out of Sparwood, BC and had no active discipline on his record.
3. The incident giving rise to the Grievor's dismissal occurred on December 11, 2019. Shortly after beginning his shift at 10 am, the Grievor gave authority to a passing train without first obtaining clearance. The Grievor was issued ten demerit points and submitted to post-incident testing, which was conducted at approximately 2:15 pm that day.
4. The Grievor tested negative for the oral swab and breathalyzer, but tested positive in his urine for THC, with a concentration amount of 88 ng/ml. The Grievor subsequently participated in an investigation and he was forthright in his responses. He explained that

he does not regularly consume cannabis and last did so approximately 21 hours before being subject to duty.

5. The Company submits that the Grievor violated CROR Rule G as well as the Company's Alcohol and Drug Policy and Procedures, HR203, HR203.1, HR203.2 effective September 1, 2019 ("Policy"). In particular, the Company states that the Grievor knowingly violated the Policy by consuming marijuana within 28-days of being subject to duty. According to the Company, acute impairment is not the appropriate standard, particularly given the safety-critical nature of the Grievor's work.

6. The Union submits that CROA jurisprudence is unequivocal: a positive result on the urinalysis does not substantiate impairment and is not a standalone basis for discipline. More specifically, the Union states that the Grievor was not in violation of CROR Rule G and that there is no basis to conclude that he was impaired or that he used a narcotic while subject to duty or while on duty. The Union submits that the 28-day ban on cannabis consumption is unreasonable, not a proper basis for discipline, and contrary to the principles set out in *KVP Co. Ltd. and Lumber & Sawmill Workers' Union, Local 2537* (1965), 16 L.A.C. 73 (Robinson) ("KVP Principles"). Summarized briefly, the KVP Principles state that a measure introduced unilaterally by the employer must (among other things) not be unreasonable, unclear, or inconsistent with the collective agreement.

7. The Policy is the subject of a separate policy grievance, which is not before me. Accordingly, my role is not to assess the reasonableness of the Policy, generally.

However, the parties agree that in determining this grievance, it is relevant to consider the Company's reliance on the Policy as it applies to the circumstances of this particular Grievor.

Analysis

8. Overwhelmingly, CROA jurisprudence has held that a positive urine test alone does not establish impairment. The Grievor consumed approximately 0.25 grams of cannabis about 21 hours before being subject to duty. It is the Company's onus to prove impairment and the caselaw is clear that a positive urine test alone does not satisfy that burden.

9. The Company relies on the Policy and states that discipline is warranted because the Grievor violated the 28-day cannabis ban. I make no findings about the validity or reasonableness of the Policy, generally. However, in the circumstances of this Grievor and based on the evidence before me, I cannot conclude that the 28-day ban on the use of cannabis was based on a valid operational reason or that it was otherwise reasonable, in keeping with KVP Principles.

10. When asked to describe the rationale for the 28-day ban, the Company relied on a report prepared by Medical Review Officer ("MRO"), Dr. Melissa Snider-Adler, dated August 30, 2019. The Union disputed this evidence, because (among other things) it was prepared by someone retained by the Company rather than by an independent expert.

11. For the purposes of this case, even if I were to consider Dr. Snider-Adler's report, I am not satisfied that it provides a reasonable basis for the Company's decision to terminate the Grievor's employment because he violated the 28-day ban. In explaining the rationale for the Policy, the Company representatives drew my attention to passages in the Snider-Adler report related to THC Residual Impairment. While I note that the report identifies some long-term effects of chronic cannabis use, this is not the Grievor's situation -- he is an infrequent user of cannabis.

12. The studies cited in the report about the residual impacts of THC in non-chronic users varied in their findings: one study stated that residual impacts could last for up to twenty-four hours (based on 20g of cannabis), another study indicated they lasted for approximately ten hours (based on 15g of cannabis). In this respect, Dr. Snider-Adler concluded:

The length of time of residual impairment, the extent of impairment, as well as the severity of the impact on functioning differ between individuals. The effects as well as the length of the time of impact are unpredictable and non-linear, differentiating cannabis from alcohol.

13. In this case, there was no evidence of impairment or residual impairment. Even if I were to rely on the Snider-Adler report, I could not infer with any certainty that the Grievor suffered from a residual impairment twenty-one hours after consuming cannabis.

14. In sum, the Company has decided to terminate the Grievor's employment because of his off-duty consumption of a legal narcotic. Based on the evidence available to me

and in the circumstances of this Grievor, I find this was unreasonable and therefore inconsistent with KVP Principles.

15. The Union has advanced a claim for punitive and aggravated damages, to which the Company has raised preliminary objections. It is not necessary for me to address the objections. I find that the Company's decision to dismiss the Grievor and its reliance on a 28-day ban in these circumstances were unreasonable. However, I am not satisfied that the Company's behaviour in this case rises to a level that would warrant damages.

16. For these reasons, the grievance is allowed. The Grievor is to be reinstated forthwith with full compensation and without loss of seniority. I remain seized and retain jurisdiction with respect to the application, interpretation, and implementation of this award.

April 22, 2022



MICHELLE FLAHERTY

ARBITRATOR