

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

CASE NO. 5022

Heard in Montreal, March 14, 2024

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The dismissal of Locomotive Engineer Mark Smith, of Kamloops, B.C. on May 5, 2022.

JOINT STATEMENT OF ISSUE:

Following an investigation, Engineer Smith was dismissed for the following reasons:

“For your violation of CROR General Rules Section G, CP Rule Book for Train and Engine Employees Item 2.1 & 2.2 and CP Alcohol and Drug Policy #HR 203 and 203.1, as evidenced by your positive oral fluid drug test results following your post incident test on March 7, 2022, in Kamloops, BC.”

UNION’S POSITION:

The Union disagrees with the penalty of dismissal.

It is the Union’s position that the Company failed to meet the burden of proof that Engineer Smith was impaired while at work and therefore his dismissal was excessive, unwarranted and unjustified in the circumstances.

Upon the completion of the investigation, the Company chose to conduct a supplemental investigation in order to enter Dr. Snider-Adler’s expert report. The Union submits the report contains no evidence or formula to determine impairment. Dr. Snider-Adler’s opinion is based on speculation and contains no factual proof that Engineer Smith was impaired while on duty. The Union submits that following the incident for which Engineer Smith was tested, he was not held from service and spent plenty of time around various Managers, none of whom raised concerns with his sobriety. The Union submits that had the Company believed Mr. Smith was impaired, he would have been removed from service immediately. Rather, the Company chose to allow him to work his assignment for the rest of the week. The mere presence of drugs and/or alcohol in an employee’s system is insufficient to justify discipline/dismissal.

On November 22, 2021, the Company advised the Union of its new procedure for the handling of positive substance tests and specifically first, second and third-time positive tests going forward.

The Company did not apply the new procedure in Engineer Smith’s case and instead chose dismissal without regard to its new procedure.

The Union requests that the Arbitrator reinstate Engineer Smith without loss of seniority and that he be made whole for all lost earnings and benefits with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

COMPANY'S POSITION

The Company disagrees with the Union's position and requested remedies.

The initial Point of Collection Testing (POCT) of the Grievor's urine was negative for any prohibited substances, and therefore the Grievor was not removed from service. The Grievor was subsequently held from service upon receipt of his confirmation test results and specifically his oral fluid test results which were positive for cannabis.

It is the Company's position that the Grievor breached Items 2.1 and 2.2 of CP's Rule Book for Train & Engine Employees and Section G of the CROR General Rules as well as CP Policy 203 – Alcohol & Drug Policy and Procedure 203.1 following post-incident drug and alcohol testing in which the Grievor was found to have tested positive for cannabis through oral fluid testing. The Company determined dismissal was just and appropriate in the circumstances following a fair and impartial investigation which confirmed the rule violations, consideration of Dr. Snider-Adler's expert report as well as a review of all relevant factors, including those described by the Union and applicable jurisprudence.

The Company requests that the Arbitrator uphold the dismissal.

FOR THE UNION:

(SGD.) G. Lawrenson

General Chairperson, LE-W

FOR THE COMPANY:

(SGD.) L. McGinley

Director, Labour Relations

There appeared on behalf of the Company:

S. Scott	– Manager Labour Relations, Calgary
D. Zurbuchen	– Manager Labour Relations, Calgary
Dr. Snidler-Adler, MD	– Chief Medical Review Officer, Driver Check
F. Billings	– Assistant Director, CPKCR, Calgary

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
G. Lawrenson	– General Chairperson, LE-W, Calgary
H. Makoski	– Vice General Chairperson, LE-W, Winnipeg
A. Sarka	– Local Chairperson, via Zoom
M. Smith	– Grievor, via Zoom

AWARD OF THE ARBITRATOR

Context

1. Following a Stop Signal infraction on March 28, 2022, Locomotive Engineer Mark Smith was the subject of a Post-Incident Test. He received a 25-day suspension for the triggering incident and was dismissed on May 5, 2022, following a positive oral fluid drug test result.

2. At the time of his dismissal, the grievor was a long service employee, with 24 years of seniority with the Company. The grievor's discipline record (see Tab 2 Union documents) may be described as mixed, as it contains two lengthy suspensions.

Preliminary Objections

3. The Company objects to the introduction of the expert report of Dr. Rosenbloom as not being in compliance with Article 39, which requires full disclosure of evidence through the investigation process. It points out that the Union had been aware of the report of Dr. Snider-Adler since April 2022, but chose to only introduce Dr. Rosenbloom's report at arbitration. It relies on **CROA 4836** and **4695** to argue that such a process is contrary to Article 39, CROA rules and principles of fair labour relations.

4. The Union argues that the Company was aware of the report of Dr. Rosenbloom, as it had been entered earlier in **AH 717** between the same parties, involving the same grievor.

Analysis and Decision

5. For the reasons given by Arbitrator Yingst-Bartel in **CROA 4836** (see paras 16-32), I find that the Union is not entitled to introduce this report at the eve of arbitration. To do otherwise would be to breach CROA rules and Article 39.

6. In any event, the report would be of limited utility, as it deals with a separate, earlier incident, with different facts from the present matter, and could not comment on the April 2022 report of Dr. Snider- Adler.

Issues

- A. Was the grievor impaired while on duty?**
- B. If so, was the grievor properly subject to discipline?**
- C. Was dismissal appropriate in the circumstances?**

A. Was the grievor impaired while on duty?

7. While the Parties disagree about the method used and whether the grievor was impaired at the start of shift, they do agree on a number of facts, set out below.

Undisputed Facts

8. The grievor was properly subject to a Post Incident Test. The Initial Point of Collection Test was negative for prohibited substances. The oral fluid test which followed was positive for cannabis.

9. The grievor stated that his last use of cannabis was at approximately 04:00 Sunday morning, March 6, 2022 (Q and A 33, 46). He stated that he had “one puff” from a “one-hitter” (Q and A 30, 39, 40). He did not know the level of THC in the cannabis.

10. The grievor then slept, spent the day at home and started his next shift at 17:30, March 6, 2022, some 13.5 hours after his use of cannabis.

11. He was Post Incident tested at 01:45 March 7, 2022, some **21.75** hours after his last use of cannabis. At that point, his oral fluid test showed a level of 8 ng/ml. (Q and A 29).

12. His Urine Sample was dilute (Q and A 37).

13. The grievor confirmed that he did not have a drug and/or alcohol problem (Q and A 53).

Position of the Parties

14. The Company took the position that the grievor was properly dismissed for violating CROR General Rules Section G, CP Rule Book for Training and Engine Employees Item 2.1 and 2.2 and CP Alcohol and Drug Policy HR 202 and 203.1 (See dismissal letter, Company documents Tab 1).

15. The Company performed a supplemental investigation based on new information provided by the grievor during the initial investigation concerning when and how he had consumed cannabis on March 6, 2022.

16. The Company accepts that it has the burden of proof to establish impairment. It notes that an oral fluid quantitative level of 10 ng/ml or higher has consistently been accepted as proof of impairment (see **CROA 4789, 4857, 4792, 4805** and **SHP 726**).

17. It notes that Dr. Snider-Adler has been accepted as an expert witness in drug and alcohol testing (see paras 40-41 Company Brief).

18. The Company relies on her expert report (see Company Tab 9) and testimony with respect to cannabis levels and impairment:

“Mr. Smith was subject to duty and reported to duty 13.5 hours after he reports using cannabis. The oral fluid test was completed 8.25 hours later. The level in the oral fluid at the start of his shift, if measured, would have definitely well exceeded 10ng/ml, the level at which is indicative of very recent use of cannabis and the highest risk of impairment.”

“In summary, after use of cannabis (THC specifically) there is significant oral fluid contamination with very high levels of THC in the oral cavity within the first 15 – 60 minutes. Thereafter there is a rapid initial decline (with levels declining approximately 95% in the first three hours). Thereafter, there is a slower steadier decline each hour ongoing until elimination of the THC from the oral cavity. With a level of 8ng/ml of TC in the oral fluid at 01:45 on March 7, 2022, it is clear from the above studies and data that the level of the THC in oral fluid, if tested at the start of the shift (March 6, 2022 at 17:30) would have been well above this quantitative level and would be expected to be over 10 ng/ml based on the studies reviewed, and patterns if THC excretion. As well, the level of THC in the oral fluid at the time of the incident (March 6, 2022 at 23:10) approximately 2.5 hours prior to the oral fluid test, would also have been higher than 8 ng/ml.”

“It is my opinion that based on the information provided above, there was a high likelihood of impairment at the time when Mr. Smith was

subject to duty, during Mr. Smith's shift, at the time of the incident, and the time of the oral fluid collection."

19. The Company further relies on her report and testimony as to the cognitive effects and impairment of cannabis:

"Use of cannabis before 24 hours leads to cognitive effects and impairment that include impairment of:

- Judgment
- Attention
- Divided attention
- Reaction time
- Coordination
- Visual perceptual changes
- Impacts on executive functioning"

20. The Company submits that there are multiple measures that establish impairment in the present matter:

- 1) The grievor's admission to cannabis use;
- 2) The oral fluid test results;
- 3) Dr. Snider-Adler's expert report;
- 4) The grievor's recounting of the Rule 439 violation.

21. The Union submits that the report of Dr. Snider-Adler contains no evidence or formula to determine impairment while the grievor was on duty.

22. It notes that Mr. Smith was not held out of service, following his Post Incident Test, and was in the company of numerous managers, none of whom indicated any concern about signs of impairment.

23. The Union notes that Mr. Smith clearly believed that he was fit for duty:

'I take my job and the safety of my coworkers, community, and myself very seriously. I have a wife and two young boys that I come home to and provide for. I went to bed at approximately 5AM March 6th, 2022 and I had a good sleep and woke feeling rested. I went through my daily routine of family time and preparing for work. When I reported to work on March 6th, 2022 at 17:30 I was fit for duty. (Tab 11, Q&A 56).

Dr. Snider-Adler assessment that I was impaired while I was at work is speculative and I strongly disagree. I was fit for duty when I reported to work. (Tab 14, Q&A 9)

Asked how he was able to ascertain that he was prepared, rested and fit for his assignment, Mr. Smith notes, "because I woke up feeling rested and clear headed. Had I not felt so, I would have booked off" (Tab 14, Q&A 38). He states that, "I am in tune with myself, my body and state of mind. If I felt impaired I would have booked unfit" (Tab 14, Q&A 41A)."

24. The Union strongly argues that 10 ng/ml has been consistently used by the jurisprudence as a reliable indicator of impairment, whereas the oral fluid test result of the grievor was at 8ng/ml. It argues that the Company has not met its burden of proof to establish impairment.

Analysis and Decision

25. In a recent decision, **CROA 4857**, I reviewed many of the cases on drug and alcohol use and summarized the results as follows:

"Impairment is the thread which runs through the jurisprudence as being the dividing line between acceptable and unacceptable levels of drug or alcohol consumption. The Company, the public and fellow employees are entitled to unimpaired railway employees."

26. The jurisprudence is consistent that at testing levels of 10 ng/ml or more, the individual will be considered impaired (see CROA 4789, 4857, 4742, 4805, SHP 726).

As Arbitrator Cavé notes in **CROA 4789**:

"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."

27. The evidence in this matter concerning the timing of cannabis use, time of work and incident and time of testing is all set out in the undisputed facts section. His test results at the time were 8ng/ml. What is contested is whether the grievor was impaired at the start of his shift, some 8.25 hours prior to his oral fluids test.

28. The grievor is clear that he believed himself to be fit for service and would not have gone to work had he not been fit to do so. His managers noticed nothing troubling about his behaviour or appearance.

29. Dr. Snider-Adler has been qualified previously by the Courts as an expert witness in Drug Testing Interpretation and has frequently testified as such (see her cv., Tab 9 Company documents). Her ability to testify as an expert witness was not challenged.

30. Dr. Snider-Adler's testimony confirms that neither the individual nor others may detect signs of impairment. As she put it: "The body may be fine, but the brain may not". I accept that neither the grievor nor his managers may have detected signs of impairment. The issue remains, however, whether the grievor was impaired while on duty.

31. For the reasons that follow, I find that the grievor was impaired while on duty.

32. In **CROA 4792** (Tab 14, Company documents) Arbitrator Cavé reinstated the grievor, when the Company's same expert witness, Dr. Snider-Adler, had opined that oral fluid levels testing at 3ng/ml, would have been significantly higher at the start of his shift, 8 hours and 49 minutes earlier. Arbitrator Cavé noted however:

"While the Company's expert expects that the Grievor's quantitative level was significantly higher than 3ng/ml at the beginning of his tour of duty, she does not opine that it could have or would have been as high as the 10 ng/ml cut-off for impairment" (para 24).

33. Here, however, the evidence is otherwise. Dr. Snider-Adler stated in her report:

"It can be assumed, based on previous oral fluid studies and knowledge of THC decline in the oral fluid, that there is a high likelihood that 8.25 hours prior to the oral fluid test, the levels, if measured at that time, would have been significantly greater than 8 ng/ml and would likely far exceed 10 ng/ml."(underlining added).

"It is my opinion that based on the information provided above, there was a high likelihood of impairment at the time when Mr. Smith was

subject to duty, during Mr. Smith's shift, at the time of the incident, and the time of the oral fluid collection".

34. These opinions were maintained in her testimony and on cross examination. Dr. Snider-Adler testified that the body breaks down alcohol in a constant, linear fashion, and hence specific calculations about earlier alcohol levels can be made. With drugs, there is a sharp drop at the start and then a slower, consistent, but non-linear, decrease over time. As such, she could not give an opinion as to the specific quantitative measure of THC present in the body of Mr. Smith at the start of his shift. She accepted that multiple variables could affect quantities, including the frequency of use of cannabis, the strength and dose of THC and possibly what goes in the mouth after consumption of cannabis. However, she stood by her opinion that the grievor would have tested at over 10 ng/ml if he had been tested at the start of his shift and that he would have been impaired.

35. No expert witness was called by the Union to contradict the findings and opinions of Dr. Snider-Adler. Given the decision made on the preliminary objection concerning the July 6, 2020 report of Dr. Rosenbloom (Tab 18, Union documents), there is no admissible expert report which contradicts that of Dr. Snider-Adler. However, even if that report had been considered, it would have been given relatively little weight, as the issue in that matter concerned the validity of testing at 2ng/ml. It did not deal with the present facts and did not opine on the April 2022 report of Dr. Snider-Adler referenced above.

36. Common sense would indicate that someone who tests positive for cannabis at 8 ng/ml at 1:45 March 7, 2022, having admittedly consumed cannabis at 04:00 March 6, 2022, likely had higher levels at earlier points in time. Whether those levels were over 10 ng/ml at 17:30 at the start of the grievor's shift and whether such levels were impairing is the subject of Dr. Snider-Adler's report and testimony. Based on the evidence in this matter, I accept that on a balance of probability, if the grievor had been tested at the beginning of his shift, he would have tested over 10 ng/ml. Given the consistent CROA

jurisprudence, and the expert evidence, such a level is indicative of impairment and I find that the grievor was impaired while on duty.

37. This finding on impairment is confirmed to a small extent by the lack of attention exhibited by the grievor which resulted in the Rule 439 violation. Dr. Snider-Adler notes that attention is affected by the residual affects of cannabis use. However, it is the oral fluid results, the undisputed facts and Dr. Snider-Adler's report and testimony which lead me to the conclusion on impairment while on duty.

B. If so, was the grievor properly subject to discipline?

38. CROA jurisprudence is consistent that proof of impairment at work in a safety sensitive position warrants discipline. As Arbitrator Flaherty noted in **CROA 4805**:

“It is also important to consider the gravity of the offence. Attending work in a safety sensitive position while impaired is a serious offence that attracts severe discipline: CROA 4653 and 4654. Particularly in the safety-sensitive environment of the railway, impairment at work cannot be tolerated.” (para 11).

39. Arbitrator Schmidt noted in SHP 726:

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 factors.

40. While the facts in each case differ, the common thread is that impairment on the job warrants discipline. Here impairment has been found, and discipline is warranted.

C. Was dismissal appropriate in the circumstances?

Position of the Parties

41. The Company submits that the grievor occupies a safety critical role. He admitted that he knew and understood the Alcohol and Drug Policy and Procedure. He nonetheless chose to consume cannabis 13.5 hours prior to his shift, without knowing the THC strength of the cannabis he used.

42. In so doing, the Company, argues that I should not disturb its decision to dismiss the grievor (see Sheet Metal Workers' International Association, Local 473 v. Bruce Power LP 2009 CanLii 3186).

43. The Union submits that the grievor was a long service employee, with long stretches of a good disciplinary record. It notes that Arbitrator Moreau did not uphold his previous dismissal and he was reinstated with full compensation.

44. The Union argues that the testing levels in many of the cases cited by the Company were at levels far higher than those found here (see **CROA 4805** and **4733**).

45. The Union strongly argues that the Company is not applying its own Hybrid Discipline and Accountability Guidelines, which sets out discipline at levels far below dismissal for the level at which the grievor tested (see Application of Hybrid Discipline and Accountability Guidelines, Tab 8, Union documents).

46. Finally, the Union argues that the Company is acting in a discriminatory fashion, as at least two other employees received sanctions of 40 and 30 days pursuant to the Policy, contrary to the grievor, who was dismissed (see Tabs 29-33, Union documents).

Analysis and Decision

47. The grievor occupies a safety critical role as a Locomotive Engineer. There is no doubt that the railway industry is inherently dangerous, where it is imperative that employees work unimpaired. As Arbitrator Garzouzi noted in **CROA 4751**:

“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.”

48. An employee in a safety critical role who comes to work impaired should expect the most severe discipline, unless compelling evidence is presented to show that a lesser penalty is appropriate.

49. Here, the Union argues that the grievor has been treated much more severely than two other employees, who had similar oral fluid tests, with similar delays between time of consumption of cannabis and time of work (see Tabs 29-33, Union documents). The Union therefore argues that it would be discriminatory for this grievor to be dismissed, while the other employees received discipline of only forty (40) and thirty (30) days of suspension.

50. The Company raises a preliminary objection to this issue, as it was never raised in the JSI. It points to Rule 14 of the CROA Agreement and CROA jurisprudence interpreting the Rules, such as **CROA 4739**, which clearly limits the jurisdiction of the arbitrator to those issues contained within the JSI.

51. As Arbitrator Hornung pointed out in **CROA 4739**, this is one of the “most significant steps in the CROA process”. To permit new issues to be raised after the JSI is to undermine the entire process. I agree with the Company’s preliminary objection and will not consider the “singling out” argument or evidence.

52. Even if I had been prepared to consider the issue and evidence, the evidence provided would be afforded little weight in the circumstances. The most obvious difference between the present matter and the two matters invoked by the Union (see Tabs 29-33 Union documents), is that there is no indication that the two other matters had any evidence as to impairment at the start of work. Here, unlike the two other matters, there is expert evidence as to impairment. As every case is necessarily decided on the basis of the evidence presented in that matter, the other matters would be of little assistance to the Union argument here.

53. The Union also argues that the Company has not followed its own Policy, as set out in the November 22, 2021 letter of Mr. Becker to Union officers and members (see Tab 8, Union documents). The relevant portions of the letter read as follows:

Application of Hybrid Discipline & Accountability Guidelines – Positive Substance Tests.

This is to advise you of the upcoming application of the Hybrid Discipline & Accountability Guidelines in relation to substance tests under the auspices of Policy HR203 and Procedures HR 203.1. The Application indicated below will take effect immediately and is being communicated to all employees.

A. 10ng/ml or more THC in Oral fluid will result in Dismissal for violation of Alcohol and Drug Policy and/or Rule G.

For first time offense, where a substance Use Disorder has been appropriately documented and validated, there will be consideration for re-instatement if the employee attends and successfully completes in-house addiction treatment for rehabilitation followed by a recognized period of post-treatment stability.

A period of unannounced substance testing (which may be permanent where appropriate) and continued participation in the designated addiction meetings, will apply where an employee is reinstated under these conditions.

B. Less than 10ng/ml THC in oral fluid and/or THC in urine

A failed substance test with:

- THC in Oral Fluid where quantitative levels are less than 10 ng/ml and/or
- THC in Urine

Will result in the following handling for violation of the 28-Day Cannabis Ban:

- 1st Time Violation:

- o 15-0 day suspension
- o mandatory meeting with substance abuse professional
- o 6 months of unannounced substance testing
- o appropriate discipline assessed for culpability in a work-related incident that triggered the necessity for a test.

- 2nd Violation

- o up to a 60 day suspension
- o mandatory meeting with substance abuse professional
- o up to 1 year of unannounced substances testing
- o appropriate discipline assessed for culpability in a work-related incident that triggered the necessity for a test.

- 3rd violation – Dismissal

54. The Union argues that as the testing levels of the grievor were at 8ng/ml, section B should apply and the discipline should be limited to the sanctions provided in section B.

55. The Company argues that the decision to dismiss is in conformity with the letter, as Dr. Snider-Adler confirmed that had the grievor been tested at the start of his shift, his oral fluid levels would have been well in excess of 10 ng/ml. It further notes the reference to an infringement of Rule G of the Canadian Rail Operating Rules.

56. In my view the Union takes an unduly narrow reading of the letter from Mr. Becker. The context is the intended application of the Hybrid Disciplinary and Accountability Guidelines. The most significant change was with respect to discipline for levels under 10 ng/ml. No change was made for those with levels over 10 ng/ml. Dismissal was the penalty.

57. Here, there have been findings that if the grievor had been tested at the start of his shift, his oral fluid levels would have exceeded 10 ng/ml. Indeed, Dr. Snider-Adler opined that the levels “would likely far exceed 10 ng/ml”. There is also a finding that the grievor was impaired at the start of his shift (see para 36).

58. Impairment is clearly contrary to the obligations set out in Rule G, the Rule Book and the HR Policy and Procedure.

59. Rule G prohibits the use of narcotics which could in any way adversely affect the ability of employees to work safely:

Rule G

- (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.

60. Rules 2.1 and 2.2 for Train and Engine Employees requires employees to report fit for duty and not to use drugs “which, in any way, will adversely affect your ability to work safely”.

61. The HR 203 Alcohol and Drug Policy, which sets out the following standard:

2.0 Policy Statement

The Policy and Procedures apply to all employees at all times while working, on duty, subject to duty, on Company premises and worksites, on Company business and when operating Company vehicles and moving equipment (whether on or off duty). To minimize the risk of unsafe or unsatisfactory performance due to alcohol and/or drugs employees are expected to meet the following standards:

2.1 Employees must report for work in a condition that enables them to safely and effectively perform their duties.

2.2 Employees must report fit for work and remain fit for work. All employees must remain free from the adverse effects of alcohol and/or drugs including acute, chronic, hangover and after-effects of such use.

2.3 Employees are prohibited from being in control of a CP vehicle, railway equipment or moving equipment, (whether on or off duty), or any vehicle on CP property or roads, while under the adverse effects of alcohol and/or drugs.

2.4 employees are also subject to the provisions of the Canada Labour Code, the Railway Safety Act, the Canadian Rail Operating Rules, General Operating Instructions, the Criminal Code of Canada and all other applicable laws.

2.5 Employees must comply with and meet the alcohol and drug standards as outlines in the Policy and Procedures.

62. HR Procedures 203.1, prohibits the use of cannabis while subject to duty, and refers specifically to Rule G:

3.1 The following are prohibited at all times while an employee is working, on duty, when subject to duty, at all times when on Company premises and worksites. When on Company business and when operating Company vehicles and moving equipment (whether on or off duty).

- Consumption or use of any product containing cannabis (including but not limited to smoking, vaporizing, ingestible oils, food products, tinctures, capsules, topicals etc.) including during meals and breaks.

3.1.5 Canadian Rail Operating Rules (CROR) – Rule G

Employees who are qualified in the CROR are governed by these rules including Rule G. The requirements of the Policy and Procedures align with and supplement the requirements of Rule G, which include:

- The use of intoxicants or narcotics by employees subject to duty, or their possession or use while on duty, is prohibited.
- 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.
- 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.
- 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.

63. In my view the requirements of Rule G, Rules 2.1 and 2.2 for Train and Engine Employees and HR Policy 203 and Procedures 203.1 to be free of the impairing effects of narcotics when on duty have not been changed by the letter from Mr. Becker. Here there is a finding that the grievor was impaired at the start of his shift. In so doing, the grievor breached the above requirements.

64. Mr. Becker's letter notes: "**10ng/ml or more THC in Oral fluid** will result in Dismissal for violation of Alcohol and Drug Policy and/or Rule G." Here, there has been a finding that the

oral fluid levels of the grievor would have exceeded 10 ng/ml. Accordingly, I do not find that the dismissal of the grievor is contrary to the letter.

Conclusion

65. Based on the evidence presented, including the expert report of Dr. Snider-Adler, the grievor was impaired at the start of his shift. In so doing, he has contravened the obligations found in CROR Rule G, Rules 2.1 and 2.2 for Train and Engine Employees and HR Policy 203 and Procedure 203.1. There is no allegation of addiction. Here the grievor made a conscious choice to use cannabis, and to take the risk that he would be found to be impaired at the start of his shift. Despite his long service, sincere belief that he was fit to work and evident desire to keep his job, impairment of a safety critical railway employee cannot be tolerated. I cannot find that the mitigating circumstances are sufficient to overturn his dismissal.

66. For these reasons, the grievance is dismissed.

67. I remain seized for any questions of interpretation or application.

April 30, 2024



JAMES CAMERON
ARBITRATOR