CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5109

Heard in Edmonton, November 14, 2024

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the dismissal of Conductor S. Sterling.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

The Grievor was dismissed as shown in CPKC Form 104 as follows, "Formal investigation was issued to you in connection with the occurrence outlined below: "Your alleged failure to disclose information related to a medical condition and use of Alcohol & Drugs that impacted the Company's ability to properly assess your fitness for duty."

Formal investigation was conducted on January 18, 2024, 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 that you were in violation of CPKC's Fitness to Work Medical Policy and Procedure (HSS000) & Alcohol and Drug Procedures Canada (HR203.1).

In consideration of the decision stated above, you are hereby dismissed from Company Service, effective immediately.

As a matter of record, a copy of this document will be placed in your personnel file."

Union Position

For all the reasons and submissions set forth in the Union's grievances, which are herein adopted, the Union contends that the outright dismissal of the Grievor is excessive and serves no educational component and no process of progressive discipline has taken place.

Prior to this alleged incident the Grievor had a received discipline for a run though switch (5-day suspension and 5 day deferred suspension under grievance), then jumped to a 40-day suspension for not requesting 3-point protection, then an AOR for a Formal Reprimand booking sick. Further the Union believes the Grievor has not received a fair and impartial process and the Company has not shown he has in fact done anything wrong thus Article 39.05 has not been complied with, and any discipline void.

In November 2023 the Grievor had sent an email to then Supt. Nicholas Pattyn in regard to looking for accommodation based on the circumstances. This email went unanswered (it was also forwarded by Trainmaster Brayden Roussel to Supt. Pattyn). The Grievor did finally speak with Supt. Pattyn who advised him that he could not arbitrarily give him weekends off.

In January the Grievor is removed from service per OHS and an investigation is scheduled for January 18, 2024. January 16, 2024 the Grievor is provided his NTA where he finally finds out why he has been removed from service and the scheduled investigation.

AS attends the statement with Investigating Officer (IO) Supt. Nicholas Pattyn. The Grievor provides his answers to questions. As shown previously by the Union: As noted, the Grievor responded “Yes” to the summary in total, in other words he did disclose his medical condition and it could have been prior to his hire date he used mushrooms. It is clear from reading this statement that at times the Grievor was confused with times/dates thus he answered truthfully to the summary.

It must be further noted that the Grievor has been subject to post incident (random in essence) D&A testing and those results were negative on all accounts.

The Grievor provided he has never attended work in an impaired state nor would he ever. The post incident (random test) strengthens his position and to be clear his testing was negative on all accounts.

The Union believes the Grievor has provided more than reasonable answers during his pre-employment medical and at all times afterwards. The Union does not believe the Company has met the burden of proof to sustain the discipline assessed (outright dismissal) as this has become a technical alleged omission.

What this really was about was an employee seeking help with family issues, and accommodation, and instead of receiving any process of accommodation the Company dismissed him.

Health Services letter dated January 8, 2024 provides the following: “Health Services (HS) has reviewed the medical file of (redacted) and has identified a potential case of non-disclosure of medical information by this employee.”

It is important to look at the investigation and the summary question put forth by the Investigating Officer Superintendent Nicholas Pattyn.

Q89 To summarize this investigation:

- ***On July 25th 2022 you completed a pre-employment medical in which you advised of dealing with [xx] however not have been treated since years past.*** *(emphasis added)*
- *You were hired at CPKC on September 12th 2022.*
- *In the month of November 2022 you underwent surgery that may have resulted in the first use of "magic mushrooms"*
- *In the month September but prior to your start date of September 12th 2023,* ***could also*** *have been the first time using magic mushrooms. (emphasis added)*
- *February 1st 2023, you divulged to CMAP Health your recreational use of magic mushrooms.*
- *On August 16th 2023, you divulged to CMAP Health your rare use of magic mushrooms.*
- *You used magic mushrooms again during your suspensions in May and July of 2023.*
- *You consulted a physician about your use of magic mushrooms but not CPKC Health Services.*
- *You never consumed the use of magic mushrooms when subject to duty or while on duty.*

Is this correct?

A89 Yes

It is clear by the summary question and the response that the Grievor was not in fact in violation of anything.

The Grievor's statement ends January 18, 2024. Later that day he texts the IO Supt. Nicholas Pattyn (as shown in our grievance).

On January 20, 2024 the Grievor sends an email to Supt. Pattyn with an attached letter (provided in our grievance) from his doctor, which also provides if there are any questions the Company could contact the doctor.

It is abundantly clear that the Grievor did nothing wrong and although he was not able to get the letter from his doctor until after his statement was done, he clearly put the Company on notice he would be retrieving additional information that he could not get prior. The Company (Supt Pattyn who was also the IO) could have called a supplemental statement but instead, outright dismissed the Grievor a week later.

The Union further relies on CROA NO. 3619 and 4753.

The Company dismissed the Grievor in light of the facts that were in their possession before the Company Form 104 was ever issued. The Company has dismissed the Grievor in violation of Article 39.05 as shown throughout and that by doing so, any discipline would be void.

The Company did not respond to the Union's Step 1 or Step 2 grievances in violation of the Collective Agreement Letter Re: Management of Grievances & The Scheduling of Cases at CROA as well as CROA 4870, the Union does not have a position of the Company.

The Union will retain all its' rights (objections) if the Company now puts forward any arguments where none were provided within the **mandatory timelines.**

As per the facts presented within our grievances as well as the investigation and information provided on the same day following the investigation and the letter the following day, the Union requests that the Grievor be reinstated forthwith and the dismissal expunged from his file, and he be compensated all loss of wages with interest, no loss of seniority, benefits including punitive damages as the Company could have avoided wrongly dismissing him.

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

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

Mr. Stirling was dismissed as shown in his Form 104 as follows: *Formal investigation was issued to you in connection with the occurrence outlined below: "Your alleged failure to disclose information related to a medical condition and use of Alcohol & Drugs that impacted the Company's ability to properly assess your fitness for duty."*

Formal investigation was conducted on January 18, 2024, 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 that you were in violation of CPKC's Fitness to Work Medical Policy and Procedure (HSS000) & Alcohol and Drug Procedures Canada (HR203.1).

In consideration of the decision stated above, you are hereby dismissed from Company Service, effective immediately.

As a matter of record, a copy of this document will be placed in your personnel file.

Company Position

The Company disagrees and denies the Union's request. The Company relies upon the position outlined in its grievance replies.

The Union suggests the Company has effectively failed to respond to the grievance and in doing so allegedly failed to fulfill the requirements of the Collective Agreement. While the Company cannot agree with the Union's allegations pertaining to the grievance response, Consolidated Collective Agreement Article 40.04 is clear in that the remedy for failing to respond is escalation to the next step. It is also clear the Union acknowledges Article 40.04 and has

progressed to the next step of the grievance procedure. Moreover, a reply was provided to the Union on June 25, 2024. The Union has not suffered any prejudice.

The Company carefully considers the appropriate disciplinary consequence, if any, to be assessed. Discipline was determined following a review of all pertinent factors, both mitigating and aggravating, and maintains the Grievor's culpability for this incident was established following the fair and impartial investigation into this matter. Moreover, the Company maintains the discipline was properly assessed in keeping with the *Hybrid Discipline and Accountability Guidelines*.

The Union has alleged the statement was not fair or impartial on the basis of no culpability established. The Company has carefully reviewed the objection raised during the statement as well as details of the Union's objection in its grievance. A plain read of the statement confirms the grievor's culpability was established and that the question(s) objected to were not leading, unfair, partial nor asked the grievor to assume culpability. The Company hereby also submits its request for a cease and desist in relation to the Union's filing of such an objection without a clear and cogent basis in fact. Absent sufficient information to support such an objection, the Company submits the objection is contrary to the principles of labour relations and arbitral jurisprudence regarding lying in the bushes with respect to procedural objections. This will serve as notice of the Company's intent to submit a preliminary objection on the foregoing basis as well as seek a cease-and-desist order should this grievance be maintained by the Union.

The Union claims that the principles of progressive discipline were not followed however, in its own grievance document it references active discipline on the Grievor's file. This contradicts the Union's characterization of the discipline assessed.

The Union has attempted to draw a link between the use of psilocybin to an accommodation matter and references communication in November 2023 where the Grievor was seeking to have weekends off. It is not clear how the requested accommodation of weekends off relates to the use of psilocybin or discipline. The Union has failed to provide the necessary information and explanation for the Company to understand its position or how it is related to the disciplinary matter at hand. To allude that discipline was a form of retaliation is without merit and the Union has not provided any evidence to support its claim.

The Company does not utilize random testing and a post incident test may occur after an incident. Further, discipline at issue does not flow from an A&D test.

The letter from the Doctor confirms that the Grievor reported that he consumed the substance at issue while employed with CPKC.

Upon review of CROA 3619 and 4753 the Company views these cases as distinguishable from the present situation.

In all, the grievance has not raised any considerations that give the Company reason to disturb the discipline assessed. The Company's position continues to be that the discipline assessed was just, appropriate and warranted in all the circumstances. Based on the foregoing, the grievance is respectfully declined.

Without precedent or prejudice to the Company's aforementioned position, it is incumbent on the Union to provide detailed information on alleged lost wages, benefits, and interest. The Company cannot properly respond to this request when the Union is vague and unspecific. The Union's request for damages is without merit.

The Union has further stated a desire to reserve the right to allege a violation of, refer to and/or rely upon any other provisions of the collective agreement and/or any applicable statutes, legislation, acts or policies. In accordance with the grievance procedure, the Company will be prepared to proceed only on the issues that have been properly advanced through the grievance procedure.

As an additional comment, failure to specifically reference any argument or to take exception to any statement presented as "fact" does not constitute acquiescence to the contents thereof. The Company rejects the Union's arguments; no violation of the agreement has occurred, and the Grievor is not due any additional compensation. Accordingly, the Company respectfully denies this grievance in its entirety.

No violation of the collective agreement has occurred and the Grievor is not due any additional compensation. The Union's request for damages is without merit.

Based on the foregoing, the Company cannot see a reason to disturb the discipline assessed and requests the Arbitrator be drawn to the same conclusion and dismiss the grievance.

For the Union:	**For the Company:**
(SGD.) W. Apsey	**(SGD.) F. Billings**
General Chairmen CTY-E	Director, Labour Relations

There appeared on behalf of the Company:

A. Harrison	– Manager, Labour Relations, Calgary
D. Zurbuchen	– Manager, Labour Relations, Calgary

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
D. Psichogios	– General Chairperson, CTY-E, Montreal
A. S.	– Grievor

AWARD OF THE ARBITRATOR

Preliminary Issue Regarding Anonymization

Background

[1] The Union raised a preliminary issue requesting anonymization of this decision. The Company opposed that position. The Union has also raised the same issue for **CROA 5105** and **CROA 5108** (the latter Award also involving the same Grievor), heard at the same session.

[2] This Award addresses the anonymization issue for this Grievor for both **CROA 5108** and **5109** and the two decisions are directed to be used together on this issue, for any precedential reference.

[3] In order to properly consider this issue, the Arbitrator directed the parties to provide additional short submissions on the application of the test of the Supreme Court of Canada in *Sherman Estate v. Donovan et al.* 2021 SCC 25 (CanLII) to these requests, as that case had not been relied upon by either party at the hearing. It was also requested by the Arbitrator the parties provide any other jurisprudence at CROA dealing with contested applications on this issue.

[4] Those submissions were provided after the CROA hearing session, as requested. The Union offered **CROA 4270**, **4679** and **4877-A** (in translation). **CROA 4270** and **4679** were decided before *Sherman Estate*, so are distinguishable.

[5] The applicable test from *Sherman Estate* is:

a. Court openness poses a serious risk to an important public interest;
b. The order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
c. As a matter of proportionality, the benefits of the order outweigh its negative effects

Arguments

[6] The Union argued that certain medical information of the Grievor may be required to resolve the issue of the Grievor's dismissal for failure to disclose the use of drugs and alcohol, and that is medical information that must be protected. It argued this circumstance meets the three-part test set out by the Supreme Court of Canada in *Sherman Estate:* Part (a) was met, as information regarding the Grievor's identity would link the Grievor with information regarding his medical conditions, which strikes at his "biographical core", resulting in an affront to the Grievor's dignity and there is a strong public interest in preventing such "sensitive personal information" from being publicized. It argued part (b) of the test was met, as without anonymization, the Grievor's, identity and health conditions – which were previously private – would become public information and anonymization was the "only remedy' which "minimally limits" the open court principle, and also offers the necessary protection to the Grievor. It argued part (c) is met, as if anonymization is allowed, there would be significant benefit to the protection of privacy, and the underlying facts of the grievance, the argument of the parties, and the reasoning

behind the decision would all continue to be public. It argued the Company has no legitimate interests in specifically naming the Grievor and did not object to anonymization for several months, until "mere weeks" before the hearing. It finally argued the Office has in the past allowed anonymization at the Union's request and over the Company's objection in **CROA** cases **4270**; **4679** and most recently in **4877-A** (in translation) the rationale of which is adopted.

[7] For its part, the Company argued that the Supreme Court has recognized that the open court principle is protected by the "constitutionally entrenched right" of freedom of expression; and that there is a strong presumption in favour of open courts, which it recognized as an important public interest (at paras 1-2). It argued that a party seeking restriction of this principle carries the burden to establish that the openness presents a "serious risk to a competing important public interest" and that the Union has not met this burden. It argued that the exception for striking at an individual's "biographical core" is a narrow one. While it conceded the Grievor's medical information which related to his mental health would be an important interest to protect, it disagreed that was the case for the Grievor's use of "magic mushrooms/psilocybin, which it argued did not satisfy this part of the test. Regarding part (b), the Company argued the Union's application also fails this aspect of the test, as alternative measures are available, such as the use of the term "medical condition" instead of the Grievor's actual condition and "illicit drug use" could be used if reference to the actual drug had to be protected. It also argued the Union fails at part (c), as the alternative measures noted are proportional.

[8] It further argued that deference should be given to the court openness principle.

Analysis of Preliminary Issue

[9] It is not disputed that many other cases have been resolved by this Office relating to alleged Drug and Alcohol use that have not been anonymized. This Arbitrator has heard a number of such cases in the past eighteen months while sitting as a CROA Arbitrator and also while sitting as an *ad hoc* arbitrator in this industry. No request for anonymization was made to this Arbitrator in those cases, even though sensitive medical information was included in the evidence. In this case, the Union has recently taken a different

position than taken by the same Union at other CROA Arbitrations, and has brought this request for anonymization of several cases heard in November 2024 and a further case that was adjourned to the January 2025 session.

[10] It can be the case that the parties can agree that anonymization is appropriate, and can bring that agreement to a hearing; or an Arbitrator may choose to anonymize a case without an application.

[11] As a starting point, it is a good practice for a Labour Arbitrator - as a quasi-judicial decision-maker - to limit disclosure of factual medical evidence in an Award to only that required to address the issues presented in a particular case, whether a request for anonymization has been made or not. Arbitrators endeavour to do so as a matter of practice.

[12] As noted by the Company, there is a “presumptive” principle that Court proceedings are “open to the public”. Neither party has argued that this principle would not also apply to quasi-judicial proceedings such as arbitration hearings, and it is often the case that there are multiple observers at hearings of this Office, who attend without objection. That presumptive principle of “openness” for judicial - and quasi-judicial - proceedings is based in freedom of expression; a constitutionally-protected freedom in this country. The three branches of the *Sherman Estate* test recognize, however, that in some instances, a balancing must occur between legitimate interests of privacy for certain information and the important public interests also served by the court openness principle. The parties did not provide any other CROA jurisprudence on this issue decided after *Sherman Estate*, beyond **CROA 4877-A**, a more recent decision of Arbitrator Cameron, where anonymization was allowed. That case involved criminal offences and media scrutiny, with a potential impact on the grievor’s ex-wife and children.

[13] In *Sherman Estate,* the trustees of the murdered Mr. and Mrs. Sherman sought to seal probate proceedings, given the intense media scrutiny and that the killer(s) was still at large. While the trustees were successful at the lower court level, the Court of Appeal overturned that decision, which award was upheld on appeal to the Supreme Court of Canada. That Court issued a comprehensive decision on this issue, which required 4.5 pages just to summarize. For the purposes of this expedited process, it is unnecessary

to provide an extensive analysis of this decision. Certain of the interests to be protected have already been canvassed in **CROA 4877-A.**

[14] Suffice it to say the Court recognized the “resolute” protection of freedom of expression embedded in the court openness principle and required demonstration of the disclosure of information that would “strike at the biographical core of the affected individuals in a way that would undermine their control over the expression of their identities”. The Court required a “serious risk” “to this important public interest”, which cannot be based on “impermissible speculation”; and the order must be “necessary to address the risk”. There must also be no other reasonable alternatives to anonymization, and the benefits must also “…outweigh its negative effects”, which is a “final barrier”.

[15] Given the facts of this case, I am satisfied that it is unnecessary to determine if the first branch of the test is met, as - even if it were - the second branch has not.

[16] It is not necessary to anonymize the Award to address privacy issues of exposure of the Grievor’s medical condition under the second branch of the *Sherman Estate* in this case, given that there is way to address this issue without offending the principle of court openness. There are reasonable alternatives to anonymization. This Award can be issued by not referring to the specifics of any medical condition that would cause the Grievor any issues, as that medical condition is not relevant to that resolution. References can be limited to the Grievor’s “medical condition” alone, which does not raise any privacy issues, given the lack of any specifics.

[17] However, I do not agree with the Union’s suggestion that the Grievor’s alleged use “magic mushrooms” would attract similar protection, regardless of whether the Grievor’s children may in future find out he engaged in illicit drug use. I cannot agree that protection of an individual’s choice to use psychoactive drugs and/or alcohol would raise an important public interest of privacy which is worthy of protection, under the first branch of the test. Neither do I agree that disclosure of that use - which *is* at the heart of this dispute - serves to identify the underlying medical condition(s). The same reasoning would be applicable to at least the recreational use of marijuana and also other drugs including - but not limited to - methamphetamines, heroine, and cocaine. It is unnecessary for the

purposes of this Award to address the medical use of marijuana under a prescription, and that question remains to be resolved another day.

[18] The Union not having met its burden to establish there are no other reasonable alternatives to anonymization to address the privacy interests of the Grievor's medical condition in this case, the anonymization application is dismissed.

[19] Given this ruling, the *Ex Parte* Statements of Issue have been amended to name the Grievor.

Decision on the Merits

Was the Grievor's Actions Culpable?

[20] The Grievor was hired on September 12, 2022.

[21] As noted in the JSI, the Grievor was dismissed on February 1, 2024 for his alleged failure to disclose information relating to a medical condition; and for his failure to disclose his use of "magic mushrooms" (or psylocibin) to "self-treat" that condition. Magic mushrooms are an illegal drug in Canada. According to the Government of Canada, magic mushrooms contain hallucinogens. On January 18, 2024, the Grievor was investigated regarding the allegation he failed to disclose information related to a medical condition and his use of "magic mushrooms" to self-treat that condition.

[22] The Grievor completed pre-employment medical information in July of 2022. In his Pre-Employment medical information (dated July 25, 2022), the employer asked if the Grievor had ever used "illicit drugs". The Grievor answered "no" (question 48). In medical information dated February 1, 2023, the Grievor stated to a medical professional that he used magic mushrooms "recreationally but not in any significant quantities" (Q/A 49).

[23] As a result of the Investigation, it also became apparent the Grievor began taking "magic mushrooms" as he used that drug to "self-treat" his medical condition, although he confirmed no physician had ever prescribed magic mushrooms for that condition. The Grievor also stated that the date of first consumption was *after* 2023, after he had already passed the pre-employment medical, although he had suffered from this medical condition since 2016. He also stated that he had dealt with his medical condition "for

years” and had treated it with both magic mushrooms and prescriptions. He stated he used “magic mushrooms” during a period of suspension in the spring and summer of 2023, and again prior to a surgical procedure in the Fall of 2023. The Grievor also stated he never consumed magic mushrooms where he was not “subject to duty” and reiterated that he had not consumed magic mushrooms at the time of his pre-employment medical July 25, 2022. The Grievor was asked in his Investigation why he stated he had *only* used magic mushrooms in the spring and summer of 2023, yet in a medical report dated *before* that time - on February 1, 2023 - it reports he reported that he “takes magic mushrooms recreationally but not in any significant quantities”? The Grievor’s explanation was that he must have forgotten “one” of the times he might have consumed them. The Grievor noted he disclosed this use because he saw no reason to lie to a medical professional. However, the Grievor denied being deliberately untruthful to the Company, as he was “certain” his use of magic mushrooms would have been after the July 25, 2022 pre-employment information was completed.

[24] It is not clear, however, how the Grievor would have gained this certainty, given the evidence demonstrated he had “forgotten” that his use of magic mushrooms prior to the spring and summer of 2023 had even occurred. Although he stated he simply “forgot” his earlier use; he also stated that he failed to disclose his recreational use of magic mushrooms prior to February of 2023 because it was not supposed to be for long term use.

[25] Those two explanations are contradictory. Either he “forgot” he had taken the drug earlier or he failed to disclose because he did not intend to use magic mushrooms long-term. A credibility assessment is required.

[26] The Company argued the Grievor’s evidence was not credible. Upon reviewing that evidence, the Company’s arguments are persuasive that the Grievor’s evidence lacks credibility, is contradictory and is therefore not trustworthy.

[27] The Grievor was not candid or consistent regarding whether he was seeking treatment for his medical condition and the evidence disclosed he was doing so in 2021, even when recent treatment was denied in 2022. The Grievor “forgot” he had consumed magic mushrooms prior to February 1, 2023, yet when confronted with the evidence he

gave to the medical professionals prior to that date, he stated that the *reason* why he had not disclosed his use of magic mushrooms prior to February 1, 2023 was he did not intend their use to be long-term. The two statements cannot co-exist and are in contradiction. Even if it were believed that the Grievor's evidence was true that he "forgot" about his use earlier than February 1, 2023, that raises significant doubts that he can be so sure that his previous consumption was *after* the very specific date of July 25, 2022, as he maintained. The *specificity* of his recollection for *that* date - that he had not used illicit drugs until *after* that point, is suspect and unconvincing, given his contradictory statements for when the drug was last used; the lack of specifics for when that use started; and his "forgetfulness" for his earlier use.

[28] In assessing credibility, the Grievor's information that he did not use "magic mushrooms" prior to July of 2022 and his assurance that he began using magic mushrooms *after* that date was not credible. The Grievor continued to use "magic mushrooms" as late as 2023 and this was more recent use was also not disclosed to the Company either, in its medical monitoring in the summer of 2023.

[29] Given the Grievor's contradictory evidence, the Company had reason to distrust the truthfulness of the Grievor's information that his use of magical mushrooms only began after the date of July 25, 2022. The Company had a reasonable basis to believe that the Grievor's answer of "no" to the use of illicit drugs on its pre-employment medical was untruthful.

[30] It is unnecessary to outline the details of the Grievor's medical condition. Suffice it to say that his condition - and the Grievor's use of an illicit drug to "self-treat" that medical condition - is information that would be required to be reported to the Company under HS 5000 Item 4.2, as having the potential to impact the Grievor's ability to work safely. By not being truthful in his answers, the Grievor denied the Company that important protection. The Grievor's failure to disclose both his medical condition and his decision to "self treat" it with illicit drugs was culpable misconduct, which negatively impacted the Company's ability to determine the Grievor's fitness for work.

[31] Culpability established, the remaining issue is whether dismissal was an appropriate level of discipline for the Grievor's culpable conduct.

Was Dismissal a Just and Reasonable Response?

[32] For the reasons, which follow, dismissal was a just and reasonable disciplinary measure, in all of these circumstances.

[33] As has been noted in the jurisprudence in this industry, under the *Canadian Transportation Act,* the railroads are required to accept dangerous goods for transportation. That includes dangerous materials such as propane, anhydrous ammonia, chlorine and crude oil. As noted by Arbitrator Picher in **SHP 530** *"Few enterprises in Canada can more credibly argue the safety sensitive nature of their operations than a national railway".* See also **AH807** and the recent decision of this Arbitrator in **CROA 4826** (at para. 3). It is not only the nature of the industry that raises the risk level for railroads, but the fact that employees work largely unsupervised in this industry, which was noted by Arbitrator Picher in **SHP 530.**

[34] At the time of the incidents involved in this Grievance, the Grievor was employed as a Conductor. That is a "safety-critical" position, in this highly "safety-sensitive" industry. Conductors control the movement of large industrial equipment, including lining switches to ensure that Trains and railroad cars go where they are supposed to go. It is not difficult to understand that the position of Conductor is pivotal to ensuring the safe operation of multi-ton trains, and that careful attention must be brought to their job, by those who occupy that position.

[35] Given these dangers - and responsibilities - individuals who occupy safety-critical positions in this industry are required to meet certain fitness to work stipulations.

[36] As has been noted in the jurisprudence, Arbitrators are united in the conclusion that the use of illicit drugs and the railroad do not mix. The impact of illicit drug use in this industry is far-reaching and potentially catastrophic: **CROA 4826**. Individuals who chose to consume drugs are impacted, but so are the employees who work alongside of them who did not make that choice; the Company whose obligation it is to operate a safe workplace for all of its employees; and the communities through which the railroad must travel with its dangerous cargo.

[37] Possession of “magic mushrooms” is illegal in Canada. Considering the nature of the offence, the Company’s argument that the Grievor’s failure to disclose that information impacted its ability to properly assess his fitness to work in a safety-critical position, in this highly safety-sensitive industry is compelling.

[38] The Company was not required to take the Grievor’s word for it that he could working safely, given the existence of his medical condition and his decision to “self-treat” it through the use of illicit drugs. Neither do the Grievor’s assurances he always did work safely and did not consume illicit drugs while “subject to duty” provide that assurance. The Company had a right - and an obligation - to inquire further into the Grievor’s medical condition - and how the Grievor had chosen to treat it - had the Grievor chosen to properly disclose it, as he was required to do.

[39] Failure to disclose information which the Company was reasonably entitled to, to allow it to assess the Grievor’s fitness to work in that safety-critical position is not a minor issue. It is significant and serious misconduct when the Grievor worked in a safety-critical position, in an industry which is also highly safety-sensitive. While the Union pointed out the Grievor’s evidence was that he had “never consumed anything which could possibly affected my abilities to perform my duties safely” and was at all times ‘fit and ready’ to work, it must be emphasized that it is irrelevant for the purposes of assessing the discipline in this case whether the Grievor ever came to work under the *influence* of “magic mushrooms”. The Grievor in this case was investigated and ultimately disciplined for failure to ***disclose*** his medical condition and his past illicit drug use to the Company, and not for working under the *influence* of that drug.

[40] While the Union argued the Company was acting to rid itself of the Grievor as he had requested weekends off to deal with custody and marital issues, there is no evidence that is the case. The Grievor would not be the first employee in this industry to desire weekends off to deal with his family issues. He was told no. There is no evidence it went any further than that conversation, nor is there any evidence the Company then began a campaign to “rid” itself of this Grievor. Neither does the Grievor have a length of service which could act to mitigate his penalty. He is a short-service employee. Looking at his discipline record, as of January 2024, when the Grievor was investigated for this failure

and his discipline was assessed, the Grievor had a 40-day suspension, which had not been grieved. That discipline was for not requesting three-point protection before stepping between the rails to complete realignment of the drawbars (while working on June 26, 2023; occurring after the incident considered in **CROA 5108**).

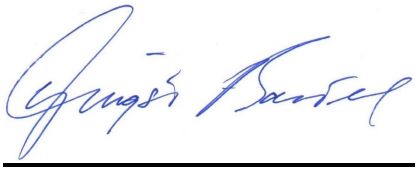
[41] Stepping between railcars when three-point protection is not requested is a serious "operating rules" offence, as demonstrated by the unchallenged penalty. That discipline is not evidence the Company was trying to get "rid" of this Grievor. While the Grievor also had a 10-day suspension for a run-through switch, that discipline was subsequently set aside in **CROA 5108**, not because the event did not occur, but given the unique circumstances of that case**.** The Grievor's record is aggravating and not mitigating.

[42] While lack of intent can act to mitigate a penalty, that mitigating factor does not arise in this case, given the Grievor's lack of credibility, and the fact that whether the Grievor believed his illicit drug use would impact his work or not, his beliefs are not the standard by which his actions - or inactions - are judged when the issue is failure to disclose.

[43] The mitigating factors are not compelling and do not serve to outweigh the significant aggravating factors in this case. The Company's action in dismissing the Grievor was a just and reasonable disciplinary response, in all of the circumstances.

[44] The Grievance is dismissed.

I retain jurisdiction for any questions relating to the implementation of this Award; and to correct any errors; and address any omissions, to give this Award its intended effect.



February 14, 2025

CHERYL YINGST BARTEL
ARBITRATOR