CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5124

Heard in Calgary, January 14, 2025

Concerning

VIA RAIL CANADA

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Dismissal of Mr. James Schneider.

JOINT STATEMENT OF ISSUE:

Appeal on behalf of Locomotive Engineer James Schnieder, PIN 610768, concerning the assessment of an outright discharge for; "Based on the findings of the investigation which includes the violation of CROR 103 (g), the violation of VIA Rail Canada's Alcohol, Drugs and Medications policy, failure to declare the use of the controlled-substance as required VIA Rail Canada's Alcohol, Drugs and Medications policy and your dishonesty about your cannabis use through the course of the investigation, the bond of trust has been irreparably broken. Given the severity of your actions and dishonesty surrounding your cannabis use, we have no choice but to terminate your employment effective today, March 27, 2023"

UNION'S POSITION:

In February 2023, Locomotive Engineer James Schnieder transferred from Canora Saskatchewan to Smithers British Columbia and began familiarization trips on the territory. After making a couple of trips, Mr. Schnieder was canvassed on February 9, 2023, and was asked to work as the ICLE on VIA Train #5, operating out of Smithers BC. It has been alleged that during the tour of duty in question, Mr. Schnieder violated CROR 103(a) when he entered the public crossing at MP85.91 without stopping to protect it per the instructions issued to him by the RTC. Consequently, a short time later Mr. Schnieder was removed from service and was tested for cause, which the breath analysis and the oral swab, both showed no signs of impairment; however, Mr. Schnieder's urinalysis test returned with a non-negative result for marijuana. Mr. Schnieder was removed from service and was issued four separate NTAs for formal employee investigations.

February 10, 2023, concerning the "circumstances surrounding your "alleged violations of CROR Rule 103(g) while operating VIA #5 on February 9, 2023"; The Union opines that the discipline assessed was unwarranted, unfair and excessive based on the grounds that Mr. Schnieder was not afforded his right to a fair and impartial investigation that the and company failed to consider several mitigating circumstances.

February 24, 2023, concerning the "circumstances surrounding your "alleged violation of VIA Rail's Drug and Alcohol Policy while on duty on February 9, 2023"; The Union opines that the discipline assessed was unwarranted and unfair based on the grounds that Mr. Schnieder was

not afforded his right to a fair and impartial investigation, the Corporation had a predetermination of guilt, and it failed to prove Mr. Schnieder was impaired while on duty or that he violated VIA's Drug and Alcohol Policy.

March 16, 2023, concerning "the circumstances surrounding recently discovered Controlled Substance Test results and your alleged fraudulent declarations surrounding marijuana use during your hiring process in February 2022."; The Union opines that the discipline assessed was unwarranted and unfair. The Corporation had a predetermination of guilt and failed to investigate the matter in a timely fashion if any modicum of the allegation was warranted.

It is the Union's position that in each of the investigations, the Corporation had a predetermination of guilt, failed to provide fair and impartial investigations, failed to meet the burden of proof, and denied Mr. Schnieder his fundamental right to representation.

The Union only became aware of the investigations after the Corporation contacted this office to inform the Union that it intended to discharge Mr. Schnieder; at which time it was alleged that Mr. Schnieder refused representation, a statement that was not entirely accurate.

Mr. Schnieder was simply unaware of his rights and who his representation was or who to contact, as he had only been in Smithers for a few days and this was the first time he had been in any form of an investigation. The Corporation, knowing that Mr. Schnieder was facing serious discipline, should have instructed him to contact this office so that the Union could provide him with his right to a fair and impartial investigation. Instead, the Corporation attempted to cover its tracks by misleading this office by suggesting that Mr. Schnieder refused representation, when in fact it was later discovered that it never offered.

The Corporation has also alleged that Mr. Schnieder violated VIA Rail's Drug and Alcohol Policy while on duty, implying that he was impaired, which was definitively proven to be false based on the industry standards oral swab test which proved to be negative.

Penultimately, it was alleged that Mr. Schnieder tested positive for marijuana when he did his medical assessment as part of his pre-employment examinations. The Company further alleged that Mr. Schnieder intentionally deceived the Corporation when he was hired in February of 2022. The Union disputes this allegation and relies on the argument that Mr. Schnieder was informed that he passed his medical and was fit for employment with VIA Rail, and if that were in fact not the case, the Corporation should have denied his application at the time he allegedly failed the pre-employment medical examination.

It is the Union's final position that no modicum of discipline whatsoever was warranted, based on the Corporation's blatant and flagrant violations of Mr. Schnieder's fundamental rights to a fair and impartial investigation. Alternatively, should it be proven that some measure of discipline was warranted; the Union would opine that the Corporation failed to consider any of the multiple mitigating factors, and failed to meet the burden of proof required to support such an assessment of discipline. Therefore, based on the Corporations blatant and indefensible violations, the Union must insist that Mr. Schnieder be awarded aggravated and punitive damages and be reinstated and returned to the active working board without loss of seniority and made whole for all lost wages and benefits with interest for the time out.

<u>COMPANY'S POSITION:</u>

The Company disagrees with the Union's position.

The Company considers the dismissal reasonable given the severity of the faults and circumstances. The Company relies on the investigation, the discipline letter, the response to the step III grievance and all relevant circumstances.

As stated in the termination letter, the findings of the investigation include the contravention of CROR Rule 103 (g), the contravention of VIA Rail Canada's Alcohol, Drugs and Medications policy (failure to declare the use of the controlled-substance, as Mr. Schneider had a prescription for cannabis for medical purposes) and dishonesty about the cannabis use.

Regarding the failure to disclose the use of a controlled-substance, the Company submits that such contravention is a severe offence, without any requirement for the Company to demonstrate impairment.

The Company further specifies that substance test was requested following the CROR Rule 103 (g) contravention, and therefore as a post-incident test. Regarding the investigation, the Company disagrees with the Union's allegation that the Company had a predetermination of guilt. In the same sense, the allegation that the investigation was unfair or partial is unsubstantiated. The Company held the three (3) investigations in good faith and without any predetermined decision.

The Union's allegation that Mr. Schneider was denied his fundamental right to representation is also unfounded. Mr. Schneider decided not to be represented by a union representative, although his rights to representation were outlined by the Company at each step of the investigation process. We refer to the Company's response to the step III grievance for more details.

Contrarily to what the Union alleges, the Company did not rely on the pre-hire (screening) drug test for the dismissal (e.g. the third investigation). Again, we refer to the Company's response to the step III grievance for more details

For the Union:	**For the Company:**
(SGD.) K. James	**(SGD.) R. Coles**
General Chairperson W	Specialist Director, Employee Relations

There appeared on behalf of the Company:

C. Trudeau	– Counsel, Fasken, Montreal
T. Drouin-Shannon	– Senior Employee Relations, Montreal
K. Gilks	– Senior Manager Transportation, Montreal

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
T. Russett	– Vice General Chairperson, LE-W, Edmonton
K. James	– General Chairperson, LE-W, Edmonton
J. Schneider	– Grievor, Smithers

AWARD OF THE ARBITRATOR

Background & Issues

[1] The Grievor was hired by the Company in February of 2022, as a Locomotive Engineer.

[2] VIA is a passenger rail service, and – as a Locomotive Engineer or "LE" - the Grievor was responsible for operating a train which carried passengers.

[3] On February 9, 2023, the Grievor and another crew member were working VIA Train No. 5. The Union has emphasized the other crew member was also new to the territory.

[4] During that trip, the Grievor copied a General Bulletin Order ("GBO") from the RTC to protect the crossing at MP 85.91, Telkwa Subdivision, under CROR Rule 103(g). The CROR apply to all railways in Canada. They are not specific to the Company.

[5] The crossing at MP 85.91 was not protected by that crew. The train proceeded through the crossing at MP 85.91 traveling approximately 15-20 mph. Instead, the crew protected a different, earlier crossing at mile 85.47.

[6] As a result of failing to protect the crossing at MP 85.91, the Grievor was subject to a drug and alcohol test under the Company's Alcohol Drugs and medications Policy (the "Policy") when he returned to the terminal at Smithers. The Point of Collection test was a urinalysis test.

[7] The urinalysis test was 'non-negative' for marijuana and negative for all other drugs/metabolites tested. The alcohol test was negative.

[8] The Non-DOT Drug Test Report notes that it was cancelled by the Medical Review Officer, as the Grievor had a "valid authorization for cannabis for medical purposes", which was verified by that Officer. That Report also stated:

> Any use of cannabis, medical or otherwise has the potential to cause impairing and sedating side effects that can last 24 hours or more. According to current evidence-based recommendations, it is advisable that this worker not participate in any safety-sensitive work for at least 24 hours after administration, or for longer if impairment persists.

[9] Three Investigations were conducted. On March 27, 2023, the Grievor was dismissed for failing to manually protect a crossing; and for breaching the Company's Alcohol, Drugs and Medications Policy when he failed to disclose to the Company that he had a prescription for medical marijuana. As noted in the JSI, the Company also had concerns with the Grievor's dishonesty in the Investigation process.

[10] This Grievance was taken against that dismissal.

[11] It is not disputed the Grievor did not protect the crossing as directed, but instead protected an earlier crossing. While there were various reasons offered for doing so (such as small signage and being unfamiliar with the territory), failure to protect the proper

crossing is culpable misconduct and a breach of CROR Rule 103(g). Any explanations for *why* that occurred would be assessed as part of mitigation, and not to determine culpability for the breach of the Rule.

[12] The remaining issues between the parties therefore are:

a. Was the Investigation fair and impartial?
b. Was the Grievor culpable for both failing to protect the crossing and failing to disclose his prescription for medical marijuana? If so,
c. Was the discipline of discharge a just and reasonable response for failing to protect the crossing and for failing to disclose marijuana use? and, if not;
d. What discipline should be substituted by an exercise of this Arbitrator's discretion?

[13] For the reasons which follow,

a. The Investigation was fair and impartial.
b. The Grievor was culpable both for failing to protect the crossing and for failing to disclose his use of marijuana to the Company;
c. The discipline of discharge was just and reasonable in all of the circumstances.

[14] The Grievance is dismissed.

<u>Analysis and Decision</u>

[15] The arguments of the parties will be addressed as relevant throughout this decision, rather than being set out separately.

[16] When reviewing discipline, the three questions in a *Wm. Scott* framework require first an assessment of culpability; and if so, consideration of all aggravating and mitigating factors to determine if the discipline was just and reasonable. If the discipline chosen is not just and reasonable, that framework invites the exercise of the Arbitrator's discretion to substitute a penalty which is.

[17] The Union has argued that the Grievor's dishonesty regarding the speed of the Train when his crewmate detrained (he said it was stopped and it was proceeding at 1.3 mph) was a "new" position which is raised on the "eve" of the hearing. However, that issue was Investigated by the Company. The Company's concern with the Grievor's

inconsistency in his initial reporting is not "new" to either the Grievor or to the Union, given that information. While the Company did not base discipline on that issue, the Grievor's dishonesty in his initial reporting is an appropriate factor to consider in determining if this employment relationship is untenable and it will be considered for that issue.

[18] The Union also argued in Reply that the Company is implying the Grievor is impaired with its questioning of when he consumed. I cannot agree. As will be analyzed below, the Company tested the Grievor's assurances that he never worked if he had consumed cannabis in the previous 24-hour period. It was entitled to make those inquiries, given the Grievor's evidence on that point.

Preliminary Issue: Alleged Denial of Union Representation

[19] On February 1, 2023, the Grievor transferred from Canora, Saskatchewan, to Smithers, B.C. He then began to take familiarization trips on his new territory.

[20] From evidence which this Arbitrator solicited at the hearing, I am satisfied that – although new to the territory – the Grievor represented to the Company he was prepared to accept an assignment approximately one week after beginning work based out of the Smithers B.C. Terminal.

[21] As a preliminary issue, the Union argued the Grievor was denied Union representation and the Investigation(s) were therefor not fair or impartially conducted. The evidence does not support the Union's arguments.

[22] The Grievor was notified on February 10, 2023 of his need to attend a formal investigation for his alleged violation of CROR Rule 103(g), which was to be held four days later, on February 14, 2023. That Notice indicated to the Grievor that he was entitled to have an "accredited representative of the T.C.R.C. present with you at this investigation. If you do desire a representative, please provide his/her contact number to the investigating officer". It was the Grievor's own decision of whether or not he wanted a Union representative to accompany him to the Investigation. The Company was not required to arrange that representation.

[23] While new to the territory, I am satisfied the Grievor was given sufficient time to locate a Union representative to accompany him, had that been his choice. If he was

unable to determine who his representative should be - in those four intervening days - he could have asked for an extension from the Company to locate that representation. He did not do so. In fact, the evidence demonstrated that the Grievor was not only notified of his right to Union representation in the Notice To Appear for each Investigation, but he was also notified of that entitlement and further asked in each of his Investigations if he required that representation. He answered "no".

[24] At the Investigation held on February 14, 2023, the Grievor was asked in Q/A 2 "Do you require a representative of the TCRC with you and if so, please state his/her name". To this, the Grievor answered "no". The Grievor had a second Investigation on March 2, 2023. In that Investigation, he was also asked the same question at Q/A 2. His answer was "I'm just representing myself so no". In his third Investigation, he was asked the same question at Q/A 2 and once again, he answered "no".

[25] It is not up to the Company to "force" the Grievor to have Union representation. The Grievor chose not to have Union representation as was his right; the Company did not deny the Grievor that representation.

[26] The transcripts of each Investigation have been carefully reviewed. There is no evidence the investigation(s) were not fairly and impartially conducted.

Merits: Failure to Protect the Crossing

[27] CROR Rule 103(g) requires, in part, that a crew is to "…stop vehicular and pedestrian traffic before entering the crossing" and *also* that a movement is not to "...enter the crossing until a signal to enter the crossing has been received from the employee providing the manual protection". VIA PTI 10.8 requires, in part, that LE's report any "*accident/incident/near miss involving their train",* which reporting is to be made to both *the RTC and VIA's OCC.* This would include CROR violations that occur where VIA is involved, regardless of the responsibility.

[28] I am satisfied those requirements are clear and the Grievor knew – or should have known – of them, being a qualified LE. I am further satisfied that complying with GBO's is a core responsibility of the Grievor's role as an LE. Given that his work is unsupervised,

the Grievor's ability to properly report when he bears responsibility for an incident is appropriately a concern of the Company.

[29] As the Union has argued mitigating factors in the Grievor's failure to protect the crossing – and that the intent of the Rule was already accomplished through crossing barriers and the Foreman's protection - it is necessary to look at the event in some detail.

[30] According to his February 14, 2023 statement, the Grievor had operated 2.5 round trips, or "5 legs" on the Telkwa Subdivision prior to the incident of February 9, 2023, during his approximately one week of service.

[31] In that Investigation, the Grievor was asked to explain what occurred on February 9, 2023. The Grievor indicated the Train was at approximately mile 50 when the crew received the GBO. The Grievor confirmed he was the "operating" engineer when the GBO was received, and his crewmate was the "In-Charge Locomotive Engineer" or ICLE at the time of the violation. He and his crewmate switched roles after the message from the RTC was received and copied. He also confirmed he did not provide his crewmate with a copy of the written message, as required by CROR Rule 135, as he was "*under the understanding that that was only for clearances but I realized now it's for all paperwork including the messages*" (Q/A 25). He did note the paperwork was on the desk when the positions were switched.

[32] The Grievor indicated the crew had a job briefing "*within the specific mileages (85-86) and we never actually looked at the mileages on the crossings*". This means that for the 35 miles between when the GBO was received at mile 50 and when the crossing was reached at mile 85, the crew did not job brief the GBO, or discuss how to protect the crossing.

[33] The crew protected the crossing at mile 85.47 instead of the crossing at mile 85.91.

[34] At mile 85.47, the Grievor's crewmate detrained. That crossing had a mileage post which indicated it was 85.47.

[35] In his Investigation, the Grievor was asked why he stated his movement was stopped when his crewmate detrained at the crossing at mile 85.47, when the download demonstrated it was still traveling at 1.3 mph. The Grievor indicated "*I have no reason. I*

should have stopped. Zero mile an hour, on and off" and that he would "*be fully stopped in the future*" (Q/A's 19, 20).

[36] That was not being responsive to the question. The question was not *why* he did not stop, but why he was *dishonest* in his initial Reporting when he stated the train "*did*" stop.

[37] That dishonesty in reporting reasonably caused the Company concern with the Grievor's ability to work unsupervised in this industry.

[38] The Grievor's evidence was that he and his crewmate *did* job brief the crossing protection; and that they "*counted them on the profile*" to determine which crossing to protect, instead of looking at the mileage signs in the field (Q/A 30). The Grievor also confirmed the crew did not discuss verifying the mileages which were visually displayed on mile posts at the crossings (Q/A 31) and that they did not discuss visually verifying the mileage of the crossing by *looking* at the signal poles when his crewmate returned to the cab after stopping at that incorrect crossing (Q/A 32). The Grievor's evidence was that he did not have a job briefing with his crewmate when he returned to the cab (such as confirming they were at the correct crossing by visually verifying the mileage posts), because he "*thought it was fulfilled*" (Q/A 37).

[39] A picture of the crossing was filed into evidence, which shows the mileage post are visible at that crossing when the train is stopped, and would have easily told this crew they were at the wrong crossing, had either of them looked at it.

[40] Maintaining situational awareness by *at a minimum* visually verifying if a train is protecting the correct crossing would be a core responsibility of an LE's job.

[41] When asked how he *<u>did</u>* verify that he was at the proper crossing when there were three crossings within a mile of each other at 85-86 (and given he did not visually verify the correct mileage by looking at the mileage post), the Grievor answered "*we thought we were at the right crossing by counting 1-2-3"* (Q/A 33).

[42] When asked how he knew that 85.91 (the correct crossing) was the third one on the profile, the Grievor answered "*I did not know. Without looking at the mileages in the field, I had no way of knowing*" (Q/A 34).

[43] Yet, with this acknowledgement that he did *not* know he was at the correct crossing, there was no verification with his crewmate of the crossing number they were protecting, even though that crew member left the train at that crossing and the mileage post was there to be seen.

[44] Given that, the crew remained unaware they were at the incorrect crossing.

[45] When asked when he realized the crew had protected the wrong crossing, the Grievor stated that when he saw workers at the correct crossing (further down the track), he realized they had protected an incorrect, earlier crossing (Q/A 35).

[46] By that time, it was too late to stop.

[47] When asked what occurred in the cab after the crew realized they had protected the wrong crossing, the Grievor stated (at Q/A 36):

> I tried to stop consistent with good train handling as quickly as possible but realized we couldn't stop. **We went over the crossing at approx. 15-20 mph unprotected**. I immediately contacted the forman [sic] to notify him of our mistake (*emphasis added*).

[48] The Grievor's evidence was he did not consider putting his train into emergency because he saw that the crossing barriers were up and the crossing was "*physically blocked and clear of personnel. That and the fact I don't think we would have stopped and could have made it worse*" (Q/A 37).

[49] While the Union noted the crossing *was* protected with crossing barrier and by the Foreman, that does not equate to the crew of a Train also protecting a crossing by bringing their train to a stop, when required to do so. Further, there was no conversation with the Foreman to traverse his limits. The Grievor also confirmed there were people and equipment working near the crossing at mile 85.91 on both sides (Q/A 45), when his Train proceeded through the crossing in breach of CROR Rule 103(g) and the GBO.

[50] The Grievor was asked whether he attempted to contact the RTC or OCC as was required, once he *realized* CROR Rule 103(g) was breached. His evidence was:

> No, I did not. When we talked to the forman [sic] he said that he had the crossing manually protected anyway so we didn't report the incident as we didn't feel at that time that there was a need to report

> it. But looking back at it and reviewing 10.8, in the future I will bring the train to a controlled stop an [sic] call the RTC and OCC.

[51] The Grievor's evidence was that he felt he *did* report the breach, because he told the Foreman. However, there is no provision for reporting a breach of a CROR by telling a Foreman.

[52] There is nothing in the Rule that suggests there is no need to report a breach of CROR Rule 103(g) to an RTC when a crossing is also manually protected, or when a Foreman also has limits, or a provision for reporting to a Foreman, instead of to the RTC.

[53] In fact, it was suggested to the Grievor that they *should* contact the RTC for *this* event:

> Stacy said that we should but from the brief conversation we had with the Forman I thought we didn't have to call it in as I again, thought he had protected the crossing for us (Q/A 42).

[54] The Grievor stated he took "*full responsibility*" and that he had no intention to "*cover anything up, I just didn't think*" (Q/A 51). He stated he would be "*a lot more attentive going forward and will comply with all the rules and policies. Also, if I'm not sure of something I will definitely seek clarification*" (Q/A 60). He also stated "*I regret my actions. Looking back on the trip I should have paid more attention to the mileages in the field and going forward I will ensure that myself and my partners are looking at all identifiable locations and not just signals*" (Q/A 61)

[55] Employees in this industry work largely unsupervised. The Company reasonably depends on Train crews to not just perform the responsibilities of their roles, but also to properly report incidents in which they are involved. Not to do so deprives the Company of the ability to fully investigate an issue, or address any issues with the track from the train not stopping as required, or proceeding at a faster speed over that crossing. It was also the case that proceeding through the crossing at 15-20 mph could have put the employees working along that track in danger.

[56] The need for reporting is not up to the Grievor's judgment. The Grievor was fortunate the employees working along that track were alert that day, or a tragedy could have resulted.

[57] Someone obviously thought that the RTC should be notified, given that when this crew pulled into the Smithers station, they were told to contact the OCC. Upon returning to Smithers, the Grievor was also post-incident tested for drugs and alcohol, as discussed below.

[58] That the Grievor failed to report the incident in these circumstances is a further fact that reasonably caused the Company concern with the Grievor's honesty and his trustworthiness to properly work unsupervised and to properly report events in which he is involved, in addition to his failure to properly protect the crossing as directed.

[59] That is an aggravating factor for discipline under a *Wm Scott* analysis.

[60] Given this comprehensive review of the evidence, there is very little to offer in terms of mitigating factors.

[61] The Grievor is a short-service employee. The evidence was there was nothing noteworthy going on in the cab during the time in question, so the actions of the crew in not having appropriate situational awareness – and not even checking when they stopped that they were at the right crossing by reading the mileage posts, are confounding. The only mitigating factor would be the Grievor's apology, however even that is tainted by the fact the Grievor chose not to report his crew's breach of the rule, *even when* that report to the RTC was in fact discussed between the crew and discarded. It was not explained how the Grievor could assume that reporting to the Forman – or the Forman also having limits – absolved him of the need to report his own breach of CROR Rule 103(g).

[62] While the Grievor maintained he was not trying to "*cover anything up*", this is in fact undermined by his lack of appropriate reporting; and brushing off the suggestion that it should in fact be reported.

<u>Merits: Violation of the Policy</u>

[63] On March 2, 2023, a supplemental investigation took place regarding an alleged violation of the Policy. That Investigation placed the DriverCheck drug and alcohol reporting before the Grievor, as well as the Policy. As earlier noted, the Grievor's urinalysis test was positive for marijuana, but was considered to be "negative" because of the Grievor's valid authorization for the use of marijuana (Q/A 10, 11).

[64] The Grievor was consuming marijuana under a prescription. That prescription was filed into evidence. The Grievor's evidence was he was taking cannabis for sleep, as well as for a medical condition (which it is unnecessary to name). It was also the Grievor's evidence he was "*using CBD gummies, edibles, but I hadn't used any 24 hours prior to work. I was using them under direction of my doctor*". That prescription lists a "daily dosage" of 1.5g. This is not an "as needed" prescription. It is unclear how the Grievor could be taking his 'daily' dose of 1.5g, yet also not be consuming gummies 24 hours prior to work, and the Company also had some confusion, which is evident on the transcript, given that the two statements are inconsistent.

[65] The Grievor's evidence was he last consumed February 7, 2023 "*to make sure I wasn't impaired for du*ty" (Q/A 26). Yet the Grievor <u>also</u> gave evidence that he worked the next day, on February 8, 2023 at approximately 14:00; and that he was back on duty at 07:00 on February 9, 2025, with a rest in Prince George. His evidence was he did not consume in Prince George.

[66] Therefore, on his own evidence, the Grievor consumed on February 7, 2023, and also worked on February 8 and 9, 2023. It was the Grievor's evidence he was the judge of his own condition, and that he *"…would not jeopardize the lives or the passengers, fellow co-workers or the public by being impaired while on duty*" (Q/A 31); and that he was not "*impaired while on duty*" (Q/A 32). The Grievor also stated:

> After learning about the effects and the length of time CBD edibles stay in your system, I will refrain from the use entirely as to not pose a risk to myself, my fellow employees or the passengers…. I'm sorry for my actions. I was never impaired at work. I thought having medical authorization and not using it 24 hours before being subject to duty that I was doing the right thing. I understand that it is not the right thing and to just stop it's use in it's entirely would be the best and safest course. On-line it said the gummies had 100% CBD in them **but in reading the package after this happened it stated that there was THC in it. Had I known that, I would have refrained from it's use.** I was taking them for sleep and [xxx] (QA 36; medical condition not disclosed; emphasis added).

[67] That the Grievor was not even aware that the gummies he was consuming in fact contained THC, which is the psychoactive element of cannabis, is concerning.

[68] The Grievor indicated he had provided his prescription to the Company shortly before the Investigation, as was recently requested by the Company. He did not provide it to the Company until after this incident had occurred.

[69] Under the Company's Policy, employees are responsible for reporting their use of alcohol, drugs, or other mood-altering substances. Employees are required to report the use of Medication, which is defined as drugs which "*inhibit* *or may inhibit* an employee's *ability to perform their job safely and productively*" (emphasis added):

> In the event that a prescribed or over-the counter Medication *may potentially have a negative impact on job performance,* the Employee is expected to immediately notify in writing his Supervisor of the Medication taken *and actual or potential* impact on the job performance. The Employee also undertakes to provide any additional details or information relevant to the subject Medications or any alternatives therefor, upon the request of his or her Supervisor (Section 5, sub-section 3; emphasis added).

[70] The Policy provides for reporting the use of drugs which "*may potentially have a negative impact on job performance"* and not just the drugs which do have that impact because they are consumed during a work day.

[71] The Policy also recognizes that:

> Certain positions are associated with a higher level of risk. These positions include designated Safety-sensitive/critical positions. Individuals holding a position defined as Safety sensitive-critical are held to a higher standard regarding the compliance with this Policy and its related procedures and are subject to greater consequences due to the direct impact that these positions have on security and safety.

[72] I am satisfied the Grievor had an obligation to report his use of medical marijuana to the Company, and that the medical use of marijuana *does* potentially have a negative impact on this Grievor's job performance, especially as it was prescribed to be taken "daily".

[73] It is difficult to envision how that 'daily dosage' could be consumed but that the Grievor could also regularly abstain from its use 24 hours before duty.

[74] Regardless, it is the "*potential*" for impact and not just impact that is relevant to the reporting obligation. Had the Grievor advised VIA of his prescription in accordance with the Policy, VIA could have asked further questions and determined if the Grievor was able to safely perform his safety-critical work. For example, the Company may have sought information from the Grievor's doctor as to when the prescription started; and how much the Grievor required. If the Grievor is able to stop using marijuana "*cold turkey*" - as he stated he would - that raises a question of whether he could have used other medication to treat his conditions given his safety-critical position in this industry, that did not have the potential to impact his work performance.

[75] It may also have been determined the Grievor was unable to continue to work in a safety-sensitive position, given his prescribed daily consumption. The important point is the Company was not required to "*take the Grievor's word for it*" that he was capable of operating a train full of passengers while consuming medical marijuana.

[76] Regarding how long he had been using marijuana – and his lack of disclosure of that use to VIA - the evidence of the Grievor on this point lacks credibility. The Grievor's evidence was he received that prescription in January 2023 and they were only "*good for a year*" (Q/A 17). While the Grievor stated he *did* also have a prescription *prior to* January of 2023, he was unsure when it was prescribed. It seems curious that the Grievor would not know when he started using medical marijuana. While he was unable to say *when* he started that use, he appears to know that he was *not* using medical marijuana at the time of his pre-employment medical in January of 2022.

[77] It is not credible that he would know he was not using on that that date specifically, if he was unable to put a date to when he started using medical marijuana. I do not find his evidence that he did not know when he began using medical marijuana to be credible. I also do not find his denial of use at the time of his pre-employment medical just a year previously to be credible. Given his inconsistent evidence and his lack of recall for certain specifics; but recall for others; I am satisfied the Grievor was using medical marijuana at the time of his pre-employment medical in January of 2022, and failed to disclose that use to the Company.

[78] Even if that were not the case, the Grievor was required to advise VIA when he started using medical marijuana, which was sometime before January of 2023, even on his own evidence. He failed to do so. The Grievor was asked in Q/A 24 if he advised VIA, and he stated he did not: "*I was unaware that I had to tell VIA that I had a prescription for cannabis however, I was not using it at work or prior to work*". While the Union also argued the Grievor was not using at work and therefore did not have an obligation to report, that argument is not compelling.

[79] The Company was entitled to understand whether the Grievor was taking medication – such as cannabis – that had the potential to impact his ability to work. Given the Grievor was prescribed a "*daily dose*", that potential impact is obvious.

[80] It is the lack of disclosure, rather than impairment, that is an issue in this case.

[81] The second and third questions in a *Wm. Scott* analysis are always fact dependent. The circumstances of this case are particularly unique.

[82] There are two decisions which are applicable. The first is **AH732**. That case relates to the culpability of the failure to disclose the use of medical cannabis. **AH732** was decided in 2021. The Arbitrator in that case noted it was one of the first cases regarding disclosure of the use of cannabis, in this industry[1]. As noted in **AH732,** failing to disclose use of cannabis is culpable misconduct and can form the basis for discipline. The grievor in that case was an eight-year employee, which is significantly more service than this Grievor. In that case – like in this case - the grievor had been prescribed cannabis for sleep issues. Like in this case, that use did not come to light until after the grievor backed his hi-rail truck through a switch not aligned for his route and tested positive for cannabis. There was also evidence the Grievor in that case contacted the RTC, as required, though that reporting was not immediate (an hour later). The grievor in that case was also able to state when he had been prescribed cannabis oil, unlike the Grievor in this dispute. He was also remorseful.

[83] It is unnecessary to repeat the Arbitrator's analysis in that Award regarding the limitations of urinalysis testing, which this Arbitrator has previously written on as well, or

[1] See para. 67.

all of the cases regarding disclosure requirements. What is relevant is his conclusion that such disclosure *can* be reasonably required and that breach of a policy which requires that disclosure is culpable misconduct. In making that determination, the Arbitrator quoted Arbitrator Ish's conclusion in *Gibson Energy (Moose Jaw Refinery Partnership) v. Unifor, Local (M. Chow)*[2], where even a leave of absence did not excuse the Grievor's disclosure requirement:

> The prescription for marijuana for two grams per day for an employee working in a safety-sensitive position is clearly a matter that must be revealed to the employer. This should have been done by the grievor on or about February 18, 2020 when he received the prescription rather than two or three weeks later in his conversation with Mr. Cust. *The mitigating factor, as argued by the union, is that the grievor was not working during that time because he was on an employer-imposed leave of absence. The leave of absence does not release the grievor from his employment obligations*… (at para. 55).

[84] As in this case, the Union in that case argued the grievor was not impaired at work.

[85] The Union provided a bulk of jurisprudence that urinalysis testing "standing alone" does not determine impairment. That jurisprudence is not on point. The distinction between discipline for "impairment" on the one hand and discipline for "lack of disclosure" on the other was also made in **AH732**, as it has been in this case. The Arbitrator considered the 8-year length of service of that Grievor, as well as his candour, in substituting a 60-day suspension for discipline, on the facts of that case.

[86] While a run-through switch as in **AH732** can be significant misconduct, it does not equate to failure to stop a passenger train at a crossing when required to do so by a GBO. That is a more serious and significant form of misconduct in this industry.

[87] When combined with the loss of situational awareness - and oblivion to gaining that awareness through the mileage posts; and the failure to report - more significant and serious misconduct is at issue in this case.

[88] In **AH732** – as has been noted above – the failure to disclose his prescription "prevents CP from conducting its crucial analysis about potential safety issued [sic]".

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[2] 2021 CanLII 16446

[89] The Grievor is culpable for failing to disclose his medical use of marijuana to the Company.

[90] The second case of **AH802** reinforces the impact of a lack of reporting and short service employees.

[91] **AH802** involved a violation of Rule 42 at CN, which was described as a "cardinal rule", which exists to protect workers on the track. By that rule, trains are not entitled to travel through a Foreman's protection without that Foreman's permission. The grievor proceeded through those limits. In that case, while the grievor also expressed candour – as has this Grievor; and while the Arbitrator recognized that demerits and/or suspension are the usual measures of discipline; the Arbitrator noted he may well have provided "another chance" to a grievor "*if the train had stopped and the matter reported immediately*" which would have allowed the Company to investigate. In that case, the Train only stopped when the RTC contacted them to do so; 30 miles down the track. The Arbitrator upheld the termination.

[92] In this case, while the Union argued that discharge for a CROR 103(g) offence is not supported in CROA jurisprudence, even accepting that statement without challenge, the discharge penalty in this case did not only result from the Grievor's breach of CROR 103(g). In addition to the actual breach of that Rule, the Grievor then failed to properly report the incident; even though that reporting was discussed; and it was *also* determined the Grievor failed to disclose to the Company that he had a prescription for Medication that was required to be reported.

[93] It was that *entirety* of circumstances on which the Company stands, and not just the breach of CROR 103(g).

[94] There must also be recognition that the Company bears significant legal obligations to ensure the safety of its employees, passengers and by extension the larger community through which it travels, as noted in *Imperial Tobacco Canada Ltd. and BCTGM Local 364-T*[3].

[3] 2001 CarswellOnt 10355, at para. 26.

[95] While the Union has argued the other employee on this crew was not dismissed, there is no evidence that other individual failed to disclose a prescription for medical marijuana, in addition to breaching CROR 103(g).

[96] The safety-critical position of an LE - in what is recognized in the jurisprudence as the most highly safety-sensitive industry in this country - must be kept in front of mind. Also, key is the fact that employees in this industry work largely unsupervised and are responsible for multi-ton equipment. The Company must rely on those employees not just to perform their job, but also to be responsible to advise the proper authorities when mistakes are made. That is a part of working unsupervised which Arbitrators take seriously, as noted in **AH802**. It must also be recalled this was a passenger train and not a freight train. The Grievor is responsible for the lives of hundreds of passengers. The stakes in this sub-sector of the industry are particularly high. Unlike in **AH732**, this Grievor does not have a level of service and reporting the incident that served to mitigate that penalty.

[97] I am satisfied that protecting crossings by bringing a train to a stop when so directed is an important and key safety rule. As in **AH802**, the Grievor is a short service employee. While the Grievor exhibited candour and gave assurances he would follow rules in the future (as in **AH802**), he failed to provide an adequate explanation of why those Rules were not followed in this instance. In this case, the Grievor failed on numerous counts to confirm his own situational awareness: he did no job brief the upcoming GBO for 35 miles; he did not verify the crossing he protected was in fact the correct crossing by a simple view of the mileage posts that were there to be seen and a question of his crewmate to visually verify their position (that should have been asked); he failed to protect the crossing that he *was* required to protect and by sheer luck the workman were alert at the crossing he *was* supposed to protect. He then failed to report the incident; and failed to disclose his use of marijuana. His explanation of the crossing already being “protected” was disingenuous, given that a Foreman’s protection does not displace the requirement for him to stop his train to protect that crossing and the employees working there, as was seen in **AH802.** He also failed to disclose important medical information to the Company, to allow it to make its own inquiries of the safety implications of his Medication, which was prescribed to him to be taken “daily”, on its face.

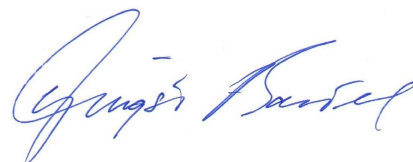
[98] I therefore cannot agree with the Union's position that the Company failed to properly consider the mitigating factors. While the Grievor was new to the area, he represented to the Company he was able to perform the work to which he was assigned. Frankly, the only substantial mitigating factor is the Grievor's apology. However, even that was undermined by the Grievor's choice to not report the incident to the RTC, when required - and when even suggested to him as the appropriate course. Against that are the significant aggravating factors in this case that have reasonably led the Company to determine the employment relationship with this Grievor is untenable and that he is untrustworthy.

[99] Given all of these circumstances, and upon review of the jurisprudence offered by the parties, regrettably for this Grievor, this Arbitrator is drawn to the same conclusion.

[100] The Company's decision to discharge the Grievor was a just and reasonable one, in all of the circumstances. No basis has been established for this Arbitrator to intervene to alter that decision.

[101] The Grievance is dismissed.

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



March 7, 2025

CHERYL YINGST BARTEL
ARBITRATOR