IN THE MATTER OF AN ARBITRATION

BETWEEN:

CANADIAN PACIFIC RAILWAY COMPANY

(the "Employer")

AND:

UNIFOR LOCAL 101R

(the "Union")

(Jeff Lavallee Dismissal – Grievance No. 204-2019-011;
CAN-CP-UNIFOR-2019-00006051)

ARBITRATOR:	Vincent L. Ready
COUNSEL:	Sharney Oliver for the Employer
	Jim Wiens for the Union
HEARING:	December 2, 2020 Virtual hearing
PUBLISHED:	February 16, 2021

The parties agreed I was properly constituted as an arbitrator under the terms and provisions of the Collective Agreement with the requisite jurisdiction to hear and determine the matters in dispute.

This matter pertains to a grievance filed by the Union regarding the Employer's dismissal of the grievor, Jeff Lavallee, from his employment as a Diesel Mechanic Trainee at the Employer's Moose Jaw locomotive repair facility. The grievor's employment was terminated on March 6, 2019 after he tested positive for marijuana. He had worked for the Employer since November 14, 2011 – although did not work for a significant portion of that time.

FACTS

The background facts giving rise to the grievance are not in dispute. On February 5, 2019, the grievor was responsible for running through a switch in the Moose Jaw Yard. The grievor subsequently tested positive for marijuana on a post-incident urine test. During the Employer's investigation, the grievor admitted to using marijuana, but stated "I always make sure there's at least 12 hours from the time I use marijuana to the time I go to work."

The grievor had previously been dismissed from his employment in August 2012 under similar circumstances. Indeed, the grievor was discharged at that time for:

> The Grievor entered Company service on November 14, 2011 and had not even worked for a year, when he was dismissed for the following:
>
> > For conduct unbecoming an employee as evidenced by your providing false and/or misleading information to the Company during your formal investigation conducted on June 28, 2012, July 13, 2012 and August 1, 2012 in connection with "the results of your post incident substance test, following the June 10,

> 2012 on track incident at Moose Jaw, SK where S1 switch was run through subsequently derailing CP6606" and for failing your post incident drug test, a violation of Policy OHS 4100 as a Safety Sensitive employee.

The grievor's prior dismissal was grieved and arbitrated, and the grievor was reinstated in April 2017 in accordance with a Reinstatement Agreement in which he committed to, amongst other things, adhere to the Employer's Drug & Alcohol Policy.

As noted, the grievor was dismissed on March 6, 2019 for "Failure to adhere to HR 203, Alcohol and Drug Policy and HR204.1, Alcohol and Drug Procedures as evidenced by [his] post incident positive substance test on February 5, 2019."

In early April 2019, the Union filed a number of grievances at Step 2 of the grievance process including grievance no. 204-2019-009 – wherein it alleged the grievor was unreasonably sent for drug and alcohol testing – and grievance no. 204-2018-010, in which it asserted the grievor was improperly held out of service following the testing. Neither of those grievances are before me.

Around the same time, the Union also filed the present grievance no. 204-2019-011, which reads as follows:

> Outline of Complaint/Grievance:
>
> On March 6, 2019, Moose Jaw Diesel Mechanic Trainee Jeff Lavallee was dismissed from Company Service for: "Failure to adhere to HR203, Alcohol and Drug Policy and HR 203.2, Alcohol and Drug Procedures as evidenced by your post incident positive substance test on February 5, 2019.

The dismissal of Mr. Lavallee is without merit. Mr. Lavallee and the Union content that the investigation was not fair an impartial, and the Company had no just cause to dismiss Mr. Lavallee. On October 9, 2018, the Union provided notice to the Company wherein it states:

> The Union finds Canadian Pacific's imposition of policies and procedures HR203/HR203.1/HR203.2 are discriminatory and unreasonable in that they do not contain a mechanism to determine impairment at the time of incident/accident. It has been repeatedly sustained by the courts and is effectively the law that a positive drug test, conducted by urine analysis, standing alone, does not establish impairment at a point in time which corresponds with an employer's legitimate business interests and, standing alone, cannot be viewed as just cause for discipline.

The Company chose not to respond to the document.

The Company's own testing results confirm that Mr. Lavallee was not under the adverse effects of any alcohol or drugs on March 6, 2019. The Union also contends a reasonable apprehension of bias by the Company as Mr. Lavallee had been previously dismissed under a similar accusation. The prior dismissal was overturned through an arbitration decision, and the Company was directed to reinstate Mr. Lavallee with full compensation for lost wages and benefits.

The Union has identified other similar run-thru switch instances at various mechanical facilities where employees involved were not subjected to substance testing, further confirming a reasonable apprehension of bias in that Mr. Lavallee was targeted for these invasive testing demands. He had not been observed by his supervisors or his co-worker as being under the influence of drugs or alcohol. He was not reported as demonstrating any cognitive deficiencies. His testimony was repeatedly consistent in that he was not under the influence of drugs or alcohol, his declarations further substantiated by the testing results. Throughout the investigation process the Union identified other employee's positive urine analysis test results that have not resulted in employee's termination, further confirming a reasonable apprehension that Mr. Lavallee was explicitly targeted for this discipline assessment. The investigation demonstrates that the Company clearly knew or ought to have known that it did not have the evidence necessary to termination Mr. Lavallee.

Resolve requested:

> The Union requests that Jeff Lavallee be returned to active duty forthwith, with full compensation for all lost wages and overtime opportunities, incurred as result of his dismissal including, but not limited to, interest on any moneys owing. Additionally, the Union is seeking compensatory damages to Mr. Lavallee for knowingly and willfully, with reckless regard to arbitration jurisprudence and decisions of various courts and tribunals, violated Lavallee's human rights and dignity of person by terminating his employment without just cause or merit and further damages to act as a deterrent for future malicious and irresponsible exercising of management rights when the known outcome of any termination will be overturned as pre-warned in SHP 530 and supported by a legion of subsequent decisions including but not limited to CROA 3691.
>
> The Union reiterates the demand that Company Policy #HR302 and Company Procedures #HR203.1 & #HR203.2, all dated October 17, 2018, be rescinded and replaced with a policy and procedures that are compliant with well established case law and deeply entrenched jurisprudence in relation to impairment in the workplace, including Arbitrator Michel Picher's CROA 4240 decision specifically regarding cannabis. The primary intent of the new policy would be to create a safe work environment. The new policy would be developed with Union consultation and participation in compliance with the well-established standards as set out in KVP Co. Ltd. and Lumber & Sawmill Workers Union, Local 2537 (1965), 16 L.A.C. 73 (Robinson).

On July 12, 2019, the Employer filed a Step 2 response in which it maintained that the discipline was "properly assessed in keeping with the *Hybrid Discipline and Accountability Guidelines*".

The grievor opted to sign an Admission of Responsibility form and was assessed ten demerits for running the switch. With respect to the positive drug test, the grievor and the Union both signed a Reinstatement Agreement dated December 11, 2019 which set out a number of conditions the grievor was required to satisfy before he would be returned to work, including that he

undergo a reinstatement substance test, medical assessment, screening interview, and successfully complete requalification training if required. For reference, the terms of the Reinstatement Agreement read as follows:

1. Before return to service takes effect Mr. Lavallee must provide the Company with a Functional Abilities Form.
2. Prior to returning to work Mr. Lavallee must submit to a substance test as direct by OHS.
3. Mr. Lavellee with [*sic*] comply with the requirements of CP OHS (Occupational Health Services) and be determined to be medically fit to return to service. This will include, but not be limited to, submitting to a Substance Abuse Professional (SAP) assessment and signing an OHS declaration letter in connection with the obligations and responsibilities of Safety-Sensitive and Safety-Critical positions.
4. Further to the conditions reference above, Mr. Lavallee must also comply with the following prior to returning to work:

    a. Prior to any return to active service Mr. Lavallee will be required to successfully complete a screening interview with his manager concerning his ongoing employment. The purpose of this interview will be to review the Company's ongoing performance expectations regarding the return to work of Mr. Lavallee and to provide full understanding and clarity regarding these expectations. If he desires, an accredited representative may accompany Mr. Lavallee to this interview.
    b. Mr. Lavallee shall strictly comply with all of Company's policies, procedures and work practices, the Alcohol & Drug Policy and Procedures.

5. Other than indicated within this letter, Mr. Lavallee shall not be paid any compensation or benefits for time out of service.
6. any alleged violation of or failure to comply with the terms of this Agreement will result in removal from service and an investigation.
7. There shall be no grievance advanced in respect of this Agreement.
8. Should OHS become aware of any noncompliance on the part of Mr. Lavallee regarding the meidcl [*sic*] requirements of this Agreement, such information will be provided to Labour Relations for the purposes of having an investigation conducted.

9. This Agreement is without precedent as to positions that may be taken by the Company or the Union in similar circumstances involving other employees and is not to be used in any way in future grievances or arbitrations or as a precedent in cases involving other employees. It is expressly understood that this Agreement is based upon the unique facts of this case.
10. Mr. Lavallee agrees that he has had an opportunity to consider the terms of this Agreement and consult with anyone he wishes, including a Union representative. Mr. Lavallee also confirms that he understands the terms of this Agreement, that he was not under the influence of any drugs or alcohol at the time of review or signing of this Agreement, and he has signed this Agreement freely and voluntarily.
11. This Agreement will remain on the employment record of Mr. Lavallee and may be utilized in the event that he appears before an arbitrator regarding this Agreement or any other future proceeding.

After signing the Reinstatement Agreement, the grievor once again produced a positive urine test and was consequently not reinstated as a result of his failure to meet the conditions set out in the Agreement.

For reference, the relevant portion of the Employer's Drug and Alcohol Policy and Procedure is as follows:

3.1.3 Cannabis

Recreational Cannabis

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)

- The use, possession, distribution, offering or sale of recreational cannabis;
- Reporting for work or remaining at work under the effects of cannabis from any source, including acute, chronic, hangover or after-effects of such use;

- Consuming 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.

The Policy stipulates that violations of the Employer's policies will result in disciplinary action including the possibility of dismissal.

The parties each filed their own Ex Parte Statement of Issue, which are reproduced below.

Employer's Ex Parte Statement of Issue

On February 5, 2019, Mr. Lavallee was involved in a locomotive movement that ran through a switch and was subsequently substance tested.

On February 11, 2019, the employer was informed by that Grievor's urine had tested positive for marijuana.

Following an investigation into the positive urine test, the Grievor was dismissed from Company Service as follows:

> Please be advised that you have been dismissed from Company Service for the following reason: Failure to adhere to HR 203, Alcohol and Drug Policy and HR203.1, Alcohol and Drug Procedures as evidenced by your post incident positive substance test on February 5, 2019.

On December 13, 2019, the Union and the Grievor signed a Reinstatement Agreement with terms and conditions which would have returned the Grievor to service, with full compensation (less mitigation and applicable deductions,) full benefits and no loss of seniority. This return to service was contingent on the Grievor passing a reinstatement substance test.

On December 24, 2019, the Company was informed that the Grievor had again tested positive in his urine.

Union's Statement of Issue

On February 5, 2019, the Grievor was involved in a locomotive movement that ran through a switch and he was subsequently substance tested. A preliminary grievance was filed on the need to subject him to substance testing.

The Grievor was held out of service pending a formal statement. A second grievance was filed on the violation of Collective Agreement Rule 28.1.

On February 11, 2019, the employer was informed that Grievor's urine had tested positive for marijuana.

On February 15, 2019, the Grievor was propositioned with an Admission of Responsibility form. It was signed and 10 demerits were assessed to his record.

Also on February 15, 2019, the Grievor provided a statement to the Company acknowledging the prior use of marijuana, but sustained he was not impaired while subject to duty.

On March 06, 2019, the Grievor was dismissed from Company Service as follows:

> Please be advised that you have been dismissed from Company Service for the following reason: Failure to adhere to HR 203, Alcohol and Drug Policy and HR203.1, Alcohol and Drug Procedures as evidenced by your post incident positive substance test on February 5, 2019.

A third grievance was filed claiming the Grievor's dismissal is without merit.

POSITIONS OF THE PARTIES

Position of the Employer

The Employer asserts that the grievor's culpability was established following a fair and impartial investigation, and that the discipline imposed followed a review of all relevant factors including the grievor's past discipline

record. The Employer refutes the Union's reliance on cases of other employees who have produced positive drug tests and been treated more leniently, asserting each case must be considered individually and on its own merits.

With respect to the Union's position that it has not complied with the Collective Agreement timelines for a response to the grievance, the Employer notes it did respond to the grievance and that the Union has known the Employer's position for more than a year. The Employer submits there has been no prejudice to the Union. In addition, the Employer objects to any attempt by the Union to expand the scope of the grievance by improperly attempting to consolidate other grievances filed in relation to the grievor such as its challenge to the grievor's being substance tested and its allegation that the grievor was held out of service in violation of Rule 28.1 of the Collective Agreement. The Employer stresses that neither of these issues were referred by the Union to arbitration along with the instant grievance. Further, it argues, the Union is precluded from challenging the reasonableness of the Alcohol & Drug Policy by way of the present grievance by application of the doctrine of laches.

In addition to the foregoing, the Employer relies on the fact that the grievor was previously dismissed for the same infraction and was subsequently returned back to work under a Reinstatement Agreement which required him to strictly comply with the Company's Alcohol & Drug Policy and Procedures amongst other things. Notwithstanding this fact, the Employer chose to extend to the grievor yet another reinstatement agreement in respect of the current infraction and dismissal for cause. The Employer argues that the December 2019 Reinstatement was a "last chance agreement", which arbitrators are reluctant to interfere with. The Employer advances that the Reinstatement Agreement resolved all of the outstanding issues regarding the grievor's dismissal and but for the fact that the grievor was unable to pass the return to work drug test as required by the agreement, the present grievance would be

rendered moot. In any event the Employer states that, given the Union concurred with this agreement, all potential remedies should be limited to those set out in that agreement, including the conditions for reinstatement.

The Employer argues dismissal was warranted in all the circumstances. It stresses that the grievor's positive urine drug test violated a Company policy with which the grievor committed to strictly comply but breached three times. The Employer disputes that this case should attract damages, maintaining that its conduct in the matter of termination was candid, reasonable, honest and forthright, and in accordance with its policies and procedure. The Employer requests that the grievance be dismissed in its entirety.

Position of the Union

The Union states that the law is unequivocally settled that marijuana in urine is not evidence, in and of itself, of impairment and its existence does not warrant dismissal. The Union notes that it has staunchly maintained that the Employer's policies and procedures related to alcohol and drugs are discriminatory and unreasonable, and that these policies must be rescinded and replaced with updated policies and procedures that comply with jurisprudence in relation to impairment in the workplace. In this respect, the Union notes that it registered its objection to the Policy in correspondence dated October 2018, in which it pointed out that, in the Union's view, the Policy disregards and undermines well-established case law to the effect that a positive urine drug test does not establish impairment at a particular point in time and therefore cannot be used as just cause for discipline. Further, and in any event, the Union states that the Employer's application of this Policy is inconsistent as it has not uniformly dismissed employees working in safety-sensitive positions for positive urine substance tests. Rather, the Union submits, the grievor was specifically targeted for dismissal on this occasion.

The Union argues that the initiating event in this instance – the switch run through – was a minor disciplinary matter for which the initial demand that the grievor submit to a substance test was unwarranted. In this respect, the Union notes that no locomotives were derailed and no productivity was lost in the shop, and neither the grievor's supervisor or manager asserted that the grievor was unfit to perform his job on this occasion. The Union maintains that the Admission of Responsibility Form signed by the grievor and the fact that no formal investigation was undertaken support its position that the incident was identified as a minor disciplinary event. The Union therefore argues that the Employer violated the Policy which requires reasonable and probable cause to believe that an employee is unfit to perform their job as a result of impairment before requiring a urinalysis drug test, and accordingly the investigation was not fair or impartial in violation of Rule 28.1 of the Collective Agreement.

The Union submits that the Employer further violated the Collective Agreement by holding the grievor out of service for more than five days, and failing to reply to the Step 2 grievances within the required timeline. In this respect, the Union maintains that the Step 2 grievance, while dated July 12, 2019, was in fact created and should have been dated July 22, 2019. The Union states that it is prejudiced when the Employer fails to participate in the grievance process in accordance with the set timelines.

The Union argues that the Employer's actions in arbitrarily holding the grievor out of service and then terminating the grievor based solely on a urine test, were intentionally vindictive and retaliatory, and were in bad faith given that the Employer is well aware of case law and procedure on substance testing for impairment. As a result, the Union requests that the grievor's employment be reinstated from February 5, 2019 with full compensation for wages with interest, benefits, and all pension, vacation and service credits lost. The Union additionally seeks damages for the "significant humiliation" suffered

by the grievor as a result of the egregious treatment and unwarranted termination imposed upon him.

DECISION

After carefully considering the submissions of the parties, I have concluded that the grievance must be dismissed.

As stated above, I start by observing that my jurisdiction has been agreed to only in respect of grievance 204-2019-011 – which is limited to a challenge of whether the Employer had just cause for dismissal. The issues raised by the Union in grievances 204-2019-009 and 204-2019-010 are not properly before me as there has been no agreement to consolidate these grievances, nor were these grievances included on the list of those to be adjudicated at this time. That said, however, I note the scope of the present grievance references both the Union's allegation that the grievor was singled out for testing improperly and that the Employer did not have the evidence necessary to terminate the grievor's employment.

I cannot find on the evidentiary record before me that the grievor was improperly drug tested. Indeed, given his admitted culpability in running the switch, his history of drug use, and the safety-sensitive nature of the work, I am not convinced the Employer did not have a reasonable basis upon which to request the grievor submit to testing. I therefore decline to void the discipline on this basis.

In assessing whether there was just cause for discipline, I note the grievor signed an Admission of Responsibility form indicating he was responsible for running the switch and accepting the disciplinary penalty of ten demerit points. There is no basis, therefore, to challenge that discipline nor has the Union made any such attempt.

With respect to whether the Employer had just cause to terminate the grievor for his failure to pass the subsequent drug test, I find the Employer had a sufficient basis upon which to terminate the grievor's employment. In so finding, I note the Union has not challenged the Employer's Drug & Alcohol policy in this grievance. It has restricted its grievance to the Employer's application of its policy to this particular set of facts only. I therefore make no finding in respect of the reasonableness of the Employer's policy generally.

In this particular case, though, assuming the reasonableness of the Employer's policy, I find the Employer's decision to terminate the grievor's employment was within the range of acceptable outcomes. The grievor failed three drug tests in his relatively short active employment. He signed two Reinstatement Agreements in which he agreed to certain terms and conditions including ongoing compliance with the Drug & Alcohol policy. He did not live up to these commitments, and I find the Employer consequently had just cause for dismissal in these circumstances.

As previously stated, I make no finding in respect of whether the Employer's cannabis-use policy is reasonable. Indeed, there is a fair amount of scientific study underway about the short-term and long-term effects of marijuana and about lingering levels of impairment following its use that would need to be examined before one could make this determination, none of which is before me.

The grievance is denied. It is so awarded.

This award is issued pursuant to the arbitration provisions of the Collective Agreement (Rules 29.1-29.7).

Dated at the City of Vancouver in the Province of British Columbia this 16th day of February, 2021.

Vincent L. Ready