CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4709

Heard in Calgary, November 12, 2019

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the dismissal of Conductor S. Velanoff.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Following an investigation, the Company on February 16, 2019 dismissed Mr. Shaun Velanoff from Service as noted in his Discipline Letter as follows;

> "Please be advised that you have been DISMISSED from Company Service, effective immediately, for your positive tested urine drug test, following the incident on 113-06 more specifically the run through cross-over switch at Thunder Bay on January 8th 2019. This was further confirmed in your investigation statement taken on February 1st, 2019 and a violation of the Alcohol and Drug Policy and Procedures (Canada) HR203 and HR203.1."

Union's Position:

The Union's position is the Company has wrongfully dismissed Mr. Shaun Velanoff and have violated any process of post testing an employee. Mr. Velanoff faced an investigation that was not fair and impartial as well as being dismissed for something that Arbitrators have clearly ruled on, yet CP continues to ignore the case law facts.

Mr. Velanoff was the Conductor on the crew that had a run through switch. The crew took full responsibility for their actions and provided how they had become distracted.

The crew is interviewed by a Superintendent and Assistant Superintendent and at no time was there ever any concerns of these employees being impaired, unfit for duties. They provided facts of the incident in writing, as noted in the interview by the Supt. and Asst. Supt, and released to go off-duty and booked rest.

While off-duty and on rest Mr. Velanoff had his rest disturbed and had to now submit to drug/alcohol testing. All this done in violation and thus a fair and impartial investigation could not have been done.

Mr. Velanoff did have a non-negative urine test for cannabis and negative on the oral swab test. There is no correlation between a positive urine test and evidence of impairment, whatsoever, particularly in light of negative swab test results. This principle is now thoroughly established in the railway industry as noted in cases which have been noted throughout this investigation.

The Company states that one of the differences in Mr. Velanoff's case and another case was amount of service. It makes no difference if the employee has 35-years of service or 5 years of service, if you are not impaired, then regardless of service you are not impaired. The other difference noted by the Company was a different Company policy was in place before, case law is exactly that. Arbitrators have looked at all the facts/arguments and provided their Awards based on this and in fact marijuana is now legal.

Mr. Velanoff should never have been tested under the conditions he was forced to submit to, Mr. Velanoff was never provided or offered Union representation at this time of wrongful testing, Mr. Velanoff should never have been dismissed.

The Union requests that the dismissal be removed from Mr. Velanoff's file, and that Mr. Velanoff be compensated for all lost wages with interest, loss of benefits, no loss of seniority or pension and the re-calculation of his AV and EDO's for the period of time he was wrongfully dismissed.

The Union further requests damages be paid to Mr. Velanoff as this was no more than an abuse of Managements Rights and a further abuse of Mr. Velanoff's rights by improperly testing, then wrongfully dismissing him. This type of Company behavior must stop.

The Union seeks damages as noted above as it is clear the Company's conduct is absolutely one that is harsh and malicious, and they will continue this abuse of Management Rights if corrective actions are not taken.

In the alternative, the Union requests that the discipline be mitigated as the Arbitrator sees fit.

The Company disagrees and denies the Union's request.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

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Company's Position:

The Company disagrees and denies the Union's request.

The Company has reviewed the Union's grievance, the statement and investigation and cannot agree with the Union's contentions. The Company maintains the Grievor was appropriately dismissed, following the fair and impartial investigation, for violation of the Alcohol and Drug Policy and Procedures HR203 and HR 203.1.

The Company was investigating a run through crossover switch involving the Grievor's tour of duty while working as the Conductor on 113-06 on January 8, 2019. As such, the Grievor was properly required to submit an Alcohol and Drug test.

The Company maintains the Union provides no rationale as to why the Grievor would be entitled to damages. Damages are reserved for conduct which is found to be harsh, vindictive, reprehensible and malicious, as well as extreme in its nature, as established in the notable Honda v. Keays Supreme Court of Canada decision. The Union failed to allege such action on behalf of the Company throughout the grievance process; as such, the Company maintains the request for damages is without merit.

Further, the Grievor was provided with a voluntary reconsideration agreement, with prejudice, on May 13, 2019, which he declined.

The Company maintains the discipline assessed was appropriate, warranted and just in all the circumstances. The dismissal remains a reasonable response to a violation of the Policy and Procedures. Accordingly, the Company sees no reason to disturb the discipline assessed.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) W. Apsey	**(SGD.) D. Zurbuchen**
General Chairperson	Labour Relations Manager

There appeared on behalf of the Company:

D. Zurbuchen	– Manager, Labour Relations, Calgary
L. McGinley	– Assistant Director, Labour Relations, Calgary

And on behalf of the Union:

R. Church	– Counsel, Caley Wray, Toronto
W. Apsey	– General Chairman, Smiths Falls
E. Mogus	– Senior Vice General Chairman, Smiths Falls

AWARD OF THE ARBITRATOR

The grievor had approximately eight years of service at the time of his dismissal. He worked as a conductor out of the Schreiber terminal.

The grievor was working as a conductor on train 113–06 on January 8, 2019 with Locomotive Engineer Ray Wilson. Train 113-06 traveled uneventfully from Schreiber to Thunder Bay. At approximately 10:45 hrs, train 113-06 arrived into the cautionary limits on the north main track at the Thunder Bay Nipigon subdivision. The crew failed to stop short of the west crossover switch that was lined in reverse, resulting in the train running through the switch. The train had to be put into an emergency brake application. An

engine and two cars crossed over the switch. The grievor immediately contacted the RTC/ ATM to inform them of the emergency brake application.

The grievor and Locomotive Engineer Wilson were interviewed by Superintendent Jason Inglis and an Assistant Superintendent at 13:00 hrs. on January 8, 2019 after tying up at 12:10 hrs. A covering Memorandum from Superintendent Inglis dated January 8, 2019 states as follows:

> During the interview, both crew members were upfront and honest taking full responsibility for the incident. Both crew members Ray and Shawn stated that they were not completely focused on the task at hand and were discussing the crew balancer and what they were lined up for on their return trip.

Subsequent to completing their interviews and filing their incident reports at 13:00 hrs, both crew members were released. They booked five hours of rest and obtained a ride to their assigned hotel. They registered at the hotel and then headed off to a restaurant for lunch. They returned to their hotel after lunch for rest.

At approximately 13:45 hrs, the crew's rest was interrupted by a phone call from the Assistant Superintendent. He advised the crew that they were required to travel back to the yard for alcohol and drug testing.

The drug and alcohol tests were administered at approximately 15:45 hrs. Locomotive Engineer Wilson was negative in all tests. The grievor tested negative on the breath alcohol test and the oral fluid swab drug test. He tested positive on a urine test for cannabis. The grievor was pulled out of service at 17:44 hrs.

On January 30, 2019 the Company issued a Notice to Appear to the grievor to attend an additional investigation on February 1, 2019 with respect to the positive post-incident drug and alcohol testing results.

The grievor was asked during his February 1, 2019 interview about the drug test results and responded that it was a “legal substance classified as a legal drug.” The grievor was then asked the date and time he took the drug and replied “it was on my personal time on EDO’s not subject to duty”. There is no dispute that the grievor was off duty from January 5 to January 7, 2019 on EDO’s. He reported back to work on January 8 at 06:15 hrs.

The Company determined after the interview with the grievor that he was in violation of the *Alcohol and Drug Policy and Procedures (Canada)* policy. He was dismissed from his employment on February 16, 2019.

The grievor was offered a without prejudice, without precedent, voluntary reinstatement agreement on May 13, 2019. The conditions set out in the offer were considered by the Union to be too onerous and unjustified. The offer was declined.

The Union submits that the post-incident investigation involving the demand for drug testing was not made in a timely manner, contrary to Company policy. The Union noted in that regard that the grievor had already provided his post-accident statement and

booked off duty for 5 hours of rest when he was interrupted in his motel room and had to return to the general yard office for drug and alcohol testing.

I agree with the Union that the grievor and his Locomotive Engineer were inconvenienced by having to return for drug and alcohol testing. Having said that, the testing was done within hours of the incident and there is no evidence that the grievor was further disturbed or inconvenienced after the testing concluded. Although it would have evidently been preferable if the two employees were tested immediately, there is no argument that the testing arose as a result of the derail incident which both the grievor and the Locomotive Engineer, to their credit, admitted culpability. As noted in the incident Memorandum of Mr. Inglis: “During the interview, both crew members were upfront and honest taking full responsibility for the incident”. Accordingly, I do not find that the discipline should be set aside for failing to provide the grievor with a fair and impartial investigation.

Turning to the merits, the Company submits that the *Alcohol Drug Policy and Procedures* is clear that employees must report in a condition that enables them to work safely and to minimize the risk of an unsatisfactory performance due to adverse effects of alcohol and/or drugs. This is required of any employee who holds a safety critical position while on duty or while subject to duty. The Company’s submits that any positive drug or alcohol test poses an undue risk to the safety of employees. The Company relies in that regard on the 2007 Alberta Court of Appeal decision of *Kellogg Brown and Root v. Alberta Human Rights Commission* (“KBR”) 2007 ABCA 426.

The Union submits that a positive urine result does not establish impairment and, standing alone, cannot be viewed as just cause for discipline. The Union notes that legal principle, originally articulated by Arbitrator Picher in **SHP 530** issued in July 2000, holds true even for employees working in safety-sensitive positions like the grievor.

I note that in 2008, Arbitrator Picher took issue with the *KBR* decision of the Alberta Court of Appeal in **CROA 3668,** where he states:

> The Alberta Court of Appeal reversed the decision of Madam Justice Martin. Declining to follow the reasoning of the Ontario Court of Appeal in **Entrop v. Imperial Oil Ltd.,** the Court found that the employer's policy did not violate the Human Rights Statute. It came to that conclusion, in part, based on "evidence" of which it gives no specifics and no elaboration, with respect to the residual effects of marijuana. The Court of Appeal states, in part:
>
> [33] … The evidence disclosed that the effects of casual use of cannabis sometimes linger for several days after its use. Some of the lingering effects raise concerns regarding the user's ability to function in a safety challenged environment. …
>
> How is this decision of the Alberta Court of Appeal to be understood? The Arbitrator has considerable difficulty with that question. There is an extensive body of scholarly literature and research dealing with the immediate and residual effects of marijuana. That learning was extensively referred to in the judgement of Madam Justice Martin in the Court of Queen's Bench. It was also cited in the decision in the Ontario Court of Appeal in **Entrop**. However, in the decision and reasoning of the Alberta Court of Appeal in **Kellogg, Brown & Root**, there is simply no reference to the medical or scientific authority upon which the Court bases its conclusion that the effects of cannabis use linger for days. As can be seen from the passages quoted above, that conclusion was specifically rejected by Madam Justice Martin who preferred the overwhelming expert evidence, including the evidence of the employer's own expert based on the findings of the National Research Council, that occasional marijuana use cannot responsibly be associated with any measurable next day performance effects. Madam Justice Martin concluded, in the Arbitrator's view correctly, that the vast preponderance of the scholarly literature does not support the theory of residual impairment or measurable next day performance effects.
>
> A board of arbitration must generally respect the decisions of the courts, and may obviously be subject to judicial review for failing to

> correctly apply the law. There is, however, no principle of stare decisis which binds a board of arbitration, particularly when courts of equal stature have expressed differing views or differing approaches on the same topic. From that standpoint, this Office prefers the reasoning of the Ontario Court of Appeal in the **Entrop** decision which found, among other things, that a positive urinalysis test "… cannot measure present impairment"

In **CROA 4240**, an award issued in 2013, Arbitrator Picher referred to his earlier 100-page seminal decision of **SHP 530** where he found that a positive drug test standing alone is not proof of impairment:

> However, it is common ground (and on this all of the expert witnesses are in agreement) that a positive drug test gives no indication as to when or in what amount the drug in question was ingested.
>
> …The fact that a disciplinary investigation confirms that a policy has been violated by the mere fact of positive drug test does nothing to make the rule any more reasonable or justifiable on a legitimate business basis. A positive drug test, which is not proof of impairment while on duty, while subject to duty or while on call, cannot, standing alone, be just cause for discipline.

He concludes in reference to the state of the law at that time:

> The arbitral jurisprudence in respect of drug testing in Canada is now extensive. It has been repeatedly sustained by the courts and is effectively the law of the land. Part of that law, as stated in the passage quoted above, is 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 views expressed by Arbitrator Picher in **CROA 4240** has been confirmed by numerous decisions of this Office since that time.

In **CROA 4296,** issued in 2014, Arbitrator Schmidt dealt with a Locomotive Engineer who, similar to the grievor in this case, tested negative for an oral fluid test, negative for breath alcohol and positive for his urine test. Arbitrator Schmidt agreed with

Arbitrator Picher's view of the law as he had set out in his previous decisions, beginning with **SHP 530**:

> The Company's position has no merit. No discipline can be sustained against the grievor. To the extent that a policy stipulates that for unionized employees a positive drug test is, of itself, grounds for discipline or discharge, it is unreasonable and beyond the well accepted standards set out in *KVP Co. Ltd. and Lumber & Sawmill Workers' Union, Local 2537* (1965) 16 L.A.C. 73 (Robinson).
>
> This law is settled. It has been for some time.

Arbitrator Albertyn, in 2015, was also faced with similar facts involving a Locomotive Engineer who had a negative oral fluid test and a positive urine test. After referencing a number of supporting decisions of this Office, he concluded in **CROA 4365**:

> A positive oral fluid test will likely result in a finding of actual impairment, but proof only of past use, as occurred with the Grievor, does not. In the circumstances, I can find no breach of the Grievor's responsibilities to perform his work without impairment by drugs or alcohol.

In the 2015 awards of **CROA 4399 and CROA 4400**, Arbitrator Silverman upheld the grievance of a Locomotive Engineer and Conductor, respectively, citing the same jurisprudence and "…noting that the law on the issue is settled".

In 2017, Arbitrator Clarke followed the lengthy line of cases in this area and concluded in **CROA 4524**:

> CP had the burden of proof to demonstrate that Mr. Playfair was impaired at the time of the November 15, 2015 incident. As numerous CROA decisions have already noted, it is not enough to show that a urine test indicates an employee may have traces of marijuana is his/her system. Those results do not demonstrate impairment at the material time. In Mr. Playfair's situation, he tested negative for the more specific oral fluid drug test.

Arbitrator Sims followed Arbitrator Clarke and came to the same conclusion in **CROA 4584**.

Most recently, Arbitrator Weatherill, in **CROA&DR 4695-M**, dealt with a dismissal grievance involving a foreman who was subject to a substance abuse test after a derail incident. The results were a negative breath alcohol and oral fluid test and a positive urine test, results which are similar to a number of these cases including the one before this arbitrator. Citing Arbitrator Picher in **CROA 4240**, Arbitrator Weatherill noted that having traces of marijuana in one's body is not conclusive of impairment. He states:

> Having traces of marijuana in the body may raise a question of whether there is impairment, but that bit of evidence by itself is not enough to establish impairment, whereas the negative breath alcohol and oral fluid tests strongly indicate that there was not. There is no suggestion whatever that the grievor's conduct, movements or verbal behaviour were indicative of impairment.

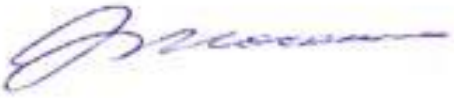
I have no difficulty arriving at the same conclusion reached by Arbitrator Weatherill, as have other arbitrators from this Office before him, that a urine drug test that uncovers traces of marijuana is not conclusive of impairment. As he succinctly put it *"…that bit of evidence by itself in not enough to establish impairment, whereas the negative breath alcohol and oral fluid tests strongly indicate there was not*". Apart from the stand-alone unreliability of the urine test as an indicator of impairment, it is noteworthy that Arbitrator Weatherill cited the contradictory results between the oral fluid test and the urine drug test as further support for his finding of insufficient evidence of impairment.

The final issue is with respect to the Union's request for damages. This request must be put into context. Cannabis has only been legislated as a legal substance for

approximately one year. The rules relating to criminal enforcement for its possession and use are no longer applicable. With this in mind, I do not view that it is appropriate to consider an award of damages at this time despite the repeated findings of this Office that a positive drug urine test is not of itself evidence of impairment.

The grievor shall be reinstated to his employment, without loss of seniority, and with full compensation for his loss of earnings. By agreement of the parties, his discipline for the run-through crossover incident shall stand at 10 demerits.

December 4, 2019



JOHN MOREAU
ARBITRATOR