CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4836

Heard in Edmonton, June 22, 2023

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the dismissal of Conductor A. Unrau of Coquitlam, BC.

THE JOINT STATEMENT OF ISSUE:

Following an investigation, Mr. Unrau was dismissed which was described as "For your non-negative test results during the pre-conductor qualifying drug and alcohol testing conducted December 11, 2020 at Coquitlam Yard. A violation of HR203 Alcohol and Drug Policy and HR 203.1 – Alcohol and Drug Procedures."

UNION POSITION:

The Union contends there was no cause whatsoever to conduct the substance test of December 11, 2020 resulting in the violation of the June 16, 2010 Substance Test Agreement and Mr. Unrau's rights as afforded under the Canadian Human Rights Act and privacy rights.

The Union contends that the investigation was not conducted in a fair and impartial manner under the requirements of the Collective Agreement and the June 16, 2010 Substance Test Agreement. For this reason, the Union contends that the discipline is null and void and ought to be removed in its entirety and Mr. Unrau be made whole.

The Union contends the Company has failed to meet the burden of proof required to sustain formal discipline related to the allegations outlined within the discipline assessment. Additionally, the Union contends that the Company continues to ignore arbitral jurisprudence on this subject, and that Mr. Unrau's dismissal is unjustified, unwarranted, and excessive in all of the circumstances, including significant mitigating factors (honest and forthright during the investigation and freely submitting to substance testing) evident in this matter.

The Union requests that Mr. Unrau be reinstated without loss of seniority and benefits, and that he be made whole for all lost earnings with interest. Further, the Union seeks damages, in amounts to be determined, resulting from the aforementioned violations. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

COMPANY POSITION:

The Company disagrees with the Union's positions and denies the Union's requests.

The Company maintains the grievor's culpability as outlined in the discipline letter was established following the fair and impartial investigation. Discipline was determined following a review of all pertinent factors, including those that the Union describe as mitigating. The

Company's position continues to be that the discipline assessed was just, appropriate and warranted in all the circumstances.

Given that the Grievor had a Positive Urine Drug test, he was indeed in violation of the Company's Alcohol and Drug Policy and Procedures. These policies, which were clearly communicated to all Train and Engine Employees, state: "Disciplinary action up to and including dismissal will be taken where CP has determined that violations of this Policy and Procedures have occurred."

The Union further contends a violation of the June 2016, 2010 Agreement. As previously communicated to the Union, this agreement no longer has application.

With respect to the Union's claim for damages, the Company maintains that the Union's claims are unsubstantiated. Damages are reserved for conduct which is found to be harsh, vindictive, reprehensible and malicious, as well as extreme in its nature such that by any reasonable standard it is deserving of full condemnation and punishment. The Union has failed to allege such conduct on behalf of the Company or supply sufficient details to support such an allegation. As such, the Company maintains the request for damages is without merit.

For the foregoing reasons as well as those outlined by the Company in its grievance correspondence, the Company cannot see a reason to disturb the discipline assessed and requests the Arbitrator be drawn to the same conclusion.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) D. Fulton	**(SGD.) L. McGinley**
General Chairperson CTY-W	Director, Labour Relations

There appeared on behalf of the Company:

T. Gain	– Counsel, CPKC, Calgary
L. McGinley	– Director Labour Relations, Calgary
D. Guerin	– Managing Director, Labour Relations, Calgary
R. Araya	– Labour Relations, Officer, Calgary

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
D. Fulton	– General Chairperson, CTY-W, Calgary
J. Hnatiuk	– Vice General Chairperson, Calgary
D. J. Edward	– Senior Vice General Chairperson, CTY-W, Calgary
G. Lawrenson	– General Chairperson, LE-W, Calgary
C. Ruggles	– Vice General General Chairperson, Calgary
M. Lengelaan	– Local Chairperson, Port Coquitlam (via Zoom)
A. Unrau	– Grievor, Port Coquitlam (via Zoom)

AWARD OF THE ARBITRATOR

A. Facts

1. By letter dated September 29, 2020, the Company offered the Grievor employment as a "Train Conductor", starting October 5, 2020. One of the terms of his employment was he would be drug tested prior to qualifying as a Conductor ("qualification testing").

2. A requirement for qualification testing was also included in section 5.1 of policy HR 203.1, the Company's Alcohol and Drug Procedures. Section 5.1 states:

> Safety Critical Position or Safety Sensitive Position candidates are required to pass a drug test as a pre-employment qualification for the position. This requirement will be set out in a conditional offer of employment. Safety Critical Position or Safety Sensitive Position candidates are also required to pass a drug test during the training process before receiving final qualification for the position.

3. The Company also had a 28 day ban on cannabis use for employees who were in or subject to safety critical or safety-sensitive positions (which includes a Conductor and Conductor Trainee; section 3.1.3).

4. The Canadian Rail Operating Rules (CROR) Rule G states that employees must "know and understand the possible effects of drugs…which, in any way, will adversely affect their ability to work safely".

5. The Grievor accepted the employment offer and conditions on September 30, 2020.

6. On December 11, 2020, while still in the training portion of his employment, the Company required the Grievor to submit to qualification testing through urine sampling and oral fluid (swab).

7. The oral fluid test result was negative. The urine test was non-negative for cannabis metabolite (THC) at 47 ng/mL. On the testing result, the sample was noted to be "dilute". There was no information of the implications arising from a sample being "dilute". An Investigation took place on December 21, 2020.

8. The Grievor stated in the Investigation that he smoked approximately half of a joint of marijuana on November 27, 2020, approximately two weeks before his positive result. The Grievor also stated this was the only time he had taken marijuana, since he started with CP in October of 2020, two months earlier. When asked why his urine was dilute, the Grievor noted he drank a bottle and a half of water prior to his test.

9. At the Investigation, the Company put in the record a report of Dr. Snider-Adler, dated September 9, 2019. This 2019 Report did not comment specifically about the Grievor's test result.

10. The Grievance was scheduled to be heard on June 22, 2023. On June 8, 2023, the Company provided to the Union a further report of Dr. Snider-Adler dated June 7, 2023 (the 2023 Report) which it intended to rely on. The 2023 Report addressed the Grievor's specific drug results. On June 13, 2023, the Union raised a preliminary objection to the use of the 2023 Report.

11. The Union's objection was based on two grounds: the evidence was not disclosed to the Union in response to its request for disclosure; and accepting the report would breach the requirements of Article 39 of the collective agreement, because it had not been put before the Grievor or Union in the Investigation. The Union relied on **CROA 4695-M** (upheld on judicial review)**.**

12. The Company argued the information was admissible as an expert response to the explanations the Grievor had already given in the Investigation. It was expert medical evidence to respond to that information. It argued the 2023 Report was not required to be put before the Grievor at the Investigation, for his response, prior to it being offered at the hearing. The Company relied on the reasoning in **CROA 4798**.

B. Summary of Arguments

13. The Company argued it had the right to test the Grievor on two bases: his employment agreement – which was freely entered into – and the terms of its policy. It argued the Grievor was aware at the time of hire that further drug testing would be a part of his training and agreed to that term. It further argued that the training period is a time of temporary employment with the Company: If an individual is not successful in their training, they are not qualified as Conductors and are released from employment and that not all Trainees are successful. It also pointed out the Grievor was not even paying membership dues to the Union in his probationary period.

14. The Company argued the training period is an important time for the Company to assess whether a Trainee is willing to abide by its policies, including HR 203 and HR 203.1; being its Alcohol and Drug Policy and Procedures, as the actual work of a Conductor is completed under less supervision than the work of a Trainee.

15. For its part, the Union argued that the discipline was not just and reasonable. Even if the 2023 Report was admissible, it argued the Company had no cause to test the Grievor as none of the accepted legal justifications for testing had been established. Even if cause was established, the Union argued the Company had not established the Grievor was impaired while performing the duties of his job, which is required to be shown before any discipline can be imposed. It urged the Grievance should be dismissed.

C. Analysis and Decision

Preliminary Objection: Can the 2023 Report Be Relied Upon?

16. For the reasons which follow, the 2023 Report cannot be relied upon by the Company as evidence in these proceedings.

17. In both **CROA 4695-PO** and **CROA 4798**, the Company was seeking to introduce expert medical evidence which interpreted the positive drug test results of the grievor. In both cases, that evidence was offered several years after the test had been taken, shortly before the matter was to be heard. The Company did not offer explanation in either case of why the Report was being proffered so late in the process.

18. The arbitrator in **CROA 4695-PO** did not allow the Company to rely on the late expert report. The arbitrator held he did not need not address the requirements for the admission of expert evidence as set out by the Supreme Court of Canada in *R. v. Mohan*[1]. Rather, he declined to admit the expert evidence, on two bases: First because Article 70 of the Collective Agreement required the Company to disclose all documents on which it intended to rely into the Investigation. He noted the

[1] 1994 CanLII 80 (S.C.C.)

Investigation process was long-closed and it was questionable whether a supplementary investigation would be appropriate two years after the fact. Secondly, it would be unfair for the Company to resile from its representation to the Union that it had already made full disclosure.

19. With some numbering changes[2], what was quoted from Article 70 in **CROA 4695** is now contained in the current Article 39. Considering this provision, the arbitrator held:

> The collective agreement expressly requires that employees not be disciplined until an investigation is held and the evidence, which the employee and the union may of course examine and question, has been produced. That has not happened in the instant case with respect to the expert report (at p. 5).

20. In November of 2020, **CROA 4695** was upheld by the Ontario Superior Court[3]. The Court considered it was a "notable feature" of Article 70 that it required full disclosure of evidence during the Investigation process. It held:

> It was reasonable in the context of the specialized railway labour relations regime for the arbitrator to exercise his discretion to refuse to allow CP to file evidence tendered eight days before the merits hearing… Arbitrators may make decisions designed to safeguard fairness and the integrity of the process. The discretionary decision about the admissibility of evidence is an example of the arbitrator's gatekeeper role…The arbitrator's reasons make clear that the decision was made not because the expert report was inadmissible, but because he exercised his discretion to protect the integrity of the CROA arbitration process (at para. 31).

21. The argument in **CROA 4798** did not proceed until more than a year later. The arbitrator in **CROA 4798** admitted the Report. The facts were similar but not identical. The arbitrator in that case noted the Union had <u>not</u> alleged any collective agreement violation regarding the timing or communication of the report, nor referred to any prejudice from that timing, nor did the Union did not seek an adjournment to submit the late report to its own expert, for review.

[2] Article 70.04 is now Article 39.05
[3] *CP Rail Company v. TCRC*; ONSC 6683

22. The arbitrator applied the factors as established in *R. v. Mohan*[4] (relevance, necessity, absence of exclusionary rule and properly qualified expert) and determined the expert report was admissible. The arbitrator made no mention of **CROA 4695** or the Court's review.

23. In the case before me - like in **CROA 4695** - the Union *did* raise the application of Article 39 of the Collective Agreement regarding the timing of the report and its communication.

24. When interpreting a collective agreement, the agreement must be viewed in its entirety. The CROA process itself is referred to by the parties in Article 41.01, where the parties agree that any remaining disputes are to be referred to this Office for resolution.

25. The process followed by this Office in hearing those disputes is established by the Memorandum of Agreement establishing this Office, most recently amended in January of 2023 (the "CROA Agreement"). The CROA Agreement was agreed to by these parties.

26. The CROA Agreement states an arbitrator has jurisdiction to "receive, hear, request and consider any evidence which he/she may consider relevant" [5] however the parties have *also* expressly agreed in the CROA Agreement that an arbitrator does not have jurisdiction to "add to, subtract from, modify, rescind or disregard any provisions of the applicable collective agreement[6]. This is a common limitation in collective agreements.

27. The requirements of Article 39 support the CROA hearing process, as the Investigation is the evidence gathering stage for that process. Oral evidence during CROA hearings is rare. Investigations provide key support for fact-finding, allowing cases to be heard in one hour.

[4] 1994 CanLII 80 (S.C.C.).
[5] CROA Agreement, as amended January 10, 2023; Article 13
[6] Article 15

28. Upon review Article 39, in conjunction with Article 41, I agree with the arbitrator in **CROA 4695** that the Collective Agreement requires the Company to disclose any information on which it intends to rely, into the Investigation; that the Grievor and the Union are entitled to know that evidence and respond to that evidence during the Investigative process (which includes any Supplementary Investigation); and that the Investigation supports the integrity and fairness of the CROA process.

29. The Company became aware of the Grievor's explanation of why his urine was dilute in December of 2020. The Company did not seek an expert opinion regarding that result until the spring of 2023, which was 2.5 years later. The Investigation was concluded and no Supplementary Investigation had been proposed by the Company. No explanation was provided for why that information was not gathered years earlier.

30. I am satisfied it would be in breach of Article 39, and inconsistent with the integrity of the CROA process, recognized in Article 41, for the Company to rely on expert evidence at this hearing which it has not first put before the Grievor during the Investigation, for his response. Like Arbitrator Weatherill in **CROA 4695**, I do not find it necessary to address the factors in *R. v. Mohan* to make this determination. This determination is made to uphold the terms of the Collective Agreement which support the integrity of the CROA process by requiring all evidence to be disclosed at an early stage.

31. As no explanation was offered by the Company for seeking the medical evidence years after the Investigation closed, I am not satisfied this is an appropriate situation to exercise discretion to hear that evidence.

32. The Company cannot rely on the 2023 Report at this hearing.

Did the Company Have Cause to Test the Grievor?

33. Turning to the merits, if no cause to test can be established, no discipline can flow.

The Law: Drug and Alcohol Testing

34. The Company operates one of the most dangerous businesses in this country. The consequences of drug use in this workplace are catastrophic. This industry has an ability to impact the public in a manner few industries can. One need only look to the tragic consequences in Lac Megantic to see this reality.

35. I am satisfied the role of a Conductor is complex; the training intense; the job safety-critical; and the work largely unsupervised.

36. There are only limited situations which give an employer legal justification to perform a drug and alcohol test on an employee; at least under the weight of the jurisprudence as it currently stands – and in the absence of any legislative provision which would support such testing for this industry.

37. The jurisprudence – both from this Office and more generally from arbitrators and the judiciary – is that drug and alcohol testing is only reasonable in the following circumstances:

    a) There exists a reasonable suspicion of drug use;

    b) An incident has occurred which is able to justify that testing;

    c) A grievor is returning to work after diagnosis of a substance use disorder (in which case random testing is permissible); or

    d) It has been determined there is a workplace problem with drugs and alcohol (in which case random testing is also permissible)[7].

38. These four situations have been developed through many years of litigation, and with consideration for what the Supreme Court of Canada has described as the "delicate case-by-case balancing required to preserve public safety concerns while protecting privacy"[8].

[7] *CEP, Local 30 v. Irving Pulp & Paper Ltd.* 2013 SCC 34, para. 30.
[8] *CEP, Local 30 v. Irving Pulp & Paper Ltd.* at para. 19.

39. Employer policies which require testing *in any other situation* have been found to run afoul of what is known as the KVP Test which a unilaterally imposed policy is measured against. Such policies do not meeting the requirement of "reasonableness"[9].

40. In addition, as multiple arbitrators have accepted, it is *impairment* – and not *"some use"* – of drugs which gives rise to just cause to discipline an employee. A positive urinalysis result –"*standing alone*"– does not establish proof of impairment.[10] However, this does not prevent the Company from building a case by gathering additional evidence to add to that of a positive urinalysis result, in order to establish impairment.

41. For example, if a grievor states they last used drugs on "x" date and on that occasion only – but medical evidence establishes the positive test result is <u>not</u> consistent with that statement – then a grievor's credibility for accurately stating when he took drugs is called into question**.** In such circumstance, arbitrators may be drawn to the conclusion that it is "more likely than not" that the grievor used drugs shortly before coming to work and that impairment can be established.

<u>Application to These Facts</u>

42. In this case, none of the four situations which give legal justification for drug testing are evident here.

43. The Union argued that **AH 731** was dispositive. **AH 731** addressed the issue of whether qualification testing is justified under section 5.1 of the Company's procedures. The arbitrator in that case held it was not:

> Section 5.1 appears to impose mandatory testing as a condition for every already-hired employee to complete his/her probationary period. It was incumbent on CP to demonstrate a legal justification for this requirement. In the absence of such, the arbitrator cannot find a basis

[9] This requirement was set out in the seminal decision of *Lumber & Sawmill Workers' Union, Local 2537 and KVP Co. Ltd.,* (known as the "KVP Test").
[10]See the analysis in **CROA 4829** and **4826**, recently released from this Office, and the jurisprudence noted.

> for CP's testing of Ms. Daniher. This lack of justification for testing meant that CP acted arbitrarily when it rejected Ms. Daniher during her probationary period (at paras. 47, 48)

44. I see no basis to disagree with the conclusion in **AH 731** that sole reliance on section 5.1 for qualification testing is arbitrary (and therefore unreasonable), *in view of the existing jurisprudence which sets out the limited situations in which testing is justified*. This requirement does not meet the KVP Test.

45. That leaves the second basis on which the Company argued testing was justified: the employment agreement executed by the Grievor.

46. In **AH 731**, the arbitrator held that section 56 of the *Canada Labour Code* makes it clear that "the collective agreement applies to all employees in the bargaining unit" (at para. 33), and that the term "employees" includes probationary employees.

47. I was provided no reference in this Collective Agreement, to challenge the applicability of that statement to this case. Article 67 of the Collective Agreement contains certain definitions, but it does not define an "employee". The Preamble to the Collective Agreement states, in part:

> The Company recognizes the Teamsters Canada Rail Conference (the "Union") as the sole and exclusive bargaining agent for all of its employees classified as Locomotive Engineer, Conductor, Assistant Conductor, Baggageperson, Brakeperson, Car Retarder Operator, Yard Foreman, Yard Helper and Switchtender (at p. 5).

48. The offer of employment to the Grievor was for the position of "Conductor". That is how he was classified on hire. I am satisfied that when he began work for the Company, the Grievor became an "employee". As an "employee", the Union was the "sole and exclusive bargaining agent" for the Grievor.

49. The Company noted the Grievor was not paying union dues during his employment. The Union carried this Grievance on his behalf and represented his interests at this arbitration. It did not put into issue that it was not required to do so.

50. I am prepared to accept that the leading decision on the impact of a pre-employment agreement on an individual who subsequently becomes subject to a collective agreement is that of the Ontario Court of Appeal in *Loyalist College of Applied Arts and Technology v. O.P.S.E.U*[11]. The Court of Appeal analyzed several leading Supreme Court of Canada decisions. The Court noted that a pre-employment agreement could only address certain limited matters and could not conflict with the Collective Agreement.

51. I am satisfied that it is the Collective Agreement which governs the ongoing employment relationship of the Grievor with the Company regarding the ability to test for drug and alcohol use, after he was hired as a Conductor and began work as a probationary employee. In a case of conflict between the Collective Agreement and the pre-employment agreement, the Collective Agreement governs.

52. It cannot be suggested that the Collective Agreement in this case supports qualification testing – or drug and alcohol testing of any type. The employment agreement therefore did not provide to the Company the legal justification to subject the Grievor to qualification testing.

D. Conclusion

53. The Company has not met its burden of proof to demonstrate it had legal justification to test the Grievor for drug and alcohol use, as part of his qualification for the role of Conductor.

54. In view of this finding, it is not necessary to determine the other issues raised by the arguments of the parties.

55. The Grievance is upheld.

[11] 2003 CanLII 29709; leave to appeal to S.C.C. denied November 20, 2003; see also the Supreme Court of Canada's reasoning in *McGavin Toastmaster Ltd. v. Ainscough* (1975) CanLII 9 at p. 725.

56. The Grievor is to be reinstated and made whole for all lost wages and benefits, including any impact on his pension benefits.

57. I remained seized to address any issues with the implementation of this Award, and to correct any errors to give it the intended effect.

July 26, 2023

CHERYL YINGST BARTEL
ARBITRATOR