CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4792

Heard in Gatineau and via Zoom Video Conferencing, July 15, 2021

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the dismissal of Locomotive Engineer M. Warner of Saskatoon, SK.

JOINT STATEMENT OF ISSUE:

Following an investigation, on August 19, 2019 Mr. Warner was dismissed from Company service for the following:

A Formal investigation was held in connection with "your post incident test results on June 27, 2019." The results of which were:

Negative – Breath Alcohol Test
Positive – Oral Fluid Test
Negative – Urine Drug Test

The investigation concluded that:

- *You tested positive (oral fluid drug test) after the start of your work shift on June 26, 2019 while on duty as a Locomotive Engineer.*
- *You violated CROR General Rules, Section G (Rule G.)*
- *You violated the Policy and Procedures as outlined in the CP Alcohol and Drug Policy- Policy# HR203 and HR 203.1.*

You are hereby dismissed from Company service.

The Union's Position:

The Union cannot agree with the harsh penalty of dismissal. The Union contends that given the evidence in this case the Company has not met the burden of proof to establish that Mr. Warner was under the influence of any intoxicants while on duty. Following the incident, and at no time during his tour of duty on 6N61-26 was a Rule G violation suspected, implied, or stated by any of the numerous Company Officers that Engineer Warner encountered or interacted with. Clearly, there exists no accusation or mentioned suspicion of impairment prior to the post incident test result. Further, it is the Union's contention that the Company had no

reason for testing Mr. Warner, clearly according to the Policy in effect, a run through switch does not constitute a significant work-related incident.

The Union further contends that the Company did not inform employees of any changes to the Drug and Alcohol Policy HR 203.1, which the Company is responsible for as was determined in the KVP Co. Ltd decision. During the investigation it was confirmed that the first time Mr. Warner was made aware of changes to the Policy was at the investigation. On August 2, 2019, sixteen days after Mr. Warner's test, the Company issued a bulletin notifying employees that changes to the Drug and Alcohol Policy would soon be in effect. The Union asserts that this is solid proof that the Company failed to inform all employees including Mr. Warner of any changes to the Drug and Alcohol Policy.

The evidence indicates that his test result for oral fluid came back with a level of 3 ng/100 ml, well below the levels contained in the Drug and Alcohol Policy 203.1 effective September 20, 2018 which were 10 ng/100 ml. As previously stated, his levels did not and were not in violation of the Company Policy at the time.

Engineer Warner has maintained a respectable working record with Canadian Pacific. He is respected by his co-workers and local management and remained honest and forthright throughout the investigation process despite how difficult it may have been. Engineer Warner is not deserving of the inequitable treatment as evidenced in this case.

The Union requests that the Arbitrator reinstate Engineer Warner without loss of seniority and that he be made whole for all lost earnings and benefits with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company's Position:

The Company disagrees and denies the Union's request.

The Company maintains the Grievor was culpable for violating CROR Rule G, Canadian Pacific Policy HR203 and HR203.1. Culpability was established through the fair and impartial investigation and discipline was determined following a review of all pertinent factors.

The Union suggests the Company has not met the burden of proof to establish that the Grievor was under the influence of any intoxicants while on duty. The grievor's positive oral fluid drug test is undisputed. This is a violation of CROR Rule G and Company policy. It is also widely accepted within the industry that a positive oral test is indicative of impairment. Furthermore, jurisprudence and scientific fact both support that a positive oral fluid drug test would indicate impairment.

The Union contends that a Rule G violation was not suspected, implied, or stated by any Company Officer to the Grievor and there was no suspicion of impairment.

The Company reminds the Union, this was a post-incident test for the Grievor's violation during his tour of duty. The Company maintains it was well within its rights to request the post-incident test and the test was warranted. The suspicion of the Grievor being impaired is neither here nor there. The results of the oral swab was positive, therefore the Grievor was subject to an investigation and discipline.

The Union further contends the Company did not inform employees of any changes to the Drug and Alcohol Policy HR 203.1 and that the Grievor's oral fluid levels were below the levels contained in the Drug and Alcohol Policy 203.1 version 1.3 dated September 20, 2018. The Company's position remains to be that the Grievor's oral fluid level of 3ng / 100ml were in

violation of Policy HR203.1 version 1.4 dated May 13, 2019. The Union's assertion [that] the Grievor's levels were not in violation of Company Policy at the time are incorrect. Secondly, Appendix 2 page 32 of Policy HR203.1 clearly states "This chart is subject to ongoing review and maybe modified from time to time by CP at its discretion."

The Company maintains that the discipline assessed was just, appropriate and warranted in all circumstances. Accordingly, the Company cannot see a reason to disturb the discipline assessed.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) G. Edwards	**(SGD.) D. Guerin**
General Chairman	Senior Director, Labour Relations

There appeared on behalf of the Company:

I. Suarez	– Labour Relations Officer, Calgary
L. McGinely	– Assistant Director, Labour Relations, Calgary
E. Allen	– Labour Relations Officer, Calgary

And on behalf of the Union:

A. Stevens	– Counsel, Caley Wray, Toronto
G. Edwards	– General Chairman, Revelstoke
H. Makoski	– Vice General Chairman, Winnipeg
G. Lawrenson	– Vice General Chairman, Calgary
K. Samuel	– Local Chairman, Saskatoon
M. Warner	– Grievor, Saskatoon

AWARD OF THE ARBITRATOR

1. The Grievor was employed as a Locomotive Engineer, a safety-critical position. On June 26, 2019, he was working as part of a three-person crew including a Conductor and a Brakeman. During their tour of duty, the crew travelled over the mainline East Wye Switch, which was positioned in reverse to allow their train to travel south. The crew subsequently failed to restore the switch to the normal position, as required. This resulted in a mainline run through switch by the subsequent train travelling east. As a result of their error, the crew was subject to post-incident testing for drugs and alcohol, conducted in the early morning on June 27, 2019. The Grievor's oral fluid test returned positive for marijuana (cannabis) at a quantitative level of 3 ng/ml.

2. The Grievor was dismissed on August 19, 2019, for testing positive on the oral fluid drug test, and thus violating Rule G of the *Canadian Rail Operating Rules* (CROR), the Company's *Alcohol and Drug Policy* #HR 203 *(*the *Policy)* and the related *Alcohol and Drug Procedures* #HR 203.1 *(*the *Procedure)*. Specifically, the Company relies on the Grievor's failure to report fit to work safely, without being under the influence of drugs, his failure to disclose his marijuana consumption before his tour of duty and being dishonest about that consumption during the investigation.

3. The parties have advised that the reasonableness of the Company's *Policy* and *Procedure* is the subject of a pending policy grievance before another arbitrator, and therefore not subject to review in this decision. They have also specifically indicated that their respective positions in this matter are advanced without prejudice to those they will take in the policy grievance.

Which version of the *Procedure* applies?

4. The parties disagree on the version of the *Procedure* that applies in this case.

5. During the Grievor's investigation statement on July 15, 2019, the Company presented him with a version of the *Procedure* showing an effective date of October 17, 2018, with the "History" notes at the bottom of each page identifying it as "version 1.4", dated May 13, 2019.

6. The Grievor noted that the document was different from the *Procedure* with which he was familiar. The Union then pulled up the *Procedure* posted on the Company's internal website at the time, which also showed an effective date of October 17, 2018, but was identified as "version 1.3", dated September 20, 2018.

7. The two versions of the *Procedure* set out different "drug concentration limits", i.e., cut-off levels for marijuana. Version 1.3 set the cut-off at 10 ng/ml, while version 1.4 set the cut-off at 2 ng/ml.

8. The Company submitted no persuasive evidence that it had communicated version 1.4 of the *Procedure* to employees. Rather, the Company filed an internal email dated July 14, 2021 (one day before the hearing), from Health Services to Labour Relations, confirming that version 1.4 was effective May 13, 2019, and that the document was posted on CP Station "a couple of days earlier". The Company did not explain what CP Station is, nor did it confirm that unionized employees had access to it. Most importantly, the Company did not provide any evidence that it communicated to employees that changes to the *Procedure* had been made.

9. It is well established that workplace policy and procedure changes that have not been communicated to employees cannot be unilaterally imposed. This reflects one of the six principles set out in *Lumber & Sawmill Workers' Union, Local 2537 v. KVP*

Co. [1965] 16 L.A.C. 73, a longstanding decision consistently followed by courts and arbitrators, which sets out the following, at paragraph 34:

> A rule unilaterally introduced by the company, and not subsequently agreed to by the union, must satisfy the following requisites:
>
> 1. It must not be inconsistent with the collective agreement.
> 2. It must not be unreasonable.
> 3. It must be clear and unequivocal.
> 4. It must be brought to the attention of the employee affected before the company can act on it.
> 5. The employee concerned must have been notified that a breach of such rule could result in his discharge if the rule is used as a foundation for discharge.
> 6. Such rule should have been consistently enforced by the company from the time it was introduced.
>
> (Emphasis added)

10. Although the Company may modify its policies and procedures from time to time, it cannot reasonably expect employees to be aware of those changes unless it informs them of such. Posting changes in the way it was done in this case does not meet the communication standard, as employees cannot reasonably be expected to review all Company policies and procedures online daily to ensure that no changes have been made. In the absence of any communication by the Company advising employees of the unilateral introduction of version 1.4 prior to the incident, the *Procedure* which applies is version 1.3.

11. The Company's subsequent versions of the *Policy* and *Procedure*, which it communicated to employees by bulletin dated August 2, 2019, with changes to be effective September 1, 2019, have no application in this case, as they were communicated and came into effect after the relevant events.

12. Moreover, the aviation standards which the Company relies on in its submissions had not been imposed in the rail industry, nor were they adopted or communicated to employees at the time of the incident. Therefore, they do not apply.

Was post-incident testing warranted?

13. The Union contends that the Company had no reason to subject the Grievor to post-incident testing. It says that the nature of the rule violation does not constitute a significant incident, which is the threshold for post-incident testing. I disagree.

14. Section 5.2.2 of the *Policy* sets out the following:

> Post Incident alcohol and drug testing may be required after a significant work related incident, a safety related incident or a near miss as part of an investigation.

The Policy provides examples justifying post-incident testing, which include incidents that may create: the risk of serious injuries; significant loss or damage to property, equipment or vehicles; or serious damage or implications to the environment.

15. The issue here is whether the crew's failure to reposition the switch from the reverse position to the normal position after setting the train to move south meets the threshold for post-incident testing.

16. It is undisputed that the crew was operating in "dark territory", formally known as the Occupancy Control System (OCS), meaning that there is no technology available to identify train location or how switches and equipment are positioned. In dark territory,

crews are required, notably, to leave every mainline switch they pass lined up correctly for the next train.

17. I accept the Company's submission that it was lucky that, in this case, the next train that ran through the switch was not a westbound crude oil train, as this could have very well resulted in catastrophic safety and environmental consequences. Such a train regularly runs over that mainline switch around the same time the incident occurred. Therefore, the crew's failure to reposition the switch did create the risk of a significant work related or safety related incident, creating the risk of serious injuries or serious damage or implications to the environment. As such, the Company's decision to conduct post-incident testing was in line with the criteria set out in the *Procedure* and was therefore justified.

Did the Grievor violate Rule G, the *Policy* or *Procedure*?

18. Rule G, which is incorporated in the *Procedure* (section 3.1.5) sets out the standards relating to intoxicants, narcotics, drugs, medication or mood altering agents. It reads as follows:

> (i) The use of intoxicants or narcotics by employees subject to duty, or their possession or use while on duty, is prohibited.
> (ii) The use of mood altering agents by employees subject to duty, or their possession or use while on duty, is prohibited except as prescribed by a doctor.
> (iii) The use of drugs, medication or mood altering agents, including those prescribed by a doctor, which, in any way, will adversely affect their ability to work safely, by employees subject to duty, or on duty, is prohibited.
> (iv) Employees must know and understand the possible effects of drugs, medication or mood altering agents, including those prescribed

> by a doctor, which, in any way, will adversely affect their ability to work safely.
>
> (Emphasis added – as per Company submissions)

19. First, the evidence is that the Grievor did not use marijuana while subject to duty, as prohibited by Rule G, paragraph (i). He consumed marijuana approximately one hour after a tour of duty, knowing he was on 24-hour rest.

20. Secondly, there is no evidence that the use of marijuana adversely affected the Grievor's ability to work safely, as prohibited by Rule G, paragraph (iii). The Company argues that the very presence of marijuana in the Grievor's system demonstrates that he was unfit to work safely, without regard to whether or not he was impaired. I cannot accept that position. This Office has repeatedly stated that the sole presence of drugs or alcohol in an employee's system is not sufficient to warrant discipline. Being impaired or not in the context of drug use is what determines whether a person is fit to work safely or not. For the purposes of the workplace, "being under the influence of drugs" must also be subject to an analysis on impairment. Contrary to the Company's assertion, impairment is the key element to determining this case.

21. Here, the Grievor's drug test result does not provide evidence of impairment, as his quantitative level of 3 ng/ml was well below the applicable cut-off of 10 ng/ml, which was in effect at the time of the incident, and which has been consistently used by this Office. The revised cut-off level of 2 ng/ml is currently the subject of the policy grievance referenced above. Unless and until this Office's jurisprudence evolves by way of

thorough scientific review, I see no reason to depart from the consistent principles established and followed by this Office.

22. Moreover, the Company has presented no behavioural or appearance indicators of the Grievor's alleged impairment. In fact, as pointed out by the Union, the Grievor spent considerable time with Company Officers on the day of the incident and none of them questioned his fitness for duty, or otherwise suspected impairment.

23. The Company argues that the Grievor was tested approximately 8 hours and 49 minutes after commencing duty, suggesting that he started his tour of duty with a higher level of marijuana in his system than the 3 ng/ml test result. The Company relies on Dr. Melissa Snider-Adler's expert report, which states, in part:

> Therefore, when we see a quantitative level of 3 ng/mL at 0309 am, it is expected that the levels 8 hours and 49 minutes prior (at the commencement of his duty) would have been significantly higher unless the use of cannabis occurred during the work day. Assuming that the use of cannabis was prior to the start of his shift, the quantitative levels at 1820 on June 26/2019 would have been more than 3 ng/mL.

24. While the Company's expert expects that the Grievor's quantitative level was significantly higher than 3 ng/ml at the beginning of his tour of duty, she does not opine that it could have or would have been as high as the 10 ng/ml cut-off for impairment.

25. The Company draws a causal correlation between the Grievor's positive drug test and the safety incident. I cannot accept that position. As indicated previously, there is simply no evidence that the Grievor was impaired while on duty. Moreover, there is no

evidence that the other crew members tested positive for drugs and/or alcohol. That suggests that the crew's operational error was likely caused by factors unrelated to impairment by drugs.

26. The Company contends that the Grievor had an obligation to inform the Company of his off-duty consumption, irrespective of impairment. There is no support for this contention in the applicable *Policy* or *Procedure*, as the Grievor was below the applicable cut-off level for impairment, and he did not suffer from a substance abuse disorder.

27. The cases cited by the Company are distinguishable from this one. Most involve a higher quantitative level of marijuana or impairment while on duty, which in some cases contributed to a safety incident. That is not the case here.

28. For the reasons set out above, I find that the Company did not discharge its burden of proving that the Grievor was impaired while on or subject to duty, or otherwise violated Rule G or any provision of the *Polic*y or *Procedure*, or that the June 26, 2019 incident was caused, in whole or in part, by the Grievor's impairment. In the absence of impairment, I am unable to conclude that the Grievor had an obligation to disclose his marijuana consumption. Consequently, the Grievor's dismissal due to his drug consumption and test result of June 2019 was not justified.

Does dishonesty warrant dismissal?

29. It appears from the record that the Grievor was dishonest during the testing process and during his statement. For example, on July 3, 2019, when the Grievor spoke to Driver Check's Medical Review Officer (MRO) who called to advise him of his test result and inquire about his drug use, the Grievor denied any use of marijuana within two or three days prior to the test on June 27, 2019. He stated he had last smoked on June 23, 2019. During the Company's investigation, the Grievor admitted that he had smoked on June 25, 2019. He stated he was confused and did not have a calendar with him when he spoke to the Driver Check MRO and therefore made a mistake when he said he had last consumed on June 23, 2019. At the hearing, the Union argued that the Grievor's revised statement, that he consumed marijuana two days later, was less favourable for him, thereby supporting that his initial statement was genuinely erroneous. I do not accept that explanation. It appears unlikely that, after being subject to drug testing, an employee would not have reflected on the timing of his last consumption, at least to assess his chances of passing the drug test. While the Grievor may have ultimately decided that the best path for him was to correct his statement about the timing of his consumption, it does not change the fact that he was initially dishonest about it.

30. The Grievor's dishonesty is to be condemned and speaks to his character. However, in this case, contrary to the Company's submission, it does not on its own, in my view, constitute an irremediable breach of the bond of trust between the Grievor and

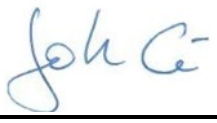
the Company, as the test results speak for themselves and the Grievor was eventually forthcoming during his investigation statement.

31. In the circumstances, I find that the Grievor's dismissal was not warranted.

32. I order that the Grievor be reinstated without loss of service and that he be made whole for all compensation and benefits lost.

33. I remain seized with respect to the implementation of this decision.

October 28, 2021



JOHANNE CAVÉ
ARBITRATOR