CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4712

Heard in Calgary, November 14, 2019

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the dismissal of Conductor N. Eisner.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Following an investigation, the Company on February 28, 2019 dismissed Mr. Nikkolas Eisner 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 118-30 more specifically occupying the mainline at Chapleau without proper authority on February 2, 2019. This was further confirmed in your investigation statement taken February 12, 2019, a violation of the Alcohol and Drug Policy and Procedures (Canada) HR203 and HR203.1."

Union's Position:

The Union's position is Mr. Eisner was not provided a fair and impartial process as well as being wrongfully dismissed.

As stated within the grievances the Investigating Officer was the same Manager who was the on-site Manager collecting information and the same Manager who was the Investigating Officer for Mr. Eisner's statement.

The Union questions why drug/alcohol testing was done. The facts were provided at the time and it should have been clear with a newly qualified employee simply made a mistake.

Mr. Eisner did have a non-negative urine test for cannabis and negative on the oral swab test. The Union submits that there is no correlation between a positive urine test and evidence of impairment, particularly in light of negative swab test results.

The Company has further advised of their "Preliminary Objection" based on an expansion of the Union's Step 2 grievance and what was provided in the Union's Step 1 grievance.

The Company accuses the Union of; "This is not only a case of the Union lying in the bushes, but also prejudice the Company."

The Company is not prejudiced, put at any disadvantage as they have the full ability to respond to the Union's contentions within their Step 2 grievance response. This is the reason there is the ability to respond.

The Union requests that the dismissal be removed from Mr. Eisner's file, and that Mr. Eisner be compensated 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 request damages be paid to Mr. Eisner as this was no more than an abuse of Managements Rights and a further abuse of Mr. Eisner's rights by wrongfully dismissing him.

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

Company's Position:

The Company disagrees and denies the Union's request.

Preliminary Objection: The Company objects to the Union's expansion of the grievance from the Step 1 submitted to Superintendent Jason Inglis on March 20, 2019; specifically, by alleging a wrongful dismissal, alleging a violation of KVP principles and the Canada Labour Code, and by requesting damages. The Company submits this expansion is a violation of CROA Rules (Clause 9).

Without prejudice to the above, the Company maintains the following:

The Company has reviewed the Union's grievance, the statement and investigation and cannot agree with the Union's contentions. The Company maintains Mr. Eisner was appropriately dismissed for violation of the Canadian Pacific's Alcohol & Drug Policy and Procedures.

The Company was investigating a Major Incident – occupying a main line without proper authority - during the Grievor's tour of duty while working as a Conductor. As such, the Grievor was properly required to submit to an Alcohol and Drug test.

The Company maintains that following a fair and impartial investigation, the discipline assessed was appropriate, warranted and just in all the circumstances. Accordingly, the Company sees no reason to disturb the discipline assessed and respectfully requests that the Arbitrator deny the grievance.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) W. Apsey	**(SGD.) S. Shaw**
General Chairperson	Senior Director, Labour Relations

There appeared on behalf of the Company:

S. Shaw	– Senior Director, Labour Relations, Calgary
D. Zurbuchen	– Manager, Labour Relations, Calgary

And on behalf of the Union:

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

AWARD OF THE ARBITRATOR

The grievor is 20 years old. He entered the service of the Company in September 2018 and qualified as a Conductor in January 2019. He was a "green vest" employee at

the time of his dismissal. The grievor stated at his investigation that he had approximately 48 hours off duty before he started his tour of duty on February 2, 2019.

The crew on train 118-30 occupied the mainline at Chapleau without proper written authority on February 2, 2019. Trainmaster Dave Machioni attended at the scene and conducted an inquiry as to the circumstances of the incident. He subsequently requested that the crew submit to substance screening testing. The grievor attended at Chapleau and provided a breath alcohol, saliva and urine sample on February 2, 2019 at 06:25 hrs. His test results were: negative for breath alcohol, negative for oral fluid test, positive for urine drug test. The grievor attended for an investigation with his union representative on February 12, 2019 where he was asked to explain the positive urine test result:

> Q 37: Can you explain the positive results of the urine fluid drug test?
>
> A 37: I smoked marijuana on my time off duty. I was not subject to duty. However in no time in the past or on this occasion have I ever reported for duty in an impaired state. I comply with CROR General Rule A Item 10.

The Union objected at the outset of the grievor's statement on February 12, 2019 because of what the Union claimed was the impartiality of Mr. Machioni being the immediate supervisor involved with the incident and also conducting the investigation.

The focus of the investigation was on the grievor's alleged contravention of the *Alcohol and Drug Policy and Procedures*. Although it would have been preferable to have another Company officer conduct the investigation, I do not see any evidence that the grievor was prejudiced as a result of Mr. Machioni asking routine questions, mostly relating to the grievor's positive urine test in the context of Company policies. This is not

a case where the discipline should be set aside as a result of the Company's failure to conduct a fair and impartial investigation.

The Company submits that this case should be reviewed in the same way as a case involving alcohol. The Company maintains in that regard that a positive drug test poses an undue risk to the safety of employees, as outlined in the 2007 Alberta Court of Appeal decision of *Kellogg Brown and Root v. Alberta Human Rights Commission* ("KBR") 2007 ABCA 426. The Company submits that the KBR decision, as well as current science on the subject, supports a finding that the grievor's consumption of cannabis, as noted from his urine test results, leads to the conclusion that he was impaired by drugs while performing his duties on February 2, 2019. On that basis, the grievor, a short-service employee, contravened the *Company's Alcohol and Drug Policy and Procedures* and deserves the termination penalty.

The Union submits that it has been long-settled law that a positive urine test result does not establish impairment and, standing alone, cannot be viewed as just cause for discipline. The Union notes 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:
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> [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. …
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> 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.
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> 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.
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> …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).
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> 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 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.

December 5, 2019

JOHN MOREAU
ARBITRATOR