CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4775

Heard in Calgary and with Zoom Video Conferencing, June 8, 2021

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal on behalf of Locomotive Engineer Phillip Gamble of Saskatoon, SK, concerning the assessment of discharge for violation of CROR G and CN's Drug and Alcohol Policy while operating the L59041-22 on February 23, 2019.

JOINT STATEMENT OF ISSUE:

On February 23, 2019, the grievor was called as the Locomotive Engineer on Train L59041-22. During this tour of duty, the grievor was involved in a CROR 568 violation wherein his train occupied the main track without authority to do so.

The grievor was required to undergo Drug and Alcohol testing which resulted in the grievor testing non-negative on the urine sample, and positive for marijuana use on the oral fluids (swab) sample. This resulted in a formal investigation on March 4, 2019, and the grievor was subsequently discharged from service effective March 7, 2019.

The Union contends that the grievor suffers from a disability as defined by the Canadian Human Rights Act, and as such the Company must afford the grievor's right to a fair and impartial investigation, and that the Company has failed to overcome the burden of proof that the grievor was impaired on February 23, 2019. The Union requests that the grievor be reinstated into his employment, without loss of seniority or loss of wages or benefits.

The Company disagrees with the Union's contentions and denied the request, based on a violation of the Company Policy to Prevent Workplace Alcohol and Drug Problems and CROR General Rule G.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) M. King (for) **K.C. James**	**(SGD.) S. Blackmore** (for) **D. Klein**
General Chairman	Senior VP Human Resources

There appeared on behalf of the Company:

V. Paquet	– Manager, Labour Relations, Toronto
S. Blackmore	– Senior Manager, Labour Relations, Edmonton
W. Maning	– Transportation Manager, Saskatchewan
K. Yokom	– Human Resources, Business Partner, Toronto
M. Salemi	– Observer, Labour Relations Associate, Toronto

And on behalf of the Union:

A. Stevens	– Counsel, Caley Wray, Toronto
K.C. James	– General Chairman, Edmonton
M. King	– Senior Vice General Chairman, Edmonton
N. Irven	– Local Chairman, Saskatoon
P. Gamble	– Grievor, Lax-Kw'Alaams

AWARD OF THE ARBITRATOR

The grievor began his service with the Company as a Conductor trainee in Smithers, B.C. in September 2012 and qualified as a Conductor about seven months later. He then moved to Saskatoon in 2015 where he trained and qualified as a Locomotive Engineer.

On February 23, 2019 the grievor's crew deadheaded to Allan Mine, where they picked up their locomotives. They departed Allan Mine with the intention of entering the North siding, where they were preparing to head back to Saskatoon with their two locomotives. They erroneously entered the mainline instead of the siding, in breach of Cardinal rule CRO Rule 568, *Signal or Permission to Enter Main Track*.

The grievor, along with the rest of his crew, were required as a result of the incident to participate in post-incident/accident testing under the Company's *Policy to Prevent Workplace Drug and Alcohol Problems*.

Prior to the testing, the grievor spoke to the Assistant Trainmaster and the Superintendent advising that he would not pass the urine test because he smoked marijuana the previous week for medical reasons while on vacation. The grievor's oral

fluid sample, upon testing, indicated a positive for THC at the quantitative level of 16ng/mL.

The grievor admitted at his investigation that he had used marijuana while subject to duty. The grievor, when asked, stated that he was under the care of a physician for depression and used marijuana regularly to control his depression. The grievor concluded his interview by stating that he felt that he was a valuable employee and willing to take the necessary steps required by CN to help him with his illness.

This Office has accepted the validity and accuracy of oral fluid testing as an indicator of impairment. See: **CROA 4742, 4743 and 4751**. Also: *Imperial Oil Ltd. v Communications, Energy & Paperworkers Union of Canada, Local 900*, 157 LAC (4th) 225, at para 27:

> [27] While the evidence given by Dr. Willette and Dr. Kadehjian was extensive and relatively detailed with respect to the science surrounding the consumption, absorption and detection of THC by means of the cheek swab test, and they were extensively cross-examined by counsel for the Union, there appears to be no substantial dispute about the accuracy of their testimony. No contrary expert opinion was adduced in evidence by the Union. On the whole, we are satisfied that their evidence does confirm, beyond any real controversy, that the cheek swab test introduced by the Company as part of its random and unannounced drug testing policy does accurately detect actual impairment in the subject tested at the time the test is taken.
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> (Emphasis added)

The cut-off level used to determine a positive oral fluid test by DriverCheck, the drug-testing firm retained by the Company, is 10 ng/mL which is indicative of consumption within twelve hours of the oral swab being taken. The THC level of 16 ng/mL was well

above the cut-off level of 10ng/ml. This result confirms the grievor's earlier admission to recent use of marijuana.

On the basis of the DriverCheck evidence submitted, and in the absence of any evidence to the contrary, the Arbitrator finds that the grievor was impaired by recent use of marijuana at the time of the incident in violation of CRO Rule G and CN's Drug and Alcohol Policy.

The next issue is whether termination was the appropriate penalty disposition. The Union maintains that the grievor suffered from depression and was self-medicating by his use of marijuana at the time of the incident. This evidence, the Union argues, indicates that the grievor suffered from a disability which triggers the duty to accommodate.

There is unfortunately scant evidence in the Arbitrator's view to support the Union's assertion that the grievor suffered from a disability. The grievor's medical certificate of March 1, 2019, which was the only medical document submitted in evidence, indicates that the grievor had tapered off his anti-depressant medication and had not been on any medication since December 2018.

The Union indicated that the grievor preferred a path to rehabilitation for his depression condition through non-traditional methods. A letter dated September 2, 2020 from the Executive Director of the *Tsow-Tun Le Lum Society Helping House* indicates that the grievor had completed 2.5 hours of training in learning and practicing his culture.

The letter, however, does not speak to the grievor's attendance for reasons of depression or other mental health concerns.

In the absence of any further evidence which would confirm the grievor's medical condition for depression or otherwise, I find that the grievor does not suffer from a disability which would invoke the duty to accommodate pursuant to the ***Canadian Human Rights Act***.

The *prima facie* penalty for impairment where an employee is on duty, or subject to duty, is termination. As Arbitrator Picher noted in **CROA 2695**, a case involving similar facts:

> In considering the appropriate measure of discipline regard must be had not only to the gravity of the infraction, but to the need for the employer to deter similar conduct by other employees. As noted, this is not a case where Mr. Middleton can plead a medical condition or disability in mitigation of his actions. In all of the circumstances, the Arbitrator is satisfied that the grievance must, therefore, be dismissed.

There are no other mitigating factors, after all the circumstances are considered, including the grievor's short service, which would lead the Arbitrator to consider a reduction of the penalty of termination.

The grievance is dismissed.

June 17, 2021

JOHN M. MOREAU, Q.C.
ARBITRATOR