CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4799

Heard via videoconferencing, in Gatineau, Quebec, December 16, 2021

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAILWAY CONFERENCE

DISPUTE:

Appeal of the dismissal of Conductor C. Hoyt of Cranbrook, B.C.

JOINT STATEMENT OF ISSUE:

Following an investigation, Mr. Hoyt was dismissed July 4 2019, which was described as "For your positive for cause drug and alcohol test completed June 10th, 2019. A violation of CROR General Rule G, CP Rule Book for Train and Engine Employees Item 2.2 D(i),(ii),(iii) and Policy #HR203 - Alcohol and Drug Policy (Canada)".

Union Position:

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.

The Union disputes the Company Policy HR 203.1 application in the instant matter for reasons previously provided within the grievance procedure. The Union further contends the Company has assessed discipline based on a policy revision which had never been conveyed to Mr. Hoyt or the Company's employees in general. As such the Union contends any assertion or reliance on the revised version of the policy (Version 1.4) by the Company is unreasonable and beyond the well accepted standards of *KVP*.

The Union contends that Mr. Hoyt's dismissal is unjustified, unwarranted, and excessive in all of the circumstances, including significant mitigating factors evident in this matter.

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

Company Position:

The Company disagrees and denies the Union's request.

The Company maintains the Grievor was provided with a fair and impartial investigation and the questions were clear and objective. The Grievor's culpability was established throughout the investigation. The discipline was just, warranted and appropriate in all the circumstances.

Given that the Grievor had a Positive Oral 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."

Further, HR 203.1 of October 2018 makes note that: "This Procedure and the related HR Policy 203 are subject to ongoing review and evaluation. They will be modified and updated as deemed necessary by the Company to respond to current circumstances and to the evolving needs of the organization. In the event that a situation arises that is not covered, please contact your Human Resources Business Partner."

In accordance with the grievance procedure, the Company will be prepared to proceed only on the issues that have been properly advanced through the grievance procedure.

Accordingly, 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	Assistant Director

There appeared on behalf of the Company:

D. Zurbuchen	– Manager Labour Relations, Calgary
J. Bairaktaris	– Director Labour Relations, Calgary

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
D. Fulton	– General Chairperson, Calgary
D. Edward	– Vice General Chairperson, Medicine Hat
R. Finnson	– Vice General Chairperson, Wynyard
J. Smoroden	– Local Chairperson, Cranbrook
C. Hoyt	– Grievor, Cranbrook

AWARD OF THE ARBITRATOR

1. The Grievor was employed as a Conductor, a safety-critical position. On June 10, 2019, he was working as part of a two-person crew with a Locomotive Engineer. During their tour of duty, the crew failed to stop the train short of the West Siding Switch at Riley,

on the Cranbrook Subdivision, as required. This resulted in the train being unintentionally diverted into the siding, thus creating a safety risk. As a result of its operational error, the crew was subject to post-incident testing for drugs and alcohol. The Grievor's oral fluid test returned positive for marijuana at a quantitative level of 4 ng/ml. The Grievor stated that he had consumed marijuana on June 8, 2019, two days prior to the incident, on his day off.

2. The Grievor was dismissed on July 4, 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 *Rule Book for Train & Engine Service Employees* (the *Rule Book*) and the Company's *Alcohol and Drug Policy* #HR 203 *(*the *Policy),* including the related *Alcohol and Drug Procedures* #HR 203.1 *(*the *Procedure)*.

3. The reasonableness of the Company's *Policy* and *Procedure* is the subject of a pending policy grievance, and not subject to review in this decision. Consequently, and as submitted by the Company in its written submissions in chief, this decision is limited to a determination of whether the Grievor's actions constituted a violation of Rule G, the *Policy* and the *Procedure* in effect at the time of the incident. I reject the Company's contradictory objection, raised in its written rebuttal submissions, that the *Policy* and *Procedure* are not properly before me, due to the pending policy grievance. In any event, the outcome of this decision would be the same if the analysis turned exclusively on the issue of a Rule G violation.

Which version of the *Procedure* applies?

4. The incident occurred at a time when the Company was in the process of transitioning to a revised version of the *Procedure*.

5. The *Procedure*, which indicates an effective date of October 17, 2018, has evolved through different versions. The versions relevant to this case are identified in the "History" notes at the bottom of each page as versions 1.3 and 1.4. This is significant, as these versions set out different "drug concentration limits", i.e., cut-off levels for marijuana. Version 1.3, dated September 14, 2018, sets the cut-off at 10 ng/ml. Version 1.4, dated May 13, 2019, sets the cut-off at 2 ng/ml.

6. The Grievor's quantitative level of marijuana was assessed against the revised cut-off set out in version 1.4 of the *Procedure*. This means that his result was deemed "positive" as it was above 2 ng/ml. However, at the time of the incident and drug test, the Union and employees had not yet been formally informed of the *Procedure* revisions reducing the cut-off from 10 ng/ml to 2 ng/ml. Indeed, the incident occurred on June 10, 2019, whereas the Union was only advised of the revisions by a letter dated July 25, 2019, from the Company's Executive Vice President of Operations to the General Chairpersons. The letter indicates that the revisions will be effective September 1, 2019. Employees were informed of the revisions and effective date by a System Bulletin issued on August 2, 2019.

7. As already explained in **CROA 4792**, while the Company may modify its policies and procedures from time to time, it is well established that workplace 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)

8. In this case, the Company argues that it had posted version 1.4 of the Procedure on an internal website, CP Station, on May 10, 2019, a few days prior to the incident. It further contends that during the Grievor's investigation statement on June 20, 2019, it presented him with and relied on version 1.4 of the *Procedure* and faced no objection by the Union or the Grievor. In fact, the investigation transcript shows that the Grievor was asked if he understood that a positive oral fluid test indicated the presence of marijuana metabolites on concentration equal or in excess of 2 ng/ml as referenced in the *Procedure* presented to him during the investigation and referenced as Appendix D. The Grievor responded, "Yes, according to Appendix D." It is certainly of interest that the Union and

the Grievor did not react to the stated revised cut-off level for marijuana, which had not yet been formally communicated to them. But even assuming the Grievor and the Union had seen the revisions posted on CP Station a few days prior, this does not justify the Company in enforcing the revised cut-off in advance of the effective date of September 1, 2019, which was determined by the Company and communicated to the Union and employees on July 25 and August 2, 2019, respectively.

9. For these reasons, version 1.3 of the *Procedure*, which sets the cut-off at 10 ng/ml, applies in this case.

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

10. The *Policy* provides the following regarding fitness for duty and the ability to work safely:

> 2.2 Employees must report fit to work, remain fit for work and be able to perform their duties free from adverse effects of alcohol and/or drugs. Adverse effects may include acute, chronic, hangover and after-effects.
>
> 2.7 Employees are required to advise CP of any use of alcohol and/or drugs that may affect their ability to work safely prior to commencing work. (…)

11. 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)

12. The *Rule Book* provisions referred to in the Joint Statement of Issue are similar in content to those of Rule G cited above. Therefore, it is not useful to reproduce them here.

13. First, the evidence is that the Grievor did not use marijuana while on duty or subject to duty, as prohibited by Rule G, paragraphs (i) and (ii). Rather, he consumed marijuana on his day off.

14. Secondly, there is no evidence that the use of marijuana adversely affected the Grievor's ability to work safely, as prohibited by Article 2.2 of the *Policy* and Rule G, paragraph (iii). Again, as stated in **CROA 4792**, this Office has repeatedly decided that the mere presence of drugs or alcohol in an employee's system is not sufficient to determine fitness to work safely, nor to warrant discipline. In the context of drug use, being impaired or not is what determines whether a person is fit to work safely or not.

15. Therefore, impairment is the key element to determining this case. The Grievor's drug test result does not provide evidence of impairment, as his quantitative level of 4 ng/ml was well below the applicable cut-off of 10 ng/ml in effect at the time of the incident under version 1.3 of the *Procedure*, which has consistently been the approach used by this Office. Moreover, the Company has presented no behavioural or appearance indicators of the Grievor's alleged impairment.

16. 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 no evidence that the Grievor was impaired while on duty. Moreover, there is no evidence that the other crew member tested positive for drugs and/or alcohol. This suggests that the crew's operational error was likely caused by factors unrelated to impairment.

17. 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 duty or subject to duty, or otherwise violated Rule G, the *Policy* or *Procedure*, nor that the June 10, 2019 incident was caused, in whole or in part, by his alleged impairment.

18. In the absence of impairment, there is no cause for discipline.

19. In the circumstances, I find that the Grievor's dismissal due to his drug consumption and test result of June 2019 was not warranted.

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

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

December 22, 2021

JOHANNE CAVÉ
ARBITRATOR