CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5182

Heard in Montreal, May 15, 2025

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The dismissal of Locomotive Engineer AB of Sudbury, Ontario, following a post-incident test.

JOINT STATEMENT OF ISSUE:

The Grievor was dismissed as per form 104 dated January 20, 2023, which stated in part: "Following an uncontrolled movement resulting in a run-through switch, you submitted to Post-incident Substance Testing on December 16, 2022, which you failed due to cocaine in your oral and urine fluid." A subsequent investigation determined that you had been consuming an illicit substance – cocaine. You are hereby dismissed for violating:

- CP's Alcohol and Drug Policy HR 203
- CP's Procedure HR 203.1
- Rule Book for Train & Engine Employees
- Rule G

Please be advised that you are dismissed from Company Service, effective January 18, 2023, for failing to ensure that at all times while working, on duty, or subject to duty you were fit to work and free from adverse effects of prohibited and illegal substances as evidenced by your positive Post-incident Oral Fluid Drug Test and Urine test collected on December 16, 2022.
As a matter of record, a copy of this document will be placed in your personal file. – Superintendent Patrick Therrien"

Union Position:

The Union maintains all arguments advanced throughout prior correspondence and grievances without prejudice and without creating precedent. It relies upon those submissions and reserves the right to object to, or respond to, any new arguments advanced by the Company.
Condensed Timeline of Events

- December 16, 2022 – An uncontrolled movement occurs. Conductor Laing assumes full responsibility in the formal investigation. Mr. AB is credited by the conductor for acting decisively to prevent a more serious outcome.
- Same Day – Mr. AB is subjected to post-incident drug testing. The oral and urine tests return positive results for cocaine metabolites. Breathalyzer is negative. There was no observed impairment or suspicion by management or coworkers.

- December 17–27, 2022 – AB acknowledges a substance issue, contacts EFAP, and begins seeking rehabilitation services.
- January 18, 2023 – He is dismissed via Form 104 for violating CP's Alcohol and Drug Policy and safety rules.
- March–April 2023 onward – AB completes a 30-day treatment program with Monarch Recovery Services and remains actively involved in aftercare counselling and peer recovery programs.

The Union asserts that AB's dismissal was unjust, disproportionate, and in violation of both collective and statutory obligations.

1. No Just Cause – Mr. AB Was Not at Fault

The grievor did not cause the incident and, in fact, mitigated its outcome. The actual cause was human error by the conductor, who took full responsibility. No signs of impairment were observed, and the Company failed to meet its own criteria for post-incident testing under Policy HR 203.1.

2. Breach of the Duty to Accommodate – Substance Dependence Is a Disability

Mr AB promptly disclosed a substance use issue and sought help — engaging EFAP and seeking treatment within days. The Company imposed discipline before offering any support or initiating an individualized assessment, thereby violating the Canadian Human Rights Act, applicable arbitral jurisprudence, and the June 16, 2010, Substance Use Agreement.

The Union acknowledges that dismissal is often imposed in cases involving positive drug tests, particularly in safety-sensitive positions. However, Mr. AB's circumstances are exceptional. He did not cause the incident, was not observed to be impaired, and acted decisively to prevent harm. He promptly disclosed a substance use issue, sought help through EFAP, completed treatment, and remains committed to recovery through verified aftercare and external employment subject to regular testing.

These factors warranted a tailored and supportive approach—not summary dismissal.

3. Procedural and Privacy Violations

The Union raises concerns regarding the inclusion of detailed toxicology data and the Company's reliance on a generic medical opinion (Appendix D) and reserves the right to address these matters at arbitration.

Remedy Sought

- Immediate reinstatement of Mr. AB;
- Full compensation for lost wages, benefits, and pensionable service;
- Removal of all discipline related to this matter;
- Implementation of a Return-to-Work plan guided by EFAP and recovery professionals;
- A declaration that the Company violated its duty to accommodate under the Canadian Human Rights Act and the collective agreement.
- The Union further notes that Mr. AB has remained substance-free, is actively engaged in ongoing recovery counselling, and has successfully passed third-party workplace drug testing in alternative employment. His post-incident conduct affirms his fitness and commitment to safety and accountability.

Conclusion

This case is not about negligence or disregard for safety. It is about a long-serving employee who, when faced with a personal health issue, took responsibility, asked for help, and took concrete steps toward recovery.

The Company chose to punish — not support — an employee who demonstrated accountability and a commitment to change.

Mr. AB deserves the opportunity to return, not only as an employee, but as a symbol that the workplace responds to illness with support and rehabilitation, not rejection. The Union respectfully asks the Arbitrator to restore Mr. AB's employment and dignity, and to reaffirm the principle that justice in the workplace includes compassion, context, and fairness.

This case presents a clear opportunity to uphold the values embedded in the Canadian Human Rights framework and our arbitral tradition — that employees who show accountability and rehabilitation must be supported, not discarded."

Company Position:

The Company disagrees with the Union's contentions and the Union's request.

The Company maintains that following the fair and impartial investigation, the Grievor was found culpable for the reasons outlined in his form 104. The Company maintains that culpability was established and there was just cause to assess discipline to the Grievor. The Company's position continues to be that the discipline assessed was just, appropriate and warranted in all the circumstances.

The Company maintains that the Alcohol and Drug Policy and Procedures (HR 203.1) provides for the ability for post incident alcohol and drug testing after a significant work-related incident, a safety related incident or a near miss. Based on the incident and damage that occurred due to the Grievor's negligence on the day in question, The Company maintains that the Grievor was appropriately post incident tested in accordance with the Alcohol & Drug policy and procedures.

The Grievor tested positive for cocaine in both his oral fluid and urine, violation Rule G and HR
203.1. The Company determined dismissal was just and appropriate in the circumstances following a fair and impartial investigation which confirmed the rule violations, consideration of Dr. Snider-Adler's expert report as well as a review of all relevant factors, including those described by the Union.

The Company maintains that no violation in regard to duty to accommodate has occurred as the Grievor had never sought medical consultation, nor did he ever request for an accommodation relating to substance use with the Company prior to the incident, in order to substantiate any alleged medical disability and/or substance use disorder.

The Company maintains that the 2010 Agreement referenced by the Union was no longer in effect.

For the foregoing reasons and those provided during the grievance procedure, the Company requests that the Arbitrator uphold the dismissal.

For the Union:	**For the Company:**
(SGD.) J. Bishop	**(SGD.) F. Billings**
General Chairperson	Director Labour Relations

There appeared on behalf of the Company:

S. Scott	– Manager, Labour Relations, Calgary
A. Harrison	– Manager, Labour Relations, Calgary
B. MacDonald	– Assistant Superintendent, Sudbury

And on behalf of the Union:

R. Church	– Counsel, Caley Wray, Toronto
J. Bishop	– General Chairperson, LE-E, Severn
J. Blythe	– Local Chairperson, Division 308, LE-E, Sudbury
AB	– Grievor, Sudbury

AWARD OF THE ARBITRATOR

Context

Preliminary Objection re Anonymity

Position of Parties

1. This issue was not the subject of extensive written or oral submissions by either Party.

2. The Union has requested that the Grievor's name be made anonymous, given the personal and medical information contained in the file. It notes further that the Grievor currently has a safety sensitive job, which could be threatened if his employer was made aware of this information.

3. The Company refers to the "open Court" policy, upheld by the Supreme Court of Canada in **Sherman Estate v Donovan et al** 2021 2 SCR 75, and a review of the issue by Arbitrator Yingst-Bartel in **CROA 5107**, and submits that the Union has not met its onus of establishing an exception to the general rule of openness.

Analysis and Decision

4. Arbitrator Yingst-Bartel in **CROA 5107** notes that there is a presumption of openness in arbitral and Court decisions:

> [41] While not addressing the *Sherman Estate* test set out below, in 2019 the Arbitrator in **AH725** noted the following regarding a request to anonymize:
>
> > …labour arbitration is not a private system of dispute resolution but rather one that is statutorily mandated under the *Canada Labour Code* and an essential component of the collective agreement between the parties. In the absence of an agreement between the parties, and despite the disclosure of the health-related history of the grievor, I do not find a compelling basis to deviate from the normal practice of this office of including the Grievor's name in this Award (at p. 6).
>
> […]
>
> [43] In *Sherman Estate v. Donovan et al.* [2021] 2 S.C.R. 75, the Supreme Court of Canada reviewed the existing jurisprudence and developed the test to be applied. There are three parts to the test that must be met by the parting seeking to rebut the presumption of openness:
>
> - "Court openness poses a serious risk to an important public interest;

> • The order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
>
> • As a matter of proportionality, the benefits of the order outweigh its negative effects" (at para. 38);

5. The Arbitrator also recognized that "each case is dependent on its own factual circumstances" (see para. 47, **CROA 5107**). I agree.

6. In **BAMCFC 4877-A**, this arbitrator quoted Judge Kasirer in **Sherman**, who set out a tripartite test:

> − La publicité des débats pose un risque sérieux pour un intérêt public important;
> − L'ordonnance sollicitée est nécessaire pour écarter ce risque sérieux pour l'intérêt mis en évidence, car d'autres mesures raisonnables ne permettront pas d'écarter ce risque; et
> − du point de vue de la proportionnalité, les avantages de l'ordonnance l'emportent sur ses effets négatifs. (para. 38)

7. Here, I find that the first test of a serious risk to a public interest has been met, for the reasons that follow.

8. In **Sherman**, the Court found that privacy rights extend "only where the sensitivity of the information strikes at the subject's more intimate self" or the "biological core" of the individual (see paras. 74-75, **Sherman**).

9. Here, I find that the disclosure of the Grievor's name would necessarily cause sensitive personal and medical information concerning his addiction and rehabilitation efforts to be made public. Such disclosure would create more than embarrassment; it also could threaten the Grievor's on-going rehabilitation efforts.

10. This matter cannot be equated with the factual situation in **Sherman**, where the Court dealt with the sensibilities of the deceased couple and their surviving family. Here, the living Grievor and his health are directly affected by the publicity of a public decision. As the Union argued, there is a reason that Alcoholics Anonymous and Narcotics Anonymous have been set up to protect the identity of participants.

11. This situation also differs factually from the one in **CROA 5107**, where the grievor's employer was not only aware of his addiction, but wrote a letter in support filed at the arbitration. Here, the Grievor's employer is not aware of his addiction and their reaction is unknown (see paras 66-68, **CROA 5107**).

12. The second test has therefore also been met, as I find that it would be very difficult, if not impossible, to write a decision dealing with claims for accommodation, without writing about the facts of the claimed disability and the facts of any proposed accommodation.

13. The third test of proportionality between the positive and negative aspects of anonymization has also been met. As this arbitrator wrote in **BAMCFC 4877-A:**

> « À mon avis, l'anonymat permet AB de garder ses informations biographiques sensibles protégées, tout en permettant le public de bien comprendre les faits, les arguments des parties et le raisonnement de la décision. L'effet négatif est limité, comme la publicité des débats est maintenue, avec la seule exception du dévoilement de l'identité d'AB. »

14. There, as here, I believe the "open Court" concept is met when the public is aware of the facts, arguments and reasoning of the decision, while the negative effects are limited to only the anonymization of the identity of the Grievor.

15. For these reasons, the Grievor will be referred to only as "AB" or "the Grievor".

Issues

- **A.** Was the Grievor subject to alcohol and drug testing?
- **B.** Was the investigation improper due to a violation of the 2010 MOU?
- **C.** Was the Grievor subject to discipline?
- **D.** Was there a duty to accommodate the Grievor, and if so, has it been met?
- **E.** What remedy is appropriate in the circumstances?

A. Was the Grievor subject to alcohol and drug testing?

Position of Parties

16. The Union submits that the Company had no grounds to alcohol and drug test the Grievor. It argues that the Grievor was not responsible for the incident reviewed in **CROA 5181** and that the Company has failed to conduct a proper balancing of privacy versus safety interests required by both the Courts and labour arbitrators (see **CROA 4256**, **CROA 4841**, **CROA 4874**, **CROA 4825**, **Ad Hoc 732**, and **CPR and IBEW SC#11-Andrew Jones**).

17. The Company argues that it has squarely met the terms of HR 203.1 for Post Incident Testing, as the Grievor was directly involved in an incident where there was: "significant loss or damage to Company, public or private property, equipment or vehicles or an incident or near miss that creates this risk" (see s. 4.3 Post Incident

Testing). The Company relies on **Weyerhaeuser Co and CEP Local 447**, 2012 Canlii 77353, **CROA 3841** and **CROA 4742**).

Analysis and Decision

18. The Company's HR 203.1 Policy at s. 4.3 sets out when Post-Incident Testing may be required:

> Post-Incident Testing
>
> 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.
>
> Employees are expected to participate fully in an investigation. Failure to report an incident is a violation of the Canadian Internal Control Plan for Incident Reporting.
>
> A significant work-related incident, safety related incident or near miss might involve any one of the following:
>
> a fatality;
>
> any number of serious injuries or multiple injuries to Company personnel or the public requiring medical attention away from the scene or lost time injuries to Company personnel; or an incident or near miss that creates this risk;
>
> significant loss or damage to Company, public or private property, equipment or vehicles or an incident or near miss that creates this risk;
>
> an incident with serious damage or implications to the environment, or an incident or near miss that creates this risk.

19. In **CROA 4841**, this arbitrator reviewed both this Policy and the jurisprudence relating to its application. I noted that the Company is required to demonstrate that: 1) there was a "serious incident"; 2) the Grievor was "involved" in the incident and 3) testing was appropriate.

20. The facts laid out in **CROA 5181** clearly establish that this a very serious incident, with 28 loaded ore cars rolling unattended for some 2 miles, including across a public highway, before the locomotives could secure them. There can be no doubt that this was a highly serious incident, with the potential for a catastrophic outcome.

21. The facts further establish that the Grievor was directly involved in the incident as the Supervisory Locomotive Engineer. Indeed, his actions and inactions led to discipline, which was upheld in **CROA 5181**. The circumstances here are very different from those in **CROA 4256**, where the Yardmaster was found not to be involved.

22. The final requirement is for proper discretion to be exercised as to whether testing is appropriate. It cannot be a mechanistic process and judgment must be exercised. As this arbitrator noted in **CROA 4841**:

> 16. Instead, that discretion must be exercised pursuant to both the Court and CROA jurisprudence, and a balancing of privacy rights and safety concerns be made (see SHP 530, **CROA 4668**). In addition to the necessary balancing of interests, there must be a "necessary link between the incident and the employee's situation to justify testing" (see Weyerhaeuser Company Ltd v. CEP, Local 447 (2006), 154 LAC (4th) 3, cited in **CROA 2456**).
>
> […]
>
> 20. However, Mr. Park was neither directly involved in the operation of the door, nor was his decision to warn so inexplicable, as to raise concerns about his judgment and possible impairment. In these circumstances, some form of managerial counselling might well be appropriate, but not post incident testing. The "necessary link", referred to above, has not been met.

23. Here, I find that the testing of those directly involved in the rollaway, including the Grievor, was entirely appropriate. In **CROA 4841**, the actions of the grievor did not contribute directly to the incident. In contrast, as decided in **CROA 5181**, the actions and omissions of the Grievor directly contributed to the incident.

24. I find therefor that the Grievor was properly the subject of testing.

B. Was the investigation improper due to a violation of the 2010 MOU?

Position of the Parties

25. The Union takes the position that the investigation should be void ab initio, given the Company's failure to abide by the June 2010 MOU (see Tab 9, Union documents). In particular the Union alleges that the Investigating Officer should not have been provided with, or asked questions about, the actual results of the drug testing.

26. The Company takes the position that the 2010 MOU has been superseded by later versions of the Alcohol and Drug Policy. In addition, it relies on the fact that the Grievor signed a form at Driver Check permitting it to share results with the Company.

Analysis and Decision

27. The 2010 MOU sets out, amongst other matters, agreement on the following with respect to the 2008 Revised CP Substance Testing Policy:

1. The parties agree and understand that Item 8 of the Revised Policy with respect to Post-Accident/Post-Incident testing shall incorporate the following terms:

a. The Company will not make any request for any employee to submit to post-accident/post-Incident substance and/or alcohol screening testing (hereinafter "substance screening testing") whatsoever unless the circumstances give rise to just and reasonable cause warranting such request.

b. All requests for a post-accident/post-incident test must be made as soon as reasonably practicable.

c. It Is the expectation where the Company has requested that an employee submit to a substance screening test that such testing will be performed within four (4) hours of the request made to the employee, understanding that the contractor (DriverCheck) will be contacted immediately following the employee's consent to a test. Only in exceptional circumstances that cause unavoidable delay will a test be performed later than Four hours from the Company's request to DriverCheck. In no circumstances shall an employee be required to submit to the test after six (6) hours from the Company's request.

d. While employees are waiting to submit to a test (as contemplated in l(c) above), employees will be treated with dignity and in a courteous manner. At minimum this Includes providing employees access to reasonable amounts of hydration, private washroom breaks, food, and telephone calls as needed. The employees can leave the immediate location and walk outside (for example) and the supervisor will want to accompany them. The Company's intention Is to avoid employee behaviour that will invalidate the requested test.

[…]

4. The Company shall re-Implement and further communicate its Revised Polley in a manner consistent with the requirements set out In Lumber and Sawmill Worke□ Union Local 2537 and the KVP Co. Ltd. (1965), 16 L.A.C. 73. Specifically, in order to re-implement the Revised Policy, the Company shall:

> Issue bulletins in every Canadian terminal where employees report to work, alerting all employees to the revised Policy and advising where employees can obtain a copy of the Revised policy and related materials.

In respect of the bulletins in paragraph 3 (a), the Company shall:

i. Ensure that the bulletins specifically advise employees of the specific consequences of refusing a test, of providing a non-- negative test, and of a positive result under the Revised Polley. The Company shall specify the range of the consequences, from accommodation under the Canadian Human Rights Act to the assessment of discipline and discharge;

ii. Ensure that the bulletins advise employees as to the process for resolving any disputes arising from the application and Implementation of the Revised Polley. This process will Involve direct discussions between the Unions' General Chairperson or equivalent, the appropriate Company AVP and the Chief Medical Officer;

Ill. Ensure that contact information within the OHS Department Is provided where employees can obtain ongoing clarification and answers to any policy questions they might have.

c. Post copies of the Revised Polley, Quick Tips, Q&A's and flowchart of process in every Canadian terminal;

5. As of the date of this agreement and until such time addressed:

in item 6 below, the Parties agree and understand that the Company will not require or-request that employees be subject to any method(s) of testing other than those specifically set out under section 5 of the Revised Policy (i.e., "breath for alcohol and urine for drugs").

6. In the event that the Company should seek, In the future, to utilize any method(s) of testing other than those specifically set out under section 5 of the Revised Policy , the Company shall provide the Unions reasonable advance notice of its intended use of such additional method(s) of testing along with details as to the anticipated application(s) of such method(s) of testing and the standards (Including cut-off concentrations) that will govern the use of such method(s) of testing.

7. The Company confirms that the cut-off concentrations established for the purposes of the Revised Policy are those cut-off concentrations set out as- Subpart 40.87 of the United States' Department of Transportation regulations set out under 1itle 49: Part 40 Procedures for Transportation Workplace Drug and Alcohol Testing Programs (current as of February 25, 2010) and 0.04 for breath alcohol concentration cut off levels. The Company shall advise the Unions and employees of any changes in the concentration cut off levels under its Revised Policy.

> The Unions reserve the right to grieve any changes in the cut-off concentrations under the Revised Policy, in the event the Company introduces any such changes.
>
> […]
>
> 12.The company confirms that the quantitative results or drug substance type of any and all substance screening tests taken under the Revised Policy shall be provided exclusively to the Company's Occupational Health Services (OHS) department. Toe Company further confirms that at no point will any Company supervisors be provided the quantitative results or drug substance type of a substance screening test conducted under the Revised Policy, other than whether the test Is "negative" or "non-negative" in respect of the applicable cut- off concentrations under the Revised Policy either "negative" or "positive" with regard to a breath alcohol test.
>
> 13. The Company confirms that, should an employee be asked to attend a formal statement (i.e. investigation) further to any Issue arising under the Revised Policy, under no circumstances will the Investigating Officer inquire as to the specific or quantitative results or drug substance type of any substance screening test conducted under the Revised Polley (other than "negative", "positive" or "non-negative"). Further, the Investigating Officer shall not require any explanation by any employee as to the quantitative results or drug substance type of any substance screening test conducted under the Revised Policy. However, in the event that such a question, or a question of equivalent consequence is advanced to an employee, the employee may refuse to answer without any consequence or adverse Inference whatsoever.
>
> […]
>
> 15.Thls Agreement resolves the Unions' policy grievance on a without prejudice basis in respect of any positions and/or grievances that either of the Unions may take with respect to matters arising under the Revised Polley or any other policy, discipline or action of the Company whatsoever.

28. A first observation is that the MOU is some 15 years old and relates to a Company Policy which is some 17 years old, which has been updated multiple times in the interim. The version applicable in this matter is from 2019 (see Tab 4, Company documents).

29. A plain reading of the MOU indicates some of the many changes which have occurred. In paragraph 5, testing is limited to “breath for alcohol and urine for drugs”. CROA jurisprudence is replete with cases in which urine testing has been found to be not indicative of impairment, while oral swab testing (which is not even mentioned in the MOU) has been relied upon. Paragraph 7 refers to concentration levels set by the US Department of Transportation, whereas the latest version sets out its own levels.

30. Paragraphs 12 and 13 provide limitations on the use of quantitative results from the drug testing with respect to Company supervisors and the Investigating Officer.

31. The Union submits that the 2010 MOU was referenced as an authority as recently as 2019 in **CROA 4695-M**, where the company did not argue that the MOU was no longer in force. I note, however, that Arbitrator Weatherill in that matter was dealing with a separate issue, whether the Company was entitled to substance test in the circumstances, and not whether the results may be communicated to the Investigating Officer. In addition, the Arbitrator did not reach any conclusion with respect to the MOU:

> “As well, under the parties’ agreement of June 16, 2010 relating to Post-Accident/Post-Incident Testing, a question may arise as to whether or not the circumstances give rise to just and reasonable cause warranting such a request. In the instant case, having regard to the conclusion I have reached on the merits, it is not necessary to deal with that question.”

32. The Union has not directed me to any decided cases in which the 2010 MOU was applied to subsequent versions of the Company Alcohol and Drug Policy.

33. There was some discussion between the Parties concerning potential estoppel, based on past conduct. I note that there have been multiple cases decided in the last two years dealing with actual testing levels which have been communicated to the Investigating Officer without reference to the 2010 MOU (see for example, **AH 877**, **CROA 5022**, **CROA 5068**, **CROA 5084**, **CROA 5100**, and **CROA 5143**).

34. I further note that the Parties have agreed to an exhaustive Policy Grievance before Arbitrator Clarke. The issue of whether the 2010 MOU has been, or should have been, incorporated into the more recent versions of the Company Alcohol and Drug Policy could be raised in that setting.

35. Accordingly, I find that the Union has not established, based on the evidence provided, that the 2010 MOU was applicable here.

36. Finally, I note that the Grievor did permit Driver Check to forward actual test results to the Company (see Tab 4, Company documents). Arbitrator Yingst-Bartel in **CROA 5107** has found that this acknowledgement form serves as a complete answer to the Union concerns about the 2010 MOU:

> 33. It is unnecessary to address the impact of the 2010 agreement to resolve this Grievance. The reach of that agreement is a dispute of a long-standing nature between these parties. For the purposes of this case, the Union's position can be addressed by referring to the documentation which the Grievor signed, agreeing to release the details of his drug results to the Company, as pointed out by the Company in its submissions.
>
> 34. While the Union has argued this authorized release to the Grievor's "supervisors", the agreement is broader than that, and includes an agreement that the results may be released
>
> > …as required to Company representatives for the purposes of investigating Company policy violations and participating legal, regulatory or administrative proceedings or such threatened proceedings including but not limited to grievances, arbitrations, or claims, or other proceedings (p. 25 MRO Report, executed by the Grievor on April 12, 2023; and witnessed)
>
> 35. That agreement is broad enough to cover the release of the Grievor's drug results to the Investigating Officer.
>
> 36. It cannot therefore be maintained the Grievor's privacy rights were invaded when he himself agreed to release drug results to the Company.

37. Given the finding on the 2010 MOU, the Grievor's express permission for actual results of the testing to be sent to the Company cannot be contrary to the MOU.

C. Was the Grievor subject to discipline?

Position of the Parties

38. The Company takes the position that the Grievor was subject to discipline, as his test results demonstrate that he was impaired while on duty, thereby breaching HR 203 Alcohol and Drug Policy, HR 203.1, Alcohol and Drug Procedure, the Rule Book for Train and Engine Employees and Rule G.

39. The Union arguments focused primarily on whether the Grievor was subject to testing and whether the 2010 MOU applied, decided above, and whether the Grievor was properly accommodated, discussed below.

Analysis and Decision

28. HR 203.1 (Tab 7), Section 3.1.5, and CROR General Rules – Rule G states:

> The use of intoxicants or narcotics by employees subject to duty, or their possession or use while on duty, is prohibited.
>
> 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.
>
> The use of drugs, medication or mood-altering agents, including hose 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.
>
> 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.

40. The Alcohol and Drug Policy HR 203.1 notes that confirmation cut off levels for cocaine in urine testing are at 100 ng/ml, while the oral fluid cut off levels are set at 8 ng/ml (see Tab 7 Company documents).

41. Arbitral jurisprudence is consistent that on duty impairment for a safety critical job will presumptively result in dismissal. As noted by Arbitrator Moreau in **CROA 4707**:

> "The evidence in this case is clear that the Grievor tested positive for cocaine in both his urine test and the oral swab shortly after the incident. I conclude with the comment that cocaine is an illegal substance which can easily lead to devastating health and addiction consequences. To uphold the grievance in the face of the clear evidence that the Grievor willingly took cocaine prior to starting work would be both contrary to recent arbitration awards of this Office and send the wrong signal to other employees in safety-sensitive positions who deliberately consume a toxic drug like cocaine before reporting for duty."

42. Arbitrator Schmidt in **SHP 726** also confirmed dismissal in similar circumstances:

> *"**An individual in the grievor's position who causes himself to become impaired on the job merits the most severe discipline, absent very compelling mitigating factors.** Not only was the grievor impaired, I must conclude that he has been dishonest about when he had last used marijuana and about his denial of cocaine use. **The Company's decision to discharge the grievor in***

> ***these circumstances was entirely appropriate and should not be disturbed****." (*Emphasis Added*)*

43. Here the Grievor tested at 1442 ng/ml of cocaine metabolite in urine testing and 16 ng/ml of cocaine and 120 ng/ml of cocaine metabolite in oral fluid testing, well above the cut off levels set out in HR 203.1

44. The report of Dr. Snider-Adler (Tab 4D, Company documents) indicates:

> "When the benzoylecgonine quantitative level is higher than the quantitative level of cocaine, the timeframe for us is 2-12. In a chronic user of cocaine however this timeframe appears to increase and use may have occurred up to 48 hours before the test."

45. Here, the Grievor was unclear when he last used cocaine (see Q and A 29, Tab 4, Company documents), but the very high levels found in the oral fluid test at 1800 hours were taken 12 hours after he had begun work (see Q and A 30-33). At Q and A 24, the Grievor agreed with the statement from Dr. Snider-Adler that: "A positive oral fluid test of cocaine and/or BZE indicates use of cocaine in a timeframe prior to the test that correlates with an individual being unfit for safety-critical and safety-sensitive duties".

46. In **CROA 5021**, this arbitrator noted that: "CROA jurisprudence is consistent that going to work impaired will result in dismissal, in the absence of very compelling mitigating factors".

47. Here, I find that the Grievor has breached CROR Rule G, HR Policy 203 and Procedures 203.1 and Rule Book for Train and Engine Employees and dismissal would be appropriate, in the absence of mitigating factors discussed below.

D. Was there a duty to accommodate the Grievor, and if so, has it been met?

Position of the Parties

48. The Union submits that the Grievor has a disability, which the Company failed to accommodate to the point of undue hardship. It argues that the failure of the Grievor to disclose his disability prior to the incident is typical of addicts. It notes the very extensive efforts made by the Grievor to overcome his addiction and maintain sobriety. It points to extensive Court and arbitral jurisprudence in which grievers have been reinstated, subject to strict controls to ensure safety for the public, Company employees and assets, as well as the individuals themselves.

49. The Company argues that the Grievor failed to disclose any drug issue prior to the incident, contrary to the Company Alcohol and Drug Policy and Procedure. It argues that the Grievor knew he had an issue but chose not to reveal it prior to the incident.

The Company submits that as such, the Union has not met its burden of proof to establish a prima facie case of discrimination. Accordingly, the Company is entitled to proceed on a disciplinary basis, where it has established clear grounds for termination.

Analysis and Decision

50. The Canadian Human Rights Act sets out prohibitions against discriminatory actions related to employment:

> 5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public
>
> a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or
>
> b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.
>
> 7. It is a discriminatory practice, directly or indirectly,
>
> a) to refuse to employ or continue to employ any individual, or
>
> b) in the course of employment, to differentiate adversely in relation to an employee,
>
> on a prohibited ground of discrimination.

51. The Supreme Court of Canada in **Stewart v. Elk Valley Coal Corp**. 2017 SCC 30 set out the legal burden to establish a prima facie case of discrimination:

> "Complainants are required to show that they have a characteristic protected from discrimination under the Human Rights Code…; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact"

52 Arbitrator Clarke in **CROA 4667** at paragraphs 31-40, reviewed the requirements to establish prima facie discrimination. He dealt with a similar fact situation to the present matter, with a Locomotive Engineer who was tested with a BAC of 0.08, but with the additional fact that he had consumed alcohol while on duty. He concluded:

> …the TCRC met the three elements needed to demonstrate prima facie discrimination in this case. The evidence in the record reveals that i) LE Paisley suffered from alcohol addiction; ii) he suffered an adverse impact when he lost his employment and iii) that his alcoholism was a factor leading to this adverse impact.

53. Accordingly, the first issue to decide is whether the Union has established that the Grievor has a cocaine addiction. Based on the evidence presented and reviewed below, I find that the Grievor does have a cocaine addiction.

54. During the investigation the Grievor immediately admitted that he had a drug problem:

> Q22 Can you explain why the saliva test would come back at above the Drug concentration limits set by CP?
>
> > Union Objection: The union objects to this question as AB is not medically qualified to answer this.
> >
> > Company Officer: This question is to provide AB a fair opportunity to explain the discrepancy between the drug concentration limits set by CP and the test results of his oral fluid.
>
> A22 I have a problem and have reached out to EFAP Dec. 17th. During that phone call I told them I worked for CP and had a safety sensitive position. They informed me that they will advise CP. I also talked to one of their counselors for about an hour. They also took my information and told me to wait for a phone call from a local counsellor. EFAP phoned me Dec. 27th stating they were having a hard time finding someone around the holidays. On Dec 20th I called telehealth and got a number of a local rehab clinic. When I called, they said it's over a year wait. I have a problem now and need help right away.
>
> […]
>
> Q34 Do you have anything you wish to add to this statement?
>
> A34 First, I am sorry for all of this that took place, it is embarrassing that it took something this big for me to come out and seek help. I never come to work high or drunk or do anything that would put myself or anyone at risk. I have been seeking help and have been trying to go through the right channels. Again, I am sorry for: everything that has happened, everything that has occurred because of my addiction.

55. His treating psychologist, Dr. Guzzo, identified severe symptoms relating to chronic substance use and abuse:

> Mr. AB has been a client of this office since September 21, 2023. He presented with symptoms of anxiety and depression related to chronic substance use and abuse.
> He attended in-person sessions on September 21, 2023; October 16, 2023; November 21, 2023, and January 8, 2024. Mr. Lamoureux was also supported by counsellors at Canadian Mental Health Association (CMHA) and Monarch Recovery Services, who referred him to me given the complexity of his presentation. Mr. Lamoureux had been a chronic user up to that

> time and his substance use and abuse was interfering with his ability to work, to be safe, to socialize, to travel, essentially function in day-to-day living.
> During treatment, Mr. AB reported the development of some severe symptoms which began to interfere with his judgement and perceptions. Given the severity, frequency, and perseverance of his symptoms, it was recommended that Mr. AB seek intensive treatment services that also included psychiatric treatment. His last appointment at my office was January 8", 2024. Therefore, my comments and observations apply to the time period discussed.

56. The Grievor was enrolled in an extensive treatment program with Monarch Recovery Services:

> This letter is to inform you that AB is currently enrolled and participating in Monarch Recovery Services – Men's Connections Counselling Program, and also completed the Men's Day Treatment Program. During his time in Day Treatment, he learned a variety of information related to recovery such as: relapse prevention, mindfulness, and psychoeducation in relation to addiction. Paul is also creating goals and established a wellness plan and relapse prevention plan.
>
> The Men's Day Treatment program began on March 20, 2023 and finished on April 19, 2023. Treatment runs Monday through Friday from 10:00am to 3:00pm. Following this, AB has taken advantage of our Connection's counselling program and has been consistent in attending biweekly, one to one counselling appointments.

57. He also successfully completed a Case Management program with the Canadian Mental Health Association, in which he attended 17 sessions (see Tabs 18-19, Union documents).

58. In addition, he has attended 35 meetings of Narcotics/Alcoholics Anonymous and 14 appointments with Outpatient Addictions and Gambling Services, part of Health Sciences North (see Tab 21, Union documents).

59. Indeed, the Company does not directly contest the addiction of the Grievor, but focuses on the requirement to self-disclose prior to an incident.

60. However, much of the caselaw cited by the Company does <u>not</u> deal with employees with addictions (see **CROA 4707**, **SHP 726**, **CROA 4798**), or with employees who only claim addictions well after the investigation process (see **AH 663**, **Shelter Regent Homes and IWA, Local 1-207, Grievance Paul Marples**). The Company relies on

CROA 5107, in which Arbitrator Yingst-Bartel found that the Grievor chose not to comply with the Company Policy to self disclose:

> When viewed wholistically and comprehensively, the evidence supports – and I so find – that the Grievor made a conscious decision not to follow the Company's disclosure requirement and instead to rely on his own judgment and his own efforts to treat his addiction(s), which were known to him. I am satisfied the Grievor had full awareness he had a disability and was not impaired by that disability from disclosing that information to the Company.
>
> I am further satisfied the Grievor did not disclose that disability to the Company as required, because he simply did not "agree" with any requirement to disclose his information to the company, which position was maintained at his Investigation. He maintained – even after recovering from his alcoholism – that he did not have to disclose his addictions to the Company.
>
> There is a deliberateness about the Grievor's choices that is often not seen in these types of disputes. In making his choice not to disclose and continue working in his safety-critical role throughout both of his addictions, the Grievor created significant risk for the Company; for his fellow employees; and for the public.

61. I find that **CROA 5107** is distinguishable from the present matter, as here the Grievor had not been diagnosed with an addiction, or gone through an addiction recovery program, prior to the incident.

62. In my view, the Grievor only confronted his addiction after the traumatic incident:

> Q23 Do you understand that, Appendix B: HR 203 Alcohol and Drug Policy, Sep 1, 2019 - update, 1.3 states that "CP recognizes that substance use disorders are treatable illnesses" however 2.7 "all employees are accountable for their actions and are expected to comply with the policy and procedures, including those who may have an alcohol and/or drug use problem."?
>
> A23 Yes, but it took a traumatic experience to make me realize I don't want to live like this anymore, I am seeking out help now and doing everything I can to treat this.
>
> […]
>
> Q34 Do you have anything you wish to add to this statement?
>
> A34 First, I am sorry for all of this that took place, it is embarrassing that it took something this big for me to come out and seek help. I never come to work high or drunk or do anything that would put myself or anyone at risk. I have been seeking help and have been trying to go through the right channels. Again, I am sorry for: everything that has happened, everything that has occurred because of my addiction. (underlining added)

63. I therefore find that the Union has established that the Grievor had a drug addiction, the first branch of the tripartite test.

64. There can be little doubt that the Grievor suffered an adverse impact when he lost his employment, and the second test has therefore been met.

65. The third test, that the addiction played a role leading to the adverse impact, is also met. The Grievor was a chronic user and abuser of cocaine, as identified by his psychologist. Even if he did not use it while on the way to work or on the stand, he clearly regularly used cocaine, to the point that, as identified by Dr. Guzzo: “(the) abuse was interfering with his ability to work, to be safe, to socialize, to travel, essentially function in day-to-day living” (see Tab 20, Union documents).

66. I therefore find that the Union has made out a prima facie case of discrimination.

67. The actions and submissions of the Company focused on the disciplinary aspects of the matter. There was little to no evidence led or submissions made on whether accommodation would result in undue hardship to the Company.

68. The Grievor has clearly made very extensive efforts to overcome his addiction. I am further comforted by the fact that he tested negative for drugs on November 22, 2023 following his addiction recovery program (see Tab 15, Union documents) and again on May 7, 2025, shortly before the arbitration (see Tab 23, Union documents). He has also been employed in a safety sensitive industry for approximately the last 18 months.

69. Accordingly, I find that the Company has not established undue hardship.

70. The Grievor should be reinstated subject to strict conditions to ensure his on-going sobriety and the protection of the public, other employees, the Company and the Grievor himself. Multiple CROA cases have found that such reinstatement without compensation is appropriate in similar circumstances (see, for example, **CROA 3355**, **CROA 4054**, **CROA 5021**, **CROA 4652**, **AH 725**, **CROA 4773**).

Conclusion

71. The grievance is partially allowed, the Grievor reinstated without loss of seniority, but without compensation. The Parties are directed to negotiate an appropriate Return to Work protocol which will ensure the safety of all concerned.

72. I remain seized for all questions of interpretation or application of this Award.

July 21, 2025

JAMES CAMERON

ARBITRATOR