

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 4695-M

Heard in Montreal, October 10, 2019

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the dismissal of Conductor D. MacDonald of Calgary, Alberta.

JOINT STATEMENT OF ISSUE:

Following an investigation, Mr. MacDonald was dismissed on September 15, 2017 for the reason as follows: "please be advised that you have been dismissed from Company Service for your violation of Canadian Pacific Policy OHS 4100 Alcohol and Drug Policy"

The Union's Position:

The Company did not respond to the Step 1 grievance. The Union submits that the investigation was not conducted in a fair and impartial manner per the requirements of the Collective Agreement. The Union also asserts that the Company breached the June 16, 2010 Substance Test Agreement in its conduct of this investigation. As a result, the Union contends that the discipline is null and void and ought to be removed in its entirety and Mr. MacDonald be made whole.

The Union contends that the Company conducted a post-incident substance test in an improper manner, violating the Alcohol and Drug Procedure Policy and the June 16, 2010 Substance Test Agreement as a result.

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. In the alternative, the Union contends that Mr. MacDonald'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. MacDonald 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's Position:

The Company has reviewed the Union's grievance, the statement and investigation package and cannot agree with the Union's contentions. The Grievor was appropriately dismissed for a violation of Canadian Pacific Policy OHS 4100 Alcohol and Drug Policy.

The Company was investigating a derailment involving the Grievor's RCLS assignment – a serious incident. Therefore, the Grievor was properly required to submit to a drug and alcohol test.

In light of the foregoing and all material in the investigation, the Company maintains the discipline assessed was appropriate, warranted and just in all the circumstance. Accordingly, the Company cannot see a reason to disturb the discipline assessed.

FOR THE UNION:
(SGD.) D. Fulton
General Chairperson

FOR THE COMPANY:
(SGD.) C. Tsoi
Labour Relations Officer

There appeared on behalf of the Company:

M. Smyth – Counsel, Hicks Morley, Toronto
D. Pezzaniti – Assistant Director, Labour Relations, Calgary

And on behalf of the Union:

M. Church – Counsel, Caley Wray, Toronto
D. Fulton – General Chairperson, Calgary
D. Edward – Senior Vice General Chairperson, Calgary
T. Haug – Local Chairperson, Calgary
W. Apsey – General Chairperson, Smith Falls
D. MacDonald – Grievor, Calgary

AWARD OF THE ARBITRATOR

The grievor, an employee of some sixteen years' service, was discharged on September 15, 2017 for the following reason:

“- - - violation of Canadian Pacific Policy OHS 4100 ALCOHOL & DRUG POLICY”

The material portions of that policy are the following:

- All employees must report for work in a condition that enables them to safely and effectively perform their duties.
- All employees must report fit to work and remain fit for work as scheduled and be able to perform their duties free from the negative effects, including the after effects of alcohol, illicit or illegal drugs, other mood altering substances or medications, any of which can have the potential to adversely affect the way a person thinks, feels or acts.

The issue in this case is whether or not the grievor was in violation of that policy at the material times.

The matter arises from an incident which occurred on August 17, 2017. The incident is sufficiently described in the memo of the Assistant Superintendent, which is as follows:

At approximately 23:20 on Thursday August 17th, the CS-21 industrial job derailed two empty tank cars on track PTO1A after shoving over a derail. The cars were also foul of track PTO1. The foreman was in control of the movement at the time of the derailment. The crew had just finished turning the tank cars and the power on the south wye, so that they would be able to spot a customer on Q lead. The foreman forgot that his movement was now facing the opposite way, and instead of reversing his movement, he went forward causing the two tank cars to go over the derail.

The grievor was part of the crew but had no involvement in the movement which the conductor was controlling, and which was some five or six cars west of where the grievor was located at the time. He was quite properly occupied on another task, and could take no action to avert the derail. The grievor was nevertheless subjected to a substance screening test. It may be that the company considered it appropriate to test all members of a crew when an incident such as this occurs during their shift. 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.

The results of the grievor's substance test were as follows:

- NEGATIVE for breath alcohol
- POSITIVE Urine Drug Test
- NEGATIVE Oral Fluid Drug Test

When asked at the investigation to explain the positive urine drug test the grievor replied:

Yes, I smoked marijuana after my shift the night before at 01:45.

The grievor was called to work as a Helper for the shift in question at 17:30 that day.

The negative results of the breath alcohol and oral fluid tests indicate that the grievor was not impaired while on duty on August 17. The positive urine drug test indicates that there were residual traces of marijuana in the grievor's body at that time. The parties agree that traces of marijuana may remain in the body for a prolonged period – a month or more – following consumption of the drug. 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. From all of the material before me I find as a fact that the grievor was not impaired during the course of his shift on August 17, 2017. I further find that on that day the grievor reported

for work in a condition that enabled him to safely and effectively perform his duties. He was fit to work and remained fit to work as scheduled. He was not in violation of the Alcohol and Drug policy as set out at the beginning of this award.

This award is consistent with the arbitral jurisprudence on similar matters. Reference may be made to **CROA 4240**, where arbitrator Picher stated, at p. 4 of the award:

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 - - - 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 material before me does not support the allegation that the grievor was in violation of the company's policy. Accordingly, the grievance is allowed. It is my award that the grievor be reinstated in employment forthwith, without loss of seniority or other benefits, and with full compensation for loss of earnings.

October 28, 2019



J. F. W. WEATHERILL
ARBITRATOR