

**IN THE MATTER OF AN ARBITRATION  
(AH 717)**

**BETWEEN**

**TEAMSTERS CANADA RAIL CONFERENCE**

(the "Union")

**AND**

**CANADIAN PACIFIC RAILWAY**

(the "Company")

**RE: Grievance of Mark Smith**

**ARBITRATOR:** John M. Moreau QC

**Appearing for The Union:**

Aleisha Stevens	- Counsel, Caley Wray
Greg Edwards	- General Chairman, LE West
Harvey Makoski	- Senior Vice-General Chairman, LE West
Ed Mogus	- General Chairman, LE East
Greg Lawrenson	- Vice General Chairman, LE East
Wayne Apsey	- General Chairman, CTY East
Dave Fulton	- General Chairman, CTY West
Doug Edward	- Senior Vice General Chairman, CTY West
Ryan Finnon	- Vice General Chairman, CTY West
Rob Bittante	- Local Chair
Dr. D. Rosenbloom	- Expert Witness
Mark Smith	- Grievor

**Appearing for The Company:**

Don McGrath	-Manager, Labour Relations
Trisha Gain	-Legal Counsel, Litigation and Labour
Dr. M. Snider-Adler	-Expert Witness

A virtual hearing was held on December 21, 2020

## **EX PARTE STATEMENT OF THE UNION**

### **DISPUTE:**

The Union advanced an appeal of the dismissal of Locomotive Engineer Mark Smith of Kamloops, BC.

### **STATEMENT OF ISSUE:**

Following an investigation, Engineer Smith was dismissed for the following reasons,

For your non-negative for cause drug and alcohol test completed June 9th, 2019. A violation of CROR General Rules Section G, CP Rule Book for Train and Engine Employees item 2.2 D (i), (ii), (iii) and policy # HR203 – Alcohol and Drug Policy (Canada).

Notwithstanding that the above-mentioned incident warranted dismissal in and of itself, based on your previous discipline history this incident also constitutes a culminating incident which warrants dismissal.

### **UNION'S POSITION:**

On January 13, 2020, the Union properly submitted a grievance regarding the Company's decision to dismiss Engineer Smith. The Company provided a link to utilize their grievance management system to obtain the grievance response. It is the Union's position that we have, in fact, not received a response to this grievance in violation of the Collective Agreement, Arbitrator Weatherill's recent award and applicable jurisprudence.

The Union cannot agree with the harsh penalty of dismissal. The Union asserts that Engineer Smith has maintained that he did not ingest or use any products that would have led to a positive Oral Swab test. As indicated on the Company's test results, Engineer Smith's urine test was returned negative, the Union contends that this contradicts the oral test and is not conclusive of a positive test. Further, Engineer Smith and the Union were not provided with any reasons for this contradictory test.

As a result of having concerns about the accuracy of the testing, on July 15 and 19, 2019 Engineer Smith had his urine tested through his Physician's office. On August 2, 2019 the Union went a step further and arranged a hair follicle test and urine test for Engineer Smith. All of the test results were returned negative for cannabis or any other prohibited drugs, which categorically questions the results of the saliva tests performed by the Company on July 9, 2019. The results of our testing were provided to the Company on August 19, 2019.

Based on our results, the Union contends that the initial Company test was inaccurate and that the Company failed to prove without a doubt that Engineer Smith was impaired while at work. As a result, the Company was not free to terminate his employment. The

Company's decision to dismiss Engineer Smith was therefore excessive, unwarranted and unjustified in the circumstances.

Engineer Smith is a long service employee with twenty-one years of dedicated service at the time of his dismissal and possesses an admirable work record, there is nothing to base his previous discipline history on, that would constitute or warrant dismissal.

The Union requests that the Arbitrator reinstate Engineer Smith without loss of seniority and that he be made whole for all lost earnings and benefits with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit. The Company has failed to respond to the Union's request.

***For the Union:** Greg Edwards, General Chairman. TCRC LE – West*

*March 31, 2020*

## **EX PARTE STATEMENT OF THE COMPANY**

### **DISPUTE:**

The Union advanced an appeal of the dismissal of Locomotive Engineer Mark Smith of Kamloops, BC.

### **STATEMENT OF ISSUE:**

Following an investigation, Engineer Smith was dismissed on July 4, 2019, for the following reasons:

“For your non-negative for cause drug and alcohol test completed June 9th, 2019. A violation of CROR General Rules Section G, CP Rule Book for Train and Engine Employees item 2.2 D (i), (ii), (iii) and policy # HR203 – Alcohol and Drug Policy (Canada).”

Notwithstanding that the above-mentioned incident warranted dismissal in and of itself, based on your previous discipline history this incident also constitutes a culminating incident which warrants dismissal.

### **COMPANY POSITION:**

On June 9, 2019, Mr. Smith was the Locomotive Engineer on train 873-028 that entered the limits of a CN Foreman's Rule 42 Protection without the permission or authority of that Foreman. This was a very serious operating incident. As a result, a Post Incident Alcohol and Drug Test was conducted with the crew.

Mr. Smith's Post Incident Alcohol and Drug Test was conducted through DriverCheck and indicated a Positive – Oral Fluid Drug Test result.

During his formal investigation Mr. Smith denied the use of or consumption of any cannabis related products.

The Company submits this is contrary to the results of a Positive – Oral Fluid Drug Test taken at the time of the incident on June 9, 2019.

The Union challenged the Post Incident Test results and subsequently arranged for their own drug testing. A Drug Urine test was taken from the grievor 36 days after the incident; a Hair Follicle Test was taken 54 days after the incident. The Company submits that these tests have no relevance to the original test results provided by the Company's Post Incident Test provider.

Based on the DriverCheck results, the Company maintains that the June 9, 2019 Substance Test was entirely accurate and clearly demonstrated that Locomotive Engineer Smith was impaired while at work. As a result, the Company justifiably terminated Mr. Smith's employment for violating CROR 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).

The Union's attempt to admit post dismissal medical evidence taken long after the triggering post-incident event is irrelevant, inadmissible and should not be accepted by the Arbitrator in any event.

As per the Company's Alcohol and Drug Policy, Mr. Smith had a right to request a urine split sample test within 72 hours of receiving his results if he wanted to contest/verify the initial post-incident findings. At no time after the DriverCheck results became known did Mr. Smith request a urine split sample test. As a result, he waived any right to challenge the results.

Discipline was determined following a review of all pertinent factors, considering all mitigating and aggravating factors.

For all the reasons brought forth through the grievance process, the Company's position continues to be that the discipline assessed was just, appropriate and warranted in all the circumstances.

Accordingly, the Company cannot see a reason to disturb the discipline assessed.

## **UNION'S POSITION**

The Union disagrees with the Company's position.

***For the Company:*** Dave Guerin, Senior Director, Labour Relations, CP,

*June 11, 2020*

# AWARD

## INTRODUCTION:

The grievor, a Locomotive Engineer (“LE”), was called into work at 04:50 on June 9, 2019 along with Conductor Patrick Welch. They were assigned to operate a coal train, 873-028, from Kamloops to Boston Bar, BC. There were Track Maintenance forces performing maintenance duties along the route. A Rule 42 protection order was in place between mile 58 and 60 Ashcroft Subdivision under the direction of CN Foreman Kotyk. There is no dispute that the crew on train 873-028 crossed from CP to CN trackage and operated their equipment approximately a half-mile into the limits of Foreman Kotyk’s Rule 42 without first obtaining authority to do so. Once the crew realized they had omitted to obtain Foreman Kotyk’s instructions, they brought their train to a stop at 08: 28<sup>1</sup>.

The grievor and his Conductor were taken for post-incident drug and alcohol testing. The grievor attended at a testing centre at 14:53 on June 9, 2019 to provide breath, alcohol and urine samples. The test confirmed that the following:

- Negative                      Breath alcohol test
- Positive                      Oral fluid drug test              *Screen: 4ng/ml   Confirm: 2ng/ml*
- Negative                      Urine Drug test.

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<sup>1</sup> Both the grievor and his Conductor Mr. Welch were issued a 30-day suspension for the incident. The grievor’s suspension for the Rule 42 violation is the subject matter of a separate grievance.

The grievor attended at an investigation on June 19, 2019. He was asked about the last time he used a drug which resulted in a positive reading on the oral fluid drug test:

**Q 41** Understanding your right to privacy, are you willing to enter the type of drug that was found in your system on June 9, 2019 into this investigation?

A Cannabis/THC

**Q 42** Prior to your tour of duty on train 873-028, June 9, 2019 when was the last time you used a drug that would indicate a positive on the oral fluid drug test?

A Union objects to the question – the union objects to the self-incriminating question as the purpose of this investigation is to determine the facts.

Please answer the question

A To my knowledge I did not ingest or use any cannabis products 24 to 36 hours prior (which is the time frame I was advised by the lady at We Care would affect the swab test). I was at a friend's BBQ for dinner with my family from about 1500 to 1930 on June 8. I took my family home and then went to bed around 2100 and was later called to go to work and felt fit for duty. Earlier in the day on June 8<sup>th</sup> I took an antihistamine and multi vitamin and again before going to work June 9<sup>th</sup>, I usually take a multi vitamin daily and the antihistamine as required especially this time of year due to allergies.

**Q 43** Referencing your answer to Q 42, you indicate that you did not ingest or use any cannabis products 24 to 36 hours prior to the test. Have you used cannabis products previous while reporting for work or remained at work under the effects of cannabis from any source, including acute, chronic, hangover or after effects of such use.

A Union objects to the question – the union objects to the self-incriminating question as a purpose of this investigation is to determine the facts.

Please answer the question

A No

The grievor was dismissed from his employment on July 4, 2019 for violating CROR Rule G, CP Rule Book for Train and Engine Employees item 2.2 d (i), (ii), (iii) and for breach of policy # HR203 – Alcohol and Drug Policy (Canada).

Both the Union and the Company called expert testimony. Dr. Melissa Snider-Adler, M.D., testified on behalf of the Company. Dr. David Rosenbloom, Pharm D., testified on behalf of the Union. Both experts provided extensive reports with respect to their interpretation of the test results and the likelihood of the grievor's impairment while on duty on July 9, 2019.

#### Dr. Snider-Adler

Dr. Snider Adler notes early on in her report the relationship between impairment and cannabis consumption (p.6):

5. Impairment from cannabis is variable and there are many factors that play a role in determining the length of time one is impaired, the extent of the impairment and the risks when performing safety sensitive and safety critical duties. There is no way to predict who will have impairment that lasts for hours and when there will be impairment that last days. The variability seen in studies is due to the fact that different studies look at different outcomes, with different complexities, use different THC strengths, and test different cohorts of individuals. *It is not possible to predict impairment from cannabis.*

(emphasis in italics)

Dr. Snider-Adler notes in her report that an oral fluid test, with a cut-off of 2ng/ml as was used in the case of the grievor, has a detection timeframe of up to 24 hours. Her conclusions from her studies in that regard is that oral consumption of cannabis takes longer to produce peak blood levels and the effects last significantly longer than smoked cannabis, with acute intoxication lasting 12-24 hours or longer. Assuming that the grievor was not a heavy user, Dr. Snider-Adler concludes that his oral fluid test is consistent with use of cannabis within 12 to 24 hours prior to the test. That would put his cannabis use into a time period between late afternoon Saturday, June 8, 2019 through to the next day, Sunday, June 9, 2019.

Given her view that the grievor was not a heavy user, Dr. Snider Adler also concludes that the negative test for urine does not negate the positive oral fluid test. She states in that regard (p. 6):

6. ...The negative tests [urine and alcohol] do not negate the positive oral fluid test and these are not evidence of the lack of validity or accuracy of the oral fluid result.

Dr. Snider Adler also comments on the effects of THC in the oral fluid testing (p.8):

For other substances tested in the oral fluid, the drug and/or the metabolic (break-down product produced by the body) is tested. Essentially, after ingestion or inhalation (by way of vaporization or smoking) THC is left in the oral cavity for hours until degradation, absorption and break down to its metabolites...

The higher the THC concentration use, the longer the remnants linger in the oral fluid and therefore stay positive on an oral fluid test. At the same time, the higher the concentration of THC (the psychoactive component of cannabis) the more impairing the drug is and the longer the impairment is thought to last...



Dr. Snider Adler concludes her interpretation of the post-incident tests as follows (p.16):

There is no doubt that there was use of cannabis that likely occurred well before 24 hours prior to the testing event. The use of cannabis in this timeframe significantly increases the risk in the workplace. Impaired judgment, as well as the impairment seen in other cognitive abilities listed above, are likely to have been present when the oral fluid test was conducted and at the time of the incident.

Dr. Rosenbloom:

Dr. Rosenbloom explains the cannabis journey in the human body (p.2):

The clearance of cannabinoids from the human body is a complex process. THC distributes rapidly into adipose (fat) tissue from where it is slowly released over time. There is further recycling involving the kidney and liver, and the half-life (time by which the blood concentration falls by half) can be very long. Despite the fact that chronic users can take weeks to months to eliminate THC in the urine, the psychoactive effects (“the trip”) only lasts 1 to 4 hours after smoking. Hence a positive urine test cannot be equated with any psychoactive or impairing effects as it could take hours to days for the metabolite to clear from the urine. *As will be demonstrated below, the saliva can also test positive for weeks after smoking and a positive test, therefore, may or may not reflect the recent use.*  
(emphasis added in italics)

Dr. Rosenbloom then goes on to say that the substance measured in a urine test is a metabolite or breakdown product of THC. He notes the following (p.2):

As far as the urine is concerned, the substance actually measured in the urine is a metabolite or breakdown product of THC--THC-COOH--which is pharmacologically inactive. In other words, the measured substance -THC-COOH is a biomarker for having smoke/ingested (or been exposed to) THC in the past for a time period of minutes to months previously. In itself, it does not relate to blood levels of the active THC. In certain circumstances, blood concentrations can be linked with impairing effects. However, this

issue is of little relevance here. *A negative urine test means that the THC has left the body and there is no ongoing impairing effect.*

(emphasis added in italics)

Dr. Rosenbloom disputes Dr. Snider-Adler view that the higher the THC concentration, the longer the remnants of THC linger in the oral fluid resulting in a positive test. He states in that regard (p.5):

Dr. Snider Adler talks about the window of detection of THC (p.8/21). She tries to connect the potency of today's products with the ability for its effects to last longer (not in dispute) but tries to link this with detection in oral fluid (OF) for which there is no scientific evidence, especially in light of a negative urine test. This is crucial in light of the fact that saliva can test positive weeks after use (studies cited below).

With respect to Dr. Snider-Adler's view that intoxication from cannabis can last up to 24 hours, Dr. Rosenbloom cites studies that dispute this assertion (p.7):

None of the higher-quality studies...found deficits at 24 hours, although one study found deficits at nine hours.

Dr. Rosenbloom further states in that regard (p.10):

I agree with Dr. Snider-Adler's statement that the two consecutive negative urine tests [July 19, 2019 and August 2, 2019] are consistent with no use of cannabis for a few days prior to the test. I disagree that the positive oral test is consistent with cannabis used 12 - 24 hours prior to the test as the studies have demonstrated that such tests could be positive for weeks after smoking cannabis... I also disagree with the inference that should a person have smoked within 12-24 hours that they would still be impaired and I have reviewed the literature that brings me to that conclusion.

Dr. Rosenbloom concludes as follows (p.11):

I therefore disagree with Dr. Snider-Adler's conclusions about the duration of impairment following cannabis use as measured by saliva levels and I assert that there is no proven link between oral fluid levels and impairment. Dr. Snider-Adler cited no solid evidence to support this proposition; this is because evidence points to the fact that there is no link.

Dr. Snider-Adler's Reply to Dr. Rosenbloom:

Dr. Snider-Adler disagrees with Dr. Rosenbloom's initial opinion that negative urine tests means "*...THC has left the body and there is no ongoing impairing effect*" and also his conclusion "*...Demonstration of saliva THC is not evidence of impairment, and especially in light of negative urine tests.*" (p.7). Dr. Snider Adler comments in that regard (p.7):

In fact, the evidence and research are not in agreement with his conclusions. A positive oral fluid test and negative urine test is evidence of very recent use of cannabis (or a urine that has been adulterated or substituted-meaning that it is not reflective of his actual urine THC-COOH concentration).

Dr. Snider-Adler goes on to conclude with respect to the grievor (p.8):

4. If an individual who does not use cannabis regularly, as it appears that Mr. Smith does not based on his other negative tests, with smoked cannabis the length of time of detection has been shown to occur only a few hours when using a cut-off level of 2 ng/mL.

Dr. Snider-Adler submits that Dr. Rosenbloom's assertion that the effects of cannabis do not last longer than 1-4 hours is not a belief that is shared by numerous organizations including Health Canada, Transport Canada and the RCMP. She further notes that

numerous companies across Canada (p.9) “...use oral fluid as a means of detecting recent use of cannabis; use within 24 hours depending on the cut-off levels used...”.

Dr. Snider-Adler concludes her Reply comments to Dr. Rosenbloom’s report as follows (p.9):

Lastly, based on the negative tests that followed this workplace test, and the results of the urine and oral fluid post-incident tests, it is clear that Mr. Smith is not a frequent user of cannabis. As such, taking into consideration a positive oral fluid test and a negative urine test, regardless of whether the cannabis was smoked, vaporized or ingested the use of cannabis occurred shortly prior to the test. Based on this there was a high likelihood of impairment at the time of the test.

## **SUBMISSIONS:**

### The Company

The Company, relying on the expert testimony of Dr. Snider-Adler, maintains that the negative urine test of June 9, 2019 does not preclude the presence of THC metabolite in the grievor’s urine. The negative urine test, consistent with studies in this area, only indicates that it was below the cut-off level used by the testing firm. Further, Dr. Snider-Adler is of the view that, assuming the grievor was not a heavy user, the positive oral swab test is indicative of cannabis being used some 12-24 hours prior to the test. Although Dr. Snider-Adler notes “...It is not possible to predict impairment from cannabis” (p. 6), she nevertheless concludes cannabis use by the grievor well before 24 hours prior to the

testing event significantly increases the likelihood of impairment at the time the test was conducted post-incident.

Counsel for the Company submits that, in the end, the expert evidence of Dr. Snider-Adler supports the argument that a negative urine test does not negate a positive oral swab test. The positive oral swab test standing alone is a sufficient basis to find that the grievor's cognitive abilities were compromised while on duty. Indeed, the evidence does not support a finding that the grievor was not impaired at the time of the incident. The slightest risk of impairment in such a safety-sensitive position cannot be tolerated by the Company and the grievance should therefore be dismissed.

### The Union

The Union notes that Dr. Rosenbloom agrees in his report with the statement of Dr. Snider-Adler that the negative urine tests (July 19, 2019 and August 2, 2019 tests undertaken by the grievor) are “...consistent with no use of cannabis for few days prior to the test” (p.10). While he also acknowledges that cognitive domains “...can be impaired for up to at least 4 hours following smoking (or ingestion)...” (p.8), he disagrees with Dr. Snider-Adler's assessment that the positive oral test is consistent with cannabis use 12-24 hours prior to the test. Dr. Rosenbloom's also concludes from the studies he cited that oral fluid tests can be “positive for weeks after smoking cannabis” (p.10). He further disagrees with Dr. Snider-Adler “...with the inference that should a person have smoked

*within 12-24 hours that they would still be impaired and I have reviewed the literature that brings me to that conclusion” (p. 10).*

The Union submits that the expert evidence from Dr. Rosenbloom indicates that there should have been a positive urine test had the grievor recently smoked or ingested marijuana. The absence of a positive urine test indicating the presence of THC leads to the conclusion that the grievor, who testified that he went to bed at 21:00 on July 8, 2019, had not smoked or ingested cannabis when he reported for work the following day at 04:50 or at least the levels of THC were not determined to be significant. Even assuming the oral swab test indicates recent use, the heightened effects would have dissipated over the time between when the grievor reported for duty at 04:50 and when he was tested at 14:53.

## **DECISION**

The facts in this case are similar to **CROA & DR 4400** where the grievor was taken for substance abuse testing after he failed to obtain proper authority to occupy a track in breach of CROR rules. The grievor in that case admitted to smoking marijuana at a poker game two nights before he reported for duty. He maintained that he did not have a substance abuse problem, never reported for duty impaired or been in possession of any substance while on duty. He tested negative for breath alcohol and oral fluid but tested positive for metabolites in his urine. The Company terminated the grievor relying on the positive urine test as evidence of impairment. Arbitrator Silverman, citing **CROA 4240**,

reinstated the grievor on the basis that a positive urine test alone did not establish impairment.

There are numerous cases from this office where drug tests have been conducted with similar results of a positive urine test and a negative oral fluid test. The unanimous view of this office over the years has been to find that a positive urine test standing alone is an insufficient basis to support a finding of impairment. A recent decision of Arbitrator Hornung in **CROA& DR 4729** summarizes the arbitral law in this area:

13. There is nothing to be gained by re-telling the well cultivated jurisprudence which has addressed marijuana testing and impairment in similar cases. In his decisions (**CROA 4706, CROA 4709 and 4712**), Arbitrator Moreau thoroughly canvasses the relevant case law and concludes as follows:

*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 in 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. CROA&DR 4729 5 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:*

*In 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 CROA&DR 4712 – 8 – 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.***

**(CROA 4709; at pp. 9-10; emphasis added):**

14. I agree with, and adopt, the reasoning of Arbitrator Moreau.

15. For the purposes of this Office, the law with respect to the ingestion of marijuana and the determination of impairment is unequivocally settled. Trace marijuana in the urine is not evidence, in and of itself, of impairment and its existence does not warrant a discipline of dismissal.

The Company, through the expert testimony of Dr. Snider-Adler, submits that a finding of a positive oral fluid test, even when the urine test is negative, supports a finding of impairment. Dr. Rosenbloom is of the view that there is *"no proven link between oral fluid levels and impairment"*. (p.11)

What is clear from the reports of both Dr. Snider-Adler and Dr. Rosenbloom is that the studies show that measuring impairment from cannabis is an inexact science. As Dr. Snider-Adler notes (p.6): *"Impairment from cannabis is variable and there are many*



*factors that play a role in determining the length of time one is impaired, the extent of the impairment and the risks when performing safety-sensitive and safety-critical duties". She concludes in the same paragraph: "It is not possible to predict impairment from cannabis".*

A central area of debate between the two experts is the time the cannabis remains in the body system in order to reach the threshold of "at or above" the cut-off level of 2 ng/mL. Dr. Snider-Adler's analysis concludes that it is unlikely the grievor was a regular user of cannabis given the two other negative urine tests of July 19, 2019 and August 2, 2019. In her view, *"...the oral fluid test is consistent with use of cannabis within 12-24 hours prior to the test"* (p. 6). She notes in her Reply report: *"In summary, based on a comprehensive review of the literature, when using a cut-off level of 2 ng/mL, most individuals will test below this cut-off level well before 24 hours (casual users of cannabis in the studies reviewed tested positive at 2ng/mL or above for up to 4 hours in the study by Niebala et al., 2001)".* (p. 6). Dr. Snider-Adler's conclusion, based on her analysis, indicates recent cannabis use (12-24 hours) by the grievor. That recent use, as demonstrated by the readings from the oral fluid test, leads Dr. Snider-Adler to conclude that *"...there was high likelihood of impairment at the time of the test"*. (p.9)

As the Union pointed out in its brief, Dr. Rosenbloom agrees with Dr. Snider-Adler *"that the two consecutive negative urine tests [July 19, 2019 and August 9, 2019] are consistent with no use of cannabis for a few days prior to the test."* (p.10 Dr. Rosenbloom/ p. 17 Dr. Snider-Adler). Dr. Rosenbloom takes issue, however, with Dr. Snider-Adler's opinion that the positive oral test is consistent with cannabis use 12-24 hours prior to the

test. In his view, “...*the studies have demonstrated that such tests can be positive for weeks after smoking cannabis... I also disagree with the inference that should a person have smoked within 12-24 hours they would still be impaired and I have reviewed the literature that brings me to that conclusion*”. (p.10). Dr. Rosenbloom then points out that Dr. Adler-Snider does not mention other studies, including the study by Niebela et al, “...*that they found OF [oral fluid] THC results up to 34 hours after smoking.*” (p. 10) He concludes “...*the bottom line in all these studies is that OF/saliva testing is unreliable.*” (p.11).

With all due respect to Dr. Snider-Adler I find the conclusions of Dr. Rosenbloom to be more persuasive on the facts of this case. I am more convinced by Dr. Rosenbloom’s supporting studies which indicate that oral THC results can remain in the oral cavity for some 24, or even 36 hours, after an oral swab test. The facts here are that the grievor reported for work at 04:50 and was not tested until 14:53. The fact that the grievor tested just over the cut-off of 2 ng/mL (4ng/mL screen) on an oral swab test well past the 6-hour mark (indicated in the studies cited by Dr. Snider-Adler for testing positive) supports Dr. Rosenbloom’s view of the lingering presence of THC metabolites (“*such tests can be positive for weeks after smoking cannabis*”) in his saliva from past use rather than any recent use.

Neither the results of the oral fluid test, standing alone, nor the actions or testimony of the grievor lead on balance to a conclusion of recent cannabis use, which is a requisite foundation for any finding of impairment. The evidence of past rather than recent use is

reinforced by the results of the negative urine test which was part and parcel of the three tests (alcohol, urine, oral swab) administered on the date of the incident, June 9, 2019.

I would add that the findings in this case are specific to the allegation of impairment while the grievor was on duty on June 9, 2019 as a result of alleged recent cannabis use. This case can be distinguished from **CROA 4742**, cited by the Company, where the grievor, unlike the facts in this case, admitted to smoking marijuana the previous evening. In addition, Arbitrator Hornung relied on the uncontradicted expert opinion of Dr. Snider-Adler testifying on behalf of the Company to support a finding of impairment based on both a positive urine test and an oral swab test. (The Union did not call any expert evidence as they did in the present case).

The facts in this case are different in that there is no admission of recent use by the grievor; no evidence of a combined positive oral swab and urine test; and, what I find to be persuasive expert evidence of Dr. Rosenbloom over that of Dr. Snider-Adler regarding the absence of a reliable link between an oral swab test reading of 4ng/mL (using a cut-off or 2ng/mL) and impairment.

I would also add that in **CROA 4743**, another case cited by the Company, the evidence involved a combined positive urine and oral swab test for cocaine above the Company cut-off levels. Arbitrator Hornung dismissed the grievance citing his reliance on the uncontradicted evidence of Dr. Snider-Adler regarding her conclusions on impairment.

He also acknowledged sharing the logic and sentiments of this arbitrator when it comes to dealing with a positive test for the illegal substance cocaine cited in **CROA 4707** (p.6):

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.

Finally, I would add that I do not place any weight on the hair test of August 2, 2019. As Dr. Rosenbloom indicated in his report: *“The hair test is subject to many false positives, as alluded to by Dr. Snider-Adler. The finding is not helpful either way and is not, to my knowledge, part of the standard testing correlating drug measurement with impairment.”* (p. 11).

## **CONCLUSION**

The grievance is upheld. The grievor shall be reinstated to service without loss of seniority and shall otherwise be made whole. I shall retain jurisdiction should any issues arise in the implementation of this award.

Dated at Calgary, this 4<sup>th</sup> day of January, 2021



**JOHN M. MOREAU, Q.C.**

**ARBITRATOR**