

IN THE MATTER OF AN ARBITRATION

BETWEEN

**CANADIAN PACIFIC RAILWAY COMPANY
(the “Company”)**

-and-

**INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
SYSTEM COUNCIL NO.11
(the “Union”)**

RE: Grievance of S&C Maintainer, Andrew Jones
Grievance No. 2050-042413

ARBITRATOR: CHRISTINE SCHMIDT

APPEARANCES FOR THE COMPANY:

Mike Moran - Labour Relations Officer

APPEARANCES FOR THE UNION:

Ken Stuebing - Counsel
Brian Strong - Senior General Chairman
Lee Hooper - Assistant General Chairman
Brad Kauk - Former Local Representative

A hearing in this matter was held in Toronto, on September 23, 2014.
Ad-hoc matter CS 2014-097.

AWARD

1. The statement of dispute and ex-parte statement of issue filed with me reads as follows:

Dispute:

Appeal of the Company's decision to hold S&C Maintainer Andrew Jones wrongfully out of service and suspended for 14 days from March 6 to March 20, 2013 and appeal of the Company's decision to subject Mr. Jones to a substance test.

Union's Exparte statement of Issue:

On March 6, 2013, S&C Maintainer Andrew Jones was involved in a Motor Vehicle Accident with a third party in Lloydminster, Saskatchewan. Mr. Jones contacted a vehicle ahead of him which resulted in minimal damage to both vehicles. Mr. Jones reported this accident to his immediate Supervisor located in Saskatoon, Saskatchewan. After some delay, Mr. Jones was removed from service pending a substance test and an investigation of the incident. Mr. Jones submitted to a substance test on March 6, 2013 shortly after the motor vehicle accident.

Mr. Jones was held from service for the period of March 6, 2013 until March 14, 2013 without pay. On March 14, 2013 Mr. Jones was required to attend an investigation regarding the incident on March 6, 2013. Subsequent to that Mr. Jones was assessed a suspension for the period of March 14, 2013 until March 20, 2013.

The Union contends that the disciplinary action assessed in this instance was unwarranted, arbitrary and discriminatory. This discipline was not in the realm of which other employees involved in similar incidences with similar circumstances were subject to.

The Union seeks a declaration that the Company has violated the Collective agreement, Company Policy, PIPEDA, arbitral jurisprudence and/or that the Company is estopped from such arbitrary and discriminatory actions as set out above. The Union further requests an order that S&C Maintainer Jones be made whole for his lost earnings and benefits as a result of his wrongfully being removed from service/suspended. In addition, the Union seeks a declaration that the Company did not have cause to request that Mr. Jones submit to a substance screening test in these circumstances.

The Company denies the Union's contentions and declines the Union's request.

FOR THE COMPANY:

FOR THE UNION:

B. Strong
Senior General Chairman

2. This case concerns whether the Company had reasonable cause to request S&C Maintainer Andrew Jones (“the grievor”) to submit to a substance screening test on March 6, 2013 after he was involved in a minor motor vehicle accident while driving a Company vehicle. I am also to determine whether the discipline assessed against the grievor, his suspension from March 6 through March 19, 2013, was warranted.

3. The facts in this case are relatively straightforward. On March 6, 2013, the grievor was performing regulatory maintenance at various locations in the City of Lloydminster, Saskatchewan. At approximately 12:10 PM while traveling between 10 and 20 km/hour in a 40km/hour zone, the vehicle two ahead of the grievor’s slammed on the brakes just prior to crossing tracks. This caused the driver of the vehicle directly ahead of the grievor’s to slam on his brakes. The grievor reacted by slamming on his brakes as well. The grievor’s truck slid on an icy section on the road and rear-ended the vehicle ahead of him. Minimal damage was incurred to the front bumper of the Company vehicle and the third party vehicle. At the time, the grievor thought he was driving at a safe distance from the vehicle ahead of him, which he reported to be less than a car length but more than a half a car length.

4. After assessing the damage sustained by the vehicles as minimal and exchanging information with the driver of the other vehicle, the grievor reported the accident and its circumstances to his supervisor, Mr. Jodie Sokolosky. Mr. Sokolosky directed to the grievor to continue working to complete the required maintenance testing until such time as Mr. Sokolosky was able to call the grievor back.

5. The grievor continued to work for a few hours. Mr. Sokolowsky consulted Divisional Engineer, Mr. Danny Wong. Mr. Sokolowsky then called the grievor back. Mr. Sokolowski told the grievor that he would be required to submit to post incident/accident substance testing in connection with the accident. Mr. Sokolowski asked the grievor if he should drive himself to the nearest testing facility. The grievor was unfamiliar with the protocol. Mr. Sokolowski said he would make more calls to find out. In the interim Mr. Sokolowski directed the grievor to keep working.

6. Approximately 45 minutes later, Mr. Sokolowski called the grievor and told him to drive himself to “the tool house,” where he was to meet Track Maintenance Supervisor, Mr. Randy Elder. The grievor arrived at approximately 5 PM. On his arrival Mr. Elder took the grievor’s keys and his cell phone. Mr. Elder asked the grievor for additional details about the accident. After the grievor made a report to the insurance company as directed by Mr. Elder, Mr. Elder drove the grievor for the post incident/accident substance test. Following the testing the grievor was held out of service.

7. The Company carried out its investigative interview on March 14, 2013. It received the grievor’s substance screening tests the following day. They were negative. The Company continued to hold the grievor out of service through March 19, 2013, which time out of service was ultimately deemed a suspension by the Company.

8. At the investigative interview, the grievor explained that at the time of the accident he thought that the distance he had maintained between his vehicle and the one in front of his should have given him time to stop and avoid any contact. The grievor acknowledged, however, that he was possibly driving too close to the vehicle.

9. Beyond the specifics of the accident itself, the grievor conveyed to the Company investigator that approximately a week before the accident, he had shared his concern about the poor tread of the vehicle’s “summer” tires with Mr. Sokolosky. He had also raised the tire issue at a safety meeting. According to the grievor, Mr. Sokolosky had tried to have the tires changed but was unable to get approval because they had only 40,000 km on them.

10. The Union brought to my attention three other accidents that took place in March 2013. The first involved the grievor’s colleague, S&C technician Kamran Ahmad. He had lost control of his Company vehicle on March 4, 2013, due to snow and ice on the road. Mr. Ahmad, like the grievor, was traveling much slower than the speed limit, past an area of high winds, when he landed in the ditch, with the vehicle flipped on its side resulting in the complete “write off” of the vehicle. In that circumstance, the Company completed an investigation at the scene of the accident and determined that there were factors beyond the grievor’s control that led to the accident. The Company decided

against subjecting Mr. Ahmad to post incident/accident testing and did not discipline him or hold him out of service.

11. The second accident involved another colleague of the grievor's, S&C Technician Tynan Kuntz, who lost control the Company truck he was driving, and slid off the road on March 5, 2013. Like Mr. Ahmad, Mr. Kuntz was not subject to testing, or to discipline or held out of service. Mr. Sokolosky supervised both Mr. Ahmad and Mr. Kuntz.

12. Finally, on March 17, 2013, while traveling off-road to attend to a hotbox detector, S&C Maintainer Blake Gundy lost control of his Company vehicle and landed in the ditch. Mr. Gundi was permitted to continue with his regular workday and was not subject to any testing or sanction by the Company.

DECISION

The Substance Screening Test

13. I will first address the Union's allegation that the Company, in the circumstances described above, had no cause to require the grievor to attend for post-incident/accident testing on March 6, 2013.

14. The Company Policy on Post-Incident/Accident Testing reads as follows:

3.2.3 Post-Incident/Accident Testing: Alcohol and drug testing may be required after a significant work-related incident or accident as part of a full investigation into the circumstances.

Employees are expected to participate fully in any subsequent investigation and failure to report an incident is a violation of the Canadian Internal Control Plan for Incident/Accident Reporting.

The decision to refer an employee or group of employees, for testing will be made by the supervisor investigating the incident or accident after after consultation with and agreement of an experienced Operating Officer. i.e. Superintendent/Division engineer and above, whenever possible. Unionized employees will be entitled to representation provided this does not cause undue delay.

For the purposes of alcohol and drug testing a significant work-related incident or accident would be one that may involve or is likely to involve any of the following;

- A fatality.
- Any number of serious injuries or multiple injuries to Company personnel are public requiring medical attention away from the scene or lost time injuries to Company personnel.
- Significant loss or damage to Company public or private property, equipment or vehicles.**
- An environmental incident with serious damage or implications to the environment.*
- Any cardinal rule violation**

*Refer to the ISROP Guidance

<http://railcity/cpr.ca/en->

ca/About Canada

Post/Safety/Health%20and%20Programs.Forms/Default.aspx

** Refer to CRV Guidance

<http://railcity.cpr.ca/en-ca/AboutCP/Safety/Strategy/Pages/default.aspx>

Alcohol and drug testing may also be required following any other significant work incident/accident or a near miss which indicated a serious lack of judgment or unexplained human response on the part of the employee(s) involved that had significant potential for more serious consequences.

A Post Incident/Accident test would not be justified in a situation where there is evidence that the act or omission of the individual(s) could not have been a contributing factor to the incident/accident e.g. structural, environmental or mechanical failure, or the individual clearly did not contribute to the situation.

In all cases employee(s) tested in the circumstances will be removed from service pending the results of the investigation, including receipt of the testing results. Depending on the test result and the outcome of the investigation, a fitness for work medical assessment May also be required through Occupational Health Services before the employee can return to Safety Critical or Safety Sensitive duties duty.

15. The Company's testing procedures are consistent with the above referenced Policy. The testing procedures provide, in part:

1. **Post-incident/accident Situation Triggering Testing:** the decision to test will take place in conjunction with the investigation of a significant work – related incident or accident as part of a full investigation into the situation. An incident or accident that may require testing would be one which resulted in any of the following:

- a fatality;
- any number of serious injuries or multiple injuries to Company personnel or public requiring medical attention away from the scene or lost time injuries to Company personnel.
- significant loss or damage to Company, public or private property, equipment or vehicles
- an environmental incident with serious damage or implications to the environment;
- a cardinal rule violation

Alcohol and drug testing may also be required following any other significant work incident/accident, or a near miss which indicated a serious lack of judgment or an unexplained human response on the part of the employee(s) involved that had significant potential for more serious consequences.

2. **Who is Tested:** Only those employees who hold a safety critical or safety sensitive position and had been directly involved in the chain of acts or omissions leading up to the event would be subject to testing. Use the errors and omissions checklist on the post incident/accident testing referral form to help come to this conclusion.

3. **Not to Test:** testing would not be required where there is clear evidence that the acts or omissions of the employees could not have been a contributing factor (e.g. obvious structural or mechanical failure, environmental factors or the individual clearly did not contribute to the situation) at the initial stage of the investigation.

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8. **Documentation:** The reasons for requiring a test should be set out in the post incident/accident testing referral form as soon as possible after the decision to test, and provided to the Program Administrator.

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10. Procedures

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Step 2: Classify the incident to determine if it qualifies as a triggering incident for a test; if it is a less significant incident, but you have reasonable grounds to believe alcohol or drug use may have been a contributing factor, refer to follow the For Cause procedures for testing.

Step 3: As part of your initial investigation, determine if other factors cause the incident, for example, obvious structural and mechanical failure, environmental factors. If it is clear factors other than human error caused the accident, testing would not be required.

Step 4: Determine whose actions or omissions may have contributed to the incident and whether there was a reasonable explanation for what happened.

Step 5: The Supervisor investigating the incident should consult with an experienced Operating Officer, Superintendent/Division engineer and above, whenever possible, in person or by phone, prior to concluding that testing will be part of the investigation and confirm which employees will be tested. The decision to test must be made as soon as possible and cannot wait to the next day.

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11. Less Significant Incidents: If investigation of the incident reveals a "For Cause" situation, follow the "For cause" testing procedures, use the checklist as a guide, and document the grounds for requiring a test.

16. The Company takes the position that generally a driver who rear-ends another vehicle is normally at fault and that it was not possible to conclude that the grievor had no responsibility for the accident without conducting a full investigation. For the same reason, the Company says it required the grievor to submit to a post incident/accident substance test. The Company argues that it is entitled to request substance testing where an "incident" is related to human judgement and/or error.

17. While I accept that presumptively a driver who rear-ends another vehicle is following too closely, I do not accept the Company's argument that it was entitled in the circumstances of this case to request substance testing. The Company Post-Incident/Accident Policy and its procedures are clear. They were not followed in this case. In the case of post-incident/accident testing the incident/accident must be "significant" for the Company to require an employee occupying a safety critical or

safety sensitive position to attend for drug and alcohol testing. The accident in this case was not significant.

18. The Company's Policy and Procedures incorporate the well-established threshold for post incident/accident testing set out in the ***SHP 530*** case:

For employees occupying risk sensitive positions, the Company may, under pain of discipline and subject to principles of just cause, conduct drug and alcohol testing by breathalyzer and urinalysis in circumstances of reasonable grounds, including following any **significant** accident or incident, and as part of a medical examination to determine fitness for duty upon transfer or promotion into a risk sensitive position.

19. I am prepared to accept that it may have not been possible for the Company to determine the grievor's responsibility for the accident without first carrying out a formal investigation. However, the record in this case discloses that the decision to request substance testing was based only on the grievor's telephone call reporting to his supervisor the minor vehicle accident. That was a completely inadequate basis for ordering the grievor to attend for post-accident testing, when the Company was aware of the icy road conditions as they existed at the time of the accident, and the concerns the grievor had raised about the condition of the tires. In the circumstances of this case the Company knew that the extent of any lack of judgment or error could not be characterized as "serious" nor could any such lack of judgement/error have had "significant" potential for more serious consequences as set out in the Policy and Procedures reproduced above.

20. The grievor's accident was a "less than significant incident." The Company must demonstrate that it had reasonable grounds to believe that alcohol or drug use was a contributing factor to the accident. The Company has not demonstrated that to be the case. In fact, the Company's own conduct suggested that it did not believe alcohol or drug use was a contributing factor to the accident. First Mr. Sokolowsky directed the grievor to continue working in his safety sensitive position carrying out inspections after he had been informed of the specifics of the minor accident. Then Mr. Sokolosky had the grievor drive himself to the tool house. Further, there is nothing before me, or any documentation to support any contention that there were reasonable grounds for requiring the grievor to undergo substance testing in this case.

21. I have reviewed the two cases provided by the Company to support its decision to test the grievor. Neither is analogous to the circumstances before me. In **CROA 4311**, the Company terminated an employee of 25 years service after his vehicle slipped on packed snow, did a 180 degree turn and a “complete roll,” coming to rest disabled upright against a tree. The grievor had tested positive on the urine drug test for marijuana – which was not linked to impairment at work. Arbitrator Picher reinstated the grievor with compensation for all wages and benefits lost. In **CROA 4311**, twenty demerits were assessed against the grievor for his unsafe operation of a Company vehicle. In **SHP 618** the grievor’s truck collided with a freight car, causing severe damage to the vehicle. Both of those cases involved significant accidents where serious personal harm could have occurred due to a lack of judgement (and where serious damage did occur in the latter case). In **SHP 618**, the grievor was assessed 20 demerits for the collision.

22. With respect to the question of whether any discipline was warranted in this case, I accept the general proposition that identifies the driver of the rear-ending vehicle to be normally at fault when there is contact between two vehicles. In this respect, the grievor’s case is distinguishable from the three other March 2013 accidents raised by the Union, as no third party vehicle was involved in those cases.

23. Each case must turn on its own facts. In this case, even considering the grievor’s expressed concern about the treads on the Company vehicle's tires, the icy road conditions, and the fact that the grievor was traveling between 10-20 km/hour in a 40km/hour zone at the time of the accident, I find that the grievor was following the vehicle in front of him more closely than he should have. In so doing, he was responsible, to a certain degree, for contact having been made with the third party vehicle. As such, he was properly subject to discipline. In coming to this conclusion, I note the driver in front of the grievor was able to stop in sufficient time to avoid contact with the vehicle whose driver was the first to brake.

24. Having regard to the cases referenced above, the quantum of discipline imposed by the Company in this case – a suspension from March 6 through March 19, 2014 - is clearly excessive. I cannot accept that this is the appropriate penalty in this case.

25. In all the circumstances, and taking into account the grievor's six years of service and his record, I direct the suspension assessed against him to be removed from his disciplinary record and that he be compensated for all lost wages and benefits. A substituted discipline of a Caution shall be placed on the grievor's record for conduct as reflected on the Form 104.

26. Therefore, the grievance is allowed in part.

27. The Union has requested a declaration that it was inappropriate for the Company to request the grievor to submit to a substance screening test in this case and I so declare.

September 29, 2014



CHRISTINE SCHMIDT
ARBITRATOR