

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4277**

Heard in Montreal, January 15, 2014

Concerning

BOMBARDIER TRANSPORTATION

And

TEAMSTERS CANADA RAIL CONFERENCE – DIVISION 660

DISPUTE:

The Company's Drug and Alcohol Use and Drug and Alcohol Testing Policy.

JOINT STATEMENT OF ISSUE:

The Company has introduced a Drug and Alcohol Use and Drug and Alcohol Testing Policy ("the Policy") that provides for testing of employees and penalties for alleged violations of the Policy.

The Union has objected to certain aspects of the Policy as unreasonable; in violation of employees' privacy and other rights; in violation of the Collective Agreement, including Articles 3 and 9 thereof; and in violation of the *Canadian Human Rights Act*. The Union has requested the Company withdraw its Policy and declare it of no force or effect. In the alternative the Union has requested the Policy be amended.

The Company has not responded to the Union's request.

FOR THE UNION:
(SGD.) G. Macpherson
General Chairman

FOR THE COMPANY:
(SGD.) A. Brown
Manager Human Resources

There appeared on behalf of the Company:

M. Horvat	– Counsel, Norton Rose, Toronto
A. Brown	– Human Resources Manager, Toronto
D. Mitchell	– General Manager, Toronto
R. Dean	– Manager Train Operations, Toronto
M. Robinson	– Manager Contracts and Administration, Toronto

There appeared on behalf of the Union:

M. Church	– Counsel, Caley Wray, Toronto
G. MacPherson	– General Chairman, Toronto
G. Vaughan	– Local Chairman, Toronto

AWARD OF THE ARBITRATOR

This award concerns Teamsters Canada Rail Conference, Division 660's ("the Union") challenge to certain portions of Bombardier Transportation Canada Inc.'s ("the Company") Drug & Alcohol Use and Drug & Alcohol Testing Policy governing Safety Critical and Safety Sensitive Positions ("the Policy"). The Union argues that certain aspects of the Policy are unreasonable, in violation of employees' privacy rights, the collective agreement, including articles 3 and 9, and in violation of the Canadian Human Rights Act ("the CHRA").

The policy grievance was filed on July 9, 2013, and since the Policy's implementation, the Union has filed a number of individual grievances on behalf of employees who have been subject to the Policy. The parties have agreed to hold those individual grievances in abeyance pending this decision.

In the Company's submission, the Policy is reasonable, consistent with the collective agreement and its legal obligations pursuant to the CHRA and what it refers to as "any applicable law" and jurisprudence. According to the Company, the Policy strikes the appropriate balance between the privacy interests of employees and the Company's interest and obligations to ensure the safe operation of railway trains.

I have reviewed the Policy thoroughly, together with the jurisprudence directly on point. I cannot agree with the Company's submissions in certain respects. Recently, in *Communications, Energy and Paper Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34 ("*Irving*"), the Supreme Court affirmed what it refers to as the "blue print" for dealing with dangerous workplaces. That blue print stems from Arbitrator Picher's decision in *Imperial Oil Ltd. and C.E.P., Local 900 (Re) (2006)*, 157 L.A.C (4th) 225 ("*Nanticoke*"), a case involving a grievance of the employer's random drug testing policy at an oil refinery. The Supreme Court quotes from Arbitrator Picher's decision as summarizing the principles that had emerged from the arbitral jurisprudence under the *KVP* test for both drug and alcohol testing. The Court adopts those principles as its own:

- No employee can be subjected to random, unannounced alcohol or drug testing, save as part of an agreed rehabilitation program.
- An employer may require alcohol or drug testing of an individual where the facts give the employer reasonable cause to do so.
- It is within the prerogatives of management's rights under a collective agreement to also require alcohol or drug testing following a significant incident, accident or near miss, where it may be important to identify the root cause of what occurred.
- Drug and alcohol testing is a legitimate part of continuing contracts of employment for individuals found to have a problem of alcohol or drug use. As part of an employee's program of rehabilitation, such agreements or policies requiring such agreements may properly involve random, unannounced alcohol or drug testing generally for a limited period of time, most commonly two years. In a unionized workplace the Union must be

involved in the agreement which establishes the terms of a recovering employee's ongoing employment, including random, unannounced testing. This is the only exceptional circumstance in which the otherwise protected employee interest in privacy and dignity of the person must yield to the interest of safety and rehabilitation, to allow for random and unannounced alcohol or drug testing.

The Supreme Court also adopts Arbitrator Picher's explanation for these principles:

... a key feature of the jurisprudence in the area of alcohol and drug testing in Canada is that arbitrators have overwhelmingly rejected mandatory, random and unannounced drug testing for all employees in a safety sensitive workplace as being an implied right of management under the terms of the collective agreement. Arbitrators have concluded that to subject employees to an alcohol or drug test when there is no reasonable cause to do so, or in the absence of an accident or near miss and outside the context of a rehabilitation plan for an employee with an acknowledged problem is an unjustified affront to the dignity and privacy of employees which falls beyond the balancing of any legitimate employer interest, including deterrence and the enforcement of safe practices. In a unionized workplace, such an extraordinary incursion into the rights of employees must be expressly and clearly negotiated. It is not to be inferred solely from the general language describing management rights or from language in a collective agreement which enshrines safety and safe practices.

It is important to note that the collective agreement before me does not provide for any restrictions on employee use of drugs or alcohol nor does it permit the employer to require any testing of the employees for drugs or alcohol. Moreover, there is no statutory authority that permits an employer to regulate alcohol or drug use testing. As articulated by Arbitrator Surdykowski, post *Irving*, in *Mechanical Contractors Association Sarnia v. United Association of*

Journeyman and Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local 663, 2013 CanLII 54951 (OB LA):

In the absence of statutory or collective agreement authority, an employer which implements or proposes to implement a rule or policy which invades employee privacy rights that employer bears the onus of establishing that the rule or policy is a necessary and proportionate response which is likely to meet a demonstrably legitimate need in the particular workplace which intrudes on employee privacy to the least possible extent.

I now turn to those portions of the Company's policy challenged by the Union. As requested, I address only those challenged provisions set out in the grievance filed July 9, 2013. In scrutinizing those challenged provisions, I take into account the entirety of the Policy (attached as Appendix A). Only those provisions that the Union challenges are reproduced in the body of the decision.

Section 5 of the Policy reads as follows:

5. PROHIBITED DRUG AND ALCOHOL USE AND ACTIVITIES

It is a violation of this policy for any employee to use, sell, or possess any illegal drug at any time in accordance with and subject to applicable laws and regulations. Without limiting the foregoing, it is also a violation of this policy for any employee to engage in the following conduct while conducting Company business:

- a) using, being under the influence of, or possessing illegal or illicit drugs;
- b) using or being under the influence of legal drugs that are being used illegally;

c) using or being under the influence of legal drugs whose use can adversely affect the ability of the employee to perform his or her job safely;

d) selling, buying, soliciting to buy or sell, transporting, possessing, distributing, or transferring illegal or illicit drugs while on Company time or property;

e) using or being under the influence of alcohol;

f) testing positive for drugs and/or alcohol...even if said substances were not ingested during working hours.

g) violating any applicable laws or regulations governing the use of drugs and/or alcohol, including but not limited to the foregoing, regulations specifically prohibiting the use of drugs and/or alcohol by employees who perform safety-critical or safety-sensitive functions;

h) reporting for service while having a blood alcohol concentration greater than '0'

Employees who violate these prohibitions may be subject to disciplinary action, up to and including termination, in accordance with Company policy and in accordance with and subject to applicable local laws and regulations.

An employee may refuse to submit to a drug or alcohol test (as defined in this policy). However, an employee who refuses to submit to a drug or alcohol test is subject to disciplinary action, up to and including termination in accordance with Company policy and in accordance with and subject to applicable local laws and regulations.

In respect of Section 5, the Union challenges the specific provision in 5 (h) that requires employees to have blood alcohol concentration levels ("BAC"s) of "0."

Section 5(h) provides that an employee may not report for service while having a BAC greater than zero. The Policy adopts a cut off level of "0" without empirical evidence of a nexus to impairment. This very issue was considered in

Re Canadian National Railway Co. and Canadian Auto Workers (2000), 95 L.A.C (4th) 341 (“*SHP 530*”). The expert evidence before Arbitrator Picher at the time confirmed that concern for impairment is legitimate based on a 0.04 BAC in a risk-sensitive position. He therefore found 0.04 BAC to be a reasonable cut-off level. The current Policy, with a cut off level of “0” is unreasonable. A policy consistent with a BAC of 0.04 would not be struck down.

The Policy goes on in Section 5 to indicate that employees who violate the prohibitions it sets out may be subject to disciplinary action up to and including termination. Consistent with notions of just cause, the provisions here are couched in terms of a possible disciplinary outcome depending on the circumstances. The Policy goes on to state that an employee who refuses to submit to a drug or alcohol test is subject to disciplinary action, up to and including termination. I do not take this to mean, as contended by the Union, that the Policy requires the imposition of discipline in every case where an employee refuses to submit to a drug or alcohol test. The Company in its brief makes clear that the Policy does not require the automatic imposition of discipline in the circumstances of an employee’s refusal. Therefore this section of the Policy is reasonable.

Section 6 of the Policy addresses the tests that the Company requires:

6. TESTS REQUIRED

....

6.2 Post-Accident/Incident Testing

6.2.1 To the extent required by applicable law or regulation, the Company will investigate the circumstances surrounding an accident/incident to determine whether drug and/or alcohol tests must be administered. The Company will conduct post-accident/incident drug and/or alcohol tests as required by applicable law and regulations and reserves the right pursuant to Company policy to require post-accident/incident drug and/or alcohol testing to the fullest extent allowed by law. An accident is defined as, an undesired and/or unplanned event that results in a loss of property, injury or fatality. An incident is defined as, an event that gave rise to an accident or had the potential to lead to an accident. Note: An incident where no ill health, injury, damage or other loss occurs is also referred to as a near-miss. The term "incident" includes "near-misses".

...

6.2.3. Any employee required to undergo a post-accident alcohol test is prohibited from using alcohol for eight hours following the accident or until he/she undergoes a post-accident alcohol test, whichever is longer.

....

6.6 Periodic Physicals and/or Testing

6.6.1 An employee may be required due to the nature of his occupation to submit to drug and/or alcohol testing or physical as part of the certification process of occupation such as Train Operator and Customer Service Ambassador.

The Union argues that section 6.2 is overly broad. The Union submits that Section 6.2.1 unreasonably permits the Company to require drug and alcohol testing without limitation in every accident, which is defined broadly in the Section, whenever any injury or loss of property results. I agree with the Union. I

refer the parties to the quotation from the *Nanticoke* case, which sets out the appropriate threshold for post accident/incident testing established 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.

....

(Emphasis added)

As Section 6.2.1 now stands, it is overly broad and is inconsistent with jurisprudence on the applicable threshold for post accident /incident testing.

The Union also challenges section 6.2.3, which prohibits an employee from using alcohol for eight hours following an accident for which he/she is required to undergo a post-accident alcohol test, whichever is longer. The rule for the eight-hours is not explained. Nor is there any basis offered for prohibiting an employee from consuming alcohol after testing has been completed. Without a rationale, this provision of the Policy is unreasonable.

Section 6.6.1 of the Policy gives the Company the power to require an employee becoming certified for safety critical and safety sensitive positions, such as Train Operator and Customer Service Ambassador, to submit to a drug and/or alcohol test or physical as part of that certification process. As I

understand the provision, the drug and/or alcohol testing or physical is limited to employees seeking to move from non-safety critical or sensitive positions to positions that are. The Union characterizes this aspect of the policy as essentially a requirement without cause.

Arbitrator Picher examined this very issue in *SHP 530*:

It would appear that this may be the first arbitral award, or tribunal decision of any kind, which finds drug testing to be permissible as a precondition to promotion or transfer into a risk sensitive position. The Union stresses that such testing differs from reasonable grounds or suspicion of impairment testing, and represents a further incursion into the privacy of employees. After much consideration, I am satisfied that such testing is justified, and represents a reasonable exercise of management's rights in the highly safety sensitive transportation industry. Section 35(1) of the Railway Safety Act authorizes railway companies to perform their own periodic medical examinations of designated employees. It is clearly within the legitimate interests of a railway to reasonably ensure that persons who move into risk sensitive positions do not suffer from an active drug or alcohol addiction or dependency. While a positive drug or alcohol test during the promotion or transfer process will not be conclusive of that question, it will justify further inquiries and a more complete assessment of the individual, so as to rule out any such problem prior to the individual assuming risk sensitive responsibilities. The careful vetting of applicants for risk sensitive positions, including drug and alcohol testing administered by the employer, is a reasonable exercise of a railway's management rights, as a further means to ensure safe operations. In fact, there is considerable precedent for Company administered medical examinations, particularly among running trades employees. Its interests in that regard must fairly be seen to outweigh the privacy rights of those who would seek to gain the responsibilities and rewards of risk sensitive employment. As a point of clarity, however, it should be stressed that the Arbitrator does not consider it to be a reasonable exercise of management's rights to require a drug or alcohol test of an employee who merely moves from one risk sensitive position to another.

Accordingly, I find that Section 6.6.1 of the Policy is reasonable.

Finally, with respect to Section 6, the Union argues that the Policy fails to properly identify the Company's duty to accommodate any employee whose test results may be positive. It argues that the Company's omission is an important one because policies that do not provide for a comprehensive employee assistance program are routinely struck down. According to the Union, this has been the case since *Entrop v. Imperial Oil Ltd.*, [2000] O.J. No. 269 (ONCA). However, the Policy does provide for and references its Employee Assistance Program in section 10 of the Policy. This is sufficient.

Section 7 deals with testing methodology and integrity:

7. TESTING METHODOLOGY AND INTEGRITY

....

7.3 Employees or applicants may be required to give urine, breath, blood, hair follicle, or any other sample in accordance with and subject to and local applicable laws and regulations. In general, if and when an employee or applicant is required to give a urine specimen, he/she will be permitted to give a urine specimen in privacy and without being observed by collection site personnel. However, an employee or applicant may be observed giving a urine specimen during the collection process by a monitor of the employee or applicant's gender designated by the Company or lab whenever there is reason to suspect that he/she may alter or substitute a urine specimen.

The Union seeks to have Section 7.3 struck from the Policy altogether. The Union argues that the section gives the Company too wide a scope to engage in the referenced testing or to collect any other "sample in accordance with and subject to applicable laws and regulations."

The starting point for the analysis of this section must be that the employee is sovereign over his or her body. That sovereignty must yield to the competing interest of the employer only to the degree that is necessary. Assessed in this light, the provision is too wide in scope. First, there are no “samples” that can be taken by the Company “in accordance with and subject to any local applicable laws and regulations.” Breathalyser testing has been found to be minimally intrusive, and the collection of urine has also been found not to violate the “respect and dignity” clause in collective agreements. I am satisfied that hair follicle sampling is minimally intrusive and does not violate the “respect and dignity” clause. However, the collection of blood is highly intrusive. I am unaware of a case in which policies permit an employer to require blood samples. I am unable to find that it is either reasonable or necessary that the Company require blood samples.

I note that the Union also objects to this provision in that it allows for employees being observed while giving a urine sample during the collection process. If this was the Company’s general practice, it would be highly objectionable. However, the provision only allows this to occur whenever there is reason, and by this I take to mean reasonable cause, to suspect that the employee or applicant may alter or substitute a urine specimen. In this circumstance, the provision is reasonable.

Section 8 of the Policy sets out the following:

8. DRUG TEST RESULTS

8.1 An initial screening test will be performed on all specimens. If the initial screening test indicates a positive test result, a confirmatory test will be conducted on the original specimen. Disciplinary action will not be taken on the basis of an initial screening test alone.

8.2 If a test is positive, a confirmatory test, paid by Bombardier, will be conducted on the original specimen. If the confirmatory test is positive, employees will have a chance to discuss any issues with the Medical Review Officer (“MRO”) and to list their prescription and non-prescription medications. The MRO will then make the final determination and report the result, positive or negative, to the company representative. If, after investigating the MRO believes that there is a legitimate reason for the test to be positive then the MRO will report the test as negative. If the MRO is convinced that employees have used illegal or illicit drugs, then the MRO will report the test as positive.

8.3 An employee whose test result is confirmed positive for drugs will be considered unqualified to perform or continue performing his/her functions safely and may be subject to disciplinary action, up to and including termination, in accordance with applicable laws, regulations and Company policy.

The Union submits that Section 8.2 fails to provide for the confidentiality of test results. However, I note that Section 13 stipulates that all test results are to be considered private and confidential information, and that test results can only be released with the employee’s written consent or as authorized by law. The Union submits that the identity of the company representative who is to be provided with test results ought to be stipulated in the Policy. I am not persuaded that it is unreasonable not to identify the specific company representative to whom the MRO is to report a positive test result pursuant to Section 8.2.

The Union challenges Section 8.3 with respect to the Company deeming an employee with a positive drug test to be unqualified to perform or continue to perform his or her job functions. The Union contends that, without proof of impairment, it is unreasonable to automatically deem an employee unqualified. I agree. To deem an employee unqualified is in effect an automatic disciplinary or quasi-disciplinary response. This provision is inconsistent with notions of just cause, and to be reasonable, the disqualification of an employee from performing his or her job functions must be couched in terms of a possible disciplinary outcome depending on the circumstances.

I now turn to Section 12 of the Policy:

12. IMPAIRED DRIVING CHARGE OR CONVICTION

Employees who require a valid driver's license in the performance of their duties (as determined by the Company) or who operate railway equipment and where driving privileges are lost or suspended due to an impaired driving charge or conviction while not on duty, must immediately report such loss to their supervisor. A medical assessment will then determine whether the employee suffers from a substance abuse disorder.

A policy grievance recently heard by Arbitrator Picher dealt with a policy with a similar provision in *Canadian National Railway Co. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 100 (Workplace Alcohol and Drug Policy Grievance)*, [2013] C.L.A.D. No. 249. Arbitrator Picher dismissed the grievance, and concluded that it is not unreasonable for an employer in a safety sensitive industry to require that

employees entrusted with driving motor vehicles or operating railway equipment be required to disclose the loss of driving privileges and be subject to a confidential assessment to determine whether they do have a substance use disorder. I adopt Arbitrator Picher's rationale, which applies equally to the employees covered by the Policy before me. Section 12 is a reasonable requirement for employees working in safety sensitive positions with the Company.

For all the foregoing reasons the grievance is allowed in part. I remain seized with respect to the interpretation or implementation of any aspect of the award.

February 10, 2014

CHRISTINE SCHMIDT
ARBITRATOR

APPENDIX A
POLICY
Bombardier Transportation Canada Inc.

Drug & Alcohol Use And Drug & Alcohol Testing Governing Safety Critical and Safety-Sensitive Positions	HUMAN RESOURCES
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1. PURPOSE

The goal of Bombardier Transportation Canada Inc.'s ("Bombardier" or "Company") drug and alcohol use and testing policy is to ensure a safe, drug- and alcohol-free work environment and to reduce and help eliminate drug- and alcohol-related incidents, accidents, injuries, fatalities, and damage.

2. SCOPE

This policy applies to all employees of Bombardier in Canada who are employed in a Safety Critical or Safety-Sensitive Position.

3. GENERAL

Bombardier bans the illegal or prohibited use, possession, sale, transfer, or distribution of controlled substances at any time, including but not limited to time while on Company business (as defined in Section 4.0 of this policy). Impairment caused by drug or alcohol use threatens the health, safety, and well-being of other employees and members of the general public who come in contact with Bombardier employees, products, equipment, or services.

4. DEFINITIONS OF TERMS USED IN THIS POLICY

For purposes of this policy and Bombardier's drug and alcohol testing program the following terms are used throughout this policy:

"Company business" includes, but is not limited to, work performed on Company premises (including but not limited to meal and break times); work performed off Company premises but relating in any way to the Company; work performed on, in, or using Company property, including a Company vehicle, Company machinery, or Company equipment; and work performed on, in, or using a non-Company vehicle, non-Company machinery, or non-Company equipment that relates in any way to the Company.

“Alcohol” in this policy refers to the intoxicating agent in beverage alcohol (e.g. wine, beer, distilled spirits and similar products), ethyl alcohol, or other low molecular weight alcohols, including methyl and isopropyl alcohol. This includes alcohol that may be contained in other liquids such as ‘de-alcoholized’ (0.5%) beer, mouthwash, cough syrups and other medications.

“Alcoholic Beverage” refers to the beverages regulated by provincial liquor control legislation (e.g. wine, beer, distilled spirits and similar products).

“Applicable Law” shall be the law of the official office of the employees who violate this policy.

“Drug” includes illegal drug, illicit drug and medication, the use of which has the potential to change or adversely affect the way a person thinks, feels or acts. For the purposes of this policy, drugs of concern are those that may inhibit an employee’s ability to perform their job safely and meet performance expectations.

“Illegal drug” means any substance which is not legally obtainable but excludes those which have been legally obtained by prescription (i.e. sedatives or narcotics for which a prescription should have been obtained).

“Illicit drug” means any substance which is not legally obtainable and whose use, sale, possession, purchase or transfer is restricted or prohibited by law (i.e. street drugs such as marijuana and cocaine).

“Medication” means any drug or substance used for medicinal purposes that has been appropriately prescribed by a physician or purchased on an over-the-counter basis.

“Negative Test Result” is a substance test result which verifies that a substance is either not detected or is below established cut-off levels according to accredited substance testing procedures.

“Positive Test Result” is a substance test result which verifies the presence of a substance at or above established cut-off levels according to accredited substance testing procedures.

“Safety Critical Positions” are railway positions directly engaged in the operation of trains and defined as such by the Railway Safety Act. These positions have a direct role in railway operations where impaired performance could result in a significant incident affecting the health and safety of employees, customers, customer’s employees, the public, property or the environment.

“Safety-Sensitive Positions” are railway positions as defined by the Operating Railway or Contractor, where impaired performance may put public safety at occasional risk as well as put at risk the safety of employees, customers, customer’s employees, property or the environment.

“Substance” includes alcohol, illegal drugs, illicit drugs and medication, the use of which has the potential to change or adversely affect the way a person thinks, feels or acts. For the purposes of this policy, substances of concern are those that

may inhibit an employee's ability to perform their job safely and meet performance expectations.

“Substance abuse” includes the continued use of alcohol or drugs despite the knowledge of recurring disturbance in health, work or social functioning.

“Substance dependence” involves a physical or psychological dependence on alcohol and/or drugs.

“Substance test” is a standardized urine drug or alcohol screen test to assess levels of drugs (which include cannabinoids, cocaine, phencyclidine, opiates and amphetamines) or alcohol and/or a standardized alcohol breathalyzer test to assess levels of alcohol in the body.

For purposes of this policy and Bombardier's drug and alcohol testing program, **“refusing to be tested”** means any of the following:

- a) failing to provide an adequate urine, blood, tissue, or bodily fluid specimen for a drug or alcohol test without valid medical explanation;
- b) failing to provide adequate breath for an alcohol test without valid medical explanation;
- c) failing to submit to a test as directed;
- d) engaging in any conduct that obstructs the testing process or refusing to cooperate with any aspect of the testing process;
- e) failing to undergo a medical examination or evaluation as directed; or
- f) providing a verified adulterated or substituted test specimen.

5. PROHIBITED DRUG AND ALCOHOL USE AND ACTIVITIES

It is a violation of this policy for any employee to use, sell, or possess any illegal drug at any time in accordance with and subject to applicable laws and regulations. Without limiting the foregoing, it is also a violation of this policy for any employee to engage in the following conduct while conducting Company business:

- a) using, being under the influence of, or possessing illegal or illicit drugs;
- b) using or being under the influence of legal drugs that are being used illegally;
- c) using or being under the influence of legal drugs whose use can adversely affect the ability of the employee to perform his or her job safely;
- d) selling, buying, soliciting to buy or sell, transporting, possessing, distributing, or transferring illegal or illicit drugs while on Company time or property;
- e) using or being under the influence of alcohol;
- f) testing positive for drugs and/or alcohol...even if said substances were not ingested during working hours.
- g) violating any applicable laws or regulations governing the use of drugs and/or alcohol, including but not limited to the foregoing, regulations specifically prohibiting the use of drugs and/or alcohol by employees who perform safety-critical or safety-sensitive functions;
- h) reporting for service while having a blood alcohol concentration greater than '0'

Employees who violate these prohibitions may be subject to disciplinary action, up to and including termination, in accordance with Company policy and in accordance with and subject to applicable local laws and regulations.

An employee may refuse to submit to a drug or alcohol test (as defined in this policy). However, an employee who refuses to submit to a drug or alcohol test is subject to disciplinary action, up to and including termination in accordance with Company policy and in accordance with and subject to applicable local laws and regulations.

6. TESTS REQUIRED Fails to properly identify the Company's duty to accommodate any employee whose test results may be positive.

6.1 Pre-Employment Testing

6.1.1 Employment applicants who receive an offer of employment may be tested for drugs and/or alcohol in accordance with and subject to applicable laws and regulations.

6.1.2 All offers of employment are conditional pending the results of the drug and/or alcohol test. The applicant may not begin work until after the Company has received and evaluated the results of the test.

6.1.3 Bombardier may withdraw an employment offer if the applicant's test result is positive.

6.2 Post-Accident/Incident Policy fails to properly define Post-Accident/Incident Testing, the result of which potentially contemplates the use of random testing.

6.2.1 To the extent required by applicable law or regulation, the Company will investigate the circumstances surrounding an accident/incident to determine whether drug and/or alcohol tests must be administered. The Company will conduct post-accident/incident drug and/or alcohol tests as required by applicable law and regulations and reserves the right pursuant to Company policy to require post-accident/incident drug and/or alcohol testing to the fullest extent allowed by law. An accident is defined as, an undesired and/or unplanned event that results in a loss of property, injury or fatality. An incident is defined as, an event that gave rise to an accident or had the potential to lead to an accident. Note: An incident where no ill health, injury, damage or other loss occurs is also referred to as a near-miss. The term "incident" includes "near-misses".

- 6.2.2 Employees involved in accidents or whose performance could have contributed to an accident may be subject to post-accident testing.
- 6.2.3 Any employee required to undergo a post-accident alcohol test is prohibited from using alcohol for eight hours following the accident or until he/she undergoes a post-accident alcohol test, whichever is longer.
- 6.2.4 An employee whose post-accident test is positive, who refuses to submit to a post-accident test, or who fails to report for the test as directed may be subject to disciplinary action, up to and including termination, in accordance with Company policy and in accordance with and subject to local applicable laws and regulations.

6.3 Reasonable Suspicion Testing

- 6.3.1 Employees are required to submit to drug and/or alcohol testing whenever the Company has reasonable suspicion to believe that the employee is under the influence of drugs or alcohol or has used drugs or alcohol in violation of applicable law or this policy in accordance with and subject to local applicable laws and regulations. Reasonable suspicion will be based on specific, contemporaneous, articulable observations concerning the appearance, behaviour, speech, or body odour of the employee.
- 6.3.2 When an employee has been notified that there is reasonable suspicion to be tested, the employee will be instructed to report to the collection site immediately to be tested. If transportation to the collection site is necessary, employees who are required to submit to a reasonable suspicion test will be transported by someone designated by the Company.
- 6.3.3 An employee who is required to take a reasonable suspicion test will be considered by the Company as unqualified to work and placed on immediate suspension, without pay, pending the results of his/her test in accordance with, and subject to applicable law. An employee whose test results are negative will be reimbursed for the time of the suspension. An employee whose test results are positive will not be reimbursed for the time of the suspension.
- 6.3.4 An employee whose reasonable suspicion test is positive or who fails or refuses to submit to a reasonable suspicion test when directed by the Company may be subject to disciplinary action, up to and including termination, in accordance with Company policy and in accordance with and subject to applicable local laws and regulations.

6.4 Return-to-Duty Testing

- 6.4.1 Employees who refuse to submit to testing or who have positive test results may be subject to return-to-work drug and/or alcohol testing in accordance with and subject to local applicable laws and regulations. Employees who refuse to take the required test or whose test results are positive may not be permitted to return to work until a satisfactory test is completed in accordance with and subject to local applicable laws and regulations.

6.5 Follow-up Testing

- 6.5.1 If a substance abuse professional has determined that an employee is in need of assistance in dealing with alcohol or controlled substance programs, or if the Company has referred an employee for chemical dependency/substance abuse treatment or evaluation, the employee may be subject to unannounced drug and/or alcohol tests pursuant to a schedule and for a duration determined in accordance with and subject to local applicable laws and regulations.
- 6.5.2 An employee whose follow-up test is positive or who fails or refuses to submit to a follow-up test when directed by the Company may be subject to disciplinary action, up to and including termination, in accordance with Company policy and in accordance with and subject to local applicable laws and regulations.

6.6 Periodic Physicals and/or Testing

- 6.6.1 An employee may be required due to the nature of his occupation to submit to drug and/or alcohol testing or physical as part of the certification process of occupation such as Train Operator and Customer Service Ambassador.

7. TESTING METHODOLOGY AND INTEGRITY

- 7.1 The Company makes every effort to ensure the integrity and accuracy of each drug or alcohol test conducted pursuant to this policy. These efforts include, among other things:
- a) procedures to ensure the correct identity of each employee at the time of testing;
 - b) a strict chain-of-custody procedure to ensure that the employee's specimen is not tampered with by the Company;
 - c) the use of trained testing personnel and approved testing devices and methods;

- d) the use of laboratories that have been certified by the applicable certifying agency;
 - e) the confirmation of an initial positive test by a second analysis;
 - f) when applicable, the appointment of a qualified Medical Review Officer (“MRO”) to review drug test results before they are reported to the Company’s designated representative.
- 7.2 To further facilitate the integrity and accuracy of each test, Driver Check or a representative acting on behalf of Driver Check will provide employees with written and/or oral instructions regarding the conduct of the specific test before each testing event. The Company considers all such instructions to be a part of this policy. Employees who refuse or otherwise fail to comply with all such instructions may be subject to disciplinary action up to and including termination in accordance with Company policy and in accordance with and subject to applicable local laws and regulations.
- 7.3 Employees or applicants may be required to give urine, breath, blood, hair follicle, or any other sample in accordance with and subject to and local applicable laws and regulations. In general, if and when an employee or applicant is required to give a urine specimen, he/she will be permitted to give a urine specimen in privacy and without being observed by collection site personnel. However, an employee or applicant may be observed giving a urine specimen during the collection process by a monitor of the employee or applicant’s gender designated by the Company or lab whenever there is reason to suspect that he/she may alter or substitute a urine specimen.
- 7.4 At a minimum, specimens taken for drug testing will be analyzed for the presence of the following drugs and their metabolites:
- a) marijuana;
 - b) cocaine;
 - c) opiates;
 - d) amphetamines;
 - e) methamphetamines, and;
 - f) phencyclidine.

Specimens taken for alcohol testing will be analyzed for alcohol and its metabolites.

- 7.5 Except for the use of methadone and medications containing alcohol, nothing in this policy prohibits an employee’s or applicant’s use of a medication legally prescribed by a licensed physician who is familiar with the employee’s medical history and position and who has advised the employee that the prescribed medication will not adversely affect the employee’s or applicant’s ability to perform his/her functions safely. Medications prescribed for someone other than the employee or

applicant, however, will not be considered lawfully used when taken by the employee or applicant under any circumstances.

8 DRUG TEST RESULTS

- 8.1 An initial screening test will be performed on all specimens. If the initial screening test indicates a positive test result, a confirmatory test will be conducted on the original specimen. Disciplinary action will not be taken on the basis of an initial screening test alone.
- 8.2 If a test is positive, a confirmatory test, paid by Bombardier, will be conducted on the original specimen. If the confirmatory test is positive, employees will have a chance to discuss any issues with the Medical Review Officer (“MRO”) and to list their prescription and non-prescription medications. The MRO will then make the final determination and report the result, positive or negative, to the company representative. If, after investigating the MRO believes that there is a legitimate reason for the test to be positive then the MRO will report the test as negative. If the MRO is convinced that employees have used illegal or illicit drugs, then the MRO will report the test as positive. Fails to provide for the confidentiality of the test results nor does it identify who in the Company is to be provided test results.
- 8.3 An employee whose test result is confirmed positive for drugs will be considered unqualified to perform or continue performing his/her functions safely and may be subject to disciplinary action, up to and including termination, in accordance with applicable laws, regulations and Company policy. Automatic conclusion that a positive test results in an employee being deemed to be unqualified.

9 ALCOHOL TEST RESULTS

- 9.1 If an employee or applicant provides adequate breath specimen for an alcohol test and the initial alcohol test registers an alcohol concentration level that is ‘0’, the test result will be reported as “negative”, and no additional test will be required at that time.
- 9.2 If an employee or applicant provides adequate breath specimen and the initial test registers an alcohol concentration level of greater than ‘0’, a second, confirmatory test will be performed. In the event that the employee provides an adequate breath specimen and the confirmatory test registers ‘0’, the test result will be reported as “negative”.
- 9.3 Our policy will prohibit covered employees whose confirmatory test registers more than ‘0’ from performing or continuing to perform any safety-sensitive or safety critical function until the employee’s next regularly scheduled duty period or for eight hours, whichever is longer. At a minimum, employees covered under this policy whose confirmatory alcohol test registers more than ‘0’ will be suspended without pay until

his/her next regularly scheduled duty period, but for no less than eight hours, and may be subject to additional disciplinary action, up to and including termination, in accordance with Company policy and applicable law. The employee may be required to complete a satisfactory return-to-duty test prior to beginning work following the suspension.

The Company may apply these procedures to all employees pursuant to Company policy and in accordance with and subject to applicable laws and regulations.

10 EMPLOYEE ASSISTANCE PROGRAM (“EAP”)

It is the policy of Bombardier to encourage employees to voluntarily seek help for substance abuse problems prior to being discovered to be in violation of the Bombardier’s Drug & Alcohol Policy. Early identification and proper treatment will improve the probability of a successful recovery from drug and/or alcohol dependency before it affects their employment relationship with Bombardier. Bombardier provides an EAP program consisting of:

Assessment, Referral, and Rehabilitation.

Bombardier has an EAP which provides covered service personnel as well as all other personnel with a comprehensive EAP that can help individuals with alcohol and/or drug abuse problems.

The EAP applies to you and your family meaning your spouse and dependent children as defined in the group insurance program. Contact your Human Resource representative for information regarding the EAP.

11 DRUG AND ALCOHOL INFORMATION

11.1 The Company will provide educational materials for all employees, explaining the applicable testing requirements and the Company’s policies and procedures for drug and alcohol testing. The Company will also make available to employees information concerning:

- a) the effects of drugs and alcohol on an individual’s health, work, and personal life;
- b) the signs and symptoms of a drug or alcohol problem; and
- c) the available methods of intervention when a problem does exist.

11.2 Each employee is required to certify that he/she has been given a copy of this policy. Applicants for employment are required to execute the certification as a condition of being hired in accordance with and subject to local applicable laws and regulations. An applicant who refuses to do

so may not be hired in accordance with and subject to local applicable laws and regulations. Existing employees who refuse to execute this required certification may be subject to discipline, up to and including termination, in accordance with Company policy and in accordance with and subject to applicable local laws and regulations.

- 11.3 Existing employees who engage in any conduct prohibited under this policy may be provided with information concerning the resources available to evaluate and resolve a drug or alcohol problem, and the names, addresses, and telephone numbers of substance abuse professionals, counselling and treatment programs.
- 11.4 For any information or answers to questions about this policy, please contact Human Resource representative, who is the Company's designated representative for your work location.

12 IMPAIRED DRIVING CHARGE OR CONVICTION

Employees who require a valid driver's license in the performance of their duties (as determined by the Company) or who operate railway equipment and where driving privileges are lost or suspended due to an impaired driving charge or conviction while not on duty, must immediately report such loss to their supervisor. A medical assessment will then determine whether the employee suffers from a substance abuse disorder.

13 CONFIDENTIALITY

All individual tests and test results will be considered private and confidential information. An employee's test results will be released only in accordance with the employee's written consent, or as otherwise authorized or required by local applicable laws and regulations.