Ad Hoc 663

IN THE MATTER OF AN ARBITRATION UNDER THE *CANADA LABOUR CODE*

BETWEEN:

Teamsters Canada Rail Conference ("TCRC")

-and-

Canadian Pacific Railway ("CP")

RE: Dismissal of Mr. A

Arbitrator: Graham J. Clarke

Date: September 22, 2019

Appearances for TCRC:

Ken Stuebing — Legal Counsel, CaleyWray, Toronto
Dave Fulton — General Chairman, CTW-W, Calgary
John Campbell — General Chairman, LE-E, Peterborough
Chris Yeandel — Vice General Chairman LE East
Dennis Psichogios — Vice General Chairman CTY East
Mr. A. — Grievor

Appearances for CP:

Maryse Tremblay — Legal Counsel, BLG, Montreal
Nizam Hasham — Legal Counsel, Labour and Litigation, Toronto
Myron Becker — Assistant Vice-President, Labour Relations
Dave Guerin — Senior Director, Labour Relations, Calgary
Tony Marquis — Senior Vice President Operations, CP

Hearings took place in Montreal on July 12, November 6, December 6, 2018 and on April 26, 2019. On August 8, 2019, following further written submissions, the parties agreed the scheduled August 27, 2019 hearing date could be cancelled.

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INTRODUCTION

1. This award examines whether CP had just cause to terminate locomotive engineer (LE) Mr. A[1]. CP argued that Mr. A's consumption of cocaine in close proximity with operating a train constituted just cause for the termination of his employment.

2. The TCRC argued that Mr. A. suffered from a disability and that CP had failed to accommodate him.

3. This case turns on its characterization. Is it solely a discipline case involving an LE's consumption of cocaine just prior to or while operating a train? Or is it a duty to accommodate case for a situation where an employee has an addiction?

4. This case has a long litigious history. The matter first came before the Canadian Railway Office of Arbitration and Dispute Resolution (CROA) on July 10, 2014. The resulting July 14, 2014 award in CROA&DR 4328 ordered Mr. A's reinstatement.

5. CP successfully judicially reviewed the award before the Superior Court of Quebec (SCQ)[2] (*SCQ Decision*).

6. A majority of Quebec's Court of Appeal (QCA) upheld the SCQ's decision[3] (*QCA Decision*). On November 23, 2017, the Supreme Court of Canada (SCC) denied leave to appeal[4].

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[1] The parties contested whether the grievor's name should remain anonymous. Ultimately, the TCRC did not insist on this issue. However, given how all prior decisions have dealt practically with this identification issue, the arbitrator will follow that prior practice in this award. This case-specific practice does not constitute a precedent.

[2] Canadian Pacific Railway Company v. Picher, 2015 QCCS 2319

[3] Teamsters Canada Rail Conference c. Canadian Pacific Railway Company, 2017 QCCA 479

[4] Conférence ferroviaire de Teamsters Canada c. Compagnie de chemin de fer Canadien Pacifique, 2017 CanLII 78693

7. The SCQ's original order to have Mr. A's matter heard by a different CROA arbitrator resulted in the current proceeding. This hearing started on July 12, 2018 as part of CROA's regular monthly session. During the hearing, the parties agreed that the case's complexity merited hearing it by way of an *ad hoc* arbitration.

8. For the reasons which follow, CP satisfied the arbitrator that it had just cause to terminate Mr. A's employment. Consistent with this Office's case law, the use of drugs or alcohol at a time contemporaneous with operating a train may result in an employee's dismissal. The TCRC's evidence did not prove *prima facie* discrimination. As a result, no duty to accommodate existed in this case.

CHRONOLOGY OF KEY FACTS

9. **June 21, 1991**: CP hired Mr. A who later qualified as a conductor in 1994. In 2012 he qualified as an LE.

10. **December 27, 2012**: Following a derailment of the train he was operating, Mr. A. tested positive for cocaine in an oral swab test. The TCRC emphasized the unfavourable weather conditions and the slow speed of the train at the time of the derailment.

11. **January 3, 2013**: DriverCheck's "Results of Controlled Substance Test" indicated "Cocaine ***Metabolite*** quantitative level = 19 ng/ml. Cut off level = 8 ng/ml" (emphasis added). On January 28, 2013, Mr. A signed a Consent to Release Confidential Information for this information to be provided to CP (E-2; Tab 9). An issue arose regarding the difference between "cocaine metabolite" and "cocaine", *infra*.

12. **January 15, 2013**: CP took an initial statement from Mr. A (U-2; Tab 2). On the same day, due to his status as "held out of service", Mr. A was not granted access to the Employee Family & Assistance Program (EFAP) (U-2; Tab 9).

13. **February 4, 2013**: With Mr. A's consent, DriverCheck produced a letter reviewing the oral fluid drug test (E-2; Tab 10). Mr. A indicated he had taken cocaine while on vacation. DriverCheck's letter indicated the oral fluid sample tested positive for cocaine, but the urine test was negative. This particular result suggested more recent exposure to cocaine.

14. **February 7, 2013**: CP conducted a supplementary investigation with Mr. A (U-2; Tab 3), including about the DriverCheck letter.

15. **February 13, 2013**: CP terminated Mr. A's employment alleging just cause (E-2; Tab 12). CP did not reference Mr. A's existing demerit points, but provided this reason for his dismissal:

> "For conduct unbecoming an employee for your engaging in the use of an illegal and prohibited substance (cocaine) as evidenced by your positive substance test conducted on December 27, 2012, a violation of CROR General Notice, General Rule G, GOI Section 3 item 1.3 and item 7.0 and Company Policy OHS 4100, at St-Luc Yard, mile 46.9, Adirondack Subdivision, while working as a Locomotive Engineer on Train 253-23 on December 27, 2012.

16. **May 8, 2013**: Mr. A sent an email to CP suggesting he had a drug dependency and disability (E-2; Tab 13):

> I am writing this letter in addition to the grievance we have previously submitted. Please understand that although I stated in in my statement to CP Rail, that I believed my use of narcotics was social and that I only engaged in it's use 5-6 times a year, it has become apparent that after consulting my family doctor, I have been diagnosed with having a dependency to it. It is of utmost importance that CP be made aware of my disability. Please accept my apologies for the delay in submitting this doctors prescription to consult a psychiatrist. It has been an ordeal for myself and my family, and has been hard to accept. I also have a prescription to consult a psychologist and another doctor that specializes in this type of matter. I believe that I can start by seeing a psychiatrist as soon as I can get an appointment. This i can do because I was advised that it can be done under the medicare system at no charge to me. As for the other two prescriptions I will follow through as soon as I have the financial ability to do so.
>
> Please forward this doctors prescription to CP early next week and ask them to include this to the rest of my documents. (Sic)

A March 27, 2013 note entitled "Consultation Request" which was attached to Mr. A's email came from a Walmart XpressDoc clinic in Laval, Quebec. The reason given for the psychiatric consultation request was a "Dependence d'opioides". Mr. A never provided CP with any further information from a doctor until many years later, *infra*.

17. **February 26, 2014**: Mr. A sent CP various documents signed by an “Agente des relations humaines” or an “intervenant(e)” working at the Laval Addiction Rehabilitation Centre attesting to his attendance at multiple workshops and other sessions (E-2; Tab 21).

18. **May 12-13, 2014**: DriverCheck sent an amended report correcting its January 3, 2013 report and indicating that it had found “cocaine” rather than “cocaine metabolite”.

19. **July 10, 2014**: This Office heard Mr. A’s grievance as just one of many arbitrations scheduled for that CROA week.

20. **July 15, 2014**: In CROA&DR 4328 (*CROA&DR 4328* or original decision), the arbitrator ordered CP to reinstate Mr. A into his former position. During the subsequent appeal process, the parties had agreed to reinstate Mr. A to a non-safety sensitive position (E-3; Tab D). During his 2014-2017 reinstatement, Mr. A submitted to and passed all of his random alcohol and drug tests.

21. **May 28, 2015**: The SCQ quashed *CROA&DR 4328* and ordered that a different arbitrator hear it anew.

22. **March 23, 2017**: A majority of the QCA upheld the SCQ decision.

23. **March 24, 2017**: CP suggested it ended Mr. A’s reinstatement to a non-safety sensitive position following the QCA’s decision on the merits of the appeal (E-1; Paragraph 87). The TCRC suggested this occurred only after the SCC refused to grant leave (U-1; Paragraph 60). The difference is not material.

24. **November 23, 2017**: The SCC refused to grant leave to appeal.

25. **July 12, 2018**: This Office held the first day of hearing into the current matter as part of CROA’s regular July hearings. During the hearing, the parties agreed to continue the matter as an ad hoc arbitration. The arbitrator refused CP’s request to order the TCRC to hand over its brief since CP had yet to complete its presentation.

26. **October 18, 2018**: Mr. A underwent a comprehensive medical assessment by Dr. Jean-Pierre Chiasson, an expert in addiction medicine (U-2; Tab 18 (Original French version)). The TCRC gave a copy of the October 25, 2018 report to CP prior to the next hearing day.

27. **November 6, 2018**: CP completed its submission in chief on Day 2 of the arbitration. The TCRC commenced its submissions, including about Dr. Chiasson's report.

28. **December 6, 2018**: The TCRC completed its presentation. Due to the number and complexity of various evidentiary objections, the parties agreed to prepare written briefs setting out their positions.

29. **March 7, 2019**: The arbitrator advised the parties that the objections would be dealt with in the final award.

30. **April 26, 2019**: CP completed its reply. Since each party has its own burden, CP for its just cause allegation and the TCRC for *prima facie* discrimination, a further hearing day was scheduled for August 27, 2019 for the TCRC's reply. Ultimately, the parties each wrote a short submission in July and August 2019, respectively, to complete the hearing.

31. This award will next examine the numerous objections the parties raised during the hearing. It will then examine how properly to characterize this case.

OBJECTIONS

Preliminary Comments

32. During the arbitration, both parties raised several evidentiary objections. A CROA arbitrator decides these questions having regard to the pertinent statutory powers and agreements between the parties.

33. Section 16(c) of the Canada Labour Code (*Code*) sets out an arbitrator's power over evidence[5]:

[5] By reference from s.60(1)(a) of the Code.

> 16 The Board has, in relation to any proceeding before it, power
>
> …
>
> (c) to receive and accept such evidence and information on oath, affidavit or otherwise as the Board in its discretion sees fit, whether admissible in a court of law or not.

34. In article 13 of the Memorandum of Agreement Establishing the CROA&DR (*MOA*), the parties have further commented on an arbitrator's power over evidence:

> The arbitrator shall not be bound by the rules of evidence and practice applicable to proceedings before courts of record but may receive, hear, request and consider any evidence which he/she may consider relevant.

35. Under CROA's expedited system of arbitration, the parties have agreed to use a formal investigation to identify the facts in *discipline* cases. The intent is to eliminate the fact-finding role arbitrators would otherwise perform in a regular arbitration. This agreement between the parties allows this Office to hear multiple cases in a single day.

36. Certain production obligations exist to ensure an impartial and fair investigation; a failure to meet these obligations may render any discipline void *ab initio*.

37. In CROA&DR 2073, this Office noted the investigation was intended to be informal, but still had to be fair and impartial:

> As previous awards of this Office have noted (e.g. CROA 1858), disciplinary investigations under the terms of a collective agreement containing provisions such as those appearing in Article 34 are not intended to elevate the investigation process to the formality of a full-blown civil trial or an arbitration. **What is contemplated is an informal and expeditious process by which an opportunity is afforded to the employee to know the accusation against him, the identity of his accusers, as well as the content of their evidence or statements, and to be given a fair opportunity to provide rebuttal evidence in his own defence.** Those requirements, coupled with the requirement that the investigating officer meet minimal standards of impartiality,

> are the essential elements of the "fair and impartial hearing" to which the employee is entitled prior to the imposition of discipline.
>
> (Emphasis added)

38. In CROA&DR 3061, this Office noted that a faulty investigation which compromised the integrity of the record could lead to a finding of the discipline being void *ab initio*:

> As noted in prior awards of this Office, in discipline cases the form of expedited arbitration which has been used with success for decades within the railway industry in Canada depends, to a substantial degree, on the reliability of the record of proceedings taken prior to the arbitration hearing at the stage of the Company's disciplinary investigation. **As a result, any significant flaw in the procedures which substantially compromise the integrity of the record which emerges from that process goes to the integrity of the grievance and arbitration process itself. Consequently, in keeping with general jurisprudence in this area, it is well established that a failure to respect the mandatory procedures of disciplinary investigations results in any ensuing discipline being ruled void ab initio.**
>
> (Emphasis added)

39. In CROA&DR 4663, the current arbitrator noted that a faulty investigation, as well as a total failure to investigate, can lead to the discipline being void *ab initio* (paras 20-23).

40. The context surrounding the current objections differs from that usually before this Office. This case has a long and expensive history. Proceedings took place before the SCQ and the QCA. The courts' decisions indicated that they had before them a significant amount of documentary material, some of which is now the subject of these admissibility objections. This context must be considered before extrapolating any conclusions in this case to regular CROA cases.

41. The parties' written submissions contain significant detail about the objections. The arbitrator will simply set out the reasons in support of each conclusion.

Did CP fail to conduct a fair and impartial investigation?

<u>The Substance Test</u>

42. The TCRC alleged that CP violated, *inter alia*, article 23 of the collective agreement by not fully disclosing the results of Mr. A's substance test until long after the two investigation interviews. Some material was provided to the TCRC on May 13, 2014 before the first arbitration hearing. CP produced further documentation at the hearing (E-2; Tab 11). The TCRC argued that the later documents represented fundamentally different quantitative results.

43. The TCRC argued the failure to provide these "keystone" documents at the time of the interviews prejudiced Mr. A and rendered his discipline void *ab initio*.

44. The arbitrator dismisses this objection for several reasons.

45. First, while there was an error in one document which used the word "metabolites" (E-2; Tab 9), it was clear from another contemporaneous document, which also summarized a conversation directly with Mr. A, that the test results had shown the presence of cocaine but *not* cocaine metabolites (E-2; Tab 10).

46. Mr. A's second interview on February 7, 2013 clearly referred to this finding regarding cocaine. CP provided Mr. A and the TCRC with the February 4, 2013 DriverCheck letter which referenced only cocaine and asked for his comments (U-2; Tab 3; QA 30). Mr. A had the opportunity to explain how he tested positive for cocaine, but not metabolites, a result which suggested recent consumption of the drug (U-2; Tab 3; QA 41).

47. Second, the "Consent to release confidential information" Mr. A signed (E-2; Tab 9) provided him with the same documentation sent to CP. This is not a case of an employer withholding important information from an employee and then attempting to rely on it at arbitration. This distinguishes this case from others, including Arbitrator Sims' decision in CROA&DR 4558.

48. Third, since Mr. A had access to this information, CP's forwarding of it to the TCRC in May 2014 and including, it appears, more of it in its brief for this hearing, falls outside the cases submitted regarding discipline being declared void *ab initio.* See, for example, CROA&DR 3452, which overturned discipline when the employer failed to provide the union with the "Reasonable Cause Report Form", a keystone document.

49. Fourth, the additional documents at Tab 11, beyond those disclosed to Mr. A and the TCRC in May 2014, only came to light as a result of a subpoena issued to Dr. Snider-Adler. They could not have been keystone documents in CP's possession at the time of its 2013 interviews with Mr. A.

50. Finally, the doctrine of waiver, *infra*, would apply, at least to the documents provided in May 2014 to the TCRC. But reliance on the doctrine ultimately isn't necessary since Mr. A, and by implication the TCRC, had access to all these documents at the same time as CP. That was the clear effect of the Consent Mr. A signed and negates any suggestion that CP's investigation was unfair.

Mr. A's Medical Report Form

51. The TCRC also objected to an October 2009 Medical Report Form which CP included in its materials (E-2; Tab 4). The TCRC argued that the document should be inadmissible since Mr. A never authorized its disclosure.

52. CP suggested the information later became relevant when Mr. A changed his position from that given at his interview on whether he suffered from an addiction. CP highlighted from that document Mr. A's answer of "no" to the question of whether he had "ever used cocaine" or other drugs. CP also argued that a "Last Chance Agreement" (E-2; Tab 3) Mr. A had signed in 2008 as a condition of reinstatement constituted consent. CP also referred to exceptions in the *Personal Information Protection and Electronic Documents Act*[6].

53. In a normal case, the arbitrator might have agreed with the TCRC about the inadmissibility of this document, absent evidence of proper consent or statutory authorization. CP did not explain how it came to be in possession of it. Personal medical information needs to be protected.

54. But this is not a normal case. It is a case where documents, like this one in dispute, have been part of the record, for whatever reason, before an arbitration tribunal and two levels of courts. The QCA seemingly referred to this very document explicitly in paragraph 41 of its judgment.

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[6] SC 2000, c 5

55. The TCRC never previously contested before the original arbitrator the inclusion of the document as part of CP's Brief. Neither did it dispute its inclusion in the record put before both the CSQ and QCA.

56. Given that context, and the doctrine of waiver, the arbitrator is not prepared to exclude the document at the fourth hearing into this case[7].

Does Dr. Snider-Adler have standing as an independent expert witness

57. The TCRC objected to Dr. Snider-Adler testifying as an expert witness. Dr. Snider-Adler is an independent contractor who DriverCheck retains to work as its Chief Medical Review Officer given her expertise in addictions medicine. She provides her expertise to multiple organizations.

58. CP called her to testify about i) the likely time of consumption given the test results; ii) Mr. A's impairment from cocaine given the test results; iii) the interpretation of the test which showed a positive saliva test for cocaine; iv) whether the test showed Mr. A was a regular user of cocaine at the time the test was performed; v) the difference between cocaine and opioids; and vi) Mr. A's ability to control consumption.

59. Dr. Snider-Adler also testified about the 2018 hair analysis results which the TCRC had produced.

60. The TCRC argued that CP is a client of DriverCheck which prevents Dr. Snider-Adler from giving expert evidence that is impartial, independent or unbiased as required by the case law[8]. It also suggested that DriverCheck's error regarding the word "metabolites" would colour her testimony in order to preserve a client relationship.

61. CP noted that the SCC's decision in *White Burgess* held that a mere employment relationship did not automatically disqualify an expert witness. And Dr. Snider-Adler was not a DriverCheck employee.

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[7] International Brotherhood of Electrical Workers System Council No. 11 v Canadian National Railway Company, 2018 CanLII 87236

[8] See, for example, *R. v. Mohan*, [1994] 2 SCR 9, 1994 CanLII 80 and *White Burgess Langille Inman v. Abbott and Haliburton Co.*, [2015] 2 SCR 182, 2015 SCC 23.

62. The TCRC did not satisfy the arbitrator that Dr. Snider-Adler could not give impartial, independent and unbiased evidence. Employee status in an organization, or that of an independent contractor providing services, does not disqualify an expert. More is needed.

63. Dr. Snider-Adler clearly had the relevant expertise. The arbitrator did exclude her from the hearing given her hybrid role. When she testified, her demeanour showed that she gave evidence favourable to both sides, including during cross-examination when she commented on how to accommodate an employee suffering from an addiction. During her testimony, Dr. Snider-Adler did not advocate for CP but instead provided the arbitrator with helpful expertise regarding the meaning of the drug test results at the heart of this case.

Did the TCRC expand the issues beyond those set out in the JSI?

64. CP alleged that the TCRC added new issues to this case which it never raised in the JSI or at the original arbitration. For example, it alleged that the TCRC first raised a void *ab initio* argument on December 6, 2018, which was day three of the four-day hearing. CP suggested that despite its provision of additional DriverCheck documents to the TCRC on May 14, 2014, a void *ab initio* argument was never raised at the later July 10, 2014 arbitration[9].

65. CP also argued that the TCRC's objection to the inclusion of the October 2009 Medical Report Form fell outside the issues identified by the JSI.

66. CP also noted that the parties agreed to use the same JSI which they had both signed before the 2014 arbitration. That JSI did not include an objection to the documents sent to the TCRC on May 14, 2014.

67. The TCRC disputed CP's facts. It alleged that it had indeed objected to the addition of further DriverCheck documents at the July 10, 2014 proceeding. Similarly, it noted that the JSI had been negotiated and signed prior to CP sending the documents on May 14, 2014. It could not have included unknown future events in the JSI. A party must be able to object when it learns of new documents or events not previously within its knowledge.

[9] The original arbitration had been scheduled for May 2014 but was ultimately not heard until July 2014.

68. The TCRC also suggested that the QCA and SCQ did not examine the merits of the case and therefore there was no need to object to the inclusion of the documents in those proceedings.

69. Given the arbitrator's decision above rejecting the TCRC's argument that the discipline be declared void *ab initio*, and the decision regarding the October 2009 Medical Report Form, CP's objection has become moot.

Can the arbitrator consider post-discharge evidence?

70. CP contested the post-discharge evidence the TCRC filed, i.e. i) Mr. A's May 8, 2013 email and medical referral; ii) Mr. A's documents from the Laval Addiction Rehabilitation Centre; iii) Hair test results of March 10 and July 5, 2018 (U-2; Tabs 17A & 17B); and iv) Dr. Chiasson's medical report dated October 25, 2018.

71. In CP's view, an arbitrator cannot rely on post-discharge evidence unless it sheds light on the reasonableness and appropriateness of the discharge at the time it was implemented. CP relied on the SCC's comments in *Cie minière Québec Cartier v. Quebec (Grievances arbitrator)*[10](*Quebec Cartier*):

> 13 This brings me to the question I raised earlier regarding whether an arbitrator can consider subsequent-event evidence in ruling on a grievance concerning the dismissal by the Company of an employee. In my view, an arbitrator can rely on such evidence, but only where it is relevant to the issue before him. **In other words, such evidence will only be admissible if it helps to shed light on the reasonableness and appropriateness of the dismissal under review at the time that it was implemented. Accordingly, once an arbitrator concludes that a decision by the Company to dismiss an employee was justified at the time that it was made, he cannot then annul the dismissal on the sole ground that subsequent events render such an annulment, in the opinion of the arbitrator, fair and equitable**. In these circumstances, an arbitrator would be exceeding his jurisdiction if he relied on subsequent-event evidence as grounds for annulling the dismissal. To hold otherwise would be to accept that the result of a grievance concerning the dismissal of an employee could vary depending on when it is filed and the time lag between the initial filing and the final hearing by the arbitrator. **Furthermore, it would lead to the absurd conclusion that a decision by the Company to dismiss an alcoholic employee could be overturned whenever that employee, as a result of the shock of being dismissed,**

[10] [1995] 2 SCR 1095, 1995 CanLII 113 (SCC)

> **decides to rehabilitate himself, even if such rehabilitation would never have occurred absent the decision to dismiss the employee.**
>
> 14 **In light of the above, I conclude that, in the case at hand, the arbitrator exceeded his jurisdiction in overturning the decision of the Company to dismiss Mr. Beaudin**. As I noted earlier, it is apparent from the arbitrator's reasons in the case at hand that he felt that the decision of the Company to dismiss Mr. Beaudin was justified at the time that the decision was made. Nonetheless, despite this conclusion, the arbitrator went on to overturn the dismissal on the grounds that subsequent-event evidence indicated that Mr. Beaudin had been cured of his alcohol problem and had become capable of fulfilling his employment obligations to the Company. Accordingly, the arbitrator decided to give Mr. Beaudin one last chance and to reinstate him to his job. However, such a decision was beyond the jurisdiction of the arbitrator. If the dismissal was justified at the time it was implemented, the arbitrator had no jurisdiction to provide Mr. Beaudin with such a last chance. **There is no provision in Quebec labour law or in the collective agreement between the Company and the Union which would permit a labour arbitrator to overturn a decision by the Company to dismiss an employee notwithstanding the fact that the Company demonstrated just cause for the dismissal.**
>
> (Emphasis added)

72. CP further contested the value of the post discharge evidence. For example, the May 8, 2013 Walmart note did not reference a cocaine dependency. Rather, it simply referred Mr. A to a psychiatrist for a dependence on opioids. Similarly, CP contested Dr. Chiasson's report, given that the consultation took place almost six (6) years after the derailment incident. In short, CP argued that such evidence did not address the reasonableness of CP's decision to terminate Mr. A.

73. The TCRC argued that the SCC's decision in *Toronto (City) Board of Education v. O.S.S.T.F., District 15*[11] *(TBE)* modified its earlier *Quebec Cartier* decision. In *TBE*, the SCC found fault with an arbitration board's failure to consider a third employee letter which had existed at the time of the arbitration:

> 72 The final significant item of evidence which leads to the conclusion that the grievor's conduct was not temporary is the third letter. **It was written several months after the Board of Inquiry's decision had been rendered,**

[11] [1997] 1 SCR 487, 1997 CanLII 378

> **and a month and a half before the hearing before the Board of Arbitration was to begin. Curiously, the majority did not even refer to it.**
>
> (Emphasis added)

74. The SCC noted that while the letter was "subsequent-event evidence", it could still be considered in certain situations:

> 74 **It is true that the third letter is, to some extent, "subsequent-event evidence" since it was written after the dismissal of Mr. Bhadauria. However it has been decided that such evidence can properly be considered "if it helps to shed light on the reasonableness and appropriateness of the dismissal"**: Cie minière Québec Cartier v. Quebec (Grievances Arbitrator), 1995 CanLII 113 (SCC), [1995] 2 S.C.R. 1095, at p. 1101. **In this case, it would not only have been reasonable for the arbitrators to consider the third letter, it was a serious error for them not to do so.**
>
> (Emphasis added)

75. The TCRC also noted that arbitrators in other jurisdictions have not always followed the SCC's decision in *Quebec Cartier* due to differently worded legislative provisions.

76. The arbitrator agrees with the TCRC that evidence does not permanently crystallize as of the date of termination, particularly when further evidence arises during the investigation and after the termination which demonstrates an employee suffered from a disability. Ignoring that evidence would cause the same error the SCC found in the *TBE* case.

77. At the April 26, 2019 hearing day, the TCRC objected to CP filing an expert report from Dr. Gilles Fleury (E-15). In its view, CP could not file that report during its reply, since that prejudiced Mr. A. The arbitrator dismissed the objection and noted that both parties had their respective burdens. The TCRC had to prove *prima facie* discrimination. It added Dr. Chiasson's report as part of its initial presentation. While CP was *replying* to the TCRC's comments regarding Mr. A's discipline, it was only *responding* to the TCRC's initial submissions regarding *prima facie* discrimination. It would have been procedurally unfair to prevent CP from adding material in response to that already filed, albeit under objection, by the TCRC.

78. The TCRC still had its right of reply on the issue of *prima facie* discrimination, which it provided via a written submission dated July 25, 2019.

79. The arbitrator accepts the parties' material into evidence. The main question is what weight, if any, to give to this material, especially for those elements which came into existence many years after the original December 2012 incident.

Are newspaper articles containing alleged comments by CP management following the original award admissible?

80. CP alleged that the newspaper articles the TCRC filed (U-2; Tab 11) constituted hearsay and were therefore inadmissible.

81. The TCRC argued that the newspaper articles are relevant for the issue of accommodation to the point of undue hardship. In particular, it noted that CP's then CEO was quoted as saying that Mr. A would never again operate a locomotive on his watch.

82. CP did not persuade the arbitrator that these newspaper articles were inadmissible. Given the conclusions reached below, however, their existence in the record became academic.

ANALYSIS AND DECISION

Introduction

83. At first glance, Mr. A's case appears similar to the one the arbitrator decided in CROA&DR 4667 (*Paisley*). LE Paisley, a long time CP employee, had consumed alcohol while operating his train. He was charged under the *Criminal Code*[12] and later pleaded guilty. CP terminated him and alleged just cause.

84. In *Paisley*, the TCRC met its burden of proving *prima facie* discrimination (para 41). The evidence disclosed, for example, that Mr. Paisley suffered from alcohol addiction (paras 44-46). He admitted he had this problem during CP's investigation and provided confirming medical and other evidence following his termination. He apologized to CP, his conductor and the TCRC for his behaviour (para 12). At the time of the arbitration, the

[12] R.S.C., 1985, c. C-46

Court hearing the criminal charges had already determined that Mr. Paisley had an alcohol addiction and had granted him a "curative discharge" (paras 20-21).

85. Despite the TCRC meeting its burden in *Paisley* of proving *prima facie* discrimination, CP treated the case solely as one involving discipline. It did not address the issue of undue hardship (paras 51-58).

86. The arbitrator reinstated LE Paisley, but subject to strict conditions designed to protect CP's legitimate business interests (paras 59-60).

87. *Paisley* was a case which turned on its characterization. Was it a discipline case or a duty to accommodate case? Mr. A's case raises the same characterization issue. The *Paisley* award reviewed how this Office has treated cases of an employee operating a train while impaired (para 24-26). This conduct is among the most serious in the railway industry. The *Criminal Code* deals with such conduct explicitly. But, in appropriate cases, the penalty may be mitigated if an employee legitimately suffered from a disability.

Did TCRC demonstrate that *prima facie* discrimination existed?

What relevance does the original arbitration decision (*CROA&DR 4328*) have to this arbitration?

88. The SCQ quashed *CROA&DR 4328* and ordered that the case be reheard by a different arbitrator. The QCA confirmed that decision.

89. The TCRC urged the arbitrator to find that *CROA&DR 4328* had determined that Mr. A had an addiction and that *prima facie* discrimination therefore existed. The TCRC suggested it was only insufficient reasons in *CROA&DR 4328* which had led both courts to agree the original award should be quashed.

90. CP contested both the TCRC's interpretation of *CROA&DR 4328* and its relevance to the current arbitration. In CP's view, a quashed award ceases to exist, and the current arbitration constituted a hearing *de novo*.

91. The arbitrator agrees that the reasons in *CROA&DR 4328* have no relevance to the current arbitration. This award must be based solely on what occurred at the ad hoc arbitration, which was a court ordered hearing de novo.

The context underlying the original arbitrator's decision in *CROA&DR 4328*

92. Despite the finding that *CROA&DR 4328* has no relevance to this rehearing, the arbitrator will nonetheless comment on the context the original arbitrator faced.

93. The nature of CROA's monthly expedited arbitration regime requires an arbitrator to hear up to 7 cases in a day over three consecutive hearing days. The *MOA* requires arbitrators to issue all awards within 30 days.

94. The original arbitrator issued 12 awards for the July 2014 session. For *CROA&DR 4328*, he did not have the benefit of multiple hearing days. In the instant case, both parties, and the arbitrator, benefited from the submissions made by specialist labour lawyers pleading a complex case.

95. The CROA regime, which had operated quite successfully for over 50 years, does occasionally have its challenges. The awards have traditionally been summary to reflect this key aspect of an expedited arbitration regime.

96. However, the parties obviously retain their right to judicially review any award. An arbitrator, who may have to draft, for example, 12 awards within 30 days, evidently only learns afterward which one(s), if any, the parties will judicially review. The greater the number of judicial reviews, the greater the pressure on any arbitrator to depart from the summary process the parties have negotiated.

97. As noted in CROA&DR 4667 at paragraph 38[13], some cases, like those involving the duty to accommodate or alleged harassment, fit uncomfortably within CROA's monthly expedited arbitration regime. When complex and developing legal issues are at stake, an ad hoc or even a regular arbitration with full *viva voce* evidence might be more appropriate.

What is the TCRC's burden of proof for *prima facie* discrimination?

98. The *Paisley* award commented on the use of the term "prima facie" when used in the context of discrimination cases:

[13] See also CROA&DR 4630P at paragraph 21.

> 31. To many labour lawyers, proving something "prima facie", which means "based on the first impression" or "at first sight", would not be overly onerous. However, in recent years, SCC jurisprudence on the issue of proving "prima facie discrimination" has led to extremely complex arbitration proceedings. Those cases often involve expert medical evidence as part of the "prima facie discrimination" analysis.
>
> 32. The term "prima facie" in this context no longer means what one might otherwise have thought at first glance.

99. In *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*[14] (*Bombardier*), the SCC confirmed that the civil standard of proof on a balance of probabilities applied to "prima facie" discrimination:

> [59] In our opinion, Bombardier is right that the standard of proof that normally applies in the civil law, namely that of proof on a balance of probabilities, applies in this case. In a discrimination context, the expression "prima facie" refers only to the first step of the process and does not alter the applicable degree of proof. This conclusion is inescapable in light of this Court's past decisions.

100. The SCC in *Stewart v. Elk Valley Coal Corp*[15] (*Elk Valley*) further commented on the test to meet to prove *prima facie* discrimination:

> [24] **To make a case of prima facie discrimination, "complainants are required to show that they have a characteristic protected from discrimination under the [Human Rights Code, R.S.B.C. 1996, c. 210]; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact": Moore, at para. 33. Discrimination can take many forms, including "'indirect' discrimination", where otherwise neutral policies may have an adverse effect on certain groups**: Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center), 2015 SCC 39 (CanLII), [2015] 2 S.C.R. 789, at para. 32. Discriminatory intent on behalf of an employer is not required to demonstrate prima facie discrimination: Bombardier, at para. 40.

[14] [2015] 2 SCR 789, 2015 SCC 39
[15] [2017] 1 SCR 591, 2017 SCC 30

(Emphasis added)

Did the evidence led in 2014 demonstrate *prima facie* discrimination?

101. As noted in the Introduction, the TCRC did not meet its burden of proof.

102. To meet the burden of proof, this office has traditionally required some medical documentation in support of a disability claim: See, for example, SHP568 and CROA&DR 4334. Arbitrator Hornung expressed the issue this way in CROA&DR 4653-4654:

> **Union Document 16, consists of a note from a doctor (who the Grievor was seeing for the first time on August 12, 2018) essentially repeating what the Grievor told him relative to his cocaine "problem".** However, that letter simply does not meet the evidentiary threshold to establish a link between the misconduct at issue and the medical condition. **The evidence is that, at the time of the incident, the Grievor was an occasional user of cocaine. In the result, there is no evidence upon which I can conclude that the Grievor was indeed suffering from a disability at the time of the incident. While, I accept that the assessment of a disability does not always require expert medical evidence, it requires more than that adduced at this hearing.**
>
> (Emphasis added)

103. In CROA&DR 2716, this Office demanded that arbitrators safeguard against possibly spurious claims:

> It is, of course, important for boards of arbitration to safeguard against spurious claims of rehabilitation, patched together in an opportunistic way so as to regain employment for an individual who has not in fact either recognized or truly come to grips with his or her addiction. **It is for that reason that this Office, and other boards of arbitration generally, place a significant onus upon the employee seeking the benefit of the arbitrator's discretion to bring forth substantial documentary evidence to confirm a meaningful course of rehabilitation and follow-up.**
>
> (Emphasis added)

104. The 2014 evidence Mr. A produced was sparse at best. The QCA at paragraph 44 of its decision had noted the absence of any medical information suggesting a cocaine dependency:

> [44] D'une part, l'obligation d'accommodement existe[20] et il n'est certes pas exclu que le mis en cause pouvait la considérer, mais elle ne s'imposait pas de façon obligatoire ici, vu toutes les circonstances du dossier. **Il ne faut pas oublier, entre autres, que le dossier ne comporte aucune preuve médicale de dépendance à la cocaïne** [21].
>
> (Emphasis added)

105. Unlike the candour one finds in *Paisley*, Mr. A was initially adamant in his investigation statements, despite the clear test results put to him, that he had not taken cocaine at any time close to the time when he was operating a train which later derailed. At best, he made a brief allusion that he might have a bigger problem (U-2; Tab 3; QA 41). But that does not constitute medical evidence.

106. The arbitrator accepts that denial may be part of an addiction problem in some cases. But that does not relieve the arbitrator from still having to make findings of fact based on all the evidence in a case, including from the grievor's comments.

107. As noted in the chronology, Mr. A seemingly changed his position several months after his termination and produced the consultation referral note from Walmart. That note referenced explicitly an opioid problem. The parties did not contest that cocaine is not an opioid.

108. Despite the consultation referral note, Mr. A never consulted a psychiatrist or produced a medical report prior to the 2014 original hearing. Indeed, nothing seemingly occurred for many months after Mr. A obtained the consultation referral note.

109. The arbitrator accepts that Mr. A attended the program at the Laval Addiction Rehabilitation Centre. But that in and of itself does not prove he had a disability. This limited evidence simply falls short of what this Office has required in the past and what the burden of proof for *prima facie* discrimination requires.

<u>Did the evidence added in 2018 demonstrate *prima facie* discrimination?</u>

110. Generally, the arbitrator has serious concerns whether evidence created and produced many years after the key events fits within the concept of "subsequent event evidence", as the SCC used that expression in *Quebec Cartier* and *TSB*. The evidence

in both those cases came into being post termination but was available when the original decision maker examined the overall context. This Office first heard Mr. A's case in July 2014. Evidently, none of the 2018 evidence existed at that time[16].

111. Moreover, the "subsequent event evidence" has to "shed light on the reasonableness and appropriateness of the dismissal". The usefulness of any evidence would seemingly dissipate the further removed it is temporally from the dismissal date.

112. But if the evidence added in 2018 does satisfy what the SCC had in mind in those two decisions, then the arbitrator will consider its weight.

113. The TCRC referred to two items in support of a finding of *prima facie* discrimination. CP had randomly tested Mr. A during his reinstatement period and he never tested positive for drugs. The TCRC also produced 2018 hair follicle tests which similarly came back negative.

114. This evidence did not persuade the arbitrator that Mr. A had a cocaine dependency which he was now managing. Those results appear equally consistent with someone who used cocaine only occasionally and never had an addiction.

115. And what of Dr. Chiasson's October 25, 2018 report on the specific issue of a cocaine dependency (U-2; Tab 18 – original French version)? If this is proper subsequent event evidence, then the arbitrator concludes, for several reasons, that it cannot support the conclusion that Mr. A had a cocaine dependency at the material times in late 2012 and early 2013.

116. First, the context surrounding this report cannot be ignored. The accident which led to Mr. A's termination occurred on December 27, 2012. Dr. Chiasson issued his report almost 6 years later on October 25, 2018. By contrast, in *Paisley*, the medical and other evidence the arbitrator considered all arose prior to the arbitration and in relatively close proximity to the incident.

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[16] In part, Dr. Chiasson commented on the materials already in the record, just as Dr. Snider-Adler had. However, the arbitrator views Dr. Chiasson's comments on the new 2018 evidence regarding whether Mr. A had a disability as significantly different, *infra*.

117. Second, Dr. Chiasson's report was only prepared and filed after Mr. A had received CP's brief and heard several hours of CP's submissions. During the first day of the hearing, Dr. Snider-Adler had testified that the test results did not show a cocaine dependency or an inability to control consumption. CP's submissions also emphasized, *inter alia*, the lack of medical evidence supporting a finding of a cocaine dependency. This context cannot be ignored when considering what weight to give to parts of Dr. Chiasson's report.

118. Third, there is a further difference between Dr. Snider-Adler's testimony and parts of the Chiasson report. Dr. Snider-Adler focused on the tests performed after the 2012 accident and testified about their implications. Dr. Chiasson's report, in contrast, added new evidence to the record. This occurred almost 6 years after the derailment and testing. The arbitrator has difficulty giving much weight to that aspect of the report given the significant passage of time.

119. Fourth, the arbitrator agrees with CP that Dr. Chiasson made it clear that his observations were based on what Mr. A told him. He also used conditional wording. Mr. A seemingly repeated to Dr. Chiasson some of the original comments he made during CP's investigation. For example, Dr. Chiasson wrote on page 3: "Selon M. [A], il aurait seulement consommé le 22 décembre 2012". The test results do not support this claim. Rather, the test results show that Mr. A consumed cocaine in close proximity to the time when he was operating his train on December 27, 2012.

120. Mr. A also advised Dr. Chiasson of a factual situation regarding "metabolites" which was not necessarily consistent with the facts the arbitrator has found given the investigation interviews and the documents CP provided to Mr. A for his interviews (page 3):

> Retenons qu'il y a eu ensuite une correction que le dépistage était positif à la cocaïne (substance mère) et non aux métabolites de cocaïne et une lettre contenant ces corrections a été envoyée à l'employeur en mai 2014.

121. Similarly, Dr. Chiasson only concluded that Mr. A might have *possibly* had a cocaine dependency based on the information provided (page 23):

> **Selon les informations**, monsieur [A] **aurait présenté possiblement** un trouble de l'usage de la cocaïne…

(Emphasis added)

122. Dr. Chiasson's report also contained strangely placed question marks (?) which impacted how to interpret his comments (page 23). Dr. Chiasson seemingly also had difficulty with Mr. A's suggestion that he had consumed cocaine days before when compared with the test results:

> Monsieur [A] présentait une dépendance à la cocaïne mais selon les informations recueillies, il consommait seulement lorsqu'il était en vacances ou les fins de semaine **(?). Il allègue n'avoir jamais consommé avant ou pendant ses heures de travail (?)**.
>
> …
>
> Par ailleurs, **il est difficile de statuer sur l'information que nous donne monsieur [A] selon laquelle il ne consommait que lorsqu'il était en congé ou en vacances (?). Cependant, s'il est exact que le test salivaire ait été positif à la cocaïne (substance mère), il va sans dire que monsieur avait consommé dans les heures précédant ce test (fait le 27/12/2012 vers 20h)**.
>
> (Emphasis added)

123. For the foregoing reasons, even though the arbitrator admitted Dr. Chiasson's report into evidence since it does comment on some of the same issues about which Dr. Snider-Adler had testified, the overall context nonetheless obliges the arbitrator to give it little weight for the specific issue of a cocaine dependency in 2012-2013.

124. The TCRC did not persuade the arbitrator that Mr. A had a cocaine dependency. Consequently, it could not demonstrate *prima facie* discrimination.

125. The arbitrator concludes this case is not a duty to accommodate case, but rather a discipline case.

Did CP have just cause to terminate Mr. A?

126. The QCA referenced the SCC's decision in *TBE* to describe a labour arbitrator's 3-step analysis when determining whether just cause exists for termination of employment:

> [36] Selon la doctrine et la jurisprudence, l'arbitre saisi d'un grief contestant un congédiement doit vérifier si l'employé a commis une faute dont la gravité justifie la fin de l'emploi. Cette démarche comporte trois étapes[15], comme le rappelle la Cour suprême dans l'arrêt Conseil de l'éducation de Toronto (Cité) c. F.E.E.E.S.O., district 15, une affaire impliquant un arbitre de griefs saisi de la contestation d'un congédiement :
>
>> La première étape de tout examen de la question de savoir si un employé a été congédié pour une «cause juste» consiste à se demander si l'employé est effectivement responsable de la mauvaise conduite que lui reproche l'employeur. La deuxième étape est de déterminer si la mauvaise conduite constitue une cause juste justifiant les mesures disciplinaires. La dernière étape consiste à décider si les mesures disciplinaires choisies par l'employeur sont appropriées compte tenu de la mauvaise conduite et des autres circonstances pertinentes. Voir Heustis, précité, à la p. 772.[16]

127. In English, the extract from the SCC's decision in *TBE* reads:

> 49 The first step in any inquiry as to whether an employee has been dismissed for "just cause" is to ask whether the employee is actually responsible for the misconduct alleged by the employer. The second step is to assess whether the misconduct gives rise to just cause for discipline. The final step is to determine whether the disciplinary measures selected by the employer are appropriate in light of the misconduct and the other relevant circumstances. See Heustis, supra, at p. 772.

128. The QCA overturned the original decision, in part, due to this Office's failure to examine all three steps:

> [39] Le mis en cause retient ici que l'employé a commis une faute lorsqu'il écrit : « I am satisfied that the Company is correct in its assertion, on the balance of probabilities, that the grievor did consume cocaine at a time and of a quantity which could impact his work performance. »[19].
>
> [40] **Il omet cependant de traiter de la seconde question, celle qui concerne la gravité de la faute. Or, il ne fait pas de doute ici que la faute de l'employé était des plus sérieuses. Il a pris une substance illicite alors qu'il était responsable de la conduite d'un train. Il occupait, je le rappelle, un poste clé en matière de sécurité, mettant ainsi en péril la sécurité des passagers et du public en général.** Une faute doit être évaluée selon le contexte en tenant compte du milieu de travail où elle a été commise.

(Emphasis added)

129. CP has demonstrated that Mr. A. took cocaine at a time when it would impact his work performance. The test results show that cocaine had been taken within hours of the testing. DriverCheck's error in including the word "metabolites" on a single document does not change this conclusion, or create any unfairness, given the other evidence Mr. A had in his possession at the time of his interviews.

130. CP further demonstrated, as the QCA itself noted, that Mr. A's taking of cocaine in close proximity to operating a train was extremely serious. Mr. A acknowledged this himself, albeit while denying the test's findings (U-2; Tab 3; QA 41):

> …I have been completely honest I have admitted to being an occasional user of cocaine, but these results must be inaccurate. They would imply that I would take a chance on crossing the US border, risking my job, embarrassment to myself, and to CP rail not to mention imprisonment. This would also imply that I would take the chance on doing it during my shift, and putting at risk the safety of my co-workers and the public, which is absolutely ridiculous…(sic).

131. As alluded to by Mr. A, the *Criminal Code* at the time of the derailment read[17]:

> Operation while impaired
>
> 253 (1) Every one commits an offence who operates a motor vehicle or vessel or operates or assists in the operation of an aircraft or of railway equipment or has the care or control of a motor vehicle, vessel, aircraft or railway equipment, whether it is in motion or not,
>
> (a) while the person's ability to operate the vehicle, vessel, aircraft or railway equipment is impaired by alcohol or a drug; or
>
> (b) having consumed alcohol in such a quantity that the concentration in the person's blood exceeds eighty milligrams of alcohol in one hundred millilitres of blood.

[17] The Criminal Code was amended in 2018.

132. CP noted that the *Canada Transportation Act*[18] includes an obligation for it to transport dangerous goods which could include crude oil and chlorine. It cannot decline reasonable requests from shippers. This statutory obligation only heightens its safety concerns if any employees operate a train while impaired (E-1; Paras 7-10).

133. This Office has treated impairment as being among the most serious offences an employee can commit. In SHP726, a recent decision which has some similarities with Mr. A's case though it did not involve an LE, Arbitrator Schmidt wrote:

> The overwhelming evidence in this case is that the grievor consumed both cocaine and marijuana immediately before he commenced his shift on March 21, 2015 or shortly thereafter. I find that he was impaired during his shift and there is simply no other rational conclusion to be drawn having regard to the evidence before me.
>
> **An individual in the grievor's position who causes himself to become impaired on the job merits the most severe discipline, absent very compelling mitigating factors. Not only was the grievor impaired, I must conclude that he has been dishonest about when he had last used marijuana and about his denial of cocaine use.** The Company's decision to discharge the grievor in these circumstances was entirely appropriate and should not be disturbed.
>
> The grievance is therefore dismissed.
>
> (Emphasis added)

134. The extreme seriousness of Mr. A's actions is beyond doubt.

135. Turning to the *TBE*'s third step, is there anything which suggests that the penalty of dismissal should be modified? For multiple reasons, the arbitrator sees no reason to intervene.

136. The arbitrator accepts the TCRC's argument that CP relied solely on this incident in support of its termination for cause. It did not raise a culminating incident argument or rely on an accumulation of demerit points. The arbitrator can still consider, however, whether there might be anything in the record which would support a mitigation of the penalty of dismissal.

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[18] SC 1996, c 10

137. Mr. A did not have an enviable discipline record at CP. He had already been terminated in the past but benefited from a Last Chance Agreement. Including the 20 points imposed for the December 27, 2012 derailment which led to the drug test, points which were not grieved, he had 45 active demerit points on his record at the time of his dismissal. This situation does not encourage intervention.

138. In *Paisley*, the LE acknowledged his behaviour and apologized. The arbitrator finds nothing similar in the record for Mr. A. There still seems to be no admission from Mr. A of the conduct the test results clearly demonstrate. Given the arbitrator's conclusion that the TCRC did not demonstrate that Mr. A had a cocaine dependency, his continuing lack of candour, which may have also persisted with Dr. Chiasson, similarly militates against intervention.

139. The arbitrator, just as Arbitrator Schmidt concluded in *SHP726*, *supra*, finds no reason to modify the penalty CP imposed for Mr. A's actions.

DISPOSITION

140. For the above reasons, and despite the TCRC's thorough and vigorous representation of Mr. A's interests, the arbitrator must dismiss his grievance.

Signed at Ottawa this 22nd day of September 2019.

Graham J. Clarke
Arbitrator