AH689

IN THE MATTER OF AN ARBITRATION

BETWEEN

CANADIAN NATIONAL RAILWAY COMPANY (CN)

And

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS SYSTEM COUNCIL NO. 11 (IBEW)

CN-IBEW-2018-00030, Discharge Mr. S, Rule G

Date: December 23, 2019
Arbitrator: Graham J. Clarke

Appearing for IBEW:

R. Church:	Counsel
S. Martin:	Sr. General Chairman
L. Hooper:	General Chairman
J. Sommer:	Reg Chairman
L. Couture:	International Representative
Mr. S:	Grievor

Appearing for CN:

V. Paquet:	Manager, Labour Relations (Toronto)
S. Blackmore:	Sr. Manager, Labour Relations (Edmonton)
J. Mann:	Sr. Director, Human Resources (Montreal)
M. Pitchen:	Director, Occupational Health (Montreal)
J. MacDonald:	Sr. Manager, S&C (Toronto)

Heard in Montreal on December 19, 2019.

Award

BACKGROUND

1. This termination arbitration took 3.5 hours to complete on December 19, 2019. The importance of this time frame will be expanded upon below.

2. Effective May 1, 2018, CN terminated Mr. S[1] for testing positive for alcohol while operating CN vehicles. Mr. S was charged under the *Criminal Code*[2] and later pleaded guilty. CN relied on railway case law to support its termination for cause. CN also objected to the IBEW raising in its ex parte statement an allegedly new issue regarding the *Canadian Human Rights Act*[3] (*CHRA*) and the duty to accommodate.

3. The IBEW argued that the factual context clearly indicated that the case involved the duty to accommodate. It further contested that CN had just cause to terminate and asked the arbitrator to reinstate Mr. S with appropriate conditions.

4. For the following reasons, the arbitrator concludes that the IBEW did not raise the *CHRA* issue in a timely fashion. Under the parties' expedited arbitration regime, the arbitrator did not have jurisdiction over that issue. Even if the arbitrator did have jurisdiction, the IBEW did not meet its burden of proving *prima facie* discrimination given, *inter alia*, insufficient evidence that Mr. S suffered from an addiction.

5. Given the consistency of railway case law in this safety-sensitive area, the arbitrator concludes that CN had just cause to terminate Mr. S.

FACTS

6. The facts were generally not contested, with the exception of certain items, or inferences, on which the IBEW sought to rely for its duty to accommodate argument.

[1] The IBEW asked that only the grievor's initial be used. CN did not object.
[2] RSC 1985, c C-46
[3] RSC 1985, c H-6

7. **July 12, 2016**: Mr. S started working for CN in the safety-sensitive position of a Signals and Communication (S&C) Maintainer. CN provided him with equipment and one of its vehicles.

8. **April 7, 2018**: A co-worker suspected Mr. S was not right and suggested he go home in a taxi. Mr. S instead started his shift and took a CN vehicle from the yard to a local gas station for a fill-up. Mr. S returned and then took another CN vehicle for refueling. Following receipt of a report from Mr. S's co-worker, a trainmaster spoke with Mr. S in the yard and confirmed Mr. S had been drinking alcohol. Following testing, Mr. S was charged under the *Criminal Code*.

9. **April 8, 2018**: Mr. S phoned CN to advise his licence had been suspended as a result of the criminal charges.

10. **April 18, 2018**: CN conducted its investigation in accordance with the parties' collective agreement. Mr. S admitted to driving CP vehicles while under the influence of alcohol. Mr. S indicated he had sought assistance from the EFAP, would meet with a therapist and had attended 3 AA meetings (U-2; Tab 3; QA 27). Mr. S was forthright in admitting his "mistake" and indicated he was "truly sorry for what I did" (U-2; Tab 3; QA 30).

11. **May 1, 2018**: CN terminated Mr. S's employment on the following grounds (E-2; Tab 4):

> You have been dismissed for positive reasonable cause test for alcohol while operating a Company Vehicle while working as an SC Maintainer in MacMillan Yard, Concord, ON, a violation of Company Policy to Prevent Workplace Alcohol and Drug Problems and a violation of Rule G on April 7, 2018.

12. **June 20, 2018**: The IBEW filed a grievance at Step 2. The IBEW did not contest "the severity of this situation" or "condone this type of behaviour". It requested leniency and a second chance for Mr. S. The IBEW added "… [Mr. S] now acknowledges that he has a problem with alcohol".

13. **July 5, 2018**: Mr. S pleaded guilty and was convicted under s. 253(1)(b)[4] of the *Criminal Code* for operating a motor vehicle with over 80 milligrams of alcohol in 100 millilitres of blood.

14. **July 26, 2018**: CN responded at Step 2 and declined to modify the penalty. It highlighted Mr. S' short service of less than 2 years and his refusal to follow his colleague's suggestion about returning home. He instead had driven two CN vehicles while under the influence of alcohol. In accordance with their collective agreement, the parties later met at Joint Conference to discuss various cases, including that of Mr. S.

15. **November 15, 2019**: Each party filed an ex parte statement rather than a Joint Statement of Issue (JSI). CN objected to parts of the IBEW's ex parte for what it considered an expansion of the grievance due to the inclusion of an allegation of a failure to accommodate Mr. S's alleged disability. CN did request particulars and the IBEW provided supplemental documents in support of its position.

ANALYSIS AND DECISION

16. The arbitrator must decide three distinct issues.

Did the duty to accommodate fall within the arbitrator's jurisdiction?

17. The arbitrator mentioned at the outset that the hearing in this termination case took 3.5 hours. Parties in the railway industry consistently have their arbitrations heard in mere hours.

18. By comparison, regular labour arbitrations, absent a settlement, routinely take several or many days to adjudicate a comparable case.

19. In order to complete cases in just a few hours, the parties have negotiated important obligations into their collective agreement which require that they identify both the facts and the issues for each case. In the instant case, the parties' expedited arbitration system models that administered by the Canadian Railway Office of Arbitration & Dispute Resolution (CROA)[5].

[4] The *Criminal Code* has since been amended.
[5] CROA has set out its procedural rules for expedited hearings in its Memorandum of Agreement.

20. For example, the parties agree that no discipline or discharge can occur until a fair and impartial investigation has occurred (Collective Agreement, Articles 13.1 and 13.4). The investigation establishes the facts of the case within 30 days of the incident, rather than months or years later at arbitration.

21. The parties must also identify the issues. Article 13.10 at Step 2 describes what is needed to ensure the success of a joint conference:

> Step 2
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> Within 45 calendar days of receiving the decision under Step 1, the General Chairman of the Union may request a joint conference with the officer designated by the Company. **The request for joint conference must be accompanied by the Union's contention and all relevant information to the dispute involved.** The joint conference shall be arranged to take place within 45 calendar days from the time such request is received and a decision shall be rendered in writing within 45 calendar days of the joint conference.
>
> (Emphasis added)

22. The grievance procedure reinforces the parties' obligations, such as at Article 13.12:

> 13.12 A grievance under Article 13.10 shall include a written statement of the grievance and where it concerns the interpretation or alleged violation of the Collective Agreement, the statement shall identify the Article involved. The Company's reply shall address the specific concerns raised.

23. Following Step 2, either the IBEW's General Chairman or CN's Sr. Director Labour Relations may request a meeting to discuss the grievance (Article 13.16). These steps are not a mere formality. They ensure that both sides fully understand the issues in dispute.

24. Should the grievance not be resolved under these steps, then the parties have agreed they will produce a JSI for the arbitration. If the parties cannot agree, they may proceed by way of ex parte statement:

> 13.21 **A Joint Statement of Issue containing the facts of the dispute and reference to the specific provision or provisions of the Collective Agreement allegedly violated, shall be jointly submitted to the arbitrator no less than 30 calendar days in advance of the date of the hearing.** In the event the parties cannot agree upon such joint statement of issue, each party shall submit a separate Statement of Issue to the Arbitrator no less than 30 calendar days in advance of the date of the hearing and shall at the same time give a copy of such statement to the other party…
>
> (Emphasis added)

25. CN alleged that the IBEW had never raised the duty to accommodate throughout the grievance procedure (E-1; para 31):

> 31. The Union's position rests on the premise that the Company should have inferred these arguments, from the exchanges between the parties during the grievance procedure. To be clear, those exchanges concerned the Union's position that the grievor deserved leniency and a last chance agreement.

26. The IBEW suggested the human rights issues were evident or, alternatively, that CN had ample notice of the changes (U-1; paras 35 & 43):

> 35. The Union's primary position is that while the *CHRA* is not pleaded explicitly until the Ex Parte Statement of Issue, the subject matter of the grievance clearly concerns the Grievor's alcohol addiction issues and the discipline that arose directly from those issues. In the Union's respectful view, the relevance of the *CHRA* is self-evident from the facts of the grievance.
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> …
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> 43. In the alternative, and strictly without prejudice to the above, should the Arbitrator disagree and find that the allegations in the Union's Ex Parte Statement of Issue are new allegations, the Union should be permitted to advance these allegations, since the Company has had ample notice of the issues at hand, was aware generally of the Union's position, and is not prejudiced by the raising of these issues.

27. In order to protect the integrity of the parties' expedited arbitration regime, railway industry arbitrators have refused to hear new issues which were not raised during the grievance procedure. As this case illustrates, railway arbitrations take just a matter of hours. That expedited system cannot accommodate the raising of new issues on the eve of arbitration, no matter how innocently, without potential prejudice arising.

28. The arbitrator agrees with CN that the IBEW's request for leniency and a last chance agreement throughout the grievance process differs significantly from an allegation that CN violated its statutory duty to accommodate Mr. S under the *CHRA*.

29. In CROA&DR 3265, Arbitrator Picher considered the parties' negotiated obligations when deciding a similar objection:

> In the circumstances of this case the Arbitrator is compelled to agree with the objection of the Company. It is true, as the Union submits, that as a general rule it is appropriate for a bargaining agent to refer to a general article which has been violated, and that to do so would normally comply with the requirements of step 3 as provided under article 24.5 of the collective agreement. The Union might then properly submit other paragraphs of the article as evidence of collateral aspects of the Company's alleged violation. That would not be the case, however, where, as here, the Union seeks to advance the operation of an article as a freestanding and separate substantive basis for the success of the grievance. **In the case at hand, notwithstanding the substantive provisions of the articles of the collective agreement governing seniority, including article 11.9(a)(i), the Union raises the entirely different substantive right and obligation provided under article 11.5, a matter not raised at step 3 of the grievance procedure.** In considering that issue, the Arbitrator considers it significant that article 24.5 expressly stipulates, with the use of the mandatory word "shall" that the Union is to specify "… the article and paragraph of the article involved."
>
> **It seems evident to the Arbitrator that the parties thereby intended to ensure that, at the final step of the grievance process, both parties would be on the same page with respect to any issue which might ultimately be pleaded at arbitration, in the event that they remained at impasse with respect to the merits of their dispute**. In the instant case, where paragraph 5 of article 11 is first raised at the filing of the Union's statement of issue, there is an obvious departure from the requirement of article 24.5, to the extent that the article raised constitutes a separate and independent allegation which, standing alone, would arguably cause the grievance to succeed. In other words, what is raised in that circumstance is a different grievance. **In the circumstances I am satisfied that the Company is correct in its assertion that to allow the**

> **Union to proceed with its claim under article 11.5 would be an improper expansion or amendment of the grievance beyond the intention of article 24.5.** On that basis the Arbitrator sustains the preliminary objection of the Company and strikes from consideration the alleged application of article 11.5 in the circumstances of this case.
>
> (Emphasis added)

30. In CROA&DR 3708, Arbitrator Moreau upheld an objection contesting the raising of an argument based on the *CHRA* only at the time of the joint statement:

> **The Union's allegations in this case regarding the alleged breaches of the CHRC and SWCA, by contrast, were first put forward in the joint statement.** Although the grievance step letters of the Union refer to the involvement of the WCB and the efforts made to accommodate the grievor, **the allegations concerning the actual statutory breaches of the SWCA and the CHRC are never squarely addressed in the grievance documents. The Company, in my view, is prejudiced in this instance because it has never been apprised of the alleged statutory breaches nor been in a position to answer those allegations during the course of the grievance procedure.** That is particularly true in the case of the SWCA, a lengthy statute which speaks to numerous matters involving workers' compensation claims. It is perhaps trite, but nevertheless important, to underline that the precise issues in dispute must be all be addressed before reaching arbitration, given the rules of this office that no dispute can be referred to arbitration until it has been processed through the last step of the grievance procedure. It would not be within the spirit, or letter, of the Memorandum of Agreement to simply allow the Union to amend its claims at this stage of the proceedings to include the CHRC and the SWCA.
>
> (Emphasis added)

31. The arbitrator agrees with the sentiments expressed by these experienced railway arbitrators. The situation may well be different in regular arbitration where the parties have not negotiated the types of procedures which exist in this expedited regime. A regular labour arbitration system can also take many days to hear a single grievance, which allows for more leeway than does the parties' expedited regime in this case.

32. The parties benefit from an extremely efficient expedited arbitration system. In order to obtain those benefits, they have negotiated clear provisions which require that all issues be identified and discussed during the grievance procedure. A vague oral

reference to alcohol and 3 AA meetings during the investigation, especially given the IBEW's burden of proof for *prima facie* discrimination, *infra*, was insufficient for CN to know that Mr. S alleged that his rights under the *CHRA* had been violated. Documentation was only produced for this issue roughly 18 months after Mr. S's termination.

33. There is further prejudice which can arise from the addition of a new issue close to the arbitration date. CN could not explore that issue during its investigation or conduct a timely supplementary investigation. The arbitrator notes further that the *CHRA* contains time limits for complaints[6].

34. The IBEW expanded its grievance beyond that which was discussed throughout the grievance procedure. The arbitrator accordingly upholds CN's objection. This conclusion, however, would not apply to situations where a party was willfully blind to a clear duty to accommodate situation.

Did the IBEW demonstrate *prima facie* discrimination?

35. Even if the arbitrator had accepted the expanded grievance, the IBEW would not have met its burden of proof regarding *prima facie* discrimination. The Supreme Court of Canada (SCC) has determined that *prima facie* discrimination involves a three-part analysis[7]. That analysis, as described in *Elk Valley,* goes beyond merely showing that an employee has an addiction:

> [23] To make a claim for discrimination under the Act, the employee must establish a prima facie case of discrimination. If this is established, the onus then shifts to the employer to show that it accommodated the employee to the point of undue hardship.
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> [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.

[6] Section 42(1)(e) of the CHRA.
[7] *Stewart v. Elk Valley Coal Corp*., 2017 SCC 30 (*Elk Valley*)

> 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.

36. Two recent railway cases illustrate the importance of evidence when someone claims to have an addiction. *AH663*[8] described the evidence in CROA&DR 4667 (*Paisley*) where the current arbitrator found the existence of an addiction and, additionally, *prima facie* discrimination:

> 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 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)**.

37. There was no similar evidence in Mr. S's case. Notably, the arbitrator found nothing flowing from his criminal proceedings which suggested either an addiction or a request for a "curative discharge" (E-2; Tab 7).

38. Mr. S's case is far closer to that of Mr. A in *AH663* than to that of the employee in *Paisley.* However, even in *AH663*, the issue of accommodation was omnipresent long before the first arbitration hearing. It was not added like in the present case only at the stage of the JSI.

39. Just like Mr. A prior to his first arbitration as described in *AH663*, Mr. S never provided any medical evidence in support of an addiction. As noted by the Quebec Court of Appeal, that is a significant factor to consider when conducting the proper analysis[9].

[8] Teamsters Canada Rail Conference v Canadian Pacific Railway, 2019 CanLII 89682
[9] Teamsters Canada Rail Conference c. Canadian Pacific Railway Company, 2017 QCCA 479 at para 44.

40. At best, and only just prior to the arbitration, Mr. S. provided counselling notes where he had advised the counsellor that he had an alcohol addiction. Mr. S had also stated in his original April 18, 2018 investigation that he attended three AA meetings, though no confirming evidence was ever provided to support this claim.

41. In *AH663*, the arbitrator described the limited information Mr. A provided in support of an alleged disability:

> 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.
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> 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.
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> 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.

42. The arbitrator finds Mr. S's information, much, if not all, of which was only produced shortly before the arbitration, to be similarly wanting.

43. The IBEW did not satisfy the arbitrator that Mr. S suffered from an addiction. It therefore could not meet the first step under the *prima facie* discrimination analysis.

Did CN have just cause to terminate Mr. S?

44. The SCC[10] has succinctly described the proper analysis for discipline in labour cases:

[10] Toronto (City) Board of Education v. O.S.S.T.F., District 15, 1997 CanLII 378

> 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.

45. There was no dispute that Mr. S drove CN vehicles while impaired. Similarly, there was no dispute that this conduct provided just cause for some type of discipline.

46. The only remaining issue is whether the arbitrator should intervene and modify the penalty, given all the circumstances[11].

47. The arbitrator notes that Mr. S admitted his fault immediately. He also pleaded guilty to the criminal charge (a second charge was withdrawn). Mr. S is young and appeared sincere at the hearing. He had not been otherwise disciplined during his short period of service.

48. However, Mr. S's driving of CN vehicles while impaired constitutes serious misconduct in the railway industry. Driving while impaired by alcohol posed a danger not only to Mr. S, but to his colleagues and the general public.

49. The *Criminal Code* specifically deals with his behaviour, *supra*.

50. Similarly, the Canadian Rail Operating Rules at Rule G also prohibit this type of behaviour:

> Rule G
>
> (i) The use of intoxicants or narcotics by employees subject to duty, or their possession or use while on duty, is prohibited.
>
> (ii) The use of mood altering agents by employees subject to duty, or their possession or use while on duty, is prohibited except as prescribed by a doctor.

[11] Section 60(2) of the *Canada Labour Code* provides this explicit arbitral power.

> (iii) The use of drugs, medication or mood altering agents, including those prescribed by a doctor, which, in any way, will adversely affect their ability to work safely, by employees subject to duty, or on duty, is prohibited.
>
> (iv) Employees must know and understand the possible effects of drugs, medication or mood altering agents, including those prescribed by a doctor, which, in any way, will adversely affect their ability to work safely.

51. Arbitral case law in the rail industry has consistently held that the violation of these standards constitutes just cause for dismissal, absent very compelling circumstances.

52. In CROA&DR 1954, Arbitrator Picher noted that the presumptive penalty is dismissal for engaging in the behaviour that is at issue in this case:

> The jurisprudence of this Office is replete with decisions confirming that running trades employees who consume alcoholic beverages while subject to duty, or while on duty, make themselves liable to dismissal. Unless compelling grounds for mitigation can be demonstrated, that is the prima facie disciplinary response justified in the circumstances.

53. In CROA&DR 2695[12], Arbitrator Picher also noted the importance of deterrence:

> The use of a narcotic in the workplace by an employee in a safety-sensitive position is an extremely serious offence. In considering the appropriate measure of discipline regard must be had not only to the gravity of the infraction, but to the need for the employer to deter similar conduct by other employees. As noted, this is not a case where Mr. Middleton can plead a medical condition or disability in mitigation of his actions. In all of the circumstances the Arbitrator is satisfied that the grievance must, therefore, be dismissed.

54. The IBEW did not persuade the arbitrator to intervene in the instant situation where a short service employee, working in a safety sensitive position, consumed alcohol and then drove two of CN's vehicles. The standard disciplinary response for such conduct is termination, absent compelling grounds for mitigation.

[12] See also, generally, SHP100; CROA&DR 3279 and CROA&DR 3928.

55. Despite Mr. S's post incident remorse, the IBEW did not persuade the arbitrator that the substitution of another penalty would be appropriate in the circumstances of this case.

DISPOSITION

56. For the reasons expressed, the arbitrator dismisses the grievance.

Signed at Ottawa this 23rd day of December 2019.

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Graham J. Clarke
Arbitrator