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IN THE MATTER OF AN AD HOC RAILWAY ARBITRATION

BETWEEN

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

And

CANADIAN NATIONAL RAILWAY COMPANY (CN)

PRELIMINARY OBJECTIONS – KOSSEY ARBITRATION

Date:	May 17, 2021
Arbitrator:	Graham J. Clarke

Appearances

IBEW:

D. Ellickson	Counsel, CaleyWray, Toronto
L. Hooper	General Chairman, Western Canada

CN:

V. Paquet	Manager Labour Relations - Toronto
S. Blackmore	Sr. Manager Labour Relations - Edmonton
F. Daignault	Sr. Manager Labour Relations - Montreal

Argument on three procedural objections heard May 12, 2021 via videoconference.

Award

BACKGROUND

1. On February 18, 2021, the parties appointed the arbitrator to hear one or more unidentified grievances on May 12. On April 12, the parties sent the arbitrator a Joint Statement of Issue (JSI) for the discharge grievance of S&C Maintainer Scott Kossey.

2. The parties have a protocol for videoconference arbitrations. They agreed to send their Briefs to the arbitrator by no later than 5 pm on May 7, 2021. They asked the arbitrator to then distribute the Briefs to ensure a common service time.

3. The parties advised that their oral submissions would be limited to reply and rebuttal arguments only. They further agreed the hearing would take no longer than 3 hours, subject to the arbitrator's discretion.

4. The day before the May 12, 2021 arbitration, the IBEW raised three preliminary objections arising from CN's Brief, namely: i) CN had expanded the grounds for termination beyond those in its Form 780; ii) CN had failed to disclose GPS and dash cam footage despite its Article 13.1 obligation to conduct a fair and impartial investigation; and iii) CN referred to and relied on a "previous DUI" incident, despite the fact it formed no part of Mr. Kossey's discipline record.

5. The arbitrator asked CN to provide "its position, including what impact, if any, these objections might have on the hearing tomorrow". CN provided brief written comments in response to the objections and added "we can expand upon them tomorrow as required during rebuttal arguments".

6. At the beginning of the May 12 arbitration, the arbitrator granted both parties an opportunity to comment fully on the three objections. The hearing then adjourned due to a pandemic related incident which required the IBEW's counsel's immediate attention.

7. For the reasons which follow, the arbitrator has decided, i) CN will not be allowed, at this final stage of the process, to add a new issue suggesting Mr. Kossey was impaired; ii) given the relief provided for the first objection, Mr. Kossey's discipline

will not be declared void *ab initio*; and iii) CN cannot rely on "similar fact evidence" to invoke a non-disciplinary event to buttress its argument about the appropriate penalty.

THE PARTIES' EXPEDITED ARBITRATION REGIME

8. CN employed Mr. Kossey as an S&C Maintainer. He had 22 years of service and only a 2011 written warning on his discipline record[1]. CN's Form 780 set out the following reasons for Mr. Kossey's termination[2]:

> Circumstances surrounding the alleged motor vehicle accident in Kamloops Yard on February 12, 2019, failure to report the motor vehicle accident to the proper authority, fleeing the scene of the motor vehicle accident and being away without leave.

9. To contextualize the IBEW's objections, one must highlight certain essential elements of the parties' arbitration regime.

10. The parties use the "railway model" for their arbitrations. While "regular" labour arbitrations often require multiple days to hear a single case, CN and the IBEW can plead an entire arbitration, and sometimes more than one, in a single hearing day. Their expedited regime might be considered revolutionary, except that various employers and trade unions have been using the railway model for almost 60 years.

11. To benefit from the significant advantages this expedited regime provides, the parties have agreed on certain key principles. For example, in the usual course, labour arbitrators rely on the "Record" the parties create for the facts and issues. It is exceptional to hear oral evidence in this regime[3].

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[1] IBEW Brief, Tab 2.
[2] IBEW Brief, Tab 6.
[3] Canadian National Railway Company v International Brotherhood of Electrical Workers System Council No. 11, 2018 CanLII 52755 (AH664) at paragraph 27.

12. While the current matter is not technically an arbitration before the Canadian Railway Office of Arbitration and Dispute Resolution (CROA), CN and the IBEW supplement their collective agreement by applying CROA's rules to their arbitrations[4].

13. For potential discipline cases, article 13.1 of the collective agreement requires CN, with the IBEW's participation, to investigate the facts. CN's investigation must be fair and impartial:

> 13.1 Except as otherwise provided herein, an employee who has 150 days working days' service will not be disciplined or discharged **until he has had a fair and impartial investigation**…

14. Article 13.4(d) highlights an employee's right to disclosure of the evidence as part of the investigation's interview process:

> (d) Where an employee so wishes, an accredited representative may appear with him at the hearing. Prior to the commencement of the hearing, the employee will be provided with a copy of all of the written evidence as well as any oral evidence which has been recorded and which has a bearing on his involvement. The employee and his accredited representative will have the right to hear all of the evidence submitted and will be given an opportunity through the presiding officer to ask questions of the witnesses (including Company Officers where necessary) whose evidence may have a bearing on his involvement. The questions and answers will be recorded and the employee and his accredited representative will be furnished with a copy of the statement and evidence which will be sent to the General Chairman electronically.
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> Exception: Privileged or sensitive material used as evidence will be secured by the Company and will be made available to be reviewed by the Union upon request.

15. For Mr. Kossey's case, the parties successfully negotiated a JSI[5] which set out the facts and issues before the arbitrator[6]:

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[4] CROA rules and CN's May 4, 2021 email re the applicable process.
[5] IBEW Brief, Tab 1
[6] CROA Rule 10 states: The joint statement of issue referred to in clause 7 hereof shall contain the facts of the dispute and reference to the specific provision or provisions of the collective agreement where it is alleged that the collective agreement had been misinterpreted or violated.

> On February 15 and 25, 2019, S&C Maintainer Scott Kossey was the subject of an investigation regarding an alleged motor vehicle accident on February 12, 2019. This investigation resulted in Mr. Kossey being dismissed from Company service on March 1st, 2019 for : "Circumstances surrounding the alleged motor vehicle accident in Kamloops Yard on February 12, 2019, failure to report the motor vehicle accident to the proper authority, fleeing the scene of the motor vehicle accident and being away without leave."
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> The Union contends the Grievor had a change in medication that resulted in his behaviour. The Union contends that the assessed discipline was excessive and unwarranted. The Union requests that that the grievor's discipline be expunged from his record and replaced with 30 demerits, and that the grievor be made whole.
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> The Company maintains the Grievor operated the vehicle while he admittedly was not feeling well. The grievor struck a concrete block, continued to operate the vehicle that had sustained extensive damage, fled the scene, failed to report the incident and was absent without authorization. **The grievor deprived the Company with the ability to test him for drugs and alcohol and determine the root cause of the accident.**
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> The Company disagrees with the Union's contentions and denies the claim.
>
> (emphasis added)

16. The JSI is a key document since it defines the arbitrator's jurisdiction[7]:

> 14. **The decision of the arbitrator shall be limited to the disputes or questions contained in the joint statement submitted by the parties or in the separate statement or statements as the case may be, or, where the applicable collective agreement itself defines and restricts the issues, conditions or questions which may be arbitrated, to such issues, conditions or questions.** The Arbitrator's decision shall be rendered in writing, together with written reasons therefor, to the parties concerned within 30 calendar days following the conclusion of the hearing unless this time is extended with the concurrence of the parties to the dispute, unless the applicable collective agreement specifically provides for a different period, in which case such different period shall prevail.

[7] CROA Rule 14.

(Emphasis added)

17. In short, the parties work together to create the arbitration's Record and identify the issues which require resolution. This important agreement allows them to argue, via written brief, one or more grievances in a single arbitration day.

18. Over time, various arbitral awards have developed fairness principles designed to prevent a party from taking the other by surprise during the extremely short oral hearings.

19. For example, an employer's failure to conduct a fair and impartial hearing will generally lead to an arbitrator finding the discipline void *ab initio,* unless that failure was merely trivial. The Saskatchewan Court of Appeal recently affirmed the essential nature of this fairness principle to the continuing integrity of the railway model:

> [56] The CROA authorities and the Arbitrator, on the other hand, emphasize systemic rather than case-specific concerns; that is, they focus on the need to protect the integrity of the unique CROA system that the parties agreed to adopt in the MOA to meet the particular needs of employers and employees in this industry. In doing so, the Arbitrator was taking account of a long-established line of CROA authority. He was not only entitled but, as Vavilov makes clear, obliged to take account of the CROA case law. In doing so, he was obliged to take account of the MOA and of the potential impact of his decision on the CROA system that embodies that agreement.
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> …
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> [60] Third, the Arbitrator's analysis was nuanced. He did not say that every trivial breach of Article 117.2 must result in a finding that the discipline is void. He found that he must void the discipline in the particular circumstances of this case. As noted above, he found that the documents that CN did not disclose were keystone documents, referring to Arbitrator Keller's reference to those documents as "material". He was concerned with breaches of "fundamental" procedural requirements. Further, it was his view that such breaches could be cured at the investigative stage, or at a stage where a further investigation could be "convened". This reflects the fact that the investigative stage is not only an agreed precondition to the imposition of discipline, but in the view of the Arbitrator, a fundamental aspect of the unique CROA process.
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> …

> [64] For these reasons, it is my opinion that the Arbitrator's decision that the discipline was void ab initio – that is, that it would be treated as a nullity from the outset – was reasonable. It was based on the Arbitrator's interpretation of the collective agreement, taking account of contextual factors, and his findings of fact. Such a remedy is not unknown in a contractual setting and is not precluded as a matter of law in relation to every contract, despite the Dunsmuir line of authority. The Arbitrator justified his decision to follow the long-established CROA approach despite that line of authority, both generally and in this case. That decision was defensible based on the facts and the law.

20. There are innumerable awards rejecting allegations that an investigation failed to be fair or impartial[8]. An arbitrator may reject such allegations outright or conclude they fall into the "trivial" category suggested by the Saskatchewan Court of Appeal. But many awards have found discipline void *ab initio* when the investigation failed to meet the essential procedural standard to which the parties jointly agreed[9].

21. Other fairness principles further protect the integrity of the parties' railway model. For example, employees will not gain a tactical advantage by attempting to sabotage the agreed-upon investigative process[10]:

> In the result, I am compelled to conclude that the case presented by the Council, both as to the preliminary objection and the alleged misconduct itself, is entirely without merit. While the assessment of thirty demerits against an employee of twenty-nine years' service is a serious matter, so too is the deliberate sabotage of a work assignment, aggravated by an equal willingness to sabotage the ensuing disciplinary investigation. The grievance must therefore be dismissed.

22. Similarly, the Investigating Officer cannot also be the chief witness against the grievor[11]. Moreover, a party cannot "wait in the bushes" and then raise a novel procedural objection at the hearing[12].

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[8] See, for example, CROA 4608 at paragraphs 19-31. Arbitrators constantly examine the conduct of informal investigations and the principles requiring fairness and impartiality.
[9] See, as just one example, CROA 4663.
[10] CROA 3157
[11] CROA 3061
[12] CROA 1241

23. Neither can a party add new issues which the parties never discussed or processed through the grievance procedure[13]:

> The Company raises a preliminary objection with respect to the scope of the issues before the Arbitrator. The Company maintains that in the submission for the joint statement of issue the Union added a matter which had not previously been raised or discussed between the parties, the alleged violation of Section 239 of the Canada Labour Code. Its representative submits that matter should not be considered by the Arbitrator. I consider that position to be correct.

24. In a recent case, the arbitrator upheld CN's objection alleging that the IBEW had added a new issue which it had never raised during the grievance procedure[14]. The late addition of a new issue causes prejudice given how the railway model operates. Parties must apply their legal and labour relations expertise at the start of each case. The JSI and the Brief are not the appropriate vehicles through which to add overlooked issues[15].

25. The above fairness principles and others have been applied to the railway model for decades.

ISSUES

26. The IBEW's objections raise three questions:

1. Did CN expand the grounds for discipline by adding Rule G and allegations of impairment?;
2. Did CN fail to provide keystone evidence to the IBEW which renders the discipline void *ab initio*? and
3. Can CN rely on non-disciplinary matters to support the termination?

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[13] CROA 4263

[14] Canadian National Railway Company (CN) v International Brotherhood of Electrical Workers System Council No. 11, 2019 CanLII 123925 (AH689)

[15] See also CROA 3708 and CROA 3265.

ANALYSIS AND DECISION

1. Did CN expand the grounds for discipline by adding Rule G and allegations of impairment?

27. The IBEW alleged that CN's Brief improperly expanded the grounds for termination to include a Rule G violation. Rule G[16] generally prohibits employee use of drugs, medication, or mood-altering agents.

28. The IBEW highlighted that neither CN's Form 780 nor the JSI mentioned Rule G. Neither was there any reference to Rule G in CN's grievance response[17]. Despite this background, the IBEW noted that multiple paragraphs in CN's Brief focused on Rule G violations[18] and the novel allegation that the grievor had been impaired. The IBEW highlighted, *inter alia*, paragraphs 30 and 98 of CN's Brief:

> 30. The evidence will demonstrate that the grievor apparently operated a Company vehicle while under the influence of an impairing substance.
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> …
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> 98. In fact, contrary to the grievor's claim, it is clear on the balance of probabilities that his condition was not caused by his medication. A review of the dash cam footage submitted during the grievor's investigation, confirms that the grievor drove to, and parked in the parking lot of a liquor store for a period of time on two occasions, approximately two hours prior to the accident.

29. The IBEW supported its argument by referencing Arbitrator Weatherill's recent award which prevented an employer from adding a Rule G allegation at arbitration[19]. The IBEW asked that all references to Rule G be struck from CN's Brief.

30. CN's May 11 email responded that "the Company has no evidence that there was a violation of Rule G"[20]. It argued that it could not make this determination since Mr. Kossey fled the scene of the accident. But CN added it was entitled to highlight in its Brief an employee's obligations when at work and the reporting requirements after an

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[16] Canadian Rail Operating Rules
[17] IBEW Brief, Tab 8.
[18] See, for example, paragraphs 15, 16, 20, 30, 35, 57, 61, 65, 71, 76, 81 and 98.
[19] CROA 4695-P.
[20] May 11, 2021 email response to the IBEW's written objections.

accident. It also offered to delete paragraph 98 which arose from its review of the dash cam video during the preparation of its Brief. That specific issue forms the basis for the IBEW's third objection, *infra*.

31. The arbitrator upholds the IBEW's objection, in part. The Rule G allegations in CN's Brief are new and were never raised during the investigation, in Form 708 or in the Step 2 grievance response. The JSI similarly does not contain any reference to that ground. CN cannot add a new ground based on Rule G to this arbitration.

32. Moreover, the JSI already suggests that a vital issue before the arbitrator arises from the impact of an employee fleeing the scene of an accident. CN described this issue in the JSI and highlighted that Mr. Kossey's actions prevented it from determining the "root cause of the accident":

> The Company maintains the Grievor operated the vehicle while he admittedly was not feeling well. The grievor struck a concrete block, continued to operate the vehicle that had sustained extensive damage, fled the scene, failed to report the incident and was absent without authorization. The grievor deprived the Company with the ability to test him for drugs and alcohol and determine the root cause of the accident.

33. CN's position throughout the process is incompatible with the novel allegation in its Brief concerning Rule G and suggestions Mr. Kossey was impaired.

34. However, the arbitrator is not prepared to order than any paragraphs possibly related to Rule G be struck from the Brief. The challenge is that Rule G and other policies can form a relevant backdrop when an employee fled the scene of the accident and prevented the usual testing. In CROA 4695-P, *supra*, Arbitrator Weatherill noted that the evidence may not necessarily change, even if an arbitrator has struck a novel issue from the arbitration:

> The grievor was investigated with respect to a positive substance test and following that was discharged for violation of the Company's Alcohol and Drug Policy. He was not discharged for a violation of Rule G. It may well be that the drug and alcohol policy contains prohibitions that overlap with those of Rule G. **It has been very well established in labour arbitration cases over many years that in discipline cases, an employer is limited to proof of the**

> **offence or offences set out in the notice of discharge. In my view, that principle should be followed in this case, and whether or not it makes a substantial difference in the thrust of the evidence presented, it is my ruling that the Company may not advance the additional charge of violation of Rule G in making its case in support of its decision.**
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> (Emphasis added)

35. In sum, the arbitrator will not consider any CN allegations that Mr. Kossey violated Rule G or was impaired. CN had not advanced this position throughout the grievance process and in the JSI.

36. But the arbitrator will not strike the paragraphs in the Brief since some may arguably be relevant for context.

2. Did CN fail to provide keystone evidence to the IBEW which renders the discipline void *ab initio*?

37. The IBEW alleged that the discipline should be declared void *ab initio* since CN, despite article 13 of the collective agreement, relied on keystone evidence that had not been disclosed to the union[21]. In its oral argument, the IBEW noted that CN had prepared still photos from the dash cam and also used its GPS to create a map of Mr. Kossey's driving route. In the IBEW's view, CN relied on this material to suggest that Mr. Kossey had been impaired despite raising no such allegations during his investigative interview.

38. CN argued that the dash cam footage had been available during, and at any time following, Mr. Kossey's investigation interview[22]. The map and the still pictures in its Brief came from the same dash cam video.

39. The arbitrator has already decided that CN cannot add novel Rule G allegations at this arbitration. That decision has, in part, resolved this second objection. If CN wanted to use potentially lengthy video footage to support other grounds for discipline, then the time to do that occurred around the time of Mr. Kossey's investigative interview. Or it might have been the subject of a supplementary investigation. But CN

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[21] See, for example, CN Brief paragraph 98 and Tab 19

[22] IBEW Brief, Tab 4 QA 6.

cannot reference a video during an investigative interview and then oblige the IBEW to guess what additional arguments it might raise at arbitration.

40. The arbitrator does not declare the discipline void *ab initio*. This is not a case where a party has tried to add previously undisclosed evidence to the arbitration Record. But the arbitrator will not consider the new grounds arising from this evidence for the same reasons already expressed for the first objection.

3. Can CN rely on non-disciplinary matters to support the termination?

41. The IBEW further objected to CN's multiple references in its Brief to what was described as a previous "DUI" incident[23]. That incident forms no part of Mr. Kossey's discipline record[24]. In short, the IBEW argued that CN cannot rely upon the DUI incident to support the termination. The IBEW requested that all references to it be struck and the evidence ruled inadmissible.

42. CN suggested it could raise the DUI issue given Mr. Kossey's reference in QA17 to "my history" which he suggested explained his conduct on February 12, 2019[25]. It also argued it was not using the incident for progressive discipline but rather as admissible "similar fact" evidence[26].

43. The arbitrator accepts that, for the purpose of context only, a reference to the DUI incident can be made given that Mr. Kossey referred to his "history" during his investigation interview to explain his conduct. But the arbitrator considers any DUI references irrelevant beyond that simple contextual purpose.

44. Under the principle of "similar fact" evidence[27], an arbitrator may admit similar fact evidence to resolve a key factual dispute. For example, in *Toronto Transit*, *supra*, Arbitrator Shime accepted similar fact evidence to conclude that the grievor's conduct had in fact been uncooperative and inappropriate for the specific grievance before him, just as it had been in the past.

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[23] See, for example, paragraphs 46-47, 63, 99-102
[24] IBEW Brief, Tab 2
[25] IBEW Brief, Tab 4
[26] CN submitted Arbitrator Shime's 2015 award in *Toronto Transit Commission and ATU, Local 113 (Parkinson), Re,* 262 L.A.C. (4th) 187 (*Toronto Transit*).
[27] Similar fact evidence often arises in criminal law cases and "is presumptively inadmissible": R. v. Handy, 2002 SCC 56 (CanLII), [2002] 2 SCR 908.

45. Similar fact evidence has no application to the instant case since the parties do not dispute the facts surrounding the February 12, 2019 incident. The JSI contains the parties' agreement on the facts. Given those facts, the main issue for the arbitrator to decide concerns whether the uncontested single, but multi pronged, incident warrants termination or the substitution of 30 demerit points.

46. A previous non-disciplinary incident is irrelevant to the arbitrator's consideration of the appropriate penalty. CN no doubt had its reasons for not treating the previous DUI incident as a disciplinary matter. But, given its previous determination, it cannot now rely on it in this case to buttress its argument about the appropriate penalty[28].

DISPOSITION

47. The arbitrator has, in part, accepted the IBEW's objections for the reasons set out above. While the arbitrator considered ordering CN to recast its Brief, that order might have led to considerable confusion in trying to separate acceptable context from inappropriate extensions.

48. Instead, this award has advised the parties of what parts of CN's Brief will be considered and what parts have been declared irrelevant for this arbitration.

49. The parties may contact the arbitrator for a new date to argue the merits of this arbitration.

SIGNED at Ottawa this 17th day of May 2021.

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Graham J. Clarke
Arbitrator

[28] See, for example, CROA 3361 and CROA 4523.