AH731

IN THE MATTER OF AN AD HOC RAILWAY ARBITRATION

BETWEEN

CANADIAN SIGNALS AND COMMUNICATIONS SYSTEM COUNCIL NO. 11 OF THE IBEW (IBEW)

And

CANADIAN PACIFIC RAILWAY COMPANY (CP)

Brittany Daniher - Termination

Date: August 5, 2021
Arbitrator: Graham J. Clarke

Appearances

IBEW:

D. Ellickson	Counsel, CaleyWray, Toronto
S. Martin	Senior General Chairman
L. Hooper	General Chairman
B. Kauk	Western Regional Representative
B. Daniher	Grievor

CP:

D. Zurbuchen	Manager, Labour Relations – Calgary
F. Billings:	Labour Relations Manager - Calgary

Arbitration heard on July 21, 2021 via videoconference.

Award

BACKGROUND

1. The parties appointed the arbitrator to hear the termination grievance of Ms. Brittany Daniher. CP hired Ms. Daniher on November 18, 2019 as an S&C Helper. On February 10, 2020, Ms. Daniher underwent a drug test at CP's request.

2. CP terminated Ms. Daniher's employment when the urine test results showed that she had tested positive for cocaine. These results violated CP's Drug and Alcohol Policy and Procedures (DAPP) (CP Brief, Tab 11).

3. The IBEW contested the termination on three main grounds: i) CP failed to conduct a fair and impartial investigation; ii) CP had no grounds to request a drug test; and iii) CP had no just cause to terminate Ms. Daniher's employment.

4. CP objected to the IBEW's addition in its ex parte statement of a claim for damages. It further argued it did not need to investigate or prove just cause to terminate Ms. Daniher given her probationary status. CP did not address the IBEW's arguments regarding its entitlement to test Ms. Daniher, other than by referring to its DAPP and an upcoming policy grievance.

5. For the reasons which follow, the arbitrator upholds the grievance. The parties characterize this case differently. If this case involved the rejection of a probationary employee, then CP's DAPP is arbitrary by requiring mandatory additional drug tests as a condition for already-hired employees to complete their probation[1].

6. If this case is disciplinary, then CP failed to investigate and, moreover, the test results did not demonstrate that Mr. Daniher was impaired. Impairment is the standard railway arbitrators have consistently required as a precondition to the imposition of discipline.

[1] This award does not examine whether testing can occur for a probationary employee as a condition for moving to a safety sensitive position.

FACTS

7. Prior to her hiring, Ms. Daniher passed a DAPP pre-hire drug and alcohol test. After her November 18, 2019 hiring, she completed her training and was assigned to an S&C gang in Southern Ontario District. At all material times, Ms. Daniher remained in that same position and had probationary employee status under the parties' collective agreement. Article 8.6 provides that the probationary period is six months accumulated service, *infra*.

8. On February 10, 2020, CP advised Ms. Daniher that she would have to undergo a DAPP test the following day. Mr. Daniher provided a urine sample at the testing facility. She was not requested to provide an oral fluid swab sample.

9. The testing facility advised Ms. Daniher that her urine sample had tested positive for cocaine. In its February 17, 2020 letter, which contained the notation "Form 104" at the bottom, CP "dismissed" Ms. Daniher on the following grounds:

> Please be advised that you have been Dismissed from Company Service effective February 17, 2020 for the following reason.
>
> For your confirmed post hiring and pre-qualification Year positive substance test on February 11, 2020. This is a direct violation of CP's Drug and Alcohol Policy HR 203 &203.1. (sic).

10. CP did not conduct an investigation under article 12.1, *infra*. The IBEW received a copy of the termination letter only after Ms. Daniher had contacted them and they had requested a copy from CP. CP advised that they provided the letter as a courtesy.

11. The IBEW grieved CP's failure to investigate despite the alleged mandatory requirement to do so under article 12.1. In addition, it alleged that CP had no legitimate grounds to ask Ms. Daniher to undergo a DAPP test.

12. CP argued that Ms. Daniher had been found "undesirable for service" pursuant to article 8.6 governing probationary employees and, since she had not established seniority rights, it had no obligation to investigate under article 12.1. CP did not respond to the IBEW's allegations about the absence of grounds to test Ms. Daniher.

13. The parties served and filed their Briefs 6 days prior to the arbitration which allowed the matter to conclude in just under 3 hours.

ANALYSIS AND DECISION

14. This arbitration raised various issues, including how to characterize the ending of Ms. Daniher's employment. The arbitrator will examine CP's preliminary objection first and then analyze both characterizations of this case. The same result occurs under either scenario.

Preliminary Objection: Can the IBEW ask for damages for the first time in its ex parte statement?

15. In *International Brotherhood of Electrical Workers System Council No. 11 v Canadian National Railway Company*[2] (AH726-P), the arbitrator reviewed various "fairness principles" which allow "railway model" arbitrations to hear one or more cases in a single day. One principle requires that both parties know the key substantive legal issues which will be argued (footnotes omitted):

> 22. Similarly, the Investigating Officer cannot also be the chief witness against the grievor. Moreover, a party cannot "wait in the bushes" and then raise a novel procedural objection at the hearing.
>
> 23. Neither can a party add new issues which the parties never discussed or processed through the grievance procedure:
>
> > 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. 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.

[2] 2021 CanLII 41839

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

16. There is an important distinction, however, between substantive legal issues[3] and the issue of the appropriate remedy. In many arbitrations, the hearing focuses on the substantive issues i.e., liability. If the grievance succeeds, arbitrators routinely remit the issue of the appropriate remedies to the parties.

17. CP did not persuade the arbitrator that the IBEW's request for remedial relief in its ex parte, including damages, somehow expanded the grievance beyond its original scope[4]. The IBEW can request remedies which flow directly from the facts in the Record before the arbitrator.

18. Moreover, the CROA Rules, which the parties apply despite not using CROA's services, do not require that all remedies be identified during the grievance procedure. This differs from the obligation to disclose all substantive issues.

19. Nonetheless, arbitrators control the integrity of the process and could prevent a party from proceeding with an undisclosed detailed remedial argument at the arbitration if it caused prejudice to the other party. The IBEW's mention of damages in its ex parte statement, served 3 weeks prior to the hearing, did not cause prejudice.

20. However, a party must do more than just ask for damages. It must also demonstrate, with appropriate legal support, why the circumstances of the case require that damages, of which there are different types, should be awarded in addition to the more standard remedial relief[5].

21. The arbitrator dismisses CP's preliminary objection.

---

[3] See, for example, CROA 3265 which upheld an objection that the newly pleaded collective agreement article would effectively add a different grievance to the arbitration.

[4] AH670 - International Brotherhood of Electrical Workers Council No. v Toronto Terminals Railway Company, 2019 CanLII 29083 at paragraphs 33-36.

[5] See, for example, AH706 - Bombardier Transportation Canada Inc. v Teamsters Canada Rail Conference, 2020 CanLII 53040. A different analysis may apply for damages requests pursuant to human rights legislation.

WAS THIS CASE A REJECTION ON PROBATION OR A DISCIPLINARY DISMISSAL?

22. The parties differed on whether this was a probation or just cause case. CP essentially argued that every case involving a probationary employee like Ms. Daniher is a probation case. The IBEW countered that since CP had pursued a disciplinary approach for her termination it had to respect the collective agreement's procedural requirements and also prove just cause.

23. The IBEW noted that CP's Form 104, which is used for just cause cases[6], clearly indicated that Ms. Daniher was "dismissed from Company Service". That dismissal arose "For your confirmed post hiring and pre-qualification Year positive substance test on February 11, 2020".

24. A couple of railway awards have held that if an employer decides to proceed by way of just cause, then the usual principles for probationary employees no longer apply. For example, in CROA 4285, Arbitrator Picher noted that the employer had decided to proceed via discipline for a probationary employee and treated it as a just cause case.

25. In CROA 4424, the employer, after conducting an investigation, again decided to proceed with discipline for a probationary employee. Only later did the employer raise the issue of "unsuitability" given the employee's probationary status.

26. Arbitrator Silverman concluded that since the employer had chosen to go the just cause route, it could not later change course:

> Here, the grievor clearly violated an important operating rule, one which can and does have serious consequences. She was a probationary employee. The Union established that, in other cases, the Company has terminated probationary using the standard of unsuitability. **Here, however, the Company chose to dismiss the grievor on the basis of her violation of Rule 104. Accordingly, following this Office's approach in CROA&DR 4285 the Company's disciplinary decision will be assessed on the standard the Company chose to apply.** In assessing the appropriate discipline for that infraction, the grievor is a short service employee but has no discipline on record. I find that the infraction should attract a penalty of twenty-five demerits.

[6] See, for example, AH711A and CROA 4706.

(Emphasis added)

27. The IBEW argued that Ms. Danier's dismissal was void *ab initio* since CP had failed to conduct a fair and impartial investigation despite the requirement under article 12.1 of the collective agreement:

> 12.1 **An employee shall not be disciplined or dismissed without having had a fair and impartial investigation and his responsibility having been established**. An employee may, however, be held off for such investigation for a period not exceeding five days and when so held off shall be given written notice of the charges against him.
>
> …
>
> (Emphasis added)

28. Despite the Form 104 letter dismissing Ms. Daniher, CP's Step 2 response referenced article 8.6 of the collective agreement which deals with probationary employees:

> 8.6 **New employees will not establish seniority rights until they have six months' accumulated service at which time they will be accorded a seniority date as of a date six calendar months previous to date on which six months of service is accumulated.** When two or more individuals reach six months' accumulated service on the same date, their seniority rank shall be determined by the date and hour they started work, and in the event of the starting time being the same, the seniority rank shall be determined by the alphabetical order of their surnames. Employees other than S&C Technicians, if employed in a higher class than that of S&C Helper a corresponding seniority date will be accorded in each lower class, except that this will not apply to new men employed for temporary maintenance relief work, unless such work was advertised and no applications received from employees holding seniority. **During this cumulative six months' period, unless removed for cause which, in the opinion of the Company renders him undesirable for its service, the employee shall be regarded as coming within the terms of this agreement.**
>
> (Emphasis added)

29. CP suggested in its Step 2 response (IBEW Brief, Tab 5) that it found Ms. Daniher "undesirable for service" and that she was also ineligible for the procedural protections afforded by article 12.1:

> The Union alleges the Company violated Article 12.1 of the Wage Agreement by not affording the Grievor a fair and impartial investigation prior to his (sic) release. The Company maintains the Grievor has not established seniority rights as she was under six months' accumulated service. As per Article 8.6 of the Wage Agreement, the Company rendered undesirable for service (sic). **Further, as she had not yet come within the terms of the Wage Agreement, the Company maintains Article 12 does not apply in her circumstance and no investigation was necessary in order to release her**.
>
> (Emphasis added)

30. CP took a similar position about Ms. Daniher's collective agreement rights in its Brief at paragraphs 37 and 38:

> 37. It is undisputed that the parties have a probationary period negotiated under its collective agreement which differentiates the entitlements of a probationer versus a regular employee. **The language is clear in Article 8.6 that the employee does not come with the terms of the collective agreement until after six months of accumulated service**.
>
> 38. The Company respectfully submits that any finding other than the employee was undesirable under her probationary period would be amending the provisions of the Wage Agreement as the discretion to dismiss employees during probation is left to the Employer's discretion.
>
> …
>
> 41. **As the Grievor had not yet come within the terms of the collective agreement**, the Company maintains Article 12 (Discipline and Grievances) of the collective agreement would not apply and the Grievor would not have been required to be released for cause, be subject to an investigation.
>
> (Emphasis added)

31. The parties can negotiate different terms and conditions for probationary employees. Article 8.6 attempts to do that. Arbitrators respect employer assessments of probationary employees' suitability, absent arbitrariness, discrimination, or bad faith.

32. But CP's position, if the arbitrator understands it correctly, that its employees do not come within the collective agreement until completing 6 months service, runs counter to the *Canada Labour Code* (*Code*)[7].

33. Section 56 of the *Code* is clear that a collective agreement applies to all employees in the bargaining unit:

> Effect of collective agreement
>
> 56 A collective agreement entered into between a bargaining agent and an employer in respect of a bargaining unit is, subject to and for the purposes of this Part, binding on the bargaining agent, **every employee in the bargaining unit** and the employer.
>
> (Emphasis added)

34. Moreover, section 57 of the *Code* makes it mandatory to have a dispute resolution mechanism in every collective agreement and imposes one if the parties fail to include one:

> Provision for final settlement without stoppage of work
>
> 57 (1) Every collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to **or employees bound by the collective agreement**, concerning its interpretation, application, administration or alleged contravention.
>
> Where arbitrator to be appointed
>
> (2) Where any difference arises between parties to a collective agreement that does not contain a provision for final settlement of the difference as required by subsection (1), the difference shall, notwithstanding any provision of the collective agreement, be submitted by the parties for final settlement
>
> (a) to an arbitrator selected by the parties; or
>
> (b) where the parties are unable to agree on the selection of an arbitrator and either party makes a written request to the Minister to appoint an

[7] RSC 1985, c L-2

arbitrator, to an arbitrator appointed by the Minister after such inquiry, if any, as the Minister considers necessary.

(Emphasis added)

35. Under the *Code*, every employee has access to a dispute resolution process for a "difference". However, the parties may negotiate different standards for probationary employees[8]. The rejection of an employee on probation is usually not considered a dismissal and therefore no investigation would be required[9].

36. CP's Brief may intend to say that, while the *Code* mandates that probationary employees come within the collective agreement generally, article 8.6 governs exclusively if it decides to reject them on probation.

37. Given the parties' different characterizations of this case, the arbitrator will analyze both possible positions.

DID CP JUSTIFY ITS DECISION TO REJECT MS. DANIHER DURING HER PROBATION PERIOD?

38. As noted above, arbitrators generally respect employer assessments of probationary employees' suitability, absent arbitrariness, discrimination, or bad faith.

39. As a quick CanLII search demonstrates, the issue of the validity of drug and alcohol policies, and related testing, is among the most contentious current issues in labour relations[10]. In court cases and labour arbitrations, trade unions and employers

[8] See, in a different context, Re Ontario Hydro and Ontario Hydro Employees' Union, Local 1000 et al., 1983 CanLII 1868.
[9] CROA 4774.
[10] See, as just a few recent examples, International Brotherhood of Electrical Workers, Local 1620 v Lower Churchill Transmission Construction Employers' Association Inc., 2020 NLCA 20, Amalgamated Transit Union, Local 113 v Toronto Transit Commission, 2017 ONSC 2078; Ottawa Macdonald-Cartier International Airport Authority v Ottawa Airport Professional Aviation Fire Fighters Association, 2021 CanLII 44861; Saskatchewan Health Authority v Health Sciences Association of Saskatchewan, 2020 CanLII 25719; and Office and Professional Employees International Union v Cougar Helicopters Inc., 2019 CanLII 125448;

invariably provide detailed legal submissions addressing the issues the court or the arbitrator must decide[11].

40. The perpetual challenge for decision makers in applying the jurisprudence comes from the need to balance crucial privacy rights with potentially life-threatening safety risks. For the railway industry, Arbitrator Picher long ago examined the issue in his mammoth SHP530. As SHP530 demonstrates, some cutting-edge issues, even for cases using the railway model of arbitration, may require multiple days of hearing and thorough legal submissions.

41. The IBEW clearly put into issue whether CP had any "reasonable grounds"[12] to retest Ms. Daniher who continued to occupy the position for which CP had originally hired her[13]. Its detailed Step 2 grievance, ex parte statement and arbitration Brief all contested CP's right to test Ms. Daniher. For whatever reason, CP chose not to address the IBEW's legal arguments. It just relied on its DAPP.

42. CP advised at the hearing that the parties are attempting to schedule a policy grievance which contests various portions of its DAPP[14]. But if a DAPP dispute arises in another arbitration, such as it did in this one, then CP must respond to legal arguments contesting any DAPP provisions. The fact a policy grievance will examine the DAPP does not relieve CP from its obligation to justify testing Ms. Daniher in the circumstances of this case.

Relevant provision of CP's DAPP

43. The parties do not dispute CP's *pre-hiring* practice to require prospective employees to pass a drug test. Ms. Daniher met this requirement.

44. But Ms. Daniher's situation brought into focus DAPP Section 5.1 dealing with additional testing "before receiving final qualification for the position":

---

[11] See also the award issued yesterday involving these same parties: AH732 - Canadian Signals and Communications System Council No. 11 of the IBEW v Canadian Pacific Railway Company, 2021 CanLII 69959

[12] Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd., 2013 SCC 34 at paragraph 45.

[13] IBEW Brief, Tab 4 (Step 2 Grievance)

[14] See also CP's Step 2 response (IBEW Brief, Tab 5).

> 5. Drug Testing Procedures for Safety Critical Positions and Safety Sensitive Positions
>
> 5.1 Pre-Employment and Qualification Testing
>
> Safety Critical Position or Safety Sensitive Position candidates are required to pass a drug test as a pre-employment qualification for the position. This requirement will be set out in a conditional offer of employment. **Safety Critical Position or Safety Sensitive Position candidates are also required to pass a drug test during the training process before receiving final qualification for the position.**
>
> (Emphasis added)

45. CP added this provision to the DAPP in September 2019[15].

46. Despite the IBEW arguing the jurisprudence did not support testing for Ms. Daniher's situation, CP provided no authority to support this additional testing. No accident or incident had occurred which satisfied the testing requirement[16]. Neither did CP lead any evidence suggesting a workplace problem with drug or alcohol use which might justify random testing.

47. Section 5.1 appears to impose mandatory testing as a condition for every already-hired employee to complete his/her probationary period. It was incumbent on CP to demonstrate a legal justification for this requirement. In the absence of such, the arbitrator cannot find a basis for CP's testing of Ms. Daniher.

48. This lack of justification for testing meant that CP acted arbitrarily when it rejected Ms. Daniher during her probationary period.

49. A second challenge for CP, even on the probation analysis, is that its evidence, based solely on a positive urine test, does not show impairment. Railway arbitral awards have consistently required evidence of on-the-job impairment. This aspect will be explored further when dealing with the just cause analysis.

[15] CP Brief, paragraph 26
[16] See, for example, CROA 3841.

DID CP HAVE JUST CAUSE TO TERMINATE MS. DANIHER'S EMPLOYMENT?

50. If the facts demonstrate that CP proceeded by way of just cause, rather than via a rejection on probation, then it failed to meet its burden of proof. CP carried out no investigation despite this essential precondition under Article 12.1 for any discipline or dismissal:

> 12.1 **An employee shall not be disciplined or dismissed without having had a fair and impartial investigation and his responsibility having been established**. An employee may, however, be held off for such investigation for a period not exceeding five days and when so held off shall be given written notice of the charges against him.
>
> …
>
> (Emphasis added)

51. Similarly, as railway awards have required for years, CP failed to show that Ms. Daniher was impaired at work.

No fair and impartial investigation

52. A key element of the railway model requires employees to submit to investigation interviews so that the parties can prepare a proper arbitration Record. A faulty investigation, unless the fault is trivial, generally leads to the discipline being found void *ab initio*, as recently summarized in AH726-P (footnotes omitted):

> 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.

…

[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.

…

[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. 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.

53. Not surprisingly, a failure to conduct any investigation at all also leads to a finding of void *ab initio*, as noted in CROA 4663[17].

[17] Central Maine & Quebec Railway v United Steelworkers – Local 1976, 2019 CanLII 3303

54. CP suggested that the need to investigate did not apply to Ms. Daniher given her status as a probationary employee. Article 12.1 does not support this interpretation since it applies to “an employee”, a status which Ms. Daniher clearly had. If this case involves discipline or dismissal, which is different from a rejection on probation, then CP had to conduct the mandatory investigation.

55. The failure to investigate means Ms. Daniher’s termination is void *ab initio*.

Did the test results support just cause for dismissal?

56. The arbitrator will not review the numerous awards which stand for the proposition that a urine test is not sufficient, in the absence of a positive oral swab result, to conclude that an employee was impaired on the job[18].

57. Not surprisingly, as CP has proved in the past in an impairment case involving cocaine, severe consequences follow for employees who work in safety sensitive positions when impaired[19]. But in the absence of evidence showing impairment at work, CP had no grounds to discipline Ms. Daniher.

DISPOSITION

58. Under either possible analysis for this case, CP cannot succeed. The rejection of Ms. Daniher on probation, based on a mandatory drug test for which CP put forward no legal justification, is arbitrary and of no effect.

59. Under the just cause analysis, which admittedly CP did not argue, the failure to hold a fair and impartial investigation, coupled with no evidence of impairment, prevents any such argument from succeeding.

60. The arbitrator orders Ms. Daniher reinstated with full compensation. The parties can determine the modalities of this compensation and return before the arbitrator in the event of any disputes. The IBEW did not satisfy the arbitrator that any damages should be awarded in this case.

---

[18] See, for example, AH706 - Bombardier Transportation Canada Inc. v Teamsters Canada Rail Conference, 2020 CanLII 53040 at paragraphs 27-44.
[19] Ibid. See AH663 - Teamsters Canada Rail Conference v Canadian Pacific Railway, 2019 CanLII 89682

61. The arbitrator retains jurisdiction with respect to the interpretation, application, and implementation of this award.

SIGNED at Ottawa this 5th day of August 2021.

_____

Graham J. Clarke
Arbitrator