AH793

IN THE MATTER OF AN ARBITRATION UNDER THE *Canada Labour Code, RSC 1985, c L-2.*

BETWEEN:

TEAMSTERS CANADA RAIL CONFERENCE

(TCRC)

-and-

CANADIAN NATIONAL RAILWAY COMPANY

(CN)

Dismissal Grievance of Conductor Geoffrey Weseen (CROR Rule G Violation)

Arbitrator: Graham J. Clarke
Date: November 3, 2022

Appearances:

TCRC:

K. Stuebing:	Legal Counsel
R. Donegan:	General Chairperson, Saskatoon
J. Thorbjornsen:	Vice General Chairperson, Saskatoon
G. Weseen:	Grievor, Winnipeg

CN:

L. Dodd:	Labour Relations Manager
V. Paquet:	Senior Manager, Labour Relations
S. Bahl:	Superintendent
R. Singh:	Labour Relations Manager
A. Bacchus:	Labour Relations Manager

Arbitration held via videoconference on October 12, 2022.

Award

Introduction

1. In their November 26, 2019, Memorandum of Settlement, the parties established a “Supplemental Arbitration Process” (SAP) due to a large backlog of grievances. The SAP obliged the parties to follow the rules and procedures of the Canadian Railway Office of Arbitration & Dispute Resolution[1] (CROA). The arbitrator agreed to provide 4 hearing dates in 2022 on the condition that the parties would plead no more than 2 cases per day[2].

2. On November 4, 2019, CN discharged Conductor Weseen for “circumstances surrounding your non-compliance with CN's Drug and Alcohol Policy on October 19, 2019”. Mr. Weseen had tested positive for both cocaine and marijuana.

3. For Mr. Weseen’s 5 grievances heard on October 12, 2022, the arbitrator has issued this award (AH793) concurrently with the related award AH792. While the particularities of railway arbitrations sometimes create separate cases, AH793 and AH792 are partially interconnected since the two awards examine some of the same events.

4. As will be expanded upon below, the arbitrator has significant concerns about the Record the parties put together and its impact on the railway model of arbitration the parties want to follow. In this case, the TCRC, despite agreeing otherwise, failed to produce key medical documentation until a few days before the arbitration when it filed its Brief. However, CN, despite knowing of Mr. Weseen’s request in 2019 for accommodation due to a disability, did not appear to inquire into it.

5. Given the parties’ request to proceed with all 5 of Mr. Weseen’s grievances on October 12, 2022, the arbitrator has concluded that CN failed to accommodate Mr. Weseen’s disability. Mr. Weseen will be reinstated into a non-safety sensitive position at CN. The arbitrator has left to the parties the drafting of a Last Chance Agreement which will incorporate the conditions of Mr. Weseen’s reinstatement.

6. The arbitrator will complete that agreement should the parties be unable to do so.

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[1] Croa.com

[2] Hearing Notice dated May 7, 2021.

7. These are the reasons for the arbitrator's conclusions.

Facts

8. It appears CN's representatives only learned of the full background to Mr. Weseen's addiction issues and past accommodations when the parties exchanged their Briefs on October 7, 2022, i.e., the Friday of the long Thanksgiving weekend. This short chronology will review that background.

9. **September 2, 2013**: CN hired Mr. Weseen[3].

10. **May 26, 2015**: Mr. Weseen voluntarily disclosed to CN his disability relating to substance abuse. CN had Mr. Weseen sign a "Continuing Employment Contract" which, *inter alia*, imposed various conditions including ongoing tests "to assess your medical fitness for work in a safety sensitive/safety critical position"[4].

11. **February 2016**: It appears Mr. Weseen had a relapse and used cocaine in 2016[5], an event which led to his attending and completing a 21-day treatment program[6].

12. **May 2016**: CN's Chief Medical Officer deemed Mr. Weseen fit to return to duties, subject to a two-year Relapse Prevention Program run by Shepell, CN's Employee and Family Assistance Program (EFAP) provider.

13. **March 23, 2018**: Shepell provided a Structured Relapse Prevention Program Closure Report[7] for the period March 10, 2016 to March 20, 2018. Shepell concluded that Mr. Weseen had achieved the goal of "Relapse Prevention/Maintaining Abstinence".

14. **January 11, 2019**: As of this date, Mr. Weseen's disciplinary record had 35 demerit points[8].

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[3] Ex-1 CN Brief; Paragraph 8. The TCRC at paragraph 12 of its Brief (Ex-3) suggested Mr. Weseen "commenced working with the Company as a Conductor in September 2014".
[4] Ex-4 TCRC Exhibits; Page 6/295. The tests included blood, urine, hair and breath analyses.
[5] Ex-4 TCRC Exhibits; Page 26/295
[6] Ex-4 TCRC Exhibits; Page 9/295.
[7] Ex-4 TCRC Exhibits; Page 20/295
[8] Ex-2 CN Exhibits; Page 9/289.

15. **October 19, 2019**: While assisting with rerailing a car, Mr. Weseen, who was acting as Yard Conductor (Foreman), lost his footing and slipped while detraining a railcar. His pants were tattered and laces were missing from one of his boots. Mr. Weseen advised a CN supervisor that he would fail the resulting drug test[9].

16. **October 29, 2019**: Mr. Weseen's oral swab tested positive for marijuana and cocaine at these levels: marijuana (12 ng/ml); cocaine (353 ng/ml) and cocaine metabolite (213 ng/ml)[10].

17. **November 1, 2019**: CN interviewed Mr. Weseen who admitted he was "struggling with substance abuse"[11]. He further acknowledged that when he accepted a call for service on October 19, 2019, he was not in compliance with CN's *Policy to Prevent Workplace Alcohol and Drug Problems* (Policy); its *Code of Business Conduct* (Code); and CROR Rule G[12].

18. **November 4, 2019**: CN issued two separate notices of discharge. For this arbitration (AH793), CN discharged Mr. Weseen for "circumstances surrounding your non-compliance with CN's Drug and Alcohol Policy on October 19, 2019"[13]. For the companion arbitration to this one (AH792), CN discharged Mr. Weseen "due to accumulation of demerits"[14].

19. **January 3, 2020**: In its Step III grievance, the TCRC maintained that Mr. Weseen suffered from a disability and required reasonable accommodation[15].

20. **March 31, 2020**: The Complex Addiction & Recovery Medical Assessment Clinic (CARMA) at the Winnipeg Health Sciences Centre assessed Mr. Weseen[16] and provided a review of his history of substance abuse. The CARMA report, which the TCRC's Brief summarized extensively, also included this paragraph:

[9] Ex-2 CN Exhibits; Page 14/289.
[10] Ex-2 CN Exhibits; Page 17/289 and Ex-1 TCRC Brief; Paragraphs 37-38.
[11] Ex-2 CN Exhibits; QA12; Page 30/289.
[12] Ex-2 CN Exhibits; QA22-25; Pages 31-32/289.
[13] Ex-2 CN Exhibits; Form 780 Page 19 of 289.
[14] Ex-2 CN Exhibits; Form 780 Page 20 of 289.
[15] Ex-2 CN Exhibits; Page 26 of 289.
[16] Ex-4 TCRC Exhibits; Page 69/295.

> He described his simulant (sic) use as less frequent since relapsing to opioids. His last cocaine use by nasal insufflation was 1 week ago, ½ gram. He is also now occasionally using methamphetamine to balance the sedation of the opioids, typically smoked. Geoff denies regular alcohol use since relapsing with opioids. He does not use benzodiazepines. He uses cannabis regularly, but has reduced his use lately.

21. **April 2020**: As alluded to in the CARMA report, Mr. Weseen was admitted to the Winnipeg Health Sciences Center Chemical Withdrawal Unit from April 1 to April 14, 2020[17].

22. **July 2020 to July 2022**: The TCRC conducted a series of hair tests for drugs and alcohol which Mr. Weseen passed[18].

23. **May 23, 2022**: Mr. Weseen's medical professional, Dr. Anne Duncan, who works at the Addictions Foundation of Manitoba, wrote a short letter about his progress[19]:

> Geoffrey Wessen (sic) has been a patient of mine since April 2020.
>
> He has been diagnosed with substance dependency which is currently in sustained remission, and generalized anxiety disorder. Geoffrey was first diagnosed with substance dependency in 2009. He relapsed to drug use in 2019 and underwent admission to Health Sciences Center Chemical Withdrawal Unit in 2020 followed by a 28 day inhouse program at Addictions Foundation of Manitoba.
>
> Geoffrey is fully engaged in his medical care. He is compliant with this treatment program including regular urine drug testing. He has been courteous and proactive in his care.

24. **June 9, 2022**: Roughly 2.5 years after the TCRC's January 3, 2020 Step III grievance, and apparently after the parties had agreed on a Joint Statement of Issue[20] (JSI), CN sent its Step III response[21]. Paragraph 5 of the SAP appears to contemplate the possibility of a Step III response arriving long after the events. CN took the position it had not dismissed Mr. Weseen due to a disability:

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[17] Ex-3 TCRC Brief; Paragraph 60. See also an essentially illegible report about this treatment: Ex-4 TCRC Exhibits; Page 72/295.
[18] Ex-4 TCRC Exhibits; Page 75 and following/295.
[19] Ex-4 TCRC Exhibits; Page 65/295. See also Dr. Duncan's July 9, 2020 letter: Page 65/295.
[20] Ex-2 CN Exhibits; Page 2/289. The undated JSI merely summarizes the parties' differing positions.
[21] Ex-2 CN Exhibits; Page 22/289

> The Company disagrees with the Union's position that the Grievor should be reinstated into his employment. To be clear, the Grievor was not dismissed because of an alleged disability but rather because he was in violation of the Company's *Policy to Prevent Workplace Drug and Alcohol Problems* and CROR Rule G. This is based on his recent use of marijuana, as evidenced by the positive oral fluids test result and the Grievor's admittance, thus justifying the Company's actions.
>
> The Company's position had been, and remains, that employees desiring assistance to overcome alcohol, drug or other health disorders that may affect the operation of a safety critical work environment, must voluntarily come forward and seek assistance through the Company's EFA Program, via the Company's Occupational Health Services Department, or by approaching their Supervisor or EFAP Peer. Under these circumstances, the Company willingly assists its employees who desire help, and provides disability benefit coverage while the employee follows the recommended treatment problem.
>
> On the other hand, employees who seek the Company's assistance only **after** having been found to have violate CROR Rule G and/or the Company's *Policy to Prevent Workplace Drug and Alcohol Problems,* do so from a very different, self-serving defensive motivation.
>
> …
>
> Based on all of the foregoing, the Company maintains that the Grievor's discharge was both warranted and appropriate based on the serious CROR Rule G and Company *Policy to Prevent Workplace Drug and Alcohol Problems* violations, and the Company must respectfully decline this grievance.
>
> (Emphasis in original)

25. **June 2022**: CN requested Mr. Weseen's medical information, a request to which the TCRC agreed.

26. **October 7, 2022**: The parties exchanged their Briefs for the October 12, 2022 arbitration. This was the first time that the TCRC shared with CN Mr. Weseen's post-termination medical information.

27. **October 11, 2022**: CN filed an objection to the previously undisclosed post-termination evidence that the TCRC had included in its Brief.

28. **October 12, 2022**: The parties pleaded Mr. Weseen's 5 grievances (AH792 and AH793).

Parties' Positions

CN

29. Due to the incomplete Record at the time when the parties drafted their Briefs, CN's submission treated this case mainly as disciplinary due to Mr. Weseen violating the Policy[22]:

> 27. The evidence clearly establishes that:
>
> • Further to the drug and alcohol testing, the Grievor tested positive for cocaine, benzoylecgonine and cannabis and therefore violated both CRO Rule G and the Company Policy to Prevent Workplace Alcohol and Drug Problems on October 19, 2019;
>
> **• The discipline assessed was both warranted and appropriate in the circumstances, in light of the grievor's use of intoxicants during a period which coincided with the performance of his safety-critical duties;**
>
> • The Grievor's egregious level of impairment, testing at 36 times the cut-off level for an illegal controlled substance as well as the positive result for marijuana make the reinstatement of the grievor untenable;
>
> **• The event did not trigger a duty to accommodate the grievor pursuant to the Canadian Human Rights Act, nor has the Union provided evidence of a causal nexus between the Grievor's purported condition and his violation of Rule G or the Company Policy.**
>
> **• To the extent the Union's argument concerning the CHRA might be entertained, CN argues that there is no evidence the grievor suffers from a disability warranting accommodation, and in the further alternative, CN submits that allowing impaired employees to work in safety critical occupations would amount to an undue hardship upon the employer and present an unacceptable safety risk to other employees and the general public;**
>
> (Emphasis added)

30. In a subsidiary argument, CN argued it had no duty to accommodate Mr. Weseen due to his failure to advise of his relapse prior to the events of October 19, 2019. CN

[22] Ex-1 CN Brief.

speculated in its Brief that Mr. Weseen may already have been accommodated in the past:

> 71. If the Company's presumption is right, then the Grievor had, by all accounts, already been provided with the benefit of an accommodation for his purported disability and he had the tools and coping skills necessary to seek assistance following his purported relapse.

31. CN further relied on the Supreme Court of Canada's (SCC) decision in *Stewart v. Elk Valley Coal Corp. (Elk Valley)*[23], in support of its decision to terminate Mr. Weseen and added these arguments in its Brief:

> 74. Like the case before you today, the Grievor knew from both his training and his experience, that he should not take drugs before working. Neither the Union, nor the Grievor have proffered any evidence to support that the Grievor lacked the "capacity" to request an accommodation for his purported disability. Therefore, the request for an accommodation should be dismissed.
>
> …
>
> 76. As in the present case, the Union has failed to establish that the grievor's conduct was not culpable because of his purported disability. Furthermore, no medical evidence was provided by the Union to support its allegations over past 20 months. The Grievor readily admitted, prior to being tested that he knew he would be found in violation of the Drug and Alcohol policy. The Grievor knowingly came to work impaired, and likely consumed cocaine, an illegal drug just before or during his regularly assigned shift.

32. CN also briefly commented on the concept of *prima facie* discrimination, which a divided SCC had examined in *Elk Valley.* CN argued that the TCRC had not discharged its burden:

> 83. As expressly set out by the Supreme Court, employees who do not seek assistance for a purported substance abuse condition until after a workplace incident leading to their termination, do not establish prima facie discrimination unless they meet the stringent evidentiary threshold established in Elk Valley Coal. The grievor plainly did not meet that burden.

33. CN concluded in part:

[23] 2017 SCC 30

> 101. It must be repeated, even if the grievor was suffering from a substance use disorder, the case law is clear that that does not mitigate the serious safety violation of reporting for work in a safety critical occupation while impaired.

34. At the arbitration, CN provided a 10-minute oral summary of the main points in its Brief. Given the additional evidentiary background which only came to light only when the parties exchanged their Briefs, CN acknowledged that Mr. Weseen had a disability. However, CN emphasized that, unlike the last time when Mr Weseen had been accommodated, he had failed to come forward in advance. A further accommodation would amount to undue hardship.

TCRC

35. The TCRC's Brief argued a somewhat different case given its unique knowledge of past accommodation measures as well as Mr. Weseen's post termination rehabilitation efforts.

36. The TCRC argued that this case involved a disability and accommodation up to the point of undue hardship:

> 80. The record before you establishes beyond dispute that the Grievor suffers from a recognized disability – substance dependency – which requires accommodation to the point of undue hardship. The Grievor advised as much during the investigation into the results of the October 19, 2019 testing. He noted at Q&A 12 and 28 that he was struggling with substance abuse. He candidly and truthfully disclosed details of his recent use and, although he emphasized that he had not at any point used drugs or alcohol while on duty, admitted that he did not comply with CROR General Rule G and/or Company policy on October 19, 2019.

37. The TCRC argued that it had met its burden to demonstrate *prima facie* discrimination and that CN had not attempted to accommodate Mr. Weseen:

> 120. The Union respectfully submits that the above jurisprudence—particularly Ms. Silverman, Mr. Sims and Mr. Moreau's reasoning, in CROA Case No. 4375, CROA Case No. 4652, and Ad Hoc 725 respectively, as well as your own decision in CROA Case No. 4667—offer compelling legal frameworks that should guide the resolution to the instant dispute. The record confirms that Mr. Weseen suffered from drug dependence at the time of his November 2019 dismissal, that he suffered an adverse impact when he lost his employment and that his substance use disorder was a factor leading to this adverse impact. The

record further confirms that the Company has not discharged its duty to accommodate Mr. Weseen's medical disability to the point of undue hardship.

38. In its oral argument, the TCRC highlighted that CN had known of Mr. Weseen's preexisting disability since he had disclosed it voluntarily in 2015. This had led to an extensive accommodation process, which had included 2 years of random testing. Mr. Weseen ultimately completed the program successfully in 2018.

39. The TCRC noted that during CN's investigation, Mr. Weseen had advised that he was struggling again with substance abuse. Despite this admission, the TCRC noted that CN treated the matter as one involving misconduct. The TCRC added that those suffering from addictions may not be honest with their employer and will deny and lie about their problems[24].

40. The TCRC further described the efforts Mr. Weseen had made to deal with his addictions, as described in the post termination medical documentation it filed. These efforts included a residential treatment program. In the TCRC's view, the arbitrator should modify the penalty.

41. The TCRC did not deny the seriousness of Mr. Weseen's actions. But it submitted that it had met its burden to show *prima facie* discrimination. The TCRC also argued that CN had provided no analysis to support its conclusion that undue hardship existed in this case. CN instead relied mainly on discipline cases which did not involve employees with a disability.

Analysis

Introduction

42. The arbitrator has commented before that the railway model might not work as well with fact-intensive duty to accommodate and harassment cases[25]. While the massive CROA library of case law provides invaluable assistance for railway specific issues, such as the appropriate range of demerits for a derailment, cases involving the application of outside legislation are often more complex.

43. This case goes beyond the collective agreement and brings into play the *Canadian Human Rights Act*[26] (*CHRA*) as well as literally thousands of non-railway cases which

[24] See, for example, CROA 4347.
[25] CROA 4630P at paragraph 21.
[26] RSC 1985, c H-6

have examined an employee's disability and the duty to accommodate process. The parties must address the legal framework that legislation and case law obliges arbitrators to follow.

What type of case is this?

44. As the arbitrator noted in AH734[27], the parties need to characterize a case properly or at least "agree to disagree" whether the case is disciplinary or involves a human rights analysis [footnotes omitted]:

> 11. The arbitrator must first characterize this case properly.
>
> 12. Mr. Moore's situation differs from those where an employee's urine tested non-negative, but the oral swab test came back negative. In those types of cases, arbitrators have generally concluded that the evidence failed to establish an employee's impairment at work.
>
> 13. Neither is this a case where an employee suffered from a disability, an allegation which mandates a duty to accommodate analysis.
>
> 14. Instead, this case falls within the category of cases where testing demonstrated that an employee worked while impaired. Railway arbitrators have often had to consider cases where employees worked in safety sensitive positions when under the influence of alcohol or narcotics.

45. Both parties acknowledge the seriousness of someone working in a safety sensitive position while impaired. As the arbitrator noted in AH734, the presumptive disciplinary penalty in CROA jurisprudence for such conduct is dismissal:

> 18. In all these cases, arbitrators consider whether compelling circumstances outweigh the prima facie disciplinary response of dismissal and the importance of deterrence [AH689]:
>
> > 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.
>
> **19. Despite its best efforts, the TCRC did not persuade the arbitrator that compelling grounds existed to change Mr. Moore's termination into a lesser penalty.**

[27] AH734: Teamsters Canada Rail Conference v Canadian National Railway Company, 2022 CanLII 5833

> **20. While Mr. Moore no doubt regrets the August 1, 2020 event, the arbitrator concludes that his actions have irreparably broken the essential bond of trust that CN must have in its generally unsupervised LEs. Mr. Moore put himself, his colleagues, CN and the general public at risk by operating his train while impaired by cocaine.**
>
> 21. The suggested mitigating factors of regret, an apology and 15 years service remain insufficient to counter the seriousness of operating a train in this condition. Similarly, Mr. Moore had 55 demerit points, including the August 1, 2020 "failure to properly secure your power" incident, which provides no support for mitigating the penalty.

46. The situation becomes more complex for cases which go beyond the collective agreement and oblige the arbitrator to consider outside legislation like the *CHRA*. In AH663[28], which involved a locomotive engineer's cocaine use, the parties "agreed to disagree" whether it was a human rights case. The arbitrator held 4 days of hearings and considered multiple supplementary written submissions from the parties before deciding that *prima facie* discrimination did not exist due to the absence of a disability.

47. As the arbitrator's summary of the facts above demonstrated, Mr. Weseen's case involves a disability. This imposes on the TCRC the burden to show *prima facie* discrimination. If it met this burden, then CN would have the burden of proof to demonstrate that it had reached the point of undue hardship.

Problems with the Record

48. In their joint undated JSI[29], CN stated that:

> The Company, nor its Occupational Health Services, had any information from the Grievor to indicate he suffered from a substance addiction prior to the instant matter.

49. For reasons which were never explained, CN did not seem to know about Mr. Weseen's extensive 2015-2018 accommodation experience.

50. At paragraph 25 of its Brief, CN suggested the TCRC had refused to consent to provide Mr. Weseen's medical information:

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[28] Teamsters Canada Rail Conference v Canadian Pacific Railway, 2019 CanLII 89682
[29] Ex-2 CN Exhibits; Page 2/289.

> 25. Given the Union's assertions that the Grievor suffers from a disability entitling him to an accommodation, the Company requested a copy of the Grievor's confidential medical file. Without consent, the Company's Occupational Health Services cannot confirm the Union's assertion that the Grievor suffers from a disability. This request was declined by the Union. To date, the Company has not received any objective documentation from the Union supporting the Grievor suffers from a disability or what efforts, if any, he has made at rehabilitation.

51. CN provided no particulars about this alleged refusal by the TCRC and/or Mr. Weseen to grant consent or participate in an accommodation analysis[30]. As described below, a failure to cooperate could end an employer's accommodation obligation. But an arbitrator would require detailed evidence before arriving at that type of conclusion.

52. In the Introduction to this award, the arbitrator expressed concern about the disclosure in this case. The expedited railway model of arbitration, which, when it works, can hear multiple cases in a single day, cannot function without proper disclosure and a complete Record.

53. The Saskatchewan Court of Appeal (SKCA) recently granted a TCRC appeal which upheld an essential disclosure principle underpinning the parties' railway model. Arbitrators will consider discipline void *ab initio* if an employer fails to disclose key documents[31]:

> [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.
>
> …
>
> [59] Second, the Arbitrator did not treat this as a choice between two options of either voiding discipline or fundamentally altering the CROA arrangement. **The Arbitrator was well aware of the approach taken in AUPE and Alberta Health and of the option of dealing with the matter on the**

[30] This may relate to a June 2022 request which the arbitrator examines below.
[31] Teamsters Canada Rail Conference v Canadian National Railway Company, 2021 SKCA 62

merits. He considered and rejected that approach, based on the CROA case law, and his analysis of the nature of the CROA process and the impact of a different approach on that process. To reiterate, he summarized his conclusion on this point as follows:

> Breaches of the collective agreement pre-discipline due process terms go to the core of the CROA process. They are not (if fundamental) just oversights that can be excused because a full de novo arbitration hearing might be thought to rectify the breach. …
>
> …
>
> To say, based on cases like Wasaya v. ALPA 2010 Carswell Nat. 6233, that all [defects]...can be mitigated by a de novo approach at the hearing is to undermine the entire CROA arrangement. It is to reverse a long line of CROA jurisprudence which the parties have directed us, as CROA arbitrators, to respect.

…

[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.

(Emphasis added)

54. As the SKCA noted, the void *ab initio* remedy the Court upheld addressed systemic rather than case specific concerns. While those involved in regular labour arbitration might consider that type of remedy draconian, it is essential to protect arbitrators' ability to hear, in a procedurally fair way, multiple matters in a single day. Adjournments do not remedy a failure to disclose; they instead undermine the effectiveness of the railway model the parties have negotiated.

55. At the arbitration, CN advised the arbitrator that it had sent a June 2022 email to the TCRC requesting certain medical documentation. In a return email, the TCRC apparently agreed to the request. The arbitrator cannot find this evidence in the parties' extensive materials, perhaps due to a lack of bookmarks, but no one disputed that CN had made that request in June 2022.

56. At the arbitration, Mr. Stuebing candidly took responsibility for the failure to produce the medical information, despite CN's June 2022 request. That failure arose in part from an accident he had suffered and from this case having originally been scheduled to be heard by a different arbitrator.

57. However, CN did not explain why it could not have obtained the medical information following Mr. Weseen's November 4, 2019 interview. Employers generally have a "duty to inquire" in such circumstances[32]. CN did not describe the extent to which it attempted to respect this duty.

58. Multiple CROA cases have described the tri-partite process required for potential human rights cases[33]. The tri-partite process allows the parties to learn the facts and then determine the appropriate legal analysis. An employer which focuses mostly on discipline, rather than on the duty to accommodate when the case requires it, may have difficulty meeting its burden of proof[34].

59. Employees must cooperate when asking for accommodation, including by sharing the medical information on which they base their request, or they may have their grievance dismissed[35]:

> 16. The arbitrator agrees with BTC that the context of this case is essential. BTC had to scramble to find a very short-term solution in real time because it did not learn of Mr. El Borte's medical/safety limitations until he showed up for work on September 16.
>
> 17. It is unclear why Mr. El Borte did not send BTC the FAF despite its request on September 10 and then again on September 13. He had no difficulty emailing medical notes to BTC. The arbitrator appreciates the TCRC's comment that this was a novel situation for their member who might not have understood the importance BTC placed on the FAF. But the arbitrator cannot ignore how his actions placed BTC in a challenging situation.
>
> 18. **BTC proactively requests information from its employees who need accommodation, as examined recently in AH707 (Valiquette)**. A different conclusion may arise, as happened in that case, depending on how BTC analyzes that information. **But BTC consistently requests relevant**

[32] Telus Communications Inc. v. Telecommunications Workers Union, 2018 BCCA 331
[33] See, for example, CROA 4503 and CROA 4648.
[34] CROA 4667.
[35] See, for example, Bombardier Transportation Canada Inc. v Teamsters Canada Rail Conference, 2020 CanLII 82183 and CROA 4504.

> **information as part of the accommodation exercise. Employees have an obligation to assist in providing that relevant information.**
>
> 19. **In this case, because Mr. El Borte did not provide the FAF as requested, BTC only learned he could not perform safety-sensitive work after he had already been permitted to work by his supervisor. BTC's decision to send Mr. El Borte home was hardly surprising given the work he performed ran counter to the FAF's medical restrictions.**
>
> (Emphasis added)

60. A trade union also has important legal obligations in the tri-partite process, including those involving the challenges of balancing an employee's needs with those of the bargaining unit.

61. While the arbitrator has significant concerns about the TCRC's June 2022 failure to respect its agreement and produce relevant medical information, CN did not satisfy the arbitrator that it could not have investigated Mr. Weseen's 2019 request for accommodation. That investigation would have allowed CN to evaluate Mr. Weseen's past efforts to treat his addictions and eliminated the need to rely on inferences in its Brief[36].

Should the arbitrator allow into evidence the post-discharge evidence?

62. The arbitrator fully understands CN's dismay when, on the Friday of the long Thanksgiving weekend, it received the TCRC's Brief and found it contained extensive post discharge medical evidence. CN emailed the following objection to the arbitrator on Tuesday October 11, 2022:

> **As the parties have exchanged their briefs today, it has come to the Company's attention the Union is including post discharge evidence which was not previously disclosed as per the Medical Evidence Act**. As such, the Company will be raising a preliminary objection. For your convenience I have included a copy of the Quebec Cartier Supreme Court of Canada case which speaks to post discharge evidence, which the Company will be referencing.
>
> **In order to avoid any delays, the Company is agreeable to dealing with the objection during the hearing and are prepared to proceed on the merits of the case in any event.**
>
> (Emphasis added)

[36] Ex-1 CN Brief; Paragraphs 71-72.

63. The arbitrator previously examined a similar request to exclude post discharge evidence in AH663[37]. For the reasons expressed in AH663, the arbitrator will admit Mr Weseen's post discharge evidence:

> 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.

64. The SCC described when arbitrators must admit such evidence[38]:

> 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.

65. But, as the arbitrator further noted in AH663, the admission of post discharge evidence does not mean that it necessarily has much weight, particularly if it was created years after the events:

> 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.

66. Given the SCC's comments as cited above, the arbitrator admits the post discharge evidence since it "helps to shed light on the reasonableness and appropriateness of the dismissal". That resolves the October 11, 2022 objection CN made over the TCRC's lack of disclosure.

[37] Teamsters Canada Rail Conference v Canadian Pacific Railway, 2019 CanLII 89682
[38] Toronto (City) Board of Education v. O.S.S.T.F., District 15, 1997 CanLII 378

Did the TCRC prove a prima facie case of discrimination?

67. The TCRC argued that it had made out a case for *prima facie* discrimination.

68. CN did not address this admittedly complex legal issue in detail, but it did suggest in its Brief that *Elk Valley* stood for the proposition that an employer can terminate an employee who fails to come forward prior to violating an employer's drug policy:

> 83. As expressly set out by the Supreme Court, employees who do not seek assistance for a purported substance abuse condition until **after** a workplace incident leading to their termination, do not establish prima facie discrimination unless they meet the stringent evidentiary threshold established in Elk Valley Coal. The grievor plainly did not meet that burden.
>
> (Emphasis in original)

69. In CROA 4652, Arbitrator Sims dealt with this proposition:

> Earlier CROA cases make it clear, a claim of addiction in no way entitles an employee to an opportunity of further employment. But, with sufficient evidence of rehabilitation efforts and robust protections for the safety interests of the Employer, as well as if co-workers and the public, such an option can be assessed in the spirit of accommodating a disability. This consideration, either under the Elk Island (sic) approach, or the existing CN policies, is not automatically precluded by CN's argument that "it was incumbent on him to seek help prior to the incident."

70. The arbitrator in CROA 4667 described the importance of evidence when examining the legal issue of *prima facie* discrimination:

> 36. The SCC in these paragraphs emphasized that any conclusion about prima facie discrimination comes from the evidence the parties put before the decision maker. It further emphasized that the employee must prove, on a balance of probabilities, only a "connection or factor" rather than a "causal connection".

71. In AH663, where the parties disputed whether *prime facie* discrimination existed, the case focussed on whether there was an addiction, one of the key elements in the analysis. The parties in this case no longer dispute that Mr. Weseen had an addiction.

72. The arbitrator must keep in mind the underlying context the SCC faced when deciding *Elk Valley*. The issue in that case was whether the termination occurred due to a breach of the employer's drug policy and not due to Mr. Stewart's disability.

73. In the original Alberta Human Rights Tribunal[39] (AHRT) decision, in addition to the parties' Agreed Statement of Facts and other evidence, the Tribunal heard 4 witnesses testify:

> [25] At the hearing two witnesses testified for the Complainant, Brent Marshall Bish and Dr. Charl Els.
>
> [26] The Respondent called two witnesses, James Frederik Jones and Dr. Mace Beckson.
>
> [27] Ian Stewart did not testify. His evidence came in through the Agreed Statement of Facts, the Exhibits, the testimony and reports of Dr. Els and Dr. Beckson and from the evidence as set out by Arbitrator Gerald Lucas Q.C. in an Arbitration Award dated April 24, 2008.

74. Based on this extensive evidence, including the testimony of two doctors, the AHRT concluded that no *prima facie* discrimination existed because the employer terminated Mr. Stewart solely due to a policy breach:

> [125] **The evidence supports that the termination in those circumstances was due to a breach of the Policy and that Mr. Stewart's disability was not a factor in the termination**. **The Policy as applied to Mr. Stewart which resulted in Mr. Stewart's termination was not applied due to his disability, but rather because of his failure to stop using drugs and failing to disclose his drug use prior to the accident.**
>
> [126] Given my finding that Mr. Stewart's disability was not a factor in his termination there is no inference that the application of the Policy was arbitrary or perpetuated historical stereotypes. I accept the evidence of Dr. Beckson, and common sense, that drug users and drug addicted individuals can be dangerous in safety sensitive workplaces, and find that the termination and the Policy as applied to Mr. Stewart including its ameliorative disclosure provisions, was directed at accountability for an individual who had the capacity to make choices. The termination, in this context, did not act, either through its intent or effect, to perpetuate stereotypes or disadvantage suffered by drug addicts.
>
> (Emphasis added)

[39] Bish v. Elk Valley Coal Corporation, 2012 AHRC 7

75. It was the AHRT's conclusion, based on extensive evidence, which divided the SCC over the concept of *prima facie* discrimination.

76. The SCC in *Elk Valley* examined the reasonableness of the AHRT's conclusion. The majority deferred to the AHRT's conclusions given the extensive evidence the original tribunal had heard:

> [5] **Like the majority of the Court of Appeal, I find no basis for interfering with the decision of the Tribunal. The main issue is whether the employer terminated Mr. Stewart because of his addiction (raising a prima facie case of discrimination), or whether the employer terminated him for breach of the Policy prohibiting drug use unrelated to his addiction because he had the capacity to comply with those terms (not raising a prima facie case of discrimination). This is essentially a question of fact, for the Tribunal to determine.** After a thorough review of all the evidence, the Tribunal concluded that the employer had terminated Mr. Stewart's employment for breach of its Policy. The Tribunal's conclusion was reasonable.
>
> (Emphasis added)

77. The TCRC relied on the following facts to support its argument that *prima facie* discrimination existed[40]:

> The record confirms that Mr. Weseen suffered from drug dependence at the time of his November 2019 dismissal, that he suffered an adverse impact when he lost his employment and that his substance use disorder was a factor leading to this adverse impact.

78. Unlike the parties in AH663 and *Elk Valley*, CN presented no evidence which might have demonstrated that Mr. Weseen's disability played no part in his termination. CN's Brief suggested that it disciplined Mr. Weseen for being impaired, something which arose due to his addiction. Given this context, CN did not persuade the arbitrator that the TCRC had failed to meet its burden on this issue.

79. The arbitrator concludes that the TCRC has met its burden to show *prima facie* discrimination. This conclusion about *prima facie* discrimination then obliges CN to demonstrate undue hardship.

[40] Ex-3 TCRC Brief; Paragraph 120.

Did CN meet its burden to demonstrate undue hardship?

80. Given the original position that CN took regarding Mr. Weseen's termination, the arbitrator finds little evidence to support its alternative conclusion that undue hardship existed. Arbitrator Moreau has noted that "The point at which undue hardship is reached is a fact-driven exercise"[41].

81. The arbitrator has examined undue hardship and the relevant principles in various CROA awards, including in AH707. The focus, except perhaps in clearly self-evident cases[42], is on the process the employer followed to support the suggested conclusion that it had passed the point of undue hardship [footnotes omitted]:

> 58. The record contains no evidence to support BTC's suggestion of an extensive search for accommodated work or the existence of a BFOR. Instead, the record suggests that BTC's Human Resources department concluded within a few hours of receiving Mr. Valiquette's April 2019 Form that it could not accommodate him.
>
> 59. They continued to hold this view in June 2019 and in October 2019 when they advised the TCRC they could not accommodate Mr. Valiquette in his safety-sensitive position. BTC took this position despite the fact it had advised Mr. Valiquette's doctor that he held a hybrid position, a part of which was not safety sensitive. The record contains no evidence that BTC ever investigated modifying his home position to fit within his restrictions.
>
> 60. Similarly, there is nothing in the record about a search for other positions, including non-safety sensitive ones, or bundled duties. Often, employers may use an occupational health department to assist in the accommodation search while keeping an employee's medical information confidential. But this possible approach is just one of many.

82. The instant case appears comparable to that examined in AH707. The arbitrator has no evidence of CN's attempts to investigate Mr. Weseen's restrictions and consider whether an accommodation could take place. CROA 4667 examined a similar situation where a railway pursued a mainly disciplinary response rather than one grounded in human rights principles:

> 58. Given the focus of CP's submissions on discipline, the arbitrator must conclude that undue hardship has not been shown. The appropriate remedy therefore will be comparable to those which this Office has ordered in past

[41] AH725 at page 15.
[42] AH707 at paragraph 50. The parties may need to provide a significant amount of evidence, including medical, to justify a "self-evident" conclusion.

cases.

83. Given the fact that the parties ultimately did not contest that Mr. Weseen suffered from a disability, there is little if any evidence about accommodation and why it would have led to undue hardship.

84. The TCRC is entitled to a remedy.

What is the appropriate remedy?

85. The arbitrator has considerable sympathy for both parties' positions. Mr. Weseen has been struggling for years with substance addiction. Despite his continuing efforts since 2015, he has had several relapses.

86. Similarly, CN has legitimate concerns about Mr. Weseen working in a safety sensitive environment[43]. Due to his substance addiction issues, he may constitute a significant risk to himself and others if he works as a conductor.

87. While there is no evidence on the Record, the arbitrator accepts the TCRC's suggestion that "addicts deny and lie to conceal their addiction"[44]. But this argument raises significant concerns about returning Mr. Weseen yet again to a safety sensitive position given the extensive evidence on the Record. There is a vast difference between an employee returning to an office environment and one resuming work in a safety-sensitive position like that of a train conductor.

88. While CN did not meet its burden to demonstrate that undue hardship existed, the arbitrator has decided to follow past arbitral awards[45] which have reinstated employees to non-safety sensitive positions only. This provides an employee suffering from an addiction with another opportunity but protects a railway's legitimate safety interests.

89. As the TCRC noted in its Brief, Arbitrator Picher in CROA 3355 reinstated a yardmaster who suffered from an alcohol addiction to a non-safety sensitive position:

> **The Arbitrator therefore directs that the grievor be reinstated into employment with the Company, in a clerical position, and not in a safety-sensitive position, in accordance with such work as he may hold by**

[43] Ex-1 CN Brief; Paragraphs 28-36.
[44] Ex-3 TCRC Brief; Paragraph 31.
[45] See, for example, CROA 4519.

> **reason of his seniority, and that thereafter he be permanently precluded for holding safety sensitive work, absent any agreement to the contrary by the Company**. In that regard it should be noted that the grievor did hold a position as a clerk in another bargaining unit, albeit he worked as a yardmaster on weekends. The grievor's reinstatement shall further be conditioned on his remaining abstinent from alcohol and non-prescription drugs, his regular attendance at meetings of Alcoholics Anonymous, to be confirmed in writing to the Company by an appropriate officer of that organization on a quarterly basis, and his being subject to random alcohol or drug testing, to be administered in a non-abusive fashion. The foregoing conditions shall apply for the duration of the grievor's employment with the Company. Failure to abide by any of the foregoing conditions shall render the grievor liable to discharge, with access to arbitration only in respect of the issue of whether he did violate any such condition or conditions. The grievor's reinstatement shall be without loss of seniority, and without compensation for wages and benefits lost.
>
> (Emphasis added)

90. The medical evidence appears to confirm that Mr. Weseen has had multiple relapses after CN originally accommodated him with a "Continuing Employment Contract" in 2015. This brings Mr. Weseen's situation within the parameters Arbitrator Picher explored in CROA 3355.

91. Accordingly, the arbitrator orders that CN reinstate Mr. Weseen to a non-safety sensitive position, without compensation or benefits, but without loss of seniority. The parties will also prepare together what is colloquially called a "Last Chance Agreement" which will include appropriate testing conditions for a two-year period. Mr. Weseen must comply with that agreement failing which he may be subject to termination.

Disposition

92. The arbitrator has raised certain concerns about how this matter transpired. The parties seemed to argue different cases in their Briefs. The Record only crystallized a few days before the arbitration. This scenario can negatively impact both the success of the railway model of arbitration and an arbitrator's ability to conduct a fair hearing.

93. The arbitrator has granted the TCRC's grievance in part. The TCRC satisfied its burden to show *prima facie* discrimination. CN did not satisfy the arbitrator that it had reached the point of undue hardship.

94. In tailoring a remedy to provide Mr. Weseen with a final chance, but which protects CN's legitimate safety concerns, the arbitrator orders CN to reinstate Mr. Weseen on these conditions:

> 1. CN will reinstate Mr. Weseen into a non-safety sensitive position, without loss of seniority, but without compensation for any wages and benefits lost;
>
> 2. Mr. Weseen will not return to work until CN medical staff have confirmed he is fit to work after the reasonable and appropriate testing for substance addiction which that staff deem appropriate;
>
> 3. For the duration of his employment, Mr. Weseen will abstain from the consumption of unprescribed drugs or alcohol;
>
> 4. For a two-year period starting from Mr. Weseen's return to work at CN, he will be subject to random, unannounced drug and alcohol testing, to be administered in a non-abusive fashion;
>
> 5. The parties will prepare a "Last Chance Agreement' in their standard form incorporating these conditions; and
>
> 6. If Mr. Weseen violates any of the conditions, he shall be liable to termination with recourse to arbitration only for the purpose of determining whether a violation of these conditions occurred.

95. The arbitrator remains seized for any issues which may result from an application of this award, including for any dispute about the content of the Last Chance Agreement.

SIGNED at Ottawa this 3rd day of November 2022.

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Graham J. Clarke
Arbitrator