

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

**BETWEEN:**

**Teamsters Canada Rail Conference**

**(TCRC)**

**-and-**

**Canadian Pacific Kansas City Railway**

**(CPKC)**

**Dispute Over a Reinstatement Order**

**Arbitrator:** Graham J. Clarke  
**Date:** September 13, 2023

**Appearances:**

**TCRC:**  
R. Church: Legal Counsel  
E. Carr: Legal Counsel

**CPKC:**  
F. Billings: Assistant Director, Labour Relations

Written submissions concerning a Reinstatement Order received: TCRC (August 2);  
CPKC (August 23); TCRC (August 30, 2023).

# Award

## BACKGROUND

1. In AH810<sup>1</sup>, the arbitrator concluded that the grievor had violated a Relapse Prevention Agreement (RPA). CP argued that this violation constituted just cause for dismissal. The TCRC submitted that CP had failed to follow the provisions in the RPA concerning what would occur following a violation.

2. CPKC did not plead AH810 as one involving the duty to accommodate. It instead proceeded as a disciplinary matter<sup>2</sup>.

3. While the arbitrator agreed with CPKC that the grievor had violated the RPA, the facts supported the TCRC's argument that CPKC had failed to follow the terms of its RPA. These conclusions resulted in the following remedial order pursuant to the arbitrator's s.60 powers under the *Canada Labour Code*<sup>3</sup> (*Code*):

66. To protect both parties' interests, the arbitrator will reinstate the grievor, but on the following conditions:

1. CP will reinstate the grievor, without loss of seniority, but without compensation for any wages and benefits lost;
2. The grievor will not return to CP until its Health Services has confirmed he is fit to work after the reasonable and appropriate testing for substance addiction which that staff deem appropriate;
3. For a two-year period starting from the grievor's return to work at CP, 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" or a "Continuing Employment Reinstatement Agreement", if they use that type of document, which incorporates these conditions and any human rights obligations; and
6. If the grievor 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. (sic)

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<sup>1</sup>[Teamsters Canada Rail Conference v Canadian Pacific Railway Company, 2023 CanLII 8754](#)

<sup>2</sup> AH810, paragraphs 22 and 61.

<sup>3</sup> [RSC 1985, c L-2](#)

4. As is customary with these parties, the arbitrator remained seized. The TCRC later contested additional reinstatement conditions imposed by CPKC's medical personnel and their third-party expert. Those conditions required, at the grievor's expense, that he attend an in-patient residential treatment program of, at minimum, 28 days. Following that, CPKC required, prior to reinstatement, that the grievor abstain from all substances for six months.

5. CPKC imposed these conditions despite its third-party expert originally concluding that the grievor was fit to return to work. CPKC had asked their expert for clarification which led to the new obligations being added.

6. For the following reasons, the arbitrator has concluded that CPKC failed to respect the remedial order in AH810.

## **FACTS**

7. The arbitrator will first review the February 9, 2023 award in AH810 and then the subsequent events which lead to the current dispute about remedy.

## **AH810**

8. CPKC satisfied the arbitrator that the grievor had violated his RPA:

40. While CP had the burden of proof in this case, the TCRC did not present any evidence to explain away the positive tests. On a balance of probabilities, CP demonstrated that the grievor had conducted himself in some way which resulted in his two positive tests.

9. Not surprisingly, a railway has serious safety concerns when a locomotive engineer, who has already received the benefit of an RPA, tests positive for THC (marijuana).

10. However, CPKC failed to follow the negotiated process in the RPA. It instead claimed it had just cause to dismiss the grievor [Footnotes omitted]:

52. The arbitrator agrees with the TCRC that the RPA is not a last chance agreement. Rather, the agreement exists to assist an employee who previously had some sort of addiction issue. In the RPA, the grievor agreed to random testing and to provide highly sensitive personal medical information, subject to proper safeguards. In exchange, CP allowed him to continue to work in a safety sensitive position.

53. While the RPA by itself, depending on the circumstances, may not prevent termination, it nonetheless includes a process that CP had undertaken to follow:

A positive test result reported to Health Services, will prompt a review of your fitness to work in a Safety Critical or Safety Sensitive Position and will result in an updated Fitness to Work Assessment.

54. CP provided no evidence about this process taking place. The capitalization of the term "Fitness to Work Assessment" (FWA) in the RPA suggests a specific form exists at CP. The RPA contemplates that Health Services will review a positive test result and then provide an updated FWA. The grievor's testing levels would presumably constitute one of the factors Health Services would examine during its review.

55. Instead, CP appeared to justify the grievor's termination solely on the basis that the positive tests violated the RPA. CP relied on CROA 4352 to support the termination of an employee whose hair sample had tested positive.

56. However, that case examined a situation involving another positive test after an earlier first violation of an RPA:...

...

60. The arbitrator notes that both cases CP submitted examined the situation from a duty to accommodate perspective.

61. CP, unlike in the cases on which it relies, did not follow its own obligations in the RPA. There is no Health Services analysis in the Record. Neither did Health Services provide an updated FWA. CP instead applied a discipline analysis and equated an RPA breach with just cause for termination. The legal analysis does not support this position.

11. The arbitrator thus concluded that, while CPKC did not have just cause for termination, the grievor's lack of candour caused concern:

63. CP did not demonstrate it had just cause to terminate the grievor's employment. Nonetheless, it did demonstrate that the grievor violated his RPA and his suggested explanation did not stand up to scrutiny. The arbitrator must fashion an appropriate remedy.

What is the appropriate remedy?

64. The arbitrator has concerns about the grievor's candour given his work as an LE. The evidence in the Record provides no reasonable explanation for the positive test other than consumption.

65. However, CP failed to follow the procedure contained in its RPA. It instead treated an RPA violation as providing just cause.

12. This led to the arbitrator's remedial order in AH810 at paragraph 66:

66. To protect both parties' interests, the arbitrator will reinstate the grievor, but on the following conditions:

1. CP will reinstate the grievor, without loss of seniority, but without compensation for any wages and benefits lost;
2. The grievor will not return to CP until its Health Services has confirmed he is fit to work after the reasonable and appropriate testing for substance addiction which that staff deem appropriate;
3. For a two-year period starting from the grievor's return to work at CP, 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" or a "Continuing Employment Reinstatement Agreement", if they use that type of document, which incorporates these conditions and any human rights obligations; and
6. If the grievor 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. (sic)

13. These types of remedial requirements have been granted in other cases and the parties, almost without exception, usually resolve the next steps without further litigation.

### **Subsequent chronology**

14. **February 17, 2023:** The parties negotiated a "without prejudice" Last Chance Agreement<sup>4</sup> (LCA) which set out certain conditions at paragraph 1:

1. Should Mr. X wish to continue his employment with the Company, he will be required to comply with the following terms and conditions:
  - a. Contact Health Services (1-866-876-0879 and selecting Option 2) the day of the signing of this agreement to commence his return to work.
  - b. Submit to a Health Services directed Safety Critical medical assessment, Addiction Medicine Physician Assessment and any other medical assessment deemed necessary under the terms and conditions

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<sup>4</sup> TCRC Submission, Tab 3

directed by the Health Services Department (HS). Arrangements for these assessment(s) will be made as soon as possible through HS.

c. Comply with any medical requirements HS determines to be necessary.

d. Further to the medical assessments and requirements referenced above, Health Services and/or Disability Management will determine whether there are any further medical requirements, such as a Return to Work (Relapse Prevention) Agreement, with which Mr. X must comply. Mr. X, and if applicable the Union, will provide their signed concurrence and Mr. X will comply with any such medical requirements.

e. Before returning to service, Mr. X must be determined to be medically fit for his regular position by the office of the Chief Medical Officer or his designate.

15. The LCA contained further terms and conditions at paragraph 3:

3. In addition to any terms and conditions arising from the above, the employment of Mr. X will be subject to the following additional terms and conditions:

a. Mr. X's discipline record will reflect his reinstatement pursuant to AH810.

b. Mr. X will not receive compensation or benefits for the period in which he was dismissed, up to and including the date of his return to active service. Mr. X shall be reinstated without loss of seniority.

c. Prior to any return to active service, Mr. X will be required to successfully complete a screening interview with his local manager concerning his ongoing employment. The purpose of his interview will be to review the Company's ongoing performance expectations regarding the return to work of Mr. X and to provide full understanding and clarity regarding these expectations. During his interview, Mr. X will be required to review Canadian Pacific Railway Alcohol & Drug Policy & Procedures (HR-203, HR 203.1 and HR 203.2). If he desires, an accredited representative may accompany him to his interview.

d. Before recommencing active duty, Mr. X will be required to successfully complete any necessary training and/or rules re-qualification. Mr. X will only be entitled to compensation and/or expenses associated with his attendance at such training and/or rules re-qualification if he successfully passes all re-qualification examinations.

e. Pursuant to AH 810 and this Agreement, Mr. X will be subject to mandatory unannounced substance testing for a period of two (2) years.

This two (2) year period will commence upon the return to service of Mr. X and will be extended by an amount equal to any period in which he is not in active service with the Company. Any positive substance test during the term of this clause will be considered a violation of this under Canadian Pacific Railway Alcohol & Drug Policy & Procedures (HR-203, HR 203.1 and HR 203.2) and may result in discipline up to and including dismissal. Mr. X will be paid lost wages for attending unannounced substance testing.

Note: The period referred to above is entirely separate from any Post Incident testing or Reasonable Suspicion testing that may be required under Canadian Pacific Railway Alcohol & Drug Policy & Procedures (HR-203, HR 203.1 and HR 203.2).

16. **April 13, 2023:** Dr. Ronald Lim of Vector Medical assessed Mr. X and provided a 17-page Independent Medical Examination Report (IME)<sup>5</sup>. Dr. Lim had previously assessed Mr. X in March 2019 and had at that time required an inpatient addiction treatment program for at least 28 days:

**Mr. X met with this writer previously, on March 13, 2019, for a similar assessment and he was recommended attend an inpatient addiction treatment program for a duration of at least 28 days, as well as to be monitored for at least 2 years with random urine drug and alcohol testing.** He attended a treatment program at Sage Health Center in June 2019 and was reinstated to work around October 2019. On January 19, 2021, the EE was dismissed from company services due to a violation of Canadian Pacific Railway alcohol and drug policy and his RPA agreement following a positive biological monitoring test when he tested positive on a hair test for Marijuana. The 2-year monitoring agreement was never completed.

Recently, the EE has been offered to return to work and has signed a last chance agreement on February 17, 2023.

**I have been asked to assess Mr. X's fitness to work in a safety critical position and to perform an addiction medicine assessment meeting the essential components of the Railway Medical Guidelines.**

(Emphasis added)

17. For his April 13, 2023 IME, Dr. Lim concluded that Mr. X was fit to work in a safety critical position and recommended this treatment:

Treatment Recommendation

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<sup>5</sup> TCRC Submission, Tab 4

The recommendations for the EE are as follows:

1. **Abstain from Methamphetamine, Alcohol, Marijuana, Cocaine, and all illicit and nonprescribed mood-altering substances.**
2. **Mr. X is currently fit for work in his present position, which is a safety sensitive position, provided he agrees to the following recommendations numbered 3-8 below.**
3. He is to find a family physician.
4. **He will also require a repeat breathalyzer and urine drug screen prior to returning to work. This should include ethyl chloride/phosphatidyl ethanol if available.**
5. To ensure ongoing abstinence, he should attend with a certified addiction and mental health therapist for relapse prevention, stress management, emotional regulation for the next 6 months. This can be via his EFAP plan, private counsellor, Sage outpatient program, counsellor from BC Interior Health addiction services or any similarly qualified person.
6. He is also to continue a self-care plan which includes engaging in physical activities, eating a balanced nutritional diet and practicing stress management and relaxation techniques such as meditation and yoga.
7. **Substance use monitoring drug screen/breathalyzer randomly according to CP Rail policy for at least 2 years from the date of his reinstatement to ensure ongoing abstinence. This should include ethyl chloride/phosphatidyl ethanol if available. I also recommend that this be done at least monthly.**
8. Attend 12 step meetings like AA /NA or SMART Recovery at least 2 to 3 times a week for the next 24 months. He is to also continue to engage with his sponsor and have a home group.
9. Any noncompliance with this above recommendation or a positive drug screen/breathalyzer during his monitoring period as determined by this MRO will require reassessment.

(Emphasis added)

18. At page 17 of his April 13, 2023 IME, Dr. Lim further responded directly to CPKC's questions 10 and 11 about Mr. X's fitness to work in his safety sensitive position:

10. An opinion on Mr. X's fitness to work in a Safety Critical Position. Specifically, any concerns with alertness, attention, concentration, judgment, or orientation related to the diagnosis or medications must be reported.



**He is currently fit to work in a safety critical position but must maintain complete abstinence from Alcohol, Marijuana and all other substances that are psychoactive and not prescribed in order to maintain alertness, attention, concentration as well as judgment to be sufficiently fit to work in a safety critical position.** He has the coping skills to do so if he chooses and must follow the recommendations provided above.

11. Any additional information to be considered in assessing Mr. X's fitness to work in a Safety Critical Position.

**He is currently fit to work in a safety critical position provided he maintains complete abstinence from all illicit and psychoactive substances including Marijuana and Alcohol. Although he has used Marijuana and Alcohol in the past 12 months its use has been infrequent by his self-report and presently does not satisfy criteria for active addiction. Thus, he does not require any further intensive treatment although he requires the continuing care program as recommended above.** He has the necessary tools already to maintain complete abstinence if he follows through with the recommendations above and utilizes the coping skills that have already been provided to him. Frequent monitoring to ensure complete abstinence for the next 24 months will increase his likelihood of success and safety to work in a safety critical position.

(Emphasis added)

19. **May 10, 2023:** A CPKC Occupational Health Nurse (OHN) emailed<sup>6</sup> Vector Medical and requested Dr. Lim comment on "some inconsistencies" and clarify them in an addendum:

Hi Beth,

Mr. X's AMP Report by Dr. Lim was reviewed by our Corporate Physician who identified some inconsistencies that they would like clarified by Dr. Lim in an Addendum report.

The inconsistencies identified are as follows:

- Alcohol use – AUDIT=3 (p9) with continued use 2-3 drinks at most about once a month (p7). This is not consistent with the AUDIT completed by Mr. X as part of the Reinstatement Medical that was 4 (3=drinking 2-3 times a week + 1=six or more drinks less than monthly).

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<sup>6</sup> CPKC Response, Tab 1; Page 29/352

• Diagnosis – on p11 and p15 the provided diagnosis includes “Alcohol abuse in partial sustained remission” and on p12 Dr Lim makes reference to his earlier report of March 13, 2019 with a diagnosis of “Alcohol Abuse in Early Remission”. This is not consistent with Dr. Lim’s AMP report dated March 13, 2019 (attached) that provided a diagnosis on p.13 that included:

“Alcohol Dependence”.

DSM-IV-TR specifies that a criteria for a diagnosis of Substance Abuse is that the symptoms have never met the criteria for Substance Dependence for this class of substance.

This employee has a previously documented diagnosis of Alcohol Dependence based on an AMP assessment in 2019, is still consuming alcohol, under-reported this use based on the AUDIT provided to Dr. Lim on this recent AMP assessment, and told Dr. Lim he does not identify alcohol as being a significant problem for him.

In addition to above, would also like to add that while reviewing the entire file prior to referring it to our corporate physician, the writer discovered in the employee’s file that they had previously tested positive for ETG on a Biological Monitoring test done on January 7, 2020 (attached).

At that time, it appears that the OHN spoke with the employee regarding the results, who was adamant they had not used any alcohol. No further action was taken as it was noted “Because the result was so low 2.3pg/mp it was confirmed he would not be considered a relapse.” I discussed this with our corporate physician who reviewed the current (2019) International Society of Hair Testing guidelines for alcohol EtG levels in hair stating that an EtG level lower than or equal to 5 pg/mg “does not contradict self-reported abstinence” but we agreed to still provide this information for Dr. Lim’s awareness and consideration.

**We ask that Dr. Lim provide an Addendum report that clarifies the inconsistencies noted above and provides updated opinions, to include the diagnosis as well as any updated recommendations on the requirement for treatment.**

If you have any questions, please let me know. Otherwise, we will await for the Addendum Report from Dr. Lim.

(Emphasis added)

20. **May 25, 2023:** CPKC followed up with Vector Medical after it did not receive a response to its May 10, 2023 request<sup>7</sup>:

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<sup>7</sup> CPKC Response; Tab 1; Page 28/352.

Hello Beth,

Health Services is follow up with regards to the email sent May 10, 2023. No response has been received. Could you please provide a response as soon as possible?

Thank you, (sic).

Vector Medical immediately apologized for the delay<sup>8</sup>: “Apologies - I was away from the 12th and just returned on Tuesday. I will get to this as quickly as possible - thanks!”.

21. **May 25, 2023**: In an additional email<sup>9</sup>, Vector Medical advised CPKC’s OHN that it had sent the May 10 request to Dr. Lim:

I have sent the request to Dr. Lim, I would anticipate it will take him a couple of days to complete but I have requested a rush. Again my apologies for the delay...

22. **May 25-26, 2023**: Although erroneously dated May 10, 2023<sup>10</sup>, Dr. Lim provided the requested Addendum on either May 25 or 26, 2023. His Addendum significantly changed his previous opinion:

...

I acknowledge that he did have a historical diagnosis consistent with Alcohol Dependence. It is also acknowledged that he has not maintained complete abstinence from alcohol and has continued to drink up until a few days ago prior to my assessment by his self-report.

In view of his diagnosis of Methamphetamine and Alcohol Dependence, he will require to maintain complete abstinence from all illicit substances including marijuana and alcohol regardless of his current pattern of use to safely work in a safety critical position.

**Also, in view of new information regarding inconsistencies provided in his AUDIT screening test as well as the ETG result on January 7, 2020, there is sufficient reason to require that he maintains at least 6 months of complete abstinence from all substances including alcohol and marijuana prior to being reinstated in a safety sensitive or critical position.**

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<sup>8</sup> CPKC Response; Page 27/352.

<sup>9</sup> CPKC Response; Page 26/352.

<sup>10</sup> CPKC Response; Paragraph 16.

I would suggest that he follow through with the following treatment recommendations over and above what I have provided in my previous report.

### **Recommendations**

- 1. He is currently not fit to work in a safety sensitive or critical position until he has satisfied the conditions below.**
- 2. He will require residential treatment of at least 28 days and possibly longer as per his treatment team. Optimal time is usually 90 days.**
- 3. Following treatment, he will require monitoring as per the previous recommendation to ensure at least 6 months of complete abstinence from all substances before being reinstated into a safety sensitive or critical position.**
4. After residential treatment he is to continue to follow through with all the other recommendations previously provided.

(Emphasis added)

23. **May 26, 2023:** The OHN advised<sup>11</sup> CPKC's Dr. Cutbill and Dr. Lambros that they had received Dr. Lim's Addendum:

We have received an addendum report from Dr. Lim and have attached it for your review.

Please kindly review and provide your Medical Fitness For Duty Opinion and/or if any further treatment or medical information is required.

24. **May 31, 2023:** The case notes<sup>12</sup> indicate that the OHN spoke with Mr. X and relayed the corporate physician's opinion:

Corporate Physician response dated May 30/23 received.

**Call with EE and provided corporate physician's fitness opinion, requirements of in-patient treatment and 6 months of abstinence required prior to SCP clearance. EE did not agree with the information provided and was very clear that they will not be attending in-patient treatment and wanted a copy of the updated AMP report to understand what changed.**

Copy of blank ROI consent form emailed to the EE.

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<sup>11</sup> CPKC Response; Tab 1; Page 26/352.

<sup>12</sup> CPKC Response; Page 23/352.

Email update below sent to LR.

PLAN: Await response from LR on how to proceed with file.

(Emphasis added)

25. **May 31, 2023:** CPKC's OHN updated the Labour Relations Department (LR) on the grievor's situation<sup>13</sup>:

**The Corporate Physician has opined that the employee is Restricted to working in a Non-Operational NSSP sedentary office type environment with direct supervision. The estimated duration for these restrictions would be 6-12 months.**

However, in speaking with Mr. X today to discuss what further information did not agree with the decision and does not intend to comply with the treatment requirements.

(Emphasis added)

26. **June 2, 2023:** The case notes<sup>14</sup> indicate that the OHN had another discussion with Mr. X and referred to the still unsigned Return to Work Agreement<sup>15</sup> (RTWA):

Call to EE to review Step 1 of RTWA. EE again expressed that they do not intend to attend inpatient treatment. Writer encouraged to review Step 1 RTWA with their Union.

Step 1 RTWA sent to all parties (LR, Union & EE) via DocuSign.

PLAN: Follow up with LR in 2 weeks if signed Step 1 RTWA is not received by then.

27. **June 12, 2023:** The case notes<sup>16</sup> indicate that all parties signed the RTWA:

Step 1 RTWA signed by all parties (LR, Union and EE) received. **Call to EE to confirm signed and confirm that in doing so, EE is willing to attend inpatient treatment. EE denied same and was adamant that he is not attending any treatment despite signing the Step 1 RTWA and asked that any further correspondence be with Greg Lawrenson (Union) and not them.**

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<sup>13</sup> CPKC Response; Page 23/352.

<sup>14</sup> CPKC Response; Page 22/352.

<sup>15</sup> CPKC Response; Page 41/352.

<sup>16</sup> CPKC Response; Page 20/352.

Email below sent to LR to determine next steps given EE, has on 3 occasions, made clear to HS that they will not comply with treatment requirements.

(Emphasis added)

28. **June 12, 2023:** The OHN provided LR with a further update<sup>17</sup>:

A Step 1 Return to Work Agreement was sent to the employee as per our usual process for all individuals requiring treatment for the substance use disorder. Mr. X was aware of the RTWA being sent to them and was encouraged to discuss with their Union how they wanted to proceed. Mr. X again clearly expressed no intent to attend treatment and thus, we (Health Services) did not expect that the employee would sign the agreement.

**However, Health Services has received the Step 1 RTWA back, signed by the employee on June 9, 2023. In signing the Step 1 RTWA, the employee has agreed to the following:**

**Bullet Point 2. You will submit to all medical assessments or requirements deemed necessary under the terms and conditions directed by Health Services or Disability Management.**

**I spoke with Mr. X again this morning and while the employee confirmed signing the Step 1 RTWA he is still refusing to comply with treatment requirements and asked that any further correspondence be conducted through their Union (Greg Lawrenson).**

As previously indicated below, Health Services cannot proceed with any further assessment to determine their fitness to occupy a Safety Critical position until they comply with the medical fitness for duty requirements.

Please provide an direction on how you would like Health Services to proceed with this file.

(Emphasis added)

29. **June 13, 2023:** The case notes<sup>18</sup> indicate a further conversation between Mr. X and the OHN:

Call received from EE inquiring re: next steps in order to move forward in process of returning to work. Writer informed EE of inpatient treatment required as first step. EE continues to be adamant they are unwilling to attend inpatient treatment but asked to be connected to LifeWorks to explore options.

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<sup>17</sup> CPKC Response; Page 20/352.

<sup>18</sup> CPKC Response; Page 20/352.

SAP referral form sent to EE via DocuSign for signing in order to send referral to LW WSP to assist with entry into treatment.

30. **June 20, 2023:** The case notes<sup>19</sup> summarize Mr. X's meeting with Lifeworks, CPKC's treatment provider:

**Call from Sandrine Aschour (LW WSP Clinical Manager); states EE attended their initial SAP appointment and made it clear to their counsellor that they were unwilling to attend inpatient treatment and only going to these sessions because they are being forced to.**

Sandrine plans to request that the Treatment Coordination team also speak to the EE to see if the EE may be more receptive to a discussion re: options with them.

PLAN: LW WSP team will provide next update via email once Treatment Coordination team has also spoken with the EE.

(Emphasis added)

31. **June 21, 2023:** Lifeworks provided the OHN with an update<sup>20</sup> about Mr. X, including his unwillingness to pay for such in patient treatment:

I hope this email finds you well. I wanted to give you an update on this client. **When our Treatment Specialist, Ava Thomas, reached out to him to begin the inpatient treatment process, he informed her that he is unable to access any loans from CP and is not willing to pay for treatment himself.**

When he was told about accessing funded beds through the Interior Health Authority, he inquired what he would be attending treatment for. Ava told him it was for a substance use disorder and as per CP requirement. He claimed that he does not meet the criteria for any substance use disorder and does not understand why he would be moving forward with any of Ava's recommended options.

**Thus, due to his unwillingness to pay and his refusal to disclose to a substance use disorder, there is no way to move forward with treatment recommendations.**

(Emphasis added)

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<sup>19</sup> CPKC Response; Page 18/352.

<sup>20</sup> CPKC Response; Page 17/352.

32. **June 22, 2023:** The OHN asked Lifeworks to close its file<sup>21</sup>:

Thanks for your email. Please go ahead and close Mr. X's file based on their non-compliance with the process.

If you have any questions regarding this, please let me know.

33. **June 22, 2023:** The OHN then provided LR with an update<sup>22</sup>:

**Since my last email, Mr. X agreed to connecting with our third party provider, LifeWorks, who assists employees with admission into treatment. Mr. X had an initial appointment with a counsellor and made it clear that they would not be attending any treatment. Mr. X also connected with a Treatment Specialist to see if they would be able to help begin the inpatient treatment process.**

**LifeWorks provided an update that "due to his unwillingness to pay and his refusal to disclose to a substance use disorder, there is no way to move forward with treatment recommendations."**

**As long as Mr. X continues to refuse treatment, he also continues to be in violation of both their Last Chance Agreement (signed on Feb 21/23) and Return to Work Agreement (signed Jun 9/23).**

Important to Note:

**Although Mr. X has brought up financial barriers, ultimately Mr. X's behaviours continue to demonstrate that they are not prepared to acknowledge having a substance use disorder which requires inpatient treatment program.** This is also not the first time that Mr. X has been in a non-compliance with Health Services regarding this very same issue in 2019.

Health Services will be providing Mr. X a letter which will outline their current fitness status and specific information requested by the Corporate Physician. Until the requested information is provided, Health Services cannot proceed with any further assessment to determine their fitness to occupy a Safety Critical position.

(Emphasis added)

34. **June 22, 2023:** The OHN's case notes<sup>23</sup> summarized the conditions Mr. X had to satisfy before returning to work:

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<sup>21</sup> CPKC Response; Page 17/352.

<sup>22</sup> CPKC Response; Page 15/352.

<sup>23</sup> CPKC Response; Page 14/352.



Letter outlining EE's current fitness status and medical information requested by Corporate Physician emailed to EE. Copy of same also provided to LR.

All follow up protocols closed.

**PLAN: HS will re-engage with EE's file if/when the following information is provided:**

**1. Copy of Discharge Summary documenting successful completion of a current minimum 28-day and abstinent-based residential treatment program**

**2. Documentation to confirm complete abstinence for a period of 6 months.**

(Emphasis added)

35. **June 23, 2023:** CPKC's Corporate Physician, Dr. Cutbill, added the following note<sup>24</sup> to the file (extract):

**Based on this, the following information will be required prior to providing an updated medical fitness for duty opinion: a Discharge Summary documenting successful completion of a current minimum 28-day residential treatment program, followed by a documented period of 6 months of complete abstinence from all substances while following the recommendations previously provided by Dr. Lim in the earlier report (as noted in the Case Note below).**

Opinion regarding medical fitness for duty (NO CHANGE):

Medically fit for duty for modified/alternate duties with the following restrictions:

- Restricted from any Safety Critical Position work or duties
- Restricted from any Safety Sensitive Position work or duties
- Restricted from any Operational Non-Safety Sensitive Position work or duties
- Restricted from driving Company Vehicles
- Restricted from operating Moving Equipment/Machinery
- Restricted to working in a Non-Operational NSSP sedentary office type environment with direct supervision

(Emphasis added)

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<sup>24</sup> CPKC Response; Page 11/352.

36. **June 27, 2023:** After considering initial correspondence from the parties<sup>25</sup>, the arbitrator sent an email which included the following comments on the need for an oral hearing and recent disputes about remedial orders:

Thank you everyone for summarizing your positions.

**I will need an oral hearing to consider the issues raised in your submissions. Can we have a Case Management Conference on Tuesday July 4, 2023 to discuss logistics?**

**This appears to be the second case where my remedial order, which I issued with the intent to resolve the matter fully and without imposing further time and expense on the parties, has instead lead to new and complex issues. See AH822 as another recent example.**

**Parties pleading railway cases may want to discuss bifurcating the issue of remedy if these two recent examples represent a trend.**

(Emphasis added)

37. **July 6, 2023:** The arbitrator held a case management conference. The parties agreed between themselves to plead this matter via written submissions.

## **PARTIES' POSITIONS**

### **TCRC**

38. The TCRC argued that CPKC failed to respect the arbitrator's remedial order. It took two alternative positions:

4. In the Union's respectful submission, your award was clear, and set out a number of specific obligations which the Company is compelled to comply with. **The Union's primary position is that the Company has simply failed to comply with the plain, common sense words used in your award. The Company has unilaterally imposed, or directly caused to be imposed in an improper manner, conditions which were not included in your award and which breach your award.**

5. In the alternative, and without prejudice to the foregoing, the Union submits that the Company's attempt to impose stricter conditions than those set out in Dr. Lim's initial report, when no such conditions were ordered by the Arbitrator, is unreasonable, arbitrary, and discriminatory under the *Canadian Human*

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<sup>25</sup> That correspondence provided an overview but did not include the detailed information later contained in the parties' submissions and summarized in this Chronology.

*Rights Act, Canada Labour Code, and Collective Agreement, and a breach of the duty to accommodate.*

**6. The Union seeks an order for the Grievor's immediate reinstatement and damages for lost wages for the entire period following Dr. Lim's April 13, 2023 report, when the Grievor was cleared to return to work by Dr. Lim in his safety-sensitive position.**

(Emphasis added)

39. In particular, the TCRC contested CPKC's addition of the 28-day in-patient treatment, followed by a 6-month abstention period prior to any return to work:

**20. It is important to note that your award provided that the Grievor would "will not return to CP until its Health Services has confirmed he is fit to work after the reasonable and appropriate testing for substance addiction which that staff deem appropriate." (see paragraph 66(1) of Tab 1).**

**21. Your award clearly provided grounds for the Grievor to be tested on a reasonable appropriate basis. Nothing in your award allowed the Company to insist that the Grievor attend mandatory in-patient treatment or abstain for 6-months before being returned to work. These are unilaterally imposed conditions precedent which do not comply with your award, and in fact, are explicitly contrary to your award. Not only are these conditions drastically beyond the realm of reasonableness given your award, but such a massive shift in position by Dr. Lim, without further explanation, simply cannot be relied on.**

...

41. In the case at hand, the Union respectfully submits that the Company failed to comply with the Arbitrator's Order dated February 9, 2023, by exceeding the restrictions set out in the Arbitrator's Order and failing to meet both its procedural and substantive duty to accommodate.

42. Firstly, the requirement to attend a residential treatment program of at least 28 days, followed by an additional six months of abstinence before reinstatement, exceeds the conditions set out in the Arbitrator's Order. The only condition necessary for the Grievor's reinstatement set out in the Arbitrator's Order is for the Company's Health Services to receive confirmation the Grievor is fit to return to work after "reasonable and appropriate testing." As an alternative position, the Union submits that the only reasonable conclusion is that the "reasonable and appropriate testing" was complete on April 13, 2023, when Dr. Lim, who was selected by the Company, issued his opinion that the Grievor "is currently fit to work in a safety critical position but must maintain complete abstinence."

...

47. Following the Arbitrator's decision in AH822, the Union submits that even if the Grievor was medically restricted from returning to his regular position, there may have been restrictions placed on him which would still allow him to work. Had the Grievor not been unjustly dismissed, and had the Company been aware of Dr. Lim's altered conclusion with respect to the Grievor's safety-critical position, the Company would have had an obligation to accommodate the Grievor, whether that be in his regular position with modifications, or a different role altogether.

48. Thus, as in AH822, the Company failed to meet its duty to accommodate by not meeting with the union to review the medical evidence, determine the restrictions, if any, and identify possible accommodations for the Grievor.

**49. In the circumstances, there is no legal or medical justification or evidence for the requirement that the Grievor attend a minimum 28-day in-patient residential treatment program, and another six months of complete abstinence before being reinstated. The Union submits that the terms of reinstatement imposed by the Company on June 22, 2023, are unreasonable and unnecessary. Alternatively, the Union submits that the Company failed to accommodate the Grievor's restrictions.**

**50. The Union requests that the Grievor be entitled to reinstatement without having to agree to the aforementioned requirements, and he be made whole for all losses from April 13, 2023, until the date he is reinstated in accordance with the award.**

(Emphasis added)

## **CPKC**

40. CPKC argued that it followed the terms of the parties' negotiated "Reinstatement Agreement"<sup>26</sup>. It alleged that the grievor had failed to respect his obligations under that agreement which prevented his reinstatement:

**6. In accordance with his Reinstatement Agreement, the Grievor contacted Health Services to commence his return to work medical and in April of 2023 attended an Independent Addiction Medical Assessment. Following review of his initial assessment, the Company noted several inconsistencies and sent those notes as well as an additional piece of medical back to the doctor asking him to clarify via an addendum report. An addendum report was issued and therein impatient treatment was recommended as well as a period of abstinence.** The Company's third party provider then attempted to assist the Grievor with admission to the aforementioned treatment however he informed the Company's Health

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<sup>26</sup> The parties negotiated both a February 17, 2023 Last Chance Agreement, *supra* and a later June 12, 2023 RTWA, *supra*.

Services department that he was unwilling to comply and move forward with treatment recommendations.

**7. The Company maintains that it has complied with AH810 in entering into an agreement with specific terms and conditions and initiating the reinstatement medical process in order to reinstate the Grievor. Unfortunately, the Grievor has failed to comply with the terms of the agreement that he and his Union agreed to and by do so has failed to comply with the terms and conditions of your award.**

8. As such, the Company is currently unable to proceed with any further assessment to determine the Grievor's fitness to occupy a Safety Critical Position.

(Emphasis added)

41. CPKC commented on the change in Dr. Lim's IME:

24. Throughout the Union's submission, they state that they do not agree with Dr. Cutbill's review and argue that the "inconsistencies" appear to be minor in nature. Respectfully, the Union, its counsel, the writer of this submission, nor the Arbitrator for that matter are qualified to make such an assertion.

**25. In paragraph 17 of the Union's submissions, they contend that it was only after the Company's "push-back" that Dr. Lim changed his report. As noted in the Company's submission and clearly shown at Tab 1, the Company did not "push-back", they simply inquired as to the inconsistencies, provided additional information, and asked Dr. Lim to provide an addendum to clarify his position. Contrary to the Union's assertions, the Company did in no way influenced Dr. Lim's changes, they simply noted the inconsistencies and asked him to speak to them.**

26. Throughout the Union's submissions, they contend that the Company has imposed additional reinstatement, wholly unreasonable, requirements not imposed by the Arbitrator's Award. Respectfully, the Company cannot agree.

**27. The Company maintains that the requirements of the Grievor to attend treatment is by no means unreasonable. Not only has an Independent Medical Professional recommended treatment but RAC medical guidelines outline that medical fitness for duty is a determination that is made by the Chief Medical Officer and that in relation to substance use disorders, "additional requirements or assessments are at the discretion of the Railway's Chief Medical Officer" (Tab 3). As such, the Company maintains they are well within the prescribed parameters to assess the grievor's fitness for work and therefore have properly imposed the requirement of treatment associated with that fitness.**

28. **As noted previously, in accordance with the award, the parties reached a reinstatement agreement with terms and conditions. More specifically, that the Grievor submit to an Addiction Medical Assessment (which he did) and that he will comply with any medical requirements HS determines to be necessary. This does not mean that the Grievor gets to pick and choose which requirements he wishes to comply with, this means that he must comply with them all, of which is to attend treatment and be abstinent for a period of time.**

(Emphasis added)

42. CPKC also alleged that the grievor violated the arbitrator's remedial order in AH810:

31. Furthermore, the Grievor's actions or lack thereof are not only in violation the reinstatement agreement but also in violation of AH810 which clearly states that "the grievor will not return to CP until its Health Services has confirmed he is fit to work after the reasonable and appropriate testing for substance addiction which that staff deem appropriate".

### **TCRC Reply**

43. The TCRC reiterated its position that CPKC unilaterally imposed new reinstatement conditions not contained in AH810:

The Union relies on its previous submissions that your award does not allow the Company to insist that the Grievor attend a mandatory 28-day in-patient treatment program or abstain from all substances for 6-months before being returned to work.

**The Union's ultimate position in this matter is that the Company unilaterally imposed, or directly caused to be imposed in an improper manner, conditions which were not included in your award and which breach your award.** Further, even if you accept that the Company is within its right to impose entirely new and extremely onerous conditions before the Grievor can return to his former position, which the Union denies, the Company breached its duty to accommodate in any event by refusing to return the Grievor to work in any capacity (either with modified duties or a new role altogether), even after Health Services confirmed the Grievor was fit to work with restrictions (though the Union denies the validity of any such restrictions in accordance with Dr. Lim's unaltered report).

(Emphasis added)

44. The TCRC further contested CPKC's subsequent communications with Dr. Lim which took place without any notice to the grievor:

The Union disagrees with the Company's statement at paragraph 17, that it did not "pushback" against Dr. Lim's original report. Contrary to the Company's assertions, the Company clearly attempted to influence Dr. Lim, not only by "flagging" very minor "inconsistencies" (which we do not view as such), but also by specifically requesting an "updated diagnosis" and "updated recommendations on the required treatment." (Tab 5 of the Union's August 2, 2023 submissions) Ultimately, Dr. Lim never made any new diagnosis which could of the extremely onerous new treatment recommendations.

**The Union maintains that it was wholly inappropriate for the Company to contact the independent medical examiner, without advising the Union or the Grievor, to ask for an updated diagnosis, updated recommendations, and updated treatment requirements. The Company's inappropriate request ultimately resulted in new recommendations which were reached without input or consultation with the Union or Grievor—which is highly questionable and unfair given that the Grievor was consulted on the initial report.** The new recommendations were based on improper interferences by the Company with the IME, and significantly, they resulted in return to work conditions which are directly contrary to the terms and conditions in your award. (sic).

(Emphasis added)

45. The TCRC maintained its position that CPKC had, in the alternative, failed to accommodate the grievor:

At paragraph 37 of the Company's submissions, the Company's makes the perplexing assertion that it met its duty to accommodate the Grievor by "trying to enroll him in treatment." **Respectfully, even if the Company was within its right to require a 28-day inpatient treatment program followed by 6 months' sobriety before his return to work, which is denied, trying to enroll the Grievor in treatment does nothing to facilitate his return to work in the meantime. Following the Arbitrator's decision in AH822 (Tab 15 of the Union's submission), the Company was required to explore alternate accommodations which would still allow the Grievor to work as soon as he was medically cleared to return.**

Indeed, the Company's physician, Dr. Lambros, recognizes that the Grievor is "medically fit for duty" with restrictions, as indicated in the notes at Tab 1 of the Company's submissions. Yet, the Company never explored those restrictions with the Grievor or the Union to discuss possible accommodations. In other words, the Company never initiated the accommodations, despite the Grievor's repeated requests to return to work.

As soon as the Grievor was deemed fit to work, the Company had an obligation to initiate the return to work process, in accordance with your Order (specifically:

“the grievor will not return to CP until its Health Services has confirmed he is fit to work after the reasonable and appropriate testing for substance addiction which that staff deem appropriate”). Your Order does not limit the Grievor’s return until after treatment is complete (setting aside the appropriateness of the treatment). Such a requirement, the Union respectfully submits, would be contrary to the principles of accommodation underlying the Canadian Human Rights Act, and the well-accepted goal of reinstatement in such circumstances, which is to return grievors to the position they would have been in had they not been unjustly dismissed.

(Emphasis added)

## ANALYSIS AND DECISION

### Statutory Context

46. The arbitrator must decide whether CPKC respected the terms of the February 9, 2023 remedial order. That remedy in AH810 constituted a statutory decision or order (SDO). Under the *Code*, the Federal Court has the jurisdiction to enforce a labour arbitrator’s order or decision<sup>27</sup>:

Filing of orders and decisions in Federal Court

66 (1) Any person or organization affected by any order or decision of an arbitrator or arbitration board may, after fourteen days from the date on which the order or decision is made or given, or from the date provided in it for compliance, whichever is the later date, file in the Federal Court a copy of the order or decision, exclusive of the reasons therefor.

Idem

(2) On filing an order or decision of an arbitrator or arbitration board in the Federal Court under subsection (1), the order or decision shall be registered in the Court and, when registered, has the same force and effect, and all proceedings may be taken thereon, as if the order or decision were a judgment obtained in the Court.

47. Traditionally, these parties have resolved remedial issues themselves, though that situation may be changing, as the arbitrator expressed in a June 27, 2023 email, *supra*:

This appears to be the second case where my remedial order, which I issued with the intent to resolve the matter fully and without imposing further time and expense on the parties, has instead lead to new and complex issues. See AH822 as another recent example.

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<sup>27</sup> See, for example, [Teamsters Canada Rail Conference v. Canadian Pacific Railway Company, 2023 FC 796](#)



48. As noted in AH810, the arbitrator remained seized after determining the merits of the grievance:

70. The arbitrator remains seized for any issues which arise from this decision.

49. The arbitrator commented in AH822<sup>28</sup> that a reserve of jurisdiction has limits. For example, while both parties' recent submissions referenced a subsequent alleged failure to accommodate, the pleadings in AH810 never raised that duty explicitly. Instead, the parties pleaded AH810 as a just cause for dismissal case, a situation which informed the arbitrator's legal analysis.

50. Presumably, since the current situation has evolved significantly since February 2023, an accommodation grievance can be filed, and the parties can agree on an arbitrator. But the parties did not satisfy the arbitrator that a dispute about AH810's SDO granted the arbitrator jurisdiction over a subsequent human rights dispute.

51. The arbitrator will accordingly limit this award's legal analysis to whether CPKC complied with the February 9, 2023 SDO.

## **The SDO**

52. Given the importance of the SDO to this award, the arbitrator will repeat it yet again:

66. To protect both parties' interests, the arbitrator will reinstate the grievor, but on the following conditions:

1. CP will reinstate the grievor, without loss of seniority, but without compensation for any wages and benefits lost;
2. The grievor will not return to CP until its Health Services has confirmed he is fit to work after the reasonable and appropriate testing for substance addiction which that staff deem appropriate;
3. For a two-year period starting from the grievor's return to work at CP, he will be subject to random, unannounced drug and alcohol testing, to be administered in a non-abusive fashion;

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<sup>28</sup> See paragraphs 38-44 in [AH822 - International Brotherhood of Electrical Workers System Council No. 11 v Canadian Pacific Railway Company, 2023 CanLII 13643](#).

5. The parties will prepare a “Last Chance Agreement’ or a “Continuing Employment Reinstatement Agreement”, if they use that type of document, which incorporates these conditions and any human rights obligations; and

6. If the grievor 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. (sic)

53. Paragraph 66, which contained a numbering typo, reflected an amalgam of previous reinstatement remedies labour arbitrators had granted. It balanced CPKC’s legitimate safety concerns with the grievor’s RPA status.

54. Evidently, the SDO speaks for itself. Paragraph 1 reinstated Mr. X to his previous situation, i.e., working pursuant to the terms of a Relapse Prevention Agreement. Paragraph 2 explicitly made Mr. X’s reinstatement conditional on his passing “reasonable and appropriate testing for substance abuse”.

55. Given the importance of safety in the railway industry, paragraph 3 of the SDO contained an extraordinary and intrusive remedy which permitted CPKC to employ “random, unannounced drug and alcohol testing”. As myriad cases have confirmed<sup>29</sup>, this type of testing is not usually permitted absent exceptional circumstances. The arbitrator also restarted the previous 2-year time frame for this extraordinary testing, commencing on the date of Mr. X’s reinstatement.

56. Paragraph 5 of the SDO, which may have contributed to the current dispute, further directed the parties to negotiate a last chance agreement, something which had not existed previously in AH810<sup>30</sup>. The reference to a “Continuing Employment Reinstatement Agreement” reflected language from the cases<sup>31</sup> CPKC had filed in support of its original position. Those cases had followed a duty to accommodate, rather than just cause, analysis.

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<sup>29</sup> See, for example, [Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd., 2013 SCC 34](#) and [AH807: Teamsters Canada Rail Conference v Canadian Pacific Railway Company, 2022 CanLII 120899](#).

<sup>30</sup> See AH810 at paragraph 52.

<sup>31</sup> See [CROA 4352](#) and [CROA 4576](#).

57. Paragraph 6 provided language often found in last chance agreements to the effect that the parties request an arbitrator to examine only whether a violation occurred given that they have already agreed on the appropriate penalty<sup>32</sup>.

58. The arbitrator could have left all these issues to the parties by bifurcating the issue of remedy<sup>33</sup>. The parties may want to consider proceeding this way in future cases, though it will add delay and expense to their otherwise incredibly efficient arbitration regime.

59. As noted in the introduction, that arbitrator has concluded that CPKC did not comply with the SDO. The next section in this award will provide the reasons for that conclusion.

### **Did CPKC's requirement for a 28-day in patient residential stay followed by a 6-month abstinence period comply with the SDO?**

60. Evidently, arbitrators reserve jurisdiction so that parties can return to sort out SDO issues. Unforeseen circumstances may impact compliance. The parties may also have legitimate disagreements about items such as mitigation and the payment of interest<sup>34</sup>.

61. CPKC did not return before the arbitrator to raise any issues with the SDO. It only involved the arbitrator when required to respond to the TCRC's motion. So far, CPKC has not reinstated Mr. X, or provided him with any remuneration, due to its insistence that he first complete a 28-day in patient residential stay followed by a 6-month abstinence period ("Conditions").

62. As noted, CPKC did not persuade the arbitrator that it had complied with the SDO. The arbitrator will divide these reasons between i) the SDO's explicit terms and ii) the impact of the parties' later agreements which the SDO had ordered.

### **CPKC's Conditions do not respect the SDO**

63. The SDO listed the conditions for Mr. X's reinstatement back into his RPA-governed employment. As summarized above, the SDO granted CPKC the right to test Mr. X prior to him resuming his duties. The arbitrator cannot find any testing results in the Record.

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<sup>32</sup> See, for example, [AH836 - International Brotherhood of Electrical Workers \(System Council No. 11\) v Canadian Pacific Kansas City Railway, 2023 CanLII 73434](#).

<sup>33</sup> See, for example, [CROA 4789S](#).

<sup>34</sup> See, for example, [CROA 4505-S](#).

64. On its face, the SDO contemplated reinstatement provided Mr. X passed appropriate drug and alcohol testing. Nowhere did the SDO contemplate CPKC adding further pre-reinstatement requirements, such as the Conditions.

**Did the SDO's required agreements allow CPKC to add the Conditions?**

65. CPKC argued, *supra*, that the agreements it concluded with the TCRC under paragraph 5 of the SDO justified the imposition of the pre-reinstatement Conditions.

66. Paragraph 5 of the SDO provided the parties with tools, by way of mutual agreement, to monitor the evidently serious situation resulting from Mr. X not respecting his original RPA. But those tools remained subject to the overriding terms of the SDO.

67. Paragraph 5 of the SDO made it explicit that the parties' agreements ("Agreements") must still "incorporate[s] these conditions". In other words, those Agreements, and any decisions made under them, cannot ignore the underlying SDO. CPKC seemingly treated the situation as a new case, such as what had occurred originally in 2019, rather than one involving Mr. X's return to his RPA situation following appropriate drug and alcohol testing. The Conditions do not respect the SDO since some of the key requirements, like testing prior to reinstatement, have not taken place.

68. That is sufficient to dispose of CPKC's argument about the Agreements.

69. However, even if the arbitrator assumed, for the sake of argument only, that the parties' Agreements allowed CPKC to ignore the SDO's terms and impose the Conditions, it still had an evidentiary burden to meet.

70. As noted in the Chronology, *supra*, the arbitrator advised the parties on June 27, 2023 that this case required an oral hearing:

I will need an oral hearing to consider the issues raised in your submissions.  
Can we have a Case Management Conference on Tuesday July 4, 2023 to discuss logistics?

71. The parties decided to proceed via written submissions. But this mutual decision does not reduce the burden on CPKC to justify its addition of the Conditions, particularly when it relies on medical evidence. While the railway model of arbitration frequently proceeds with only written briefs, exceptions exist when contested medical evidence is at

issue<sup>35</sup>. As noted, the SDO called for testing (paragraph 2) before any reinstatement would take place. But, despite no testing<sup>36</sup>, CPKC added the Conditions.

72. The arbitrator dismisses any suggestion<sup>37</sup> that CPKC caused the medical professionals to act in “an improper manner”. The Record contains no evidence supporting this allegation. In any event, such allegations would be a matter for a College and not for a labour arbitrator.

73. But the lack of such evidence does not mean that the arbitrator will blindly adopt whatever the medical professionals have written in the IME/Addendum or in clinical notes. The Addendum’s 180-degree change to the IME seemingly occurred within hours, or at most a day, of Dr. Lim receiving CPKC’s request for a clarification. This abrupt change required an explanation.

74. Decision makers routinely evaluate medical evidence, including for experts, via document production, testimony, and cross-examination. The complete context behind a contested expert report, including all communications with the expert, remains crucial for any decision maker. The arbitrator notes further that, despite the parties’ negotiated tripartite last chance agreement<sup>38</sup>, the Addendum request occurred without the knowledge of, or input from, Mr. X.

75. Similarly, the extent of the Conditions required an explanation. Finding otherwise would essentially allow CPKC, or its medical professionals, to decide unilaterally the appropriate remedy for Mr. X, without regard to the SDO’s clear terms.

76. In summary, even if the Agreements allowed CPKC to modify the SDO’s remedy, CPKC did not meet its evidentiary burden to justify the imposition of the Conditions.

## **DISPOSITION**

77. For the reasons expressed above, the arbitrator reiterates the requirements set out in the February 9, 2023 SDO.

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<sup>35</sup> See, as just two examples, AH822, *supra*, and [AH663](#).

<sup>36</sup> TCRC Submission; Page 55/226: The IME at page 8 stated “Physical examination was not done as this evaluation was done via telemetry health”.

<sup>37</sup> TCRC Submission, Paragraph 4.

<sup>38</sup> TCRC Submission; Tab 3.

78. The arbitrator, in the exercise of his reserved jurisdiction, has also accepted the TCRC's argument that Mr. X should be "made whole"<sup>39</sup> from April 13, 2023, which was the date when Dr. Lim's IME originally concluded that he was fit to return to work.

79. While the arbitrator understands the concern arising from Mr. X's comments about consuming alcohol, the SDO provided CPKC with exceptional drug and alcohol monitoring tools. The SDO further set out the severe consequences for Mr. X should he fail such testing.

80. Should the parties require a more formalized order for the purposes of judicial review or enforcement, they can draft it and provide it to the arbitrator. In the event any concerns arise over the order's content, the arbitrator will amend and complete any draft submitted.

SIGNED at Ottawa this 13<sup>th</sup> day of September 2023.



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Graham J. Clarke  
Arbitrator

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<sup>39</sup> TCRC Submission; Paragraph 50.