

AH866-P

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

BETWEEN:

**TEAMSTERS CANADA RAIL CONFERENCE - MAINTENANCE OF WAY
EMPLOYEES DIVISION ET AL**

(TCRC-MWED)

-and-

CANADIAN PACIFIC KANSAS CITY RAILWAY COMPANY

(CPKC)

Dispute: Expert's reply report served 10 calendar days before next hearing day

Arbitrator: Graham J. Clarke
Date: December 2, 2023

Appearances:

TCRC-MWED:

M. Church: Legal Counsel, CaleyWray
D. Brown: Legal Counsel, TCRC-MWED
W. Phillips: President

CPKC:

M. Tremblay: Legal Counsel, BLG
T. Gain: Legal Counsel, CPKC

Motion heard Friday December 1, 2023.

Decision

INTRODUCTION

1. The parties retained the arbitrator to hear multiple policy grievances, filed by most of CPKC's trade unions¹, contesting the employer's revised Drug and Alcohol Policy (D&A). The parties successfully negotiated a Joint Statement of Issue (JSI) dated March 13, 2022 which set out the myriad issues requiring resolution.

2. This major arbitration has required significant administrative time for the arbitrator involving, *inter alia*, signing hotel contracts and paying a large deposit to provide the parties with an appropriate hearing room in Ottawa. Roughly 20 individuals from across Canada attend the arbitration sessions on behalf of the various parties.

3. Given the logistics for this type of arbitration, and the importance of expert evidence, the arbitrator held two Case Management Conferences (CMC) on April 6 and September 20, 2023, respectively. The September CMC resolved certain procedural issues, including CPKC's concerns about the timing for the exchange of the parties' Briefs and expert reports.

4. The arbitration started on October 18, 2023 during which time the TCRC-MWED completed presenting its Brief. The parties then adjourned the October 19, 2023 date. The TCRC-MWED has not completed its case in chief. The parties had agreed to present their expert evidence on December 5-6, 2023.

5. This decision examines a new procedural issue for that expert evidence.

6. On Friday November 23, 2023 at 3:30 pm, the TCRC-MWED filed a reply report (Report) from its expert, Dr. Evan Wood. CPKC asked the arbitrator to exclude that Report due to a lack of notice and the absence of any reference in the parties' procedural agreements about such replies.

¹ References to the TCRC-MWED in this award include also the TCRC; the TCRC-RTC; the IBEW; Unifor and the United Steelworkers.

7. The TCRC-MWED insisted on its right to produce the Report and argued the hearing should proceed as planned on December 5-6, 2023 with each side presenting its expert evidence.

8. On Friday December 1, 2023, the arbitrator held a third CMC to provide the parties with an opportunity to make submissions on this issue. This decision will of necessity be brief given the impending resumption of the hearings in just a few days.

9. For the following reasons, the arbitrator accepts the TCRC-MWED's filing of the Report. However, given the lack of any notice about the Report, the arbitrator will allow CPKC to present its expert evidence in January, 2024 during the next scheduled hearing days. The evidence for December 5-6, 2023 will be limited to that of Dr. Wood.

PARTIES' POSITIONS

10. This dispute arises in part from the parties' summary of certain logistical matters resolved during the September 20, 2023 CMC. On September 25, 2023, CPKC, with the TCRC-MWED's approval, confirmed their agreed-to process/timelines:

Further to the case management call of last week, this is to inform you that the parties have agreed to the following process/timelines:

1. Both parties will file their briefs (including documents, expert reports and books of authorities) on October 10, 2023;

2. The hearing dates of October 18 and 19, 2023 will be used for the presentation of the Union's case only, excluding its expert evidence;

3. The hearing dates of December 5 and 6, 2023 will be used for the presentation of the expert evidence, including cross-examinations of both parties' experts;

4. The hearing dates of January 16 and 17, 2024 will be used for the presentation of the Company's case.

5. At the end of the first set of hearing dates (on October 19), the parties wish to discuss with you: (1) whether reply briefs should be submitted, and if so, when; and (2) the parties' estimate of how long cross-examinations of experts will take on December 5-6, 2023.

Please do not hesitate to communicate with us, if you have any questions.

(Emphasis added)

11. The reference to "reply briefs" at paragraph 5 meant the legal briefs the parties use in the railway model of arbitration. In an October 19, 2023 email setting our various steps

required for the December 5-6, 2023 hearing dates, the arbitrator advised the parties that their reply briefs would presumably come after the expert evidence and the conclusion of CPKC's case in chief:

7. Replies

I would appreciate written replies. But it appears they can only be done properly after the experts have testified and CPKC has completed its case in chief. I will leave this issue in the parties' hands for discussion and resolution.

12. CPKC asked the arbitrator to protect the current schedule by excluding the Report from the Record. In the alternative, CPKC asked the arbitrator to reschedule the presentation of its expert evidence so that its experts could prepare their own reply reports:

We received a supplemental reply report prepared by Dr. Evan Wood from Mr. Church on Friday afternoon. This was not contemplated in the process that was agreed to between the parties as described in my email of September 25, 2023 (attached).

Following the first set of hearing dates, you summarized the next steps for the hearing in your email of October 19 (attached). Your email does not contain any reference to the filing of reply or supplemental expert reports. Your email discusses written replies (legal briefs) that could be done after the experts have testified and after CPKC has completed its case in chief. There was never an agreement between the parties or direction from you that supplemental or reply reports would be filed prior to the testimonies of the experts.

The receipt of a report in reply from the TCRC without any notification and contrary to the agreed-upon process is not only concerning but creates obvious difficulties going forward. CPKC therefore requests that Dr. Wood's report in reply not be accepted into evidence. Mr. Church will have the opportunity to cross-examine both Dr. Snider-Adler and Dr. Heustis regarding their respective reports at next week's hearing.

In the event you decide to accept Dr. Wood's reply report, CPKC should also be afforded the opportunity to provide reply reports from its own experts for fairness reasons. In that regard, we note that CPKC's expert witnesses cannot possibly prepare such reply reports in the brief period between now and next week's hearing, therefore if the decision is made to proceed in this way, the testimonies of CPKC's experts will need to be scheduled for the January hearing dates. This means that the December dates would be used exclusively for the cross-examination of Dr. Wood.

...

13. The TCRC-MWED contested CPKC's request and suggested, *inter alia*, it had done the employer a favour by providing Dr. Wood's Report in advance of the hearing:

I write in reply to Ms. Tremblay's email of late yesterday. Since I am involved in other matters today, I only have time to provide a brief response. I reserve the right to supplement this reply in due course.

With the greatest of respect to all concerned, we are in the middle of this case. Our case remains open – not closed. We have the right to reply to CPKC's expert reports. Our expert has yet to testify. He is scheduled to testify next week. If necessary, we can ask him to deliver his replies to CPKC's expert reports orally. There is nothing to prohibit such. However, it would take much more time.

Moreover, by providing CPKC and yourself with Dr. Wood's reply ten days before the hearing, allows all to review it, and certainly allows CPKC to prepare for cross-examination on such.

Instead of providing the report in advance, we could have asked Dr. Wood to present his report orally and/or in writing on December 5. I thought we were doing CPKC a favour by providing it in advance.

There is no prohibition in our agreement that prevents us (or CPKC) from presenting an expert reply report. Such was to be expected. Moreover, since we are calling Dr. Wood on December 5, it makes sense to ask him about his report at that time. Finally, and with the greatest respect, we do not need anyone's permission to file the reply expert report at this stage of the case.

We do not object to CPKC's experts filing or testifying orally in response to Dr. Wood's report. However, we do strongly object to any delay or to allow CPKC's experts to testify in January 2024. We object to the entirety of Ms. Tremblay's proposal.

In the alternative, and without prejudice to the above, we submit that Ms. Tremblay use Wednesday, December 6 to present her brief. We do not want to lose or waste this date. We will arrange to get free to attend your proposed CMC on December 1 at 2 pm.

...

14. During the December 1, 2023 CMC, CPKC contested the suggestion that, instead of providing the Report 10 days in advance, the TCRC-MWED could have asked Dr. Wood to read it into the Record during his upcoming testimony.

ANALYSIS AND DECISION

15. The arbitrator must decide two issues:

1. Should Dr. Wood's Report be admitted into evidence? And
2. If the arbitrator accepts the Report, should the earlier agreed-to procedure be modified to avoid prejudice?

1. Should Dr. Wood's Report be admitted into evidence?

16. The *Code* grants the arbitrator a broad discretion over evidence. Dr. Wood's Report will be admitted into evidence. The Report is not something which had always existed, and which had only been produced on the eve of a short arbitration lasting just a few hours.

17. The railway arbitration model provides arbitrators with the ability to impose serious sanctions for non-disclosure of pre-existing evidence, since it undermines the very essence of the parties' negotiated arbitration regime. But this case is about rebuttal expert evidence prepared only after the exchange of the initial expert reports.

2. If the arbitrator accepts the Report, should the earlier agreed-to procedure be modified to avoid prejudice?

18. The arbitrator has no difficulty concluding that the TCRC-MWED's filing of Dr. Wood's Report, without any advance discussion or notice, caused CPKC prejudice. The procedure for the upcoming hearing days must regrettably be modified to remedy this prejudice.

19. There are several reasons for this conclusion.

20. First, as this arbitration's challenging logistics illustrate, the case will not, unlike most other railway arbitrations, be heard in a matter of hours. The parties have scheduled multiple hearing days over several months. In addition, the parties have retained experts from both Canada and the United States, a reality which complicates their logistical planning.

21. Second, and perhaps ironically, the arbitrator recently commented in AH810² about CPKC's late filing of its expert's report and how that impacted the arbitrator's duty to conduct a fair hearing for all parties:

29. Since there was no objection to the timing of the disclosure to Dr. Snider-Adler's report (Expert Report), the arbitrator will not comment further on that specific aspect of the case. However, from a systemic point of view, the arbitrator reiterates the concerns previously expressed about the late filing of

² [Teamsters Canada Rail Conference v Canadian Pacific Railway Company, 2023 CanLII 8754](#)

medical information. This impacts the success of the parties' railway model and an arbitrator's ability to ensure a fair hearing. This same concern exists if a party waits until just prior to an arbitration before obtaining clearly relevant medical or expert evidence.

22. Evidently, the Report did not exist prior to this arbitration starting. But, whether during preliminary discussions at the start of the hearing on October 18, 2023 or in response to either of the procedural emails dated September 25 and October 19, 2023, the issue of reply expert evidence could easily have been raised.

23. Third, this case involves significant expert evidence. While the TCRC-MWED suggested that providing the Report 10 calendar days³ before the next hearing dates provided enough notice, the arbitrator respectfully disagrees. Moreover, the arbitrator had already been required to hold a CMC to resolve the question, *inter alia*, of the timing and filing of the expert evidence and Briefs.

24. By analogy only, the courts have taken significant steps to avoid surprises inherent in the late filing of an expert report. For example, in the *Federal Courts Rules*⁴, Section 299 requires, as a condition precedent for admissibility, 60 days and 30 days notice for expert reports, including those in rebuttal:

Admissibility of expert's evidence

(1.1) Unless the Court orders otherwise, no evidence in chief of an expert witness is admissible at the trial of an action in respect of any issue unless

(a) the issue has been defined by the pleadings or in an order made under rule 265;

(b) an affidavit or statement of the expert witness prepared in accordance with rule 52.2 has been served on all other parties **at least 60 days** before the commencement of the trial; and

(c) the expert witness is available at the trial for cross-examination.

Admissibility of rebuttal evidence

(1.2) Except with leave of the Court, no expert witness's evidence to rebut evidence in an affidavit or statement served under paragraph (1.1)(b) is admissible unless an affidavit or statement of the expert witness prepared

³ CPKC noted there were only 6 working days when it received the Report late in the afternoon on a Friday.

⁴ [Federal Courts Rules, SOR/98-106](#)

in accordance with rule 52.2 has been served on all other parties at least 30 days before the commencement of the trial.

(Emphasis added)

25. In Ontario, Section 53.03 of the *Rules of Civil Procedure*⁵ imposes even longer notice obligations for expert reports:

53.03 (1) A party who intends to call an expert witness at trial shall, **not less than 90 days** before the pre-trial conference scheduled under subrule 50.02 (1) or (2), serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).

(2) A party who intends to call an expert witness at trial to respond to the expert witness of another party shall, **not less than 60 days** before the pre-trial conference, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).

(Emphasis added)

26. Section 53.03(2.1) also sets out the format for expert reports including the need to identify the precise issues which will be the subject of testimony and cross-examination:

(2.1) A report provided for the purposes of subrule (1) or (2) shall contain the following information:

1. The expert's name, address and area of expertise.
2. The expert's qualifications and employment and educational experiences in his or her area of expertise.
3. The instructions provided to the expert in relation to the proceeding.
4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.
5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.
6. The expert's reasons for his or her opinion, including,
 - i. a description of the factual assumptions on which the opinion is based,

⁵ [Rules of Civil Procedure, RRO 1990, Reg 19.](#)

- ii. a description of any research conducted by the expert that led him or her to form the opinion, and
- iii. a list of every document, if any, relied on by the expert in forming the opinion.

7. An acknowledgement of expert's duty (Form 53) signed by the expert⁶.

...

27. Section 53.03(3) focuses every expert's evidence:

Sanction for Failure to Address Issue in Report or Supplementary Report

(3) An expert witness may not testify with respect to an issue, except with leave of the trial judge, unless the substance of his or her testimony with respect to that issue is set out in,

- (a) a report served under this rule;
- (b) a supplementary report served on every other party to the action not less than 45 days before the commencement of the trial; or
- (c) a responding supplementary report served on every other party to the action not less than 15 days before the commencement of the trial.

28. Evidently, the courts' procedures for expert reports do not apply to labour arbitrations. But they do provide helpful guidance about the importance of notice, the need for a fair opportunity for all parties to consider such evidence and the requirement for focused expert testimony.

29. The arbitrator does not accept the TCRC-MWED's suggested alternative solution that CPKC be ordered to present its own brief next week instead of in January, 2024 as agreed. The only reason why the originally scheduled procedure cannot proceed arises from the filing of Dr. Wood's Report.

30. It would be rather incongruous to oblige CPKC to change its agreed schedule for pleading its case to remedy another party's lack of notice and/or discussion about an incoming reply expert report.

⁶ Form 53 includes this paragraph: "I acknowledge that the duty referred to above prevails over any obligation which I may owe to any party by whom or on whose behalf I am engaged".

DISPOSITION

31. For the reasons set out above, the arbitrator admits Dr. Wood's Report into evidence. However, due to the lack of notice or discussion about that Report, the arbitrator grants CPKC's request to use the December dates solely for Dr. Wood's evidence.

32. CPKC's experts will testify during the January 2024 dates.

SIGNED at Ottawa this 2nd day of December 2023.

A handwritten signature in black ink, appearing to read 'G. Clarke', written in a cursive style.

Graham J. Clarke
Arbitrator