

AH877

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

**BETWEEN:**

**INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, SYSTEM  
COUNCIL NO. 11**

**(IBEW)**

**-and-**

**CANADIAN PACIFIC KANSAS CITY RAILWAY**

**(CPKC)**

**Luke McGuinness: 20-day suspension and dismissal**

**Arbitrator:** Graham J. Clarke

**Date:** July 5, 2024

**Appearances:**

**IBEW:**

M. Church: Legal Counsel

J. Sommer: Senior General Chair – IBEW, SC 11

S. Martin: International Representative – IBEW, SC 11

L. McGuinness: Grievor

**CPKC:**

R. Araya: Labour Relations Officer

D. Zurbuchen: Manager Labour Relations

B. Stiefel: S&C Manager (Observer)

Arbitration held in Ottawa on June 12, 2024.

# Award

## BACKGROUND

1. This award covers two separate grievances arising from the same events. On May 25, 2022, S&C Maintainer Luke McGuinness had a motor vehicle accident (MVA) in which his CPKC truck hit a car from behind on Highway 43 in eastern Ontario.

2. On June 30, 2022, CPKC assessed Mr. McGuinness a 20-day suspension for the MVA. CPKC also dismissed Mr. McGuinness due to a positive oral fluid test for cocaine.

3. The IBEW contested the severity of the suspension given what it viewed as a very minor incident. It noted that a car had suddenly braked in front of Mr. McGuinness and he could not avoid hitting it. The IBEW further contested that CPKC had any proper grounds to conduct a drug test. It asked the arbitrator to reinstate Mr. McGuinness in his employment.

4. For the reasons which follow, the arbitrator has concluded that the MVA on May 25, 2022 was a major, rather than minor, incident. Nonetheless, the arbitrator reduced the 20-day suspension to 5 days. CPKC also satisfied the arbitrator that it met the threshold to conduct a drug test. CPKC had cause to dismiss Mr. McGuinness for driving his company vehicle while impaired by cocaine. Given the seriousness of that incident and the longstanding jurisprudence, the arbitrator will not intervene to modify the dismissal.

## CHRONOLOGY

5. Since the two disciplinary measures arose from the same facts, this chronology will highlight the key events.

6. **January 28, 2019:** CPKC hired Mr. McGuinness who occupied the safety sensitive position of S&C Maintainer. He had the required "G" class licence for driving a Hi-rail F250 truck which can be driven on both roads and the rails.

7. **May 25, 2022:** While travelling on Highway 43 at the speed limit of 70 kmh, the car in front of Mr. McGuinness put on its brakes and he hit it from behind spinning it around. The other car left the scene. CPKC's vehicle suffered damage<sup>1</sup>.

8. **May 25, 2022:** Mr. McGuinness gave his account of the MVA in his Initial Incident Report<sup>2</sup>:

Was driving on cruise control at 70Km when car in front of me slammed on their breaks no signal like they forgot where they were turning I slammed on my brakes knew I was not going to stop in time tried to swerve right but didn't quite make it hit their back end with the right front corner of bumper and Hirail the car spun around the back end was pretty messed up the car then took off down the street they were turning down and I pulled off to side of the road. (sic)

9. **May 25, 2022:** S&C Supervisor Chambers provided the following Memorandum<sup>3</sup> about the events:

On May 25, 2022, Luke McGuinness called me at 0937 EST. He stated to me that he was travelling westward on Highway 43 when a vehicle in front of him slammed on their brakes. He stated he did not have enough time to stop or go around and he made contact with the back of the car. I asked him if he was ok and told him to pull over and that I would be there as soon as I could. I escalated the incident to Colin Griffith and I arrived approx. one hour later. I picked up Luke and drove him back to Smiths Falls.

10. **May 25, 2022:** CPKC had a third party, DriverCheck, conduct post incident drug testing<sup>4</sup> at 11:44 am on the same day as the MVA.

11. **May 31, 2022:** Mr. McGuinness' oral fluid drug test<sup>5</sup> came back positive for cocaine 25 ng/ml.

12. **June 9, 2022:** CPKC conducted Mr. McGuinness' investigation<sup>6</sup> under the collective agreement (CBA) for the MVA, the salient parts of which included:

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<sup>1</sup> CPKC Documents; Ex-2; Tab 4; Appendix 5.

<sup>2</sup> CPKC Documents; Ex-2; Tab 4; Appendix 3.

<sup>3</sup> CPKC Documents; Ex-2; Tab 4; Appendix 1.

<sup>4</sup> CPKC Documents; Ex-6; Tab 4H.

<sup>5</sup> CPKC Documents; Ex-6; Tab 4H; Page 139/205.

<sup>6</sup> CPKC Documents; Ex-6; Tab 4K.

Q06. Are there any appendices that you wish to refute, rebut, or comment on?

A06. Yes

Codys Memo # 1

**While on the phone with Cody at the initial phone call he also asked if there was damage to the vehicle so I told him it was the bumper and hi rail.** Asked me to take pictures. He asked if 911 was called and I said I think one of the construction workers called 911 which was confirmed. Cody asked me to get a statement off of one of the construction workers who witnessed the accident which isn't my job.

When Cody arrived on scene he told me immediately that he has to take me for substance testing, there was no interview process nor was I afforded the right to union representation regarding the matter as per HR 203.1. He parked the truck down the road, Cody drove me to the testing facility

Luke Incident Report #3

**Just to clarify in my incident report when I state the "back end was pretty messed up" I was referring to the bumper where I made contact.** It's impossible to estimate the damage with the vehicle fleeing the scene or having a good look at it. It just looked a bit crumpled up.

Noted

...

Q14. In your own words, can you please describe what happened on May 25, 2022 regarding the alleged Motor vehicle incident?

A14. I came into work driving down hwy 43 heading from Smiths Falls toward Perth, a car in from of me slammed on her brakes without using her signal light. When I noticed her braking, I slammed my brakes to try and avoid a collision and was not able to miss her and I clipped her right side rear bumper as I tried to swerve to the right to avoid her. (sic)

...

Q17 Referencing Appendix 5 it shows damage to the front of the CP unit L 19093 was this caused by the collision that occurred on May 25, 2022 at approximately 0935?

A17 Yes

...

**Q20 Referencing IIR report Luke McGuinness it states the you contacted the vehicle causing it to spin around is that correct?**

**A20 Yes.**

...

Q22 Referencing IIR report Luke McGuinness it states the vehicle was really messed up, is that correct?

A22 I was kind of in shock and didn't really get a good look at it. I only got to see it for a second as it drove away.

...

Q24 What were the road conditions like on May 25, 2022?

A24 It was a nice clear day

...

Q27 Approximately, how far behind the vehicle were you travelling when you noticed their brake lights?

A27 I guess about 4 car length and maybe applied my brakes around 3 or 2 and a half car length once I noticed her slam them on. (not sure how to explain it in Feet)

Q28 In your opinion, did you allow enough room between your vehicle and the car in front of you to provide adequate reaction time?

A28 I thought I did, but I could have gave more room, this is normally how I drive.

Q29 Referencing you initial incident report you state you were on cruise control doing approximately 70 km/hr. Is that correct?

A29 that is correct

Q30 What is the posted speed limit of the highway speed at the location on the incident?

A30 70 km/hr

...

**Q33 in your opinion, what could have been done differently to have prevented this motor vehicle Collison from occurring?**

**A33 The only thing I can think of would be to leave more space between the vehicles.**

...

**Q41 To summarize on May 25, 2022 you were travelling westward on Highway 43 in CP unit L19093**

**Road conditions were clear.**

**A red vehicle suddenly slammed on their brakes to attempt to make a left turn.**

**You could have left more space to properly react.**

**You contacted the vehicle on the rear corner causing the vehicle to spin around.**

**The vehicle was pretty messed up**

**You pulled over to the side of the road and the red vehicle sped away from the scene**

**Is this correct?**

**A41 Yes but i didn't get a good look at the damage**

Q42 Referencing the initial incident report you state the vehicle is pretty messed up. Please provide more details on how the vehicle was pretty messed up?

A42 I saw that there was damage, but not how much as it happened so fast and the girl drove away.

Q43 So your original statement in your IIR is not an accurate testament of what damage the vehicle really sustained.

A43 Correct. The whole thing happened really fast and I don't remember much.

**Q44 Do you understand that by failing to be in control of L 19093 and contacting a third party vehicle that CP has lost the use of a vehicle in their fleet and potentially cost the company several thousand dollars in repair bills?**

**A44 Nick Duncan Objects to the question. (The Company alleges that Mr. McGuinness was not in control of his vehicle when in reality the driver ahead conducted a blatantly dangerous maneuver and made every effort to bring his vehicle to a controlled stop with the conscience and active effort to maneuver into a location that mitigated the risk of injury to himself, the driver or any bystanders. Failing to control the vehicle would have resulted in serious injury and damage.)**

**Objection noted but you are answering on behalf of the employee and is hearsay as you were not witness to the incident but I will rephrase the question for Luke's benefit.**

**Had to remind Mr. Duncan to be respectful @ 1437**

**Nick agreed to conference in Cody Chambers to get the repair estimate from the body Shop.**

**Q Union would like to know actual cost of repair bill**

**Call with Cody 1450, Asked Cody if an estimate for the body shop was available for the damage to L 19039. He said the estimate was \$3700 but that does not include any work or parts that our hirail mechanic needs to do.**

Q45 Do you understand that by allegedly failing to be in control of L 19093 and contacting a third party vehicle that CP has lost the use of a vehicle in their fleet while getting repaired and cost the company 3700\$ in repair bills?

A45 Yes

(Emphasis added)

13. **June 14, 2022:** CPKC conducted its CBA investigation<sup>7</sup> for Mr. McGuinness' positive drug test:

Q06. Is there anything in these appendices that you wish to refute, rebut, or comment on?

A06. Yes

...

**Union Representative objects to the following adding the follow Appendicies**

Appendix#4

The decision for post incident testing was made without actually doing an investigation at the scene of the incident to determine if criteria was met.

Company has not provided a checklist to validate the reasoning for cause testing. Aside from what was stated verbally to Mr. Chambers, we have no record of what was explained to Mr. Griffith.

Mr. Chambers failed astronomically to present any relatable or crucial information to warrant Post Incident Testing under 4 .3 which might involve any one of the following

1. Fatality

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<sup>7</sup> IBEW Documents; Ex-9; Tab 4.

2. Any number of serious injuries or multiple injuries to company personnel or the public requiring medical attention away from the scene or lost time to injuries to Company personnel; or an incident or near miss that creates this risk
3. Significant loss or damage to Company, public or private property, equipment or vehicles or an incident or near miss that creates this risk
4. An incident with serious damage or implication to the environment, or an incident or near miss that creates this risk.

**The company has many vehicles with damaged bumpers and vehicle bodys that have not been fixed. Regardless of that, the Company failed to make any reasonable decision that would validate post incident testing while not even being on scene.**

**Mr. Chambers fails to mention in his memo that upon arrival to the Smiths Falls GYO Mr. Griffith showed up and they (Mr. Chambers, Mr. Griffith and Mr. McGuinness) proceeded to have a conversation about the incident with Mr. Jeff Switzer. After that conversation Mr. McGuinness was instructed to go pick up his truck and take it to body shop but ended up taking it back to the GYO since ARI didn't get back to them about which shop to take it to. Mr. McGuinness was freely driving company vehicles from may 25 onward until being removed from service may 31 2022. It should be noted that in the past CP has stopped employees from driving vehicles after an mva pending post incident testing and results.**

Investigating Officer: Objection noted Mr. McGuinness was involved in a serious incident/accident and was post-incident tested as per HR 203.1.

...

**Q20 With reference to Appendix 8, the results of these tests were:**

- **Breath Alcohol Test- Negative**
- **Oral Fluid Drug Test- Positive**
- **Urine Drug Test- Negative**

**Is this correct?**

**A20 Yes**

**Q21 Please share for the statement what you ingested that triggered the positive test.**

**A21 I have no idea**



**Q22 Referencing appendix 8, can you explain the positive oral test results on May 25 2022? Specifically the Positive for Cocaine-. Quantitative level = 25 ng/ml.?**

**A22 No, I have no idea**

...

Q28 Referencing Appendix 8, it states that you used cocaine 3 weeks prior to the oral fluid test. Is this correct?

A28 Incorrect, I had my days and weeks mixed up

**Q29 Prior to your post incident substance testing on May 25, 2022 when was the last time you used cocaine?**

**A29 May 13, 2022**

Q30 What time did you take cocaine on May 13, 2022?

A30 sometime after 2000, not quite sure as I was drinking.

Q31 How did the cocaine enter your body?

A31 Through my nose(Snorted)

Q32 Do you know how much cocaine did you consume on May 13, 2022?

A32 no

Q33 How often to you use cocaine?

A33 not very often

Q34 Can you elaborate on your last response?

A34 Maybe a couple times a year

...

**Q39 Do you understand that based on this detection table Appendix 9 page, your Oral Fluid test for cocaine can only be detected above cutoff levels for up to 8 hours?**

**A39 I understand but it is untrue**

...

Q44 Referencing your post incident test results completed at 11:44 AM on May 25, 2022 oral fluid results which were positive for 25 ng/ml and negative urine test results, the table on appendix 9 page 18, shows the length of time cocaine

is detected in oral fluid is up to 8 hours. Are you stating you did not consume cocaine on May 25, 2022?

A44 Yes 100% I did not do cocaine on May 25

...

Q56 Do you have anything you wish to add to this investigation?

A56 Throughout the course and process of this investigation stemming from my MVA and post incident testing I have done nothing but comply with Company directive and gave honest answers. I have no explanation for the positive post incident test as I did not consume any cocaine on the day of May 25 2022. I woke up after being booked on rest, got ready for work, went to work and was involved in an MVA. I believe that the test could be a false positive. I told the MRO that I did cocaine weeks prior but there's no explanation for it now because I didn't ingest any. Why would I admit to that and deny this positive test?

I would have expected that being in such a stressful accident given the third party vehicle that was struck fled the scene that the supervisor, Mr. Cody Chambers would have walked me through the steps of the Drug testing procedure but when he showed up all he said was "are you ok" and "I have to take you for a drug test." He could have went over the policy with me, at least he could have told me I was entitled to Union representation.

(Emphasis added)

14. **June 30, 2022:** CPKC issued Form 104<sup>8</sup> for the MVA which imposed a 20-day suspension:

A formal investigation was issued to you in connection "with your tour of duty on May 25, 2022 and any and all events surrounding the alleged motor vehicle incident which occurred on highway 43."

Following the formal investigation conducted on June 9, 2022, it has been concluded that you were found in violation of the following rules/policies:

- Engineering Safety Rule Book: E-2 Vehicles Used for Company Business (1):
- Rule book for engineering employees 2.2
- COR 4135 VEHICLE MANAGEMENT POLICY 2.0
- SPC 41 M/W Rules and Instructions 1.1.

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<sup>8</sup> CPKC Documents; Ex-2; Tab 1.

Please be advised that you are hereby assessed with a 20 Day Suspension.

15. **June 30, 2022:** CPKC issued its Form 104<sup>9</sup> dismissing Mr. McGuinness for his non-negative drug test:

Please be advised that you have been DISMISSED from Company Service for reasons as follows:

A formal investigation was conducted on June 14, 2022 "in connection with your alleged Non negative post incident substance testing that was completed on May 25, 2022. Collection Site Wills Transfer Ltd.146 Hwy 15 P.O.BOX 340 Smiths Falls, ON K7A 4T2. Collection Date and Start time: May 25 2022 11:44 AM" to develop all the facts and circumstances surrounding the occurrence.

Following the conclusion of the investigation, your culpability was established regarding your formal investigation conducted on June 14, 2022, it has been concluded that you were found culpable of violating the following rules, policies and procedures:

- CROR General Rule G.
- Policy# HR 203 Alcohol and Drug Policy (Canada)
- HR 203.1 Alcohol and Drug Procedure

Please be advised that you are hereby Dismissed, effective July 30, 2022.

## **ANALYSIS AND DECISION**

16. The arbitrator heard 4 separate grievances, including these 2 for Mr. McGuinness, on June 12-13, 2024. The parties agreed<sup>10</sup> to follow the November 1, 2023 Rules for the Canadian Railway Office of Arbitration & Dispute Resolution (CROA)<sup>11</sup>. Those Rules impose pleading time limits and require, *inter alia*, the exchange of written briefs in advance of the hearing. The pleading time limits can be increased if the parties give advance notice that witnesses will be called<sup>12</sup>.

17. As is often customary in the railway industry, the parties pleaded Mr. McGuinness' two disciplinary measures separately. The arbitrator must evaluate the two measures independently to respect how the parties pleaded these cases. In other words, the

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<sup>9</sup> CPKC Documents; Ex-6; Tab 1.

<sup>10</sup> The CBA at article 13.3 (arbitration) notes "For the application of this Article, it is understood that the rules and principles of the Canadian Railway Office of Arbitration (CROA) will be adhered to".

<sup>11</sup> [CROA Rules, November 1, 2023](#). The IBEW is not a CROA member, but it has agreed to adhere to the railway model for its arbitrations.

<sup>12</sup> CROA Rules, Paragraph 11.

arbitrator must evaluate the 20-day suspension on its own merits without considering Mr. McGuinness' subsequent dismissal for testing positive for cocaine.

### **What are the issues before the arbitrator?**

18. At the hearing, CPKC objected to the IBEW allegedly expanding the issues placed before the arbitrator. The two Joint Statement of Issues (JSI) help identify the scope of the matters the parties have placed before the arbitrator.

19. For the suspension, the IBEW in the JSI<sup>13</sup> alleged:

The Union contends that the discipline issued by the Company was excessive and unjust.

The Union contends that McGuinness operated his motor vehicle safely and in accordance with his responsibilities under all relevant laws and with the Company's policies.

The Union contends that the McGuinness was not at fault for the motor vehicle accident.

The Union requests that McGuinness have the discipline expunged from his employee record and he receives compensation of his regular earnings, standby and any overtime incurred or entitled to. (sic)

20. For the termination, the IBEW alleged<sup>14</sup>:

#### **UNION POSITION:**

The Union contends that the discipline issued by the Company was excessive and unjust.

The Union contends that the Company did not have sufficient grounds to subject McGuinness to drug and alcohol testing.

The Union contends that the incident resulting in the Company's post-incident drug and alcohol testing did not meet the requirements to administer testing as per their policies due to lack of severity.

The Union contends that McGuinness did not behave in anyway, or show any symptoms of impairment.

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<sup>13</sup> CPKC Documents; Ex-2; Tab 2.

<sup>14</sup> CPKC Documents; Ex-6; Tab 2.

The Union requests that McGuinness have the discipline expunged from his employee record and be made whole, including but not limited to seniority, wages, benefits, and pension.

## **Did CPKC have grounds to suspend Mr. McGuinness for the MVA?**

21. CPKC satisfied the arbitrator that it had grounds to discipline Mr. McGuinness. However, the arbitrator will reduce the suspension from 20 to 5 days for the following reasons.

22. The IBEW relied on Ad-hoc CS 2014-097<sup>15</sup> (*Jones*) to support its view that Mr. McGuinness was not at fault for the accident and should receive no discipline. The decision in *Jones* highlighted how the facts in each case determined the result. In *Jones*, the driver drove at 10-20 kmh in a 40 kmh zone when he collided with the vehicle ahead. The road conditions at the time of the accident were icy and the vehicles sustained minimal damage.

23. Despite that scenario, Arbitrator Schmidt still found the grievor responsible for the accident:

23. Each case must turn on its own facts. In this case, even considering the grievor's expressed concern about the treads on the Company vehicle's tires, the icy road conditions, and the fact that the grievor was traveling between 10-20 km/hour in a 40km/hour zone at the time of the accident, **I find that the grievor was following the vehicle in front of him more closely than he should have. In so doing, he was responsible, to a certain degree, for contact having been made with the third party vehicle. As such, he was properly subject to discipline.** In coming to this conclusion, I note the driver in front of the grievor was able to stop in sufficient time to avoid contact with the vehicle whose driver was the first to brake.

(Emphasis added)

24. The arbitrator has concluded that Mr. McGuinness' MVA constituted a significant incident. Mr. McGuinness drove CPKC's F250 hi-rail truck on cruise control on Highway 43 at the speed limit of 70 Kmh. When a member of the public's car suddenly braked in front of him, he was unable to avoid hitting that person's car. His written report indicated that the back of the other car was "pretty messed up"<sup>16</sup>. The damage to CPKC's vehicle

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<sup>15</sup> [Canadian Pacific Railway Company v International Brotherhood of Electrical Workers System Council No.11, 2014 CanLII 87068](#)

<sup>16</sup> CPKC Documents; Ex-2; Tab 4; Appendix 3 (Mr. McGuinness' Initial Incident Report).

was \$3700<sup>17</sup>, a not insubstantial sum. Presumably, the cost to CPKC would have gone up further had the other vehicle not left the scene.

25. Unlike in *Jones*, Mr. McGuinness' accident occurred on a "nice clear day"<sup>18</sup>. His accident did not involve two bumpers lightly touching each other. Rather, the force of the accident, according to Mr. McGuinness, caused the vehicle in front to "spin around"<sup>19</sup>. To his credit, Mr. McGuinness noted that that he could have left more space to avoid the MVA.

26. The arbitrator has concluded that Mr. McGuinness bore responsibility for not driving his vehicle safely enough to avoid colliding with the car ahead. Drivers must be prepared for such foreseeable events and leave more than enough space to take evasive action.

27. Nonetheless, considering Mr. McGuinness' pristine disciplinary record during his 3+ years of employment, the arbitrator will substitute a 5-day suspension for the 20-day suspension CPKC imposed<sup>20</sup>. The arbitrator found the cases CPKC put forward all dealt with different scenarios, including those involving employees with significant disciplinary records<sup>21</sup>.

### **Did CPKC have grounds to test Mr. McGuinness and to dismiss him due to a positive oral fluid test?**

28. This is not the first case considering whether a railway employer has the right to compel an employee to take a drug test.

29. In AH732<sup>22</sup>, a case involving these same parties, the arbitrator concluded that a minor incident involving a hi-rail derail did not justify testing. In AH807<sup>23</sup>, the arbitrator concluded that an anonymous tip did not give CPKC grounds to test an employee. In AH879<sup>24</sup>, a different case heard during the same June 12-13, 2024 session with these

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<sup>17</sup> Orally at the hearing, CPKC alleged the damage was \$6000 which prompted an objection from the IBEW. The arbitrator could find no support in the Record for that amount.

<sup>18</sup> QA24.

<sup>19</sup> QA20.

<sup>20</sup> See [SHP618](#) for a case where discipline was reduced despite an accident causing significant damage.

<sup>21</sup> See, for example, [CROA 1782](#); [CROA 4741](#) and [CROA 4783](#).

<sup>22</sup> AH732 - [Canadian Signals and Communications System Council No. 11 of the IBEW v Canadian Pacific Railway Company, 2021 CanLII 69959](#)

<sup>23</sup> AH807 - [Teamsters Canada Rail Conference v Canadian Pacific Railway Company, 2022 CanLII 120899](#)

<sup>24</sup> AH879 - [International Brotherhood of Electrical Workers, System Council No. 11 v Canadian Pacific Kansas City Railway, 2024 CanLII 60992](#)

parties, the arbitrator found that CPKC did not have grounds to test an employee who, relying on his foreman's instructions, had backed his hi-rail over a switch.

30. Does Mr. McGuinness' situation fall within these precedents?

31. The IBEW relied on its MVA characterization to dispute that CPKC had any reason to test Mr. McGuinness. Since, in its view, CPKC had no grounds to test Mr. McGuinness, the IBEW's Brief argued that the arbitrator could not consider the later positive oral fluid test for cocaine:

9. The Union submits that the facts in the 20 day suspension case will inform the Arbitrator as to the answers as to whether or not the Company had reasonable grounds to request drug and alcohol testing in this case; whether the Company followed its own protocol; and whether there was ever any evidence or suspicion that the Grievor was impaired or in violation of the Company's D&A policies at any time.

...

13. These threshold issues must not be minimized or overlooked. If the Company is permitted to rely on results of testing that ought to have never been requested in the first place, on its own policies and in accordance with case law, the door is opened to future abuse of these rights and the resulting extreme invasions of privacy of the Union's members, including this Grievor.

### **Employees' privacy rights and drug testing**

32. In the interest of brevity, the arbitrator refers the parties to AH879, *supra*, and its discussion about drug testing<sup>25</sup>. AH879 noted the difference between reasonable cause testing and testing following a "workplace accident or significant event"<sup>26</sup>. In the latter scenario, the focus is on determining the cause of the accident rather than on the employee.

33. In ATCO<sup>27</sup>, Arbitrator Casey noted the three conditions arbitrators require employers to meet to compel post incident testing:

[128] Arbitrator Smith followed the arbitral jurisprudence which determined that employers must establish 3 conditions to compel post-incident testing:

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<sup>25</sup> See paragraphs 17–22.

<sup>26</sup> This terminology comes from paragraph 45 of the Supreme Court of Canada's decision in [Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd., 2013 SCC 34](#)

<sup>27</sup> [ATCO Electric Ltd. \(ATCO\) v Canadian Energy Workers Association \(CEWA\), 2024 CanLII 37038](#)

1. There must be a precipitating event of sufficient gravity to justify the intrusive invasion of the employee's right to privacy;
2. There must be a reasonable investigation and;
3. A drug and alcohol test would assist in the investigation into the cause of the incident.

34. The arbitrator will apply these principles to Mr. McGuinness' situation.

**Did CPKC have cause to test Mr. McGuinness for drugs?**

35. CPKC satisfied the arbitrator that the MVA provided sufficient justification to proceed with drug testing. This conclusion results from both CPKC's Policy and the arbitral 3-part test summarized above.

36. CPKC's HR 203.1 Policy at section 4.3 describes Post Incident Testing<sup>28</sup>. In particular, it notes:

Post Incident alcohol and drug testing may be required after a significant work related incident, a safety related incident or a near miss as part of an investigation.

Employees are expected to participate fully in an investigation. Failure to report an incident is a violation of the Canadian Internal Control Plan for Incident Reporting.

A significant work related incident, safety related incident or near miss might involve any one of the following:

- a fatality;
- any number of serious injuries or multiple injuries to Company personnel or the public requiring medical attention away from the scene or lost time injuries to Company personnel; or an incident or near miss that creates this risk;
- significant loss or damage to Company, public or private property, equipment or vehicles or an incident or near miss that creates this risk;
- an incident with serious damage or implications to the environment, or an incident or near miss that creates this risk.

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<sup>28</sup> CPKC Documents; Ex-6; Tab 4G.



37. CPKC demonstrated that the MVA fell within the description of a significant work related incident in its Policy. The high speed MVA was clearly major, caused at least \$3700 damage and put a member of the public at risk. The arbitrator can draw no conclusions about why that person left the scene after the car had been spun around and damaged. But none need be drawn. The Record illustrates the seriousness of what transpired. Fortunately, no one was hurt.

38. CPKC's drug testing policies are being challenged at arbitration, so the arbitrator will also consider the 3-part test from the arbitral jurisprudence. Under that analysis as well, CPKC could test its safety sensitive employee following the MVA.

39. First, was there "a precipitating event of sufficient gravity"? The arbitrator explained above why Mr. McGuinness' situation differed from the one examined in *Jones*. The arbitrator concludes the MVA met the "sufficient gravity" criterion for multiple reasons:

- a) the MVA occurred on the public Highway 43;
- b) Mr. McGuinness had been travelling at 70 Kmh;
- c) CPKC's F250 hirail truck collided with the back of a member of the public's car;
- d) the collision caused that car to spin around; and
- e) the collision caused damage both to CPKC's F250 and the other car.

40. Second, was there a reasonable investigation? The arbitrator respectfully disagrees with the IBEW's argument that CPKC tested first and then got the facts later. The above chronology indicated that CPKC had received sufficient information from Mr. McGuinness about the MVA<sup>29</sup>. While the May 25, 2022 documentation from Mr. McGuinness and others may have been written after the drug testing, that does not mean that CPKC had no knowledge of the facts beforehand.

41. The Record satisfied the arbitrator that CPKC had enough information in this case to meet the "reasonable investigation" criterion.

42. Due to the pleading time limits to which the parties have agreed, the IBEW asked the arbitrator to review the investigation and the grievance correspondence<sup>30</sup>. As noted

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<sup>29</sup> Just to avoid any confusion over the facts, paragraphs 41-43 in the IBEW's Brief (Ex-8) seemingly relate to a different case heard during the June 12-13, 2024 session.

<sup>30</sup> IBEW Brief; Ex-08; Paragraphs 16 and 36.

in AH879, this can present some challenges for an arbitrator compared to regular arbitration where all witnesses testify *viva voce*.

43. The arbitrator noted in reviewing the investigation interview that the representative assisting Mr. McGuinness, however innocently, both argued the case and purported to give evidence. The arbitrator has difficulty giving those interventions much weight.

44. The Investigating Officer must be impartial. Myriad cases have contested whether an investigation was fair and impartial. Arguing the merits of the case would be more appropriate with CPKC representatives around the time of the incident, during the grievance process or at arbitration. This does not mean that representatives cannot raise objections during an employee's questioning or pose questions to the employee or other witnesses.

45. The investigation is a joint fact-finding exercise which allows the parties to avoid long arbitrations with extensive oral evidence. If a representative has non-hearsay evidence to provide, or seeks to clarify certain facts for the Record, there are ways to do that in the parties' expedited regime. This ensures both parties have an opportunity to ask questions about the evidence<sup>31</sup>.

46. Third, would a drug and alcohol test assist in the investigation into the cause of the incident? In some situations, where the reason for an accident is obvious, testing would not assist<sup>32</sup>. In this case, however, the opposite is true. CPKC in its Engineering Safety Rule Book emphasizes safe practices for employees who use its vehicles<sup>33</sup>. Despite its efforts, CPKC was faced with the scenario of one of its vehicles hitting a member of the public's vehicle on Highway 43 with sufficient force to spin it around and cause damage.

47. This situation justified conducting a drug and alcohol test since the facts, unlike in AH879, did not rule out impairment as a cause for the MVA.

48. In summary, CPKC had grounds to test Mr. McGuinness.

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<sup>31</sup> AH879 at paragraphs 29-31.

<sup>32</sup> See AH879 where an employee backed up through a switch due to his foreman's erroneous instructions.

<sup>33</sup> Ex-2; CPKC Documents, QA34.

## **What is the appropriate penalty?**

49. Mr. McGuinness tested positive for cocaine on the oral fluid test. Arbitrators have held repeatedly that a positive oral fluid test leads to the conclusion that an employee worked while impaired. In Mr. McGuinness' case, he operated CPKC's F250 while impaired which led to the MVA with a member of the public.

50. The IBEW does not have the burden in this case, but to contest the traditional inferences from oral fluid results, it does have an evidentiary burden<sup>34</sup>. It is not enough to suggest that the test involved a false positive result.

51. A positive oral fluid test does not end the analysis. Section 60(2) of the *Canada Labour Code*<sup>35</sup> (*Code*) provides arbitrators with the power to modify disciplinary penalties:

**60(2) Where an arbitrator or arbitration board determines that an employee has been discharged or disciplined by an employer for cause and the collective agreement does not contain a specific penalty for the infraction** that is the subject of the arbitration, the arbitrator or arbitration board has power to substitute for the discharge or discipline such other penalty as to the arbitrator or arbitration board seems just and reasonable in the circumstances.

(Emphasis added)

52. The parties have not negotiated into their CBA a specific penalty for this type of infraction.

53. In SHP744<sup>36</sup>, the arbitrator reviewed the longstanding jurisprudence which holds that dismissal is the presumptive penalty for an employee who works while impaired (Footnotes omitted):

32. The challenge Mr. Arjoon imposed on Unifor is that the longstanding arbitral case law indicates that dismissal is the presumptive disciplinary penalty for an employee who works while impaired.

33. In AH793, *supra*, the arbitrator wrote:

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<sup>34</sup> See AH736 - [Teamsters Canada Rail Conference – Maintenance of Way Employees Division v Canadian Pacific Railway Company, 2021 CanLII 118656](#) at paragraph 128 and AH670 - [International Brotherhood of Electrical Workers Council No. v Toronto Terminals Railway Company, 2019 CanLII 29083](#).

<sup>35</sup> [Section 60\(2\), Code](#).

<sup>36</sup> SHP744 - [Unifor Local 101R v Canadian Pacific Kansas City Railway, 2024 CanLII 57556](#)

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.

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.

34. The arbitrator has considered Mr. Arjoon's long service. But that factor, by itself, does not rebut the presumption that dismissal is the appropriate penalty for being impaired when performing a safety sensitive job. While Mr. Arjoon does not work in the running trades, his work moving rail cars inside a railyard clearly differs from an office job. The safety risks are obvious.

35. Similarly, during the investigation, Mr. Arjoon seemed to deflect responsibility which makes it difficult for an arbitrator to conclude that any bond of trust remains with CPKC. For example, Mr. Arjoon tried to distinguish a "permit" from a "prescription" as a reason not to disclose his cannabis use. Despite that assertion, he then stated he intended to tell his absent supervisor upon the latter's return but not the female supervisor on duty on the day of the incident. Mr. Arjoon further suggested the policy was difficult for a layperson to understand.

54. Similar to the situation in SHP744, the arbitrator finds no reason to intervene and modify the penalty that CPKC imposed<sup>37</sup>. While Mr. McGuinness had no prior discipline, he had just over 3 years service.

55. The arbitrator also cannot ignore that Mr. McGuinness tried to deflect responsibility by suggesting that he had not consumed cocaine for some time. The oral fluid tests do not support that conclusion and the IBEW put forward no evidence to support its suggestion that Mr. McGuinness had been the victim of a false positive result. Mr. McGuinness also seemingly sought to downplay the damage to the other vehicle despite his original recollection in his Initial Incident Report<sup>38</sup>.

56. Accordingly, the arbitrator will not intervene and modify the discipline CPKC imposed.

## **DISPOSITION**

57. The arbitrator has concluded that CPKC had cause to discipline Mr. McGuinness for the MVA but found the 20-day suspension excessive. That suspension will be reduced to 5 days. CPKC will compensate Mr. McGuinness accordingly.

58. For the positive oral fluid drug test, CPKC persuaded the arbitrator not to intervene and reduce Mr. McGuinness' dismissal. Mr. McGuinness operated CPKC's F250 vehicle while impaired and hit a member of the public's vehicle with sufficient force to spin it around. The jurisprudence's presumptive penalty of dismissal applies to this situation.

59. The arbitrator remains seized for any issues resulting from the reduction in Mr. McGuinness' suspension.

SIGNED at Ottawa this 5<sup>th</sup> day of July 2024.



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Graham J. Clarke  
Arbitrator

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<sup>37</sup> See also [CROA 5022](#), and [CROA 4805](#).

<sup>38</sup> CPKC Documents; Ex-6; Tab 4K; QA 22 and 41-43.