AH879

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)

Brandon MacLeod: Dismissal/Refusal to take drug test

Arbitrator: Graham J. Clarke
Date: July 3, 2024

Appearances:

IBEW:

M. Church:	Legal Counsel
J. Sommer:	Senior General Chair – IBEW, SC 11
S. Martin:	International Representative – IBEW, SC 11
B. MacLeod:	Grievor

CPKC:

D. Zurbuchen:	Manager Labour Relations
R. Araya:	Labour Relations Officer
B. Stiefel:	S&C Manager (Observer)
D. Shannik:	S&C Manager (Observer)

Arbitration held in Ottawa on June 12, 2024.

Award

BACKGROUND

1. CPKC dismissed Mr. MacLeod after the latter's refusal to take a drug test. The incident arose from Mr. MacLeod's CPKC hi-rail truck running through a switch.

2. CPKC alleged that the switch incident[1] provided grounds to drug test Mr. MacLeod and that his refusal to take the test constituted cause for dismissal. In the alternative, CPKC advised that it had made offers for Mr. MacLeod to return to work and his failure to do so should reduce any liability.

3. The IBEW alleged that the switch incident, for which Mr. MacLeod bore no responsibility since he had followed his foreman's instructions, provided no grounds for drug testing. It asked for reinstatement with full compensation, an apology and damages of $50,000.

4. For the reasons which follow, the arbitrator concluded that CPKC had no grounds to request that Mr. MacLeod submit to a drug test. CPKC will reinstate Mr. MacLeod with full compensation. The evidence did not satisfy the arbitrator that this was an appropriate case for an apology or damages.

CHRONOLOGY

5. **February 14, 2018**: Mr. MacLeod started working for CPKC. At the time of the incident, he held the position of S&C Helper (Truck Driver).

6. **October 25, 2022**: Mr. MacLeod, accompanied by his foreman and fellow IBEW member Devon Robbins, backed his 10-ton boom truck through a switch. Mr. MacLeod's Initial Incident Report[2] noted that:

> I asked if switches were lined for us and he stated that they were and gave me the go ahead to proceed. He did not realize that someone had restored it to the normal position. We proceeded past the switch points and that is when we realized we had gone through the switch points.

[1] The parties did not place the grievances contesting discipline for the switch run through before the arbitrator. Nonetheless, the facts remain central to this case: CPKC Brief, Paragraph 6.
[2] CPKC Documents, Tab 6a.

7. **October 25, 2022**: The Director, Track Methods, Mike Weschka, examined the scene and noted[3] in part:

> When we arrived on scene, we found an S&C ten-ton truck E14018 on top of the Scale Track switch with the rear hi-rail wheels on the lead of the switch and the front hi-rail wheels on the diverging route of the switch. The Foremen was trying to get the switch to through when we arrived without any luck. I asked the foremen Devon Robbins (Who was in the truck at the time of the incident) what happened and he explained that the truck was approaching the switch in reverse and assumed that the switch was left in the same position they left it earlier in the day. As they were backing up over the point area of the switch, they heard a noise, came to a stop and then pulled forward. Devon then tried to line the switch and realized that they already ran through the switch. I then asked the drive of the ten-ton for his name. He said it was Brandon.

8. **October 26, 2022**: The next day, in response to S&C Manager Don Whan's request[4], Mr. MacLeod refused to submit to a drug test. CPKC removed him from service following this refusal[5].

9. **November 3, 2022**: CPKC held its investigation interview with foreman Devon Robbins who confirmed that he had advised Mr. MacLeod he could proceed over the switch:

> Q30: Referencing Brandon's Initial incident report he states that you gave he the go ahead to proceed when asked if the switches were lined is that correct?
>
> A30: Yes
>
> …
>
> **Q32: How did you know the Scale switch was still lined for your intended movement?**
>
> **A32: I didn't know. I just assumed it was still lined. I could not see the switch marker.**
>
> **…**
>
> **Q47: Can you explain why E14018 did not stop prior to running though the Scale track hand throw switch?**

[3] CPKC Documents, Tab 6b.
[4] CPKC Documents, Tab 5b (Don Whan memorandum).
[5] CPKC Documents, Tab 5a.

A47: He did stop short of it. I told him it should still be lined in the position we left it. (sic)

(Emphasis added)

10. **November 3, 2022**: CPKC held investigation interview #1[6] for the October 25, 2022 run through switch. The facts for that incident remain crucial to an understanding of Mr. MacLeod's later refusal to take a drug test:

> Q06: Is there anything in these appendices that you wish to refute, rebut, or comment on?
>
> A06: Yes, I'd like to comment on some of the evidence.
>
> Devon Robbins Incident Report - Devon doesn't state that he told me I was clear to proceed through the switch but he does state that in his statement.
>
> Company officer response: Noted
>
> Mike Weschka Memo - I cant necessarily comment on the conversation that was had between Mike and Devon but he states that "the truck was approaching the switch in reverse and assumed that the switch was left in the same position they left it earlier in the day."
>
> **I came to a stop prior to fouling the switch. I asked Devon if the switch was still lined for us and if we were good to proceed through it. Devon stated yes and I asked again if we were good to go and he said yes, you're good to proceed. This was also referenced in Devons statement**
>
> The switch was only left in the reverse about 30 minutes to an hour prior to that. (sic)
>
> …
>
> Devon Robbins Statement -
>
> A12- Devon said that his response was "we should be" when I asked if the switch is still lined. What was said was I asked Devon if the switch was still lined for us and if we were good to proceed through it. Devon stated yes and I asked again if we were good to go and he said yes, youre good to proceed. This was also referenced in Devons statement
>
> Company officer response: Noted
>
> **A30 Devon confirms that what I wrote in my incident report was correct about asking him if the switch was lined and ok to proceed.**

[6] CPKC Documents, Tab 6.

Company officer response: Noted

A47 Devon says he told me it should still be lined in the position we left it which is incorrect. I asked Devon if the switch was still lined for us and if we were good to proceed through it. Devon stated yes and I asked again if we were good to go and he said yes, youre good to proceed. (sic)

…

Q13: Could you please provide your account of events that took place on October 25, 2022?

A13: SO I finished loading and unloading materials for Devon on the east end of Lambton yard, then when I finished I went over to Scarlett where Devon was working he had asked me if I could load up the switches and drop them off at the new locations. I then asked if he would then come with me, to throw switches and show me where the new switches were to go. He said yes absolutely, we went over the job briefing that was completed earlier in the day. I initialed the book. I drove back around to Lambton yard as he walked down there to meet me. I met him there. I loaded the switches. Devon got in with me. Then we drove to the scale track set on. We proceeded to set my truck on. Then we started our movement westbound in the direction of the new switch locations. As we continued Devon got out to line switches for us. He left the first switch on the scale track in the reverse position we proceeded to the next switch where he got out and lined it for us. And then he waved me through. He relayed that he normalled the switch and I relayed it back. And then we continued to the far end where Dave Sauve was working and dropped that switch off. And then we proceed eastward in reverse dropping the new switches off at their locations. Devon was getting out to line switches for us and then restoring the switches as were dropping the new machines off. RTC called Devon and said there was a train approaching. Devon asked for another 10-15 minutes to finish the work up. RTC said go ahead. We dropped the last switch off. And then devon had got out to line the second last switch for us. Normalled it and waved me through. Then he jumped back in with me. **Then I came to a stop at the last switch he had left lined for me on the scale track. I asked if the switch was lined for me he confirmed it was. I asked him a second time and he said it was good to proceed. I then released my brakes and started rolling back. We heard a little pop noise and I stopped. I heard the engineer say he think we just went through the points**. I put my head out the window and stated the switch was lined my foreman verified the switch was lined and gave me permission through. The engineer stated I think your rear end just went through the points. Devon got out to see what the hell was going on and I stayed in the truck. He went out there and asked me to pull ahead 10'. Mike showed up 20 minutes later, he opened my door and asked my name. I was told I could not drive the truck at that moment. Grant Jones came and grabbed the truck and set it off. (sic)

…

Q15: What actions did you take to ensure the position of the switch was lined for the intended route of the track unit you were operating?

A15: I verified twice with my foreman that it was safe to do so.

…

Q25: Can you explain why you or Devon did not exit the vehicle to confirm the position the Scale track hand throw?

A25: I did not exit the vehicle. The foreman was slated for lining and relining switch for us.

Q26: When you stopped short of the scale track switch why did you ask Devon twice if the switch was lined correctly?

A26: To verify I know he lift it open. Knowing he left it open I just verified with him it was correct and safe to do so.

Q27 To clarify he took no action to check the switches. He just gave you a verbal that it was ok to proceed?

A27: Yes, he looked in the mirror and said yes it was good to proceed.

…

Q29: To clarify, you stated you could not see the points from the driver side mirror account the truck was too long but took Devon's word for it that he could see the points from the passenger side mirror?

A29: I didn't assume he could see the points I figured he could see the sign on top of the switch or whatever.

…

Q35: Too summarize Devon was a passenger in vehicle E14018 which you were operating. He was tasked with lining switches and assisting with dropping switches off at multiple locations. On the way back to the clear you approached the Scale track hand throw switch and came to a complete stop. You could not see the switch marker indication account it was on passenger side of the truck. You could not see the Switch points from the driver's side mirror account the truck was too long. You asked Devon twice while stopped short of the points what position the switch was in. he confirmed it was lined for your movement. He did not exit the vehicle. You observed him check the side mirror. The truck was equipped with a working back up camera. Once confirmation was received twice by your foreman you released the brakes and proceeded over the switch which was not lined for your intended route. Is that correct?

A35: Yes (sic)

…

Q37: Is there anything you wish to add to the statement?

A37: Looking back on the incident in question I have to acknowledge that I could have handled this situation differently. The sole purpose of having my foreman with me was to do the switch handling so I could focus on operating the 10-ton. That is what we discussed in the job briefing. When I stopped at the scale track switch and asked my foreman if it was lined for our route and he didn't get out of the truck to check, I should have got out myself and verified the position of the switch. Hindsight is 20/20 but this is my foreman and this is who the Company tells me to trust and put my life in his hands. I took his word for it and that is my mistake. I can only learn from my mistakes and be more diligent to improve myself moving forward.

(Emphasis added)

11. **November 7, 2022**: CPKC held investigation interview #2[7] concerning Mr. MacLeod's refusal to take a drug test:

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

A06: Yes

Dons Memo

0655 - he fails to mention that when I stated I was refusing the test I told him I didn't do anything wrong, I followed my foremans instructions and it should only be him. I feel like im being the one targeted that its my fault for following my boss' instructions

0815 Don Whan never read me 4.6 from HR 203.1. in its entirety. He didn't have the policy in hand so its hard to say. He was reading something off his phone which was maybe the first sentence and the bullet points. He never read me anything about employees cannot be forced to submit to an alcohol and/or drug test as it requires informed consent. Nothing from the rest of that paragraph. (sic)

…

Q23: Can you explain why you refused to participate in the post incident testing on October 26, 2022

[7] CPKC Documents, Tab 5.

A23: Yes, I refused because I was following orders from my foreman. CP had told me that my foreman's certified one. Who I follow orders from, who I put my life in his hands. As it's his duty to get me on and off the tracks safely. I asked him twice if it was safe to proceed on the tracks and he informed me it was. Him being my foreman I trusted him and followed his orders. Come to find out we had an incident, therefor by someone I was supposed to follow orders from was me. I was following orders from my foreman. If I don't follow orders from my foreman its insubordination, and if I do then there's an incident like that day. I did my job by the book that's why I refused and he failed to do his. In my five years there I've had zero incidents. I've never been questioned or asked to do a drug test before, I've always done my job 110% like I'm suppose too. The one time I have my foreman with me, the one I trust has put me in this situation. In the five years I have been there my foreman has had multiple close calls with coworkers with their lives, and has not had to drug test or been taken in for statements but then when I follow the rules and follow the rules as I'm told by him. He has again but a co-worker in a bad situation. (sic)

…

Q26: Is there anything you wish to add to the statement?

A26: Once again my foreman is given a responsibly to do a job, He's paid to oversee the safety of the crew. And to see our safety on and off of the tracks. And I do as he says and do my job 110% everyday. And take into fact he's my foreman, I respect him and do as he says. And by doing that has resulted in an incident that was 100% out of my hands. **I just followed orders. I feel I'm being subjected to as if I made the bad decision, myself. All I did was take orders from my foreman. I feel the only one at fault is the foreman. HE should be the only one subjected to an investigation and drug testing.** I volunteered to be a 10 ton driver and Health and safety, and never had I or would I be under the influence at work. Or put any co-workers in that situation. I feel the only one who has done any wrong is my foreman and that's why I'm refusing this.

(Emphasis added)

12. **December 5, 2022**: CPKC's Form 104[8] dismissed Mr. MacLeod for these reasons:

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

A formal investigation was conducted on November 7, 2022 "in connection with the alleged failure to comply with Policy # HR203 Alcohol and Drug Policy

[8] IBEW Documents, Tab 7.

(Canada) on October 26, 2022" 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 November 7, 2O22 where it has been concluded that you refused to test on October 26, 2022, violating the following rules, policies and procedures:

- o Policy # HR 203 Alcohol and Drug Policy (Canada)
- o HR 203.1Alcohol and Drug Procedure

Please be advised that you are hereby Dismissed, effective December 5, 2022.

13. **March 27, 2023**: CPKC sent Mr. MacLeod directly a "with prejudice" offer of reinstatement[9]. Paragraphs 3-4 of that letter read:

> 3. We discussed the fact that your reinstatement into service is viewed as a last chance arrangement for continued employment with CP Rail. Failure to comply with all Rules, Procedures, and Policies, governing your safety sensitive position may result in your removal from service, a formal investigation and the possibility of discipline up to and including dismissal.
>
> 4. It is understood that this does not resolve any grievance(s) filed on your behalf and that you will not be paid any compensation or benefits for the time out of service including time required to complete the foregoing requirements.

14. **April 5, 2023**: The IBEW objected[10] to CPKC's March 27, 2023 letter:

> We are in receipt of your letter of March 27, 2023, regarding Brandon Macleod and must register our position and objection.
>
> Firstly, contrary to your letter, Macleod did not have a discussion with you on March 22, 2023.
>
> Secondly, while the Company is entitled to unilaterally reinstate Macleod, as the certified bargaining agent the Union must be consulted and participate in that process. Dealing directly with employees who have been terminated and for whom the Union has filed a grievance is contrary to the *Canada Labour Code*.

[9] CPKC Documents, Tab 7.
[10] CPKC Documents, Tab 8.

> The Union specifically rejects the Company's purported unilateral imposition of any terms associated with the reinstatement, including and especially that the reinstatement is on a last chance basis.
>
> The Union continues to reserve all of its rights and remedies associated with the grievance, the Collective Agreement and the *Code*.

15. **January 26, 2024**: CPKC offered the IBEW a reinstatement agreement[11] for Mr. MacLeod which contained, *inter alia*, the following terms:

> Notwithstanding the reason for termination was for cause, the Company is prepared to offer Brandon Macleod reinstatement on certain terms and conditions. Should Brandon Macleod wish to resume employment with the Company, he will be required to comply with the following:
>
> …
>
> 5. Mr. MacLeod will be reinstated with full benefits and no loss of seniority.
>
> 6. Mr. MacLeod will not receive any compensation pursuant to the terms and conditions of this agreement; however, the parties have agreed that Mr. MacLeod, through his Union, will retain the right to pursue wages lost as a result of his dismissal through arbitration.
>
> 7. Mr. Macleod's discipline record will reflect his subsequent reinstatement from dismissal. This agreement acts as full and final resolve for any and all outstanding claims relating to any time during which Mr. MacLeod was held from service, dismissed, and the time between the signing of this agreement and his return to active service save and except for his right to pursue lost wages as outlined in Item 6 above.
>
> …
>
> 10. There shall be no grievance advanced in respect of the terms and conditions set forth in this Agreement.
>
> …
>
> 13. This Agreement will remain on the employment record of Brandon Macleod and may be utilized in the event that he appears before an arbitrator regarding this agreement or any other future proceeding.

[11] CPKC Documents, Tab 9.

16. **May 2024**: The parties sent the arbitrator their Joint Statement of Issue (JSI)[12]. The IBEW raised the following items:

> 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 Macleod 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 Macleod did not behave in anyway, or show any symptoms of, impairment.
>
> The Union requests that Macleod have the discipline expunged from his employee record and be made whole, including but not limited to seniority, wages, benefits, and pension.
>
> The Union further requests a written apology from the Company as well as damages be paid to Macleod in the amount of $50,000 or an amount that the arbitrator sees fit.

EMPLOYEES' PRIVACY RIGHTS AND DRUG TESTING

17. The Supreme Court of Canada's (SCC) decision in *Irving*[13] described the challenges and general parameters for drug testing employees. It contrasted reasonable grounds testing with that which occurred following a workplace accident or significant incident. The goal was to balance important privacy rights with safety in a dangerous workplace:

> [4] A substantial body of arbitral jurisprudence has developed around the unilateral exercise of management rights in a safety context, resulting in a carefully calibrated "balancing of interests" proportionality approach. Under it, and built around the hallmark collective bargaining tenet that an employee can only be disciplined for reasonable cause, an employer can impose a rule with disciplinary consequences only if the need for the rule outweighs the harmful impact on employees' privacy rights. The dangerousness of a workplace is clearly relevant, but this does not shut down the inquiry, it begins the proportionality exercise.
>
> [5] **This approach has resulted in a consistent arbitral jurisprudence whereby arbitrators have found that when a workplace is dangerous, an employer can test an individual employee if there is**

[12] CPKC Documents, Tab 3.
[13] Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd., 2013 SCC 34

> **reasonable cause to believe that the employee was impaired while on duty, was involved in a workplace accident or incident, or was returning to work after treatment for substance abuse.** In the latter circumstance, the employee may be subject to a random drug or alcohol testing regime on terms negotiated with the union.
>
> …
>
> [45] But, as previously noted, the fact that a workplace is found to be dangerous does not automatically give the employer the right to impose random testing unilaterally. **The dangerousness of the workplace has only justified the testing of particular employees in certain circumstances: where there are reasonable grounds to believe that the employee was impaired while on duty, where the employee was directly involved in a workplace accident or significant incident, or where the employee returns to work after treatment for substance abuse.** It has never, to my knowledge, been held to justify random testing, even in the case of "highly safety sensitive" or "inherently dangerous" workplaces like railways (Canadian National) and chemical plants (DuPont Canada Inc. and C.E.P., Loc. 28-O (Re) (2002), 2002 CanLII 79097 (CA LA), 105 L.A.C. (4th) 399), or even in workplaces that pose a risk of explosion (ADM Agri-Industries), in the absence of a demonstrated problem with alcohol use in that workplace. That is not to say that it is beyond the realm of possibility in extreme circumstances, but we need not decide that in this case.
>
> (Emphasis added)

18. For many years, decision makers have applied the balancing of interests proportionality approach to which the SCC made reference in *Irving*. The Alberta Court of Queen's Bench[14] adopted Arbitrator Sims' helpful analysis when explaining the difference between reasonable cause testing and post workplace accident or serious incident testing:

> [29] **Arbitrator Sims was careful to ensure that reasonable cause testing (with its focus on the employee) and post-incident testing (with its focus on determining the cause of the accident) not be conflated**. While acknowledging they may overlap, he specifically rejected the proposition that post-incident an employer would need to "point to evidence that positively suggested impairment to a sufficient degree to override the employee's privacy interests". He said:
>
> > In my view, adopting the *same* test is not justified either in principle or based on the case law. The tests are different because the circumstances and the interests involved are different. Both tests, however, must still

[14] *Canadian Energy Workers' Association v ATCO Electric Ltd*, 2018 ABQB 258

involve a balancing of interests, both within the policy itself and at the point of application. (para 159).

(emphasis in original)

[30] A little further in his analysis, Arbitrator Sims sets out the three part test relied upon by the Arbitration Board in this case. Arbitrator Sims finds that there are three elements to post-incident testing:

- The threshold level of the incident needed to justify testing.

- The degree of inquiry necessary before the decision is made.

- The necessary link between the incident and the employee's situation to justify testing (para 162).

[31] **With respect to the threshold level, it is clear from the jurisprudence that there must be something more than an accident or incident. It should be significant.** As arbitrator Sims notes at para 176:

In my view the amount of the damage or the magnitude of the incident must remain a factor to be weighed in determining whether there is sufficient cause to justify overriding the employee's privacy rights through mandatory testing. This can include the near miss concept which, almost by definition, involves no damage, but there still has to be a sufficient gravity to the event. Any near miss must involve a realistic conclusion after a thorough investigation that serious damage almost occurred.

(Emphasis added)

19. In the 2024 award in *ATCO*[15], Arbitrator Casey reviewed the law, including the issue of awarding damages in drug testing cases. That case reiterated the elements of the three-part test followed for post incident testing and confirmed that the mere happening of an incident did not justify testing:

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

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;

[15] *ATCO Electric Ltd. (ATCO) v Canadian Energy Workers Association (CEWA)*, 2024 CanLII 37038

> 3. A drug and alcohol test would assist in the investigation into the cause of the incident.
>
> [129] Arbitrator Smith stated that arbitrators must exercise care and scrutinize critically the actions of management so that the threshold for ordering post-incident testing is not so diluted that the mere happening of an incident permits testing.

20. In AH807[16], the arbitrator summarized some of the applicable principles in this challenging area (Footnotes omitted):

> 31. A similar analysis applies in this case. The SCC in Irving has described the governing principles. An arbitrator may analyze this non-exhaustive list of considerations when deciding employee drug and alcohol testing cases:
>
> > 1. A dangerous workplace by itself does not justify random testing in the absence of a demonstrated problem with drug/alcohol use;
> >
> > 2. Instead, a proportionality exercise applies when balancing a legitimate safety rule requiring testing with employees' privacy rights:
> >
> > 3. If reasonable grounds exist to believe that an employee was impaired while on duty then drug and alcohol testing may take place;
> >
> > 4. An employer must preserve the evidence on which it concluded that reasonable grounds existed;
> >
> > 5. In appropriate cases, some degree of deference may be given to those who make this decision "in a real-life context that is often time-sensitive".
> >
> > 6. Drug and alcohol testing may also take place if an employee was directly involved in a workplace accident or significant incident, or where the employee returns to work after treatment for substance abuse;
> >
> > 7. An employer must respect the procedure found in its own drug and alcohol policy

21. In AH732[17], a case involving these same parties, the arbitrator concluded that CPKC did not have proper grounds to test following a hi-rail truck's minor derailment (Footnotes omitted):

> 38. Given the arbitration Record, the arbitrator agrees with the IBEW. The Record before the arbitrator does not contain the evidence relied on to support

[16] AH807 - *Teamsters Canada Rail Conference v Canadian Pacific Railway Company*, 2022 CanLII 120899
[17] AH732 - *Canadian Signals and Communications System Council No. 11 of the IBEW v Canadian Pacific Railway Company*, 2021 CanLII 69959

> CP's decision to test Mr. Brydson. Situations exist where testing may be obvious, but this case is not one of them.
>
> …
>
> 41. In the instant case, the IBEW contested the grounds for testing. CP did not provide the evidence on which it based its conclusion to test. CP's Brief contains memoranda from managers (CP Brief, Tab 5), but the testing seemed already to be a foregone conclusion. Those memoranda refer to "incident drill down" and "an incident form", but those documents, if they exist, are not in the Record before the arbitrator.
>
> 42. In the absence of such evidence, and given that the incident, albeit involving a switch and a hi-rail derail, appears to fall at the far end of the severity spectrum, CP did not demonstrate it met its DAPP criteria to test Mr. Brydson.

22. The arbitrator will apply these principles to Mr. MacLeod's situation.

ANALYSIS AND DECISION

23. Several issues require resolution in this award.

Procedure and evidence

24. The arbitrator heard 4 separate grievances on June 12-13, 2024. The parties agreed[18] to follow the November 1, 2023 Rules for the Canadian Railway Office of Arbitration & Dispute Resolution (CROA)[19]. 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[20].

25. Due to time limitations under the CROA Rules applicable for this ad hoc arbitration, the parties did their best to provide the arbitrator, who received the Briefs in advance, with an executive summary of the case. The parties then asked the arbitrator to review the extensive materials in detail and drew particular attention to certain elements[21].

26. This can lead to evidentiary challenges.

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[18] 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".
[19] 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.
[20] CROA Rules, Paragraph 11.
[21] See, as just one example, the IBEW Brief at paragraphs 16 and 22.

27. For example, the IBEW invited the arbitrator[22] to review the evidence at page 3 of Mr. MacLeod's statement. Upon review, this extract did not involve Mr. MacLeod's evidence, but rather a lengthy comment the IBEW representative made. That comment referenced an alleged conversation he had had with a CPKC manager about the circumstances of Mr. MacLeod's testing. The IBEW's grievances repeated the same information[23].

28. In AH825[24], while involving a significantly different context, the arbitrator noted the challenge when a grievor's union representative attempts to give evidence during an employee's statement (Footnotes omitted):

> 16. In this Statement, the TCRC, via its repeated objections and reference back to its QA7 Note, seemly answered most of the questions posed to Mr. Mellquist. The only detailed answer Mr. Mellquist gave was to Q16. This procedure would never happen at a regular arbitration. If the TCRC wanted to object to a question, or put a position on the record during a witness's testimony, then the witness would usually have to leave the room to avoid, however innocently, receiving the answer to a proper question.
>
> 17. Similarly, the TCRC seemingly objected to every question asking Mr. Mellquist to comment on the facts. The objection occurred on the basis that it would require him "to admit responsibility".
>
> 18. What is the result? The arbitrator has little evidence from Mr. Mellquist about what transpired on July 1, 2020. Instead, the TCRC put in the evidence via its repeated reference to its own Note.

29. The IBEW has traditionally provided thorough and helpful grievance responses[25]. But problems arise when they are used to suggest evidence which is then relied on during argument[26]. The is not a criticism of the IBEW representative in this case who was no doubt trying to be thorough. But there is a difference between someone representing a grievor during a statement and a witness providing important evidence for the Record.

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[22] IBEW Brief, Paragraph 21.
[23] IBEW Documents, Tab 9 and 11.
[24] AH825 - *Teamsters Canada Rail Conference v Canadian Pacific Railway Company*, 2023 CanLII 26191
[25] AH724 - *Canadian Signals and Communications System Council No. 11 of The IBEW v Canadian Pacific Railway Company (CP)*, 2021 CanLII 73282
[26] IBEW Brief, Paragraphs 28 and 30. The IBEW explicitly asked the arbitrator to review its grievance responses at Tabs 9 and 11.

30. The railway model provides ways, often through statements or oral evidence, for the parties to ensure the Record contains the relevant evidence in discipline cases[27]. This obligation usually falls to the employer, but a bargaining agent can add evidence to the record as well[28]. This process ensures both parties have an opportunity to ask questions about the evidence which will form part of the Record.

31. Where there is no opportunity to ask questions, the arbitrator, given the expedition inherent in the railway model, cannot give much weight to that evidence without impacting the fairness of the process.

Did CPKC have grounds to request that Mr. MacLeod take a drug test?

32. CPKC's HR 203.1 at section 4.3 describes Post Incident Testing[29]. 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.

[27] See, for example, AH837 - *International Brotherhood of Electrical Workers (System Council No. 11) v Canadian National Railway Company*, 2023 CanLII 99782. See also AH878 - *International Brotherhood of Electrical Workers, System Council No. 11 v Canadian Pacific Kansas City Railway*, 2024 CanLII 57803

[28] See, for example, CROA 4590 at paragraphs 14-16. While article 12.3 in the parties' collective agreement may not be as specific as comparable provisions in other railway agreements, the IBEW can add proper evidence during an investigation.

[29] CPKC Documents, Tab 5c.

33. CPKC did not satisfy the arbitrator that Mr. MacLeod's incident fell within the factors in HR 203.1. The facts CPKC had before it do not suggest that the incident involved a fatality, serious injuries, significant loss or damage to equipment or vehicles or environmental implications.

34. If one applied the arbitral case law's 3-part test as summarized above, CPKC similarly did not demonstrate that the run through switch by a hi-rail truck justified overriding Mr. MacLeod's privacy rights[30].

35. First, was there "a precipitating event of sufficient gravity"? The evidence confirmed that the hi rail truck went through the switch. But that is not sufficient, by itself, to proceed with drug tests. As in AH732, *supra*, the evidence showed the run through by the hi-rail truck was very minor. CPKC provided no evidence of damage.

36. Second, was there a reasonable investigation? CPKC satisfied the arbitrator that it had looked into the matter sufficiently to understand the facts of the situation[31]. Mr. MacLeod had explained that he had relied on his foreman's instructions before he backed over the switch.

37. Third, would a drug and alcohol test assist in the investigation into the cause of the incident? CPKC did not convince the arbitrator of the need for drug testing to investigate the cause of the accident. The evidence both before and after the request to test showed that Mr. MacLeod had provided the relevant facts of the incident. He had relied on the erroneous comments of his foreman before running over the switch. The foreman confirmed these facts too.

38. CPKC did not suggest that the employees attempted to hinder the time sensitive analysis for drug testing. Instead, the Record demonstrated that Mr. MacLeod and his foreman remained candid and helpful throughout the entire process.

39. In short, CPKC did not have grounds to test Mr. MacLeod. Therefore, it did not have just cause to discipline Mr. MacLeod for refusing to take a drug test. While the IBEW

[30] In other scenarios, a run through switch may justify testing: CROA 4792.
[31] CPKC Documents, Tabs 6a (Bandon MacLeod initial incident report) and 6b (Mike Weschka memorandum).

acknowledged the risk Mr. MacLeod took in refusing to take the test given the adverse inferences that could arise[32], Mr. MacLeod's refusal provided no grounds for termination.

40. In the circumstances, the arbitrator will order Mr. MacLeod's reinstatement with full compensation.

Did CPKC's two reinstatement offers impact Mr. MacLeod's entitlements?

41. Usually, parties do not disclose settlement offers to arbitrators. Exceptionally, both parties presumably agreed to refer to them in this case[33]. As the arbitrator understands the argument, CPKC submitted that Mr. MacLeod could have mitigated his damages by accepting either of its offers.

42. The arbitrator dismisses CPKC's argument. An employer can unilaterally reinstate a dismissed employee prior to arbitration[34]. This unilateral action, if unconditional, may limit liability. But Mr. MacLeod's case differs because CPKC's offers required the acceptance of various conditions.

43. First, CPKC's March 27, 2023 offer, which it made directly to Mr. MacLeod, included, among other things, last chance agreement language. Not surprisingly, the IBEW, after becoming aware of this letter, objected to its various terms. That letter cannot lessen CPKC's liability.

44. Second, the January 26, 2024 offer to the IBEW also contained conditions which Mr. MacLeod could not accept. For example, it provided no "compensation" but stated Mr. MacLeod could continue to pursue "wages lost". Compensation differs from wages.

45. Moreover, the offer contained a form of release and required an agreement on the appropriate entry for Mr. MacLeod's disciplinary record: "Mr. Macleod's discipline record will reflect his subsequent reinstatement from dismissal". This would have seemingly removed some of the items that the IBEW intended to contest in this arbitration. Not surprisingly, Mr. MacLeod did not accept the offer.

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[32] See 4.6 of CPKC's policy (CPKC Documents, Tab 5; Page 63/275); CROA 4476, CROA 4028 and CROA 3581.
[33] See, for example, IBEW Brief paragraph 32 and CPKC Brief paragraphs 12-13.
[34] See, for example, CROA 4522 (*Canadian Pacific Railway Company v Teamsters Canada Rail Conference*, 2016 CanLII 96499)

46. Accordingly, neither of CPKC's offers reduce its liability in this case. However, the arbitrator understands that Mr. MacLeod earned other income as a truck driver since his termination[35]. Those sums can properly be considered at the remedial stage.

Should the arbitrator order damages and an apology in this case?

47. In its grievances, the IBEW asked for a written apology and $50,000 damages for emotional distress. The JSI contained a similar request.

48. For the following reasons, the arbitrator will not order CPKC to write an apology or pay damages.

49. The IBEW provided no authority that the arbitrator could order an apology. Even if such authority existed, the arbitrator finds persuasive Arbitrator Casey's comment in *ATCO*[36] that "I don't consider that a forced apology would accomplish much of value".

50. The IBEW's Brief described its request for aggravated and punitive damages:

> 43. In the Union's respectful submission, the Union believes that the Grievor is entitled to aggravated and punitive damages as a result of the Company's bad faith manner of dismissal of the Grievor and egregious violations of the Collective Agreement.

51. At the hearing, CPKC objected that the IBEW had expanded its case beyond the issues set out in the grievances and in the JSI. Given the arbitrator's conclusion not to award damages, the objection has become moot. The arbitrator did have some difficulty however with the IBEW's reference to a breach of the "impartial investigation provisions in the Collective Agreement"[37], an issue which does not seem to appear anywhere in the Record[38].

52. The IBEW and CPKC provided a general review of the law on aggravated and punitive damages. They both acknowledged the exceptional nature of such damages.

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[35] IBEW Brief, Paragraph 7.
[36] Paragraph 199.
[37] IBEW Brief, paragraph 51.
[38] In oral argument, the IBEW changed its stance and advised they were not contesting the fairness of the investigation.

53. The arbitrator described above the evidentiary challenge in the Record arising from comments the IBEW made on Mr. MacLeod's interview transcript. Those allegations referred to comments by a CPKC manager. While those alleged events might have been a legitimate area to explore when building a case for damages, that did not occur.

54. The drug testing case law suggests that an employer operating a safety sensitive business may expose itself to a damages award if it ignores an employee's privacy rights and instead orders drug testing. Such a practice clearly goes against the SCC's decision in *Irving* and the many other decisions from the courts and labour arbitrators.

55. While the arbitrator, due to the Record, did not order damages in this specific case, this finding in no way limits the parties' opportunity in the future to review the existing extensive jurisprudence on drug testing and argue when/if an arbitrator should award damages.

DISPOSITION

56. For the reasons set out above, the arbitrator orders CPKC to reinstate Mr. MacLeod with full compensation. The arbitrator retains jurisdiction should the parties be unable to agree on the remedial issues arising from this award.

SIGNED at Ottawa this 3rd day of July 2024.

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Graham J. Clarke
Arbitrator