

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

BETWEEN:

**CANADIAN SIGNALS AND COMMUNICATIONS SYSTEM COUNCIL NO. 11 OF THE
IBEW**

(IBEW)

-and-

CANADIAN PACIFIC KANSAS CITY RAILWAY

(CPKC)

Production order and solicitor/client privilege

Arbitrator: Graham J. Clarke

Date: May 12, 2025

Appearances:

TCRC:

K. Stuebing: Legal Counsel

Y. Jin: Legal Counsel

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

CPKC:

L. McGinley: Director, Labour Relations

R. Araya: Labour Relations Officer

Motion heard by way of written submissions.

Award

BACKGROUND

1. This arbitration will commence on May 27, 2025.
2. On February 28, 2025, the arbitrator issued AH900-P¹ which dealt with the IBEW's motion for production. AH900-P concluded that the requested documents met the "arguably relevant" test. The arbitrator added (Footnotes omitted):

31. CPKC will provide the documents and particulars within 30 days of the date of this decision. Should CPKC raise privilege for any documents, then it will bring the matter before the arbitrator within the same 30-day period. CPKC will describe any such document(s) for which it claims privilege, including the date and the individuals involved.

3. By email dated March 18, 2025, CPKC raised legal privilege for a specific email chain (Chain):

The Company has identified one email exchange for which the Company is raising privilege at this time. This email exchange was an email from me to internal CPKC legal counsel with others copied, seeking legal advice regarding a draft fixed term employment agreement for Mr. Earl Korzenoski, and our internal CPKC legal counsel's response. These two emails occurred on January 9 and 10, 2024, between me, Trisha Gain, Legal Counsel, and Jocelyn Bietz, HR Business Partner, copying Jeff Switzer, GM S&C Operations, Cory Wogrinc, Asst GM S&C Operations, Kevin Ehnes, Director S&C Operations West, and Dave Guerin, Managing Director Labour Relations.

4. By email dated March 27, 2025, CPKC added additional information:

The Company has identified additional exchanges which were part of the below referenced email thread for which the Company is raising privilege at this time. This newly identified thread is reply email exchanges between the Company and internal CPKC legal counsel, with the same individuals copied, seeking legal advice regarding Mr. Earl Korzenoski and Fixed Term Contracts. These emails were exchanged on March 18, 19, 2024.

¹ [*Canadian Signals and Communications System Council No. 11 of the IBEW v Canadian Pacific Kansas City Railway, 2025 CanLII 16088*](#)

5. On April 17, 2025, the IBEW contested CPKC's claim of privilege and further alleged a continuing failure to produce certain documents and particulars. Given the arbitrator's absence from the country, the parties worked collaboratively to file their written submissions on these issues.

6. For the reasons which follow, the arbitrator orders CPKC to produce certain documents and particulars. CPKC has satisfied the arbitrator that a legal privilege applies to the Chain.

ISSUES

7. The parties had differing views on document production, particulars and whether legal privilege attached to the Chain. CPKC did provide further documentation during the written submission process which reduced the number of issues requiring resolution.

Mr. Bernava's March 22, 2025 contract

CPKC

8. In its response, CPKC maintained that this 2025 contract fell outside the scope of AH900-P's production order:

The Union states the Company failed to produce Mr. Bernava's current contract. The Company requests that you dismiss this request outright. Mr. Bernava's current contract dated March 21, 2025 and signed March 22, 2025 does not properly form part of the present dispute, nor does it properly form part of the Production Order as the contract was made after the Union's February 25, 2025, Production Order request and your order in AH900-P.

The Wage Agreement between the parties requires a grievance be filed "within thirty-five (35) calendar days from the date of the cause of the grievance became known." A contract dated March 21, 2025, simply cannot be the subject of a grievance filed on June 18, 2024. The Company submits any issue the Union may have with the March 21, 2025 Bernava contract must be the subject of a separate grievance...

...

As this contract could not and did not form part of the June 2024 grievance, it may not be referred to at arbitration nor is it within the jurisdiction of the Arbitrator.

Notwithstanding the above, the Company submits that the production requested by the Union on February 25, 2025, and so ordered on February 28, 2025 cannot include a contract dated March 21, 2025 and therefore is not captured by your Order.

IBEW

9. In its May 5, 2025 Reply, the IBEW maintained that this document remained relevant for this arbitration:

CPKC, in its submissions dated May 2, 2025, asks that you dismiss the Union's request for the production of Mr. Bernava's non-Union sanctioned FTCE agreement signed March 22, 2025.

CPKC does not state that the document is not relevant or is privileged. Therefore it is the Union's submission that CPKC has conceded that the document is relevant and not privileged. Without prejudice to the Union's position that CPKC is not entitled to later object on the basis of relevance or privilege, the Union submits that Mr. Bernava's non-Union sanctioned FTCE agreement signed March 22, 2025 is clearly relevant to the same degree as all of the other non-Union sanctioned FTCE agreements CPKC has already produced, and such relevance is founded upon the same bases as the other non-Union sanctioned FTCE agreements, which you referred to in your February 28, 2025 award.

The sole reason CPKC has provided and relied on is that the document "does not properly form part of the present dispute" because the document was created after the grievance was filed and/or after your February 28, 2025 award. Indeed, CPKC goes as far as stating that the document is outside your jurisdiction as the Arbitrator.

...

In a policy grievance where the company's alleged violation is ongoing, there is no question that such ongoing violation may lead, as it did in this case, to the creation of further relevant and non-privileged documents after the referral of the grievance to arbitration. The production of such documents is not merely a matter of general arbitral principles – it is a question of fundamental fairness.

Decision

10. The arbitrator has previously examined how the railway model handles multiple grievances involving the same issue². A trade union does not generally have to file individual grievances for every alleged violation and have them all heard individually.

11. But the instant dispute does not involve a later grievance raising the same issue. The IBEW has simply requested the production of another FTCE agreement. The issue concerns a document's relevance. It does not concern a separate and distinct grievance.

² [*Teamsters Canada Rail Conference \(TCRC\) v Canadian Pacific Railway Company*, 2023 CanLII 8290](#)

12. The requested document remains arguably relevant to this arbitration. CPKC will produce Mr. Bernava's agreement.

The entire email chain from Cory Wogrinc's April 12, 2024 email to Lauren McGinley

CPKC

13. CPKC advised³ as follows on this request:

Bullet 3 - Regarding the Union's third requested document, the Company clarified on April 28, 2025, that while the Company located additional responses on the email chain referenced by the Union, there is nothing which "contain[s] an answer to Mr. Wogrinc's question." The Company went on to note however, that, as the Union is aware, Mr. Duncan continued under his contract until approximately October 1, 2024 and Mr. Korzenoski until May 4, 2024, following which he began working under a new contract in January 2025.

IBEW

14. The IBEW had questions⁴ about the completeness of the identified email chain:

The Union has received some further emails in this email chain from CPKC. The Union will provide substantive submissions on this document in its Arbitration Brief and at the hearing.

However, the Union has not been provided with any assurance or confirmation that CPKC has provided the entirety of the email chain. In Rene Araya's email dated March 28, 2025, it was only stated that "the Company has located additional responses on the email chain referenced by the Union". The Union does not know whether further or other responses on the email chain exist and remain outstanding.

Decision

15. The arbitrator appreciates the challenges all parties face in the digital document era. The courts regularly grapple with e-discovery related issues⁵. Nonetheless, given CPKC's size and sophistication, digital production should not raise any major issues. Parties regularly must produce an entire email chain, rather than just extracts, as part of the civil litigation and arbitration process.

16. The arbitrator orders CPKC to confirm to the IBEW when it has done a complete search and has produced the entire email chain, including any tangents or branches

³ CPKC May 2 response, page 2.

⁴ IBEW May 5 Reply, page 4.

⁵ See, for example, [Gowing Contractors Ltd v. Walsh Construction Company Canada, 2023 ONSC 4407](#).

created, for example, when someone did not respond to the most recent email or changed the subject line.

Particulars

17. At CPKC's request, the arbitrator held another case management conference on May 12, 2025 given the parties' differing positions⁶. During that CMC, the IBEW advised that it required particulars since CPKC had not agreed to provide a stipulation confirming the activities of the employees in question⁷. The IBEW summarized during the CMC the particulars it required.

18. CPKC provided some information orally during the CMC and referenced various documents it had provided.

19. In AH900-P, the arbitrator ordered:

30. CPKC may redact personal information such as employees' home addresses, but terms and conditions such as salary remain arguably relevant given the parties' allegations. **For greater certainty, the arbitrator's order includes providing particulars about the work the FTCEs perform, why CPKC hired them and the date/duration of the contracts.**

(Emphasis added)

CPKC

20. In its May 2, 2025 response CPKC noted that it had provided all the required documentation:

...In its April 17, 2025, submission, the Union indicated the Company failed to produce same yet has not particularized what it feels the Company did not provide.

The Company maintains all documentation has been provided and/or the IBEW has the information or access to the information, in the form of bulletins, and the contracts which contain date/duration of the contracts...

IBEW

21. The IBEW emphasized that documents remain distinct from particulars:

As a sophisticated, unionized employer, CPKC should know what you meant by "particulars" in your February 28, 2025 award. "Particulars" does not refer to documents; it refers to the specifics of a fact situation or event expected to be addressed in evidence: see, for example, *Stone Lodge v. U.F.C.W., Local 175*, 1998 CarswellOnt 5634 at para 11. No doubt CPKC would object if the Union

⁶ The IBEW maintained there was no need for a further CMC.

⁷ See paragraph 17 in AH900-P.

were to respond to a request for particulars by referring CPKC to a bundle of correspondences and contracts.

Decision

22. The IBEW satisfied the arbitrator that CPKC has not provided particulars despite the order to do so in AH900-P.

23. The *Code*⁸ explicitly distinguishes between particulars (information) and documents:

16 **The Board**⁹ has, in relation to any proceeding before it, **power**

...

(f.1) **to compel**, at any stage of a proceeding, **any person to provide information or produce the documents and things** that may be relevant to a matter before it, after providing the parties the opportunity to make representations;

(Emphasis added)

24. Particulars differ from documents. Parties often jointly request and share particulars as well as documents to ensure a hearing proceeds efficiently. As noted recently in AH899¹⁰, the railway model of arbitration requires this crucial collaboration to function as intended:

38. The success of the railway model, which can hear multiple cases in a single day, relies entirely on the parties' cooperative effort to put the facts of each case into the Record. The later arbitration deals almost exclusively with legal argument, though exceptionally witnesses can testify.

25. In *OSSTF*¹¹, the arbitrator commented how the parties in that case had worked collaboratively both for document production and particulars:

12. Allegations are not facts. But the parties' allegations help identify the potential issues the arbitrator may have to resolve. Prior to this arbitration

⁸ [Canada Labour Code, RSC 1985, c L-2](#)

⁹ *Code* s.60(1)(a) grants this same power to labour arbitrators to compel production.

¹⁰ [International Brotherhood of Electrical Workers, System Council No. 11 v Canadian National Railway Company, 2025 CanLII 27020](#)

¹¹ [Ontario Secondary School Teachers' Federation v Ontario Secondary School Teachers' Federation Staff Association, 2024 CanLII 11434](#). See paragraphs 17-19, 53.

commencing on October 27, 2022, counsel for both parties worked collaboratively by exchanging documents and particulars.

26. The arbitrator orders CPKC to provide the particulars previously ordered in AH900-P. CPKC's oral comments during the CMC may have clarified some of the information required which can now be particularized in writing.

Does a legal privilege attach to the email chain?

27. CPKC has alleged that a legal privilege applied to the Chain. It has not raised any other privileges¹².

IBEW

28. In line with the procedure other cases have followed, the IBEW asked the arbitrator to resolve the privilege question¹³:

The process outlined in *Puc Services* requires that, should the Union dispute any of the Employer's claims to privilege, the Employer would provide the disputed documents to the arbitrator for assessment.

In this case, CPKC has not provided accurate descriptions of documents for which it claims privilege, including information as to both the date and the individuals involved with regard to the privilege claims.

Given that the Union has raised doubts as to the veracity of CPKC's claims of privilege and has provided detailed submissions in support of its position, it is the respectful submission of the Union that CPKC must provide the disputed documents to you so that you may assess the claims of privilege.

CPKC

29. CPKC agreed on the process through which the arbitrator would resolve the disagreement over privilege:

Contrary to the Union's submissions, CPKC did correctly state the year in which the email exchanges occurred and provided an accurate description of the contents of the correspondence. In good faith, the Company confirms that the exchanges for which it claims privilege contain legal advice regarding fixed term contracts, including but not limited to Mr. Bernava's March 2024 contract renewal/fixed term contract. Further to the decision of Arbitrator Albertyn in *Puc Services*, the exchange in dispute has, with this submission, been sent to the Arbitrator under separate copy.

¹² See, as an example, the Wigmore Test examined in [Ontario Secondary School Teachers' Federation v Ontario Secondary School Teachers' Federation Staff Association, 2024 CanLII 11434](#).

¹³ IBEW Reply, April 17, 2025.

Applicable legal principles

30. *Solosky*¹⁴ sets out the test for legal privilege that decision makers must apply:

...privilege can only be claimed document by document, with each document being required to meet the criteria for the privilege—(i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties...

31. Merely copying an in-house lawyer on emails does not make admissible business records privileged.

32. The tribunal in *Prince Edward Island (Transportation and Infrastructure) (Re)*¹⁵, commented on situations involving in house counsel who often exercise multiple roles inside an organization:

[78] When the lawyer involved is a government lawyer, we must consider the remarks of the Supreme Court of Canada in *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31 (CanLII), [2004] 1 SCR 809, at paragraph 20. **Because in-house lawyers may be called upon to give policy or business advice, which is not legal advice, further evidence may be needed about the circumstances in which the legal advice arose:**

Owing to the nature of the work of in-house counsel, often having both legal and non-legal responsibilities, each situation must be assessed on a case-by-case basis to determine if the circumstances were such that the privilege arose. Whether or not the privilege will attach depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered.

(Emphasis added)

33. In *IBEW Construction Council of Ontario v Johnson Controls BE Ltd.*¹⁶ (*Johnson Controls*), the OLRB recently applied these principles. *Johnson Controls* noted the importance of solicitor/client privilege, but added that any analysis had to focus on whether the documents involved “a communication between solicitor and client, which entails the seeking or giving of legal advice, and which is intended to be confidential by the parties”:

¹⁴ [Solosky v. The Queen, 1979 CanLII 9 \(SCC\)](#) at page 837.

¹⁵ [2022 CanLII 83334 \(PE IPC\)](#).

¹⁶ [2025 CanLII 31618 \(ON LRB\)](#).

11. Solicitor and client privilege exists between a lawyer, acting in the capacity of a lawyer, and their client. It is an important principle in the functioning of our adversarial system of litigation, and any exceptions to the privilege must be interpreted narrowly. The privilege is one of substantive law and not procedure; its purpose is to ensure that both legal counsel and his or her client can maintain the confidentiality of their discussions, so as to encourage an open dialogue with counsel concerning the factual and legal circumstances in issue.

12. **Whether solicitor and client privilege exists to protect the disputed documents from disclosure in these proceedings must be assessed not solely on the basis of the lawyer and client relationship, a relationship that can entail the giving of non-legal advice, but rather on the basis of the documents themselves and whether they meet the criteria for solicitor and client privilege, namely, was it a communication between solicitor and client, which entails the seeking or giving of legal advice, and which is intended to be confidential by the parties; see, R. v. Solosky (1979), 1979 CanLII 9 (SCC), [1980] 1 SCR 821.**

(Emphasis added)

34. *Johnson Controls* also noted who had the burden to prove a legal privilege:

15. The onus rests with the party claiming the privilege to establish all elements of the privilege on a balance of probability. Finally, any conflict or ambiguity must be resolved in favour of finding solicitor and client privilege.

Documents in the Chain

35. As noted, the parties agreed on the process the arbitrator should follow¹⁷. To this end, CPKC provided the Chain only to the arbitrator, with the IBEW's consent. The Chain contained 6 emails:

- January 9, 2024: Email from Kevin Ehnes, S&C Director – Ops West to 3 others. It does not appear a lawyer was copied
- January 9, 2024: Email from Lauren McGinley, Labour Relations, to CPKC legal counsel asking for legal advice, seemingly about Mr. Ehnes earlier January 9, 2024 email
- January 10, 2024: Email from in house counsel Trisha Gain responding to the January 9, 2024 request for legal advice
- March 18, 2024: Email from Kevin Ehnes to Rene Araya, Labour Relations, with cc to CPKC legal counsel, in which contractual legal advice is requested

¹⁷ See, as just one example, [Puc Services Inc. v Power Workers' Union, 2023 CanLII 49818](#).

- March 19, 2024: Email from Rene Araya responding to Mr. Ehnes questions; legal counsel is copied
- March 19, 2024: Email from Jaden J. Ehman, Asst. Director S&C Operations BC East responded to Mr. Araya and others, with cc to legal counsel.

36. The arbitrator wrote twice to CPKC, with a copy to IBEW each time, asking whether CPKC had provided the full Chain. The Chain originally received did not fully match CPKC's description. In response to the first email, CPKC advised it had provided the full Chain. However, after the second email, CPKC added Ms. Gain's January 10, 2024 email which contained legal advice.

37. All parties have the duty to follow proper e-discovery practices in this digital age. It is up to a party seeking to protect its legal privilege to meet the burden imposed on it. A failure to do so may result in a type of waiver of that privilege.

Decision

38. There are evidently many nuances to the question of solicitor/client privilege, given the challenging role in which internal legal counsel find themselves when compared to those working at outside law firms. The parties consented to the process for this case but retain the right to file full legal submissions in future cases addressing those myriad nuances.

39. The Chain CPKC provided to the arbitrator satisfied the test for legal privilege. Read as a whole, the Chain involved individuals discussing an issue and asking for legal advice. In house counsel participated and provided legal advice as part of the Chain.

40. The scenario did not differ significantly from one where a group of trade union or employer representatives requested legal advice during an email exchange with outside counsel.

DISPOSITION

41. For the foregoing reasons, the arbitrator has accepted parts of the IBEW's motion:

1. CPKC will produce Mr. Bernava's March 22, 2025 contract.
2. For Cory Wogrinc's April 12, 2024 email, CPKC will review and then confirm to the IBEW that it has done a complete search and has produced the entire email chain, including any tangents or branches created when someone did not respond to the most recent email or changed the subject line.
3. Given the clear difference between particulars and documents under the *Code*, CPKC will produce the particulars originally ordered in AH900-P.
4. A legal privilege excludes the Chain from the production order in AH900-P.

SIGNED at Ottawa this 12th day of May 2025.



Graham J. Clarke
Arbitrator