SHP744

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

BETWEEN:

UNIFOR LOCAL 101R

(Unifor)

-and-

CANADIAN PACIFIC KANSAS CITY RAILWAY

(CPKC)

Dismissal of Rail Car Mechanic R. Arjoon

Arbitrator: Graham J. Clarke
Date: June 24, 2024

Appearances:

Unifor:
J. Kennedy: Unifor National Rail Director
G. Imhoff: Regional Vice President
R. Arjoon: Grievor

CPKC:
S. Oliver: Manager Labour Relations
P. Sheemar: Manager Labour Relations
J. Screen: Specialist – Engineering Labour Relations

Arbitration held via videoconference on June 18, 2024.

Award

BACKGROUND

1. On July 12, 2019, CPKC dismissed Mr. Arjoon, a Rail Car Mechanic, for a positive oral fluid drug test[1]. Mr. Arjoon joined CPKC on August 31, 1987 and had a couple of years to go before obtaining his full pension.

2. The parties advised that nothing turned on the 5-year delay between the 2019 dismissal and the hearing of this matter.

3. CPKC argued that the drug test results provided just cause for termination. Because the parties' negotiated arbitration procedure did not involve exchanging their Briefs in advance, CPKC also proactively objected to certain arguments Unifor might raise if they went beyond the Joint Statement of Issue (JSI).

4. Unifor emphasized that Mr. Arjoon's duties as a trackmobile operator fell outside Transport Canada's Canadian Railway Operating Rules[2] (CROR) and the Rule G contained therein. The parties agreed that Mr. Arjoon held a safety sensitive position. In the JSI, Unifor did not contest that CPKC had grounds to impose discipline but asked the arbitrator to consider several mitigating factors.

5. Some of those suggested mitigating factors, such as whether CPKC had grounds to test Mr. Arjoon and whether the latter suffered from a disability, fell within CPKC's proactive objection.

6. For the reasons which follow, the arbitrator has decided not to intervene and modify the penalty CPKC imposed. For decades, railway arbitrators have confirmed that the presumptive penalty of dismissal applies to any employee who works while impaired. This case falls squarely within those longstanding precedents.

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[1] Given the longstanding jurisprudence on urine drug tests, the arbitrator will examine this case as one involving a safety sensitive employee who had a positive oral fluid drug test: AH731 at paragraphs 56-57.
[2] Canadian Railway Operating Rules

CHRONOLOGY

7. **August 31, 1987**: CPKC hired Mr. Arjoon.

8. **April 1, 2019**: Mr. Arjoon, who had just returned that day from a leave of absence, was operating a trackmobile when a railcar derailed at the Weston Shops in Winnipeg. CPKC had Mr. Arjoon drug tested. This resulted in a positive oral fluid test above the 10 ng/ml cutoff. Before CPKC could conduct its investigation under the collective agreement (CBA), Mr. Arjoon entered a sixty-day (60) residential treatment program for substance abuse.

9. **June 21, 2019**: Mr. Arjoon completed his residential program.

10. **June 24, 2019**: CPKC held its mandatory investigation[3] regarding an alleged violation of its drug policies. Mr. Arjoon's statement included these particulars:

> QA20: Mr. Arjoon explained the positive drug test came from his doctor's suggestion, due to reasons which do not need to be set out in this decision, to self-medicate with liquid cannabis tincture.
>
> QA 35 and 36: Mr. Arjoon advised he intended to share the medical issue upon his return to work but did not want to do so with a female supervisor:
>
> > 35. Had you notified any of your immediate supervisors or managers of your condition prior to the commencement of your shift that day?
> >
> > A: When I reported for duty on the morning of April 1, 2019, the first thing I wanted to do was speak to my manager regarding my medical circumstance regarding the instruction as I was given by my doctor and regarding changing my safety sensitive and reporting to OHS as per the policy.
> >
> > 36. Was your direct manager on the property that day?
> >
> > A: I approached supervisor Lisa Kennedy initially about the job abolishments and I asked to speak to production manager Marc Philippot about some medical issues. She informed me that he was on vacation and would not return until April 3, 2019. I now had a dilemma. Do I discuss uncomfortable personal, medical issues with my female supervisor? I decided to wait until Marc's return on April 3, 2019

[3] CPKC Documents, Tab 5.

Q44: Mr. Arjoon suggested a doctor gave him a permit rather than a prescription which he believed relieved him of the need to report his cannabis use to CPKC:

> 44. Were you medically assessed to determine whether or not you would be allowed to be in possession of prescribed medications without a legally, medically obtained prescription (illegal drug) as per section 3.1.2 of policy 203.1?
>
> A: Yes, I was medically assessed and issued a permit on March 8, 2019. But a permit is not a prescription. A permit only allows me to acquire medicinal cannabis. If I would have had a prescription on that date, I would have reported it immediately as per policy 203.

QA45: Mr. Arjoon also suggested CPKC's drug policy was too complex for a layman:

> 45. If you were allowed to use cannabis for medicinal purposes, what would the procedure be for informing CP of the use of these drugs?
>
> A: According to the policy, if I would be obtaining a prescription for use while safety sensitive, I would have to immediately report it to my supervisor. As policy 203.1 is convoluted, complicated and has a lot of grey areas, and is hard to understand in laymen's terms, my intention was to discuss with my manager Marc Philippot so I could govern myself accordingly.

QA51: Mr. Arjoon did not allege he had an addiction but only that he might have had one if he had not obtained treatment (extract):

> I just finished a CP approved 60 day residential treatment for drug and alcohol abuse. I have done a total and honest inventory of my life. I have no doubt that without intervention that I would be in addiction. I am grateful to CP for acknowledging my illness and for approving my treatment.

11. **July 12, 2019**: CPKC's Form 104[4] terminated Mr. Arjoon for the following reasons:

> Following the fair and impartial investigation conducted June 24th, 2019, you are hereby advised that you have been DISMISSED from Company service for the following reasons:
>
> Your positive post incident oral fluid drug test and positive urine drug test results from April 1, 2019 following an on track incident- specifically the derailment of

[4] CPKC Documents, Tab 1.

SOO119040 at 13:20 on Track 20 at Weston. A violation of CP Policy# HR 203.1 Alcohol and Drug Procedures (Canada), including CROR - Rule G[5].

12. **August 9, 2019**: Unifor grieved[6] Mr. Arjoon's termination and raised various positions including (extracts):

> …
>
> Mr. Arjoon has returned from his Leave of Absence on April 1, 2019 and felt fit for duty. When he reported for duty on the morning of April 1, 2019, the first thing he wanted to do was speak to his manager Marc Philippot regarding his medical circumstance regarding the instruction as he was given by his doctor. But Mr. Philippot was on vacation and would not return until April 3, 2019. Mr. Arjoon decided to wait until Mr. Philippot return on April 3, 2019.
>
> The Union contend that Mr. Arjoon should have informed the company on that morning. The Union does not dispute that Mr. Arjoon had an obligation to advise the Company concerning his medical situation. Rather we submit that Mr. Arjoon did not do this intentionally, he did not premeditate and plan his misconduct. Mr. Arjoon had the intention to speak to his manager when he returned on April 3, 2019.
>
> …
>
> The Canadian Human Rights Act requires individualized or personalized accommodation measures. Policies that result in the employee's automatic loss of employment, reassignment, or that impose inflexible reinstatement conditions without regard for personal circumstances are unlikely to meet this requirement. Accommodation should include the necessary support to permit the employee to undergo treatment or a rehabilitation program, and consideration of sanctions less severe than dismissal.

13. **May 17, 2024**: Unifor provided the arbitrator with a copy of the parties' JSI[7]. That JSI summarized the issues from Unifor's perspective:

> The Union maintains the Company's decision to terminate Mr. Arjoon was overly aggressive.
>
> In consideration of Mr. Arjoon's Company Service (32 years), the Union requests to the Arbitrator that Mr. Arjoon be given a chance of reinstatement with the Company after successful completion of drug & alcohol screening. In addition, the Union requests a review of the Grievor's past Company supported

[5] Unifor advised at paragraph 5 of its Brief that the parties later agreed Rule G did not apply to Mr. Arjoon.
[6] CPKC Documents, Tab 2.
[7] CPKC Documents, Tab 2.

substance abuse rehabilitation be considered when deciding on the Grievor's reinstatement.

It shall be noted, Mr. Arjoon participated in a 12-step program and attended meetings regularly to try to maintain his sobriety after completing substance abuse rehabilitation. At the time of incident, the Grievor possessed a medical marijuana license and had received distressing information from his medical doctor relating to a possible illness, which resulted in the Grievor developing severe anxiety.

ANALYSIS AND DECISION

14. The facts in the above Chronology and the parties' pleadings set out several questions the arbitrator must answer.

What type of case is this?

15. In AH734[8], the arbitrator noted the need to categorize a case from a legal perspective (Footnotes omitted):

> 11. The arbitrator must first characterize this case properly.
>
> 12. Mr. Moore's situation differs from those where an employee's urine tested non-negative, but the oral swab test came back negative. In those types of cases, arbitrators have generally concluded that the evidence failed to establish an employee's impairment at work.
>
> 13. Neither is this a case where an employee suffered from a disability, an allegation which mandates a duty to accommodate analysis.
>
> 14. Instead, this case falls within the category of cases where testing demonstrated that an employee worked while impaired. Railway arbitrators have often had to consider cases where employees worked in safety sensitive positions when under the influence of alcohol or narcotics.

16. In its grievance, Unifor did reference in passing the *Canadian Human Rights Act* and the duty to accommodate. But the JSI did not allege that Mr. Arjoon suffered from a disability. Taking a residential program after a positive drug test does not demonstrate that Mr. Arjoon suffered from a disability.

17. If Unifor wanted to argue that Mr. Arjoon had a disability that required accommodation, then it had the legal burden to prove *prima facie* discrimination. This

[8] *Teamsters Canada Rail Conference v Canadian National Railway Company*, 2022 CanLII 5833

would include clear medical evidence. In AH793[9], the arbitrator noted (Footnotes omitted):

> 46. The situation becomes more complex for cases which go beyond the collective agreement and oblige the arbitrator to consider outside legislation like the CHRA. In AH663, which involved a locomotive engineer's cocaine use, the parties "agreed to disagree" whether it was a human rights case. The arbitrator held 4 days of hearings and considered multiple supplementary written submissions from the parties before deciding that prima facie discrimination did not exist due to the absence of a disability.
>
> 47. As the arbitrator's summary of the facts above demonstrated, Mr. Weseen's case involves a disability. This imposes on the TCRC the burden to show prima facie discrimination. If it met this burden, then CN would have the burden of proof to demonstrate that it had reached the point of undue hardship.

18. Unifor did not plead Mr. Arjoon suffered from a disability. To be fair to Mr. Kennedy, he emphasized his comments in this area went only to the issue of reducing the penalty (mitigating factors), *infra*.

19. Nonetheless, the arbitrator must apply a disciplinary analysis to this case.

Did Unifor expand the issues in this arbitration?

20. As noted, CPKC raised proactive objections to items it suspected Unifor might raise in its Brief. For example[10], Unifor alleged that the minor nature of the accident did not justify CPKC's drug testing. Unifor again emphasized that it referred to the accident for the purposes only of mitigation of the penalty.

21. Despite Mr. Kennedy's able argument, adding the issue of whether CPKC had grounds to test Mr. Arjoon[11] constituted a significant expansion of the issues placed before the arbitrator. Neither the original grievance nor the JSI contested the original drug testing or the results.

22. Given that most parties plead railway arbitrations in an hour or two, parties must disclose the key issues in advance. In the instant case, the parties' agreed-upon

[9] See also AH663 for another case examining whether *prima facie* discrimination existed.
[10] Unifor Brief, Paragraphs 16-18.
[11] AH732 and AH807, like other Canadian arbitral awards, examine whether an employer had proper grounds to oblige an employee to take a drug test.

procedure had them exchange their briefs at the start of the hearing. This reflected the traditional process followed by CROA. Many decisions have confirmed that a party, however innocently, cannot add new issues in its Brief and take the other party by surprise.

23. In AH809-M[12], the arbitrator concluded that a new argument had been added in the Brief and fell outside the issues submitted to arbitration (Footnotes omitted)[13]:

> 35. While an arbitrator in a regular labour arbitration might remedy these challenges through expensive adjournments, the current parties have required an expedited process. They do not want an arbitrator to decide a single case after multiple hearing days sometimes over a number of years. Instead, their agreement often requires an arbitrator to hear multiple cases in a single day.
>
> 36. To get these benefits, the parties have accepted certain important obligations, such as clearly identifying the issues before the arbitrator.
>
> …
>
> 39. For similar reasons to those cite above in AH825, the TCRC first raised this argument in its brief. There may be vague references to Mr. Cole's email, but the arbitrator can find nothing in the grievance steps or the JSI alleging that an agreement existed and that the TCRC filed a grievance to enforce that agreement.
>
> 40. Even if the arbitrator were wrong on that essential procedural point which goes to the heart of the railway model's incredible efficiency, a review of the facts does not disclose a clear agreement. Beyond the interpretation challenges which a single email can present, the parties continued to contest the numbers even after Mr. Cole's email.
>
> 41. The arbitrator appreciates the challenges for both parties in identifying the legal issues early in the process. But that identification is at the heart of this arbitration regime since the late addition of issues can prevent an arbitrator from running a procedurally fair hearing. It is for that reason that the railway model has, for decades, imposed harsh consequences for actions, however innocent, which prejudice the process.

24. Arguments on the mitigation of the penalty do not provide a gateway to add new issues to an arbitration. To accept those arguments, the arbitrator would have to conclude that CPKC did not have any grounds to test Mr. Arjoon. That would result in the arbitrator

[12] *Teamsters Canada Rail Conference v Canadian Pacific Kansas City Railway*, 2024 CanLII 18523
[13] See also AH689 and AH825.

doing indirectly what could not be done directly under the parties' rules for this expedited railway arbitration.

Should the arbitrator modify the disciplinary penalty imposed?

25. In the JSI, Unifor asked the arbitrator to give Mr. Arjoon another chance at CPKC. The *Canada Labour Code*[14] at section 60(2) provides the arbitrator with the power to modify a disciplinary penalty unless both parties in their CBA have agreed on a specific penalty:

> 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)

26. The CBA does not contain a specific penalty for the infraction in this case. The parties therefore can refer to various factors when commenting on the penalty. An employer may refer to an employee's discipline record. A trade union might highlight an employee's long service.

27. Unifor took issue with CPKC's reference to Mr. Arjoon's disciplinary history since he was dismissed solely for the positive drug test. The arbitrator did have some difficulty with CPKC raising three previous agreements which resolved totally unrelated events involving Mr. Arjoon[15]. Those 3 agreements contain this type of language:

> **This Agreement** is without prejudice as to positions that may be taken by CP or the Union in similar circumstances involving other employees and **is not to be used in any way in future grievances or arbitrations** or as a precedent in cases involving other employees. It is expressly understood that this Agreement is based upon the unique facts of his situation.
>
> (Emphasis added)

[14] *Canada Labour Code*, RSC 1985, c L-2
[15] CPKC Documents, Tab 4.

28. While the parties can agree to use such agreements in future arbitrations[16], the agreements CPKC produced seemingly say the opposite. The discipline history CPKC put forward also references some of these agreements[17].

29. Moreover, the use of these agreements seems to run counter to the parties' Appendix 15 in the CBA[18] which reads in part:

> During recent discussions at the National negotiations the Union expressed concerns that the Company sometimes includes or references an employee's discipline record created by VIP in its' submission. In situations where discipline has been reduced without precedent or prejudice through the grievance procedure, VIP records both the initial assessment and the reduction as separate entries. **The Union has requested that when the Company chooses to include an employee's discipline record in its' arbitration submission that it be edited to show only the discipline result as modified following a grievance resolve. This will serve to confirm that the Company is agreeable to the Union's request.**
>
> (Emphasis added)

30. The arbitrator has not considered those agreements given their clear wording and the parties' CBA agreement on how discipline records should be presented at arbitration. Nonetheless, the arbitrator has considered Mr. Arjoon's proper disciplinary record and the suspensions it contains.

31. Should the arbitrator modify the penalty given Mr. Arjoon's long service?

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:

> 45. Both parties acknowledge the seriousness of someone working in a safety sensitive position while impaired. As the arbitrator noted in AH734, the

[16] See AH736 at paragraph 136.
[17] CPKC Documents, Tab 3.
[18] CBA January 1, 2019 – December 31, 2022, page 203/320

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[19]. 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[20]. Despite that assertion, he then stated he intended to tell his absent supervisor upon the latter's return but not the female supervisor

[19] See also CROA 5022, AH691 and CROA 4805.
[20] QA44.

on duty on the day of the incident[21]. Mr. Arjoon further suggested the policy was difficult for a layperson to understand[22].

36. Given the gravity of working when impaired, a lack of candour and Mr. Arjoon's disciplinary record, his long service alone did not persuade the arbitrator to modify the dismissal CPKC imposed.

DISPOSITION

37. For the foregoing reasons, the arbitrator dismisses the grievance.

SIGNED at Ottawa this 24th day of June 2024.

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Graham J. Clarke
Arbitrator

[21] QA35-36.
[22] QA45.