AH810

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

BETWEEN:

Teamsters Canada Rail Conference

(TCRC)

-and-

Canadian Pacific Railway Company

(CP)

Dismissal of a Locomotive Engineer

Arbitrator: Graham J. Clarke
Date: February 9, 2023

Appearances:

TCRC:
R. Church: Legal Counsel
H. Makoski: Vice-General Chairman, LE West
B. Plant: Local Chair

CP:
L. McGinley: Manager Labour Relations, Calgary, AB
T. Gain: Legal Counsel for CP
L. Trueman: Director Global Health Services & DM for CP
S. Kumasi: Manager Health Services Programs for CP

Arbitration held via videoconference on January 25, 2023.

TABLE OF CONTENTS

Award

BACKGROUND

1. On March 22, 2022, the parties signed a Memorandum of Settlement (Appendix 2) (MOS) revising the arbitration process in Article 41 of their collective agreement. The arbitrator agreed to hear 4 Ad Hoc cases in 2022 and a further 8 in 2023 on the condition that the parties would plead no more than 2 cases per day.

2. The TCRC requested that this award be anonymized given the sensitive medical information on file. CP did not object. The arbitrator will accordingly only refer to the "grievor" in these reasons.

3. CP terminated the grievor, who worked as a locomotive engineer (LE), after a positive hair follicle test authorized under a Relapse Prevention Agreement. CP alleged that it had just cause to terminate the grievor in these circumstances. CP submitted an expert report which concluded that the positive test could not have come from, despite the grievor's speculation, a Hemp Cream product[1] made by the Body Shop.

4. The TCRC argued no just cause existed given the grievor's explanation of the result and other negative substance tests. It also argued that hair follicle testing was unreliable and subject to false positives. In the alternative, it argued that CP had failed to respect its obligations under the Relapse Prevention Agreement and the grievor should be reinstated on conditions.

5. For the reasons which follow, the arbitrator has concluded that CP met its burden to demonstrate that the grievor tested positive for purposes of the Relapse Preventing Agreement. However, CP led no evidence about the steps that agreement required it to take following a relapse. The arbitrator accordingly will reinstate the grievor with conditions but without compensation.

[1] TCRC Exhibits; Tab 4

CHRONOLOGY OF FACTS

6. The arbitrator has considered the entire Record and merely highlights some of the key facts below for ease of reference.

7. **September 7, 2010**: CP hired the grievor.

8. **July 25, 2019**: The grievor agreed to a Relapse Prevention Agreement (RPA)[2]. Some of the terms included:

> The medical reports and documents regarding your [Redacted] have been reviewed. This Relapse Prevention Agreement is an important component to assist you in maintaining your stable and abstinent recovery. It is also required to support your ongoing fitness for work in a Safety Critical Position, Safety Sensitive Position. This Relapse Prevention Agreement is for a period of **two years**. You are required to review and acknowledge that you understand and agree to the terms of this Relapse Prevention Agreement.
>
> (Bold in original)

9. The parties redacted most of the RPA's terms except for the following regarding a Biological Testing Protocol:

> Participate in a Biological Testing Protocol as outlined in Appendix One to this Agreement including reading and acknowledging the participant information when Monitoring with EtG/EtS included with this agreement.

10. The grievor acknowledged his RPA obligations:

> I [Name redacted by arbitrator] confirm that I have received the terms outlined in this Relapse Prevention Agreement and associated Biological Testing Protocol. I acknowledge that I have read and understood my responsibilities to support my stable, abstinent recovery and my ongoing fitness to work.

11. The RPA contained a summary of the Biological Testing Protocol which included hair testing:

> As part of your biological testing protocol, you will undergo urine and/or hair testing for alcohol and drugs. Please review the following information including

[2] TCRC Exhibits; Tab 3 (Both parties provided only a redacted version of the RPA)

the participant information when monitoring with EtG/EtS as this will be part of your testing.

…

A positive test result reported to Health Services, will prompt a review of your fitness to work in a Safety Critical or Safety Sensitive Position and will result in an updated Fitness to Work Assessment.

(Emphasis added)

12. **October 2020**: The grievor had tested negative under RPA testing[3].

13. **December 11, 2020**: Following an alleged rules violation, the grievor had a negative post-incident test[4].

14. **January 19, 2021**: The grievor underwent biological monitoring testing pursuant to the RPA. His initial test result was "Positive for CarboxyTHC. Quantitative level = 1.9 pg/10mg"[5]. A testing of a second sample later took place with this result: "Positive for CarboxyTHC. Quantitative level = 1.8 pg/10 mg"[6].

15. **February 16, 2021**: CP conducted its investigation interview which included these QA extracts:

> 28. According to Appendix C the Non-DOT Drug Test Results taken on January 19, 2021 and submitted to the Company on January 28, 2021 it states that the Biological Monitoring test produced from a Chest Hair of yours provided a quantitative level of 1.9 pg/10mg for Carboxy THC. Is this Correct?
>
> A. Yes
>
> 29. In Appendix C under the Psychemedics Alcohol Reference Ranges the confirmation cutoff level for Carboxy THC is 1 pg/10 mg. Is this correct?
>
> A. According to this document
>
> …

[3] TCRC Exhibits; Tab 28
[4] TCRC Exhibits; Tab 10. See also TCRC Brief at paragraphs 50-51.
[5] TCRC Exhibits; Tab 5
[6] TCRC Exhibits; Tab 6

31. According to the Interview performed by Dr. Iris Greendwald as listed in Appendix C you stated that there had been no marijuana use since mid 2018. That you had a recent PIN urine and salvia test that were negative. You had a hair test done of chest hair 3 months ago that was also negative. Is this correct?

A. That is correct

…

33. Furthermore in Appendix C it states that you use hemp cream from the Body Shop on your foot. Is this correct

A. Yes

34. Does the hemp cream from the Body Shop that you use contain Carboxy THC?

A. I don't know, but the cream does contain Cannabis Sativa Seed Oil but I am not sure if that contains THC

35. When did you start using the Body Shop hemp cream?

A. September 2020

36. How often do you use the hemp cream?

A. Once or twice a week.

…

41. [Name redacted by arbitrator] as you have stated in Appendix C that you have not consumed marijuana since mid 2018., can you please explain why this Biological monitoring testing confirmed that there was a positive carboxy THC in your donor samples?

A. I cannot explain it. To my knowledge, I did not ingest or use any cannabis products except for topical application of hemp cream.

…

46. Appendix B states A positive test result reported to Health Services, will prompt a review of your fitness to work in a Safety Critical or Safety Sensitive Position and will result in an updated Fitness to Work Assessment. Is this correct?

A. Yes

16. **March 4, 2021**: CP dismissed the grievor via a Form 104[7]:

> Please be advised that you have been dismissed from company service for the following reason(s):
>
> For your violation of the CP Alcohol and Drug Policy and your Relapse Prevention Agreement as evidenced by your positive test result for biological monitoring on January 19, 2021.

17. **April 9, 2021**: The TCRC grieved the termination at Step 1[8] and expressly referred CP to the arbitration award AH717 and the commentary therein about false positives in hair follicle testing.

18. **June 8, 2021**: CP responded to the grievance[9] and confirmed the termination:

> After thorough review of the grievance at hand and all of the information relevant to [the grievor's] discipline, the company has proven and confirmed that [the grievor] was culpable for his violation of the CP Alcohol and Drug Policy and his Relapse Prevention Agreement.
>
> In all, the grievance has not raised any considerations that give the Company reason to disturb the discipline assessed. The Company's position continues to be that the discipline assessed was just, appropriate and warranted in all the circumstances. Based on the foregoing, the grievance is respectfully declined.

19. **August 6, 2021**: The TCRC filed a Step 2 grievance[10] contesting the termination. It again referred to AH717 and its concerns about the reliability of hair testing results.

20. **October 20, 2021**: CP's response maintained its position on the grievor's termination:

> The Union argues the hair follicle test conducted is unreliable and therefore the company is not free to dismiss the grievor. The Company cannot agree with this statement and maintains the hair follicle testing holds substantial evidence and that a positive hair follicle test is a violation of the Relapse Prevention Agreement.

[7] CP Exhibits; Tab 1
[8] TCRC Exhibits; Tab 13
[9] TCRC Exhibits; Tab 14
[10] TCRC Exhibits; Tab 15

21. **January 6, 2023**: The parties signed a Joint Statement of Issue (JSI) which allowed this matter to proceed to arbitration under the terms of the March 22, 2022 MOS. The MOS requires a JSI as a condition precedent for access to this supplementary arbitration process.

ANALYSIS AND DECISION

22. Neither party pleaded this case as one involving the duty to accommodate[11] but rather as a disciplinary matter.

23. This case raises two key issues. First, did the grievor violate the RPA? Intertwined with this issue is how the arbitrator should interpret the "evidence" about hair follicle testing. Second, if the arbitrator determines that the grievor breached the RPA, did CP fail to respect its own RPA obligations?

Hair follicle testing evidence

24. These sophisticated parties have significant experience with expert evidence[12].

25. The parties exchanged their initial Briefs on January 19, 2023 for this January 25, 2023 arbitration. CP included in its Brief an expert report dated January 16, 2023 from Dr. Melissa Snider-Adler[13]. That report addressed, among other things, the arbitration award AH717[14] and comments attributed therein to her. In its Step 1 and Step 2 grievances, the TCRC had raised AH717 to support its concerns about false positives in hair follicle testing.

26. While the arbitrator may be wrong, it does not appear that the TCRC had any knowledge of this January 16, 2023 expert report, or the request for it, prior to receiving CP's Brief. The TCRC's January 19, 2023 Brief made no reference to it.

27. In AH793[15], the arbitrator raised concerns about the late production of medical evidence:

> 52. In the Introduction to this award, the arbitrator expressed concern about the disclosure in this case. The expedited railway model of arbitration, which,

[11] TCRC Exhibits; Tab 1: JSI. CP's case law suggested other employers apply a human rights analysis, *infra*.
[12] See, as just one example, AH663: Teamsters Canada Rail Conference v Canadian Pacific Railway, 2019 CanLII 89682.
[13] CP Exhibits; Tab 14. The report does not indicate when CP asked for this opinion.
[14] http://arbitrations.netfirms.com/adhoc/AH717.pdf
[15] Teamsters Canada Rail Conference v Canadian National Railway Company, 2022 CanLII 102424

> when it works, can hear multiple cases in a single day, cannot function without proper disclosure and a complete Record.
>
> …
>
> 61. While the arbitrator has significant concerns about the TCRC's June 2022 failure to respect its agreement and produce relevant medical information, CN did not satisfy the arbitrator that it could not have investigated Mr. Weseen's 2019 request for accommodation. That investigation would have allowed CN to evaluate Mr. Weseen's past efforts to treat his addictions and eliminated the need to rely on inferences in its Brief.
>
> …
>
> 92. The arbitrator has raised certain concerns about how this matter transpired. The parties seemed to argue different cases in their Briefs. The Record only crystallized a few days before the arbitration. This scenario can negatively impact both the success of the railway model of arbitration and an arbitrator's ability to conduct a fair hearing.

28. In AH807[16], a similar issue arose. Ultimately, the arbitrator did not have to resolve an objection about the addition of new medical evidence just prior to the arbitration:

> 50. CP objected to the TCRC, 2 days before the hearing, filing a December 12, 2022 note from Mr. Calibaba's doctor providing information about his medications. During the investigation, Mr. Calibaba had refused to consent to providing verifying documentation about his use of diuretics, despite relying on them as an explanation for certain events which occurred.
>
> 51. The arbitrator ultimately does not need to resolve this objection given the lack of reasonable grounds to test Mr. Calibaba. However, the arbitrator reminds both parties of the importance of the Record in these matters and the systemic harm the late filing of information can have on this expedited arbitration process.

29. Since there was no objection to the timing of the disclosure to Dr. Snider-Adler's report (Expert Report), the arbitrator will not comment further on that specific aspect of the case. However, from a systemic point of view, the arbitrator reiterates the concerns previously expressed about the late filing of medical information. This impacts the success of the parties' railway model and an arbitrator's ability to ensure a fair hearing. This same concern exists if a party waits until just prior to an arbitration before obtaining clearly relevant medical or expert evidence.

[16] Teamsters Canada Rail Conference v Canadian Pacific Railway Company, 2022 CanLII 120899

30. The Record for this arbitration contains the following evidentiary challenges for the arbitrator. The Record has i) a single new Expert Report; ii) expert reports from AH717, a case in which both doctors testified[17], and iii) references to a few reported decisions about hair follicle testing.

31. The arbitrator has considered the TCRC's objection to the merits of the Expert Report[18]. Given the broad scope of s.16(c) of the *Code*, the arbitrator has decided to allow the Expert Report into evidence. For several reasons, the TCRC did not persuade the arbitrator to disregard the Expert Report.

32. First, arbitrators have accepted Dr. Snider-Adler as an expert witness before[19]. This does not mean that she can testify about any subject, but the arbitrator is satisfied for current purposes that she does have the requisite expertise in the drug testing area which is central to this case.

33. Second, the arbitrator understands the TCRC's concern when CP posed a leading question to Dr. Snider-Adler about AH717:

> 4. Finally, can you provide commentary on the back and forth in the Mark Smith case and the arbitrator's quoting of Dr. Rosenbloom? I believe Dr. Rosenbloom misrepresented/ inaccurately summarized your findings in making the foregoing statement, but given the particulars of that case, the specific sentence was not the focus for your reply. Can you confirm this?"

34. There are clearly better ways to ask this expert about comments attributed to her in AH717. Nonetheless, despite the framing of CP's question, Dr. Snider-Adler's response to the comments attributed to her in AH717 remain relevant to this arbitration.

35. Dr. Snider-Adler commented in the Expert Report that the opposing expert had misrepresented her position on "false positives". In her view, the chance of a "false positive" was negligible in the circumstances of this case. The arbitrator is not prepared

[17] In this case, the arbitrator upheld the TCRC's objection when CP attempted to call Dr. Snider-Adler during its Reply. The time to do that was during its case in chief when the TCRC would still have an opportunity to cross-examine and comment.
[18] TCRC Reply Brief; paragraphs 4-39.
[19] See, for example, CROA 4798.

to prefer the comments made in AH717 given the subsequent comments from Dr. Snider-Adler in the Record in this case.

36. Third, while the TCRC contested the merits of the Expert Report, and pointed to what it considered some internal inconsistencies, the arbitrator accepts its general conclusion about the topical Hemp Cream product, given the lack of evidence to the contrary.

37. Fourth, the arbitrator has not been persuaded to prefer Dr. Rosenbloom's expert report from AH717 over that produced by Dr. Snider-Adler for this case. Similarly, while the TCRC referred to railway and other cases which raised questions about the reliability of hair follicle testing, the arbitrator has not been persuaded to take judicial notice of them and prefer them to the Expert Report in this case.

38. The parties can debate this medical issue again in a future case should the need arise.

Did the grievor violate the RPA?

39. The grievor had no explanation for his two positive tests other than referring to the Hemp Cream product he used. The Expert Report before the arbitrator indicates that[20]:

> In this case, [the grievor] advised that he was using hemp cream from The Body Shop. All hemp products sold through The Body Shop (as can be found on their website) state that their hemp products contain hemp seed oil. Again, the seeds of the hemp plant do not contain THC or CBD (or other cannabinoids). These would not result in a positive test for THC metabolite.
>
> Additionally, even cannabis products containing THC being used topically (as a cream), are not expected to result in a positive drug testing, including hair testing, for THC or THC metabolite. This is reviewed in more detail below.

40. While CP had the burden of proof in this case, the TCRC did not present any evidence to explain away the positive tests. On a balance of probabilities, CP demonstrated that the grievor had conducted himself in some way which resulted in his two positive tests.

41. But that does not end the analysis.

[20] CP Exhibits; Tab 14; Page 6 of 23.

Did CP follow the procedure in its RPA?

Was there an expansion?

42. CP suggested that the TCRC expanded the issues in this arbitration when it argued that CP had failed to follow its own obligations under the RPA. The arbitrator disagrees that any expansion took place.

43. First, CP alleged that the grievor had violated the RPA. That makes the RPA itself one of the issues in this arbitration. The TCRC remains fully entitled to review the RPA's language and argue that CP failed to follow its own obligations under that agreement.

44. Second, the JSI does not require the parties' arguments, only the facts and the issues[21]:

> The joint statement of issue referred to in clause 7 hereof shall contain the facts of the dispute and reference to the specific provision or provisions of the collective agreement where it is alleged that the collective agreement had been misinterpreted or violated.

45. The TCRC regularly, as it has again done in this case[22], provides CP with its full position via the steps in the grievance procedure. If CP suggests it can rely on the RPA to support a just cause termination, then the TCRC can argue that the very same document prevents it from doing so.

46. Third, the difference between issues and arguments is not always clear. Railway arbitrators will prevent unfairness in situations where one party has expanded the issue and caused prejudice to the other. For example, an improper expansion may occur when a party raises a new issue that had not previously been candidly explored between the parties. This occurred in AH689[23]:

> 31. The arbitrator agrees with the sentiments expressed by these experienced railway arbitrators. The situation may well be different in regular arbitration where the parties have not negotiated the types of procedures which exist in this expedited regime. A regular labour arbitration system can also take many

[21] CROA MOA, paragraph 10.
[22] TCRC Exhibits; Tabs 13 and 15.
[23] Canadian National Railway Company (CN) v International Brotherhood of Electrical Workers System Council No. 11, 2019 CanLII 123925

> days to hear a single grievance, which allows for more leeway than does the parties' expedited regime in this case.
>
> 32. The parties benefit from an extremely efficient expedited arbitration system. In order to obtain those benefits, they have negotiated clear provisions which require that all issues be identified and discussed during the grievance procedure. A vague oral reference to alcohol and 3 AA meetings during the investigation, especially given the IBEW's burden of proof for prima facie discrimination, infra, was insufficient for CN to know that Mr. S alleged that his rights under the CHRA had been violated. Documentation was only produced for this issue roughly 18 months after Mr. S's termination.
>
> 33. There is further prejudice which can arise from the addition of a new issue close to the arbitration date. CN could not explore that issue during its investigation or conduct a timely supplementary investigation. The arbitrator notes further that the CHRA contains time limits for complaints.
>
> 34. The IBEW expanded its grievance beyond that which was discussed throughout the grievance procedure. The arbitrator accordingly upholds CN's objection. This conclusion, however, would not apply to situations where a party was willfully blind to a clear duty to accommodate situation.

47. The arbitrator dismisses the argument that the TCRC cannot rely on the precise terms of the RPA when arguing its case.

The grievor's alleged breaches

48. CP alleged in the JSI and in its Form 104 that the grievor had violated both the "CP Alcohol and Drug Policy" (Policy) and the RPA.

49. For the Policy issue, CP did not suggest that the hair follicle test showed the grievor had been impaired while on duty. Railway case law is relatively consistent regarding the possible consequences for a railroader who works when impaired, subject to human rights obligations[24] [Footnotes omitted]:

> 23. This case is not about CP's legitimate concerns over safety. A railway is an inherently dangerous undertaking. There have been tragic deaths in this industry. The Criminal Code and the Canada Labour Code have been amended in recent years to increase everyone's safety obligations.
>
> 24. The arbitral jurisprudence has long reflected the serious consequences for railway employees who work while impaired. As AH734 indicated, railway

[24] AH807: Teamsters Canada Rail Conference v Canadian Pacific Railway Company, 2022 CanLII 120899 at paragraphs 23-26.

arbitrators apply a presumption that termination constitutes the appropriate penalty for employees who work while impaired:

> 17. In AH633, the arbitrator upheld an LE's termination due to his testing positive for cocaine when at work. Arbitrator Moreau came to a similar conclusion for impairment in CROA 4733:
>
> > For all the above reasons, I regrettably must dismiss the grievance. There is simply too much risk to the Company and the public when an employee in a safety- sensitive position like the grievor reports to work in an impaired condition, in violation of the Company's drug and alcohol policy and CRO Rule G, and then goes on to carry out his assigned duties. The grievor's long service, coupled with his forthright answers throughout this matter, is unfortunately insufficient for the arbitrator to consider reinstatement. The grievance is dismissed.
>
> 18. In all these cases, arbitrators consider whether compelling circumstances outweigh the prima facie disciplinary response of dismissal and the importance of deterrence:
>
> > 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.

25. The applicable legal analysis changes if a person suffers from a disability, a scenario which involves, inter alia, the burden to demonstrate that undue hardship exists.

50. However, as AH706[25] summarized, a different result occurs if an employee violated a drug policy but was not impaired while at work:

> 36. The facts do not support BTC's suggestion that the "impaired" line of cases apply to Mr. Ouimet's situation. Unlike in CROA&DR 4527, Mr. Ouimet's oral swap test came back negative. Railway arbitrators have consistently concluded that this test result signifies the individual was not impaired. BTC had to demonstrate that the "impaired" line of cases applied to Mr. Ouimet. It failed to meet this burden when it referred to its amended 2018 Policy but without providing evidence of impairment as well.
>
> 37. The "unimpaired" line of cases has commented on the implications flowing from a negative oral swab test. For example, in CROA&DR 4524, the arbitrator noted:
>
> > 24. CP had the burden of proof to demonstrate that Mr. Playfair was impaired at the time of the November 15, 2015 incident. As numerous CROA decisions have already noted, it is not enough to show that a urine test indicates an employee may have traces of marijuana in his/her system. Those results do not demonstrate impairment at the material times. In Mr. Playfair's situation, he tested negative for the more specific oral fluid drug test.
> >
> > 25. CP's position, as set out in its policy and as argued, posits that employees should never take illegal drugs. But the case law has not upheld a policy that extends that broadly.

51. Since CP put forward no evidence about the grievor being impaired while on duty, the Policy provided no grounds to terminate the grievor.

Did Health Services conduct a review under the RPA?

52. The arbitrator agrees with the TCRC that the RPA is not a last chance agreement. Rather, the agreement exists to assist an employee who previously had some sort of addiction issue. In the RPA, the grievor agreed to random testing and to provide highly sensitive personal medical information, subject to proper safeguards. In exchange, CP allowed him to continue to work in a safety sensitive position.

53. While the RPA by itself, depending on the circumstances, may not prevent termination, it nonetheless includes a process that CP had undertaken to follow[26]:

[25] Bombardier Transportation Canada Inc. v Teamsters Canada Rail Conference, 2020 CanLII 53040
[26] TCRC Exhibits; Tab 3; Page 34/386.

> A positive test result reported to Health Services, will prompt a review of your fitness to work in a Safety Critical or Safety Sensitive Position and will result in an updated Fitness to Work Assessment.

54. CP provided no evidence about this process taking place. The capitalization of the term “Fitness to Work Assessment” (FWA) in the RPA suggests a specific form exists at CP. The RPA contemplates that Health Services will review a positive test result and then provide an updated FWA. The grievor’s testing levels would presumably constitute one of the factors Health Services would examine during its review.

55. Instead, CP appeared to justify the grievor’s termination solely on the basis that the positive tests violated the RPA. CP relied on CROA 4352[27] to support the termination of an employee whose hair sample had tested positive.

56. However, that case examined a situation involving another positive test after an earlier first violation of an RPA:

> **On April 17, 2013 the results of a controlled substance test (a hair sample) showed positive for oxycodone. Under the terms of the Relapse Prevention Agreement, management was advised of this result on May 9, 2013. As a result, on May 13, 2013, the grievor signed a Continuing Employment Reinstatement Agreement. As part of the Continuing Employment Reinstatement Agreement the grievor was required to execute another Relapse Prevention Agreement, which he did on June 6, 2013.** The grievor complied with the counselling requirements under the Continuing Employment Agreement. He also was required to undergo drug testing.
>
> **One of the terms of the Continuing Employment Reinstatement Agreement is found in paragraph 5 of that agreement:**
>
> > **Should you fail to comply with the full terms of this contract, including compliance with the Relapse Prevention Agreement, you will be discharged from CN and will not be eligible for continuing employment/reinstatement.**
>
> (Emphasis added)

57. In CROA 4352, the arbitrator refused to reinstate the employee after yet another positive test:

---

[27] CROA 4352

> Therefore, having regard to the specific facts of this case, the continuing employment contract, the obligations of accommodation to the point of undue hardship, the material relied upon by the Union and the grievor's safety critical position, the Company cannot be required to reinstate the grievor.

58. In another case CP put forward, CROA 4576[28], a similar scenario occurred following an employee's first violation of an RPA:

> **On February 12, 2015 the grievor failed a random test and was reported as being in violation of his Relapse Prevention Agreement. He was not terminated. Instead, after meeting with his Superintendent, he was allowed to continue work if he signed agreements called "Continuing Employment Contract for Safety Sensitive and Safety Critical Position for Employees with a Substance Use Disorder." This second form of agreement provides, in clear terms:**
>
> > 3. The Chief Medical Officer, taking into consideration your specific medical condition, will establish a Relapse Prevention Agreement. For the duration of this contract, you are required to comply with the terms of medical treatment and rehabilitation for your condition, as established in a Relapse Prevention Agreement, listing all necessary behaviours expected of you. These necessary behaviours include total abstinence from all substances, both on and off duty, and all other requirements for treatment, counselling, medical examinations, and blood, urine, hair, breath and any other biolological tests. If you do not comply with the terms of your Relapse Prevention Agreement, the Chief Medical Officer will report this non-compliance to CN and you will be considered in breach of this contract.
> >
> > …
> >
> > **5. Should you fail to comply with the full terms of this contract, including compliance with the Relapse Prevention Agreement, <u>you will be discharged from CN and will not be eligible for continuing employment or reinstatement</u>**.
>
> (Bold text added; underlining in original)

59. In CROA 4576, Arbitrator Sims, following another positive test, upheld the employee's termination:

> **The type of agreement the grievor entered into accommodates substance dependency, but it does so on conditions. The one condition is**

[28] CROA 4576

> **abstinence, but the other is a willingness to be forthcoming and truthful in the event of any breach or relapse. Here the grievor, following his first relapse, was given a further chance. Following that, it turns out, he voluntarily consumed alcohol**. He did not disclose this before going to work. He was randomly tested and then investigated. He did not attribute the test results to his addiction, or to any relapse. Instead, he concocted an incredible story putting the blame on his partner. The medical officer and the Company both, quite understandably, disbelieved his story. He later confessed that it was not true.
>
> **What he did not do, and by clear implication cannot be further trusted to do, is to come forward and advise the Employer of his use of alcohol or drugs before going to work as a locomotive engineer. In these circumstances, with such a demonstration of a lack of trustworthiness, it is quite justified for the Employer to invoke the consequence of the agreement, which is termination**. **Weighing the grievor's right not to be discriminated against due to his substance abuse, the safety critical nature of the job, the effort at cover up, and the accommodation already offered, I am persuaded that the Employer has reached the point of undue hardship**. Further, the grievor has never established that this alcohol consumption, contrary to his agreement, was caused by a relapse in his earlier cocaine addiction. In these circumstances, despite the several positive things properly said in his favour, I find I must dismiss the grievance.
>
> (Emphasis added)

60. The arbitrator notes that both cases CP submitted examined the situation from a duty to accommodate perspective.

61. CP, unlike in the cases on which it relies, did not follow its own obligations in the RPA. There is no Health Services analysis in the Record. Neither did Health Services provide an updated FWA. CP instead applied a discipline analysis and equated an RPA breach with just cause for termination. The legal analysis does not support this position.

62. To the extent CP relies on the argument that the grievor had to come forward first before it had to follow its own RPA obligations, the arbitrator must dismiss it. First, the RPA contains no such distinction. Secondly, that argument, which has been made in the context of the duty to accommodate, has not persuaded arbitrators[29].

[29] See, for example, AH793: Teamsters Canada Rail Conference v Canadian National Railway Company, 2022 CanLII 102424 at paragraphs 67-79.

63. CP did not demonstrate it had just cause to terminate the grievor's employment. Nonetheless, it did demonstrate that the grievor violated his RPA and his suggested explanation did not stand up to scrutiny. The arbitrator must fashion an appropriate remedy.

What is the appropriate remedy?

64. The arbitrator has concerns about the grievor's candour given his work as an LE. The evidence in the Record provides no reasonable explanation for the positive test other than consumption.

65. However, CP failed to follow the procedure contained in its RPA. It instead treated an RPA violation as providing just cause.

66. To protect both parties' interests, the arbitrator will reinstate the grievor, but on the following conditions:

> 1. CP will reinstate the grievor, without loss of seniority, but without compensation for any wages and benefits lost;
>
> 2. The grievor will not return to CP until its Health Services has confirmed he is fit to work after the reasonable and appropriate testing for substance addiction which that staff deem appropriate;
>
> 3. For a two-year period starting from the grievor's return to work at CP, he will be subject to random, unannounced drug and alcohol testing, to be administered in a non-abusive fashion;
>
> 5. The parties will prepare a "Last Chance Agreement' or a "Continuing Employment Reinstatement Agreement", if they use that type of document, which incorporates these conditions and any human rights obligations; and
>
> 6. If the grievor violates any of the conditions, he shall be liable to termination with recourse to arbitration only for the purpose of determining whether a violation of these conditions occurred.

DISPOSITION

67. The arbitrator has raised procedural concerns about the disclosure in this case. Only full disclosure allows the railway model to hear, in a procedurally fair way, multiple cases in a single day.

68. CP demonstrated that the grievor tested positive while subject to the RPA. The Record discloses no innocent explanation for that result.

69. However, because CP did not follow the RPA's process, the arbitrator has decided to reinstate the grievor with appropriate conditions.

70. The arbitrator remains seized for any issues which arise from this decision.

SIGNED at Ottawa this 9th day of February 2023.

_____

Graham J. Clarke
Arbitrator