CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4652

Heard in Edmonton, September 11, 2018

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the discharge of Conductor S. DeBlaere of Winnipeg, Manitoba for a violation of the Company's Policy to Prevent Alcohol and Drug Problems ('The Policy') and Canadian Rail Operating Rules (CROR) General Rule G.

JOINT STATEMENT OF ISSUE:

On July 24, 2017, the Grievor was involved in a CROR 42 violation and subjected to post-incident testing for drugs and alcohol. The Grievor tested positive for cocaine. Following an investigation, the Company determined the Grievor was in violation of the Policy and assessed a disciplinary discharge.

The Union's position is that the discharge was unwarranted as the grievor suffers from a disability which requires accommodation. He should be reinstated into employment and made whole for all lost wages and benefits.

The Company disagrees and takes the position that, if the grievor had a problem with drug dependency, it was incumbent on him to seek help prior to an incident. The Company further submits that the Grievor's termination was based strictly on the break of CN's Alcohol and Drug Policy and CROR General Rule G.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) R. S. Donegan	**(SGD.) M. Galan** (for) **K. Madigan**
General Chairperson	Vice President, Human Resources

There appeared on behalf of the Company:

M. Galan	– Manager, Labour Relations, Edmonton
K. Morris	– Senior Labour Relations Manager, Edmonton
B. Kambo	– Manager, Labour Relations, Edmonton
T. Dunn	– Nurse, Case Manager, Edmonton

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
J. Thorbjornsen	– Vice General Chairperson, Saskatoon

M. Anderson – Vice General Chairperson, Edmonton
R. DeBlaere – EFAP Peer, Winnipeg
S. DeBlaere – Grievor, Winnipeg

AWARD OF THE ARBITRATOR

The grievor, a conductor, along with the locomotive engineer on the same crew, committed Rule 42 violations by travelling through a protected area where a road crew was working. His grievance over his 45 Brown system points for that infraction was denied in **CROA 4651**. Following that incident, both employees were required to complete a post-incident alcohol and drug test. In the grievor's case, this showed the presence of cocaine in his saliva. That led to an investigation, held on July 31, 2017, and then his termination. While the locomotive engineer tested positive for both cocaine and marijuana, there is no outstanding grievance over his termination.

The grievor and the locomotive engineer left Winnipeg on July 23, 2017 to take a train out to Rivers, Manitoba. They stayed overnight in the Company bunkhouse, but did not book off for rest, remaining subject to a call out. About ten hours later, the crew was called to take another train back to Winnipeg, a distance of 143 miles. Track was being maintained between miles 13 and 8, in Winnipeg, almost at the end of the trip. Despite written instructions in the TGBO, a yellow over red flag, and then a red flag, the train went straight through the protected area, initially at about 30 miles per hour.

The notice of investigation for the drugs issue read:

> Reason for investigation: circumstances surrounding your alleged non-compliance with CN's Drug and Alcohol Policy, and CROR General Rule

> G, on July 24, 2017 while working as Conductor on train Q10851 21, as evidenced by your positive test results for cocaine.

At the end of his investigation meeting the grievor made the following statement:

> In the past year and a half I've been going through a rough time in my life, which has led to a substance abuse problem. I've tried to seek help in the past, but it's hard to admit to yourself when you have a problem. Regardless I have never brought my issues when I'm at work, and I've never been high when I'm at work. I take my job and safety seriously when on duty 100 percent of the time. It was never my intention for things to get this bad. And I'm sorry for the inconvenience and potential disaster that could of happen. I will be getting help and want to prove to CN that I am an asset to this company. I value my job and take pride in it.

The discharge notice gave the following reasons for termination:

> Your non-compliance with CN's Drug and Alcohol Policy on July 24, 2017 while working as a Conductor on train Q10851 21.

The Union emphasizes the absence of any reference to Rule G in these reasons. Rule G provides:

> G(i) The use of intoxicants or narcotics by employees subject to duty, or their possession or use while on duty, is prohibited.
>
> (ii) The use of mood altering agents by employees subject to duty, or their possession or use while on duty, is prohibited except as prescribed by a doctor.
>
> (iii) The use of drugs, medication or mood altering agents, including those prescribed by a doctor, which, in any way, will adversely affect their abiity to work safely, by employees subject to duty, or on duty, is prohibited.
>
> (iv) Employees must know and understand the possible effects of drugs, medication or mood altering agents, including those prescribed by a doctor, which, in any way, will adversely affect their ability to work safely.

That omission makes little difference here. The Dispute and Joint Statement of Issue each allude to Rule G. In any event, CN's policy specifically incorporates Rule G, saying:

> This policy supplements but does not modify the General Safety Rule 1.1, Canadian Rail Operating Rules (C.R.O.R.) Rule G and the Union/Management Agreement on The Control of Drug and/or Alcohol Abuse. (Rule G By Pass). Nothing in this policy reduces the requirements of Rule G or changes the provisions of the Rule B By Pass agreement.

On August 28, 2017, during the investigation, the grievor denied having or using drugs on his way out to Rivers, while he stayed over in Rivers for 10 hours, or on his way back. To explain the test results he answered:

> Question 18: … I used drugs on Saturday night and they must have still been in my system.

That Saturday was July 22, 2017. He left Winnipeg on the train out to Rivers on July 23, 2017 at 9:45 a.m.. Asked how often he used illegal drugs he said:

> Question 20: I have been dealing with a substance abuse problem for the past year and a half.

The Company partly justifies its termination for breach of its Drug and Alcohol policy based by the seriousness of the resulting Rule 42 incident. The discipline for that violation was upheld in CROA 4651, for the reasons given there, which do not need to be repeated. Suffice to say that it was a very serious incident with the potential for catastrophic harm. The justification for the drug testing after this incident was to rule out impairment as a possible cause. It did not do so; indeed it provided evidence that both the conductor and the locomotive engineer had cocaine in their systems.

The Union relies on a series of prior CROA cases dealing with employees with addictions. The Employer relies on other CROA cases and on the recent Supreme Court of Canada decision in:

> *Brent Bish on behalf of Ian Stewart v. Elk Valley Corporation, Cardinal River Operation and Alberta Human Rights Commission*, [2017] 1 S.C.R. 591 ("*Elk Valley*")

Elk Valley was released on June 15, 2017. Mr. DeBlaere's termination occurred on August 8, 2017. No amendments to CN's policy occurred, based specifically on the *Elk Valley* litigation, prior to these events. The parties disagree on the reach of that decision, as well as its applicability to CN's policies and to the facts of this case.

Before assessing *Elk Valley* (*supra*) it is useful to review how the CROA process has dealt with employees who, before or after an incident, have sought relief from termination on the basis that they suffer the disability of addiction justifying accommodation. CROA is a long-standing and mutually agreed upon method of dispute resolution that bifurcates the normal arbitration process by relying upon evidence gathered through a workplace investigation, without undue formality. It confines the arbitrator to the parameters set out in a joint statement of issue. The system has produced a large body of prior decisions by which the parties govern themselves in the arguments they raise and the form of proof accepted on certain points. CROA cases have involved alcohol and drug use, addiction, and appropriate penalties for breaches of either CN's policies or of prior reinstatement or last chance orders. Certain themes can be extracted.

The operation of a locomotive on a rail line is every bit as safety sensitive as the coal mine in *Elk Valley*. In CROA 2609, Arbitrator Picher upheld the termination of an employee who, he concluded, had shown up for work under the influence of alcohol. He was asked to undertake testing, but declined, resulting in an adverse inference that supported the direct evidence given by his supervisors. Arbitrator Picher said:

> … given the safety sensitive nature of the Company's undertaking as a common carrier and the grievor's position as a locomotive engineer, nothing herein should be interpreted to suggest that the Company did not have reasonable and probable grounds to require the grievor to take a test, that a urine test was unreasonable in the circumstances or that the employee had a right to insist on a breathalyzer test in preference to a urine test. The prospect of an employee assuming the care and control of a train's movement when under a reasonable apprehension of intoxication is extremely serious. (*emphasis added*)

Turning to penalty, he said:

> Needless to say, the violation of Rule G by a person occupying the safety sensitive position of a locomotive engineer is among the most serious of disciplinary offences, particularly where it involves being under the influence of alcohol while on duty.

Alcoholism and drug addiction have long been recognized as disabilities under s. 3(1) of the *Canadian Human Rights Act*. They are a form of illness and to be treated as such (see **CROA 2716**). The legislation provides:

> 7. It is a discriminatory practice, directly or indirectly,
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> (a) to refuse to employ or continue to employ any individual, or
>
> (b) in the course of employment, to differentiate adversely in relation to an employee;
>
> on a prohibited ground of discrimination.

However, it is addiction to, not the simple use of, drugs or alcohol, that is a disability. Addiction cannot simply be presumed from use.

In **CROA 3818**, Arbitrator Picher declined to reinstate an employee, a locomotive engineer, following a post-incident test which revealed cocaine use. The incident was a failure to stop safely, causing a derailment. The grievor did not claim to be an addict nor did he seek accommodation. Rather, he took issue with whether the evidence, which included expert testimony as well as the test results, proved impairment at the time the test was taken. Having found the demand for a test was justified, the arbitrator asked:

> … what conclusion is to be drawn from the results of the test, combined with the statements of Mr. Birkeland.
>
> When regard is had to the whole of the evidence, including the expert testimony presented by the Company, the Arbitrator finds both the statements and actions of Mr. Birkeland to be troubling. If, as the grievor maintains, he is not a habitual cocaine user then the only conclusion to be drawn is that he did in fact consume cocaine some eight to five hours prior to the taking of the urinalysis and oral fluids drug samples. Alternatively, if he did not consume during that period, but in fact did so some twenty-eight to forty-eight hours previous, as he maintains, he is not being honest with respect to his use of cocaine and must, on the balance of probabilities, be viewed as a person who is a habitual cocaine user. Either scenario raises serious issues with respect to the grievor's honesty, as well with respect to his actual involvement with a drug whose consumption immediately before or during a tour of duty in a highly safety sensitive workplace is such as to cause substantial concern and call into question his continuing employability.
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> On the whole of the evidence before me I am inclined to conclude, on the balance of probabilities, that the grievor did in fact consume cocaine on the day of his tour of duty, an obviously serious infraction that would justify discharge, absent the most compelling mitigating factors. There are no mitigating factors presented in the case at hand beyond the grievor's prior service. However, given the gravity of the offence committed, the Arbitrator is not persuaded that his prior service can outweigh the safety concerns which present themselves in the face of an employee who would knowingly consume cocaine immediately prior to or during his or her tour of duty. The Arbitrator's first inclination is to accept the grievor's statement that he is not a habitual cocaine user. Accepting that statement, however, leads to the unfortunate inference that he did consume cocaine immediately prior to or during the course of his tour of duty … (*emphasis added*)

Many CROA cases have been decided, sometimes with and sometimes without expert or medical evidence, on the basis that an individual disciplined following a test or an incident was in fact addicted. This resulted in CROA proceeding on the assumption that a duty to accommodate followed from the accepted fact of addiction.

Several of the cited cases refer to CROA's approach to its remedial authority to substitute a penalty in lieu of termination where the Union establishes that employers are coming to grips with their addiction.

The Union refers to three decisions involving the same employee, the first case resulting in reinstatement and an accommodation and the second granting a further chance following a relapse. In **CROA 2716**, in March 1996, Arbitrator Picher held:

> Both legislation in Canada, such as the Canadian Human Rights Code, and an extensive body of arbitral jurisprudence, clearly recognize that alcoholism and drug addiction are a form of illness, and are to be treated as such. When, as in the instant case, an employee can demonstrate by clear and compelling evidence that he or she has made substantial strides in gaining control of an addictive condition, even if it be after the culminating and sometimes galvanizing event of discharge, it is incumbent upon a board of arbitration to take full cognizance of that reality in considering whether to exercise the board's statutory discretion to reduce the penalty of discharge. Any other approach would, in my respectful view, run contrary to current statutory standards which prohibit discrimination on the basis of an illness such as alcoholism or drug addiction, and specific statutory provisions which now compel employers and unions alike to explore means of reasonable accommodation for persons so afflicted.
>
> It is, of course, important for boards of arbitration to safeguard against spurious claims of rehabilitation, patched together in an opportunistic way so as to regain employment for an individual who has not in fact either recognized or truly come to grips with his or her addiction. It is for that reason that this Office, and other boards of arbitration generally,

> place a significant onus upon the employee seeking the benefit of the arbitrator's discretion to bring forth substantial documentary evidence to confirm a meaningful course of rehabilitation and follow-up.
>
> … the interests of the Company can be reasonably protected, and balanced against the interests of the grievor, by a denial of compensation and a reduction of penalty, subject to conditions fashioned to protect the employer against a relapse or a reoccurrence. (*emphasis added*)

Some five years later in **CROA 3355**, the same grievor showed up to work under the influence of alcohol. By that time he had 23 years service. Arbitrator Picher was impressed by the grievor's abstinence after his initial reinstatement up to the incident, which he accepted as a relapse of the kind that can be one aspect with the illness. No incident was involved. The grievor was reinstated, without back pay, to a clerical position, banned from safety sensitive work, and subject to complete abstinence for the future. That accommodation proved however to be shortlived as the grievor again took to drink and was dismissed again. That termination was upheld in **CROA 3415**.

Arbitrators have not always accepted that a post-incident claim of addiction will justify reinstatement on terms that allow rehabilitation. In **CROA 4392** Arbitrator Silverman sustained a termination of an employee with a prior history of drug abuse following a cardinal rule violation and a positive post-incident test for cocaine use. The Union argued the case on the basis that the Company had a duty to accommodate the grievor due to his physical disability. It characterized the incident as a relapse.

The physician's report from the earlier drug abuse case concluded that it was a case of substance abuse not substance dependence, but that if the employee could not

remain abstinent, he should be reviewed with a view to remedial treatment. There was evidence of some post-incident effort at rehabilitation. However, the arbitrator concluded after referring back to three earlier cases (**CROA 2716, 4347** and **4375**) that:

> In CROA&DR 2716 this Office analyzed the statutory provisions that require a board of arbitration, to exercise its discretion to mitigate the penalty of discharge. That case referred to the obligation to consider "clear and compelling evidence" even post discharge of rehabilitation. In this case, there is not the kind of substantial evidence necessary to persuade me to reinstate the grievor. (See CROA&DR 2716, 4347, 4375).
>
> Given the facts of this case, the lack of clear and compelling evidence supporting an accommodated return to work and the safety sensitive operations of the Company, the discharge is upheld.

Several cases recognize that relapse can be a characteristic of the illness, and accommodation can, but not necessarily will, be extended in such circumstances (**CROA 3415, 4054, 4143, 4094** and **4375**).

When addicted employees in rehabilitation have been reinstated, fairly strict terms have been imposed. Such conditions have included an exclusion for safety sensitive work (**CROA 3355**), abstinence and random testing (almost all cases), attendance at treatment programs, alcoholics anonymous or narcotics anonymous (**CROA 2716**). **CROA 4375** provides a useful example.

CROA 4527 addressed the need for proof of addiction. The grievor was dismissed after a post-derailment test showed marijuana use and impairment. The grievor's position was that he was only an occasional drug user, although his EAP counsellor attested to his ongoing substance abuse problem. The arbitrator said at p. 6-7:

> … the whole of the grievance rests on a single question: did Mr. Cook have a substance abuse problem that can be considered a disability under the *Charter of Rights* when the events of January 20 occurred? If so, was the infraction committed linked to the alleged disability?
>
> The burden of proof rests on the Union's shoulders. It must demonstrate, on the balance of probabilities, that the Grievor had indeed a disability and that there is a connexion – or causal link – between the disability and the violation that incurred discipline.
>
> The Employer asserts that in order to establish the existence of a disability, expert medical evidence has to be submitted by the Union. While it is true that a physician's diagnosis weighs heavily in the appreciation of a grievor's condition, some nuances must be made.
>
> A review of the jurisprudence shows that arbitrators do not always require expert medical evidence to conclude that a disability does afflict a grievor. However, if no such expert opinion is presented, other medical evidence must make the case for a disability quite compelling.

After reviewing other cases supporting the need for medical evidence, Arbitrator Flynn concluded at p. 9-10:

> To briefly summarize, Mr. Cook was evaluated on January 26 by the Shepell.fgi counsellor, who referred him to OHS for *further* assessment. The Grievor then visited the EAP three more times and no clear, convincing, diagnosis was obtained to attest to his alleged disability. Ms. Solomon of the AFM center wrote that "if client is still facing challenges with his *substance use* he will be appropriate for AFM program" (emphasis added). With respect to the contrary opinion, "facing challenges" with substance use does not establish the existence of a disability. Mr. Cook himself merely stated that he was an occasional user during the Company's investigation.
>
> It is not enough to simply claim that one may have substance abuse or is facing challenges with substance abuse and that one visited the EAP a few times. As arbitrator H. Kates explained in CROA&DR 1341:
>
> > "[…] in order of an employee to take proper advantage of the Company's EAP Program, that employee must come forward and voluntarily submit to it prior to any incident that may give rise to a legitimate disciplinary response on the employer's part. <u>The EAP Program is not designed to be used as a "shield" for a breach of Rule 'G' after the fact</u>. At that time the threat to the safety of the company's railway operations has occurred and such risks should not be seen to be condoned by a belated recourse to the Company's EAP Program" (emphasis added)

> By consuming marijuana before going to work, Mr. Cook committed an offense deserving severe discipline, up to and including discharge. Drug use cannot be tolerated in the extremely safety sensitive railway environment. (*emphasis added*)

I now turn to the decision in *Elk Valley* (*supra*). It began with an Alberta Human Rights Tribunal decision. An employee, said to be addicted to drugs, was terminated following a workplace incident and a failed drug test. His complaint alleged discrimination on the basis of disability. The Employer replied, and the Commission found, that the termination was for the grievor's failure to comply with an express provision in the Employer's policy, described in the majority decision at paragraph 1.

> Employees were expected to disclose any dependence or addiction issues before any drug-related incident occurred. If they did, they would be offered treatment. However, if they failed to disclose and were involved in an incident and tested positive for drugs, they would be terminated - a policy succinctly dubbed the "no free accident" rule. The aim of the Policy was to ensure safety by encouraging employees with substance abuse problems to come forward and obtain treatment before their problems compromised safety.

Two factors make *Elk Valley* less easy then it might be to interpret and apply. First, much of the case is about deference to the tribunal making the initial decision (see para. 19-20). The Court found the Human Rights Tribunal's decision was reasonable in the sense of falling "within the range of acceptable outcomes". (see para 41). The majority reasons concluded that it was not unreasonable, based on the tribunal's findings of fact, to rule that *prima facie* discrimination had not been established. Second, there were three sets of reasons:

- The majority reasons authored by the Chief Justice;
- The reasons of Moldaver J. and Wagner J., holding that the conclusion of a lack of a *prima facie* was unreasonable, but the result was in any event the same, because the finding of undue hardship was reasonable.

- The dissent of Gascon J., dissenting on all but the point of deference to the tribunal. He viewed the lack of a *prima facie* case conclusion to be unreasonable, as was the Tribunal's approach to the justification for the policy and undue hardship.

The question of significance for this case is whether, or the degree to which, *Elk Valley* altered the law or whether, instead, it was just a fact specific case based on the unique fact finding of the tribunal. If there is an answer to that question it lies in paragraphs 39 and 42-43 of the majority decision.

> **39** It cannot be assumed that Mr. Stewart's addiction diminished his ability to comply with the terms of the Policy. In some cases, a person with an addiction may be fully capable of complying with workplace rules. In others, the addiction may effectively deprive a person of the capacity to comply, and the breach of the rule will be inextricably connected with the addiction. Many cases may exist somewhere between these two extremes. Whether a protected characteristic is a factor in the adverse impact will depend on the facts and must be assessed on a case-by-case basis. The connection between an addiction and adverse treatment cannot be assumed and must be based on evidence: *Health Employers Assn. of British Columbia v. B.C.N.U.*, 2006 BCCA 57, 54 B.C.L.R. (4th) 113, at para. 41.
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> **42** Where, as here, a tribunal concludes that the cause of the termination was the breach of a workplace policy or some other conduct attracting discipline, the mere existence of addiction does not establish *prima facie* discrimination. If an employee fails to comply with a workplace policy for a reason related to addiction, the employer would be unable to sanction him in any way, without potentially violating human rights legislation. Again, to take an example given by the majority of the Court of Appeal, if a nicotine-addicted employee violates a workplace policy forbidding smoking in the workplace, no sanction would be possible without discrimination regardless of whether or not that employee had the capacity to comply with the policy.
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> **43** It is, of course, open to a tribunal to find that an addiction was a factor in an adverse distinction, where the evidence supports such a finding. The question, at base, is whether at least one of the reasons for the adverse treatment was the employee's addiction. If the Tribunal in this case had found, on the evidence, that the employer terminated Mr. Stewart's employment, or that the Policy adversely affected him, because, either alone or among other reasons, he was addicted to drugs, *prima facie* discrimination would have been made out. However, in the Tribunal's view, the evidence did not support that conclusion. As a result, Mr. Bish did not establish a *prima facie* case of discrimination.

Unlike Moldaver J. and Wagner J., the majority found no need to address the issue of alleged undue hardship. (see paragraphs 42 and 47).

The Employer argues that post-termination evidence of drug addiction, and efforts towards recovery, are not admissible to prove addiction or to justify mitigation. It relies on:

Cie Miniere Quebec Cartier v. Quest [1995] 2 S.C.R. 1095

Some commentators view the ruling in *Quebec Cartier* as significantly modified by the subsequent ruling in:

Toronto Board of Education v. OSSTF District 15 [1997] 1 S.C.R. 487

Whether or not that is so, it is now widely accepted that post-discharge evidence is relevant and admissible when dealing with the application of s. 60(2) of the *Canada Labour Code* (and similar provincial legislation) reading:

> (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.

See, for example:

> 14 After careful consideration of the relevant provisions and the able submissions of the respective counsel. I am convinced, not only that the awards in question are not manifestly wrong, but that the reasoning of the arbitrators in question is reasonable and correct. In other words, I agree that the jurisdiction conferred by section 60(2) of the *Canada Labour Code* is much broader than the corresponding provision of the *Quebec Labour Code* and that therefore the reasoning of the Court in *Compagnie Miniere* does not apply in an arbitration under

> the *Canada Labour Code*. Therefore the jurisprudence under the *Canada Labour Code*, which had recognized that arbitrators had the jurisdiction to consider post-discharge evidence in determining the appropriateness of penalty remains unaffected.
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> *Bell Canada and CEP* [1996] Carswell Nat. 3005 (Dissanayake)

See also:

> *Unifor Local 975 v. Enbridge Gas Distribution Inc*. (unreported decision, Sept. 11, 2016, Cummings) at para. 8.

Brown and Beatty in *Canadian Labour Arbitration*, 7:6144 Post-discharge evidence, express the following opinion:

> Many arbitrators outside of Quebec and in provinces with similar legislation have held that there is nothing in the court's decision that prohibits them from looking at events right up to the hearing that bear on the question of whether the decision to terminate was excessive and/or consistent with the duty to accommodate under human rights law. As well, arbitrators have held that facts about an employee's disability and rehabilitative potential which arise and/or come to light after the employee has been dismissed fall within the court's ruling and are admissible if they are relevant to the question of whether the employer acted reasonably at the time.

The Union argues that the CN policy lacks an explicit "no free accident rule". The Employer says such a rule is implicit in its policy's terms, and breaches of the explicit provisions are sufficient to fall within the scope of the *Elk Valley* decision. The policy document begins with a letter from CN's President and C.E.O. which reads in part:

> Coming to work impaired can have serious consequences. It can lead to accidents and risk lives. That's why we must have a zero-tolerance approach and why we are obliged to take disciplinary action in the case of any employee who is impaired on the job. That is also why we encourage employees who feel they may have a problem to seek help right away.
>
> You can get assistance with any alcohol or drug problem through our Employee and Family Assistance Program (EFAP) which is there to

support employees and help them address the problem. The program is designed to help before the situation becomes serious, but can also support employees with longer term problems.

The policy itself states explicitly:

> This policy applies to all employees of CN .... Those employees in safety sensitive positions are held to a higher standard and are subject to more serious consequences because of the direct impact that these positions have on safety.
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> …
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> … CN has zero tolerance for impairment in the workplace.
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> …
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> All employees are required to report and remain fit for duty, free of the negative effects of alcohol and other drugs. It is strictly prohibited to be on duty or to be in control of a CN vehicle or equipment while under the influence of alcohol or other drugs, including the after-effects of such use. Specifically, the use, possession, presence in the body, distribution or sale of illegal drugs while on duty (including during breaks), on or off company premises, on company business, or on company premises including vehicles and equipment, is prohibited …
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> …
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> Violations by an employee will result in corrective action up to and including dismissal …
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> …
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> 3 Reasonable Cause and Post Accident Testing
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> Biological testing for the presence of drugs in urine or alcohol in the breath is conducted where reasonable cause exists to suspect alcohol or drug use or possession in violation of this policy, including after an accident or incident. Post accident testing is done after any significant accident or incident where an experienced operating officer, upon consideration of the circumstances, determines that the cause may involve or is likely to involve a rule violation and/or employee judgment. In cases of reasonable cause or post accident testing, any employee whose breath alcohol concentration is over 0.04 or who tests positive for illegal drugs would be considered to be in violation of this policy.
>
> …
>
> Prevention and Assistance

> Personal problems affecting an employee's performance, health or safety can often be overcome with proper education, counseling or treatment. CN is committed to helping any employee who may have a problem related to alcohol or any other drug. However, the employee must be willing to address the problem before it has any impact on performance. Seeking assistance is the preferred method of dealing with these problems. In these cases, the employee's employment or advancement opportunities will be not be affected, provided approved rehabilitation is undertaken and results in satisfactory control of the problem. (*emphasis added*)

The Company notes, on this last point, that it provides disability benefit coverage for employees who self-report and then follow a recommended treatment program.

When reviewing the prior CROA decision and assessing the impact of *Elk Valley* (*supra*) it is important to distinguish just cause for discipline from the exercise of the s. 60 remedial authority once cause is established. In this case just cause is established. The grievor admits consuming cocaine the night before he left at 9:45 a.m. for Rivers. Whether he consumed cocaine again in Rivers is a matter of speculation as he denies it, and the only evidence to the contrary is the levels shown by his tests after the incident. No evidence was put forward to help extrapolate these results back to the prior events. I find serious just cause whether or not CN's policies collectively amount to the type of "no free accident" policy involved in *Elk Valley*.

The grievor did not argue directly that his pre-trip use of cocaine was due to addiction. At best he said he was careful not to use drugs prior to duty; something contradicted by his explanation of his levels. The *Elk Valley* decision holds that evidence is needed to establish that such pre-trip use, which is clearly contrary to CN's express

policy, with or without any express “no free accident” provision, is due to addiction. I find CN had just cause for discipline on the basis of his admitted pre-trip consumption. It also had proper cause for testing, and the test established on duty impairment. I am unpersuaded by the “we were distracted” excuses for going through the designated work crew area. Rather, I find that impairment was a significant contributing factor.

The separate question is whether this is a case where the authority given by s. 60 of the *Canada Labour Code* ought to be exercised to allow the grievor a further chance because he is addicted to drugs but has demonstrated a willingness and ability to overcome that addiction. He admitted to the Employer, prior to his termination, but only after this very serious incident, that he had a problem. I endorse the caution in **CROA 2716** that arbitrators must “safeguard against spurious claims to rehabilitation” and should require “substantial documentary evidence to confirm a meaningful course of rehabilitation and follow-up.” As detailed above, I find that *Quebec Cartier* (*supra*) does not preclude such evidence as it relates to the s. 60 discretion.

Earlier CROA cases make it clear, a claim of addiction in no way entitles an employee to an opportunity of further employment. But, with sufficient evidence of rehabilitation efforts and robust protections for the safety interests of the Employer, as well as if co-workers and the public, such an option can be assessed in the spirit of accommodating a disability. This consideration, either under the *Elk Island* approach, or the existing CN policies, is not automatically precluded by CN’s argument that “it was incumbent on him to seek help prior to the incident.”

The evidence of the grievor's efforts to deal with his addiction are as follows. In his interview he said he'd been dealing with the problem for a year and one half. Right after the incident he contacted the EFAP program and obtained an appointment with a Drug and Alcohol Counsellor for August 3rd. He attended on his own physician on August 2nd who diagnosed alcohol abuse and drug addiction. He was referred to the Addiction Foundation of Manitoba and advised to attend AA meetings.

He attended the August 3rd meeting with the EFAP Counsellor and completed their questionnaire and underwent testing. The Drug Abuse Screening Test revealed a score of 11 which, the guide says, shows a "Substance Use Disorder of 'substantial' severity requiring an 'intensive' level of recommended intervention". He attended four out of five follow-up meetings with the EFAP counsellor, sleeping in on one occasion.

From October 12 to November 9, 2017 the grievor attended the Addiction Foundation of Manitoba's Intensive Residential Rehabilitation Program. The program's comments at the conclusion were:

> Client has completed all aspects of Men's Intensive Treatment and presented a good recovery plan. Client was very introspective during groups and 1-1 sessions. Client has some great insights.

His physician wrote in January 2018 that he had remained sober since July 29, 2017, although there is nothing to indicate this is based on anything but the grievor's self-reporting. More significant are the results of random testing on March 22, 2018 and July

17, 2018 that shows negative for all tested substances including alcohol, marijuana and cocaine.

The grievor's NA sponsor wrote on July 14, 2018, attesting to the grievor's daily attendance and positive change. His current employer of five months provided a very strong reference on his work performance and on his changing lifestyle.

This evidence of considerable rehabilitation effort, which is unchallenged, brings the grievor within the range of circumstances previously accepted by CROA arbitrators as justifying a conditional second chance. Nothing in the *Elk Valley* decision undermines that approach.

If this exercise of s. 60 discretion is based on general principles of accommodation, it must also consider the undue hardship criteria. Reinstatement without strigent conditions would be inappropriate. I have weighed the grievor's record plus his recklessness in taking drugs the night before being available for duty. The grievor's record was detailed in **CROA 4651**. The Company, in its argument, suggested that the level of cocaine in the grievor's system on July 24th suggested either much higher levels on the Saturday night and Sunday morning, or else further consumption at Rivers. However, no evidence was put forward to assist in drawing conclusions from the test results. Had there been evidence to contradict the grievor's evidence of no at-work consumption, proven dishonesty would have precluded any second chance. No such evidence was presented and I am unwilling to infer dishonesty from the 187 ng/ml result

without some evidence of what that reading proves in terms of time and amount of consumption.

The proposition that proven impairment while operating a train automatically proves that accommodating rehabilitation measures thereafter would amount to undue hardship has not been accepted in prior CROA cases. The combination of the grievor's proven commitment to abstinence and rehabilitation, along with the deterrent effort of what amounts to a very significant suspension followed by strigent conditions persuades me that providing relief under s. 60 does not amount to an undue hardship in this case.

The grievor's recognition of his addiction, combined with the substantial evidence of his consistent efforts towards rehabilitation also persuades me this case falls within the range of cases where under CROA the s. 60 discretion has been seen as appropriate. As a result, the grievor is reinstated, but without compensation, and subject to the following conditions, similar to those in **CROA 4375**:

> 1. The grievor shall not be returned to work until such time as he is confirmed by the Company's medical officer to be physically fit to work, including any addiction problems assessment which the Company's medical officer deems appropriate.
>
> 2. Upon being confirmed fit to return to work by the Company's medical officer the grievor shall be subject to the following conditions for a period of 2 years:
>
> a) The grievor shall abstain from the consumption of alcohol or drugs;
>
> b) The grievor shall be subject to random, unannounced drug and alcohol testing, to be administered in a non-abusive fashion.
>
> c) The grievor shall attend regular NA meetings, or an equivalent support group.

d) The grievor shall engage in such periodic contact and follow-up with the Company's Employee and Family Assistance Program (EFAP) as the parties may agree is appropriate, or failing agreement as shall be assigned by a CROA arbitrator.

3. The grievor will be subject to discharge without further recourse if the return to work conditions are proven to have been violated in any way.

I thank counsel for their helpful arguments.

February 5, 2019

ANDREW C. L. SIMS, Q.C.
ARBITRATOR