CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4841

Heard in Montreal, July 11, 2023

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE
MAINTENANCE OF WAY EMPLOYEES DIVISION

DISPUTE:

Post incident substance test of Mr. R. Park.

JOINT STATEMENT OF ISSUE:

At approximately 0630 on January 4, 2022, the garage door at the Edmonton Tool House was detailed from the running tracks requiring repair as a result of a piece of rail protruding off the back of a parked BTMF truck when the garage door was closed.

Following the incident, Foreman R. Park was requested to participate in a substance test. Mr. Park underwent the substance testing with a negative result.

The Union grieved the testing of Mr. Park on January 26, 2022, alleging:

1. Mr. Park had no responsibility for the incident as he was outside the building in his care when the incident occurred;
2. That the Company, in failing to investigate nor discipline Mr. Park, effectively admitted that he had no part in the incident;
3. By testing Mr. Park, the Company violated Policy H$203.1 Section 4.3; and
4. The Company violated Mr. Park's privacy rights by testing him.

The Union requests that the Arbitrator (1) declare that the Company's decision to test the grievor was improper and a violation of his privacy rights, (2) declare that the Company violated Policy HR 203.1, (3) order the Company to apologize to the grievor, and (4) order the company to compensate the grievor $5,000.00 for reparation/ damages.

The Company disagrees with the Union's allegations and denied the Union's request on the following basis:

1) The incident was a significant incident as contemplated by the Policy HR 203.1;
2) Foreman Park was responsible for providing direction to his crew and left the driver of the BTMF truck (contractor) unattended; and,
3) The Company maintains Mr. Park was appropriately post incident tested in accordance with Policy 203.1 and arbitral jurisprudence. As such, the Company did not violate Mr. Park's privacy rights.

The Company disputes the Union's request for $5,000.00 maintaining the Union's failure to provide sufficient information to support this request.

For the foregoing reasons and those provided during the grievance procedure, the Company maintains its actions were appropriate in all the circumstances and requests the arbitrator be drawn to the same conclusion and dismiss the Union's position in its entirety.

FOR THE UNION:
(SGD.) W. Phillips
President - MWED

FOR THE COMPANY:
(SGD.) L. McGinley
Director Labour Relations

There appeared on behalf of the Company:
L. McGinley – Director, Labour Relations, Calgary
J. Bairaktaris – Director, Labour Relations, Calgary

And on behalf of the Union:
W. Phillips – President, MWED, Ottawa
D. Brown – Counsel, Ottawa
P. Boucher – President, TCRC, Ottawa

AWARD OF THE ARBITRATOR

ANALYSIS

1. The jurisprudence is clear that drug and alcohol testing requires a balancing of the employee's privacy rights with the employer's right to take reasonable steps to ensure safety of employees, company property and the public.

2. As Arbitrator Clarke found in **CROA 4668**, a careful balancing of the legitimate interests on both sides must be made, in light of the facts of each case. In so doing, he quoted and adopted the reasoning of Arbitrator Picher in a 2000 award in SHP530:

> **The legacy of SHP530**
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> 11. In the lengthy July 2000 award in SHP530, Arbitrator Picher examined whether a policy entitled "Policy to Prevent Workplace Alcohol and Drug Problems", and which required substance testing, violated the applicable collective agreement and the Canadian Human Rights Act. The award is lengthy, so the arbitrator will only summarize a few of its key principles.
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> 12. Arbitrator Picher noted the legitimate, though competing, interests in this area:
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> > Turning to the merits, seldom has the Arbitrator encountered a contest of such thoroughly considered and argued positions from both sides. **The Company's policy is rooted in a legitimate concern for the well-being of its employees and the safety of its own operations, in a**

> **manner most consistent with its obligations to the public. The Union and Intervener advance equally legitimate arguments in eloquent defence of the privacy and dignity of the individual, deeply cherished values in Canadian society.** The Arbitrator must strive to resolve their positions in a manner that best reconciles the competing interests of the parties, in the light of established law and jurisprudence.
>
> (Emphasis added)

13. The arbitrator accepted that these competing interests must be balanced based on the facts of each case:

> Without exception, boards of arbitration, striving to be responsive and pragmatic in the face of workplace realities and genuine concerns for safety, have opted for the balancing of interests approach. **In this Arbitrator's view that is the preferable framework for a fair and realistic consideration of the issue of drug and alcohol testing in the workplace generally, most especially in an enterprise which is highly safety-sensitive. While the time-honoured concept of the sovereignty of an individual over his or her own body endures as a vital first principle, there can be circumstances in which the interests of the individual must yield to competing interests, albeit only to the degree that is necessary.** The balancing of interests has become an imperative of modern society: it is difficult to see upon what basis any individual charged with the responsibilities of monitoring a nuclear plant, piloting a commercial aircraft or operating a train carrying hazardous goods through densely populated areas can challenge the legitimate business interests of his or her employer in verifying the mental and physical fitness of the individual to perform the work assigned. Societal expectations and common sense demand nothing less.
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> (Emphasis added)

14. However, the linchpin for substance testing focuses on whether reasonable and probable grounds exist:

> In the result I am taken back to the contest between an employer's right to manage and an employee's right to individual privacy that is dealt with in the drug and alcohol testing awards that are cited herein. Simply put, absent express language in the collective agreement, both the employee's right to individual privacy (with all that that

> entails) and the employer's right to make rules for the purpose of furthering its business objectives (with all that that entails) are accepted as legitimate and valued, albeit sometimes competing rights. In circumstances where these rights are competing, such that employees may be disciplined for non-compliance, resolution is achieved by weighing or balancing the competing impacts. **In respect of drug and alcohol testing of employees the balance has been struck in favour of protecting individual privacy rights, except where reasonable and probable grounds exist to suspect the drug and alcohol impairment or addiction of an employee in the workplace and except where there is no less intrusive means of confirming the suspicion.** Conversely, the balance has been struck in favour of management's right (as part of its general right to manage) to require drug or alcohol testing, where the two aforementioned conditions exist. It follows that each case must be decided on its own facts.
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> (Emphasis added)

3. The company policy on drug and alcohol testing calls for the following:

> **4.3 Post Incident Testing**
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> Post Incident alcohol and drug testing may be required after a significant work related incident, a safety related incident or a near miss as part of an investigation.
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> Employees are expected to participate fully in an investigation. Failure to report an incident is a violation of the Canadian Internal Control Plan for Incident Reporting.
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> A significant work related incident, safety related incident or near miss might involve any one of the following:
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> - a fatality;
> - any number of serious injuries or multiple injuries to Company personnel or the public requiring medical attention away from the scene or lost time injuries to Company personnel; or an incident or near miss that creates this risk;
> - significant loss or damage to Company, public or private property, equipment or vehicles or an incident or near miss that creates this risk;
> - an incident with serious damage or implications to the environment, or an incident or near miss that creates this risk.
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> The decision to refer an individual for testing will be made by the Supervisor investigating the incident after consultation with and agreement of an Experienced Company Operating Officer (ECOO), i.e. Senior Vice President (SVP), Assistant Vice President, (AVP), General Manager (GM),

> Superintendent, Director or Chief Engineer. Unionized employees will be entitled to union representation provided this does not cause undue delay. Post Incident testing is not justified if it is clear that the act or omission of the individual(s) could not have been a contributing factor to the incident e.g. structural, environmental or mechanical failure or the individual clearly did not contribute to the situation.

Was there a "serious incident"?

4. The Union takes the position that there could not have been a serious incident, as no formal investigation was ever launched by the employer.

5. The Company takes the position that there was indeed a "significant work related incident", a "safety related incident" and a "near miss". A heavy garage door fell ten feet to the ground, next to where the contractor was operating the garage door opening/closing switch. The garage door was damaged, the maintenance truck was stuck inside the garage for many hours, preventing maintenance work on the track and the contractor could have been injured in the incident. The Company says this constitutes a significant work related incident, a "near miss" of injury to the contractor and a "significant loss or damage" to Company property.

6. Here, I agree with the Company. The falling door could have severely injured either the contractor or other employees. The damage to the door itself, and the loss of access to the truck and the ability to maintain the track are also a significant loss or damage.

Was Mr. Park "involved" in the incident?

7. The Union takes the position that Mr. Park could not have been involved in the incident, as he was in his car some distance away from the garage door at the time of the incident. It also notes that Mr. Park did not operate the door. The Union argues that under the Company policy, Mr. Park was not "involved" and therefore should not have been post incident tested.

8. The Company takes the position that Mr. Park, as foreman, supervised the activities of the contractor. Mr. Park noticed the possible obstruction of the door by the rail on the maintenance truck and could have avoided the incident by moving either the rail or the truck. He did warn the contractor to be careful in lowering the door, but then left the garage to go to his car. The Company argues that Mr. Park was directly involved in the incident.

9. In my view, this situation is quite different from that in **CROA 4256**, where the grievor was found not to be responsible for the movement of the train and had no responsibility to warn of an obvious obstruction:

> In the circumstances, I have substantial difficulty understanding on what basis the Company's officers could conclude that there was a clear link or a probable link between the incident which occurred and the grievor's actions or condition. He was, very simply, going about his business conducting other work in the yard office at the time of the collision. There is no suggestion that he contributed to the collision nor was any discipline ever assessed against him. Nor has it been suggested by the Company that the Yardmaster was under any obligation to give a special warning to the locomotive engineer with respect to the presence of a substantial consist of cars in track NF-52, a fact that was plainly obvious for the locomotive engineer to see.
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> What the material before the Arbitrator establishes is that a collision occurred in the yard while the grievor was on duty as Yardmaster. With respect, that of itself does not justify requiring an employee to undergo a drug and alcohol test in the wake of a collision or other accident. There is no evidence to suggest that the Company's officers who conducted the preliminary investigation of the collision believed or had reason to believe that any act or omission of the grievor contributed to the collision which occurred. There is no suggestion that there was anything improper in his having placed a consist of cars in NF-52 or that he was under any particular obligation to alert yard crews about the presence of cars in that track. Nor, as noted above, was there anything to suggest to the Company's supervisors that Yardmaster M was in any way involved in the minute to minute operations of the yard movement which became involved in the collision due to the apparent carelessness of its locomotive engineer.
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> In all of the circumstances I am compelled to agree with the Union that the Company's officers did not have a sufficient basis to conclude that the grievor had any involvement or likely responsibility for the collision which occurred. To use the words of Arbitrator Sims, the Company has not established the necessary link between the incident and the situation of the

> grievor so as to have justified the requirement that he undergo drug and alcohol testing.

10. Here, however, Mr. Park was responsible for the actions of the contractor and the placement of the truck and had specifically provided an instruction to the contractor concerning the operation of the door. In my view, Mr. Park was "involved" in the incident, for the purposes of s. 4.03 of the Policy.

Was testing appropriate here?

11. Under s. 4.03 of the Policy, "Post incident testing may be required after a significant work related incident, a safety related incident or a near miss as part of an investigation". I have found above that the incident met this threshold test as it relates to a significant and serious incident.

12. It notes: "The decision to refer an individual for testing will be made by the Supervisor investigating the incident after consultation with and agreement of an Experienced Company Operating Officer (ECOO)…" Here, the supervisor, Mr. Leduc, contacted a senior manager, Mr. Humphries and discussed the incident with him. In my view, this procedural step was met.

13. Finally, the Policy notes: "Post incident testing is not justified if it is clear that the act or omission of the individual(s) could not have been a contributing factor to the incident e.g. structural, environmental or mechanical failure or the individual clearly did not contribute to the situation".

14. In my view, the final paragraph of s. 4.03 clearly states when testing will not be appropriate. It does not, however, state when testing will be appropriate. For that, discretion will have to be exercised under the initial paragraph: "Post incident testing may be required…".

15. The CROA jurisprudence is clear that this process cannot be a mechanical one, or a matter of simply checking a box on a form. (See **CROA 4256**).

16. Instead, that discretion must be exercised pursuant to both the Court and CROA jurisprudence, and a balancing of privacy rights and safety concerns be made (see SHP 530, **CROA 4668**). In addition to the necessary balancing of interests, there must be a "necessary link between the incident and the employee's situation to justify testing" (see Weyerhaeuser Company Ltd v. CEP, Local 447 (2006), 154 LAC (4th) 3, cited in **CROA 2456**).

17. Here, Mr. Park had been involved in a decision not to move either the truck or the rail. Rather, a warning was issued to the contractor and Mr. Park left the area.

18. Had Mr. Park operated the door himself, or observed the contractor operating the door and failed to react, the balance might well tip towards the need for testing. If Mr. Park had noticed a potential danger and failed to do anything about it, this action might well be so inexplicable that testing would be appropriate. As noted by Arbitrator Picher in **CROA 3841**:

> "There is no good explanation for the grievor's failure to avoid the run-through of the switch. By his own account he had a clear view as his locomotive progressed forward towards the switch, a switch he had passed many times before…by (his) own admission he can give no explanation for how or why he ran through the switch in violation of CROR 114B".

19. Here, however, a warning was issued, which if it had been properly followed by the contractor, no incident would have occurred. It can be argued that Mr. Park made a poor managerial decision in warning the operator of the door, rather than moving the truck or rail.

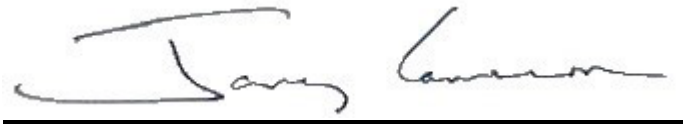
20. However, Mr. Park was neither directly involved in the operation of the door, nor was his decision to warn so inexplicable, as to raise concerns about his judgment and possible impairment. In these circumstances, some form of managerial counselling might well be appropriate, but not post incident testing. The "necessary link", referred to above, has not been met.

21. I find, therefore, that the post incident testing on Mr. Park was not justified and to this extent, the grievance is upheld.

Are damages appropriate?

22. The Company has been successful on the issues of whether this was a serious incident and whether Mr. Park was involved, for the purposes of the Policy. The Union has been successful concerning the issue of whether post incident testing was appropriate. Even on this final threshold, the matter was not clear and obvious. While I accept that inappropriate post incident testing can result in damages, with the appropriate evidence, this is not that case. I decline, therefore, to award damages in these circumstances.

August 8, 2023



JAMES CAMERON

ARBITRATOR