CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4870

Heard in Montreal, October 17, 2023
Additional written submissions from the Parties
In November and December, 2023

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The incorrect and arbitrary handling of Mr. P. Smith in relation to CPR's Policy on Asbestos Management, but the issues give rise to the entire policy and its adopted course and actions.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Mr. Peter Smith is a retired RTE that worked more than thirty-six (36) years as a yard-person, trainperson, conductor, and locomotive engineer and was diagnosed with colon cancer and extensive lung abnormalities in 2010 then retiring in 2012. In 2019, Mr. Smith had heart surgery whereby further evidence of lung abnormalities were found consistent with previous findings. For example, from his files at the Jewish General Hospital from 2010 to 2016, extensive abnormalities in both lungs, ground-glass opacities, lung lesions, extensive granulomas, calcified lymph nodes, (and hilar and mediastinal calcifications), asbestosis, lung calcification, sarcoidosis, interstitial, lymphangitis carcinomatosis, and mesothelioma. Then in surgical notes of his heart surgery July 2019, "we opened the pleurae cavity and to our great surprise we found that the lung was encased in a very thick chronic peel of tissue…impossible to remove the peel as it was so chronic and thick". Mr. Smith with assistance from his brother Trevor Smith had reached out to the Company for assistance as per the 2006 Policy on Asbestos Management for information on the statistics of asbestos related medical problems, materials used and suppliers as well as the opportunity to take part in the medical program maintained to assess employee exposure to asbestos through Occupational Health Services. As per the policy statement, CPR would also conduct exposure assessments for employees exposed to asbestos, questionnaires, and medical programs with records kept of such as well as asbestos repairs, removals, air clearance test results, disposal records, all of which are to be filed with environmental services. The information requested and assistance was denied on September 18, 2020.

Union Position:

For all the reasons and submissions set forth in the Union's grievances, which are herein adopted, the Union contends as below.

The Company failed to respond to the step two appeal which is a violation of Article 40.02 of the Collective Agreement and the May 29, 2018 Agreement on Management of Grievances.

The Company requested a time limit extension from the Union to respond to the step three appeal yet still responded late.

The Union contends that in the case of Mr. Peter Smith, that he was not handled in accordance with the policy on asbestos management and as such was deprived of assistance with his diagnoses, monitoring, maintenance in a medical program, and denied access to exposure reports, materials and equipment and suppliers of asbestos, the asbestos abatement information, all of which could have been used as per policy, for his protection in the described medical program.

The declination to provide Mr. Peter Smith the requirements under policy, not only violate his rights, but violates all employees covered by policy at CP as the information gathered on asbestos, the sites that contained asbestos, the levels of exposure, the disposal of, the treatment of those exposed, the consequent health effects, the medical questionnaires/assessments/programs, planning and management would assist in the management of risk associated with asbestos.

Most cases of asbestos related health problems take years after exposure to diagnose.

The action that CP has taken developing a policy on asbestos management is only useful if all aspects are covered off as proposed. The removal of asbestos is only a part of the process. The next steps of worker protection, work site controls, worker training, and medical programs are required to fulfill the policy statement of responsibility.

The Union contends that Mr. Peter Smith ought to have access to the policy's assistance and should be placed in the medical program. That he should have access to the asbestos related information regarding his workplace, exposure, materials, abatement, and all risks that he was unaware of during his working service time at CP.

The Union contends that all employees current and retired and estates of those deceased have access to all the above information.

The Company has taken an approach that Mr. Smith does not fall under the CA as a retired employee and therefore does not address the issue based on this. The Union contends this is an arbitrary and discriminatory way to handle as Mr. Smith was an employee of CP Rail when these issues caused him harm but did not know of such account CP Rail's mismanagement of the policies. Therefore, the grievance ought to be considered valid and justified for Mr. Smith.

The Union requests that Peter Smith and all employees present, future, retired, and estates of those deceased be privy to the policy, be included in assistance programs as per policy, be informed, participate, and have access to the information contained and described as per policy. That all those mentioned have the right to know, the right to participate, and the right to refuse afforded to them, and in addition to such further relief the Arbitrator deems necessary in order to ensure future compliance with the above provisions.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

Mr. Smith entered company service on July 2, 1974, as a running trades employee. He retired October 1, 2012.

A request for information on the 2006 Asbestos Management Policy, including asbestos related medical information and a request for a medical assessment, was made on behalf of retiree Mr. Peter Smith on August 13, 2020. The request was declined on September 18, 2020.

Union Position:

The Union has filed their own Ex Parté Statement of Issue.

Company Position:

The Company disagrees and denies the Union's request.

The Company objects to the improper submission of this grievance on the basis that (1) Mr. Smith was no longer covered by the TCRC Collective Agreement at the time this grievance was filed and (2) that the TCRC Collective Agreement does not contemplate nor provide for the filing of grievances on matters such as this.

Mr. Smith retired October 1, 2012. The step two appeal was filed approximately 8 years later on November 17, 2020. At the time the grievance was filed, Mr. Smith was not an employee (Locomotive Engineer, Conductor, Trainman or Brakeman) nor a dues paying member of the TCRC bargaining unit. Accordingly, the Company maintains the grievance was not properly filed under the TCRC Collective Agreement and as such, ought to be dismissed on this basis alone.

Mr. Smith submitted a Workers' Compensation Claim with the CNESST for this matter and that claim was accepted, entitling him to benefits. Mr. Smith has had no loss of compensation or benefits as a result, nor has his file been mishandled as the Union argues. As Mr. Smith's Workers' Compensation Claim is active and within the jurisdiction of the insurance provider, he would not be entitled to any further benefits, compensation, or otherwise, from the Company and certainly not through the grievance and arbitration procedures.

A recent Administrative Labour Tribunal decision was released on August 24, 2023, wherein the Tribunal found Mr. Smith's medical condition to be related to his exposure to asbestos during his employment and constitutes an employment injury as an occupational disease. In the same decision, the Tribunal found a second medical condition to be unrelated to asbestos exposure. The CNESST has yet to render its decision on entitlement following the Tribunal's decision.

The Company disagrees with the Union's request for further relief and reserves the right to object or further detail such disagreement should the Union attempt to expand upon this position.

The Union's comments alleging arbitrary and discriminatory handling of Mr. Smith are without merit and unsupported by fact.

The TCRC Collective Agreement contemplates grievances being filed further to (1) "a wage claim not allowed", (2) "a grievance concerning the meaning or alleged violation of any one or more of the provisions of this Collective Agreement", or (3) "against discipline imposed". As identified by the Union's position outlined above, no violation has been alleged regarding the provisions of the TCRC Collective Agreement and on this basis, this grievance is not properly filed.

The Company further objects to the Union's references to "*all employees present, future, retired, and estates of those deceased…*" as inappropriate. The TCRC Collective Agreement

Article 40 Grievance Procedure explicitly contemplates a "cause of grievance" not some yet unknown or possible future event being the subject matter of a grievance. This reference by the Union is inappropriate and not properly submitted before the arbitrator.

In regards to the Union's allegations concerning the grievance correspondence, as per the grievance procedure the remedy for a failure to respond is escalation to the next step. This has occurred and the Company's position has been provided.

Finally, the Company maintains its handling of Mr. Smith was appropriate and in line with Policy and other legal obligations (e.g. PIPEDA) in all the circumstances.

The Company maintains that no violation of the Collective Agreement or the 2006 Asbestos Management Policy has occurred, Mr. Smith is not due any additional compensation and requests the Arbitrator decline the Union's grievance in its entirety.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) E. Mogus	**(SGD.) L. McGinley**
General Chairperson, LE-E	Director, Labour Relations

There appeared on behalf of the Company:

A. Cake	– Manager Labour Relations, Calgary
D. Zurbuchen	– Manager Labour Relations, Calgary
M. Pilon	– WCB Specialist, Montreal
L. McGinley	– Director, Labour Relations, Calgary

And on behalf of the Union:

D. Ellickson	– Counsel, Caley Wray, Toronto
J. Bishop	– Vice General Chair, LE-E, MacTier
D. Fulton	– General Chairman, CTY-W, Calgary
J. Hnatiuk	– Vice General, CTY-W, Calgary

AWARD OF THE ARBITRATOR

Preliminary Objections

1. Both the Company and the Union have raised a host of preliminary objections which go to almost every aspect of the grievance process in the present matter. These objections include:

- **A.** Does the Union have the right to bring a grievance on behalf of a retired member?
- **B.** Can Trevor Smith bring a request on behalf of his sick brother, Peter Smith?
- **C.** Is the Union entitled to rely on the 2022 amendments to the Policy, or only the 2006 version of the Policy?
- **D.** What are the consequences of the Company failing to provide a Step 2 Response? Is the Company Step 3 response untimely?
- **E.** Can the Union bring a grievance which is based on a Policy, rather than the Collective Agreement itself?

F. Is the Union entitled to make a claim on behalf of all of its members, both active and retired and on behalf of deceased members?

Decisions on these objections will substantially address the merits of this matter.

A. Does the Union have the right to bring a grievance on behalf of a retired member?

Position of the Parties

2. The Company takes the position that Peter Smith retired in 2012 and is no longer covered by the Collective Agreement or represented by the Union. It points to the preamble of the Agreement, which reads as follows:

> The Company recognizes the Teamsters Canada Rail Conference (the "Union") as the sole and exclusive bargaining agent for all of its employees classified as Locomotive Engineer, Conductor, Assistant Conductor, Baggage-person, Brakeperson, Car Retarder Operator, Yard Foreman, Yard Helper and Switchtender.

3. It also submits that the CROA Agreement at para. 6 excludes a grievance on behalf of a retired employee:

> The jurisdiction of the arbitrators shall extend and be limited to the arbitration, at the instance in each case of a railway, being a signatory hereto, or of one or more of its employees represented by a bargaining agent, being a signatory hereto, of;
>
> (A) disputes respecting the meaning or alleged violation of any one or more of the provisions of a valid and subsisting collective agreement between such railway and bargaining agent, including any claims, related to such provisions, that an employee has been unjustly disciplined or discharged; and;
>
> (B) other disputes that, under a provision of a valid and subsisting collective agreement between such railway and bargaining agent, are required to be referred to the Canadian Railway Office of Arbitration & Dispute Resolution for final and binding settlement by arbitration;
>
> but such jurisdiction shall be conditioned always upon the submission of the dispute to the Office of Arbitration in strict accordance with the terms of this agreement.

4. It relies on **CROA 2383** in which Arbitrator Picher found a grievance on behalf of retired members to be inarbitrable.

5. The Union submits that s. 57 of the Canada Labour Code and Weber[1] give the arbitrator broad jurisdiction to resolve disputes between the parties.

6. It submits that this matter is in the nature of a policy grievance, even if the specific facts relate to a particular employee. It submits that the Courts have repeatedly found that the employer must apply its policies in a manner which is not arbitrary, discriminatory or in bad faith (see paras. 45-49, Union Brief).

7. Factually, it submits that the grievor here only found out about his asbestos related illness after he retired. The Union argues that his rights crystallized, however, when he was exposed to the asbestos, which happened while he was covered by the Agreement[2].

Decision

8. It is clear that rights created during the life of a collective agreement may survive the expiration of the agreement. In Dayco, the Supreme Court of Canada held that retirement benefits survived the termination of the agreement:

> To summarize, I am of the view that retirement rights can, if contemplated by the terms of a collective agreement, survive the expiration of that agreement. Moreover, although it is not strictly necessary to decide the point in this appeal, I would also find that these surviving rights vest at the time of retirement, and would survive subsequent collective bargaining that purported to divest such rights. As such, I have concluded that the arbitrator's general propositions in this respect were correctly stated, and the arbitrator had jurisdiction to hear the union's grievance. Of course, I make no comment on whether the terms of the agreement between the company and the union do in fact create such a vested right. That is a question for the arbitrator to decide when the arbitration hearing proceeds on the merits.

9. The 2006 Asbestos Management Policy explicitly recognizes that the health effects caused by asbestos may manifest themselves years after the initial exposure:

> Health Effects:
> The health hazard posed by the inhalation of asbestos fibres depends on the mineral type of the asbestos, and the size and shape of the

[1] Weber v. Ontario Hydro, [1995] 2 S.C.R. 929
[2] Dayco (Canada) Ltd. v. C.A.W., [1993] 2 S.C.R. 230 (S.C.C.)

fibres. The likelihood of developing health problems from asbestos depends on when the asbestos exposure began, and the quantity of asbestos fibres that have been inhaled.

a. Pleural effusions and plaques

Pleural effusions and plaques are collections of fluid and fibrous tissue (respectively) that collect on the inside of the chest wall, likely due to friction effects or inflammation caused by asbestos fibres. They do not lead to cancer and normally do not affect lung function. The likelihood of developing pleural effusions and plaques is increased in persons having occupational exposure to asbestos, and can first appear on a chest x-ray within 10-15 years after first exposure.

b. Asbestosis

Asbestosis is a diffuse lung disease that produces fibrous tissues throughout the whole lung. This disease occurs only with higher levels and longer duration of occupational exposure, and is not seen in the general population nor in persons who have had “bystander” or low level occupational exposure to asbestos. It will generally occur between 20 and 30 years after the first exposure to asbestos. Asbestosis causes progressive loss of lung function and can also lead to lung cancer.

c. Lung Cancer

The majority of lung cancers in the general population are probably due to smoking or environmental radiation, with a small proportion likely due to asbestos exposure. Asbestos-related lung cancers are most likely to occur when asbestosis is present; whether asbestos-related lung cancers will occur in the absence of asbestosis remain unclear. The types of tumours are very similar to those caused by cigarette smoking. Asbestos exposure and smoking together increase the risk for lung cancer greater than either asbestos exposure or smoking alone. For this reason, smokers who have had past or current exposure to asbestos are encouraged to stop smoking as soon as possible.

d. Mesothelioma

Mesothelioma is a normally rare, but usually fatal, cancer that arises from the cells that form the lining of the lung. The risk for this cancer increases in proportion to the amount of asbestos fibres that have been inhaled. These tumours usually do not appear until after 30 years from first exposure. These tumours have no relationship to tobacco smoking, and the only means of prevention is to reduce further asbestos exposure.

10. If the illness only manifests itself between ten (10) and thirty (30) years after exposure, the Company’s argument would mean that the Policy would only ever apply to a small subset of individuals, being those exposed at the beginning of their careers and

still actively employed at the time of the manifestation of the illness. This argument might well mean that the large majority of those becoming ill would never be entitled to any of the protections of the Policy, despite being exposed during the course of their employment with the Company.

11. In my view, the Union argument is more compelling. If the employee was exposed to asbestos while employed by the Company and becomes ill after retirement, the employee's rights under the Policy have crystallized, as was the case in Dayco.

12. I find that **CROA 2383** is distinguishable on the facts. There, Arbitrator Picher dealt with an extended health care plan given to retirees on a gratuitous basis. There, the arbitrator found that the Company was entitled to cancel the plan on a prospective basis, but paid out retirees until the plan was cancelled. Here, the Asbestos Management Plan has not been cancelled, and indeed was modernized in 2020. The issue here has nothing to do with whether the Company is compelled to continue a plan, but rather whether retirees have access to the protection of an existing plan. For the reasons given above, I find that they do have such access.

B. Can Trevor Smith, bring a request on behalf of his sick brother, Peter Smith?

Position of the Parties

13. The Company argues that Trevor Smith was never a member of the Union or covered by the Collective Agreement, and the Union has no right to bring a grievance on his behalf.

14. The Union argues that Peter Smith gave his brother permission to act on his behalf and emailed this permission to the Company in July 2020. It states that Peter Smith was copied on email exchanges made by Trevor Smith with the Company. Finally, it argues that this objection was never raised in the Company Ex Parte Statement, nor in the Company response to the grievance, and it may not now advance such an argument.

Decision

15. Based on CROA Rule 14, to which both parties have agreed, I only have jurisdiction to deal with issues identified in the JSI or Ex Parte Statements:

> The decision of the arbitrator shall be limited to the disputes or questions contained in the joint statement submitted by the parties or in the separate statement or statements as the case may be, or, where the applicable collective agreement itself defines and restricts the issues, conditions or questions, which may be arbitrated, to such issues, conditions or questions. The Arbitrator's decision shall be rendered in writing, together with written reasons therefor, to the parties concerned within **45** calendar days following the conclusion of the hearing unless this time is extended with the concurrence of the parties to the dispute, or unless the applicable collective agreement specifically provides for a different period, in which case such different period shall prevail.
>
> The decision of the arbitrator shall not in any case add to, subtract from, modify, rescind or disregard any provision of the applicable collective agreement.

16. The Company did not raise this objection prior to their Brief. It is therefore prevented by Rule 14 from doing so now.

17. If there was a need to rule on the merits of this objection, I would have found that the permission given by Peter Smith and the correspondence between Trevor Smith and the Company would now preclude the Company from invoking an incapacity for Trevor Smith to act on behalf of his sick brother.

C. Is the Union entitled to rely on the 2022 amendments to the Policy, or only the 2006 version of the Policy?

Position of the Parties

18. The Company notes that in paragraphs 21-25 and 65 of the Union Brief, it refers to the 2022 Asbestos Management Program, which is the successor to the 2006 Program.

19. The Company objects to these references, as the 2022 Asbestos Management Program is never mentioned in the grievance or in the Union Ex Parte Statement of Issues.

20. This objection is not specifically addressed by the Union.

Analysis and Decision

21. Based on CROA Rule 14, referred to above, I only have jurisdiction to deal with issues raised in the Joint or Ex Parte Statement of Issues. The CROA jurisprudence is consistent about the importance of the Parties respecting the Rules to which they have jointly agreed (see **CROA 4739** as an example).

22. Accordingly, I may not consider or rule upon the 2022 Asbestos Management Program.

D. What are the consequences of the Company failing to provide a Step 2 Response? Is the Company Step 3 response untimely?

Position of the Parties

23. The Union takes the position that the Company violated article 40.02 of the Collective Agreement and 2018 CROA Agreement between the parties by its failure to provide a response to their Step 2 grievance. It further argues that the Step 3 response from the Company was untimely, as it states that the response was provided on May 22, 2021, a day after the agreed to extension.

24. The Company takes the position that the remedy for a failure to respond at a given level of the grievance procedure is to proceed to the next level, which was done. It further argues that the Step 3 response was provided at 11:40 MST on May 21, 2021 (see Company documents, Tab 16). It also states that the Union suffered no prejudice.

Analysis and Decision

25. The Collective Agreement and the CROA Agreement both set out a requirement to respond to all levels of a grievance. Article 40.02 notes that the Step 2 response must be provided “as soon as possible but in any case within 60 calendar days of the date of the appeal”, while the CROA Agreement notes: “There is agreement that all grievances

must be advanced and must be responded to in each case, at all levels…" (See Tab 15, Union documents).

26. Even if the Company is correct that the Union may move to the next level if the Company fails to respond to a grievance, this does not address the requirement in the Collective Agreement and the CROA Agreement that there be a response. The Parties recognize that there is value in having a position on the record, so that issues can be narrowed or agreements reached. No answer is not a good answer. This is not a practice to be encouraged. Here, the Company has breached article 40.02 and the 2018 CROA Agreement by failing to make a Step 2 Response.

27. With respect to the Step 3 filing, the Company sought an extension until "end of day May 21" (see Union documents, Tab 11). No argument was advanced concerning the meaning of "end of day", but a common understanding of the expression would be "end of the business day" not "end of calendar day". If it were otherwise, there would be no need to add "end of day" to "May 21".

28. However, the Union has not advanced any evidence of prejudice. The power to relieve against late filings is given to arbitrators under s. 60 (1.1) of the Canada Labour Code. Any possible lateness here is de minimis and should be relieved against.

E. Can the Union bring a grievance which is based on a Policy, rather than the Collective Agreement itself?

Position of the Parties

29. The Company submits that the grievance was filed under article 40.02 of the Collective Agreement, which reads as follows: "a grievance concerning the meaning or alleged violation of any one or more of the provisions of this Collective Agreement". It states that as no violation of the Collective Agreement has been argued, this grievance has been improperly filed.

30. The Company further argues that the Union is improperly attempting to argue a policy grievance on the back of an individual grievance.

31. The Union submits that there is no specific provision of the Collective Agreement in issue, as the grievance involves the interpretation and application of the 2006 AMP, which the Union alleges has been made in an arbitrary, unreasonable and in bad faith manner. It submits that there is nothing improper in the grievance addressing both a policy and individual concern, as there is nothing in the Collective Agreement which prevents this.

Analysis and Decision

32. The Courts have repeatedly upheld arbitral decisions which identify and decide the essential issues between the parties, as opposed to being limited by procedural objections (see Blouin Drywall Contractors Ltd. (1975), 8 O.R. (2d) 103 (C.A.)).

33. Arbitrators and Courts have found that Company Policies may be challenged by Unions, even if the Policy is not directly referenced in the Collective Agreement. Policies may be challenged if their provisions or their application are unreasonable, discriminatory or in bad faith (see KVP Co. (1965), 16 LAC 73; Air Canada (2019), 300 LAC (4th) 436).

34. Here, it is clear that the essential issue between the Parties is the proper interpretation and application of the 2006 AMP. This is found in all steps of the grievance process and in the Statement of Issues:

> Steps 2 and 3: “This grievance directly references the handling of Mr. Peter Smith in relation to CPR’s Policy on Asbestos Management, but the issues give rise to the entire policy and its adopted course and actions”

35. Union Statement of Issues Ex Parte

> …The Union contends that in the case of Mr. Peter Smith, that he was not handled in accordance with the policy on asbestos management and as such was deprived of assistance with his diagnoses, monitoring, maintenance in a medical program, and denied access to exposure reports, materials and equipment and suppliers of asbestos,

> the asbestos abatement information, all of which could have been used as per policy, for his protection in the described medical program.
>
> The action that CP has taken developing a policy on asbestos management is only useful if all aspects are covered off as proposed. The removal of asbestos is only a part of the process. The next steps of worker protection, work site controls, worker training, and medical programs are required to fulfill the policy statement of responsibility.
>
> The Union contends that Mr. Peter Smith ought to have access to the policy's assistance and should be placed in the medical program. That he should have access to the asbestos related information regarding his workplace, exposure, materials, abatement, and all risks that he was unaware of during his working service time at CP.

36. Company Statement of Issues Ex Parte:

> The Company maintains that no violation of the Collective Agreement or the 2006 Asbestos Management Policy has occurred, Mr. Smith is not due any additional compensation and requests the Arbitrator decline the Union's grievance in its entirety.

37. As noted above, the Company objects to the present grievance, based as it is, on a Company Policy. However, I do not find that the objection is well founded. The essential issue at the heart of the grievance is the proper interpretation and application of the 2006 AMP. The Union has alleged that the Company has mis-applied the AMP, and done so in a manner which is unreasonable, discriminatory or in bad faith. I find that both the Canada Labour Code, the Collective Agreement and the jurisprudence require me to decide this essential issue between the Parties.

38. In AH 809, Arbitrator Clarke did an extensive review of the legislative and contractual framework for the resolution of disputes between these same Parties, together with principles of interpretation commonly applied by arbitrators. His approach, set out at paragraphs 14-31, makes good sense and I adopt it here. He looks at the statutory framework given by the Canada Labour Code, the articles of the Collective Agreement between these Parties and the principles of contract interpretation set out in the jurisprudence.

39. Section 57 of the Canada Labour Code stipulates that that all disputes between the parties be settled by arbitration or otherwise:

> Every collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or employees bound by the collective agreement, concerning its interpretation, application, administration or alleged contravention.

40. Section 57 of the Code requires collective agreements to have a mechanism to arbitrate "all differences" between the parties. This Collective Agreement has such a mechanism in article 41.01:

> 41.01 All differences between the parties to this Collective Agreement concerning its meaning or violation which cannot be mutually adjusted shall be submitted to the Canadian Railway Office of Arbitration and Dispute Resolution for final settlement without stoppage of work.

41. As Arbitrator Clarke noted in AH 809:

> "34. …article 41.01 of the CA makes it explicit that both CP and the TCRC can take "all differences" to CROA. That article reflects the Code's requirement for the CA to contain a provision for the settlement of all differences. This would allow CP to file an employer grievance, despite no specific CA wording setting out this entitlement."

42. A "difference" clearly exists between the Parties as to the proper interpretation of the 2006 AMP. Article 41.01 of the Collective Agreement would permit the referral to arbitration of such a difference.

43. Moreover, article 40.02, specifically referred to in the grievance, is the mechanism by which all violations of the Collective Agreement are referred to arbitration:

> 40.02 A grievance concerning the meaning or alleged violation of any one or more of the provisions of this Collective Agreement shall be processed in the following manner…

44. Article 40.02 refers to "any one or more of the provisions of this Collective Agreement". That would therefore encompass article 41.01, which refers to "all differences", not just those based on matters explicitly mentioned in the Collective Agreement.

45. Other contestations of Policies by these Parties have been upheld by both arbitrators and the Courts. In CPR Co. v TCRC 2023 ONSC 5109, the Ontario Divisional Court upheld a decision of Arbitrator Kaplan in which he found the employer's Functional Abilities Form and Policy 1804 had infringed employee privacy rights. He found that the FAF and Policy failed the KVP test of reasonableness. Obviously neither the Form nor the Policy would be part of the Collective Agreement, yet a grievance was the appropriate mechanism used to address these issues.

46. Based on the Code, the Collective Agreement and the jurisprudence, I find that the proper interpretation of the 2006 AMP is a dispute properly brought before me by the present grievance.

G. Is the Union entitled to make a claim on behalf of all of its members, both active and retired and on behalf of deceased members?

Position of Parties

47. The Company argues that the grievance concerns an individual, Peter Smith, and that the Union is not entitled to seek relief on behalf of all its members, and even its former members, being either retired or deceased.

48. The Company relies on **CROA 2383**, in which a grievance filed for a retired member was found to be inarbitrable.

50. It argues that the Union claim on behalf of "all employees present, future, retired, and estates of those deceased be privy to the policy…" has exceeded the 60 calendar days for the filing of a grievance.

51. The Union submits that there is nothing improper about it seeking relief on behalf of all affected employees.

Analysis and Decision

52. It is noteworthy that the Collective Agreement here does not distinguish between individual, group and policy grievances, as is the case in most collective agreements.

53. As Arbitrator Clarke noted in AH 809, a decision involving the same Parties and the same Collective Agreement:

> "35. Second, the CA, unlike in some other labour agreements, does not distinguish between individual, group and policy grievances …
>
> 36. There is nothing in this wording suggesting that the TCRC cannot bring a single grievance contesting an alleged CA violation and seeking remedies for any prejudiced employees".

54. Arbitrator Clarke cites the reasoning of Arbitrator Stout:

> "45. Fourth, in AH756, albeit under a different collective agreement with different parties, Arbitrator Stout previously concluded that a trade union, in similar circumstances to those present in this case, could file a group grievance: [35] I agree with the Union that there is nothing in Agreement 4.3 that specifically restricts the right of the Union to file a grievance on behalf of a number of their members involving similar circumstances and seeking a systemic remedy. [36] I acknowledge that the language in the collective agreement is couched in the singular and not the plural. However, I do not see that as an impediment to having a number of similar violations raised in a single grievance. The provision must be interpreted in context and having regard to the legislative mandate to have all differences resolved by arbitration or otherwise. In addition, the Union has previously processed grievances with claims on behalf of numerous employees in a single grievance CROA 3822, CROA 3570, and CROA 3467. While some of these grievances have been referred to as "policy" grievances, some would also be fairly characterized as group grievances as well. In any event, there is no specific language limiting the Union's right to file a grievance on behalf of their members.
>
> 46. The same conclusion applies in this case. The TCRC can file a grievance contesting a scenario which occurred and seek redress for its members".

55. I therefore find that the Union is not prevented from filing a grievance on behalf of all of its members under article 40.2, including former members, if their rights had crystallized, as discussed above, while employed by the Company.

Merits of Case

Context

56. In August and September 2020, Trevor Smith informed the Company that his brother Peter had asbestosis and provided details of the illness (see Tabs 6-7, Union documents). He makes two requests:

> 1) Would there be a list of asbestos equipment and material suppliers to CPR (Canada and US) used to prepare this (2006 Asbestos) policy, and any statistics on the asbestos related medical problems experience by CPR employees exposed to asbestos?
>
> 2) Would it be possible for Peter to meet with a CPR occupational therapist or be included in your medical program to be assessed (page 3 (of the Policy)) as he should have been in 2010?

57. These requests were refused by the Company, although it did offer to provide any available information directly to the CNESST. The Tribunal did not make any request, although it did find that the asbestosis and colorectal cancer were caused by an occupational disease (see Tab 4, Union documents). Thus, the information requested was never provided, nor was the grievor assessed under the medical program.

58. Mr. Peter Smith died by suicide in September 2023, shortly before the hearing of his grievance. At the time of his medical retirement, he had thirty-seven years of service with the Company.

Position of the Parties

59. The Union takes the position that the Company collected extensive information pursuant to the 2006 AMP. At the time of the request by his brother, Peter Smith had made CNESST claims which had not been adjudicated. The Union states that this information could have been helpful in making his claims. The Union states that the statistical information requested on asbestos related illnesses would not have infringed privacy concerns and should have been provided to the grievor. The Union further states that the Company should have provided a medical assessment, as it had good reason to believe that the illnesses of Peter Smith were work related.

60. The Company takes the position that the grievor has had no loss of compensation due to the above refusals, his claims are properly before the CNESST and that he is not entitled to further compensation through the grievance and arbitration process.

61. The Company submits that the statistical information requested would involve the medical information of others and hence potential privacy violations. It was, however, prepared to provide this information directly to the CNESST.

62. The Company states that there was no known recognized asbestos exposure at the time of the information and medical assessment request.

Analysis and Decision

63. The 2006 Asbestos Management Policy and Procedure (see Tab 5, Union documents) sets out an extensive road map to the asbestos problem at the Company and measures to deal with the issues. Extracts are set out as follows:

> **Problem Statement:**
> Inhalation of asbestos is associated with varying degrees of fibrosis, asbestosis (scarring of the lung), and an increased risk of cancer such as mesothelioma and bronchogenic carcinoma (cancer of the lung).
> In many cases, asbestos is present in a "bound" form, meaning the product does not have the tendency to release fibres unless disturbed. Deterioration, accidental damage, or general maintenance activities such as cutting, sawing, tearing, and rubbing of asbestos-containing materials, can expose friable asbestos fibres, which can then become airborne and respirable.
>
> **Legislation**
> Health hazard concerns have prompted the development of federal, provincial and state legislation to restrict the use of asbestos and protect the health and safety of workers. Regulatory requirements include exposure limits to airborne asbestos, worker protection and personal hygiene, work-site controls to prevent the spread of contamination, worker training and medical programs, and disposal requirements.
>
> **Policy Statement**
> Canadian Pacific Railway (CPR) is committed to the use of sound management practices that meet or exceed applicable legislative and

regulatory requirements to mitigate the risks associated with asbestos-containing materials in the workplace. To meet this commitment:
• CPR is actively working to phase out all asbestos-containing materials from the work place;
• Asbestos-containing materials in poor condition will be given a high priority for repair and/or removal;
• Asbestos repair and removal operations ***will only be conducted by qualified contractors*** in compliance with applicable federal, provincial and/or state occupational health and safety regulations; and
• CPR will conduct exposure assessments for employees accidentally or inadvertently exposed to asbestos fibres during the course of their work.
It is CPR's intention is to leave potentially hazardous repair or removal operations to the companies that are specifically trained to conduct such work.

Environmental Services
Environmental Services is responsible for:
• Maintaining the asbestos survey / inventory for Canada and the US;

Occupational Health Services (OHS) / Casualty Management
Occupational Health and Safety / Casualty Management is responsible for:
•Maintaining a medical program to assess employees' exposure to asbestos on an as required basis.

CPR Facility Supervisors and / or Managers
Facility Supervisors and / or Managers are responsible for:
•Ensuring no CPR personnel perform work on asbestos Containing materials;

Commercial use of Asbestos
Typical applications of asbestos include the following:
- Pipe, boiler/heat exchanger and valve insulation;
- Air ducts;
- Spray-on coating to protect steel beams from buckling in the event of a fire;
- Gaskets;
- Fire-resistant textiles;
- Cement products;
- Wallboards and acoustical ceiling tiles and panels;
- Roof and floor products (e.g. roofing felts and floor tiles); and
- Filler in resins, plastics, caulking and sealants.

Health Effects:

The health hazard posed by the inhalation of asbestos fibres depends on the mineral type of the asbestos, and the size and shape of the fibres. The likelihood of developing health problems from asbestos depends on when the asbestos exposure began, and the quantity of asbestos fibres that have been inhaled.

a. Pleural effusions and plaques

Pleural effusions and plaques are collections of fluid and fibrous tissue (respectively) that collect on the inside of the chest wall, likely due to friction effects or inflammation caused by asbestos fibres. They do not lead to cancer and normally do not affect lung function. The likelihood of developing pleural effusions and plaques is increased in persons having occupational exposure to asbestos, and can first appear on a chest x-ray within 10-15 years after first exposure.

b. Asbestosis

Asbestosis is a diffuse lung disease that produces fibrous tissues throughout the whole lung. This disease occurs only with higher levels and longer duration of occupational exposure, and is not seen in the general population nor in persons who have had “bystander” or low level occupational exposure to asbestos. It will generally occur between 20 and 30 years after the first exposure to asbestos. Asbestosis causes progressive loss of lung function and can also lead to lung cancer.

c. Lung Cancer

The majority of lung cancers in the general population are probably due to smoking or environmental radiation, with a small proportion likely due to asbestos exposure. Asbestos-related lung cancers are most likely to occur when asbestosis is present; whether asbestos-related lung cancers will occur in the absence of asbestosis remain unclear. The types of tumours are very similar to those caused by cigarette smoking. Asbestos exposure and smoking together increase the risk for lung cancer greater than either asbestos exposure or smoking alone. For this reason, smokers who have had past or current exposure to asbestos are encouraged to stop smoking as soon as possible.

d. Mesothelioma

Mesothelioma is a normally rare, but usually fatal, cancer that arises from the cells that form the lining of the lung. The risk for this cancer increases in proportion to the amount of asbestos fibres that have been inhaled. These tumours usually do not appear until after 30 years from first exposure. These tumours have no relationship to tobacco smoking, and the only means of prevention is to reduce further asbestos exposure.

Exposed surfaces or activities such as cutting, sawing, tearing, and rubbing of asbestos-containing materials can result in the release of asbestos fibres. Asbestos fibres have a tendency to split along their length to create progressively thinner fibres. The thinner the fibre, the greater the tendency for it to become airborne and respirable.

Amphibole fibres (e.g. amosite and crocidolite) are considered more hazardous than chrysotile fibres because of their physical characteristics. Amphibole fibres, which are needle-like and brittle, are more likely than chrysotile fibres to split into very fine fibres and become airborne. Chrysotile fibres are curly and are thicker than amphibole fibres.

If inhaled, amphibole fibres are more likely to persist in the lungs than chrysotile fibres, which are more easily eliminated by the body's natural defence mechanisms.

Medical Assessment

For persons having a recently recognized exposure to asbestos, the first priority is to establish the type of asbestos, when the exposure began, the level of exposure, what respirators were used, and other exposures to asbestos in the past. This information is collected by two means: an exposure questionnaire completed by the employee and a worksite assessment performed under the direction of a qualified occupational hygienist.

Unless there is significant exposure to asbestos prior to 10 years in the past, there is little value in doing a routine chest x-ray or other medical investigations. Chest x-rays will identify 1/3 or less of pleural plaques that may be present; changes suggestive of asbestosis require relatively high levels of exposure and over 20 year to appear. Employees are encouraged to see their own physician if they presently have breathing difficulties or other respiratory symptoms - these symptoms will likely not relate to asbestos. For individuals reporting significant past exposure to asbestos prior to 10 years ago, an Employee Health Advisor will contact the employee to discuss whether a medical assessment is appropriate.

Although CPR employees will no longer be conducting asbestos abatement work, a medical program has been set-up by CPR Occupational Health and Safety / Casualty Management to assess employees' exposure to asbestos on an as required basis.

> Employee records of past and present occupational and non-occupational exposure to asbestos will be maintained and evaluated on an on-going basis.
>
> **Asbestos Exposure Questionnaire**
> An asbestos exposure questionnaire must be completed by CPR employees who are accidentally or inadvertently exposed to asbestos fibres during the course of their work.
> The completed questionnaire must be forwarded to Occupational Health and Safety in Canada and Casualty Management in the US.
>
> **Record Keeping**
> Records must be maintained of all asbestos repairs and removals. This includes contract terms of reference, work specifications, contractor permits, licences and qualifications, sampling and analysis reports, notification to provincial or state authorities, final inspection and air clearance test results, and disposal records. These records are maintained by Environmental Services.

64. The Policy Statement sets out a mandatory assessment: "CPR will conduct exposure assessments for employees accidentally or inadvertently exposed to asbestos fibres during the course of their work". The Medical Assessment sets out how and what information is to be collected:

> For persons having a recently recognized exposure to asbestos, the first priority is to establish the type of asbestos, when the exposure began, the level of exposure, what respirators were used, and other exposures to asbestos in the past. This information is collected by two means: an exposure questionnaire completed by the employee and a worksite assessment performed under the direction of a qualified occupational hygienist.

65. It notes that a medical program has been set up by OHS "to assess employees' exposure to asbestos on an as required basis".

66. The Company was informed of the exposure of Peter Smith to asbestos in August-September 2020 (see Tabs 6-7, Union documents). Given my finding that Peter Smith as a retired worker was entitled to the protection of the 2006 Policy, he should have been the subject of the mandatory assessment. He was entitled to know the kind of asbestos he came into contact with while working at the Company. He was further entitled to

benefit from whatever medical services were being made available by OHS to employees who had come into contact with asbestos. The refusal to provide such information and services to him was arbitrary and cannot stand.

67. I find that the informational requests made by Trevor Smith on behalf of his sick brother were somewhat broad, given that Peter Smith was entitled to information with respect to his asbestos exposure and not to the existence of asbestos in areas where he could not have been exposed. By way of illustration, if he never worked in the Atlantic region, he would not be entitled to that information. If he worked in the Montreal and Toronto areas, he would be entitled to that information.

68. I also find that the high-level statistical information requested concerning asbestos exposure by Company employees is relevant information that Peter Smith should have been provided. It would have been helpful for him to have known that certain classes of work, or workers in particular areas where he had worked, were subject to elevated levels of asbestos exposure. The decision not to provide this extremely relevant information to a former long time employee now suffering from a probable (later confirmed) work place illness is arbitrary and cannot stand. The only caveat to this would be if the Company can establish that the provision of specific information would result in a privacy breach. However, high-level statistical information, without identification of individual information, is unlikely to represent such a breach.

69. Likewise, I find that all current and former employees would be equally entitled to this information and these services, if they can establish reasonable grounds to believe that they have been exposed to asbestos while employed by the Company. As the Policy is drafted to apply to the individual, the information requested and to be supplied would pertain to that individual (see Medical Assessment: “For persons having a recently recognized exposure to asbestos…”; “For individuals reporting significant past exposure…” ; Asbestos Exposure Questionnaire: “questionnaire must be completed by CPR employees who are accidently or inadvertently exposed to asbestos…”).

70. The Union has requested that I order the Company to provide copies of the 2006 AMP to all current and former employees. The Company notes that the 2006 and current AMP are available on the Company website. I decline to make an order for additional copies to be made. However, nothing prevents the Union from contacting its existing and former members and providing advice concerning the former and current AMP. Equally, nothing prevents the Company from informing current and past employees of the AMP. Given the widespread use of asbestos in industry in the past, reiterating the need for current and past employees to be vigilant and pro-active makes sense. By way of a single example, the Policy recognizes that smokers need to take particular care:

> "Asbestos exposure and smoking together increase the risk for lung cancer greater than either asbestos exposure or smoking alone. For this reason, smokers who have had past or current exposure to asbestos are encouraged to stop smoking as soon as possible."

71. I recognise that this decision will result in a series of individually based requests for information and services, but this is what the 2006 Policy requires. I further recognise that the decision applies only to the older Policy, not the 2022 version of the Policy. Any broader or more up to date decision would require either agreement of the Parties, perhaps through the auspices of a Joint Health and Safety Committee, or further litigation. Given the clear need to protect past, current and future employees from the harms caused by the widespread industrial use of asbestos, it is sincerely to be hoped that the Parties can work together to ensure that this need is met.

Conclusion

72. Accordingly, I find that the Company breached the Collective Agreement and the CROA Agreement when it failed to respond at Step 2 to the grievance.

73. I declare that the Company breached the 2006 AMP when it failed to provide the requested information as it pertained to Peter Smith. I further declare that the Company breached the 2006 AMP when if failed to provide a medical assessment when it was informed that Peter Smith had been exposed to asbestos.

74. I find as well that all other TCRC members and former members, who have reasonable grounds to believe they have been exposed to asbestos while on Company service, are entitled to request the information and services set out in the 2006 AMP.

75. I remain seized with respect to any issues of interpretation or application of this Award.

January 24, 2024

JAMES CAMERON
ARBITRATOR