CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4668

Heard in Montreal, January 10, 2019

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Grievance on behalf of Mr. W. Lind, for being withheld from work service by the Company following his arbitrated reinstatement, and the wages lost as a result thereof.

THE JOINT STATEMENT OF ISSUE:

Mr. Lind was reinstated through the grievance procedure and as a result of arbitrated case CROA 4441 dated February 3, 2016. The award did not contain any restrictions regarding substance abuse, or an imposed relapse prevention agreement. The Company ordered a full medical assessment for Mr. Lind prior to his return, which included a substance test. Mr. Lind complied with all aspects of the medical assessment except for the substance test, after requesting the Company to substantiate its requirement. The Company investigated the matter, but withheld Mr. Lind from service throughout the entire period. Mr. Lind ultimately relented to the substance test.

The Union's Position:

The Union contends the Company has failed to provide any evidence or restriction suggesting Mr. Lind was not medically fit to return to active service following CROA 4441, or which could substantiate the requirement for substance testing as part of the medical assessment. As such the Union contends that the Company has failed to properly follow parameters regarding the medical assessment, resulting in a violation of Company policies, the RAC Medical Rules, and the *Canada Labour Code*.

The Union further contends the described Company actions are in violation of PIPEDA, Mr. Lind's Human Rights, and has failed to comply with CROA 4441. The Company is unable to demonstrate justification based upon reasonable and probable grounds to request the substance testing in this matter.

The Union requests that Mr. Lind be made whole for all time held from service by the Company from February 24, 2016 to June 9, 2016. The Union is seeking an order that these claims are justified under the terms of the Collective Agreement and/or other appropriate provisions, in addition to any further relief the Arbitrator deems necessary.

The Company's Position:

The Company disagrees and denies the Union's request.

Arbitrator Silverman's CROA 4441 awarded a reinstatement of Mr. Lind to his position of Conductor, a Safety Critical Position. The Company's Occupational Health Service – Fitness to Work Medical Procedures Policy 5000 Section 2.2.1(c), requires anyone performing in a Safety Critical Position to have a full medical assessment after a prolonged absence of six months for other than medical reasons. It is the Company's positon the medical assessment, in these circumstances, requires a substance test. Mr. Lind's dismissal was not for medical reasons and extended for a period greater than six months prior to him being arbitrarily reinstated.

The requirement for a Company organized comprehensive individualized medical assessment is in order to provide an informed opinion of Mr. Lind's fitness to work prior to commencement of employment in a Safety Critical Position of Conductor. This is in keeping with the Rules governing Safety Critical Position pursuant to section 20 of the Railway Safety Act, and the Company Fitness to Work Medical Policy and Procedure.

The Company maintains that Mr. Lind was required to take a substance test and he initially chose not to comply and after a lengthy period he eventually agreed to submit to the substance test and was henceforth returned to active service.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) D. Fulton	**(SGD.) D. McGrath**
General Chairperson	Labour Relations Manager

There appeared on behalf of the Company:

L. McGinley	– Assistant Director, Labour Relations, Calgary
J. Bairaktaris	– Director Labour Relations, Calgary
M. Boucher	– Assistant Superintendent, Toronto
Dr. G. Lambros	– Chief Medical Officer, Calgary
S. Tremblay	– Manager Health Services Program, Calgary

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
D. Fulton	– General Chairperson, Calgary
D. Edward	– Senior Vice General Chairperson, Calgary
B. Knight	– Local Chairperson, Cranbrook
G. Edwards	– General Chairperson, Calgary
W. Apsey	– General Chairperson, Smiths Falls
W. Lind	– Grievor, Cranbrook, BC

AWARD OF THE ARBITRATOR

Nature of case

1. A different arbitrator ordered the reinstatement "forthwith" of Conductor Bill Lind. A delay occurred for that reinstatement when CP insisted that Mr. Lind undergo a substance test. Mr. Lind objected and asked for the basis on which CP imposed this

requirement. Mr. Lind ultimately took the test, which came back negative, but filed a grievance concerning losses incurred from the delay.

2. For the reasons set out below, the arbitrator did not find any reasonable cause or other justification for CP requiring Mr. Lind, a long-time employee, to submit to a substance test as a condition for his arbitrator-ordered reinstatement. Mr. Lind is accordingly entitled to compensation for that delay, the amount of which the parties have apparently already resolved.

Facts

3. In CROA&DR 4441, this Office reinstated Conductor Lind on these terms:

> Given the nature of what occurred in these three incidents, the Grievor's thirty-three years with the Company, his disciplinary history (zero demerits at the time of the incidents) and the severity of the discipline issued to the Grievor, I find that discharge was not justified.
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> Even if the Grievor's approach on October 25, 2014 was not as measured or appropriate as that of Locomotive Engineer Smoroden, it did not, combined with what else the Company relies upon, warrant outright discharge.
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> Accordingly, the grievance is allowed in part. **The grievor is to be reinstated to his employment forthwith with compensation for all wages and benefits lost and without loss of seniority. A written warning is to be placed on his record for the events of October 25, 2014.**
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> (Emphasis added)

4. CROA&DR 4441 involved allegations of i) disrespectful and rude behaviour towards a manager; ii) improper use of booking unfit and iii) submitting a false or fabricated harassment claim. The original arbitrator overturned the termination of employment and replaced it with a written warning for Mr. Lind's employment file.

5. CROA&DR 4441 did not involve any allegations of drug or alcohol use.

6. CP terminated Mr. Lind on November 18, 2014. On February 3, 2016, the arbitrator issued her decision reinstating him. He had been off work roughly 15 months when the delay in question started accruing.

7. CP delayed reinstating Mr. Lind due to his refusal to take a substance test. Mr. Lind sought an explanation for this requirement. As the delay continued, Mr. Lind took the test, but grieved CP's authority to order the test and the resulting economic loss he suffered.

Analysis and decision

8. There are multiple reasons why CP's insistence on substance testing was not appropriate in Mr. Lind's specific situation.

The context arising from CROA&DR 4441

9. The original arbitrator in CROA&DR 4441 found that the events involving Mr. Lind only merited a written warning, rather than the termination of his employment. As noted in the above extract, Mr. Lind had 33-years service and zero active demerits on his record at the time CP terminated his employment. CROA&DR 4441 found that Mr. Lind ought never to have been removed from the workplace in the first place.

10. Moreover, unlike in some cases involving alleged drug and alcohol use, the arbitrator issued no remedial order requiring Mr. Lind to undergo substance testing. He was simply ordered reinstated "forthwith".

The legacy of SHP530

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.

12. Arbitrator Picher noted the legitimate, though competing, interests in this area:

> 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.
>
> (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)

15. SHP530 is equally notable for its comments about testing reinstated employees after an absence from work:

> **The Arbitrator cannot sustain that part of the policy which purports to require an employee in a risk sensitive position to undergo drug and alcohol testing after a leave of absence of more than six months.** While counsel for the Company suggests that that aspect of the policy would be applied in the circumstance of an employee whose leave of absence was drug or alcohol related, there is no language within its terms to that effect, and in that regard I must take the policy as I find it. **As counsel for the Union and Intervener argue, on what rational basis can it be supposed that an employee who has been on a leave of absence, for example on maternity leave or leave for any purpose, should be scrutinized for drug or alcohol use by means of a breathalyzer or urinalysis upon their return to work? I can see none. By KVP standards any such requirement must be viewed as an unreasonable rule, unduly encroaching upon the privacy and dignity of the individual and serving no countervailing legitimate employer interest.** The requirements to that effect within the policy must therefore be found and declared to be an unreasonable and unsupported extension of management's rights which are contrary to the collective agreements. Nor would I find that they have any BFOR justification to the extent that they would apply to any employee who held a risk sensitive position immediately prior to the leave of absence in question.
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> (Emphasis added)

16. No one argued that the legal principles contained in the above extracts had been superseded by subsequent developments in this important area.

17. Accordingly, SHP530 stands for the proposition that reasonable and probable grounds need to exist before substance testing can take place. In Mr. Lind's specific situation, none of the evidence satisfied the arbitrator that this key condition had been met.

The applicability of CP policies

18. One issue which arose at the hearing concerned a new Policy which CP provided to the TCRC on January 4, 2019, just days before the hearing on January 10, 2019 (U-1; TCRC Brief; Paragraph 68). The arbitrator has not considered this policy for two reasons. First, there is no reference to it in the parties' JSI. Second, such policies need to be communicated to the TCRC if the employer intends to rely on them. The TCRC could then consider whether to contest the policy under the principles set out in *Re KVP Co. and Lumber & Sawmill Workers' Union, Loc. 2537* (1965), 16 L.A.C. 73 (Robinson).

19. The arbitrator makes no other comments about the policy.

20. The TCRC made a similar objection to other material which CP introduced in its Brief (E-1; CP Brief; Paragraphs 62-63). The arbitrator makes the same observations.

The evidence of CP's Chief Medical Officer

21. CP's Chief Medical Officer, Dr. George Lambros, testified at the hearing. Neither party contested that the CMO may, in appropriate factual circumstances, order testing (U-1; TCRC Brief; Paras 48-50). However, while the CMO believed that testing was justified in this case, the issue is a legal rather than medical one.

22. The basis for ordering testing came not from an examination of Mr. Lind's specific personal situation, other than perhaps a medical form he completed, but rather from what was described at the hearing as a "holistic approach" (E-1; CP Brief; Paragraph 79). For example, the CMO noted that 10% of employees will have a

substance use disorder. In addition, the CMO commented that a job termination can lead to financial and other stressors which may lead to a substance use disorder. Comments were also made that reliance cannot be had on employee medical forms since they may lie about substance abuse.

23. The legal problem with a decision based mostly on a "holistic approach" is that, absent facts specific to the employee, the process appears to lead to mandatory substance testing for virtually any employee who an arbitrator may reinstate. SHP530 has already rejected that type of scenario, *supra*.

24. Similarly, the evidence at the hearing suggested that Mr. Lind had independent business interests which differentiated him from the scenario that the loss of a job could lead to alcohol or drug use. CROA&DR 4441 found that Mr. Lind ought not to have been terminated in the first place. A reliance on an inappropriate termination makes it challenging to demonstrate that reasonable and probable cause exists for substance testing.

25. Past decisions on which CP relied in support of its position had fundamentally different factual underpinnings. For example, in CROA 4476, the facts suggest the CMO had specific grounds to order a hair follicle test for an employee who had been away from work for an extended period of time while performing union duties:

> The Company explains that the medical documents of Mr. White's that were handed to the CMO, Dr. Daniel Leger, for review revealed that he had past cocaine use and mental health conditions that were not disclosed in his "Pre-Placement Medical Questionnaire" completed on June 29, 2015. That inconsistency led Dr. Leger to

> order a hair sample to verify the Grievor's claims of abstinence and make sure he was fit to return to work. A decision that was the CMO's alone.

26. Nothing similar existed for Mr. Lind.

27. CROA&DR 3609 is similarly distinguishable, since the grievor in that case had been observed smoking marijuana:

> The most compelling evidence in this case is that of the bargaining unit employee and his observations of what took place on October 18, 2006. He was sitting in the passenger seat and saw a marijuana "joint" pass between the grievor and another employee seated in the back seat. The two of them smoked the whole "joint" together. The scent was unmistakeably that of marijuana.
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> …
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> In the view of this arbitrator, the employer did have reasonable cause to request the grievor attend for testing, notwithstanding that nine days had transpired since the actual incident. **The policy is clear that any observed use of drugs or alcohol provides reasonable cause for requesting that an employee submit to testing.** Even in the absence of the policy, the employer has the right and obligation to ensure there is has been no violation of CROR Rule G, particularly given the responsibility of a foreman for the safety of train crews.
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> (Emphasis added)

28. No facts of this kind existed for Mr. Lind.

29. As SHP530 notes, where reasonable cause has been established, such as in CROA&DR 3609, then substance testing can take place. But this case did not contain the requisite facts for that conclusion.

30. An arbitrator reinstated Mr. Lind in a case which never involved drug or alcohol allegations. Nothing specific to Mr. Lind's situation justified the need for substance testing. No facts arose from his 33 years of service which would establish reasonable cause.

31. Without specific facts for Mr. Lind's situation, CP's demand lacked reasonable cause.

Disposition

32. Each decision in this area is limited to the specific facts of the case. The TCRC demonstrated CP did not have reasonable cause to require Mr. Lind to undergo substance testing as a condition of an arbitrator-ordered reinstatement. Mr. Lind is therefore entitled to the compensation claimed for the period from February 24, 2016 to June 9, 2016.

33. The arbitrator remains seized for any issues which may arise from this award.

January 28, 2019

GRAHAM J. CLARKE
ARBITRATOR