CITATION: Canadian Pacific Rail Company v. Teamsters Canada Rail Conference, 2020 ONSC 6683
DIVISIONAL COURT FILE NO.: 624/19
DATE: 20201112

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Lederer, Penny and Kristjanson JJ.

BETWEEN:	
Canadian Pacific Railway Company Applicant	*Frank Cesario* and *Amanda P. Cohen* for the Applicant
– and –	
Teamsters Canada Rail Conference Respondent	*Michael Church and Patrick Enright* for the Respondent
	HEARD (by videoconference): July 30, 2020

Kristjanson J.

Overview

[1] CP Rail Company ("CP") seeks judicial review of an award made by labour arbitrator J.F.W. Weatherill of the Canadian Railway Office of Arbitration ("CROA"). CROA is a specialized arbitration system for labour disputes in the railway industry. The grievor was dismissed by CP for contravention of CP's Alcohol and Drug Policy, based on a positive urine drug test showing the presence of residual traces of marijuana. The arbitration hearing was adjourned twice. Eight days before the third hearing date, and almost two years after the dismissal, CP sought for the first time to introduce an expert report addressing issues including the reliability of urine testing and corresponding impairment from marijuana. In a preliminary award the arbitrator refused to admit the expert report into evidence (CROA Case No. 4695). Following the hearing on the merits, the arbitrator determined that the grievor had not violated the Alcohol and Drug Policy and reinstated him to his employment (CROA Case No. 4695-M).

[2] CP seeks to quash the award because the arbitrator's decision to exclude the expert report was unreasonable and produced an unreasonable result. CP also objects to the arbitrator's unreasonable characterization of facts and failure to grapple with the law of impairment.

[3] For reasons set out below, this application for judicial review is dismissed as the arbitrator's decisions were reasonable.

Background Facts

[4] The grievor was terminated by CP in September 2017 in accordance with CP's Alcohol and Drug Policy and Associated Procedures ("Drug Policy"), after a positive urine test for residual traces of marijuana.

[5] The termination arose from events that took place on August 17, 2017. That day, while the grievor was working as a conductor in a trail yard, two tanks derailed after his crewmate moved a locomotive in the wrong direction along the tracks. CP deemed this a "significant" work-related incident, leading CP to test the grievor in accordance with the Drug Policy and initiate an investigation under the collective agreement.

[6] The Drug Policy states that "all employees must be able to perform their duties free from the negative effects, including the after effects of alcohol, illicit or illegal drugs, or other mood altering substances or medications." Violation of the Drug Policy may lead to dismissal. Section 3.2.3 states that alcohol and drug testing may be required after any work-related incident or accident, including for a "significant" work-related incident or accident that involves considerable loss or damage to CP. Section 3.1 of the Policy prohibits Safety Critical employees from having a positive drug test.

Disciplinary Investigations Under the Collective Agreement

[7] The investigative process that takes place before a CROA arbitration hearing, set out in collective agreement, is part of the railway sector's specialized labour relations regime. The collective agreement provides in Article 70, under the heading "Investigations and Discipline":

> Article 70–Investigations and Discipline
>
> 70.01 When an investigation is to be held, each employee whose presence is desired will be notified, in writing if so desired, as to the date, time, place and subject matter…
>
> (4) The notification shall be accompanied with all available evidence, including a list of any witnesses or other employees, the date, time, place and subject matter of their investigation, whose evidence may have a bearing on the employee's responsibility….
>
> 70.02 Clause 70.01(4) above will not prevent the Company from introducing further evidence or calling further witnesses should evidence come to the attention of the Company subsequent to the notification process above. If the

> evidence comes to light before commencement of the investigation every effort will be made to advise the employee and/or the accredited representative of the Union of the evidence to be presented and the reason for the delay in the presentation of the evidence. Furthermore, should any new facts come to light during the course of the investigation, such facts will be investigated and, if necessary, placed into evidence during the course of the investigation….
>
> 70.04 Employees will not be disciplined or dismissed until after a fair and impartial investigation has been held and until the employee's responsibility has been established by assessing the evidence produced. No employee will be required to assume this responsibility in their statement or statements. The employee shall be advised in writing of the decision within 20 days of the date the investigation is completed i.e. the date the last statement in connection with the investigation is taken except as otherwise mutually agreed. Failure to notify the employee within the prescribed, mandatory time limits or to secure agreement for an extension of the time limits will result in no discipline being assessed.

[8] A notable feature of the disciplinary investigation is the requirement for full disclosure of evidence during the investigation.

The Investigation Meetings and Termination

[9] The first investigation meeting pursuant to Article 70 of the collective agreement took place on August 24, 2017. The results of the grievor's drug and alcohol testing came back after the meeting. The grievor's breath alcohol and oral fluid tests were negative, but his urine test came back positive for THC in violation of the Drug Policy.

[10] A second investigation meeting took place on August 31, 2017, during which the grievor conceded that he had "smoked a joint" at 1:45a.m. on August 17, 2017 (15 hours and 45 minutes before starting his shift, and about 21 hours before the derailment incident).

[11] On September 15, 2017, following the completion of the investigation, the grievor was dismissed.

[12] The respondent union, Teamsters Canada Rail Conference ("Union") grieved the dismissal and the matter was referred to the CROA for arbitration.

The CROA Dispute Resolution System

[13] A CROA proceeding is an expedited arbitration process, which allows for quick and final resolutions to labour disputes in the railway industry. The CROA rules are established by the parties under a Memorandum of Agreement.

[14] In *Canadian National Railway v. Sims*, 2019 SKQB 245 at para. 8. Zerr J. described unique features of CROA arbitrations which contribute to the speed and efficiency of the arbitration process:

a. There is a permanent roster of CROA-appointed arbitrators to hear arbitration cases, under the coordination of a Chief Arbitrator;

b. Six cases are typically scheduled in a given arbitration day;

c. Adjournments will only be granted with the agreement of both parties in "all but the most extraordinary of circumstances";

d. Any preliminary objections filed after the case has been scheduled is [sic] is dealt with during the hearing, with the merits of the grievance;

e. The jurisdiction of the appointed arbitrator is limited to the issues outlined in a document called a Joint Statement of Issues ("JSI"), or in an Ex-Parte Statement of Issues should the parties fail to agree on a JSI;

f. Hearings are based primarily on the parties' written statements and supporting evidence, which are not exchanged before the hearing;

g. The decision to accept testimonial evidence is completely in the hands of the arbitrator, and oral witness testimony is rare;

h. The arbitrator has extremely broad investigative powers and is not bound by the rules of evidence and practice applicable to proceedings before courts, and the arbitrator may receive, hear, request, and consider any evidence which he/she may consider relevant;

i. The decision must be provided to the parties no later than thirty days after the hearing;

j. Decisions are typically short;

k. Decisions typically refer to previous CROA decisions to substantiate the reasons.

The Evidentiary Ruling About the Expert Report

[15] Eight days before the hearing, CP sought to introduce an expert report about impairment from marijuana use into evidence. The hearing proceeded on July 11, 2019 to deal with the Union's objection to admission of the expert report into evidence. The arbitrator made a preliminary award on July 24, 2019 excluding the export report from evidence.

The Award

[16] The arbitrator heard the grievance on the merits on October 10, 2019. In his decision dated October 23, 2019, the arbitrator determined that residual traces of marijuana in the grievor's urine as a result of recreational off-duty marijuana use did not "establish impairment", did not violate the Drug Policy, and did not establish just cause to terminate his employment. The arbitrator ordered CP to reinstate the grievor as an employee.

Jurisdiction and Standard of Review

[17] The Divisional Court has jurisdiction to hear this application pursuant to ss. 2(1) and 6(1) of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1.

[18] The parties agree that the standard of review is reasonableness

The Issues on this Application

[19] The applicant raises three issues:

a) The arbitrator unreasonably failed to consider relevant and probative evidence in the expert report.

b) The arbitrator misapprehended key evidence about the grievor's involvement in the derailment.

c) The arbitrator's Award ignored key legal and factual considerations relating to impairment from marijuana use.

Analysis

The arbitrator did not unreasonably exclude the expert report

[20] CP argues that the arbitrator's decision to exclude the expert report was unreasonable, in part because the arbitrator failed to read the expert entire report and failed to apply the legal test for the admission of expert evidence. In so doing, CP argues, the arbitrator "failed to admit, or consider, relevant and highly probative evidence on the central issue of impairment."

[21] Reasonableness review must begin with the reasons of the arbitrator. Here, the arbitrator scrutinized the admissibility of the expert report in the context of the unique labour relations environment specific to rail employees, the provisions of the collective agreement, and the facts found in the arbitration.

[22] The hearing was scheduled to be heard on the merits in March 2019 but was not heard due to the illness of the arbitrator. It was listed again for April 2019 but was not reached that day. CP did not raise the issue of an expert report on either occasion. The hearing was rescheduled for July 11, 2019.

[23] On April 2, 2019 the Union wrote to CP requesting "full disclosure of all documents that the Company intends to rely upon." CP replied: "the only document the Company will rely on that is not already in the Union's possession or in the public domain" was an excerpt from the grievor's work history.

[24] On June 26, 2019, CP sought to obtain an expert report from an addictions medicine specialist which addressed the "reliability of urine testing and corresponding impairment from marijuana." CP received the report on July 2nd and submitted the report to the Union on July 3rd.

[25] On July 4, 2019, the Union wrote to CP raising a preliminary objection to CP's ability to rely on the expert report at the arbitration hearing. The Union also reserved its right to request an adjournment if its request to exclude the expert report and evidence was not granted. The Applicant states it its factum that CP indicated that it would object to an adjournment because "the CROA process places high value on efficiency."

[26] The arbitrator states that he did not read the expert report, although he did review the table of contents and noted relevant sections relating to residual impairment and safety sensitive work.

[27] The arbitrator declined to exercise his discretion to admit the evidence in reasons which are transparent, intelligible and offer justification on two main grounds. First, the arbitrator anchored his decision in the wording of the collective agreement, the central context of this labour arbitration. He found that the grievor was discharged within the twenty-day period following the completion of the investigation as required by Article 70.04. The arbitrator found as a fact, based on the wording of the Memorandum of Agreement governing the collective bargaining relationship, that:

> The investigation clearly, had been "completed" on August 31, the date the last statement in connection with the investigation was taken. The "record", so to speak, was closed at that time.

[28] While acknowledging that a supplementary investigation may be held when important facts come to light after an investigation is completed, the arbitrator found it questionable whether a supplementary investigation would be appropriate two years after the fact, as was the case here. The arbitrator held that the collective agreement requires that employees not be disciplined until an investigation is held and the evidence has been produced, and the expert report was never produced during the investigation. In the context of the CROA labour relations regime, this was a reasonable decision interpreting the collective agreement provisions common to the railway industry.

[29] Second, the arbitrator declined to admit the report on the grounds of fairness to the grievor and protection of the integrity of the expedited CROA arbitration process. A court conducting a reasonableness review of a decision of an administrative decision-maker must consider both the reasonableness of the outcome given the legal and factual context, and the reasoning process: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, paras. 85-86. The reviewing court also considers whether the reasons accord with the "purposes and practical realities of the relevant administrative regime" and represent "a reasonable approach given the consequences and the operational impact of the decision": *Vavilov*, para. 93.

[30] The arbitrator reviewed the history of the proceedings, including the two earlier adjournments of the case, and the Union's April 2019 request for disclosure. He found that the Union was entitled to rely on CP's representation in April 2019 that it had produced all relevant material, and it would be unfair to the Union and to the grievor to allow the introduction of the evidence "at this late stage of these extended proceedings."

[31] It was reasonable in the context of the specialized railway labour relations regime for the arbitrator to exercise his discretion to refuse to allow CP to file evidence tendered eight days before

the merits hearing, which had been adjourned twice. It was reasonable for the arbitrator to to consider the unfairness of CP's actions in serving an expert report at the 11th hour yet, bizarrely in my view, opposing any attempt by the grievor to seek an adjournment to respond to this report. It was also reasonable for the arbitrator to consider the hardship an adjournment would have imposed on the grievor, who had been discharged 23-months before the hearing. Administrative decision-makers may make decisions designed to safeguard fairness and the integrity of the process. The discretionary decision about the admissibility of evidence is an example of the arbitrator's gatekeeper role. It was reasonable for the arbitrator to place weight on CP's representations to the Union in April that CP had produced all material evidence for the hearing. Both the outcome and the reasoning process were reasonable, in accordance with the context, purposes and practical realities of the CROA scheme.

[32] Because of the reasons given, the arbitrator was not required to review the entire expert report, analyze the *Mohan* factors, and determine the admissibility of the expert report, as argued by the applicant. The arbitrator's reasons make clear that the decision was made not because the expert report was inadmissible, but because he exercised his discretion to protect the integrity of the CROA arbitration process.

The arbitrator did not misapprehend key facts about the grievor

[33] CP argues that the arbitrator misapprehended key evidence about the grievor's involvement in the movement of the train, which it argues is an "important error" demonstrating unreasonableness. Alleged flaws in the decision must be more than merely superficial, minor, or peripheral to the substance of the outcome. A party challenging the decision must establish that the flaws in the reasoning or outcome are sufficiently central or significant to render the decision unreasonable (*Vavilov* at para 100).

[34] The arbitrator found as a fact that the grievor was not involved in the derailment as he was occupied with another task at the time and was located "five or six cars west" from the incident. But even if the arbitrator erred, the discharge was not for the grievor's role in the derailment. He was terminated for a violation of the Drug Policy, not for his actions relating to the derailment. His alleged role in the derailment was not at issue before the arbitrator. The issue was whether the positive urine drug test violated the Drug Policy and warranted dismissal. Any findings with respect to the grievor's role were not sufficiently central or significant in the context of the issues in the grievance before him to render the decision unreasonable.

The arbitrator did not ignore key legal and factual considerations

[35] CP also argues that the arbitrator incorrectly relied on prior arbitral caselaw stating that a positive urine drug test, without other corroborating factors, does not establish impairment. CP advanced this argument in the excluded expert report, discussed above, as well as its submissions. They argue that the arbitrator's analysis was insufficient and shows a failure to grapple with the issues, as well as the importance of the safety sensitive nature of railway operations. I disagree.

[36] The arbitrator found that the grievor tested negative for breath alcohol and oral fluids, but positive on the urine drug test, and admitted in the investigation to smoking marijuana off-duty the night before the incident. The arbitrator found that the grievor was not impaired, although the

positive urine test revealed that there were "residual traces of marijuana" in the grievor's body. As the parties agreed that traces of marijuana may remain in the body for a month or more, the arbitrator held that by itself a positive urine test does not establish impairment where negative breath alcohol and oral fluid tests strongly indicate there was no impairment. He found as a fact that there was no suggestion that the grievor's conduct, movement or verbal behaviour revealed impairment. He concluded on all of the evidence that the grievor was not impaired during his shift and did not violate the Drug Policy. The arbitrator stated that this conclusion was consistent with arbitral jurisprudence in the railway sector, citing a CROA decision that "a positive urine drug test, standing alone, does not establish impairment."

[37] Reasonableness review is not "a line-by-line treasure hunt for error" (*Vavilov* at para. 102). There must be no fatal flaw in the logic of the decision, and there must be a line of analysis that can lead the decision-maker from the evidence to the conclusion.

[38] The arbitrator's analysis, based on the facts before him, shows a line of analysis leading from the evidence to the conclusion. His reliance on arbitral caselaw was reasonable. The Union relies on eight CROA decisions, from 2008 to 2019, which all state that a failed urinalysis test is not by itself sufficient proof of impairment. Oral fluid testing, on the other hand, can reliably show impairment. In basing his decision on the CROA caselaw, on the facts found by the arbitrator, the arbitrator's analysis was reasonable.

Conclusion

[39] As a result, the application for judicial review is dismissed.

[40] Costs to the Union are fixed at the agreed amount of $5,000.00.

Kristjanson J.

I agree

Lederer J.

I agree

Penny J.

Date of Release: November 12, 2020

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REASONS FOR JUDGMENT

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