AH706

IN THE MATTER OF AN ARBITRATION

BETWEEN

BOMBARDIER TRANSPORTATION CANADA INC. (BTC)

And

TEAMSTERS CANADA RAIL CONFERENCE (TCRC)

Dismissal grievance of Marc-André Ouimet

Date: August 4, 2020
Arbitrator: Graham J. Clarke

Appearing for BTC:

D. McDonald: Counsel, Norton Rose Fulbright
A. Ignace: Human Resource Manager
C. Henripin: Human Resource Advisor

Appearing for TCRC:

A. Stevens: Counsel, Caley Wray, Toronto
W. Apsey: General Chairperson, Smiths Falls
M-A Ouimet: Grievor, Montreal

Heard via videoconference on July 23, 2020

Award

BACKGROUND

1. The parties, while subject to provincial jurisdiction, are members of the Canadian Railway Office of Arbitration and Dispute Resolution (CROA)[1]. They follow an expedited arbitration system that the railway industry has used successfully since 1965.

2. Exceptionally, the parties retained the arbitrator and, on July 23, 2020, pleaded this Ad Hoc arbitration, along with a second one[2]. Where warranted, this award will cite from the original French documents rather than any suggested translations.

3. BTC hired Mr. Ouimet, a Mechanical Technician, on February 7, 2011 and alleged it had just cause to terminate his employment on January 10, 2020. The reason for termination arose from alleged policy violations following an accident Mr. Ouimet had when a groundman colleague and he were moving a train.

4. BTC tested Mr. Ouimet for drugs and alcohol. A urine test came back positive for cannabis, but the oral swab test came back negative. BTC alleged it had just cause for termination because Mr. Ouimet's behaviour violated its Drug and Alcohol Policy as well as its Code of Ethics and Conduct.

5. The TCRC relied on multiple CROA awards which have held that an employee is not impaired, despite a positive urine test, if the oral fluid test comes back negative. Because its grievance[3] provided BTC with examples from this extensive case law, the TCRC asked not only for Mr. Ouimet's reinstatement but also for damages.

6. BTC did not respond to the grievance. Its sole comment in the Joint Statement of Issue (JSI)[4] was "The Company disagrees and denies the Union's request".

[1] croa.com
[2] AH707: (Bombardier Transportation Canada Inc. v. Teamsters Canada Rail Conference (Valiquette)
[3] TCRC Document, page 134
[4] TCRC Documents, Tab 1

7. For the following reasons, the arbitrator concludes that BTC did not meet its burden of demonstrating it had just cause to terminate Mr. Ouimet's employment. He shall be reinstated with full compensation.

FACTS

8. The parties' submissions set out the facts in detail. The arbitrator will provide only a brief overview.

9. BTC has a Drug and Alcohol Policy[5] (*Policy*) and a Code of Ethics and Conduct[6] (*Code*). The parties did not dispute that Mr. Ouimet, a shopcraft employee who occupied a safety sensitive position, was aware of the *Code* and of the original 2009 version of the *Policy*. The 2009 *Policy* and the *Code* focused on impairment at work.

10. BTC amended the *Policy* in 2018. The TCRC highlighted that BTC never provided Mr. Ouimet with the 2018 amendment to the *Policy* on which it had relied in support of termination. The 2018 *Policy* prohibited employees in safety sensitive positions from using drugs like cannabis at any time, even when off work:

> 4.3. II est totalement interdit à tout employé ou non-employé occupant un Poste/tache où la sécurité constitue un élément essentiel de faire usage de toute Drogue, y compris le cannabis, en tout temps, même si l'employé ou non-employé n'est pas Au travail ou sur les Lieux de travail, sous réserve du sous-paragraphe 4.6 de cette Politique. (sic)

11. On December 10, 2019, Mr. Ouimet started his shift in BTC's shop at 0600. At 11:25, Mr. Ouimet was operating a lead locomotive with two passenger cars when one of the cars collided with a guardrail. BTC allowed Mr. Ouimet and the groundman to continue working.

12. Around lunch, BTC advised Mr. Ouimet he would have to take a urine and other tests. Mr. Ouimet candidly advised BTC's manager that he had consumed marijuana the night before[7].

[5] BTC Documents, page 23 of 401
[6] BTC Documents, page 35 of 401
[7] TCRC Documents, page 067

13. On his urine test, Mr. Ouimet tested positive for marijuana metabolite at a level of 79 ng/ml. He tested negative for all drugs on the oral swab test and negative for alcohol on the breathalyzer.

14. In accordance with the parties' expedited arbitration model, an initial investigation took place into the accident[8]. After the results of the drug test came back, BTC held a supplementary interview on January 6, 2020[9]. During that interview, the TCRC noted that the revised 2018 *Policy* was not signed and asked when it had been given to employees[10].

15. During that second interview, Mr. Ouimet acknowledged that he had consumed marijuana the night before at 18:00[11], essentially 12 hours before his shift started the next morning.

16. BTC terminated Mr. Ouimet's employment for violation of the *Policy* and the *Code* as noted in this extract from the termination letter[12]:

> Cette lettre est en référence à l'enquête tenue le 6 janvier dernier concernant une violation alléguée de la politique de Bombardier Transport en matière d'alcool et de drogues sur les lieux du travail ainsi qu'au Code d'Éthique et de Conduite, survenue le 10 décembre 2019.
>
> Cette enquête a permis de révéler que vous ne vous êtes pas conformé à la Politique de drogues et d'alcool de Bombardier et que vous avez également enfreint l'esprit du Code d'Éthique en matière de Santé, Sécurité et Environnement et auquel vous avez adhéré lors de votre embauche.
>
> En raison de la gravite de l'infraction, la Compagnie n'a d'autre choix que de mettre fin à votre emploi et ce, effectif en date du 10 janvier 2020, puisque vous avez rompu irrémédiablement le lien de confiance nécessaire au maintien de votre emploi chez Bombardier.

[8] TCRC Documents, page 048
[9] TCRC Documents, page 117
[10] TCRC Documents, page 118, Q&A 4
[11] TCRC Documents page 120, Q&A 22
[12] TCRC Documents, page 131

17. BTC did not impose discipline for the accident itself, which had been the subject of the first investigative interview, though the alleged policy violations arose from that event.

ANALYSIS AND DECISION

18. This case requires answers to the following questions:

1. Did BTC conduct a fair and impartial investigation?
2. Did BTC demonstrate just cause to terminate Mr. Ouimet?
3. Should the arbitrator award general, aggravated and/or punitive damages?

1. Did BTC conduct a fair and impartial investigation?

19. The lynchpin for the parties' expedited arbitration system is the conduct of a fair and impartial investigation. That investigation allows them to plead two and often more cases in a single day. An arbitrator may declare any discipline void *ab initio* if an employer fails to hold a fair and impartial investigation[13].

20. Many decisions comment on how investigations should take place, including this extract from CROA&DR 4608:

> 26. An investigation under the parties' expedited arbitration regime is intended to be more informal than the process which might take place before an administrative tribunal. It is neither a criminal investigation nor a process conducted by experienced legal counsel.
>
> 27. It is rather an opportunity for both parties to ensure this Office's record contains the material facts should a later hearing be necessary. As a process designed to eliminate to a large extent the need for this Office to hear oral evidence, it allows each party to ask questions and to have the employee answer those questions. The TCRC posed questions to Mr. Madubeko near the end of the interview to ensure the record contained other facts it considered essential.
>
> 28. While not identical to the questioning of a witness in a labour arbitration or in an examination for discovery, the common goal of an employee's interview is to have him or her answer proper questions about the matters in question. Objections can be made, including, for example, to contest "loaded questions" which assume facts not in evidence. At the extreme ends of the investigation

[13] See, for example, AH663 at paragraphs 35-39

> spectrum, this Office has overturned unfair investigations (CROA&DR 4591) and has also commented on attempts to obstruct a proper investigation (CROA&DR 3157).

21. Also noted in the cases is the challenge some face in asking open ended questions[14]:

> 13. Laypeople, including inexperienced lawyers, seem to have difficulty formulating open ended questions. They often fail to start questions with words like “who”, “what”, “when”, “where” and “why”. But this frequent challenge, absent more, did not convince the arbitrator in this case that the investigation ceased to be fair and impartial.

22. The TCRC alleged that the questions posed by BTC’s investigating officer demonstrated bias. Some questions were leading and even loaded, since a few presumed that Mr. Ouimet had worked while impaired[15]. The TCRC asked that the discipline be declared void *ab initio*, or, in the alternative, that the arbitrator award damages for this manner of conducting the investigation.

23. The arbitrator has reviewed both investigation interviews[16]. The initial interview about the accident used mainly open-ended questions. The second interview, relating to the drug test results, was less pristine. Certain “loaded” questions presupposed an important fact regarding whether Mr. Ouimet was impaired at work[17]. The interviewer seemingly assumed that the urine test results confirmed impairment on December 10, 2019. M. Ouimet appeared to have a better understanding of the relevant case law, *infra*, since he disputed being impaired and highlighted for the interviewer the negative oral swab test.

24. A lot of the technically “leading” questions simply asked Mr. Ouimet to confirm certain uncontested facts[18]. They are comparable to lawyers asking leading questions at arbitration when the subject matter is not disputed. Other questions cited extracts from the *Policy* or the *Code*. Mr. Ouimet answered by confirming the content of those

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[14] CROA&DR 4664
[15] TCRC Brief, paragraphs 37-46
[16] TCRC Documents, pages 48 and 117
[17] TCRC Documents, page 121, Q&A 31-32
[18] TCRC Documents, page 119, Q&A 15-17; 20; 25

documents and then disagreed that he had infringed them[19]. For the specific references put to him about the 2018 *Policy*, which he noted he had never seen, he responded that he had not been impaired at work[20].

25. Ideally, interviewers should never use loaded questions which assume disputed facts[21] and should avoid cross-examination[22]. The goal of an investigation is to get the facts into the written record on which railway arbitrators will rely. However, this does not mean that a leading question can never be asked depending on the circumstances.

26. After reviewing the two investigative interviews in this case, the arbitrator cannot conclude, despite the presence of a few questions which ought to have been phrased differently, that the interviews violated the obligation to conduct a fair and impartial investigation.

2. Did BTC demonstrate just cause to terminate Mr. Ouimet?

27. Safety is evidently of crucial importance to both parties. Railway accidents have caused massive harm, including death, to both industry employees and the Canadian public at large. This is far from a trivial area in a safety sensitive industry.

28. BTC argued at paragraph 54 of its Brief that its *Policy* allows it to terminate employees regardless of whether they were impaired at work[23]:

> As in Tolko and Elk Valley, the Grievor in the present matter was in a safety sensitive environment and he knew he should not do drugs. **Bombardier submits that the central consideration leading to the Grievor's dismissal, was not whether he was impaired, but rather that he breached the Alcohol and Drug Policy, in an environment where such a breach can result in dangerous consequences.**
>
> (Emphasis added)

[19] TCRC Documents, page 121, Q&A 27-30
[20] TCRC Documents, page 122, Q&A 36-38
[21] TCRC Documents, page 121, Q&A 31-32
[22] CROA&DR 4608 at paragraph 28 and CROA&DR 4664 at paragraphs 12-13.
[23] BTC also suggested that Mr. Ouimet was impaired but provided no admissible evidence in support: BTC Brief, paragraph 66.

29. Railway case law has focused on whether an employee was impaired. But this focus is not wholly separate from the consideration of a unilaterally imposed employer drug and alcohol policy. The two are linked, as noted in SHP 530:

> The real conflict between the Company's drug and alcohol policy and the collective agreements of both the Union and the Intervener is the contradiction between substantial parts of the language of the policy and the just cause provisions of the agreements. For example, at p. 20 of the policy the Company states that "presence in the body … of illegal drugs is prohibited while on duty". **At page 16 of the policy employees are advised that any violation of the policy by an employee in a risk sensitive position "… will result in dismissal". However, it is common ground (and on this all of the expert witnesses are in agreement) that a positive drug test gives no indication as to when or in what amount the drug in question was ingested. More specifically, it cannot, standing alone, establish impairment while an employee is on duty, is subject to duty or is on call. In that context, if parsed literally, the rule expounded by the employer is that if an employee has ingested an illegal drug, for example marijuana, during a scheduled leave or holiday, and tests positive some weeks later, he or she will be discharged. In the Arbitrator's view, that rule is unreasonable on its face as there is no nexus between a positive drug test, standing alone, and impairment while on duty**. So construed the rule would purport to regulate the private morality of employees, without reference to any clearly demonstrated legitimate employer interest.
>
> Under the collective agreements, which contain extensive provisions for the investigation of disciplinary infractions, employees are to be discharged or disciplined only for just cause. **To the extent that the policy stipulates that for unionized employees a positive drug test is, of itself, grounds for discipline or discharge, it must be found to be unreasonable, and beyond the well accepted standards of the KVP decision**.

30. It is for this reason that CROA case law can be placed in two distinct categories: "impaired" and "unimpaired".

31. CROA jurisprudence regularly imposes significant sanctions, including a rebuttable presumption of termination being the appropriate penalty[24], for a railway industry employee who works when impaired through drugs or alcohol. Cases have also noted the importance of deterrence[25].

[24] CROA&DR 1954
[25] CROA&DR 2695

32. For example, in AH689, the arbitrator upheld an employee's termination due to his operating railway vehicles while under the influence of alcohol:

> 54. The IBEW did not persuade the arbitrator to intervene in the instant situation where a short service employee, working in a safety sensitive position, consumed alcohol and then drove two of CN's vehicles. The standard disciplinary response for such conduct is termination, absent compelling grounds for mitigation.

33. A similar disciplinary result occurred in AH663 when cocaine impacted a running trade employee's performance:

> 129. **CP has demonstrated that Mr. A. took cocaine at a time when it would impact his work performance. The test results show that cocaine had been taken within hours of the testing**. DriverCheck's error in including the word "metabolites" on a single document does not change this conclusion, or create any unfairness, given the other evidence Mr. A had in his possession at the time of his interviews.
>
> …
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> 137. Mr. A did not have an enviable discipline record at CP. He had already been terminated in the past but benefited from a Last Chance Agreement. Including the 20 points imposed for the December 27, 2012 derailment which led to the drug test, points which were not grieved, he had 45 active demerit points on his record at the time of his dismissal. This situation does not encourage intervention.
>
> 138. In Paisley, the LE acknowledged his behaviour and apologized. The arbitrator finds nothing similar in the record for Mr. A. There still seems to be no admission from Mr. A of the conduct the test results clearly demonstrate. Given the arbitrator's conclusion that the TCRC did not demonstrate that Mr. A had a cocaine dependency, his continuing lack of candour, which may have also persisted with Dr. Chiasson, similarly militates against intervention.
>
> 139. The arbitrator, just as Arbitrator Schmidt concluded in SHP726, supra, finds no reason to modify the penalty CP imposed for Mr. A's actions.
>
> (Emphasis added)

34. As noted in the above extract, a different result may occur if the evidence demonstrates that the employee suffered from a disability: CROA&DR 4667. BTC referred to the Supreme Court of Canada's decision in *Elk Valley*[26], but that case, in addition to its human rights analysis, may have also fallen within the "impaired" category of cases due to a positive test for cocaine following a workplace accident.

35. BTC referenced CROA&DR 4527 as support for its decision to terminate Mr. Ouimet for cause. The difficulty with that reliance is that that decision falls within the "impaired" category of cases. Arbitrator Flynn highlights that key factual point:

> The Grievor provided a urine sample which tested non-negative in a point of collection test and thus had to also provide an oral fluid sample. Both samples were sent to Driver Check, Physical Exams and Drug Testing for further and more detailed analysis.
>
> On January 26, the results came back, **the Grievor's samples tested positive and indicated recent use of marijuana and impairment at the time of the incident**.
>
> (Emphasis added)

36. The facts do not support BTC's suggestion that the "impaired" line of cases apply to Mr. Ouimet's situation. Unlike in CROA&DR 4527, Mr. Ouimet's oral swap test came back negative. Railway arbitrators have consistently concluded that this test result signifies the individual was not impaired. BTC had to demonstrate that the "impaired" line of cases applied to Mr. Ouimet. It failed to meet this burden when it referred to its amended 2018 *Policy* but without providing evidence of impairment as well.

37. The "unimpaired" line of cases has commented on the implications flowing from a negative oral swab test. For example, in CROA&DR 4524, the arbitrator noted:

> 24. CP had the burden of proof to demonstrate that Mr. Playfair was impaired at the time of the November 15, 2015 incident. As numerous CROA decisions have already noted, it is not enough to show that a urine test indicates an employee may have traces of marijuana in his/her system. Those results do not demonstrate impairment at the material times. In Mr. Playfair's situation, he tested negative for the more specific oral fluid drug test.

[26] Stewart v. Elk Valley Coal Corp., 2017 SCC 30 at paragraph 2.

> 25. CP's position, as set out in its policy and as argued, posits that employees should never take illegal drugs. But the case law has not upheld a policy that extends that broadly.

38. Marijuana, of course, has since become lawful. As noted in CROA&DR 4524, there is a clear difference for just cause cases between consuming and then working impaired versus consuming and then later working unimpaired[27]. A unilateral policy change cannot treat both situations as the same.

39. Arbitrator Moreau, in the most recent case involving expert evidence on the issue of impairment and cannabis, has recently confirmed this approach[28]:

> While Dr. Greenwald disagrees with Dr. Rosenbloom's opinion that the lingering acute effects of marijuana are limited to 3-4 hours, **there is common ground between the two experts that a positive urine test alone is unable to measure or determine the level of impairment of an individual who has consumed cannabis.** As Dr. Greenwald notes at p.5 of her rebuttal report cited above: "Dr. Rosenbloom is correct in his assertion that exact level of impairment cannot be determined from a positive urine test alone".
>
> …
>
> As Dr. Rosenbloom attests, the THC content "leaches out for up to 30 days" which supports the finding that 21ng/ml of THC remained in the grievor's urine at the time he was tested. **That result alone, as the CROA cases have determined, does not lead to a finding of impairment. There is no other evidence that the grievor demonstrated any physical signs that would lead to the conclusion that he was impaired at the time the incident occurred. Indeed, the grievor tested negative on the oral fluid tests**. Accordingly, after consideration of the prevailing case law, particularly from this Office, and the expert evidence adduced in this case, I find that the Company has not met the onus of demonstrating that the grievor was in violation of CROR Rule G, as alleged in his Form 104 dismissal letter of April 8, 2019.
>
> (Emphasis added)

40. Similarly, BTC did not persuade the arbitrator that it had just cause to terminate Mr. Ouimet when he had tested negative for the more specific oral swab test. It remains

[27] See also SHP 530.
[28] CROA&DR 4706.

an employer's responsibility to prove impairment in these cases. A positive urine test and a negative oral swab test do not satisfy that burden.

41. The arbitrator appreciates why this remains a challenging area for the parties, despite the case law regarding impairment. These parties continue to struggle with it, as demonstrated by their mediation efforts before Arbitrator Schmidt who is hearing a policy grievance contesting BTC's revised *Policy*.

42. The issue of drug and alcohol policies remains in dispute for other railway parties, as noted recently by Arbitrator Hornung in CROA&DR 4729:

> 28. This difference of opinion between the parties is a continuing one and has led to repeated dismissals and consequent arbitrations which has plagued their relationship and burdened the CROA process with cases that share largely repetitive issues.
>
> 29. From the material submitted, it appears that in recent years both the potency and concentration of marijuana has increased and that significant advancements have been made relative to marijuana testing.
>
> 30. Given the circumstances, I am unable to conclude – without the appropriate evidence, including expert evidence – whether, inter alia, the Drug Concentration Limits for Marijuana Metabolite (THC) in the urine, or Marijuana (THC) in oral fluids, as set out in # HR 203.1, are reasonable limits so as to apply to the Grievor or otherwise support the imposition of any remedy for their breach. Nor – without such evidence - can it be concluded that, as the Union alleges in its Policy Grievance, aspects of the Drug and Alcohol Testing Policy are unreasonable and unenforceable for failing to meet the KVP standards.

43. In addition, BTC also failed in the instant case to demonstrate that it brought to Mr. Ouimet's attention the 2018 amendment to the *Policy* on which it relied for his termination. BTC did not seemingly dispute the TCRC's position that the amended *Policy* was sent to employees the day after Mr. Ouimet's investigation interview.

44. For these reasons, BTC did not demonstrate it had just cause to terminate Mr. Ouimet's employment. The arbitrator accordingly orders BTC to reinstate Mr. Ouimet in employment forthwith, without loss of seniority or other benefits, and with full compensation for loss of earnings, less any sums he earned in mitigation.

3. Should the arbitrator award general, aggravated and/or punitive damages?

45. The TCRC requested damages for three reasons. It argued that its detailed grievance provided BTC with multiple cases which held that a negative swab test showed no impairment. BTC's decision to terminate Mr. Ouimet based on the urine test, despite the negative oral swab test and the extensive case law, should therefore attract damages, in addition to the full compensation owing for reinstatement.

46. In further support of its damages claim, the TCRC also contested the manner of BTC's investigation as well as the allegedly public way BTC tested Mr. Ouimet.

47. The TCRC's case law described certain situations where arbitrators have awarded general damages. The TCRC did not satisfy the arbitrator of the existence of an independent actionable wrong which could justify an award of aggravated and/or punitive damages.

48. For several reasons, the arbitrator has concluded that this case does not justify an award of damages.

49. First, the arbitrator dismissed the TCRC's argument that BTC failed to carry out a fair and impartial investigation.

50. Second, the issue of impairment remains hotly contested in the railway industry and no doubt elsewhere. Current science makes the issue easier for alcohol than for cannabis. The recent legalization of marijuana has added further complexity. Policies are being amended to take this important change into account. Various railway parties continue to grapple with this issue as evidenced by the ongoing process before Arbitrator Schmidt regarding BTC's *Policy* and the case before Arbitrator Hornung, *supra*.

51. Third, Mr. Ouimet smoked marijuana 12 hours before his 06:00 shift. Given the general 24-hour recommendation to which BTC alluded at the hearing[29], it is not

[29] The arbitrator excluded the expert report from a different case that BTC included in its materials and filed on the eve of the arbitration. The parties did agree to refer to two publicly available exhibits from that report.

surprising that a dispute arose. The fact that BTC failed to meet its burden of proof in this case is not sufficient, by itself, to attract a damages award.

52. Fourth, while some railway employers have dealt with this issue repeatedly, the evidence did not demonstrate that BTC had had the same experience. The investigation interview, for example, seemly demonstrated a lack of knowledge about the existing case law.

53. Given this context, the TCRC did not persuade the arbitrator that this is a proper case to consider awarding damages in addition to the remedies arising from reinstatement.

54. The TCRC's third allegation concerning where BTC conducted the drug testing is nonetheless troubling. Mr. Ouimet indicated that it took place in the "bureau du directeur générale" and commented on the lack of privacy[30]:

> A cet effet, Mon test a été pris dans le bureau du directeur général avec les rideaux ouverts avec tout l'équipement utilisé pour le dépistage de drogue et alcool sur la table et tous les gens regardait je me suis senti comme un bandit, c'était devant mes pairs, cela ne donne pas une bonne image de moi. (sic)

55. At the hearing, BTC indicated this office is on the second floor. Without a visual, the arbitrator had trouble concluding how "public" this test was. BTC's decision not to respond to the grievance, or to comment on this allegation in the JSI, left the record somewhat sparse.

56. While the TCRC's three allegations did not support that this was an appropriate case for damages, the manner of Mr. Ouimet's testing, as gleaned from the record, requires a remedy. The arbitrator therefore gives the TCRC the option of having this award continuously posted, for no more than 30 days, in a conspicuous place in the workplace where employees may read it.

[30] TCRC Documents, pages 119 and 123 Q&A 11 and 41.

57. This remedy is designed to counter any negative inferences which might have arisen from the way BTC conducted Mr. Ouimet's drug testing. Whether the TCRC chooses to exercise this option will depend on Mr. Ouimet's wishes.

DISPOSITION

58. BTC did not satisfy its burden of proof that it had just cause to terminate Mr. Ouimet. The TCRC did not convince the arbitrator that BTC's investigation was unfair or that additional damages should be awarded given the overall circumstances of this case.

59. However, the TCRC will have the option of having this award posted in the workplace to counteract any negative inferences flowing from how BTC conducted Mr. Ouimet's drug test.

SIGNED at Ottawa this 4th day of August 2020.

Graham J. Clarke
Arbitrator