

**SHP751**

**ARBITRAGE EN VERTU DU CODE CANADIEN DU TRAVAIL, LRC 1985, C L-2**

**ENTRE :**

**UNIFOR, LOCAL 100**

**(Unifor)**

**-et-**

**LA COMPAGNIE DES CHEMINS DE FER NATIONAUX DU CANADA**

**(CN)**

**Grief concernant le congédiement de M. Paul Massé**

**Arbitre :** Graham J. Clarke

**Date :** Le 7 juillet 2026

**Pour Unifor :**

|             |                                                           |
|-------------|-----------------------------------------------------------|
| M-A. Paré : | Représentant national                                     |
| S. Moreau : | Vice-Président région de l'Est, Unifor Section locale 100 |
| P. Massé :  | Plaignant                                                 |

**Pour CN :**

|              |                                              |
|--------------|----------------------------------------------|
| S. Sayah :   | Spécialiste principale en conformité         |
| M. Martens : | Première directrice, Relations de travail    |
| L. Bouzid :  | Spécialiste principale en conformité         |
| S. Vinet :   | Associée, relations de travail et conformité |

Arbitrage tenu à Montréal le 30 juin 2026.

## TABLE DES MATIÈRES

|                                                                                                               |    |
|---------------------------------------------------------------------------------------------------------------|----|
| Introduction .....                                                                                            | 3  |
| Chronologie .....                                                                                             | 3  |
| Le CN avait-il des motifs raisonnables d'exiger un test de dépistage? .....                                   | 9  |
| Position des parties .....                                                                                    | 9  |
| CN .....                                                                                                      | 9  |
| Unifor .....                                                                                                  | 11 |
| La jurisprudence .....                                                                                        | 13 |
| Décision .....                                                                                                | 17 |
| Quelle est la sanction appropriée pour un employé avec un résultat positif pour la marijuana à 10ng/ml? ..... | 20 |
| Positions des parties .....                                                                                   | 20 |
| CN .....                                                                                                      | 20 |
| Unifor .....                                                                                                  | 21 |
| La jurisprudence .....                                                                                        | 22 |
| Décision .....                                                                                                | 24 |
| Objection d'Unifor .....                                                                                      | 24 |
| M. Massé a-t-il travaillé chez CN avec les facultés affaiblies? .....                                         | 26 |
| L'arbitre devrait-il modifier la sanction imposée par le CN? .....                                            | 29 |
| Disposition .....                                                                                             | 30 |

# Sentence arbitrale

## INTRODUCTION

1. Le 6 avril 2025, le plaignant, M. Massé, a frappé un poteau de ciment causant des dommages au véhicule de CN. CN a par la suite exigé des tests de dépistage d'alcool et de drogues (Test). Les données quantitatives de l'échantillon de liquide buccal indiquaient que M. Massé avait un résultat positif pour la marijuana à 10ng/ml.

2. Le 2 mai 2025, CN a congédié M. Massé pour le motif suivant<sup>1</sup> :

Violation of CN's Policy to Prevent Workplace Alcohol and Drug Problems and CN Code of Business Conduct in relation to the results of the post incident drug and alcohol testing conducted on April 6, 2025.

3. Selon Unifor, CN n'avait pas de motif raisonnable pour exiger un Test. Subsidiairement, Unifor prétend que le résultat du Test à 10ng/ml ne démontre pas que M. Massé se trouvait en situation de facultés affaiblies au travail.

4. CN soutient que M. Massé a été impliqué dans un incident évitable alors qu'il conduisait un véhicule de la compagnie. Il aurait omis de respecter les procédures de marche arrière, ce qui a entraîné des dommages à des biens appartenant à l'entreprise. CN argumente que le congédiement constituait une mesure disciplinaire appropriée pour un employé qui conduisait un véhicule avec des facultés affaiblies, et ce, malgré l'absence de mesures disciplinaires dans son dossier.

5. Pour les raisons suivantes, l'arbitre doit conclure que CN avait le droit d'exiger un Test. L'arbitre a aussi décidé de ne pas intervenir pour modifier la sanction imposée par CN, étant donné l'état de la jurisprudence dans ce domaine.

## CHRONOLOGIE

6. L'arbitre ne reproduit que les faits les plus saillants du dossier préparé par les parties.

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<sup>1</sup> Documents d'Unifor, Onglet N (Fiche 780).

7. **4 mars 2019** : CN embauche M. Massé. Aux moments pertinents pour les fins de cet arbitrage, il occupait le poste d'apprenti mécanicien de wagons.

8. **6 avril 2025** : Un incident a lieu alors que M. Massé conduit un véhicule de CN. Dans son exposé, Unifor décrit l'incident comme suit :

6. Pendant son quart de travail du 6 avril 2025, alors que M. Massé effectue une manœuvre de recul avec son véhicule de fonction, il heurte un poteau, causant des dommages mineurs au marchepied.

L'exposé du CN décrit l'incident comme suit :

18. Le plaignant opérait le véhicule et reculait lorsqu'il a heurté une structure de ciment, causant des dommages au parechoc du véhicule. Le plaignant a indiqué qu'il était distrait par des sons ambiants et des questions posées par son collègue qui était passager dans le véhicule.

19. Le plaignant et son collègue n'ont pas suivi la politique du CN sur la procédure de marche arrière, ce qui constitue une violation motivée par des considérations de sécurité. Les superviseurs ont recueilli de l'information à la suite de l'accident, ce qui a justifié la tenue d'un test de dépistage de drogue et d'alcool post-incident.

Avant les événements du 6 avril 2025, M. Massé n'avait aucun historique disciplinaire<sup>2</sup>.

9. **6 avril 2025** : Un représentant de CN, M. Stabile, prépare un « incident summary » et l'envoie par courriel. Il obtient des commentaires de M. Massé et de son collègue. M. Stabile décrit l'incident comme suit<sup>3</sup> :

At 18:53 Supervisor Maxime Boucher and myself were in the office we had just got in the office after having briefed the carmen on shift. Carmen Paul Masse and Mykhaylo Myloserdnyy returned from their pullby of train 368. Carmen Masse immediately went to see supervisor Maxime Boucher to advise him that he had had an incident with the truck. He had advised that he was getting into position to conduct his pullby and had to turn around and when doing so back into the cement structure. Supervisor Maxime Boucher and I immediately went to the location of the incident at Josi to create a reenactment. We took pictures of the truck and the position he had when he was backing up. There is a visible mark where the bumper contacted the cement structure in the 3rd photo. Both carmen advised that they did not follow procedure and did not get out of the vehicle to assist each other in backing up. We brought the vehicle back to the

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<sup>2</sup> Documents du CN, Onglet 3.

<sup>3</sup> Documents d'Unifor, Onglet F.

shop and asked carmen Paul Masse and Mykhaylo Myloserdnyy to give a summary of what happened. (sic).

10. **6 avril 2025** : Le CN oblige M. Massé à prendre part à un Test en vertu de sa *Politique de la Compagnie sur la prévention des problèmes causés par l'alcool et les drogues en milieu de travail*<sup>4</sup> (« Politique »). Un échantillon d'urine se révèle « non négatif » lors d'un test de dépistage au point de collecte<sup>5</sup>.

11. **10 avril 2025** : Les parties ne contestent pas la conclusion de la compagnie DriverCheck selon laquelle l'échantillon buccal de M. Massé donnait un résultat positif<sup>6</sup> pour la marijuana au seuil établi par la Compagnie (10ng/mL) :

Positive for Marijuana - THC Parent. Quantitative level - 10 ng/mL

12. **15 avril 2025** : Le CN mène une première enquête sur l'accident<sup>7</sup>. M. Massé demande à témoigner en anglais. Les questions et les réponses saillantes sont reproduites ci-dessous :

8. Q. Do you wish to dispute or refute any of the information submitted as evidence?

A. Maybe add and not dispute, When I was doing my 3 point turn, when I was about to backing up I looked at Mykaelo to see if he would get out and he was just staring straight so I just said screw it and backed up. I don't have any confidence about him. When I work with him I consider working by myself. He speaks very little french and no english. MAny people have complained about him in the past. He is a nice guy but working with him is undesirable. It;s still my fault tho as I was driving. I absolutely regret not following the procedure and should have asked him to exit the vehicule.

Also in the evidence 2, the truck that Francesco state had an accident is the 271292 but in fact it is 274304.

...

10. Q. Explain in your own words the circumstances surrounding the vehicle accident on April 6, 2025.

A. So As i was doing my 3 point turn , the engine was right there so i was hyper focus of not hitting the engine. Not that this is not an excuse but not having

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<sup>4</sup> Documents du CN, Onglet 4.

<sup>5</sup> Documents d'Unifor, Onglet G.

<sup>6</sup> Documents du CN, Onglet 5 (Résultats reçus de DriverCheck Inc.)

<sup>7</sup> Documents d'Unifor, Onglet L.

mikaelo getting out of the vehicle, my focus was still on the engine as it was right there. I knew that the pillar was there but I taught that I had more distance. I did not even had my foot on the accelerator. When we hit the pillar, it was so light that we felt it but I pulled forward about a foot or 2 and did not think anything of it because I hit it so lightly. We remained in the truck until train 368 said they were ready to go and only when we exit for the roll by that we saw the damage. And then after the pullby i reported the incidence to Maxime Boucher. Sorry that I did not respect the procedure and hindsight I realise I should have done so. The back step is made of aluminum so it bend like paper, I did not hit it hard.

...

13.Q. M.Masse, why did you decide to back up the truck at the location where the accident happened?

A. I felt it was convenient at the time, in hindsight, bad judgement

14.Q. M.Masse, before backing up, did you ask your colleague to get out of the vehicle to assist and do the backup procedure?

A. i did not

15.Q. M.Masse, in your own words, what is the direct cause of the accident?

A. I was focusing on the engine and taught there was more space between the truck and the pillar and the way I was positioned as i was backing up, the view of the pillar was obstruct by the hose reels on the side of the truck

16.Q. What else could have you done differently?

A. Only after the roll by I should have turned the vehicule and it would have been the best course of action as the engine would not have been there.

(sic)

13. **15 avril 2025** : Le CN tient ensuite son enquête sur les résultats du Test<sup>8</sup> :

6. Q. You are now provided with the following information which is entered as evidence that may have a bearing on your responsibility in connection with the matter under investigation:

EV-1: notice to appear

EV-2 : Cn code of business conduct for drugs and alcohol

EV-3 : Non-DOT Drug Test results

EV-4 : Driver check form

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<sup>8</sup> Documents du CN, Onglet 10.

Note. Pause from Alexandre and Paul at 6h24

Came back at 6h40

Note : Le syndicat souhaite déposer en évidence l'annexe du mémorandum d'entente de la convention collective 12 concernant les drogues et alcool. Et/ou la politique drogue et alcool du CN. (evidence rajouté par Alexandre Gravel et sera note à evidence 5

...

10.Q. Please explain in your own words the circumstances surrounding the events on April 6th, 2025.

A. My knee hurts, I used it for the pain in my knee.

...

13.Q. Mr. Masse, as entered into evidence 3, the result of the saliva test performed indicated a positive result for 10 ng/ml, is that correct?

A. yes

14. Q. Mr. Masse, did you dispute the results of the swab and urine tests when notified by telephone?

A. i did not

...

16. Q. Mr. Masse, please state your understanding of CN's Policy to Prevent Workplace Alcohol and Drug Problems.

A. I am aware that i am not allowed to be impaired at work, which i was not.

...

21. Q. Were you in a violation of a policy on April 6, 2025?

A. from my understanding, no

22.Q. What are the details of this violation ?

A. i used it for the pain in my knee

23. Q. Following a reasonable doubt, did you do a screening in accordance with the policy on prevention of problems caused by drug and alcohol at workplace?

A. Question for me is not clear but from what I understand, yes i did a test at work by driver check.

Note. Objection from Alexandre Gravel: it is not following a reasonable doubt, the test was done because of the truck accident. If you look further on the sheet (evidence 4, CN supervisor form) that was filled by Mr. Boucher, we can see that everything was normal with mr. Masse.

...

27. Q. Mr. Masse, when was the last time you consumed marijuana prior to the start of your shift at 18h30 on April 6, 2025?

A. no details.

Note. Objection from Alexandre Gravel : That question is a personal matter and should not be answered by mr. Masse.

...

31. Q. Do you have anything further to add to this employee statement?

A. I hope a decision will not be based on just a number. I can assure you I was not impaired. There are multiple factors involved in impairment that will not be determined solely by a number. I value this job, I have a family that I need to support and I will not let marijuana be an obstacle in providing for my family. I truly value my job and I will do anything necessary to maintain it. I have not smoked since the incident, which is evidence that I do not have a problem.

(sic)

14. **2 mai 2025** : Par le biais d'une fiche 780, le CN attribue à M. Massé 15 points de démerite pour l'accident qu'il a eue avec le véhicule de la compagnie<sup>9</sup> :

For your responsibility in the incident involving CN vehicle 274304 on April 6, 2025, which resulted in damage to said vehicle and violation of the CN vehicle Back-Up Policy.

Unifor ne conteste pas les 15 points de démerite<sup>10</sup>.

15. **2 mai 2025** : Dans une deuxième fiche 780, le CN congédie M. Massé pour les motifs suivants<sup>11</sup> :

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<sup>9</sup> Documents du CN, Onglet 6 (La fiche 780 a été remis lors de l'audience par CN et également par courriel de l'Unifor le 30 juin 2026).

<sup>10</sup> Exposé de CN, paragraphe 20.

<sup>11</sup> Documents d'Unifor, Onglet N.

Violation of CN's Policy to Prevent Workplace Alcohol and Drug Problems and CN Code of Business Conduct in relation to the results of the post incident drug and alcohol testing conducted on April 6, 2025.

16. **10 mai 2025** : Unifor dépose son grief<sup>12</sup> contestant le congédiement de M. Massé.
17. **6 juin 2025** : Le CN dépose sa réponse<sup>13</sup> au grief.
18. **12 janvier 2026** : Les parties demandent à l'arbitre de trancher leur différend.

## **LE CN AVAIT-IL DES MOTIFS RAISONNABLES D'EXIGER UN TEST DE DÉPISTAGE?**

19. Unifor prétend que le CN n'avait pas le droit d'exiger un Test et que, par conséquent, l'arbitre ne devrait pas tenir compte des résultats.

### **Position des parties**

#### **CN**

20. CN a argumenté qu'il avait suivi, après l'accident, les étapes nécessaires avant d'exiger un Test :

46. Comme nous le verrons, l'allégation du Syndicat selon laquelle la Compagnie n'avait pas de motifs raisonnables pour exiger le test est sans fondement. Les superviseurs ont recueilli de l'information à la suite de l'incident, ce qui a justifié la tenue d'un test de dépistage de drogue et d'alcool post-incident. Le plaignant a facilement admis sa consommation de cannabis.

...

52. Il est essentiel de bien apprécier l'ensemble des circonstances de l'événement avant de porter un jugement. La preuve démontre que la manœuvre en cause n'était ni complexe ni particulièrement difficile à exécuter.

53. En l'espèce, l'employé effectuait une marche arrière dans le but de compléter un virage en trois points. Conformément à la politique du CN, lorsqu'un employé recule un véhicule en présence d'un passager, ce dernier doit descendre du véhicule, s'assurer que la voie est dégagée et guider l'employé de façon sécuritaire. La politique prévoit notamment ce qui suit:

“Si vous transportez des passagers, demandez à au moins une personne de sortir du véhicule pour vous guider. Le membre du personnel qui agit

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<sup>12</sup> Documents du CN, Onglet 7.

<sup>13</sup> Documents du CN, Onglet 8.

comme guide doit avoir une vue dégagée de la trajectoire suivie par le véhicule et il doit se tenir dans le champ de vision du conducteur ou de la conductrice ou maintenir une communication constante avec lui ou elle par radio ou par un autre moyen.’

...

55. L’incident s’est aussi survenu en plein jour, vers 18 h 30 au mois d’avril, alors que la luminosité était encore suffisante. De plus, l’employé était en service depuis environ 30 minutes seulement et devait, à ce titre, être pleinement alerte et en mesure d’exécuter ses tâches de manière sécuritaire.

56. La structure heurtée était un pilier de grande taille soutenant un pont, clairement visible et non dissimulé. Il ne s’agissait donc pas d’un obstacle difficile à percevoir.

57. Comme la démontre la photographie ci-dessous, le pilier en question est massif, bien défini et se distingue nettement de son environnement immédiat. Sa taille, sa position et l’absence de toute obstruction visuelle rendent sa présence manifeste. Aucun facteur atténuant ne permet d’expliquer ni de justifier l’incapacité de l’employé à identifier cet obstacle lors de la manœuvre.

58. La Compagnie affirme que, suite à l’incident du 6 avril 2025, elle avait des motifs raisonnables de considérer que l’accident ait pu être provoqué par un jugement affaibli par l’alcool ou la drogue.

59. Contrairement à la prétention du Syndicat, ces motifs ne reposent pas uniquement sur la survenance de l’incident. Les superviseurs ont recueilli des informations immédiates révélant plusieurs éléments préoccupants, incluant la distraction admise par le plaignant et le non-respect des procédures de marche arrière.

60. De plus, l’importance de l’impact, incompatible avec la description d’une manœuvre lente, suggère un manque de perception et de contrôle.

61. Les dommages causés par cet incident peuvent être constaté sur la photo ci-dessous

62. Considérés de manière cumulative, ces faits constituaient des éléments objectifs et sérieux permettant raisonnablement de suspecter un affaiblissement des facultés.

21. Le CN a aussi décrit la différence entre un dépistage post-incident et un dépistage pour motif raisonnable :

79. Il convient d’emblée d’établir une distinction fondamentale entre deux types de dépistage prévus par la Politique de la Compagnie : le dépistage pour motif raisonnable (« reasonable cause testing ») et le dépistage post-incident (« post-

incident testing »). Le Syndicat confond ces deux mécanismes distincts, ce qui invalide l'ensemble de son argumentation relative au formulaire de doute raisonnable.

...

81. Le dépistage post-incident, en revanche, est déclenché par la survenance d'un incident ou accident répondant aux critères établis par la Politique. Ce type de dépistage ne requiert pas l'observation de signes d'intoxication. Le déclencheur est l'incident lui-même, et non le comportement de l'employé. L'objectif est de déterminer si la consommation d'alcool ou de drogues a pu contribuer à l'incident.

82. En l'espèce, le dépistage administré au plaignant était un dépistage post-incident, tel qu'il appert clairement du motif de congédiement lui-même : « Violation of CN's Policy to Prevent Workplace Alcohol and Drug Problems and CN Code of Business Conduct in relation to the results of the post incident drug and alcohol testing conducted on April 6, 2025. »

83. L'argument du Syndicat selon lequel le formulaire de doute raisonnable ne comportait pas d'observations claires de signes d'intoxication est donc sans pertinence. Dans le cadre d'un dépistage post-incident, la Compagnie n'avait pas à documenter des signes d'intoxication observables, puisque ce n'était pas le fondement du test. Le seul critère applicable était la survenance d'un incident ayant causé des dommages — critère qui est incontestablement satisfait en l'espèce.

...

90. Contrairement à la prétention du Syndicat, ces éléments, considérés de manière cumulative, constituent des indicateurs objectifs d'un possible manque de jugement et de perception, lesquels sont reconnus par la jurisprudence arbitrale comme pouvant justifier la tenue d'un dépistage post incident.

## **Unifor**

22. Unifor explique pourquoi le CN n'avait pas le droit d'exiger un Test (références omises) :

[19] Toutefois, d'abord et avant tout, dans le présent dossier, une question supplémentaire et d'une importance capitale doit également être soulevée : **l'Employeur était en droit d'exiger que M. Massé se soumette à des tests de dépistage de drogue/alcool le 6 avril 2025?** Le Syndicat dans le Grief conteste l'exigence du test de dépistage et allègue que l'Employeur n'avait pas les motifs raisonnables requis.

[20] Les tests de dépistage de drogue ou d'alcool en milieu de travail sont étroitement encadrés par la législation et la jurisprudence qui en découle. De tels dépistages enfreignent notamment, sans s'y limiter, le droit à la vie privée

ainsi que le droit à son intégrité. Dans la décision phare Irving, la Cour Suprême rappelle que « *l'utilisation du corps d'une personne, sans son consentement, en vue d'obtenir des renseignements à son sujet, constitue une atteinte à une sphère de la vie privée essentielle au maintien de sa dignité humaine* » et que « *Le prélèvement d'échantillons de substances corporelles est une mesure très envahissante et, comme notre Cour l'a souvent confirmé, il est assujéti à des normes et à des garanties rigoureuses qui permettent de satisfaire aux exigences de la Constitution.* »

...

[27] De plus, bien qu'un accident ait bel et bien eu lieu le 6 avril 2025, un employeur ne peut systématiquement ordonner un test de dépistage à chaque fois qu'un accident survient, ce n'est pas une justification suffisante à elle seule.

...

[31] Le Syndicat avance que l'Employeur ne disposait pas de motif suffisant afin d'ordonner un test de dépistage le 6 avril 2025.

- a) Il n'e s'agissait pas d'un accident important mais plutôt d'un accident mineur, sans blessure, sans dommages majeurs, et il n'y avait aucun motif raisonnable de croire que l'alcool ou la drogue était en cause.
- b) L'Employeur n'avait aucun motif raisonnable de croire que M. Massé avait à ce moment les capacités affaiblies par la consommation d'alcool ou de drogue.
- c) L'accident s'expliquait pleinement par les éléments récoltés dans la version que les travailleurs ont donnés le 6 avril 2025 avant qu'un test de dépistage soit ordonné.

[32] La Politique sur la prévention des problèmes causés par l'alcool et les drogues en milieu de travail, une des deux politiques invoquées par l'Employeur pour justifier le congédiement de M. Massé, prévoit elle-même des notions qui semblent conformes à ce que nous avançons. À la section « 3 MOTIFS RAISONNABLES ET TESTS APRÈS ACCIDENT », on peut notamment y lire que « *Des analyses [...] peuvent être exigées, notamment après un accident ou un incident, s'il y a des motifs raisonnables de soupçonner la consommation ou la possession d'alcool ou de drogues [...]* » ainsi que « *Les tests après un accident sont menés à la suite d'un accident ou d'un incident grave* ». Le Syndicat soutient fermement que l'accident n'était en rien grave, il s'agissait d'un accrochage mineur.

[33] Outre les constatations visuelles, rappelons que M. Massé a affirmé les points suivants lors de l'enquête et qui supportent qu'il s'agit d'un incident mineur : [ONGLET L]

- a) Il n'a pas appuyé sur l'accélérateur lors de la manœuvre de recul.
- b) Le contact avec le pilier de ciment lui a paru très léger.

c) Le marchepied qui se trouve à l'arrière du véhicule est fait d'aluminium et, selon M. Massé, il plie comme du papier (« it bend like paper ») et que l'impact n'était pas substantiel (« I did not hit it hard »).

...

[36] Nous ajoutons que l'accident mineur survenu le 6 avril 2025 n'est pas suffisant, à lui seul, afin de donner des motifs raisonnables à l'Employeur d'ordonner un test de dépistage, surtout que dans le présent cas, dès les premières discussions avec les superviseurs sur place, M. Massé a fourni des explications crédibles et pertinentes pour expliquer l'accident le soir même de sa survenance; [ONGLET F]

- a) L'admission du non-respect de la procédure de recul avec un véhicule
- b) La proximité avec la locomotive, ce qui accaparait la concentration de M. Massé
- c) Les bruits de cloches du passage à niveau
- d) Son collègue Mykhaylo qui lui posait une question

(Caractères gras et en italiques vient du texte original d'Unifor)

## La jurisprudence

23. Un simple accident ne donne pas à un employeur le droit automatique d'exiger un Test<sup>14</sup>. Dans AH732<sup>15</sup>, l'arbitre a conclu qu'un employeur n'avait pas suivi les démarches nécessaires avant d'exiger un Test :

41. In the instant case, the IBEW contested the grounds for testing. CP did not provide the evidence on which it based its conclusion to test. CP's Brief contains memoranda from managers (CP Brief, Tab 5), but the testing seemed already to be a foregone conclusion. Those memoranda refer to "incident drill down" and "an incident form", but those documents, if they exist, are not in the Record before the arbitrator.

42. In the absence of such evidence, and given that the incident, albeit involving a switch and a hi-rail derail, appears to fall at the far end of the severity spectrum, CP did not demonstrate it met its DAPP criteria to test....

24. Quelle est l'analyse juridique appropriée dans ce domaine qui implique à la fois la santé et la sécurité au travail et le droit à la vie privée des employés?

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<sup>14</sup> Voir, par exemple, [CROA 4840](#).

<sup>15</sup> [Canadian Signals and Communications System Council No. 11 of the IBEW v Canadian Pacific Railway Company, 2021 CanLII 69959](#)

25. Dans AH879<sup>16</sup>, l'arbitre a examiné en détail cette question importante (références omises) :

18. For many years, decision makers have applied the balancing of interests proportionality approach to which the SCC made reference in Irving. The Alberta Court of Queen's Bench adopted Arbitrator Sims' helpful analysis when explaining the difference between reasonable cause testing and post workplace accident or serious incident testing:

[29] Arbitrator Sims was careful to ensure that reasonable cause testing (with its focus on the employee) and post-incident testing (with its focus on determining the cause of the accident) not be conflated. While acknowledging they may overlap, he specifically rejected the proposition that post-incident an employer would need to "point to evidence that positively suggested impairment to a sufficient degree to override the employee's privacy interests". He said:

In my view, adopting the same test is not justified either in principle or based on the case law. The tests are different because the circumstances and the interests involved are different. Both tests, however, must still involve a balancing of interests, both within the policy itself and at the point of application. (para 159).

(emphasis in original)

[30] A little further in his analysis, Arbitrator Sims sets out the three part test relied upon by the Arbitration Board in this case. Arbitrator Sims finds that there are three elements to post-incident testing:

- The threshold level of the incident needed to justify testing.
- The degree of inquiry necessary before the decision is made.
- The necessary link between the incident and the employee's situation to justify testing (para 162).

[31] With respect to the threshold level, it is clear from the jurisprudence that there must be something more than an accident or incident. It should be significant. As arbitrator Sims notes at para 176:

In my view the amount of the damage or the magnitude of the incident must remain a factor to be weighed in determining whether there is sufficient cause to justify overriding the employee's privacy rights through mandatory testing. This can include the near miss concept which, almost by definition, involves no damage, but there still has to be a sufficient gravity to the event.

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<sup>16</sup> [\*International Brotherhood of Electrical Workers, System Council No. 11 v Canadian Pacific Kansas City Railway\*, 2024 CanLII 60992](#)

Any near miss must involve a realistic conclusion after a thorough investigation that serious damage almost occurred.

(Emphasis added)

19. In the 2024 award in ATCO, Arbitrator Casey reviewed the law, including the issue of awarding damages in drug testing cases. That case reiterated the elements of the three-part test followed for post incident testing and confirmed that the mere happening of an incident did not justify testing:

[128] Arbitrator Smith followed the arbitral jurisprudence which determined that employers must establish 3 conditions to compel post-incident testing:

1. There must be a precipitating event of sufficient gravity to justify the intrusive invasion of the employee's right to privacy;
2. There must be a reasonable investigation and;
3. A drug and alcohol test would assist in the investigation into the cause of the incident.

[129] Arbitrator Smith stated that arbitrators must exercise care and scrutinize critically the actions of management so that the threshold for ordering post-incident testing is not so diluted that the mere happening of an incident permits testing.

26. Toujours dans AH879, l'arbitre est arrivé à la conclusion que l'employeur n'avait pas le droit d'exiger un Test<sup>17</sup> (références omises) :

34. If one applied the arbitral case law's 3-part test as summarized above, CPKC similarly did not demonstrate that the run through switch by a hi-rail truck justified overriding Mr. MacLeod's privacy rights.

35. First, was there "a precipitating event of sufficient gravity"? The evidence confirmed that the hi rail truck went through the switch. But that is not sufficient, by itself, to proceed with drug tests. As in AH732, supra, the evidence showed the run through by the hi-rail truck was very minor. CPKC provided no evidence of damage.

36. Second, was there a reasonable investigation? CPKC satisfied the arbitrator that it had looked into the matter sufficiently to understand the facts of the situation. Mr. MacLeod had explained that he had relied on his foreman's instructions before he backed over the switch.

37. Third, would a drug and alcohol test assist in the investigation into the cause of the incident? CPKC did not convince the arbitrator of the need for drug

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<sup>17</sup> Voir aussi AH732 - [Canadian Signals and Communications System Council No. 11 of the IBEW v Canadian Pacific Railway Company, 2021 CanLII 69959](#)

testing to investigate the cause of the accident. The evidence both before and after the request to test showed that Mr. MacLeod had provided the relevant facts of the incident. He had relied on the erroneous comments of his foreman before running over the switch. The foreman confirmed these facts too.

38. CPKC did not suggest that the employees attempted to hinder the time sensitive analysis for drug testing. Instead, the Record demonstrated that Mr. MacLeod and his foreman remained candid and helpful throughout the entire process.

39. In short, CPKC did not have grounds to test Mr. MacLeod. Therefore, it did not have just cause to discipline Mr. MacLeod for refusing to take a drug test. While the IBEW acknowledged the risk Mr. MacLeod took in refusing to take the test given the adverse inferences that could arise, Mr. MacLeod's refusal provided no grounds for termination.

27. Toutefois l'arbitre a confirmé le droit d'un employeur d'exiger un Test, dans le cadre d'autres situations. Dans AH877<sup>18</sup>, l'arbitre a procédé à l'analyse suivante avant de conclure que l'exigence d'un Test était légitime (références omises) :

39. First, was there "a precipitating event of sufficient gravity"? The arbitrator explained above why Mr. McGuinness' situation differed from the one examined in Jones. The arbitrator concludes the MVA<sup>19</sup> met the "sufficient gravity" criterion for multiple reasons:

- a) the MVA occurred on the public Highway 43;
- b) Mr. McGuinness had been travelling at 70 Kmh;
- c) CPKC's F250 hirail truck collided with the back of a member of the public's car;
- d) the collision caused that car to spin around; and
- e) the collision caused damage both to CPKC's F250 and the other car.

40. Second, was there a reasonable investigation? The arbitrator respectfully disagrees with the IBEW's argument that CPKC tested first and then got the facts later. The above chronology indicated that CPKC had received sufficient information from Mr. McGuinness about the MVA. While the May 25, 2022 documentation from Mr. McGuinness and others may have been written after the drug testing, that does not mean that CPKC had no knowledge of the facts beforehand.

41. The Record satisfied the arbitrator that CPKC had enough information in this case to meet the "reasonable investigation" criterion.

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<sup>18</sup> [\*International Brotherhood of Electrical Workers, System Council No. 11 v Canadian Pacific Kansas City Railway\*, 2024 CanLII 62438](#)

<sup>19</sup> MVA signifie Motor Vehicle Accident.

42. Due to the pleading time limits to which the parties have agreed, the IBEW asked the arbitrator to review the investigation and the grievance correspondence. As noted in AH879, this can present some challenges for an arbitrator compared to regular arbitration where all witnesses testify viva voce.

43. The arbitrator noted in reviewing the investigation interview that the representative assisting Mr. McGuinness, however innocently, both argued the case and purported to give evidence. The arbitrator has difficulty giving those interventions much weight.

44. The Investigating Officer must be impartial. Myriad cases have contested whether an investigation was fair and impartial. Arguing the merits of the case would be more appropriate with CPKC representatives around the time of the incident, during the grievance process or at arbitration. This does not mean that representatives cannot raise objections during an employee's questioning or pose questions to the employee or other witnesses.

45. The investigation is a joint fact-finding exercise which allows the parties to avoid long arbitrations with extensive oral evidence. If a representative has non-hearsay evidence to provide, or seeks to clarify certain facts for the Record, there are ways to do that in the parties' expedited regime. This ensures both parties have an opportunity to ask questions about the evidence.

46. Third, would a drug and alcohol test assist in the investigation into the cause of the incident? In some situations, where the reason for an accident is obvious, testing would not assist. In this case, however, the opposite is true. CPKC in its Engineering Safety Rule Book emphasizes safe practices for employees who use its vehicles. Despite its efforts, CPKC was faced with the scenario of one of its vehicles hitting a member of the public's vehicle on Highway 43 with sufficient force to spin it around and cause damage.

47. This situation justified conducting a drug and alcohol test since the facts, unlike in AH879, did not rule out impairment as a cause for the MVA.

48. In summary, CPKC had grounds to test Mr. McGuinness.

28. Plus récemment, l'arbitre a conclu que les événements entourant un accident permettaient à un employeur d'exiger un Test<sup>20</sup>.

## Décision

29. Le CN a convaincu l'arbitre qu'il avait le droit de faire subir un Test à M. Massé. Toutefois, il n'a pas été facile d'en arriver à cette conclusion. Le CN n'a pas produit de preuve détaillée sur le dommage causé au marchepied (parechoc). L'arbitre n'a que des photos, alors qu'une preuve plus détaillée l'aurait aidé dans son analyse juridique de l'incident.

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<sup>20</sup> AH906 - [International Brotherhood of Electrical Workers, System Council No. 11 v Toronto Terminals Railway Company, 2026 CanLII 10266](#)

30. Cela étant dit, voici les motifs pour lesquels l'arbitre a conclu que CN pouvait exiger un Test.

31. Premièrement, même si l'accident n'était pas catastrophique, le dommage au véhicule de CN semble être plus que mineur. La photo du dommage<sup>21</sup> indique que le marchepied (parechoc) du véhicule était très endommagé. Quoique M. Massé ait essayé de minimiser la construction du marchepied en disant<sup>22</sup> « The back step is made of aluminum so it bend like paper, I did not hit it hard », il a quand même admis en contre-interrogatoire qu'il pouvait mettre tout son poids là-dessus, présumément quand il devait grimper dans le véhicule.

32. De plus, M. Stabile a indiqué dans son rapport<sup>23</sup> que « There is a visible mark where the bumper contacted the cement structure in the 3rd photo ». La preuve suggère donc que le véhicule a heurté le pilier en ciment avec une certaine force.

33. L'arbitre ne peut ignorer non plus le fait qu'un autre employé de CN se trouvait dans le véhicule avec M. Massé. Malgré ce fait, M. Massé ne lui a pas demandé de sortir afin de l'aider à reculer le véhicule. Pendant l'enquête, M. Massé a aussi confirmé que « the view of the pillar was obstruct by the hose reels on the side of the truck ». (sic). Par conséquent, M. Massé n'a pas respecté les procédures établies de marche arrière<sup>24</sup>.

34. L'objectif de cette ligne directrice pour les manœuvres de véhicules en marche arrière vise la sécurité<sup>25</sup> :

Les présentes lignes directrices s'appliquent lorsqu'un conducteur ou une conductrice doit faire marche arrière avec un véhicule. Afin de réduire les risques de blessures graves et de décès, il est important de ne pas faire marche arrière à l'aveuglette avec un véhicule. Les conducteurs doivent suivre les consignes, surtout lorsqu'ils conduisent des véhicules dont le champ de vision arrière est limité ou obstrué (par exemple, les camions-grues, les camions rail-route, les camions-ateliers, etc.).

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<sup>21</sup> Exposé du CN, page 14

<sup>22</sup> Documents d'Unifor, Onglet L.

<sup>23</sup> Documents d'Unifor, Onglet F.

<sup>24</sup> Documents d'Unifor, Onglet E « Norme relative aux manœuvres de véhicules en marche arrière ».

<sup>25</sup> Documents du CN, Onglet 11.

35. L'accident de M. Massé n'est pas aussi grave que l'événement décrit dans AH877, mais, en prenant compte de toutes les circonstances, elle est quand même assez grave pour satisfaire la première étape de l'analyse.

36. Deuxièmement, l'exigence d'un Test a eu lieu seulement après une enquête par les responsables de CN. La décision n'a pas été prise tout de suite après l'accident, ce qui était la situation dans AH732.

37. Les parties ont décrit les démarches suivies par les superviseurs avant d'exiger un Test. Par exemple, Unifor a décrit dans son exposé les démarches des représentants de l'employeur :

[7] M. Massé et son collègue Mykhaylo Myloserdnyy, alors passager dans le véhicule, rapportent promptement l'incident à leur superviseur et admettent d'emblée ne pas avoir respecté la procédure établie par la Compagnie lorsqu'on doit reculer avec un véhicule.

[8] Les représentants de l'Employeur M. Francesco Stabile et M. Maxime Boucher procèdent à une enquête sur le lieu de l'incident, questionnent M. Massé et M. Myloserdnyy et prennent des photos sur le lieu de l'accident.

[9] Malgré l'absence de symptômes ou de motifs de croire à une quelconque faculté affaiblie, M. Boucher a exigé que M. Massé se soumette à un test de dépistage de drogues et d'alcool.

38. De son côté, le CN a décrit, dans son exposé, l'enquête de ses superviseurs :

58. La Compagnie affirme que, suite à l'incident du 6 avril 2025, elle avait des motifs raisonnables de considérer que l'accident ait pu être provoqué par un jugement affaibli par l'alcool ou la drogue.

59. Contrairement à la prétention du Syndicat, ces motifs ne reposent pas uniquement sur la survenance de l'incident. Les superviseurs ont recueilli des informations immédiates révélant plusieurs éléments préoccupants, incluant la distraction admise par le plaignant et le non-respect des procédures de marche arrière.

60. De plus, l'importance de l'impact, incompatible avec la description d'une manœuvre lente, suggère un manque de perception et de contrôle.

61. Les dommages causés par cet incident peuvent être constaté sur la photo ci-dessous.

39. Pendant l'audience, les deux parties ont aussi fait référence à la documentation complétée par les représentants de CN<sup>26</sup>.

40. L'arbitre est d'avis qu'une enquête raisonnable a eu lieu avant que la décision d'exiger un Test soit prise.

41. Troisièmement, le CN a convaincu l'arbitre qu'un Test était important pour déterminer la cause de l'accident. M. Massé a causé un dommage à un véhicule de CN. Selon les photos, il semble évident que CN serait obligé de remplacer le marchepied (parechoc). De plus, malgré le fait qu'un autre employé se trouvait dans le camion avec M. Massé, le plaignant n'a pas suivi les procédures établies de marche arrière. Ces agissements indiquent pourquoi le CN a rempli le troisième critère de l'analyse juridique.

42. Comme l'arbitre l'a dit dans AH732, un accident mineur sans d'autres circonstances ne donne pas le droit automatique à un employeur d'exiger un Test. Toutefois, dans le cas de M. Massé, la preuve démontre que l'incident n'était pas mineur. De plus, le fait que M. Massé n'a pas suivi la procédure de marche arrière rend l'incident encore plus grave.

43. Ces faits obligent l'arbitre à rejeter l'argument d'Unifor quant au droit du CN d'exiger un Test.

## **QUELLE EST LA SANCTION APPROPRIÉE POUR UN EMPLOYÉ AVEC UN RÉSULTAT POSITIF POUR LA MARIJUANA À 10NG/ML?**

### **Positions des parties**

#### **CN**

44. Le CN suggère que le résultat positif à 10ng/ml démontre que M. Massé a travaillé avec des facultés affaiblies :

69. La preuve d'expert établit que la consommation de cannabis entraîne un affaiblissement des facultés cognitives et psychomotrices pouvant persister pendant plusieurs heures, généralement entre 4 et 8 heures, selon divers facteurs individuels.

70. Bien que certaines incertitudes subsistent dans la littérature scientifique quant à la corrélation précise entre les concentrations de THC et le niveau

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<sup>26</sup> Documents de CN, Onglet 5; Documents d'Unifor, Onglet F, Note de service de F. Stable avec des photos du dommage.

d'intoxication, la jurisprudence arbitrale et judiciaire reconnaît la valeur probante du dépistage par liquide buccal pour identifier une consommation récente dans une période correspondant à celle de l'affaiblissement des facultés.

...

74. Ainsi, un résultat de 10 ng/mL de THC dans le liquide buccal constitue non seulement un indicateur reconnu de consommation récente, mais également un seuil ayant été validé sur le plan jurisprudentiel comme permettant d'identifier des individus se trouvant dans une période où un affaiblissement des facultés est raisonnablement susceptible d'être présent.

75. Le Syndicat soutient que la présence de THC dans la salive ne constitue pas une preuve d'intoxication et que le résultat de 10 ng/mL serait « très faible ». Toutefois, le Syndicat ne conteste ni la validité du test, ni le protocole utilisé. Par ailleurs, le plaignant lui-même n'a jamais remis en question le résultat positif obtenu.

## **Unifor**

45. Pour Unifor, M. Massé ne s'est pas présenté pas au travail avec des facultés affaiblies. Dans l'alternative, l'Unifor demande à l'arbitre de modifier la sanction et de réintégrer M. Massé :

[49] Dans le présent dossier, et sans répéter l'argumentaire déjà présenté dans la première partie de la présente, le Syndicat réitère qu'il y a absence totale de facteurs objectifs ou observables permettant de déceler la moindre trace de faculté affaiblie chez M. Massé lors de l'incident du 6 avril 2025. Ceci constitue certainement une preuve contraire importante à la prétention de l'Employeur.

[50] Les habitudes de consommation de M. Massé de l'époque, selon son témoignage crédible et honnête, à l'effet qu'il ne consommait de la marijuana qu'en terminant son quart de nuit, avant d'aller dormir, de nombreuses heures avant son prochain quart de travail, viennent renforcer la prétention qu'il ne se trouvait pas en état de facultés altérées par la drogue lorsqu'il se présentait au travail, notamment lors de l'incident du 6 avril 2025.

[51] En résumé, le Syndicat affirme donc que l'Employeur n'a pas rempli son fardeau de preuve, n'a pas démontré de façon probante que M. Massé s'est présenté au travail avec les facultés altérées par la drogue.

[52] Pour ces raisons, le Syndicat répond à la négative à la première question, si M. Massé n'avait pas les facultés altérées par la marijuana, il ne peut être coupable de l'infraction reprochée par l'Employeur d'avoir enfreint Les Politiques en lien avec les drogues et alcool.

[53] Le Syndicat soumet que pour cette raison, l'arbitre devrait faire plein droit au Grief.

Dans l'alternatif, l'Unifor demande à l'arbitre de modifier la sanction imposée par le CN :

[55] Le Syndicat ne s'attardera pas longuement à cette question. Dans la mesure où l'arbitre reconnaîtrait M. Massé coupable d'avoir enfreint lesdites politiques de l'Employeur, la jurisprudence en matière de drogue et alcool est claire à l'effet que l'Employeur est en droit de sanctionner un travailleur. Le Syndicat répond donc à l'affirmative à cette deuxième question.

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57] D'emblée, il est important de rappeler que M. Massé n'occupe pas un poste à sécurité sensible. Ceci est notamment démontré par la pièce jointe Q du MOA 2024 [ONGLET B] dans laquelle les parties ont clarifié, suite au litige SHP530, quelles fonctions parmi les salariés de la Convention Collective 12 peuvent constituer un poste à sécurité sensible. M. Massé n'entre dans aucune de ces catégories. L'Employeur n'a jamais prétendu le contraire dans le dossier.

[58] M. Massé a un dossier disciplinaire vierge avant l'incident du 6 avril 2025.

[59] M. Massé a toujours collaboré à l'enquête de l'Employeur avec franchise et honnêteté. Il est possible de le constater lorsqu'il n'hésite pas à admettre sa faute de n'avoir pas respecté la procédure de recul avec un véhicule, le 6 avril 2025. Il s'est soumis aux tests de dépistage de drogue alcool tel qu'exigé par l'Employeur malgré l'absence apparente de motifs justifiant un tel dépistage. Il a admis avoir consommé de la marijuana est dehors du travail et il a également collaboré pleinement et honnêtement aux entrevues d'enquête.

[60] Lors de l'entrevue d'enquête du 15 avril 2025, M. Massé a informé l'Employeur qu'il avait cessé sa consommation de marijuana suite à l'incident du 6 avril 2025, mentionnant notamment qu'il était prêt à faire tout ce qui est nécessaire afin de maintenir son emploi.

## La jurisprudence

46. Récemment, dans AH866<sup>27</sup>, l'arbitre a examiné, entre autres choses, la politique de Canadian Pacific Kansas City Railway (CPKC) et la réduction du seuil pour le cannabis de 10ng/ml à 4 et 2ng/ml. AH866 impliquait presque tous les syndicats chez CPKC, incluant Unifor.

47. Ces syndicats ont demandé à l'arbitre de retenir le seuil de 10ng/ml, puisque ce résultat lors d'un test buccal démontre qu'un employé a travaillé avec des facultés

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<sup>27</sup> [\*Teamsters Canada Rail Conference – Maintenance of Way Employees Division v Canadian Pacific Kansas City Railway Company\*, 2026 CanLII 60171](#)

affaiblies<sup>28</sup>. Le nouveau seuil de 4 et 2ng/ml dans la politique de CPKC n'aurait pu démontrer la même chose.

48. Dans AH866, l'arbitre a aussi noté qu'une présomption existe selon laquelle le congédiement est la sanction *prima facie* pour un employé qui travaille avec des facultés affaiblies. L'un des facteurs reconnus par les arbitres derrière cette présomption vient de l'importance de la dissuasion (deterrence en anglais)<sup>29</sup>.

49. Toutefois, cette présomption n'existait que si l'employé touchait un niveau de 10ng/ml ou plus (références omises) :

43. Railway arbitrators have consistently accepted that an employee's positive oral fluid (OF) test indicated impairment. Those findings led to a presumption that termination constituted the appropriate response.

44. However, those arbitral comments reflected the reality when railways used a 10ng/ml cutoff. An OF test does not show impairment the way an alcohol breathalyzer test does. But the 10ng/ml cutoff did allow for a reasonable inference of impairment, subject to a party's right to produce evidence to the contrary. However, when the DAPP significantly lowered the cutoff threshold, that unofficial "inference" evidently disappeared.

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229. CPKC pursues the legitimate objective of maintaining a safe workplace for its employees and the public. An employee working when impaired creates intolerable hazards, especially for co-workers. This scenario explains why arbitrators generally apply a presumption that termination constitutes the appropriate penalty for working while impaired.

...

264. As the Unions acknowledged, CPKC has legitimate concerns about any employee working while impaired. The arbitral presumption that dismissal constitutes the appropriate penalty for impaired employees illustrates the seriousness of this issue and the need for deterrence.

265. A level slightly lower than 10ng/ml may exist which would broaden the window of detection to help identify impaired employees. But the evidence did not show that 4/2ng/ml represented that appropriate cutoff level.

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<sup>28</sup> [AH866](#) au paragraphes 259-260 et 264-267.

<sup>29</sup> Voir, par exemple, AH689 - [Canadian National Railway Company \(CN\) v International Brotherhood of Electrical Workers System Council No. 11](#), 2019 CanLII 123925

266. In the past, the parties implicitly accepted the previous OF 10ng/ml threshold as indicative of impairment. This does not mean an OF test constituted an impairment test like a breathalyzer. But the parties accepted over time that, subject to the right to present contradictory evidence, the window of detection from a 10ng/ml test generally corresponded with an accepted window of impairment.

267. In short, the 10ng/ml threshold allowed the parties to determine impairment with some certainty. This allowed discipline cases to proceed under the expedited railway model without the lengthy and expensive expert evidence heard in the instant case.

...

274. The evidence in this case, and these real-world examples, highlight the difficulty with CPKC's unilateral change from 10ng/ml to 4/2ng/ml. While 10ng/ml may have missed detecting some employees, it nonetheless constituted a standard which all parties accepted. This supported the arbitral presumption that termination constituted the appropriate penalty.

50. La question se pose donc si la présomption devait s'appliquer à la situation de M. Massé étant donné qu'il a testé positif pour le cannabis à 10ng/ml.

## Décision

### Objection d'Unifor

51. Pendant l'audience, Unifor s'est objecté au fait que le CN a fait référence, dans son exposé, à la Règle G<sup>30</sup> du Règlement d'exploitation ferroviaire du Canada. Selon Unifor, la fiche 780 n'a jamais fait référence à la Règle G.

52. L'arbitre est d'accord avec Unifor.

53. La fiche 780<sup>31</sup> doit énumérer les motifs de discipline. On ne voit aucune référence à la Règle G dans la fiche 780. De plus, l'experte du CN confirme que les motifs de discipline se limitent à sa Politique. L'arbitre a déjà traité d'une situation presque identique dans AH726-P<sup>32</sup> (références omises):

23. Neither can a party add new issues which the parties never discussed or processed through the grievance procedure:

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<sup>30</sup> L'Exposé du CN, paragraphe 38 et ss.

<sup>31</sup> Documents d'Unifor, Onglet N.

<sup>32</sup> [\*International Brotherhood of Electrical Workers System Council No. 11 v Canadian National Railway Company\*, 2021 CanLII 41839](#)

The Company raises a preliminary objection with respect to the scope of the issues before the Arbitrator. The Company maintains that in the submission for the joint statement of issue the Union added a matter which had not previously been raised or discussed between the parties, the alleged violation of Section 239 of the Canada Labour Code. Its representative submits that matter should not be considered by the Arbitrator. I consider that position to be correct.

24. In a recent case, the arbitrator upheld CN's objection alleging that the IBEW had added a new issue which it had never raised during the grievance procedure. The late addition of a new issue causes prejudice given how the railway model operates. Parties must apply their legal and labour relations expertise at the start of each case. The JSI and the Brief are not the appropriate vehicles through which to add overlooked issues.

...

31. The arbitrator upholds the IBEW's objection, in part. The Rule G allegations in CN's Brief are new and were never raised during the investigation, in Form 708 or in the Step 2 grievance response. The JSI similarly does not contain any reference to that ground. CN cannot add a new ground based on Rule G to this arbitration.

32. Moreover, the JSI already suggests that a vital issue before the arbitrator arises from the impact of an employee fleeing the scene of an accident. CN described this issue in the JSI and highlighted that Mr. Kossey's actions prevented it from determining the "root cause of the accident":

The Company maintains the Grievor operated the vehicle while he admittedly was not feeling well. The grievor struck a concrete block, continued to operate the vehicle that had sustained extensive damage, fled the scene, failed to report the incident and was absent without authorization. The grievor deprived the Company with the ability to test him for drugs and alcohol and determine the root cause of the accident.

33. CN's position throughout the process is incompatible with the novel allegation in its Brief concerning Rule G and suggestions Mr. Kossey was impaired.

54. Dans AH866<sup>33</sup>, l'arbitre a récemment réitéré ce principe fondamental et son importance cruciale pour le succès du régime d'arbitrage spécialisé des parties (références omises):

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<sup>33</sup> [\*Teamsters Canada Rail Conference – Maintenance of Way Employees Division v Canadian Pacific Kansas City Railway Company\*, 2026 CanLII 60171](#)

174. The railway model of arbitration works so efficiently because the parties have agreed to limit their arguments to the issues set out in the JSI. In AH891, the arbitrator refused to hear an issue which formed no part of the JSI:

39. CPKC clearly raised delay and estoppel in the JSI. But CPKC did not raise laches. The parties' supplemental submissions satisfied the arbitrator that a distinct legal issue which arises for the first time from a party's case law cannot be added to those already found in the JSI. This is consistent with SHP744 which held that the issue of mitigation does not open the door to adding further issues never contained in the JSI.

175. The same result occurred in AH825 when a party's brief contained an issue not found in the JSI:

25. The arbitrator agrees with CP that the TCRC took a new position in its Brief despite the parties' agreed upon JSI. A vague reference to an ET in a Step 1 grievance, and nothing else thereafter, does not justify filing a Brief which focussed mainly on the arbitral case law examining ETs.

176. The JSI provides the parties with the opportunity to set out the issues requiring resolution. A vague reference to other materials does not allow a party to incorporate new issues during the arbitration if they did not explicitly identify them in the JSI. This important requirement, which avoids surprises, allows railway arbitrators to hear one or more grievances in a single day, on the merits, and to issue awards shortly thereafter.

55. Par conséquent, l'arbitre ne tient pas compte des arguments de CN sur la Règle G.

### **M. Massé a-t-il travaillé chez CN avec les facultés affaiblies?**

56. CN a convaincu l'arbitre qu'un résultat de 10 ng/ml indiquait que M. Massé avait travaillé avec des facultés affaiblies. Comme mentionné dans AH866, de nombreuses sentences arbitrales dans l'industrie ferroviaire sont venues à la même conclusion.

57. L'arrêt *Amalgamated Transit Union, Local 113 v Toronto Transit Commission* (TTC) suggère que les cours civiles semblent être du même avis quant au seuil de 10ng/ml<sup>34</sup> :

[144] Because cannabis impairs cognitive and motor abilities and because oral fluid testing at the TTC cut-off levels identifies recent use of cannabis (i.e. within approximately 4 hours of being tested), I conclude that oral fluid testing

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<sup>34</sup> [2017 ONSC 2078](#). Il faut ajouter, toutefois, que la cour dans TTC a examiné une demande pour une injonction.

for cannabis at the TTC cut-off level will detect persons whose cognitive and motor abilities are likely impaired at the time of testing.

58. Comme mentionné dans AH866, une partie peut toujours contester la preuve scientifique à cet égard.

59. Pour appuyer son argument que M. Massé n'a pas travaillé avec des facultés affaiblies, malgré les résultats de son Test à 10ng/ml, Unifor a fait référence à une sentence récente : *CPKC c. TCRC – MWED*<sup>35</sup> (*Marshall*). Dans cette sentence, l'arbitre a déterminé que l'incident en question justifiait l'exigence d'un Test. Toutefois, l'arbitre a aussi déterminé qu'un résultat de 24ng/ml n'a pas démontré que l'employé travaillait avec des facultés affaiblies.

60. Par conséquent, l'arbitre est intervenu pour réintégrer M. Marshall dans son emploi :

[29] Moving then to the dismissal grievance, **I begin with the threshold issue of whether the Employer had grounds to require the Grievor to undergo post-incident testing. On the facts of this case, I find that it did.** The Grievor's TOP violation was a serious safety incident. Although no collision, injury or property damage occurred, the Grievor cancelled the very protection under which he and the contractor were occupying the main track. That error plainly created the risk of grave consequences and was sufficient to justify post-incident testing under section 4.3 of HR 203.1.

[30] **I also accept that the Employer was not required to observe classic signs of impairment before directing the Grievor to test.** The Grievor occupied a safety-sensitive position as Extra Gang Foreman. He was responsible not only for his own safety, but for the protection of others working under his authority. **In that context, a serious and inexplicable TOP violation was enough to warrant post-incident testing as part of the Employer's investigation into whether alcohol or drugs may have been a contributing factor.**

...

[34] I am not persuaded that it has done so. **Most notably, I find the Employer has not sufficiently established that the Grievor was actually impaired while at work on July 15, 2022.** The evidence shows a negative breath test, a negative urine point-of-collection test, and a negative laboratory urine test. The only confirmed positive result was the oral fluid test, at 24 ng/mL.

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<sup>35</sup> *CPKC c. TCRC – MWED (Dale Marshall)*, (sentence non-rapportée en date du 12 juin 2026).

**While I accept that this level of cannabis violates the Employer's policy, I find it does not on its own establish that the Grievor was impaired in the performance of his duties that day. The Grievor denied impairment throughout, and I accept that there were no contemporaneous observations of unfitness, and no reason to believe the Grievor was being untruthful when he explained he had consumed cannabis the evening prior to work.**

**[35] The distinction between violating a policy and attending work impaired matters. The Employer's case for dismissal rests heavily on the proposition that the oral fluid result established impairment and an irreparable breakdown in trust; however, I am unable to make that finding on this record. This is not a case where the Grievor was observed to be under the influence, unable to perform his work, or behaving in a way that demonstrated actual impairment. Nor is it a case involving an established substance use disorder, repeated policy breaches, or prior alcohol- or drug-related discipline.**

...

[40] In sum, I conclude that dismissal was excessive. The Grievor gave the Employer cause for discipline because he used cannabis in breach of a known policy before reporting for duty in a safety-sensitive position. However, the Employer did not establish actual workplace impairment or other circumstances sufficient to justify discharge.

(Caractères gras ajoutés)

61. L'arbitre n'est évidemment pas au courant de la façon dont les parties dans *Marshall* ont plaidé le cas. Dans chaque arbitrage, les conclusions d'un arbitre dépendent de la preuve déposée par les parties. C'est l'une des raisons pourquoi une sentence arbitrale venant d'un arbitre ne lie aucunement un autre arbitre.

62. L'arbitre ne peut appliquer le raisonnement dans *Marshall* à la situation de M. Massé.

63. Premièrement, comme mentionné dans AH866, la preuve scientifique indique qu'un individu avec un résultat positif pour la marijuana à un niveau de 10ng/ml dans le liquide buccal aura des facultés affaiblies. M. Marshall semble avoir eu quasiment 2.5 fois

ce niveau dans ses résultats. De plus, contrairement semble-t-il à la situation dans *Marshall*, les résultats du test d'urine étaient « non négatif » pour M. Massé<sup>36</sup>.

64. Deuxièmement, une partie peut toujours contester la science dans ce domaine. Mais l'arbitre ne peut donner de force probante au fait que l'employé témoigne qu'il n'avait pas des facultés affaiblies. C'était le témoignage de M. Marshall et de M. Massé. Une conclusion à propos des facultés affaiblies n'est pas déterminée par l'opinion subjective de l'employé en question.

65. Troisièmement, quoique l'observation du comportement de la personne est parfois pertinente dans ce domaine, l'arbitre doit appliquer l'analyse juridique examinée ci-dessus, étant donné que le cas de M. Massé trouve son origine dans son accident avec un camion de CN.

66. Pour ces motifs, l'arbitre doit conclure, selon les résultats du Test, que M. Massé a travaillé avec des facultés affaiblies.

#### **L'arbitre devrait-il modifier la sanction imposée par le CN?**

67. Comme mentionné, le congédiement est la sanction *prima facie* pour un employé qui travaille avec des facultés affaiblies. Dans la situation de M. Massé, l'arbitre n'est pas prêt à intervenir pour modifier la sanction imposée par le CN.

68. M. Massé a livré un court témoignage au début de l'audience. Il se présente bien comme individu.

69. Toutefois, son témoignage n'était pas constant avec ses commentaires lors de l'enquête le 6 avril 2025. Lors de l'enquête, M. Massé a indiqué qu'il prenait la marijuana pour une douleur au genou. À l'audience, il n'a pas mentionné ce fait, sauf pendant le contre-interrogatoire du CN.

70. De plus, lors de l'enquête, M. Massé, par le biais de son représentant, a refusé de répondre à la question 27 « Mr. Masse, when was the last time you consumed marijuana prior to the start of your shift at 18h30 on April 6, 2025? ». Le représentant de M. Massé s'est objecté de la façon suivante :

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<sup>36</sup> Documents d'Unifor, Onglet G. L'arbitre mention le test d'urine de M. Massé uniquement à cause des résultats négatifs mentionnés dans l'extrait tiré de *Marshall*.

Objection from Aleaxandre Gravel : That question is a personal matter and should not be answer by mr. Masse. (sic)

71. Pendant son témoignage à l'audience, toutefois, M. Massé a indiqué qu'il avait pris de la marijuana vers 8 h 30 avant de se coucher. L'accident a eu lieu à 18 h 30 le 6 avril.

72. Le moment où quelqu'un aurait pris de la marijuana est très important dans des arbitrages de ce genre. Un résultat de 10ng/ml suggère une consommation récente<sup>37</sup>. La différence dans cette preuve cruciale n'incite pas l'arbitre à intervenir pour modifier la sanction imposée par le CN.

73. Il est extrêmement dangereux de conduire un véhicule avec des facultés affaiblies. C'est pourquoi les arbitres ont depuis longtemps adopté la présomption selon laquelle le congédiement, au moins *prima facie*, représentait la sanction appropriée. Cette présomption reconnaît l'importance de la dissuasion (deterrence en anglais) dans ce domaine<sup>38</sup>.

74. Les faits dans ce dossier, les années de service limitées de M. Massé, ainsi que son témoignage lors de l'audience, n'ont pas persuadé l'arbitre de modifier la sanction imposée par le CN étant donné la gravité de la faute commise.

## DISPOSITION

75. Pour ces motifs, et malgré les représentations détaillées d'Unifor, l'arbitre doit rejeter le grief de M. Massé.

SIGNÉ à Ottawa ce 7<sup>ième</sup> jour de juillet 2026.



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Graham J. Clarke  
Arbitre

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<sup>37</sup> Voir les arrêts TTC et AH866.

<sup>38</sup> Voir aussi AH734 - [Teamsters Canada Rail Conference v Canadian National Railway Company, 2022 CanLII 5833](#).

**ARBITRATION UNDER THE CANADA LABOUR CODE, RSC 1985, C L-2**

**BETWEEN:**

**UNIFOR LOCAL 100**

**(Unifor)**

**- and -**

**THE CANADIAN NATIONAL RAILWAY COMPANY**

**(CN)**

**Grievance regarding the termination of Mr. Paul Massé**

**Arbitrator:** Graham J. Clarke

**Date:** July 7, 2026

**For Unifor:**

|            |                                                  |
|------------|--------------------------------------------------|
| M-A. Paré: | National Representative                          |
| S. Moreau: | Vice-President, Eastern Region, Unifor Local 100 |
| P. Massé:  | Grievor                                          |

**For CN:**

|             |                                            |
|-------------|--------------------------------------------|
| S. Sayah:   | Senior Compliance Specialist               |
| M. Martens: | Director, Labour Relations                 |
| L. Bouzid:  | Senior Compliance Specialist               |
| S. Vinet:   | Associate, Labour Relations and Compliance |

Arbitration hearing held in Montreal on June 30, 2026.

## TABLE OF CONTENTS

|                                                                                                       |    |
|-------------------------------------------------------------------------------------------------------|----|
| Introduction .....                                                                                    | 3  |
| Chronology .....                                                                                      | 3  |
| Did CN have reasonable grounds to require a screening test?.....                                      | 9  |
| Position of parties .....                                                                             | 9  |
| CN .....                                                                                              | 9  |
| Unifor.....                                                                                           | 11 |
| Case law .....                                                                                        | 13 |
| Decision .....                                                                                        | 17 |
| What is the appropriate penalty for an employee who tests positive for<br>cannabis at 10 ng/ml? ..... | 20 |
| Position of parties .....                                                                             | 20 |
| CN .....                                                                                              | 20 |
| Unifor.....                                                                                           | 21 |
| Case law .....                                                                                        | 22 |
| Decision .....                                                                                        | 24 |
| Unifor's objection .....                                                                              | 24 |
| Did Mr. Massé work at CN while impaired? .....                                                        | 26 |
| Should the arbitrator modify the penalty imposed by CN?.....                                          | 29 |
| Disposition .....                                                                                     | 30 |

# Arbitral Award

## INTRODUCTION

1. On April 6, 2025, the grievor, Mr. Massé, hit a concrete post, causing damage to a CN vehicle. CN subsequently ordered that he undergo alcohol and drug testing (the Test). The quantitative results from the oral fluid sample indicated that Mr. Massé tested positive for cannabis at 10 ng/ml.

2. On May 2, 2025, CN terminated Mr. Massé for the following reason:<sup>1</sup>

Violation of CN's Policy to Prevent Workplace Alcohol and Drug Problems and CN Code of Business Conduct in relation to the results of the post incident drug and alcohol testing conducted on April 6, 2025.

3. According to Unifor, CN did not have reasonable grounds for requiring a test. Subsidiarily, Unifor contends that the test result of 10 ng/ml does not prove that Mr. Massé was impaired while at work.

4. CN maintains that Mr. Massé was involved in a preventable incident while driving a company vehicle. He allegedly failed to follow the back-up procedures, which resulted in damage to company property. CN argues that dismissal was an appropriate disciplinary measure for an employee who was driving while impaired, despite the absence of any previous disciplinary measures on his record.

5. For the following reasons, the arbitrator must conclude that CN was justified in requiring a test. The arbitrator also decided not to intervene to modify the penalty imposed by CN, given the current state of case law in this area.

## CHRONOLOGY

6. The arbitrator has presented only the most significant facts in the case file prepared by the parties.

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<sup>1</sup> Unifor documents, Tab N (Form 780).

7. **March 4, 2019:** CN hires Mr. Massé. At the time relevant to this arbitration case, he worked as a carman.

8. **April 6, 2025:** An incident took place while Mr. Massé was driving a CN vehicle. In its submission, Unifor described the incident as follows:

6. During his shift on April 6, 2025, while Mr. Massé was backing up his company car, he struck a post, causing minor damage to the running board.

CN's submission describes the incident as follows:

18. The grievor was backing up the vehicle when he struck a concrete structure, causing damage to the vehicle's bumper. The grievor stated that he was distracted by ambient noise and questions asked by his co-worker, who was a passenger in the vehicle.

19. The grievor and his co-worker failed to follow CN's policy for the vehicle back-up procedure, which constitutes a violation on the grounds of safety concerns. The supervisors gathered the information following the accident, which justified the post-incident screening test for drugs and alcohol.

Prior to the events of April 6, 2025, did Mr. Massé have a disciplinary history?<sup>2</sup>

9. **April 6, 2025:** A CN representative, Mr. Stabile, prepares an "incident summary" and sends it by email. He obtains comments from Mr. Massé and his co-worker. Mr. Stabile describes the incident as follows:<sup>3</sup>

At 18:53 Supervisor Maxime Boucher and myself were in the office we had just got in the office after having briefed the carmen on shift. Carmen Paul Masse and Mykhaylo Myloserdnyy returned from their pullby of train 368. Carmen Masse immediately went to see supervisor Maxime Boucher to advise him that he had had an incident with the truck. He had advised that he was getting into position to conduct his pullby and had to turn around and when doing so back into the cement structure. Supervisor Maxime Boucher and I immediately went to the location of the incident at Josi to create a reenactment. We took pictures of the truck and the position he had when he was backing up. There is a visible mark where the bumper contacted the cement structure in the 3rd photo. Both carmen advised that they did not follow procedure and did not get out of the vehicle to assist each other in backing up. We brought the vehicle back to the

<sup>2</sup> CN documents, Tab 3.

<sup>3</sup> Unifor documents, Tab F.

shop and asked carmen Paul Masse and Mykhaylo Myloserdnyy to give a summary of what happened. (sic).

**10. April 6, 2025:** CN requires that Mr. Massé submit to a Test under its Policy to Prevent Workplace Drug and Alcohol Problems<sup>4</sup> (the “Policy”). A urine sample tests “non-negative” during a screen performed at the collection site.<sup>5</sup>

**11. April 10, 2025:** The parties do not dispute DriverCheck’s conclusion that Mr. Massé’s oral fluid sample tested positive<sup>6</sup> for cannabis at the threshold set by the Company (10 ng/mL):

Positive for Marijuana - THC Parent. Quantitative level - 10 ng/mL

**12. April 15, 2025:** CN conducts a first investigation of the accident.<sup>7</sup> Mr. Massé asks to testify in English. The relevant questions and answers are reproduced below:

8. Q. Do you wish to dispute or refute any of the information submitted as evidence?

A. Maybe add and not dispute, When I was doing my 3-point turn, when I was about to back up, I looked at Mykaelo to see if he would get out and he was just staring straight so I just said screw it and backed up. I don’t have any confidence in him. When I work with him I consider working by myself. He speaks very little French and no English. Many people have complained about him in the past. He is a nice guy but working with him is undesirable. It’s still my fault though, as I was driving. I absolutely regret not following the procedure and should have asked him to exit the vehicle.

Also in the evidence 2, the truck that Francesco stated had an accident is the 271292 but in fact it is 274304.

...

10. Q. Explain in your own words the circumstances surrounding the vehicle accident on April 6, 2025.

A. So, as I was doing my 3-point turn, the engine was right there, so I was hyper-focused on not hitting the engine. Not that this is not an excuse, but not having

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<sup>4</sup> CN documents, Tab 4.

<sup>5</sup> Unifor documents, Tab G.

<sup>6</sup> CN documents du CN, Tab 5 (results received from DriverCheck Inc.)

<sup>7</sup> Unifor documents, Tab L.

Mikaelo getting out of the vehicle, my focus was still on the engine as it was right there. I knew that the pillar was there but I thought that I had more distance. I did not even have my foot on the accelerator. When we hit the pillar, it was so light that we felt it, but I pulled forward about a foot or 2 and did not think anything of it because I hit it so lightly. We remained in the truck until train 368 said they were ready to go and it was only when we exited for the roll by that we saw the damage. And then after the pullby I reported the incident to Maxime Boucher. Sorry that I did not respect the procedure and in hindsight I realize I should have done so. The back step is made of aluminum so it bent like paper. I did not hit it hard.

...

13.Q. Mr. Masse, why did you decide to back up the truck at the location where the accident happened?

A. I felt it was convenient at the time. In hindsight, bad judgement.

14.Q. Mr. Masse, before backing up, did you ask your colleague to get out of the vehicle to assist and do the back-up procedure?

A. I did not.

15.Q. Mr. Masse, in your own words, what is the direct cause of the accident?

A. I was focusing on the engine and thought there was more space between the truck and the pillar and the way I was positioned as I was backing up, the view of the pillar was obstructed by the hose reels on the side of the truck.

16.Q. What else could have you done differently?

A. Only after the roll by I should have turned the vehicle and it would have been the best course of action as the engine would not have been there.

(sic)

13. **April 15, 2025:** CN conducts its investigation of the Test results:<sup>8</sup>

6. Q. You are now provided with the following information which is entered as evidence that may have a bearing on your responsibility in connection with the matter under investigation:

EV-1: Notice to appear

EV-2 : CN code of business conduct for drugs and alcohol

EV-3 : Non-DOT Drug Test results

EV-4 : DriverCheck form

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<sup>8</sup> CN documents, Tab 10.

Note. Pause from Alexandre and Paul at 6:24

Came back at 6:40

Note: The Union wishes to table the appendix to the memorandum of understanding for Collective Agreement No. 12 concerning drugs and alcohol. And/or CN's drug and alcohol policy. (Evidence added by Alexandre Gravel and to be noted as evidence 5)

...

10.Q. Please explain in your own words the circumstances surrounding the events on April 6th, 2025.

A. My knee hurts, I used it for the pain in my knee.

...

13.Q. Mr. Masse, as entered into evidence 3, the result of the saliva test performed indicated a positive result for 10 ng/ml, is that correct?

A. Yes.

14. Q. Mr. Masse, did you dispute the results of the swab and urine tests when notified by telephone?

A. I did not.

...

16. Q. Mr. Masse, please state your understanding of CN's Policy to Prevent Workplace Alcohol and Drug Problems.

A. I am aware that I am not allowed to be impaired at work, which I was not.

...

21. Q. Were you in a violation of a policy on April 6, 2025?

A. From my understanding, no.

22.Q. What are the details of this violation ?

A. I used it for the pain in my knee.

23. Q. Following a reasonable doubt, did you do a screening in accordance with the policy to prevent problems caused by drug and alcohol in the workplace?

A. The question for me is not clear, but from what I understand, yes I did a test at work by DriverCheck.

Note. Objection from Alexandre Gravel: It is not following a reasonable doubt, the test was done because of the truck accident. If you look further on the sheet (evidence 4, CN supervisor form) that was filled out by Mr. Boucher, we can see that everything was normal with Mr. Masse.

...

27. Q. Mr. Masse, when was the last time you consumed marijuana prior to the start of your shift at 18:30 on April 6, 2025?

A. No details.

Note. Objection from Alexandre Gravel: That question is a personal matter and should not be answer by mr. Masse.

...

31. Q. Do you have anything further to add to this employee statement?

A. I hope a decision will not be based on just a number. I can assure you I was not impaired. There are multiple factors involved in impairment that will not be determined solely by a number. I value this job. I have a family that I need to support and I will not let marijuana be an obstacle to providing for my family. I truly value my job and I will do anything necessary to maintain it. I have not smoked since the incident, which is evidence that I do not have a problem.

(sic)

**14. May 2, 2025:** Using Form 780, CN assessed Mr. Massé 15 demerit points for the accident he was involved in with the company vehicle:<sup>9</sup>

For your responsibility in the incident involving CN vehicle 274304 on April 6, 2025, which resulted in damage to said vehicle and violation of the CN vehicle Back-Up Policy.

Unifor does not dispute the 15 demerit points.<sup>10</sup>

**15. May 2, 2025:** Via a second Form 780, CN dismisses Mr. Massé for the following grounds:<sup>11</sup>

---

<sup>9</sup> CN documents, Tab 6 (Form 780 was given by CN during the hearing and by email from Unifor on June 30, 2026).

<sup>10</sup> CN brief, paragraph 20.

<sup>11</sup> Unifor documents, Tab N.

Violation of CN's Policy to Prevent Workplace Alcohol and Drug Problems and CN Code of Business Conduct in relation to the results of the post-incident drug and alcohol testing conducted on April 6, 2025.

16. **May 10, 2025:** Unifor files its grievance<sup>12</sup> contesting Mr. Massé's termination.
17. **June 6, 2025:** CN files its response<sup>13</sup> to the grievance.
18. **January 12, 2026:** The parties ask the arbitrator to settle their dispute.

## **DID CN HAVE REASONABLE GROUNDS TO REQUIRE A SCREENING TEST?**

19. Unifor claims that CN was not justified in requiring a Test and that, consequently, the arbitrator should not take the results of the Test into consideration.

### **Position of parties**

#### **CN**

20. CN argues that it followed the necessary steps following the accident before demanding a Test:

46. As we will see, the Union's claim that the Company did not have reasonable grounds for requiring the Test is unfounded. Supervisors gathered information following the incident, which justified the administration of a post-incident drug and alcohol test. The grievor readily admitted to using marijuana.

...

52. It is important to fully grasp all the circumstances of the incident before passing judgement. The evidence shows that the manoeuvre in question was neither complex nor particularly difficult to perform.

53. In the case at hand, the employee was backing up in order to complete a three-point turn. In accordance with CN policy, when an employee backs up a vehicle in the presence of a passenger, the passenger must exit the vehicle, ensure that the coast is clear, and guide the employee safely. More specifically, the policy stipulates:

"If you are carrying passengers, ask at least one person to exit the vehicle and to guide you. The employee who serves as a guide must have a clear

---

<sup>12</sup> CN documents, Tab 7.

<sup>13</sup> CN documents, Tab 8.

view of the vehicle's path and must remain in the driver's field of vision or maintain constant communication with him or her by radio or other means."

...

55. The incident also took place in broad daylight, at around 6.30 p.m. in April, when there was still sufficient light. Furthermore, the employee had only been on duty for approximately 30 minutes and, as such, should have been fully alert and able to perform his duties safely.

56. The structure that was struck is a large pillar supporting a bridge, that is in plain view and not hidden. As such, it is not an obstacle that would have been hard to see.

57. As can be seen in the photograph below, the pillar in question is massive, clearly defined and stands out from its immediate surroundings. Its size, position and the absence of any visual obstructions make its presence obvious. There are no mitigating factors that could explain or justify the employee's failure to identify this obstacle during the manoeuvre.

58. The Company contends that, following the incident of April 6, 2025, it had reasonable grounds to believe that the accident may have been caused by impaired judgement due to alcohol or drugs.

59. Contrary to the Union's claim, these grounds are not based solely on the occurrence of the incident. Supervisors gathered immediate information revealing several causes for concern, including the grievor's admission of distraction and failure to follow back-up procedures.

60. In addition, the force of the impact, which is incompatible with the description of a slow manoeuvre, suggests a lack of perception and control.

61. The damage caused by this incident can be observed on the photo below.

62. Taken together, these facts constituted objective and serious grounds for reasonably suspecting that his faculties were impaired.

21. CN also explained the difference between post-incident testing and reasonable cause testing:

79. First, it is important to establish a fundamental distinction between the two types of testing provided for in the Company's policy: reasonable cause testing and post-incident testing. The Union conflates these two distinct mechanisms, invalidating its entire argument regarding the reasonable doubt form.

...

81. Post-incident testing, on the other hand, is triggered by the occurrence of an incident or accident that meets the criteria set out in the Policy. This type of testing does not require the observation of signs of intoxication. The trigger is the incident itself, not the employee's behaviour. The aim is to determine whether alcohol or drug use may have contributed to the incident.

82. In this case, the test administered to the grievor was a post-incident test, as is clearly apparent from the statement of the grounds for dismissal: "Violation of CN's Policy to Prevent Workplace Alcohol and Drug Problems and CN Code of Business Conduct in relation to the results of the post-incident drug and alcohol testing conducted on April 6, 2025."

83. The Union's argument that the reasonable doubt form did not contain any clear observations of signs of intoxication is therefore irrelevant. In the context of a post-incident test, the Company was not required to document observable signs of intoxication, as that was not the basis for the test. The only applicable criterion was the occurrence of an incident that caused damage — a criterion which was unquestionably met in this case.

...

90. Contrary to the Union's claim, these factors, when taken together, constitute objective indicators of a potential lack of judgement and perception, which are recognized by arbitral case law as justification for conducting post-incident testing.

## **Unifor**

22. Unifor explains why CN did not have reasonable grounds to require a Test (references omitted):

[19] However, first and foremost, in this case, another issue of paramount importance must also be raised: **Was the Employer justified in requiring Mr. Massé to undergo drug and alcohol testing on April 6, 2025?** In the Grievance, the Union contests the requirement to submit to the Test and alleges that the Employer did not have the necessary reasonable grounds to require it.

[20] Drug and alcohol testing in the workplace is strictly regulated by legislation and the case law arising from such legislation. Such testing infringes, particularly but not exclusively, the right to privacy as well as bodily integrity. In

its flagship Irving decision, the Supreme Court reiterates that: *“the use of a person’s body without his consent to obtain information about him, invades an area of personal privacy essential to the maintenance of his human dignity”* and that *“seizure of bodily samples is highly intrusive and, as this Court has often reaffirmed, it is subject to stringent standards and safeguards to meet constitutional requirements.”*

...

[27] Furthermore, although an accident did indeed take place on April 6, 2025, an employer cannot systematically order a drug test every time an accident occurs; the occurrence of an incident is not, in itself, sufficient justification.

...

[31] The Union argues that the Employer did not have sufficient grounds to require the Test on April 6, 2025.

- a) It was not a serious accident, but a minor one, with no injuries and no major damage, and there were no reasonable grounds to believe that alcohol or drugs were a factor.
- b) The Employer had no reasonable grounds to believe that Mr. Massé’s faculties were impaired at that time by the consumption of alcohol or drugs.
- c) The accident was fully explained by the evidence gathered from the account given by the workers on April 6, 2025, before a Test was ordered.

[32] The Policy to Prevent Workplace Alcohol and Drug Problems, one of two policies cited by the Employer to justify Mr. Massé’s termination, contains provisions that appear to be consistent with our arguments. In section 3, entitled “REASONABLE CAUSE AND POST-ACCIDENT TESTING,” it is specified that: *“[...] testing for the presence of drugs [...] or alcohol [...] is conducted where reasonable cause exists to suspect alcohol or drug use or possession in violation of this policy, including after an accident or incident [...]”* and *“Post-accident testing is done after any significant accident or incident.”* The Union strongly contends that the accident was by no means serious; it was merely a minor collision.

[33] In addition to the visual observations, it should be noted that Mr. Massé made the following statements during the investigation, which support the view that this was a minor incident: [TAB L]

- a) He did not press on the accelerator while backing up.
- b) The contact with the cement pillar appeared to him to be very light.

c) The running board at the rear of the vehicle is made of aluminium and, according to Mr. Massé, “it bend like paper” and “I did not hit it hard.”

...

[36] We would add that the minor accident which occurred on April 6, 2025 is not, in itself, sufficient to give the Employer reasonable cause to order a drug test, particularly since, in this case, from the very first discussions with the supervisors on site, Mr. Massé provided credible and relevant explanations for the accident on the evening it occurred; [TAB F]

- a) Admission of failure to follow the back-up procedure for vehicles;
- b) The proximity with the locomotive, which monopolized Mr. Massé’s concentration;
- c) The sounds of the bell at the crossing;
- d) His co-worker Mykhaylo, who was asking him a question.

(Bold and italics added by Unifor in original text)

## Case law

23. A simple accident does not give an employer the automatic right to demand a Test.<sup>14</sup> In AH732,<sup>15</sup> the arbitrator found that an employer failed to follow the necessary procedures before ordering a Test:

41. In the instant case, the IBEW contested the grounds for testing. CP did not provide the evidence on which it based its conclusion to test. CP’s Brief contains memoranda from managers (CP Brief, Tab 5), but the testing seemed already to be a foregone conclusion. Those memoranda refer to “incident drill down” and “an incident form”, but those documents, if they exist, are not in the Record before the arbitrator.

42. In the absence of such evidence, and given that the incident, albeit involving a switch and a hi-rail derail, appears to fall at the far end of the severity spectrum, CP did not demonstrate it met its DAPP criteria to test....

24. What is the appropriate legal analysis in this area, which involves issues of both workplace health and safety and employees’ right to privacy?

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<sup>14</sup> See, for example, [CROA 4840](#).

<sup>15</sup> [Canadian Signals and Communications System Council No. 11 of the IBEW v Canadian Pacific Railway Company, 2021 CanLII 69959](#)

25. In AH879,<sup>16</sup> the arbitrator examined this important issue in detail (references omitted):

18. For many years, decision makers have applied the balancing of interests proportionality approach to which the SCC made reference in Irving. The Alberta Court of Queen's Bench adopted Arbitrator Sims' helpful analysis when explaining the difference between reasonable cause testing and post workplace accident or serious incident testing:

[29] Arbitrator Sims was careful to ensure that reasonable cause testing (with its focus on the employee) and post-incident testing (with its focus on determining the cause of the accident) not be conflated. While acknowledging they may overlap, he specifically rejected the proposition that post-incident an employer would need to "point to evidence that positively suggested impairment to a sufficient degree to override the employee's privacy interests". He said:

In my view, adopting the same test is not justified either in principle or based on the case law. The tests are different because the circumstances and the interests involved are different. Both tests, however, must still involve a balancing of interests, both within the policy itself and at the point of application. (para 159).

(emphasis in original)

[30] A little further in his analysis, Arbitrator Sims sets out the three-part test relied upon by the Arbitration Board in this case. Arbitrator Sims finds that there are three elements to post-incident testing:

- The threshold level of the incident needed to justify testing.
- The degree of inquiry necessary before the decision is made.
- The necessary link between the incident and the employee's situation to justify testing (para 162).

[31] With respect to the threshold level, it is clear from the jurisprudence that there must be something more than an accident or incident. It should be significant. As Arbitrator Sims notes at para 176:

In my view the amount of the damage or the magnitude of the incident must remain a factor to be weighed in determining whether there is sufficient cause to justify overriding the employee's privacy rights through mandatory testing. This can include the near miss concept which, almost by definition, involves no damage, but there still has to be a sufficient gravity to the event.

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<sup>16</sup> [\*International Brotherhood of Electrical Workers. System Council No. 11 v Canadian Pacific Kansas City Railway\*, 2024 CanLII 60992](#)

Any near miss must involve a realistic conclusion after a thorough investigation that serious damage almost occurred.

(Emphasis added)

19. In the 2024 award in ATCO, Arbitrator Casey reviewed the law, including the issue of awarding damages in drug testing cases. That case reiterated the elements of the three-part test followed for post incident testing and confirmed that the mere happening of an incident did not justify testing:

[128] Arbitrator Smith followed the arbitral jurisprudence which determined that employers must establish 3 conditions to compel post-incident testing:

1. There must be a precipitating event of sufficient gravity to justify the intrusive invasion of the employee's right to privacy;
2. There must be a reasonable investigation and;
3. A drug and alcohol test would assist in the investigation into the cause of the incident.

[129] Arbitrator Smith stated that arbitrators must exercise care and scrutinize critically the actions of management so that the threshold for ordering post-incident testing is not so diluted that the mere happening of an incident permits testing.

26. Also in AH879, the arbitrator concluded that the employer did not have the right to require a Test<sup>17</sup> (references omitted):

34. If one applied the arbitral case law's 3-part test as summarized above, CPKC similarly did not demonstrate that the run through switch by a hi-rail truck justified overriding Mr. MacLeod's privacy rights.

35. First, was there "a precipitating event of sufficient gravity"? The evidence confirmed that the hi-rail truck went through the switch. But that is not sufficient, by itself, to proceed with drug tests. As in AH732, *supra*, the evidence showed the run through by the hi-rail truck was very minor. CPKC provided no evidence of damage.

36. Second, was there a reasonable investigation? CPKC satisfied the arbitrator that it had looked into the matter sufficiently to understand the facts of the situation. Mr. MacLeod had explained that he had relied on his foreman's instructions before he backed over the switch.

37. Third, would a drug and alcohol test assist in the investigation into the cause of the incident? CPKC did not convince the arbitrator of the need for drug

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<sup>17</sup> See also AH732 - [\*Canadian Signals and Communications System Council No. 11 of the IBEW v Canadian Pacific Railway Company\*, 2021 CanLII 69959.](#)

testing to investigate the cause of the accident. The evidence both before and after the request to test showed that Mr. MacLeod had provided the relevant facts of the incident. He had relied on the erroneous comments of his foreman before running over the switch. The foreman confirmed these facts too.

38. CPKC did not suggest that the employees attempted to hinder the time-sensitive analysis for drug testing. Instead, the Record demonstrated that Mr. MacLeod and his foreman remained candid and helpful throughout the entire process.

39. In short, CPKC did not have grounds to test Mr. MacLeod. Therefore, it did not have just cause to discipline Mr. MacLeod for refusing to take a drug test. While the IBEW acknowledged the risk Mr. MacLeod took in refusing to take the test given the adverse inferences that could arise, Mr. MacLeod's refusal provided no grounds for termination.

27. However, the arbitrator confirmed that the employer is justified in requiring a test in the context of other situations. In AH877,<sup>18</sup> the arbitrator conducted the following analysis before concluding that the testing requirement was justified (references omitted):

39. First, was there “a precipitating event of sufficient gravity”? The arbitrator explained above why Mr. McGuinness' situation differed from the one examined in Jones. The arbitrator concludes the MVA<sup>19</sup> met the “sufficient gravity” criterion for multiple reasons:

- a) the MVA occurred on the public Highway 43;
- b) Mr. McGuinness had been travelling at 70 Kmh;
- c) CPKC's F250 hi-rail truck collided with the back of a member of the public's car;
- d) the collision caused that car to spin around; and
- e) the collision caused damage both to CPKC's F250 and the other car.

40. Second, was there a reasonable investigation? The arbitrator respectfully disagrees with the IBEW's argument that CPKC tested first and then got the facts later. The above chronology indicated that CPKC had received sufficient information from Mr. McGuinness about the MVA. While the May 25, 2022 documentation from Mr. McGuinness and others may have been written after the drug testing, that does not mean that CPKC had no knowledge of the facts beforehand.

41. The Record satisfied the arbitrator that CPKC had enough information in this case to meet the “reasonable investigation” criterion.

<sup>18</sup> [\*International Brotherhood of Electrical Workers, System Council No. 11 v Canadian Pacific Kansas City Railway\*, 2024 CanLII 62438](#)

<sup>19</sup> MVA stands for Motor Vehicle Accident.

42. Due to the pleading time limits to which the parties have agreed, the IBEW asked the arbitrator to review the investigation and the grievance correspondence. As noted in AH879, this can present some challenges for an arbitrator compared to regular arbitration where all witnesses testify viva voce.

43. The arbitrator noted in reviewing the investigation interview that the representative assisting Mr. McGuinness, however innocently, both argued the case and purported to give evidence. The arbitrator has difficulty giving those interventions much weight.

44. The Investigating Officer must be impartial. Myriad cases have contested whether an investigation was fair and impartial. Arguing the merits of the case would be more appropriate with CPKC representatives around the time of the incident, during the grievance process or at arbitration. This does not mean that representatives cannot raise objections during an employee's questioning or pose questions to the employee or other witnesses.

45. The investigation is a joint fact-finding exercise which allows the parties to avoid long arbitrations with extensive oral evidence. If a representative has non-hearsay evidence to provide, or seeks to clarify certain facts for the Record, there are ways to do that in the parties' expedited regime. This ensures both parties have an opportunity to ask questions about the evidence.

46. Third, would a drug and alcohol test assist in the investigation into the cause of the incident? In some situations, where the reason for an accident is obvious, testing would not assist. In this case, however, the opposite is true. CPKC in its Engineering Safety Rule Book emphasizes safe practices for employees who use its vehicles. Despite its efforts, CPKC was faced with the scenario of one of its vehicles hitting a member of the public's vehicle on Highway 43 with sufficient force to spin it around and cause damage.

47. This situation justified conducting a drug and alcohol test since the facts, unlike in AH879, did not rule out impairment as a cause for the MVA.

48. In summary, CPKC had grounds to test Mr. McGuinness.

28. More recently, the arbitrator found that the events surrounding an accident could justify an employer requiring a Test.<sup>20</sup>

## Decision

29. CN convinced the arbitrator that it was justified in requiring Mr. Massé to undergo a Test. However, reaching this conclusion was not easy. CN did not produce detailed evidence of the damage caused to the running board (bumper). The only prove the arbitrator has is photographs. More detailed evidence would have assisted him in his legal analysis of the incident.

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<sup>20</sup> AH906 - [International Brotherhood of Electrical Workers, System Council No. 11 v Toronto Terminals Railway Company, 2026 CanLII 10266](#)

30. That said, here are the reasons why the arbitrator concluded that CN was justified in requiring a Test.

31. First of all, even though the accident was not catastrophic, the damage to the CN vehicle appears to be more than minor. The photograph of the damage<sup>21</sup> shows that the vehicle's running board (bumper) was badly damaged. Although Mr. Massé tried to downplay the quality of the construction of the step by saying<sup>22</sup> "The back step is made of aluminium so it bend like paper, I didn't hit it hard", he nevertheless admitted during cross-examination that he could put his full weight on it, presumably when he had to climb into the vehicle.

32. Moreover, Mr. Stabile specified in his report<sup>23</sup> that: "There is a visible mark where the bumper contacted the cement structure in the 3rd photo." The evidence therefore suggests that the vehicle struck the cement pillar with a certain amount of force.

33. Nor can the arbitrator ignore the fact that another CN employee was in the vehicle with Mr. Massé. Despite this, Mr. Massé did not ask him to get out to help him back up the vehicle. During the investigation, Mr. Massé also confirmed that "the view of the pillar was obstruct by the hose reels on the side of the truck." (sic). Consequently, Mr. Massé failed to follow the established back-up procedures.<sup>24</sup>

34. The aim of these guidelines for backing up vehicles is to ensure safety:<sup>25</sup>

These guidelines apply when a driver needs to back up a vehicle. To reduce the risk of serious injury and death, it is important not to back up a vehicle without being able to see what is behind it. Drivers must follow these guidelines, particularly when driving vehicles with limited or obstructed rear visibility (for example, truck cranes, hi-rail trucks, workshop trucks, etc.).

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<sup>21</sup> CN brief, page 14

<sup>22</sup> Unifor documents, Tab L.

<sup>23</sup> Unifor documents, Tab F.

<sup>24</sup> Unifor documents, Tab E, "Guidelines relating to back-up manoeuvres."

<sup>25</sup> CN documents, Tab 11.

35. Mr. Massé's accident is not as serious as the incident described in AH877, but, taking all the circumstances into account, it is nevertheless serious enough to meet the criteria for the first stage of the analysis.

36. Secondly, the Test requirement was only imposed following an investigation by CN officials. The decision was not taken immediately after the accident, as was the case with AH732.

37. The parties described the procedures followed by the supervisors before requiring a Test. For example, in its brief, Unifor described the procedures followed by the employer's representatives:

[7] Mr. Massé and his colleague Mykhaylo Myloserdnyy, who was a passenger in the vehicle at the time, promptly report the incident to their supervisor and admit straight away that they failed to follow the Company's established back-up procedure.

[8] The Employer's representatives, Mr. Francesco Stabile and Mr. Maxime Boucher, conduct an investigation into the incident, question Mr. Massé and Mr. Myloserdnyy and take photos at the site of the accident.

[9] Despite the absence of any symptoms or grounds for believing that Mr. Massé's faculties were in any way impaired, Mr. Boucher demands that he undergo a drug and alcohol test.

38. For its part, CN described the investigation conducted by its supervisors in its brief:

58. The Company states that, following the incident on April 6, 2025, it had reasonable grounds to believe that the accident may have been caused by impaired judgement due to alcohol or drugs.

59. Contrary to the Union's claim, these grounds are not based solely on the occurrence of the incident. The supervisors gathered immediate information revealing several causes for concern, including the grievor's admission of distraction and failure to follow back-up procedures.

60. Moreover, the severity of the impact, which is inconsistent with the description of a slow manoeuvre, suggests a lack of awareness and control.

61. The damages caused by this incident can be observed on the photo below.

39. During the hearing, the two parties also referred to the documentation completed by the CN representatives.<sup>26</sup>

40. The arbitrator is of the view that a reasonable investigation took place before the decision to require the Test was made.

41. Thirdly, CN convinced the arbitrator that a test was necessary in order to determine the cause of the accident. Mr. Massé caused damage to a CN vehicle. From the photographs, it seems clear that CN would have to replace the running board (bumper). Furthermore, despite the fact that another employee was in the truck with Mr. Massé, the grievor failed to follow the established back-up procedures. These actions explain why CN met the third criterion of the legal analysis.

42. As stated by the arbitrator in AH732, a minor accident, in the absence of other circumstances, does not automatically give an employer sufficient cause to require a Test. However, in Mr. Massé's case, the evidence shows that the incident was not minor. Moreover, the fact that Mr. Massé did not follow the back-up procedure makes the incident even more serious.

43. Based on these facts, the arbitrator must reject Unifor's argument regarding CN's justification in requiring a test.

## **WHAT IS THE APPROPRIATE PENALTY FOR AN EMPLOYEE WHO TESTS POSITIVE FOR CANNABIS AT 10 NG/ML?**

### **Position of parties**

#### **CN**

44. CN contends that the positive result of 10 ng/ml proves that Mr. Massé was impaired while working:

69. Expert evidence shows that marijuana use leads to an impairment of cognitive and psychomotor functions that can last for several hours, generally between 4 and 8 hours, depending on various individual factors.

70. While there is still some uncertainty in the scientific literature regarding the exact correlation between concentrations of THC and the level of intoxication, arbitral and legal jurisprudence recognize the probative value of oral fluid testing

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<sup>26</sup> CN documents, Tab 5; Unifor documents, Tab F, Memo from F. Stabile with photos of the damage.

in identifying recent consumption during a period corresponding to that of impairment.

...

74. Thus, a THC level of 10 ng/mL in oral fluid is not only a recognized indicator of recent consumption, but also a threshold that has been validated in case law as enabling the identification of individuals who are in a period during which impaired faculties are reasonably likely to be present.

75. The Union maintains that the presence of THC in saliva does not constitute evidence of intoxication and that a result of 10 ng/mL would be “very low.” However, the Union does not dispute either the validity of the test or the protocol used. Furthermore, the grievor himself has never challenged the positive result obtained.

### **Unifor**

45. For Unifor, Mr. Massé did not report to work while impaired. Alternatively, Unifor asks that the arbitrator modify the penalty and reinstate Mr. Massé:

[49] In this case, and without repeating the arguments already set out in the first part of this brief, the Union reiterates that there is a complete absence of objective or observable factors that would indicate even the slightest sign of impairment on the part of Mr. Massé at the time of the incident on April 6, 2025. This definitely constitutes significant counter-evidence to the Employer’s claim.

[50] Mr. Massé’s credible and honest testimony regarding his consumption habits at the time – he only used marijuana at the end of his night shift, before going to sleep, many hours before the start of his next shift – supports the claim that he was not under the influence of drugs when he reported for work, particularly at the time of the incident on April 6, 2025.

[51] In summary, the Union therefore maintains that the Employer failed to meet its burden of proof and failed to demonstrate beyond a reasonable doubt that Mr. Massé reported for work while impaired.

[52] For these reasons, the Union’s answer to the first question is “no”: if Mr. Massé’s faculties were not impaired by marijuana, he cannot be found guilty of the offence alleged by the Employer, namely of having violated the policies regarding the use of drugs and alcohol.

[53] The Union submits that, for this reason, the arbitrator should uphold the Grievance.

Alternatively, Unifor asks that the arbitrator modify the penalty imposed by CN:

[55] The Union will not dwell at length on this issue. Should the arbitrator find Mr. Massé guilty of breaching the Employer's policies, the case law on drugs and alcohol is clear in that the Employer is justified in imposing disciplinary action on an employee. Therefore, Unifor's response to this second question is "yes".

...

[57] First of all, it is important to note that Mr. Massé does not hold a safety-sensitive position. This is demonstrated in particular by Attachment "Q" of the 2024 MOA [TAB B], in which the parties clarified, following the SHP530 dispute, which duties performed by employees covered by Collective Agreement #12 constitute a safety-sensitive position. Mr. Massé does not fall into any of these categories. The Employer has never claimed otherwise in this case.

[58] Mr. Massé had a clean disciplinary record prior to the incident of April 6, 2025.

[59] Mr. Massé has consistently cooperated with the Employer's investigation with candour and honesty. This is evident from the fact that he did not hesitate to admit his mistake in failing to follow the vehicle back-up procedure on April 6, 2025. He submitted to the drug and alcohol testing required by the Employer, despite the apparent lack of grounds justifying such testing. He admitted to having consumed marijuana outside working hours and cooperated fully and honestly during the investigation interviews.

[60] During the investigation interview of April 15, 2025, Mr. Massé informed the Employer that he had stopped using marijuana following the incident of April 6, 2025, mentioning in particular that he was prepared to do whatever was necessary to keep his job.

## Case law

46. Recently, in AH866,<sup>27</sup> the arbitrator notably examined the policy of the Canadian Pacific Kansas City Railway (CPKC) and the lowering of the threshold for marijuana from 10 ng/ml to 4 and 2 ng/ml. Nearly all the unions present at CPKC, including Unifor, were involved in AH866

47. These unions asked the arbitrator to uphold the testing threshold of 10 ng/ml, since this result following an oral fluid test demonstrates that an employee worked while impaired,<sup>28</sup> whereas the new threshold of 4 and 2 ng/ml in CPKC's policy would not have been able to demonstrate impairment.

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<sup>27</sup> [\*Teamsters Canada Rail Conference – Maintenance of Way Employees Division v Canadian Pacific Kansas City Railway Company\*, 2026 CanLII 60171.](#)

48. In AH866, the arbitrator also noted that there is a presumption that termination constitutes the prima facie penalty in the case of an employee who works while impaired. One of the factors recognized by arbitrators as underpinning this presumption is the importance of deterrence.<sup>29</sup>

49. However, this presumption only applied if the employee's level was 10 ng/ml or higher (references omitted):

43. Railway arbitrators have consistently accepted that an employee's positive oral fluid (OF) test indicated impairment. Those findings led to a presumption that termination constituted the appropriate response.

44. However, those arbitral comments reflected the reality when railways used a 10ng/ml cutoff. An OF test does not show impairment the way an alcohol breathalyzer test does. But the 10ng/ml cutoff did allow for a reasonable inference of impairment, subject to a party's right to produce evidence to the contrary. However, when the DAPP significantly lowered the cutoff threshold, that unofficial "inference" evidently disappeared.

...

229. CPKC pursues the legitimate objective of maintaining a safe workplace for its employees and the public. An employee working when impaired creates intolerable hazards, especially for co-workers. This scenario explains why arbitrators generally apply a presumption that termination constitutes the appropriate penalty for working while impaired.

...

264. As the Unions acknowledged, CPKC has legitimate concerns about any employee working while impaired. The arbitral presumption that dismissal constitutes the appropriate penalty for impaired employees illustrates the seriousness of this issue and the need for deterrence.

265. A level slightly lower than 10ng/ml may exist which would broaden the window of detection to help identify impaired employees. But the evidence did not show that 4/2ng/ml represented that appropriate cutoff level.

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<sup>28</sup> AH866, paragraphs 259-260 and 264-267.

<sup>29</sup> See, for example, AH689 - [Canadian National Railway Company \(CN\) v International Brotherhood of Electrical Workers System Council No. 11](#), 2019 CanLII 123925.

266. In the past, the parties implicitly accepted the previous OF 10ng/ml threshold as indicative of impairment. This does not mean an OF test constituted an impairment test like a breathalyzer. But the parties accepted over time that, subject to the right to present contradictory evidence, the window of detection from a 10ng/ml test generally corresponded with an accepted window of impairment.

267. In short, the 10ng/ml threshold allowed the parties to determine impairment with some certainty. This allowed discipline cases to proceed under the expedited railway model without the lengthy and expensive expert evidence heard in the instant case.

...

274. The evidence in this case, and these real-world examples, highlight the difficulty with CPKC's unilateral change from 10ng/ml to 4/2ng/ml. While 10ng/ml may have missed detecting some employees, it nonetheless constituted a standard which all parties accepted. This supported the arbitral presumption that termination constituted the appropriate penalty.

50. The question this raises, therefore, is whether the presumption should apply to Mr. Massé's case, given that he tested positive for marijuana at 10 ng/ml.

## **Decision**

### **Unifor's objection**

51. During the hearing, Unifor objected to the fact that, in its brief, CN referred to Rule G<sup>30</sup> of the Canadian Rail Operating Rules. According to Unifor, Form 780 makes no reference to Rule G.

52. The arbitrator agrees with Unifor.

53. Form 780<sup>31</sup> must set out the grounds for disciplinary action. There is no reference to Rule G in Form 780. Furthermore, CN's ex parte brief confirms that the grounds for disciplinary action are limited to its Policy. The arbitrator has previously dealt with an almost identical situation in AH726-P<sup>32</sup> (references omitted):

23. Neither can a party add new issues which the parties never discussed or processed through the grievance procedure:

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<sup>30</sup> CN brief, paragraph 38 et seq.

<sup>31</sup> Unifor documents, Tab N.

<sup>32</sup> [\*International Brotherhood of Electrical Workers System Council No. 11 v Canadian National Railway Company\*, 2021 CanLII 41839](#)

The Company raises a preliminary objection with respect to the scope of the issues before the Arbitrator. The Company maintains that in the submission for the joint statement of issue the Union added a matter which had not previously been raised or discussed between the parties, the alleged violation of Section 239 of the Canada Labour Code. Its representative submits that matter should not be considered by the Arbitrator. I consider that position to be correct.

24. In a recent case, the arbitrator upheld CN's objection alleging that the IBEW had added a new issue which it had never raised during the grievance procedure. The late addition of a new issue causes prejudice given how the railway model operates. Parties must apply their legal and labour relations expertise at the start of each case. The JSI and the Brief are not the appropriate vehicles through which to add overlooked issues.

...

31. The arbitrator upholds the IBEW's objection, in part. The Rule G allegations in CN's Brief are new and were never raised during the investigation, in Form 708 or in the Step 2 grievance response. The JSI similarly does not contain any reference to that ground. CN cannot add a new ground based on Rule G to this arbitration.

32. Moreover, the JSI already suggests that a vital issue before the arbitrator arises from the impact of an employee fleeing the scene of an accident. CN described this issue in the JSI and highlighted that Mr. Kossey's actions prevented it from determining the "root cause of the accident":

The Company maintains the Grievor operated the vehicle while he admittedly was not feeling well. The grievor struck a concrete block, continued to operate the vehicle that had sustained extensive damage, fled the scene, failed to report the incident and was absent without authorization. The grievor deprived the Company with the ability to test him for drugs and alcohol and determine the root cause of the accident.

33. CN's position throughout the process is incompatible with the novel allegation in its Brief concerning Rule G and suggestions Mr. Kossey was impaired.

54. In AH866,<sup>33</sup> the arbitrator recently reiterated this fundamental principal and its crucial importance for the parties' specialized arbitration model (references omitted):

<sup>33</sup> [\*Teamsters Canada Rail Conference – Maintenance of Way Employees Division v Canadian Pacific Kansas City Railway Company\*, 2026 CanLII 60171.](#)

174. The railway model of arbitration works so efficiently because the parties have agreed to limit their arguments to the issues set out in the JSI. In AH891, the arbitrator refused to hear an issue which formed no part of the JSI:

39. CPKC clearly raised delay and estoppel in the JSI. But CPKC did not raise laches. The parties' supplemental submissions satisfied the arbitrator that a distinct legal issue which arises for the first time from a party's case law cannot be added to those already found in the JSI. This is consistent with SHP744 which held that the issue of mitigation does not open the door to adding further issues never contained in the JSI.

175. The same result occurred in AH825 when a party's brief contained an issue not found in the JSI:

25. The arbitrator agrees with CP that the TCRC took a new position in its Brief despite the parties' agreed upon JSI. A vague reference to an ET in a Step 1 grievance, and nothing else thereafter, does not justify filing a Brief which focussed mainly on the arbitral case law examining ETs.

176. The JSI provides the parties with the opportunity to set out the issues requiring resolution. A vague reference to other materials does not allow a party to incorporate new issues during the arbitration if they did not explicitly identify them in the JSI. This important requirement, which avoids surprises, allows railway arbitrators to hear one or more grievances in a single day, on the merits, and to issue awards shortly thereafter.

55. Consequently, the arbitrator does not take CN's arguments regarding Rule G into account.

### **Did Mr. Massé work at CN while impaired?**

56. CN convinced the arbitrator that a result of 10 ng/ml indicated that Mr. Massé had been working while impaired. As mentioned in AH866, numerous arbitral awards in the railway industry have reached the same conclusion.

57. The decision in *Amalgamated Transit Union, Local 113 v Toronto Transit Commission* (TTC) suggests that the civil courts appear to be of the same view regarding the 10 ng/ml threshold:<sup>34</sup>

[144] Because cannabis impairs cognitive and motor abilities and because oral fluid testing at the TTC cut-off levels identifies recent use of cannabis (i.e. within approximately 4 hours of being tested), I conclude that oral fluid testing

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<sup>34</sup> [2017 ONSC 2078](#). It should be added, however, that the court in the TTC case examined an application for an injunction.

for cannabis at the TTC cut-off level will detect persons whose cognitive and motor abilities are likely impaired at the time of testing.

58. As mentioned in AH866, a party can always challenge the scientific evidence in this regard.

59. To support its contention that Mr. Massé was not impaired while at work, despite his test result of 10 ng/ml, Unifor referred to a recent award: *CPKC v TCRC – MWED*<sup>35</sup> (*Marshall*). In that award, the arbitrator determined that the incident in question met the criterion for requiring a test. However, the arbitrator also determined that a result of 24 ng/ml did not demonstrate that the employee was impaired while at work.

60. Consequently, the arbitrator intervened to reinstate Mr. Marshall in his position:

[29] Moving then to the dismissal grievance, **I begin with the threshold issue of whether the Employer had grounds to require the Grievor to undergo post-incident testing. On the facts of this case, I find that it did.** The Grievor's TOP violation was a serious safety incident. Although no collision, injury or property damage occurred, the Grievor cancelled the very protection under which he and the contractor were occupying the main track. That error plainly created the risk of grave consequences and was sufficient to justify post-incident testing under section 4.3 of HR 203.1.

**[30] I also accept that the Employer was not required to observe classic signs of impairment before directing the Grievor to test.** The Grievor occupied a safety-sensitive position as Extra Gang Foreman. He was responsible not only for his own safety, but for the protection of others working under his authority. **In that context, a serious and inexplicable TOP violation was enough to warrant post-incident testing as part of the Employer's investigation into whether alcohol or drugs may have been a contributing factor.**

...

**[34] I am not persuaded that it has done so. Most notably, I find the Employer has not sufficiently established that the Grievor was actually impaired while at work on July 15, 2022. The evidence shows a negative breath test, a negative urine point-of-collection test, and a negative laboratory urine test. The only confirmed positive result was the oral fluid test, at 24 ng/mL.**

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<sup>35</sup> *CPKC c. TCRC – MWED (Dale Marshall)*, (unreported award as of June 12, 2026).

While I accept that this level of cannabis violates the Employer's policy, I find it does not on its own establish that the Grievor was impaired in the performance of his duties that day. The Grievor denied impairment throughout, and I accept that there were no contemporaneous observations of unfitness, and no reason to believe the Grievor was being untruthful when he explained he had consumed cannabis the evening prior to work.

[35] The distinction between violating a policy and attending work impaired matters. **The Employer's case for dismissal rests heavily on the proposition that the oral fluid result established impairment and an irreparable breakdown in trust; however, I am unable to make that finding on this record. This is not a case where the Grievor was observed to be under the influence, unable to perform his work, or behaving in a way that demonstrated actual impairment. Nor is it a case involving an established substance use disorder, repeated policy breaches, or prior alcohol- or drug-related discipline.**

...

[40] In sum, I conclude that dismissal was excessive. The Grievor gave the Employer cause for discipline because he used cannabis in breach of a known policy before reporting for duty in a safety-sensitive position. However, the Employer did not establish actual workplace impairment or other circumstances sufficient to justify discharge.

(Emphasis added)

61. The arbitrator is, of course, not aware of how the parties in *Marshall* presented their case. In every arbitration, an arbitrator's findings depend on the evidence submitted by the parties. This is one of the reasons why an arbitral award made by one arbitrator is in no way binding on other arbitrators.

62. The arbitrator cannot apply the reasoning in *Marshall* to Mr. Massé's situation.

63. First of all, as mentioned in AH866, scientific evidence suggests that a person whose oral fluid tests positive for cannabis at a level of 10 ng/ml will be impaired. Mr. Marshall seems to have had nearly 2.5 times that level according to his results. Moreover, contrary to the situation in *Marshall*, the urine test findings in Mr. Massé's case were "non-negative."<sup>36</sup>

64. Second, a party can always challenge the scientific evidence in this area. However, the arbitrator cannot accept as conclusive evidence an employee's testimony that he was not impaired. This was the testimony given by Mr. Marshall and Mr. Massé. A finding regarding impairment cannot be determined by the subjective opinion of the employee in question.

65. Third, although observing the person's behaviour can sometimes be relevant in such situations, the arbitrator must apply the legal analysis set out above, given that Mr. Massé's case stems from his accident involving a CN truck.

66. For these reasons, the arbitrator must conclude, based on the findings of the test, that Mr. Massé was impaired while at work.

**Should the arbitrator modify the penalty imposed by CN?**

67. As mentioned, dismissal is the prima facie penalty in the case of an employee who is impaired while at work. In Mr. Massé's case, the arbitrator is not prepared to intervene to modify the penalty imposed by CN.

68. Mr. Massé gave a brief statement at the start of the hearing. He comes across as a good person.

69. However, his testimony was not consistent with the comments he made during the investigation on April 6, 2025. During the investigation, Mr. Massé stated that he was using cannabis to treat knee pain. At the hearing, he did not mention this fact, except during cross-examination by CN.

70. Furthermore, during the investigation, Mr. Massé, through his representative, refused to answer question 27: "Mr. Massé, when was the last time you consumed marijuana prior to the start of your shift at 18:30 on April 6, 2025?" Mr. Massé's representative raised the following objection:

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<sup>36</sup> Unifor documents, Tab G. The arbitrator only mentions Mr. Massé's urine test because of the negative results mentioned in the *Marshall* excerpt.

Objection from Alexandre Gravel: That question is a personal matter and should not be answered by Mr. Masse. (sic)

71. During his testimony at the hearing, however, Mr. Massé stated that he had consumed cannabis at around 8:30 a.m. before going to bed. The accident took place at 6:30 p.m. on April 6.

72. The moment at which a person is thought to have consumed cannabis is very important in arbitrations of this kind. A result of 10 ng/ml suggests recent consumption.<sup>37</sup> Given the discrepancy in this crucial evidence, the arbitrator is not inclined to intervene to modify the penalty imposed by CN.

73. It is extremely dangerous to drive a vehicle while impaired. This is why arbitrators have long adopted the presumption that termination, at least prima facie, is the appropriate penalty. This presumption recognizes the importance of deterrence in such cases.<sup>38</sup>

74. The facts of this case, Mr. Massé's limited years of service, and his testimony at the hearing did not persuade the arbitrator to modify the penalty imposed by CN, given the seriousness of the offence committed.

## **DISPOSITION**

75. For these reasons, and despite Unifor's detailed submissions, the arbitrator must dismiss Mr. Massé's grievance.

SIGNED in Ottawa on this 7<sup>th</sup> day of July 2026.



Graham J. Clarke  
Arbitrator

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<sup>37</sup> See the TTC ruling and AH866.

<sup>38</sup> See also AH734 - [Teamsters Canada Rail Conference v Canadian National Railway Company, 2022 CanLII 5833](#).