CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4777

Heard in Montreal, January 24, 2014

Concerning

BOMBARDIER TRANSPORTATION

And

TEAMSTERS CANADA RAIL CONFERENCE - DIVISION 850

DISPUTE:

The Company's Drug and Alcohol Use and Drug and Alcohol Testing Policy

JOINT STATEMENT OF ISSUE:

The Company has implemented a Drug and Alcohol Use and Drug and Alcohol Testing Policy ("the Policy") that provides for testing of employees and penalties for alleged violations of the Policy. The Company has raised certain arbitration aspects of the Policy as being non-arbitrable. The Union disagrees with the Company's position. It is subject of the Collective Agreement, including Articles 2 and 8 thereof, and in violation of the Canadian Human Rights Act. The Union has requested the Company withdraw its Policy and declare it of no force or effect. In the alternative the Union has requested the Policy be amended.

FOR THE UNION:	FOR THE COMPANY:
Jason Ennis - Counsel	Michael Rose - Counsel
Keith Cole - Member	Brooklyn Rose - Witness

Those appeared on behalf of the Company:

M. Akhtar - Counsel, Human Rows, Toronto
M. Ali - Manager, Employee Relations, Toronto
J. Ennis - General Manager, Toronto
J. Ennis - Manager Train Operations, Toronto
D. Hanjan - Manager Employee Relations and Compensation, Toronto

Those appeared on behalf of the Union:

J. Ennis - Counsel, Cohen Ring, Toronto
K. Cole - Member, Local Chairman, Toronto
D. Vaughan - Local Chairman, Toronto

AWARD OF THE ARBITRATOR

This award concerns Teamsters Canada Rail Conference, Division 850's ("the Union") challenge to certain portions of Bombardier Transportation Canada Inc.'s ("the Company") Drugs & Alcohol Use and Drug & Alcohol Testing Policy governing Safety Critical and Safety Sensitive Positions ("the Policy"). The Union argues that certain aspects of the Policy are unreasonable, in violation of employees' privacy rights, the collective agreement, including articles 2 and 8, and in violation of the Canadian Human Rights Act ("the CHRA").

The policy grievance was filed on July 9, 2013, and since the Policy's implementation, the Union has filed a number of individual grievances on behalf of employees who have been subject to the Policy. The parties have agreed to hold those individual grievances in abeyance pending the decision.

In the Company's submission, the Policy is reasonable, consistent with the collective agreement and its legal obligations pursuant to the CHRA and what it refers to as "any applicable law" and jurisprudence. According to the Company, the Policy strikes the appropriate balance between the privacy interests of employees and the Company's interest and obligations to ensure the safe operation of railway trains.

I have reviewed the Policy thoroughly, together with the jurisprudence directly on point. I cannot agree with the Company's submissions in certain respects. Recently, in *Communications, Energy and Paper Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34 ("the Irving Decision"), the Supreme Court affirmed that it refers to the test for dealing with bargaining employees that Arbitrator Picher laid down in *Canadian Pacific Railway Company and Brotherhood of Maintenance of Way Employees (Weaver Grievance)*, (2008), 107 L.A.C.(4th) 225 ("Bombardier"), a case involving a grievance of the employer's random drug testing policy at an oil refinery. The Supreme Court quotes from Arbitrator Picher's decision as summarizing the principles that had emerged from the arbitral jurisprudence under the KVP test for both drug and alcohol testing. The Court adopts those principles as its own:

> No employee can be subjected to random, unannounced alcohol or drug testing as part of an employer's safety management program.
>
> An employer may require alcohol or drug testing of an individual where the facts give the employer reasonable cause to do so.
>
> It is within the prerogative of management's rights under a collective agreement to also require alcohol or drug testing following a significant incident, accident or near miss, where it may be important to identify the root cause of what occurred.
>
> Drug and alcohol testing is a legitimate part of continuing contracts of employment for individuals found to have a problem of alcohol or drug use. As part of an employer's program of rehabilitation, such agreements or policies requiring such employees to submit to random, unannounced testing for a reasonable period of time following their return to work are reasonable and consistent with the Canadian Human Rights Act, provided the employee is informed of the consequences of a relapse before being tested. This is the only exceptional circumstance in which the otherwise protected employee interest in privacy and dignity of the person must yield to the interest of safety and rehabilitation, to allow for random and unannounced alcohol or drug testing.

The Supreme Court also adopts Arbitrator Picher's explanation for these principles:

> a key feature of the jurisprudence in the area of alcohol and drug testing in Canada is that arbitrators have overwhelmingly rejected mandatory random and unannounced drug testing for all employees in a safety sensitive workplace as being an unreasonable violation of the privacy interest of employees. Such testing has been found to be a disproportionate response to the employer's legitimate interest in workplace safety because it does not relate to the ability of the individual employee to perform the job safely and productively. Such random testing has been found to be an unreasonable search and seizure of the employee's person, in violation of the dignity and privacy of employees which falls outside the balancing of any legitimate management interests. Including deterrence and the detection of employees who may be impaired by alcohol or drugs while at work, such testing has been found to violate the rights of employees that are protected under s. 8 of the Canadian Charter of Rights and Freedoms, and to be a disproportionate response to the language in a collective agreement which enshrines safety and safe practices.
>
> It is important to note that the collective agreement before me does not provide for any restrictions or employee use of drugs or alcohol nor does it permit the employer to require any testing of the employees for drugs or alcohol. Moreover, there is no statutory authority that permits an employer to regulate alcohol or drug use testing. As articulated by Arbitrator Burkett, paragraph 30 in *Mechanical Contractors Association Sarnia v. United Association of Journeymen and Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local 663*, 2010 CanLII 68847 (ON) (Burkett):
>
> > In the absence of statutory or collective agreement authority, an employer which implements or proposes to implement a rule or policy which mandates employee privacy rights that arise because of the nature of establishing that the rule or policy is a necessary and proportionate response to legitimate workplace concerns, the employer must establish a reasonable and demonstrable need for the rule or policy.
>
> > I have both to those portions of the Company's policy challenged by the Union. As requested, I address only those challenged provisions set out in the grievance filed July 9, 2013. In accordance those challenged provisions, I take into account the entirety of the Policy (attached as Appendix A). Only those provisions that the Union challenges are reproduced in the body of the decision.
>
> > Section 2 of the Policy states as follows:
>
> > **2. PROHIBITED DRUGS AND ALCOHOL USE AND ACTIVITIES**
>
> > It is a violation of this policy for any employee to: (a) possess an illegal drug at any time in accordance with and subject to applicable laws and regulations. Without limiting the foregoing, it is also a violation of this policy for any employee to engage in the following conduct while conducting Company business:
>
> > (a) using, being under the influence of, or possessing illegal or stolen drugs;
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> > (b) using or being under the influence of legal drugs that are being used illegally;
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> > (c) using or being under the influence of legal drugs whose use can reasonably be expected affect the ability of the employee to perform his or her job safely;
>
> > (d) selling, buying, soliciting to buy or sell, transporting, possessing, distributing, or transferring illegal or illicit drugs while on Company time or property;
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> > (e) using or being under the influence of alcohol;
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> > (f) having positive for drugs and/or alcohol…(seven if said substances were not ingested during working hours)
>
> > (g) violating any applicable laws or regulations governing the use of drugs and/or alcohol, including but not limited to the foregoing, regulations specifically prohibiting the use of drugs and/or alcohol by employees who perform safety critical or safety sensitive positions;
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> > "Accepting the terms and conditions of this policy and/or alcohol concentration greater than 0"
>
> > Employees who violate these prohibitions may be subject to discipline, action, up to and including termination, in accordance with Company policy and in accordance with and subject to applicable local laws and regulations.
>
> > An employee may refuse to submit to a drug or alcohol test (as defined in this policy). However, an employee who refuses to submit to a drug or alcohol test is subject to disciplinary action, up to and including termination in accordance with Company policy and in accordance with and subject to applicable local laws and regulations.
>
> > In respect of Section 8, the Union challenges the specific requirements in (b) that requires employees to have blood alcohol concentration levels ("BAC's) of "0."
>
> > The Union provides that an employee may not have any alcohol in their system while having a BAC greater than 0 (zero) and that such a "zero" BAC is not an employee violation of a nexus to impairment. This very issue was considered in the *Canadian National Railway Co. and Canadian Auto Workers* (2005), 95 L.A.C.(4th) 341 ("*CNR/CAW*"). The expert evidence before Arbitrator Picher at the time confirmed that concern for impairment is legitimate based on a 0.04 BAC or a late-session BAC. Consequently, Arbitrator Picher found that a "zero" BAC is not a breach of the collective agreement and that a BAC of 0.04 or greater is a violation of the collective agreement.
>
> > The Policy goes on in Section 3 to indicate that employees who violate the prohibitions it sets out may be subject to discipline action up to and including termination. Combined with notions of just cause, the provisions here are crucial in terms of a possible disciplinary outcome depending on the circumstances. The Policy goes on to state that an employee who refuses to submit to a drug or alcohol test is subject to disciplinary action, up to and including termination. I do not take issue, in this respect, as contended by the Union, that the Policy requires the imposition of discipline in every case where an employee refuses to submit to a drug or alcohol test. The Company in its brief makes clear that the Company has discretion in the application of discipline in the circumstances of an employee refusal. Therefore this section of the Policy is reasonable.
>
> > Section 6 of the Policy addresses the tests that the Company requires:
>
> > **6. TESTS REQUIRED:**
>
> > **6.2 Post-Accident/Incident Testing:**
>
> > 6.2.1 Unless required by applicable law or regulation, the Company will investigate the circumstances surrounding an accident/incident to determine whether drug and/or alcohol tests must be administered. The Company will conduct post-accident/incident drug and/or alcohol tests as required by applicable laws and regulations and reserves the right pursuant to Company policy to require post-accident/incident drug and/or alcohol testing to the fullest extent allowed by law. An accident is defined as an event that gives rise to an accident or hazard that results in personal injury or damage to property, equipment, materials or supplies, or damage to facilities, equipment, materials or supplies, or damage to the environment to the extent that it is determined to be at least sufficient to result in a reportable accident. Nothing in this section is to be construed to mean that the term "accident" includes "near miss."
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> > 6.2.2. Any employee required to undergo a post-accident alcohol test is prohibited from using alcohol for eight hours following the accident or until he/she undergoes a post-accident alcohol test, whichever is longer.
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> > **6.4 Periodic Physicals and/or Testing**
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> > 6.4.1 An employee may be required due to the nature of his occupation to submit to drug and/or alcohol testing or physical as part of the certification process of occupation such as Train Operator and Customer Service Ambassador.
>
> > The Union argues that section 6.2 is overly broad. The Union submits that Section 6.2.1 unreasonably permits the Company to require drug and alcohol testing without limitation in every accident, which is defined broadly in the Section whenever any injury or loss of property results. I agree with the Union. I refer the parties to the quotation from the Irving Decision case, which sets out the appropriate threshold for post-accident/incident testing established in the SHP 200 case:
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> > > [T]o establish a reasonable and demonstrable need for such testing, the employer must show that a serious accident or incident has occurred, and that it was of such a serious nature that it could reasonably have been expected to cause serious bodily harm or death, including but not limited to environmental damage, or such a serious disruption to the operation of the workplace, that it could reasonably have been expected to cause such harm or disruption. The employer must show that the employee who was involved in the accident or incident, including drug and alcohol testing administered to the employee, is a reasonable exercise of management's rights to ensure a safe workplace, and to ensure safe operations. In fact, there is considerable precedent for Company administered post-accident/incident testing where the employee who was involved in the accident or incident is not subjected to testing, but testing of other employees who may have been involved in the accident or incident is permitted. As a rule of thumb, it should be determined that the Arbitrator is satisfied that there is a reasonable exercise of management's rights to require a drug or alcohol test of an employee who merely moves from one risk sensitive position to another.
>
> > Accordingly I find that Section 6.6.1 of the Policy is reasonable.
>
> > Finally with respect to Section 6, the Union argues that the Policy fails to properly identify the Company's duty to accommodate any employee whose test results may be positive. It argues that the Company's omission is an important one because policies that do not provide for a comprehensive employee assistance program are inherently struck down. According to the Union, this has been the case since Entrop v. Imperial Oil Ltd., [2000] O.J. No. 265 (OHCA). However, the Policy does provide for and references the Employee Assistance Program in section 10 of the Policy. This is sufficient.
>
> > Section 7 deals with testing methodology and reporting:
>
> > **7. TESTING METHODOLOGY AND INTERPRETATION**
>
> > 7.3 Employees or applicants may be required to give urine, breath, blood, hair follicle, or any other sample in accordance with and subject to and local applicable laws and regulations. In general, if and when an employee or applicant is required to give a urine specimen, he/she will be permitted to give a urine specimen in privacy and without being observed by collection site personnel. However, an employee or applicant may be observed giving a urine specimen during the collection process by a member of the medical profession or a government gender designated by the Company or ski resort/ski area in accordance with applicable laws and regulations.
>
> > The Union seeks to have Section 7.3 struck from the Policy altogether. The Union argues that the section gives the Company too wide a scope in engage in the referenced testing or to collect any other "sample in accordance with and subject to applicable laws and regulations."
>
> > The starting point for the analysis of this section must be that the employee is sovereign over his or her body. That sovereignty must yield to the competing interest of the employer only to the degree that is necessary. Assessed in this light, the provision is too wide in scope. First, there are no "samples" that can be taken by the Company "in accordance with and subject to any local applicable laws and regulations." Bombardier testing has been found to be minimally invasive, and the Company has been found not to violate the employee's privacy interests. I am satisfied that hair follicle sampling is minimally invasive and does not violate the "respect and dignity" clause. However, the collection of blood is highly intrusive. I am unaware of a case in which policies permit an employer to require blood samples. I am unable to find that it is another form of breathalyzer or necessary that the Company require blood samples.
>
> > I note that the Union also objects to this provision in that it allows for employees being observed while giving a urine sample during the collection process. If this was the Company's general practice, it would be highly objectionable. However, the provision only allows this to occur whenever there is reason, and by the I take to mean reasonable cause, to suspect that the employee or applicant may alter or substitute a urine specimen. In this circumstance, the provision is reasonable.
>
> > Section 8 of the Policy sets out the following:
>
> > **8. DRUG TEST RESULTS**
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> > 8.1 An initial screening test will be performed on all specimens. If the initial screening test indicates a positive test result, a confirmatory test will be conducted on the original specimen. Discipline action will not be taken on the basis of an initial screening test result.
>
> > 8.2 A test is positive, or confirmed for drug and/or alcohol, if the laboratory reports to the Company that the test result is positive, employees will have a chance to discuss any issues with the Medical Review Officer ("MRO") and to be heard prior to any final determination. The MRO will then make the final determination and report the result (positive or negative) to the company representative. If, after investigating the MRO believes that there is a legitimate reason for the test to be positive then the MRO will report the test as negative. If the MRO is convinced that employees have used illegal or illicit drugs, then the MRO will report the test as positive. Facts to provide for the confirmatory and the test results are those to identify the drug or its metabolites.
>
> > 8.3 An employee who has tested positive for drugs will be considered unqualified to perform or continue performing his/her functions safely and may be subject to disciplinary action, up to and including termination, in accordance with applicable laws, regulations and Company policy. Automatic conclusion that a positive test results in an employee being deemed to be unqualified.
>
> > Accordingly, I find that Section 8.3 of the Policy is reasonable.
>
> > The Union challenges Section 8.3 stating that it is overly broad. The Union argues that the section gives the Company too wide a scope to engage in the referenced testing or to collect any other "sample in accordance with and subject to applicable laws and regulations."
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> > The Company's position is that Section 8.3 is reasonable, consistent with the collective agreement and its legal obligations pursuant to the CHRA and what it refers to as "any applicable law" and jurisprudence. According to the Company, the Policy strikes the appropriate balance between the privacy interests of employees and the Company's interest and obligations to ensure the safe operation of railway trains.
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> > I have reviewed the Policy thoroughly, together with the jurisprudence directly on point. I cannot agree with the Company's submissions in certain respects. Recently, in *Communications, Energy and Paper Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34 ("the Irving Decision"), the Supreme Court affirmed that it refers to the test for dealing with bargaining employees that Arbitrator Picher laid down in *Canadian Pacific Railway Company and Brotherhood of Maintenance of Way Employees (Weaver Grievance)*, (2008), 107 L.A.C.(4th) 225 ("Bombardier"), a case involving a grievance of the employer's random drug testing policy at an oil refinery. The Supreme Court quotes from Arbitrator Picher's decision as summarizing the principles that had emerged from the arbitral jurisprudence under the KVP test for both drug and alcohol testing. The Court adopts those principles as its own:
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> > It is within the prerogative of management's rights under a collective agreement to also require alcohol or drug testing following a significant incident, accident or near miss, where it may be important to identify the root cause of what occurred.
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> > Drug and alcohol testing is a legitimate part of continuing contracts of employment for individuals found to have a problem of alcohol or drug use. As part of an employer's program of rehabilitation, such agreements or policies requiring such employees to submit to random, unannounced testing for a reasonable period of time following their return to work are reasonable and consistent with the Canadian Human Rights Act, provided the employee is informed of the consequences of a relapse before being tested. This is the only exceptional circumstance in which the otherwise protected employee interest in privacy and dignity of the person must yield to the interest of safety and rehabilitation, to allow for random and unannounced alcohol or drug testing.
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> > The Supreme Court also adopts Arbitrator Picher's explanation for these principles:
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> > > a key feature of the jurisprudence in the area of alcohol and drug testing in Canada is that arbitrators have overwhelmingly rejected mandatory random and unannounced drug testing for all employees in a safety sensitive workplace as being an unreasonable violation of the privacy interest of employees. Such testing has been found to be a disproportionate response to the employer's legitimate interest in workplace safety because it does not relate to the ability of the individual employee to perform the job safely and productively. Such random testing has been found to be an unreasonable search and seizure of the employee's person, in violation of the dignity and privacy of employees which falls outside the balancing of any legitimate management interests. Including deterrence and the detection of employees who may be impaired by alcohol or drugs while at work, such testing has been found to violate the rights of employees that are protected under s. 8 of the Canadian Charter of Rights and Freedoms, and to be a disproportionate response to the language in a collective agreement which enshrines safety and safe practices.
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> > It is important to note that the collective agreement before me does not provide for any restrictions on employee use of drugs or alcohol nor does it permit the employer to require any testing of the employees for drugs or alcohol. Moreover, there is no statutory authority that permits an employer to regulate alcohol or drug use testing. As articulated by Arbitrator Burkett, paragraph 30 in *Mechanical Contractors Association Sarnia v. United Association of Journeymen and Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local 663*, 2010 CanLII 68847 (ON) (Burkett):
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> > > In the absence of statutory or collective agreement authority, an employer which implements or proposes to implement a rule or policy which mandates employee privacy rights that arise because of the nature of establishing that the rule or policy is a necessary and proportionate response to legitimate workplace concerns, the employer must establish a reasonable and demonstrable need for the rule or policy.
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> > Section 2 of the Policy states as follows:
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> > It is a violation of this policy for any employee to: (a) possess an illegal drug at any time in accordance with and subject to applicable laws and regulations. Without limiting the foregoing, it is also a violation of this policy for any employee to engage in the following conduct while conducting Company business:
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> > (a) using, being under the influence of, or possessing illegal or stolen drugs;
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> > (b) using or being under the influence of legal drugs that are being used illegally;
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> > (c) using or being under the influence of legal drugs whose use can reasonably be expected affect the ability of the employee to perform his or her job safely;
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> > (d) selling, buying, soliciting to buy or sell, transporting, possessing, distributing, or transferring illegal or illicit drugs while on Company time or property;
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> > (e) using or being under the influence of alcohol;
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> > (f) having positive for drugs and/or alcohol…(seven if said substances were not ingested during working hours)
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> > (g) violating any applicable laws or regulations governing the use of drugs and/or alcohol, including but not limited to the foregoing, regulations specifically prohibiting the use of drugs and/or alcohol by employees who perform safety critical or safety sensitive positions;
>
> > (h) "Accepting the terms and conditions of this policy and/or alcohol concentration greater than 0"
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> > Employees who violate these prohibitions may be subject to discipline action, up to and including termination, in accordance with Company policy and in accordance with and subject to applicable local laws and regulations.
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> > An employee may refuse to submit to a drug or alcohol test (as defined in this policy). However, an employee who refuses to submit to a drug or alcohol test is subject to disciplinary action, up to and including termination in accordance with Company policy and in accordance with and subject to applicable local laws and regulations.
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> > In respect of Section 8, the Union challenges the specific requirements in (b) that requires employees to have blood alcohol concentration levels ("BAC's) of "0."
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> > The Union provides that an employee may not have any alcohol in their system while having a BAC greater than 0 (zero) and that such a "zero" BAC is not an employee violation of a nexus to impairment. This very issue was considered in the *Canadian National Railway Co. and Canadian Auto Workers* (2005), 95 L.A.C.(4th) 341 ("*CNR/CAW*"). The expert evidence before Arbitrator Picher at the time confirmed that concern for impairment is legitimate based on a 0.04 BAC or a late-session BAC. Consequently, Arbitrator Picher found that a "zero" BAC is not a breach of the collective agreement and that a BAC of 0.04 or greater is a violation of the collective agreement.
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> > The Policy goes on in Section 3 to indicate that employees who violate the prohibitions it sets out may be subject to discipline action up to and including termination. Combined with notions of just cause, the provisions here are crucial in terms of a possible disciplinary outcome depending on the circumstances. The Policy goes on to state that an employee who refuses to submit to a drug or alcohol test is subject to disciplinary action, up to and including termination. I do not take issue, in this respect, as contended by the Union, that the Policy requires the imposition of discipline in every case where an employee refuses to submit to a drug or alcohol test. The Company in its brief makes clear that the Company has discretion in the application of discipline in the circumstances of an employee refusal. Therefore this section of the Policy is reasonable.
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> > Section 6 of the Policy addresses the tests that the Company requires:
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> > **6.2 Post-Accident/Incident Testing:**
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> > 6.2.1 Unless required by applicable law or regulation, the Company will investigate the circumstances surrounding an accident/incident to determine whether drug and/or alcohol tests must be administered. The Company will conduct post-accident/incident drug and/or alcohol tests as required by applicable laws and regulations and reserves the right pursuant to Company policy to require post-accident/incident drug and/or alcohol testing to the fullest extent allowed by law. An accident is defined as an event that gives rise to an accident or hazard that results in personal injury or damage to property, equipment, materials or supplies, or damage to facilities, equipment, materials or supplies, or damage to the environment to the extent that it is determined to be at least sufficient to result in a reportable accident. Nothing in this section is to be construed to mean that the term "accident" includes "near miss."
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> > 6.2.2. Any employee required to undergo a post-accident alcohol test is prohibited from using alcohol for eight hours following the accident or until he/she undergoes a post-accident alcohol test, whichever is longer.
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> > **6.4 Periodic Physicals and/or Testing**
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> > 6.4.1 An employee may be required due to the nature of his occupation to submit to drug and/or alcohol testing or physical as part of the certification process of occupation such as Train Operator and Customer Service Ambassador.
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> > The Union argues that section 6.2 is overly broad. The Union submits that Section 6.2.1 unreasonably permits the Company to require drug and alcohol testing without limitation in every accident, which is defined broadly in the Section whenever any injury or loss of property results. I agree with the Union. I refer the parties to the quotation from the Irving Decision case, which sets out the appropriate threshold for post-accident/incident testing established in the SHP 200 case:
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> > > [T]o establish a reasonable and demonstrable need for such testing, the employer must show that a serious accident or incident has occurred, and that it was of such a serious nature that it could reasonably have been expected to cause serious bodily harm or death, including but not limited to environmental damage, or such a serious disruption to the operation of the workplace, that it could reasonably have been expected to cause such harm or disruption. The employer must show that the employee who was involved in the accident or incident, including drug and alcohol testing administered to the employee, is a reasonable exercise of management's rights to ensure a safe workplace, and to ensure safe operations. In fact, there is considerable precedent for Company administered post-accident/incident testing where the employee who was involved in the accident or incident is not subjected to testing, but testing of other employees who may have been involved in the accident or incident is permitted. As a rule of thumb, it should be determined that the Arbitrator is satisfied that there is a reasonable exercise of management's rights to require a drug or alcohol test of an employee who merely moves from one risk sensitive position to another.
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> > Accordingly, I find that Section 6.6.1 of the Policy is reasonable.
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> > Finally with respect to Section 6, the Union argues that the Policy fails to properly identify the Company's duty to accommodate any employee whose test results may be positive. It argues that the Company's omission is an important one because policies that do not provide for a comprehensive employee assistance program are inherently struck down. According to the Union, this has been the case since Entrop v. Imperial Oil Ltd., [2000] O.J. No. 265 (OHCA). However, the Policy does provide for and references the Employee Assistance Program in section 10 of the Policy. This is sufficient.
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> > Section 7 deals with testing methodology and reporting:
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> > **7. TESTING METHODOLOGY AND INTERPRETATION**
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> > 7.3 Employees or applicants may be required to give urine, breath, blood, hair follicle, or any other sample in accordance with and subject to and local applicable laws and regulations. In general, if and when an employee or applicant is required to give a urine specimen, he/she will be permitted to give a urine specimen in privacy and without being observed by collection site personnel. However, an employee or applicant may be observed giving a urine specimen during the collection process by a member of the medical profession or a government gender designated by the Company or ski resort/ski area in accordance with applicable laws and regulations.
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> > The Union seeks to have Section 7.3 struck from the Policy altogether. The Union argues that the section gives the Company too wide a scope to engage in the referenced testing or to collect any other "sample in accordance with and subject to applicable laws and regulations."
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> > The starting point for the analysis of this section must be that the employee is sovereign over his or her body. That sovereignty must yield to the competing interest of the employer only to the degree that is necessary. Assessed in this light, the provision is too wide in scope. First, there are no "samples" that can be taken by the Company "in accordance with and subject to any local applicable laws and regulations." Breathalyzer testing has been found to be minimally invasive, and the Company has been found not to violate the employee's privacy interests. I am satisfied that hair follicle sampling is minimally invasive and does not violate the "respect and dignity" clause. However, the collection of blood is highly intrusive. I am unaware of a case in which policies permit an employer to require blood samples. I am unable to find that it is another form of breathalyzer or necessary that the Company require blood samples.
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> > I note that the Union also objects to this provision in that it allows for employees being observed while giving a urine sample during the collection process. If this was the Company's general practice, it would be highly objectionable. However, the provision only allows this to occur whenever there is reason, and by the I take to mean reasonable cause, to suspect that the employee or applicant may alter or substitute a urine specimen. In this circumstance, the provision is reasonable.
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> > 8.1 An initial screening test will be performed on all specimens. If the initial screening test indicates a positive test result, a confirmatory test will be conducted on the original specimen. Discipline action will not be taken on the basis of an initial screening test result.
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> > 8.2 A test is positive, or confirmed for drug and/or alcohol, if the laboratory reports to the Company that the test result is positive, employees will have a chance to discuss any issues with the Medical Review Officer ("MRO") and to be heard prior to any final determination. The MRO will then make the final determination and report the result (positive or negative) to the company representative. If, after investigating the MRO believes that there is a legitimate reason for the test to be positive then the MRO will report the test as negative. If the MRO is convinced that employees have used illegal or illicit drugs, then the MRO will report the test as positive. Facts to provide for the confirmatory and the test results are those to identify the drug or its metabolites.
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> > 8.3 An employee who has tested positive for drugs will be considered unqualified to perform or continue performing his/her functions safely and may be subject to disciplinary action, up to and including termination, in accordance with applicable laws, regulations and Company policy. Automatic conclusion that a positive test results in an employee being deemed to be unqualified.
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> > Accordingly, I find that Section 8.3 of the Policy is reasonable.
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> > The Union challenges Section 8.3 stating that it is overly broad. The Union argues that the section gives the Company too wide a scope to engage in the referenced testing or to collect any other "sample in accordance with and subject to applicable laws and regulations."
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> > The Company's position is that Section 8.3 is reasonable, consistent with the collective agreement and its legal obligations pursuant to the CHRA and what it refers to as "any applicable law" and jurisprudence. According to the Company, the Policy strikes the appropriate balance between the privacy interests of employees and the Company's interest and obligations to ensure the safe operation of railway trains.
>
> > I have reviewed the Policy thoroughly, together with the jurisprudence directly on point. I cannot agree with the Company's submissions in certain respects. Recently, in *Communications, Energy and Paper Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34 ("the Irving Decision"), the Supreme Court affirmed that it refers to the test for dealing with bargaining employees that Arbitrator Picher laid down in *Canadian Pacific Railway Company and Brotherhood of Maintenance of Way Employees (Weaver Grievance)*, (2008), 107 L.A.C.(4th) 225 ("Bombardier"), a case involving a grievance of the employer's random drug testing policy at an oil refinery. The Supreme Court quotes from Arbitrator Picher's decision as summarizing the principles that had emerged from the arbitral jurisprudence under the KVP test for both drug and alcohol testing. The Court adopts those principles as its own:
>
> > No employee can be subjected to random, unannounced alcohol or drug testing as part of an employer's safety management program.
>
> > An employer may require alcohol or drug testing of an individual where the facts give the employer reasonable cause to do so.
>
> > It is within the prerogative of management's rights under a collective agreement to also require alcohol or drug testing following a significant incident, accident or near miss, where it may be important to identify the root cause of what occurred.
>
> > Drug and alcohol testing is a legitimate part of continuing contracts of employment for individuals found to have a problem of alcohol or drug use. As part of an employer's program of rehabilitation, such agreements or policies requiring such employees to submit to random, unannounced testing for a reasonable period of time following their return to work are reasonable and consistent with the Canadian Human Rights Act, provided the employee is informed of the consequences of a relapse before being tested. This is the only exceptional circumstance in which the otherwise protected employee interest in privacy and dignity of the person must yield to the interest of safety and rehabilitation, to allow for random and unannounced alcohol or drug testing.
>
> > The Supreme Court also adopts Arbitrator Picher's explanation for these principles:
>
> > > a key feature of the jurisprudence in the area of alcohol and drug testing in Canada is that arbitrators have overwhelmingly rejected mandatory random and unannounced drug testing for all employees in a safety sensitive workplace as being an unreasonable violation of the privacy interest of employees. Such testing has been found to be a disproportionate response to the employer's legitimate interest in workplace safety because it does not relate to the ability of the individual employee to perform the job safely and productively. Such random testing has been found to be an unreasonable search and seizure of the employee's person, in violation of the dignity and privacy of employees which falls outside the balancing of any legitimate management interests. Including deterrence and the detection of employees who may be impaired by alcohol or drugs while at work, such testing has been found to violate the rights of employees that are protected under s. 8 of the Canadian Charter of Rights and Freedoms, and to be a disproportionate response to the language in a collective agreement which enshrines safety and safe practices.
>
> > It is important to note that the collective agreement before me does not provide for any restrictions on employee use of drugs or alcohol nor does it permit the employer to require any testing of the employees for drugs or alcohol. Moreover, there is no statutory authority that permits an employer to regulate alcohol or drug use testing. As articulated by Arbitrator Burkett, paragraph 30 in *Mechanical Contractors Association Sarnia v. United Association of Journeymen and Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local 663*, 2010 CanLII 68847 (ON) (Burkett):
>
> > > In the absence of statutory or collective agreement authority, an employer which implements or proposes to implement a rule or policy which mandates employee privacy rights that arise because of the nature of establishing that the rule or policy is a necessary and proportionate response to legitimate workplace concerns, the employer must establish a reasonable and demonstrable need for the rule or policy.
>
> > I have both to those portions of the Company's policy challenged by the Union. As requested, I address only those challenged provisions set out in the grievance filed July 9, 2013. In accordancing those challenged provisions, I take into account the entirety of the Policy (attached as Appendix A). Only those provisions that the Union challenges are reproduced in the body of the decision.
>
> > Section 2 of the Policy states as follows:
>
> > **2. PROHIBITED DRUGS AND ALCOHOL USE AND ACTIVITIES**
>
> > It is a violation of this policy for any employee to: (a) possess an illegal drug at any time in accordance with and subject to applicable laws and regulations. Without limiting the foregoing, it is also a violation of this policy for any employee to engage in the following conduct while conducting Company business:
>
> > (a) using, being under the influence of, or possessing illegal or stolen drugs;
>
> > (b) using or being under the influence of legal drugs that are being used illegally;
>
> > (c) using or being under the influence of legal drugs whose use can reasonably be expected affect the ability of the employee to perform his or her job safely;
>
> > (d) selling, buying, soliciting to buy or sell, transporting, possessing, distributing, or transferring illegal or illicit drugs while on Company time or property;
>
> > (e) using or being under the influence of alcohol;
>
> > (f) having positive for drugs and/or alcohol…(seven if said substances were not ingested during working hours)
>
> > (g) violating any applicable laws or regulations governing the use of drugs and/or alcohol, including but not limited to the foregoing, regulations specifically prohibiting the use of drugs and/or alcohol by employees who perform safety critical or safety sensitive positions;
>
> > (h) "Accepting the terms and conditions of this policy and/or alcohol concentration greater than 0"
>
> > Employees who violate these prohibitions may be subject to discipline action, up to and including termination, in accordance with Company policy and in accordance with and subject to applicable local laws and regulations.
>
> > An employee may refuse to submit to a drug or alcohol test (as defined in this policy). However, an employee who refuses to submit to a drug or alcohol test is subject to disciplinary action, up to and including termination in accordance with Company policy and in accordance with and subject to applicable local laws and regulations.
>
> > In respect of Section 8, the Union challenges the specific requirements in (b) that requires employees to have blood alcohol concentration levels ("BAC's) of "0."
>
> > The Union provides that an employee may not have any alcohol in their system while having a BAC greater than 0 (zero) and that such a "zero" BAC is not an employee violation of a nexus to impairment. This very issue was considered in the *Canadian National Railway Co. and Canadian Auto Workers* (2005), 95 L.A.C.(4th) 341 ("*CNR/CAW*"). The expert evidence before Arbitrator Picher at the time confirmed that concern for impairment is legitimate based on a 0.04 BAC or a late-session BAC. Consequently, Arbitrator Picher found that a "zero" BAC is not a breach of the collective agreement and that a BAC of 0.04 or greater is a violation of the collective agreement.
>
> > The Policy goes on in Section 3 to indicate that employees who violate the prohibitions it sets out may be subject to discipline action up to and including termination. Combined with notions of just cause, the provisions here are crucial in terms of a possible disciplinary outcome depending on the circumstances. The Policy goes on to state that an employee who refuses to submit to a drug or alcohol test is subject to disciplinary action, up to and including termination. I do not take issue, in this respect, as contended by the Union, that the Policy requires the imposition of discipline in every case where an employee refuses to submit to a drug or alcohol test. The Company in its brief makes clear that the Company has discretion in the application of discipline in the circumstances of an employee refusal. Therefore this section of the Policy is reasonable.
>
> > Section 6 of the Policy addresses the tests that the Company requires:
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> > **6. TESTS REQUIRED:**
>
> > **6.2 Post-Accident/Incident Testing:**
>
> > 6.2.1 Unless required by applicable law or regulation, the Company will investigate the circumstances surrounding an accident/incident to determine whether drug and/or alcohol tests must be administered. The Company will conduct post-accident/incident drug and/or alcohol tests as required by applicable laws and regulations and reserves the right pursuant to Company policy to require post-accident/incident drug and/or alcohol testing to the fullest extent allowed by law. An accident is defined as an event that gives rise to an accident or hazard that results in personal injury or damage to property, equipment, materials or supplies, or damage to facilities, equipment, materials or supplies, or damage to the environment to the extent that it is determined to be at least sufficient to result in a reportable accident. Nothing in this section is to be construed to mean that the term "accident" includes "near miss."
>
> > 6.2.2. Any employee required to undergo a post-accident alcohol test is prohibited from using alcohol for eight hours following the accident or until he/she undergoes a post-accident alcohol test, whichever is longer.
>
> > 6.2.3 An employee shall be required to submit to a post-accident test, or test for reasonable cause, as soon as practicable after the accident or incident. If an employee does not submit to a post-accident test, or test for the test or directed may be subject to disciplinary action, up to and including termination, in accordance with Company policy and in accordance with and subject to local applicable laws and regulations.
>
> > **6.4 Periodic Physicals and/or Testing**
>
> > 6.4.1 An employee may be required due to the nature of his occupation to submit to drug and/or alcohol testing or physical as part of the certification process of occupation such as Train Operator and Customer Service Ambassador.
>
> > **7. TESTING METHODOLOGY AND INTERPRETATION**
>
> > 7.1 The Company makes every effort to ensure the integrity and accuracy of each drug or alcohol test conducted pursuant to this policy. These efforts include, among other things:
>
> > (a) procedures to ensure the correct identity of each employee at the time of testing;
>
> > (b) a strict chain of custody procedure to ensure that the employee's specimen is not tampered with by the Company;
>
> > (c) the use of breast testing personnel and approved testing devices and methods;
>
> > (d) the use of laboratories that have been certified by the applicable regulatory agency;
>
> > (e) the confirmation of an initial positive test by a second analysis;
>
> > (f) when applicable, the participation of a qualified Medical Review Officer ("MRO") to review drug test results before they are re