CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5021

Heard in Montreal, March 14 2024

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The Union advanced an appeal on behalf of Locomotive Engineer AB ("The Grievor") of Toronto, Ontario, regarding his dismissal.

JOINT STATEMENT OF ISSUE:

Following a formal investigation, the Grievor was dismissed from Company service on June 27, 2022, for the following:

> "'Train handling that resulted in a 2 car derailment while working H19-04 on May 4, 2022 (where you were the Locomotive Engineer) you submitted to Post-Incident Substance testing on May 4, 2022 to which you had a positive oral fluid test result for cocaine and cocaine metabolite and a positive urine substance test result for cocaine metabolite.'

Formal investigation was conducted on May 24, 2022 and a supplemental investigation on June 17, 2022 to develop all the facts and circumstance in connection with the referenced occurrence. At the conclusion of that investigation it was determined the investigation record as a whole contains substantial evidence that you violated the following:

Summary of Rules Violated:

Book	Section	Subsection	Description
Rule Book for Train & Engine Employees	2	2.1	Reporting for Duty
Rule Book for Train & Engine Employees	2	2.2 (a) (b) (c)	While on Duty
HR Policy	Alcohol and Drug Policy (Canada)		Policy HR 203
HR Policy	Alcohol and Drug Procedures (Canada)		Policy HR 203.1
CROR	General Rules		Rule G

Union's Position:

The Union reserves its right on its positions made throughout correspondence and grievances. The Union will not duplicate all arguments presented in grievances and correspondence but relies on them. The Union stands by all of its positions put forth. The Union reserves its rights to object and respond to any new positions presented by the Company.

AB has been honest and forthright throughout this entire process.

In the response to the step one appeal, Superintendent Therrien quoted from the Company's Drug and Alcohol policy (subject to a separate appeal) wherein he wrote "Disciplinary action up to and including dismissal will be taken where CP has determined that violations of this policy and procedures have occurred." The Union contends in all of the Company's policies, whether the Hybrid Discipline Policy (subject of a separate appeal), and Alcohol and Drug Procedures (subject of separate appeal) state "up to dismissal". The Company has levied the ultimate penalty by immediately assessing discharge without any consideration of mitigating factors.

The 2019 and 2018 Drug and Alcohol policies are under separate appeal and also conflict with the June 16, 2010 agreement.

The Union objects to the investigation appendices that provided the investigating officer quantitative values of the testing results which is against AB's privacy rights as well as the award and supplemental award of Arbitrator Kaplan whereby the company supervisors are only entitled to restriction information, not medical information. This illegal procedure nullifies the discipline in itself.

Furthermore, the incident that led to the testing was considered minor and not significant enough to justify the testing per policy 203.1 and June 16th, 2010 agreement. This was exemplified by the very minor discipline (AOR), assessed to AB by the Company. From the onset, the investigation procedure was unclear as the former and since demoted Assistant Superintendent Ken Gough had confirmed only a possibility for train handling being the cause. Additionally, there was no evidence produced showing if other factors that were not under LE AB's control were possible. The Company arbitrarily determined Mr. AB was at fault and proceeded with alcohol/drug testing without "Just Cause". Additionally, there was no fatality, no injuries, no significant loss to property, no near miss that justified testing as per policy 203.1.

The Union objects to the investigation appendices that provided the investigating officer quantitative values of the testing results which is against Mr. AB's privacy rights as well as the award and supplemental award of Arbitrator Kaplan whereby the company supervisors are only entitled to restriction information, not medical information. This illegal procedure nullifies the discipline in itself.

The Company was afforded its opportunity for a complete investigation on May 24, 2022 and that first investigation was completed in its entirety. Referring to the final question of the first investigation; Q60 – "Are you satisfied in the manner of which this investigation was conducted?". The question was answered, A60- "Let the record speak for itself". This established closure. The investigation was then initialed and signed by the accredited representatives and LE AB confirming that this investigation into the subject matter was duly completed.

At the start of the supplementary investigation, the TCRC Local Chairperson Blake Marquette, rightly objected to the entirety of the investigation stating;

> "The Union vehemently objects to the Company conducting a supplemental investigation as the Company has not introduced any new evidence or information which would substantially alter the first investigation of May 24th, 2022. This is tantamount to double jeopardy. The Union argues the Company is greatly exceeding its managerial rights by undertaking a "do-over" because the sufficiency or lack thereof content of the first investigation. This is contrary to the principal of a fair and impartial investigation".

Company investigating officer Superintendent Therrien provided this response;
“This supplemental investigation will be used to supplement the original investigation which was conducted on May 24th 2022. New evidence has been introduced such as Appendix B as well as appendix C, the latter of which was not available on May 24th 2022”.

The above Company response was an admission that Appendix B was readily available for the first investigation. The Company relies on this three year old document in investigations one on a regular basis and it is always available to the Company. Entry of it as new evidence was an afterthought.

The Company’s entry of Appendix C, “AB’s Company Medical File”, was also entered as new evidence in the second investigation despite the fact that the Company had ample opportunity to expand on question 41 of the first investigation;

Q41; Do you consent to disclose any medical information related to your drug or alcohol use? A41; The Company relied on this question to later unjustly conduct a supplemental investigation.

Our Collective Agreement states: “should any new facts come to light during the course of the investigation, such facts will be investigated and, if necessary, placed into evidence during the course of the investigation”.

Q&A 41 is not an example of a new fact coming to light especially given the fact that AB had already admitted to and explained his 10 year addiction to cocaine and alcohol in question 59 of the first investigation; From the first investigation,

Q59: AB, do you have anything you wish to add regarding this investigation?

A59: I had a long standing issue with cocaine and alcohol use for the last 10 years. Prior to the incident I didn't view it as a problem. I believed it was something I had a hold of. Since the incident occurred, I've had some time to do some self reflection and have come to realize that I have an addiction problem and require assistance. I have taken steps in my recovery such as on May 11th, began to attended NA meetings As per appendix G. On May 13th, I contacted EFAP in order to receive assistance, they got me a counselling session. On May 15th, followed up with EFAP, received an additional counselling session and scheduled appointments for additional sessions. Also on May 15th, I attended an NA meeting. On May 19th received my first scheduled counselling session and have an additional one scheduled for June 2nd, 2022. May 21st, I attended an NA meeting. On May 22nd, contacted EFAP again to request rehabilitation which I am waiting to hear back from them. On May 22nd, I contacted CAMH for rehabilitation and they have reached out to me this morning and completed a screening questionnaire and they set me up with an outpatient program with Compass. I am eagerly awaiting CAMH response. On May 23rd, I went to see an MD to speak about my addiction who referred me to CAMH. On May 23rd once again attended an NA meeting. I have also contacted the renaissance center to enquire about rehabilitation. I've had a long battle with my addictions with Alcohol and Cocaine for the past 10 years. I am making strides towards my recovery. I have abstained from cocaine and alcohol for the past 2 weeks and will continue to do so. I am a proud employee of CP Rail, I take great pride in working here. I realize I have a problem and I'm working to get help. I am hoping I may continue to be a part of CP Rail and contribute to the Company in the future.”

If the Company was so adamant on pursuing the subject of medical files further, they should have done so at first opportunity within the body of the first investigation. If desired, they should have advised of a recess and or postponement to attain the files and enter it accordingly as new evidence at first opportunity.

The Company cannot re-do a statement account they forgot to ask or missed an opportunity to elaborate further on a subject that they later realize was previously only touched on at the first investigation. Supplemental investigations are not for accommodating new ideas borne in hindsight.

It is no surprise that AB’s Company Periodic Medical had shown no admission of addictions and AB of course denied any usage through the years in those files. This is typical

behaviour of any substance user as part of their illness, is denial. This fact is also recognized by the Canadian Human Rights Commission. The medical questions were answered as any person with the disability of addiction unaware or in denial of their ailment would answer.
The Company's own Chief Medical Officer has previously stated, "that reliance cannot be had on employee medical forms since they may lie about substance abuse".

Regardless, the Company clearly pursued multiple questions regarding Mr. AB's medical forms in the second investigation despite the fact that AB already admitted to a 10 year addiction in the first investigation.

A repeat hearing in this case is no more than abuse of managerial rights. The member was being unnecessarily held in this process for the Company's sole benefit as the Company were no more than interrogating to solicit desired responses. This is seen as an attempt to draw out culpability under the guise of so-called "new evidence".

The further information gathered by the Company in the second investigation did not substantially alter any outcome. It simply bought the Company more time to assess discipline.

The Union further contends that this is more about the Company's mismanagement of a file. The 20 days to assess discipline had passed and in desperation, an illegal card under the guise of a supplemental investigation was played.

This abuse of procedure should alone nullify this entire investigation and remove all discipline assessed.

"Disability" as defined by the CHRC means, any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug; (déficience) AB has a disability. The fact that AB had never sought medical consultation, nor did he ever request for an accommodation with the Company prior to the incident, in order to substantiate a medical disability and/or substance use disorder does not mean that he is not inflicted with this disability and ought not be accommodated.

It should be noted that AB's addictions are by no means reflective in his earning ability, work record or loyalty as a CP employee. AB would be considered an above average running trades earner earning $160K plus per year. This compliments his value as an employee but also further validates the disease of addiction's shrewd strength of denial. He was obviously holding it together while in the clutches of addiction, arguably to a fault which has contributed to his demise.
Appendix C of the investigation is an opinion paper dated August 30, 2019 by Dr. Melissa Snider-Adler. First, this is a generic report predating the allegations by near 3 years, therefore stale. This appendix is unfair and biased and ought to be stricken from any proceedings as Dr. Snider-Adler is not an independent medical expert having a business relationship with CP Rail.

In the second investigation, AB was bombarded with medical, scientific toxicology information from Dr. Snider-Adler's report for him to confirm as understood. AB responded honestly to the timelines of his last consumption of cocaine;

Q16: Referring to Appendix B (Dr. Snyder-Adler Response) in summary states that results are not indicative of use 72 hours prior and rather indicate use of cocaine on the same day of the incident. Is this correct? A16: Yes. I don't know the toxicology behind it. I can't explain the levels but have been truthful to the timeline I recounted during the first investigation.

Q17: Provided the information in Appendix B (Dr. Snyder-Adler Response) do you stand by your answer in Q&A 29 of Appendix A that the last use of cocaine was 72 hours prior? A17: Yes I stand by my answer.

The Union further contends the outright discharge of Locomotive Engineer AB for a positive urinalysis and swab is excessive given his length of service, his record and his not being impaired at work.

AB's Human Rights were violated and CP's Alcohol and Drug policy was not correctly followed.

The Union would also like to object and point out the fact that at no time were the crew ever afforded Union representation while their human/collective agreement rights were being violated.

The Union also submits the Revised Alcohol and Drug Policy violates numerous aspects of the June 16, 2010 Agreement with the Company as well as applicable legislation including the *Canadian Human Rights Act*. This includes the requirement that employees who are addicted (and in denial about such) disclose alcohol or drug issues prior to an incident. Additionally, the Union contends the policy is contrary to employees' privacy rights and applicable standards with respect to workplace substance testing as defined in leading arbitral jurisprudence. The results ought to be simply positive or negative when disclosed to the investigating officer.

The Company has failed to take into account that AB was forthright and honest throughout the investigative process. He readily admitted to a 10 year addiction to alcohol and cocaine, and assured that he was not impaired at work.

During the investigation, AB advised that he sought help, yet the Company chose to ignore this and outright dismissed him instead of aiding him in getting him rehabilitation, receive benefits, and/or be accommodated under a return to work accommodation. The Company's own Chief Medical Officer has previously stated, "for example, the CMO noted that 10 % of employees will have a substance use disorder. In addition, the CMO commented that a job termination can lead to financial and other stressors which may lead to a substance use disorder. Comments were also made that reliance cannot be had on employee medical forms since they may lie about substance abuse".

Furthermore, the Company both publicly and internally calls all employees at CP as being part of a "family". The Union believes that if this is in fact true, AB, having been with CP for over fourteen years, ought to be given an opportunity to prove he has learned from this incident. Furthermore, AB would agree to measures to protect the Company's legitimate interest.

Human beings are not always aware of disability nor dependence. Unfortunately, it took this incident for AB to realize he was on a very destructive path. He since continues to be very active in his recovery attending AA and NA and he is still trying to get into a treatment centre.
Curtis has taken ownership and accountability and has made tremendous strides in his rehabilitation and recovery. He has completed the Compass Recovery Program through CAMH, the Early Recovery Group Program, attended hundreds of NA meetings and continues to do so, many AA meetings, worked with EFAP, completed a confidential wellness and recovery support program for alcohol and drugs known as "Breaking Free" by Lifeworks, and much more, and has found employment. He has taken the steps and has proven that he ought to be reinstated with CP.

AB has made the very best of a bad situation and he has completely turned his life around but also knows, understands and wants to keep progressing so that he will never fall into the clutches of addiction again, one day at a time. He is and remains substance free at this time.
AB has tracked and continues to track all the NA/AA meetings he has attended. This information and the Breaking Free Certificate of completion are both readily available to CP and or the Arbitrator.

AB has found employment since his dismissal which exemplifies his hard working character and fitness to work.

AB is well respected amongst his peers and the Union hopes the Company will provide the opportunity for him to return as a member of the CP family.

For all of the reasons and submissions set forth in the Union's grievances, which are herein adopted, the Union requests that AB be reinstated to his position of Locomotive Engineer, and he be compensated all loss of wages with interest, benefits, and without loss of seniority or pensionable service. If needed, the Union further requests AB be accommodated as per Company Policy for Workplace Accommodation, the Canadian Human Rights Act, The Commission's

Workplace Accommodation, and the policy requirements under CHRC. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

Company Position

The Company disagrees and denies the Union's request.

The Company maintains that discipline was assessed after a fair and impartial investigation and a review of all factors, including those the Union describe as mitigating. The Company held a fair and impartial investigation in accordance with the collective agreement. It appropriately introduced evidence and allowed the Grievor the opportunity to respond, accordingly. None of the evidence introduced was improper but rather, objective facts. The Company was within its right to conduct a supplemental investigation when new information was brought forward by the Grievor in the initial investigation.

The Company maintains that quantitative values of the testing results did not infringe on the Grievor's privacy rights. With respect to the Union's allegation of the June 16, 2010 Agreement being in violation, the Company maintains it did not enter into any Agreement which would restrict its ability to make future change or introduce a new policy, particularly in the area of Alcohol and Drugs, which is an ever changing area in law. The Company maintains the parties have both recognized that this agreement is no longer in effect.

The Company maintains it had grounds to post incident test, in accordance with Company Policy and Procedures and arbitral jurisprudence. Following a train handling violation that resulted in a derailment, the Grievor was properly subject to Post Incident testing in accordance with Company Policy and Procedure, where his results came back positive in his oral fluid and urine for cocaine and cocaine metabolite.

The Grievor held a Safety Critical Position and confirmed he knew and understood the Company's Alcohol & Drug Policy and Procedures. He confirmed that he had an alleged substance abuse problem for at least 10 years but never disclosed this in his Safety Critical periodic medical assessments prior to the incident.

The Grievor was well aware that under the Company's Alcohol & Drug Policy and Procedures it is prohibited for employees to report for duty while under the effects of banned substances. The Grievor not only blatantly disregarded the Company's Drug & Alcohol Policy and Procedures, but he put himself, his colleagues and the general public at risk when he chose to attend work unfit. The fact remains that his explanation for his positive post incident results do not align with medical expert opinion of the data.

The Company's Alcohol and Drug Policy and Procedures are clear that employees must disclose a substance abuse problem before a workplace incident occurs and that disclosure after an event will not prevent an employee from being subject to discipline up to and including dismissal. The Grievor had a responsibility to notify the Company before an incident occurred.

The Company maintains no violation of the duty to accommodate occurred as the Grievor never sought medical consultation, nor did he ever request for an accommodation from the Company prior to the incident, in order to substantiate any alleged medical disability and/or substance use disorder.

The Company maintains the discipline assessed was appropriate, warranted and just in all the circumstances. There has been no violation of the collective agreement, the Canadian Human Rights Act, the Alcohol and Drug Policy and Procedure nor any other policy nor agreement. Accordingly, the Company cannot see a reason to disturb the discipline assessed and requests the Arbitrator be drawn to the same conclusion.

FOR THE UNION:
(SGD.) E. Mogus
General Chairperson

FOR THE COMPANY:
(SGD.) F. Billings
Assistant Director, Labour Relations

There appeared on behalf of the Company:

D. Zurbuchen	– Manager Labour Relations, Calgary
F. Billings	– Assistant Director, Labour Relations, Calgary
S. Scott	– Manager, Labour Relations, Calgary

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
E. Mogus	– General Chairperson, LE-E, Oakville
A. B.	– Grievor, Toronto *Via Zoom*

AWARD OF THE ARBITRATOR

Anonymization

1. The Union has requested anonymization, given the personal health details which will be examined. The Company has not objected, and accordingly the grievor will be referred to as "AB".

Context and Issues

2. The grievor had some fifteen years of seniority when he was dismissed. His discipline record was somewhat mixed, but he did have multiple lengthy periods of discipline free service.

3. The Parties, in a very helpful and efficient manner, have agreed that there is no dispute about the following issues:

i. The grievor was impaired at the start of his shift;

ii. There was a fair and impartial investigation.

4. The Parties have further agreed that the only issues to be decided are as follows:

A. Was the Company justified in dismissing the grievor?

B. Was there a duty to accommodate the grievor, and if so, was this duty met?

A. Was the Company justified in dismissing the grievor?

5. The grievor occupied a safety critical position as a Locomotive Engineer. On May 4, 2022, there was a 2-car derailment, following which the grievor was tested. The oral

swab and urine tests showed positive results for cocaine and cocaine metabolites. The grievor has admitted that he was impaired from the use of cocaine at the start of his shift.

6. CROA jurisprudence is consistent that going to work impaired will result in dismissal, in the absence of very compelling mitigating factors.

7. As Arbitrator Moreau noted in **CROA 4707**:

> "The evidence in this case is clear that the Grievor **tested positive for cocaine in <u>both</u> his urine test and the oral swab shortly after the incident…**
>
> I conclude with the comment that cocaine is an illegal substance which can easily lead to devastating health and addiction consequences. **To uphold the grievance in the face of the clear evidence that the Grievor willingly took cocaine prior to starting work would be both contrary to recent arbitration awards of this Office and send the wrong signal to other employees in safety-sensitive positions who deliberately consume a toxic drug like cocaine before reporting for duty." (Emphasis added)**

8. Arbitrator Schmidt in **SHP 726** was equally explicit:

> "An individual in the grievor's position who causes himself to become impaired on the job merits the most severe discipline, absent very compelling mitigating factors. Not only was the grievor impaired, I must conclude that he has been dishonest about when he had last used marijuana and about his denial of cocaine use. The Company's decision to discharge the grievor in these circumstances was entirely appropriate and should not be disturbed."

9. Arbitrator Cavé in **CROA 4798** also upheld the dismissal of a Locomotive Engineer who had a positive post- incident test for cocaine:

> 63.In this case, the Grievor chose to report to work while impaired from the use of an illicit drug, rather than booking unfit. She performed her safety-critical duties while impaired, moving from the acute intoxication phase (the "high") when she reported for duty to the early residual impairment phase (the "crash") at the time of post-incident testing, approximately seven hours later.
>
> 64.Considering the severity of the Grievor's actions and the significant aggravating factor (lack of honesty), notwithstanding her very long service and good disciplinary record, the decision to terminate the Grievor was reasonable. It would not be appropriate to substitute a lesser penalty in the circumstances.

10. Here, in the absence of the mitigating factors discussed below, I would have found that by being impaired on the job, the grievor breached CROR Rule G, HR Policy 203 and Procedures 203.1 and Rule Book for Train and Engine Employees 2.1 and 2.2, and dismissal would be appropriate.

B. Was there a duty to accommodate the grievor, and if so, was this duty met?

11. In his May 24, 2022 investigation, the grievor revealed for the first time that he had a substance abuse problem:

> **Q50: Are you familiar with Policy HR203.1 Item 3.2.2 as it reads?**
> **3.2.2 Disclosure and Requests for Assistance**
> The Company recognizes that substance use disorders are medical conditions and that early intervention and ongoing monitoring and accountability greatly improves the effectiveness and success of treatment.
>
> Employees who suspect they have a substance use disorder, an emerging issue or problem related to alcohol and/or drugs, or restrictions and/or limitations related to alcohol and/or drugs, are required to report, seek assistance, and to access and follow appropriate treatment promptly before a workplace incident occurs, an investigation is initiated, a violation of the Policy or Procedures occurs, or before unsafe or unsatisfactory job performance is identified. Subsequent disclosure or requests for assistance after an event (as detailed above) will not prevent an employee from being subject to an investigation and discipline up to and including dismissal, and failure to disclose may result in disciplinary action up to and including dismissal.
>
> Employees are encouraged to access assistance through the Company's Employee and Family Assistance Program (EFAP), CP Health Services, their treating physician, or Appropriate community services for help with any issue or problem that may affect their safe work performance. EFAP is a valuable resource in assisting employees who suspect they may have a substance use disorder or an emerging issue or problem related to the use of alcohol and/or drugs.
>
> **A50:** Yes. Prior to the incident I didn't think I had a substance abuse problem. I now realize I should have reached out prior to the incident.
>
> Q59: Mr. AB, do you have anything you wish to add regarding this investigation?
>
> A59: I had a long standing issue with cocaine and alcohol use for the last 10 years. Prior to the incident I didn't view it as a problem. I

> believed it was something I had ahold of. Since the incident occurred. I've had some time to do some self reflection and have come to realize that I have an addiction problem and require assistance. I have taken steps in my recovery such as on May 11th I began to attended NA meetings As per appendix G. On May 13th I contacted EFAP in order to receive assistance, they got me a counselling session. On May 15th I followed up with EFAP, I received an additional counselling session and scheduled appointments for additional sessions. Also on May 15th I attended an NA meeting. On May 19th, I received my first scheduled counselling session and have an additional one scheduled for June 2nd 2022. May 21st attended an NA meeting. On May 22nd I contacted EFAP again to request rehabilitation which I am waiting to hear back from them. On May 22nd I contacted CAMH for rehabilitation and they have reached out to me this morning and I completed a screening questio1maire and they set me up with an outpatient program with compass. I am eagerly awaiting CAMH response. On May 23rd I went to see an MD to speak about my addiction who referred me to CAMH. On May 23rd I once again attended an NA meeting. I have also contacted the renaissance center to enquire about rehabilitation.
>
> I've had a long battle with my addictions with Alcohol and Cocaine for the past 10 years. I am making strides towards my recovery. I have abstained from cocaine and alcohol for the past 2 weeks and will continue to do so. I am a proud employee of CP Rail, I take great pride in working here. I realize I have a problem and I'm working to get help. I am hoping I may continue to be a part of CP Rail and contribute to the company in the future (underlining added).

12. Prior to this, the grievor had repeatedly denied having a drug or alcohol problem to both his own doctors and to the Company (see Tab 4D, Company documents, Q and A 21-30).

Position of the Parties

13. The Company argues that this failure to disclose over a ten year period constitutes dishonesty striking at the heart of the employment relationship.

14. It argues further that the Union has failed to establish a nexus between the medical issue and the failure to disclose.

15. Finally, it argues that the post incident evidence does not displace the undue hardship that would be caused by any attempt to accommodate the grievor through a return to work.

16. The Union argues that AB had a disability at the time of the incident and that it was discriminatory for the Company to terminate his employment. It argues that the Company had a duty to accommodate the grievor up to the point of undue hardship, which has not been established. It argues that the extensive and sustained efforts in rehabilitation, together with the successful results obtained, weigh in favour of a substitution of penalties, with the grievor being reinstated on terms which will protect the interests of all parties.

17. The Union submits that the jurisprudence has recognized that addicts deny, lie and conceal to cover up their addictions. It notes that a failure to disclose is not an articulated ground in the termination notice.

Analysis and decision

18. Drug addiction has long been recognized as a disability under s. 3(1) of the Canadian Human Rights Act. As Arbitrator Picher noted in **CROA 2716:**

> "Both legislation in Canada, such as the Canadian Human Rights Act, and an extensive body or arbitral jurisprudence, clearly recognize that alcoholism and drug addiction are a form of illness, and are to be treated as such".

19. Section 15(2) of the Canadian Human Rights Act recognizes that a refusal to continue to employ an individual based on their disability is not discriminatory, if it can be established that: "accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost".

20. In order for the obligation to accommodate to arise, the complainant must first establish that there was a prima facie case of discrimination. As held by the Supreme Cour of Canada in Stewart v. Elk Valley Coal Corp. 2017 SCC 30:

> (24) To make a case of prima facie discrimination, "complainants are required to show that they have a characteristic protected from discrimination under the Human Rights Code…; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact"

21. As Arbitrator Clarke noted in **CROA 4667**:

> 20. The Court concluded (U-1; TCRC Brief; Tab 24): THE COURT: **It is clear that Mr. Paisley suffers from an alcohol addiction, and he is need of curative treatment.** I'm satisfied that he has approached the matter of sobriety and curative treatment in a genuine way with intentions to be successful in managing alcoholism. One never is cured. And if successful can live a – a good life without alcohol.
> And I'm satisfied by the dedication that Mr. Paisley has shown that it is not contrary to the public interest to grant a curative discharge. And I do so and invite the Crown to recommend the terms of a probation order. (sic)
> (Emphasis added)
> 21. The Court granted LE Paisley a curative discharge, but subject to a one-year probation period. As noted in the JSI, a Prohibition Order prevents LE Paisley from operating a vehicle or rail equipment until May 22, 2019.

22. For the reasons that follow, I find that the Union has made out a prima facie case of discrimination.

23. Firstly, it is clear that AB had a serious and long standing substance abuse issue. In the referral to CAMH, his family doctor identified the following:

> "Please can you see for addiction support.
> 10+ years of ETOH heavy use-30-40 units/wk
> 10 years of regular cocaine use 2-4 g/wk" (Tab 6, Union documents).

24. In a recent medical note, Dr. Bal notes:

> "AB was seen at the Michael Garron Hospital Rapid Access Addiction Medicine Clinic on January 30, 2024, and will be followed here on a regular basis going forward. He meets the criteria for Stimulant Use Disorder and Alcohol Use Disorder and is now in sustained remission." (Tab 27, Union documents, underlining added).

25. It was not contested that AB has a disability and based on the above, I so find.

26. Secondly, there was an adverse impact on AB, as his employment was terminated.

27. Thirdly, I find that his disability was a factor leading to the adverse impact. AB was addicted to alcohol and cocaine, which led to his consumption of cocaine prior to his shift on May 4, 2022, and his impairment while at work. This impairment was a breach of multiple safety Policies, which led to his termination.

28. Accordingly, I find that the Union has made out a prima case of discrimination, based on the disability of AB.

29. The true issue between the Parties is whether the Company has accommodated the grievor to the point of undue hardship. The burden of proof is on the Company.

30. The Company strongly argues that the railway industry is a highly dangerous one, where an impaired employee endangers himself, fellow employees, the public and the Company. It argues that its mandatory Alcohol and Drug Policies are present and require the disclosure of substance abuse issues before an incident (see paras 54-66, Company brief).

31. The Union argues that the CROA jurisprudence establishes that where proof is made of substantial efforts towards rehabilitation, addicted grievors are reinstated on terms which protect all parties (see, for example, **CROA 4094**).

32. The Union argues that AB has made very substantial efforts to rehabilitate himself and should be reinstated, with an order protecting the interests of all parties.

33. The Union notes that the denials of substance issues by the grievor are a function of the disability, as has been held by CROA arbitrators and as recognized by the Company's own Chief Medical Officer.

34. In **CROA 4652**, Arbitrator Sims reviewed the CROA jurisprudence in light of the Elk Valley decision:

> Earlier CROA cases make it clear, a claim of addiction in no way entitles an employee to an opportunity of further employment. But,

> with sufficient evidence of rehabilitation efforts and robust protections for the safety interests of the Employer, as well as if co-workers and the public, such an option can be assessed in the spirit of accommodating a disability. This consideration, either under the Elk [Valley] approach, or the existing CN policies, is not automatically precluded by CN's argument that "it was incumbent on him to seek help prior to the incident" (underlining added).

35. I find that the Union has adduced very substantial evidence of the rehabilitation efforts of AB. These efforts include:

a) Counselling sessions through the Employee and Family Assistance Program (5 sessions);
b) CAMH's Concurrent Outpatient Medical and Psychosocial Addiction Support Service (COMPASS) (May 30-August 19,2022);
c) CAMH's Early Recovery Group (6 sessions);
d) Attendance at NA meetings, often multiple times per week (see Tabs 16,19,24,25, Union documents);
e) Lifeworks Breaking Free (see Tab 20, Union documents).

36. The evidence is clear that the rehabilitation efforts of AB have been serious and sustained. This matter is unlike the efforts referred to in **CROA 4392.**

37. These efforts have also been successful in maintaining the sobriety of AB. Dr. Bal noted that he is now in "sustained remission" from his disorders (see Tab 27, Union document). It is also noteworthy that the grievor obtained three months after his dismissal, and continues to hold, a safety sensitive railway job, having passed a pre-employment drug test (see Tab 47, Union documents).

38. The fact that the grievor was dishonest with respect to his substance abuse issues is troubling, but not surprising. Multiple arbitrators have noted that addicts deny and lie to cover up their addictions. As Arbitrator Stout noted in **CROA 4347**:

> Turning to the merits of the case, the grievor tested positive and admitted to using cocaine while off duty on the evening of February 24, 2012. The grievor also provided false and misleading information during the investigation into his positive drug test. However, the grievor

> provided some of the information to the Company during the investigation that he was not required to disclose. Furthermore, not being entirely honest is part and parcel of the grievor's disability (addiction).
> The evidence provided by the Union is compelling. It demonstrates that the grievor suffered from a disability (an addiction) when he was terminated.

39. Arbitrator Knopf noted that a requirement to disclose may not be possible:

> It is unreasonable to apply a blanket policy requiring disclosure of drug or alcohol dependence when, by definition, the dependency may be a factor that prevents the disclosure. At the same time, we appreciate the Policy's objective of ensuring that people with substance abuse problems are identified and offered assistance, long before an incident occurs. Ideally, this will help to prevent accidents and facilitate rehabilitation services to those in need. However**, it is too categoric to declare that it is reasonable to expect employees to reveal substance abuse addiction prior to an incident. Substance abuse is very often the result of addiction. Addiction is a recognized disability. "Denial" is a hallmark of the condition. Someone who suffers from addiction is often unable to reveal or recognize their problem. This brings into play the *Human Rights Code*'s protections against discrimination on the basis of disability**. Therefore, it is not reasonable to expect every employee to reveal substance abuse or addictions prior to an incident.
> (Tab 37, Union documents, emphasis added)

40. Arbitrator Stout noted that the prejudice to the Company caused by this dishonest behavior can be dealt with by not awarding compensation (see **CROA 4347**).

41. I find therefore that the grievor has demonstrated substantial efforts in his rehabilitation efforts. These efforts have been obviously successful, as demonstrated by his current safety sensitive employment and the opinion of his treating addiction specialist that he is now in sustained remission.

42. CROA jurisprudence is replete with examples of addicted employees, who have shown strong evidence of rehabilitation, being reinstated on strict terms to ensure continuing sobriety (see **CROA 4059**, **CROA 4094** and **CROA 4347**). Many of the cases cited by the Company deal with grievors who have not established that they have an addiction (see **CROA 4527**, **CROA 4762**, **AH 638** and **AH 663**), or have not shown

successful rehabilitation (see **CROA 4527**). Neither of those conditions is present here, the grievor having an addiction and having shown clear evidence of rehabilitation.

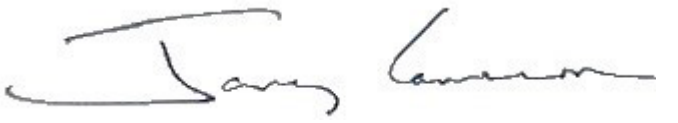
43. In **CROA 4873** I found the evidence of rehabilitation submitted by the grievor was reinforced by the fact that he had obtained work in a safety critical role. Here, the grievor has found work in a safety sensitive role, which involved pre-employment testing. Such evidence is a strong indication that reinstatement here would not amount to undue hardship.

44. Accordingly, I find that AB should be reinstated without loss of seniority, but without compensation.

45. I remit to the Parties the issue of what protective orders are necessary in order to insure no further incidents involving impairment.

46. I remain seized with respect to this issue as well as to any issues of interpretation or application.

May 22, 2024



JAMES CAMERON
ARBITRATOR