

**CANADIAN RAILWAY OFFICE OF ARBITRATION  
& DISPUTE RESOLUTION**

**CASE NO. 5088**

Heard in Montreal, October 9, 2024

Concerning

**CANADIAN PACIFIC KANSAS CITY RAILWAY**

And

**TEAMSTERS CANADA RAIL CONFERENCE**

**DISPUTE:**

Appeal of the dismissal of Conductor M. Barron of Brandon, MB

**JOINT STATEMENT OF ISSUE:**

Following a formal investigation, Conductor Barron was dismissed on June 30, 2023, for the following:

“A formal investigation was conducted on June 20, 2023, in connection with “your alleged Conduct Unbecoming while staying in CPKC supplied accommodations for Locomotive Engineer training in Calgary”. At the conclusion of the investigation, your culpability was established that your conduct was unbecoming on June 10 & 11, 2023 while staying in CPKC supplied accommodations for Locomotive Engineer training in Calgary, AB.

A violation of:

- Policy 1300 Workplace Discrimination & Harassment in the Workplace
- Code of Business Ethics
- HR203 Alcohol and Drug Policy
- HR203.1 Alcohol and Drug Procedures
- HR203.2 Alcohol and Drug Assistance”

**UNION'S POSITION:**

For all the reasons and submissions set forth in the Union's grievances, which are herein adopted, the following outlines our position.

The Union contends the Company's failure to respond to the Step One and Two appeals is a violation of Article 40.03 of the Collective Agreement and the Letter Re: Management of Grievances & the Scheduling of Cases at CROA.

The Union contends that the investigation was not conducted in a fair and impartial manner under the requirements Article 39.05 of the Collective Agreement. For these reasons, the Union contends that the discipline is *void ab initio* and ought to be removed in its entirety and the grievor be made whole.

The Union contends the Company has failed to meet the burden of proof or establish culpability related to the allegations outlined above.

The Union contends the Company has failed to consider mitigating factors contained within the record.

The Company has failed to address Mr. Barron's diagnosis of a disability resulting in addiction. Mr. Barron made the Company aware of his diagnosis prior to and inside of the investigation. Mr. Barron asked for help from the Company with his disability but the only action the Company took was to dismiss him. In doing so, the Company has discriminated against Mr. Barron by failing to address his recognized disability that is protected under Canadian Human Rights. The Company failed to accommodate Mr. Barron and his condition.

The Union contends the discipline assessed is discriminatory, arbitrary, unwarranted, unjustified, and excessive in all the circumstances. It is also the Union's contention that the penalty is contrary to the arbitral principles of progressive discipline.

The Union requests that the discipline be removed in its entirety, and that Mr. Barron be reinstated without loss of seniority and benefits and be made whole for all associated loss with interest. 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 culpability was established through the fair and impartial investigation and that discipline was determined following a review of all pertinent factors, including those that Union describe. The Company's position continues to be that the discipline assessed was just, appropriate, and warranted in all the circumstances.

In regard to the Union's contentions that the Company has failed to accommodate the Grievor, the Company maintains that no such violation has occurred. The Grievor did not raise any concerns or medical with the Company in order to substantiate any alleged medical disability and/or substance use disorder nor did he communicate he may have a problem until after an incident occurred.

As such, the Company maintains that the Grievor was rightfully dismissed given the circumstances and that the dismissal should not be disturbed.

**For the Union:**  
**(SGD.) D. Fulton**  
General Chairperson

**For the Company:**  
**(SGD.) F. Billings**  
Director, Labour Relations

There appeared on behalf of the Company:

F. Billings	- Director, Labour Relations, Calgary
S. Oliver	- Manager, Labour Relations, Calgary

And on behalf of the Union:

M. Church	- Counsel, Caley Wray, Toronto
D. Fulton	- General Chairperson, CTY-W, Saskatoon
J. Hnatiuk	- Vice General Chairperson, CTY-W, Saskatoon
D. Holleman	- Local Chairperson, Brandon <i>via</i> Zoom
M. Barron	- Grievor <i>via</i> Zoom

### **AWARD OF THE ARBITRATOR**

1. The grievor, who had 4.5 years of seniority as a Conductor, was dismissed in June 2023 as a result of Conduct Unbecoming, while staying in Company supplied accommodations in Calgary for Locomotive Engineer training.

2. At issue between the Parties is whether the grievor's very poor behaviour can be explained by an addiction to alcohol, whether the Company has met its duty to accommodate, and whether termination or some lesser discipline is appropriate in the circumstances.

### **3. Issues**

- A.** Did the grievor have Conduct Unbecoming a CPKC employee?
- B.** Has the Union established a prima facie case of discrimination?
- C.** Was there a duty to accommodate the grievor, and if so, was this done?
- D.** What is the appropriate remedy?

#### **A. Did the grievor have Conduct Unbecoming a CPKC employee?**

##### **Position of Parties**

4. There is little dispute that the grievor was heavily intoxicated and behaved in a highly rude and belligerent manner to hotel staff, and to constables of CPKC Police and Calgary Police Services.

##### **Analysis and Decision**

5. The factual basis for the charge of Conduct Unbecoming is set out at paragraphs 6-15 of the Company Brief:

6. The Grievor was attending Locomotive Engineer Training in Calgary, AB and staying in Company provided accommodations at the Glenmore Inn and Convention Centre.

7. On June 10, 2023 at approximately 0300, the Grievor was in the hotel hallway and was asked by hotel security personnel Darrell McLaren to continue his conversation inside the room as there had been a noise complaint.

8. 20 minutes later, the Grievor came to the front desk and asked Night Auditor Nordness if he could get into his room (107) as he was locked out. He had no identification on his person so he was escorted to his room by Mr. McLaren who validated his identity and allowed him into his room without incident.

9. At approximately 0400 the Grievor returned to the front desk complaining that Mr. Nordness was not doing his job correctly and

that he had not provided him with new key cards for his room. At that time Mr. Nordess stated that the key card in the Grievor's room was still active and should work. The Grievor then asked to speak to a Manager as he was not happy with the service and wanted his money back. Mr. Nordess informed him that Canadian Pacific Railway had paid for the room. Mr. Nordess then made new key cards for the Grievor's room.

10. Despite Mr. Nordess making him new key cards, the Grievor stated "what kind of hotel do you run here?". It was at this time Mr. McLaren stepped in and tried to reason with the Grievor informing him that the key cards he was previously given were working and that here is no problem with the keys. The Grievor became verbally abusive towards Mr. McLaren and started taking pictures and videos of he and Nordess while also threatening to have Mr. Nordess fired and repeatedly asking why he had not been given new keys.

11. Mr. McLaren asked the Grievor to leave the lobby and return to his room however the Grievor refused to do so, and the CPKC Police, who were located at CPKC Headquarters a few minutes away, were called. At approximately 0420 Constable Krahenbil of the CPKC Police arrived and he and the Grievor went outside to have a discussion.

12. Following this, the Grievor and Constable Krahenbil entered the lobby and the Constable asked the Grievor to apologize as well as return to his room for the night however he would not comply. At 0455 the Calgary Police Service (CPS) were called to assist in evicting the Grievor from the property. The Grievor was then escorted back to his room by CP

KC Constable Krahenbil to pack up his things.

13. At approximately 0510, Calgary Police Service (CPS) Constable Nakamru arrived to assist with the removal of the Grievor from the hotel. While assisting with the removal of the Grievor, CPKC Constable Krahenbil picked up the Grievor's luggage and placed it in the hallway. It was at this time the Grievor demanded CPS arrest the CPKC Constable for theft. CPS then informed the Grievor that they would not be arresting the CPKC Constable.

14. At 0515, the Grievor exited the hotel with his luggage and was directed to go to the edge of the parking lot and not enter the property again or he would be charged with trespassing. While the Officers walking away, the Grievor threatened to kick their ass and yelled "pigs, pigs, fucking pigs".

15. Later that morning, the Grievor was provided with a taxi to the airport and a flight home however he arrived too late to the airport so the airline would not let him board. As such, he was booked on

another flight and he secured accommodation in the meantime. Later that evening the Grievor reached out to the Company stating that he was in a bad way and threatened self harm. The CPKC Police were then contacted to assist with the situation which they were able to de-escalate and the Grievor returned home the following day. A copy of Trainmaster James Horst's memo which outlines the events following the initial incident at the Glenmore Inn can be found at Tab 5.

6. The facts set out in paragraphs 25-35 and 38-44 of the Union Brief do not substantially differ from those put forward by the Company.

7. Indeed, the grievor admits that he was intoxicated when dealing with Hotel Security (Q and A 20), calling the CPS and CPKC Police "Pigs, Pigs, fucking pigs" (Q and A 38), was removed by the Police as he was rude and belligerent (Q and A 42), and was in fact rude and belligerent to hotel staff and police services ( Q and A 43).

8. Policy 1300 Workplace Discrimination and Harassment in the Workplace sets out the following:

**Harassment**

Harassment is any conduct based on any of the grounds listed above that offends or humiliates and is a type of discrimination.

Personal harassment is behavior that is inappropriate and offensive but is not related to the grounds listed under the Canadian Human Rights Act. However, it is prohibited under this Policy as well as under CP's Code of Business Ethics and will not be tolerated.

Harassment may take many forms, including:

- **Threats**
- **Intimidation**
- **Verbal abuse**
- **Bullying**
- **Unwelcome remarks**
- **Name calling**
- Inuendo
- Derogatory or degrading remarks regarding gender or sexual orientation
- Offensive, inappropriate material
- Hate literature
- Offensive jokes

Harassment is unacceptable not only during working hours and on Company premises, but also in work-related settings such as conferences, business trips and social events.

9. The Code of Business Ethics also deals with Harassment in the Workplace:

**RESPECTFUL WORKPLACE & HUMAN RIGHTS**

Employees must ensure a work environment free of discrimination, harassment and violence, in all forms, and where individuals are accorded equity in employment processes, procedures and practices based on merit and ability. CP and its employees will comply with applicable human rights legislation.

CP is committed to providing and maintaining a work environment that promotes and protects fundamental human rights and supports the dignity of all individuals and will make every effort to ensure that no one at CP is subjected to discrimination, sexual or other forms of personal harassment or violence in the workplace. Such conduct will not be tolerated at any level.

10. There can be little doubt that the behavior of the grievor constituted Harassment, being all of the highlighted forms of Threats, Intimidation, Verbal abuse, Bullying, Unwelcome remarks and Name Calling. As Harassment has been found while staying at a Company supplied hotel while on training, it also constitutes a breach of the Code of Business Ethics.

11. The Company relies on **AH 704** where similar behavior at the same hotel, undergoing the same training, resulted in termination being upheld by Arbitrator Moreau. It also relies on **AH 736**, where the termination of an employee who had engaged in harassment and Conduct Unbecoming was upheld by Arbitrator Clarke.

12. If the facts in this case were substantially similar to those in the two cited cases, I too would be inclined to dismiss the grievance. In **AH 704** and **AH 736** it is noteworthy that there were findings that accommodation was not required, as no disability had been established. Disability and accommodation in this matter will be explored below.

## **B. Has the Union established a prima facie case of discrimination?**

### **Position of Parties**

13. The Company argues that there can be no discrimination, as the grievor did not disclose any alcohol dependency prior to the incident which resulted in his dismissal.

14. The Union argues that addicts commonly lie, both to themselves and to others, about their addiction. Indeed, this deceit forms part of the illness, and cannot be held against the addict.

15. The Union submits that it has shown sufficient evidence to establish a prima facie case of discrimination.

### **Analysis and Decision**

16. The *Canadian Human Rights Act* sets out that it is a discriminatory practice to refuse to continue to employ an employee on the basis of a prohibited ground of discrimination:

#### **Prohibited grounds of discrimination**

3 (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.

#### **Denial of good, service, facility or accommodation**

5 It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public

(a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or

(b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination

#### **Employment**

7 It is a discriminatory practice, directly or indirectly,

(a) to refuse to employ or continue to employ any individual, or

(b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.

17. Alcohol 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 of arbitral jurisprudence, clearly recognize that alcoholism and drug addiction are a form of illness, and are to be treated as such”.

18. However, for a grievor to be entitled to the protections of a duty to accommodate, the Union must first establish a prima facie case of discrimination. As held by the *Supreme Court 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”

19. In **CROA 4667**, Arbitrator Clarke applied the SCC jurisprudence to the case of a Locomotive Engineer with an alcohol addiction, found to be impaired on the job:

“41. In applying the principles from these SCC decisions, the arbitrator has concluded that the TCRC met the three elements needed to demonstrate prima facie discrimination in this case. The evidence in the record reveals that i) LE Paisley suffered from alcohol addiction; ii) he suffered an adverse impact when he lost his employment and iii) that his alcoholism was a factor leading to this adverse impact.”

20. In this matter, the grievor has testified that he had too much to drink while staying at a Company supplied hotel, and that he has a substance abuse problem with alcohol:

Q58: Referring to the audio in Appendix eight, 04m50s into the Audio you admit to the last two days was “Nothing but Booze”, is this correct?

A58. Yeah I was drinking Friday into Saturday

Q59. Referring to Appendix eight, you mentioned you would need help with alcohol, is this correct?

A59. Yes.

Q60. Do you have a substance abuse problem with alcohol?

A60. I believe I do



Q61. Referring to Appendix five, HR203 Alcohol and Drug Policy Item 2.3 States: *Employees are prohibited from being in control of a CPKC vehicle, railway equipment or moving equipment, (whether on or off duty), or any vehicle on CPKC property or roads, while under the adverse effects of alcohol and/or drugs.*

Is this correct?

A61. Yes

Q62. Were you under the influence of Alcohol, while staying in CPKC Supplied accommodations for a business trip, more specifically Locomotive Engineer Training?

A62. Yes. (underlining added)

21. Indeed, the grievor had sought help with his family doctor prior to his trip to Calgary (see Q and A 68) and was given a diagnosis of “Alcohol use disorder, severe” by Dr. Beaupré of Lifeworks within two days of the incident (see Tab 8, Union documents).

22. There can be little doubt that the grievor’s alcohol disorder led to his very poor behavior while in Calgary. As the grievor testified during his investigation:

Q.49: Why were you so disrespectful and subsequently leading to harassing Policy Officers and Hotel Staff?

A. because I messed up and gave into temptation, I had too much to drink and the situation escalated.

Q.76: Do you have any closing comments you wish to add to this investigation?

A. I would like to sincerely apologize for my behavior, if I had not been drinking none of this would have happened.

23. The employment of the grievor was terminated because of his behaviour in Calgary for “Conduct Unbecoming” (see Tab 5 Union documents).

24. Thus, as with the reasoning of Arbitrator Clarke in **CROA 4667**, I conclude that i) Conductor Barron suffered from alcohol addiction; ii) he suffered an adverse impact when he lost his employment and iii) that his alcoholism was a factor leading to this adverse impact. As such, the Union has made out a prima facie case of discrimination.

25. I therefore conclude that the Union has made out a prima facie case of discrimination.

### **C. Was there a duty to accommodate the grievor, and if so, was this done?**

#### **Position of the Parties**

26. The Company argues that the duty to accommodate does not arise, as the grievor failed to identify an addiction issue prior to the incident.

27. The Union argues that the duty to accommodate arises as soon as the Union has met its burden of proof to establish a prima facie case of discrimination. When this is done, the Company then bears the burden to show that accommodation could not take place without undue hardship. The Company has not led evidence of any efforts to accommodate.

#### **Analysis and Decision**

28. The Company notes that the grievor failed to disclose any drug or alcohol issue, despite undergoing two SAPs. The Company relies on HR Policy 203, which states:

2.8 Employees who voluntarily request assistance with an alcohol and/or drug use problem will not be disciplined or dismissed for requesting assistance. However, this voluntary request and disclosure must be made before a workplace incident occurs, an investigation is initiated, a violation of the Policy and Procedures occurs, and before unsafe or unsatisfactory 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(s) and discipline up to and including dismissal.

29. I cannot agree with the Company argument that there can be no discrimination, unless the employee discloses his addiction prior to any incident. As Arbitrator Knopf decided in **Unifor Local 900 and Imperial Oil-Drug and Alcohol Policy Grievance**:

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.

30. I came to a similar conclusion in **CROA 5021**, writing that: "Multiple arbitrators have noted that addicts deny and lie to cover up their addictions."

31. The fact that the grievor here did not disclose his alcohol addiction prior to the incident does not mean that he does not have an addiction. Denial of the addiction is part of the illness.

32. The Company has not led evidence to show that accommodation was not possible without undue hardship. Instead, it chose to rely on the legal argument that accommodation did not arise, as there had been no disclosure pre-incident. In my view, while disclosure is to be encouraged by all Parties, it is not a prerequisite to the existence of a duty to accommodate. As the SCC noted in **Elk Valley**:

"To make a claim for discrimination under the Act, the employee must establish a prima facie case of discrimination. If this is established, the onus then shifts to the employer to show that it accommodated the employee to the point of undue hardship"

33. As I have found that the Union has established a prima facie case of discrimination, it was then incumbent on the Company to show accommodation to the point of undue hardship. It has not led evidence to this effect and therefore has not met its burden to show that accommodation was not possible without undue hardship.

## D. What is the appropriate remedy?

### Position of Parties

34. The Union argues that there is strong evidence of both remorse and rehabilitation. It argues that this evidence warrants the reinstatement of the grievor upon terms sufficient to protect the interests of all Parties. It cites a number of cases where grievors with addictions have been reinstated upon terms sufficient to protect the interests of all parties.

35. The Company argues that the termination should be upheld. It cites several cases where the termination of much longer service employees has been upheld where Conduct Unbecoming has been established.

### Analysis and Decision

36. In **CROA 4873**, I reviewed a substantial number of CROA decisions dealing with reinstatement and compensation:

54. The strong thrust of CROA jurisprudence has been to order reinstatement without compensation, for grievors suffering from a disability, having breached Company non-impairment Policies, but having demonstrated a sincere, concerted and substantial effort to rehabilitate (**See CROA 4054, 4094, 4347, 4375, 4472, 4652, 4667, 4773, AH 725**).

55. CROA jurisprudence which has not ordered reinstatement deals with situations where a disability has not been established (**AH 758, CROA 4813**), no sincere, concerted and substantial efforts to rehabilitate have been made (**AH 704**), the grievor has not been honest (**CROA 4798**) or where undue hardship has been established after multiple accommodation efforts (**CROA 3415**).

37. A claim of addiction does not result in automatic reinstatement. Sufficient evidence must be led to establish that the grievor has made very substantial progress in his rehabilitation and that sufficient terms can be put in place to protect the safety concerns of all. As Arbitrator Sims noted in **CROA 4652**:

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."

38. There is substantial CROA jurisprudence where grievors with drug or alcohol addictions have been reinstated upon terms ensuring safety and sobriety (see, for example, **CROA 3355, CROA 3415, CROA 4054, CROA 5021**).

39. Here, I find that there are substantial reasons to believe that the grievor now has his addiction under control.

40. The grievor has made significant efforts to stop drinking and to maintain sobriety. Since the incident in June 2023, he has been assessed by both Lifeworks and Addiction Services (see Tabs 8-9, Union documents). He has attended regular AA meetings since that time, as attested by both colleagues and a diary (see Tabs 11-13, Union documents). He sets out in some detail his efforts to maintain sobriety and how his life has improved as a result of doing so (see Tab 14, Union documents). His family doctor, Dr. Beaupré, notes: "His condition is currently in remission and his prognosis is favourable" (see Tab 10, Union documents).

41. The grievor has expressed remorse for his words and actions and has offered a written apology to the hotel, where he had behaved improperly:

Q76: Do you have any closing comments you wish to add to this investigation?

A76: I would like to sincerely apologize for my behaviour, if I had not been drinking none of this would have happened. Since this happened, I have mailed a formal apology to Glenmore Inn in regards to my behaviour, I would also like CPKC to know that I was never trying to represent Company in a negative way. I would like to confirm how much I enjoy my work with CPKC and hope one evening of poor choices wont shine a dark light on me forever. I would like to affirm I have started to take the right steps to avoid anything like this happening again, I have reached out to EFAP, attended multiple AA meetings, two counselling sessions with more

planned in the future. I have also reached out to my family doctor who has made recommendations which I have followed up on.

42. In **CROA 4143**, Arbitrator Picher reinstated a grievor who had demonstrated sobriety for close to eighteen months:


Firstly, it must be borne in mind that alcoholism is an illness which merits efforts at accommodation to the point of undue hardship... it is incumbent on a board of arbitration to consider the entire picture in a case such as this. The material before me confirms that following his discharge the grievor engaged in a course of action which has led to a period of close to a year and a half of sobriety on his part. On his behalf the Union has tendered in evidence a number of reports and documents giving substance to the fact that the grievor has successfully completed treatment programs and that he has been a faithful participant in the activities of Alcoholics Anonymous. On the whole, I am satisfied that this is an appropriate case for reinstatement on conditions fashioned to protect the Company's legitimate interests.

43. Here, the grievor appears to have been sober for seventeen months at the time of the hearing, very close to the period of sobriety in **CROA 4143**. There is no evidence, however, of independent testing of the grievor's sobriety, as there was in **CROA 4873**, where a separate railway employer tested the grievor's on-going sobriety.

44. Accordingly, the grievor is to be reinstated without loss of seniority, but without compensation, in line with the jurisprudence cited in **CROA 4873**. This reinstatement is subject to the grievor passing a return to work medical. He should then be subject to on-going unannounced testing by addiction specialists for a period of two years.

45. I remain seized with respect to any questions of interpretation or application of this Award.

November 25, 2024



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**JAMES CAMERON**  
**ARBITRATOR**