CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5096

Heard in Montreal, October 9, 2024

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Discharge of Locomotive Engineer A. Venn, for violation of CN's Code of Business Conduct and General Rule A by engaging in inappropriate comments and behaviours towards co-worker during your trips between Belleville and Toronto and during your layover in Toronto on November 5 & 6, 2022 as per the investigation report issued on September 15, 2023.

JOINT STATEMENT OF ISSUE:

On November 5th and 6th, 2022, the grievor worked with a female Conductor, Ms. J. Odgen to Toronto and return. On the trip to Toronto, in the CN-provided bunkhouse and on the return trip to Belleville, inappropriate conversations and behaviour occurred.

The grievor attended a formal investigation on September 21st and 28th, 2023. On October 10th, 2023, the grievor was terminated from his employment relation with Canadian National Railway for violation of CN's Code of Business Conduct and General Rule A.

The Union's Position:

The Union objects to the Company's actions as they violated Article 71 of the Collective Agreement. Furthermore, the Union reserves the right to allege a violation of, refer to, and/or rely upon any other provisions of the Collective Agreement and/or any applicable statue, legislation, act, or policy. The Union contends the Company has failed to meet the burden of proof or establish culpability regarding the allegations outlined above to justify such a severe penalty. The Union contends Grievor's discipline is unjustified, unwarranted, and excessive in all circumstances, including significant mitigating factors evident in this matter, in particular Grievor's tenure and record. It is also the Union's contention that the penalty is contrary to the arbitral principles of progressive discipline and constitutes disciplinary discrimination.

The Union's position is that the Arbitrator has full jurisdiction to review the evidence in this case and determine whether the Company has met its burden of proof. The Arbitrator's jurisdiction under the Collective Agreement and the *Canada Labour Code* is in no way limited by the third-party investigator's report.

The Union requests that the grievor be reinstated without loss of seniority, benefits, pension and that he be made whole for all lost earnings with interest.

In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company's Position:

The Company does not agree with the Union's position. Upon being made aware of the complaint the Company took action to follow proper process and regulations. A third-party investigator was agreed upon by both parties and once the third party provided their final report the Company completed an internal investigation in accordance with the Collective Agreement. The Company maintains the arbitrator does not have the jurisdiction to challenge the findings of the neutral third-party investigator and is limited to determining whether the internal formal statement process was neutral and unbiased and conformed to the requirements of the Collective Agreement. The investigation was conducted in a fair and impartial manner. The Collective Agreement was fully complied with, and based on the internal investigation, the Company determined the employee was in violation of the Code of Conduct and General Rule A. the Company takes these allegations seriously and maintains that there was just cause to warrant discharge in this circumstance.

For the Union:	**For the Company:**
(SGD.) M. Kernaghan	**(SGD.) M. Guimond**
General Chairperson, LE-C	VP, Eastern Region

There appeared on behalf of the Company:

H. Cameron	– Counsel, Norton Rose Fulbright, Ottawa
M. Martens	– Director, Labour Relations, Calgary
J. F. Migneault	– Manager, Labour Relations, Montreal
L. Dodd	– Manager, Labour Relations, Winnipeg
A. Chouman	– Labour Relations, Associate, Toronto
T. Sadhoo	– Manager, Labour Relations, Toronto

And on behalf of the Union:

R. Church	– Counsel, Caley Wray, Toronto
M. Kernaghan	– General Chairperson, LE-C, Toronto
C. Wright	– Senior Vice General Chairperson, LE-C, Barrie
A. Venn	– Grievor

AWARD OF THE ARBITRATOR

Context

1. Locomotive Engineer Venn was the subject of a harassment complaint by a female Conductor. The complainant opted for an outside investigation under the *Canada Labour Code*. The investigation found that the actions of LE Venn did not constitute sexual harassment nor did he engage in retaliation. However, there was a finding that the

Responding Party, LE Venn, “engaged in persistent and sexualized conduct, including masturbating in front of the PP (Principal Party), and in doing so he engaged in unprofessional conduct in violation of the CN Code of Conduct”.

2. The Company held an internal investigation, which resulted in the discharge of the grievor for:

> “Violation of CN’s Code of Business Conduct and General Rule A by engaging in inappropriate comments and behaviors towards a coworker during your trips between Belleville and Toronto and during your layover in Toronto on November 5-6, 2022 as per the investigation report issued on September 15, 2023”.

3. **Issues**

- **A.** Jurisdiction of Arbitrator
- **B.** Preliminary Objection that Investigation not Fair and Impartial and Discipline Should Be Void Ab Initio;
- **C.** Was Discipline Appropriate?
- **D.** Was Discharge Unreasonable, and if so, what other penalty should be imposed?

A. Jurisdiction of Arbitrator

Position of Parties

4. The Company takes the position that the arbitrator does not have the jurisdiction to challenge the findings of the neutral third party investigator and is limited to determining whether the internal formal statement process was neutral and unbiased, and in conformity with the collective agreement.

5. The Union takes the position that the investigator’s report is one piece of evidence, but not dispositive of the entire case. It notes that s. 57 of the Canada Labour Code requires all collective agreements to contain an arbitration clause, while s. 58 protects decisions of the arbitrator named from judicial review. The Union argues that accepting the Company’s argument would amount to a fettering of the arbitrator’s jurisdiction.

6. The Union further argues that s.71 of the Collective Agreement requires the Company to have an internal investigation before imposing discipline.

Analysis and Decision

7. Under s. 57 of the Canada Labour Code, all collective agreements must contain some form of arbitration clause:

> 57 (1) Every collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or employees bound by the collective agreement, concerning its interpretation, application, administration or alleged contravention.

8. Under CROA Rule 6, it is clear that the arbitrator has jurisdiction to decide issues concerning discipline of employees:

> The jurisdiction of the arbitrators shall extend and be limited to the arbitration, at the instance in each case of a railway, being a signatory hereto, or of one or more of its employees represented by a bargaining agent, being a signatory hereto, of; (A) disputes respecting the meaning or alleged violation of any one or more of the provisions of a valid and subsisting collective agreement between such railway and bargaining agent, including any claims, related to such provisions, that an employee has been unjustly disciplined or discharged;

9. Under CROA Rule 15, this decision is final and binding on the Parties:

> Each decision of an arbitrator that is made under the authority of this agreement shall be final and binding upon the Railway, the bargaining agent and all the employees concerned.

10. The Parties acknowledge that the independent investigator has no power to impose discipline as a result of his investigation. That is a decision made by the Company, pursuant to s. 71 of the Collective Agreement. Should discipline be imposed, it is subject to grievance and then review under the CROA Rules.

11. As such, I am required, both by the Code and CROA, to determine issues of contested discipline. Although arbitrators under CROA Rules are not bound by the strict rules of evidence, we are still required to decide issues based on the evidence before us.

As such, I will have to decide to uphold or dismiss the present grievance, based on the totality of the evidence presented at the hearing. This evidence will be reviewed below.

B. Preliminary Objection that Investigation not Fair and Impartial and Discipline Should Be Void Ab Initio

Position of Parties

12. The Union makes a preliminary objection that the Union had a right to be present under article 71.6 of the Collective Agreement when the complainant, Ms. Ogden, was responding to questions. It submits that the Union never waived this right and CROA jurisprudence has consistently held that any significant flaw in the procedure which compromises the integrity of the record must result in any ensuing discipline being ruled void ab initio (see **CROA 3322, CROA 4591, CROA 3061**).

13. The Company argues that the current Union objection must be dismissed, as the argument that providing written answers as a procedural irregularity was never raised in the disciplinary investigation, grievance documents, Ex Parte Statement or in the JSI. The Union is not permitted to modify a grievance at arbitration.

14. The Company argues that the investigation met the standards of procedural fairness. It notes that article 71 does not require that all evidence be given viva voce, and requiring this would amount to an improper amendment to the Collective Agreement.

15. The Company submits that it reached out to the Union for questions to be put to Ms. Ogden in writing, given that she was on an approved leave of absence and in no condition to attend a workplace investigation. The Union did provide its questions in writing.

Analysis and Decision

16. There is no doubt that a failure to provide a fair and impartial investigation will result in the discipline being held to be void ab initio. The Collective Agreement sets out requirements for such investigations:

> 71.1 When an investigation is to be held the locomotive engineer whose presence is desired will be properly advised in writing at least 48 hours prior to the investigation as to the time, place and subject matter, which will be confined to the particular matter under investigation. Such notification will be presented at the home terminal and shall not be presented in conjunction with the commencement of a tour of duty. Investigations will only be scheduled to start between 0800 and 1700 hours, at the employee's home terminal, or otherwise if mutually agreed upon between the Local Chairman and the Company.
>
> At the outset of the investigation the locomotive engineer will be provided with all evidence the Company will be relying upon, which may result in the issuing of discipline. The Company will provide sufficient time for the locomotive engineer and his representative to review all the evidence provided prior to the commencement of the investigation.
>
> 71.2 A locomotive engineer will not be disciplined or dismissed without having had a fair and impartial hearing and his or her responsibility established. At an investigation, the investigating company officer, the locomotive engineer and/or his representative shall have right to voice record, at their own expense, the investigation proceedings on a recording device. This provision will not be used to delay or postpone the investigation proceedings.
>
> 71.5 At the hearing the locomotive engineer, if he or she so desires, may, have an accredited representative of the Teamsters Canada Rail Conference present who will be accorded the privilege of requesting the presiding officer to ask questions for the record which have a bearing on the responsibility of the locomotive engineer. The locomotive engineer to be given a clear copy of his or her statement.
>
> 71.6 A Locomotive engineer ad his or her accredited representative shall have the right to be present during the examination of any witness whose evidence may have a bearing on the locomotive engineer's responsibility to offer rebuttal through the presiding officer by the accredited representative. The Local Chairman and/or the General Chairman to be given a

> copy of statements of such witnesses on request. (underlining added)

17. The Union cites a number of cases to illustrate the importance and application of this principle.

18. Arbitrator Picher held in **CROA 3214:**

> As well elaborated in prior jurisprudence, the Company's failure to observe the mandatory requirements of article 86.4 of the collective agreement must result in the discipline being null and void. (See, e.g., *CROA 1937 and 1819*) In this case, it is not enough for the Company to raise in its defence that the grievor has admitted to some wrongdoing. Knowledge of the precise extent of that wrongdoing and the evidence before the Company to establish it is a matter of essential right to the grievor, as plainly intended by article 86.4 of the collective agreement. In that regard, the parties have fashioned a provision which requires not only that fairness and impartiality be done, but that they manifestly must be seen to be done. The denial of the grievor's rights in that regard vitiates the assessment of discipline against him.

19. The same arbitrator reiterated the principle in **CROA 3322**:

> It is well settled that a violation of these provisions amounts to the denial of a substantive right, the consequence of which is to render any discipline void *ab initio,* regardless of the merits of the case. *This means that the discipline being contemplated at the investigation will be completely stricken from the employee's records, because of this procedural flaw.* The reason for that firm rule is to safeguard the integrity of the expedited grievance and arbitration process established within the railway industry and the Canadian Railway Office of Arbitration".

20. Arbitrator Clarke in **CROA 4591** also clearly endorsed these principles:

> 3. Investigations are crucial to the CROA process: *CROA&DR 4549*. They provide a factual transcript for the parties' and the arbitrator's use at the expedited arbitration hearing. For over 50 years, the parties' collective efforts in developing factual transcripts has enabled this Office to provide, when compared with the alternatives, timely and cost-effective arbitration decisions.
>
> 4. In CROA&DR 2073, Arbitrator Picher emphasized that, while investigations must remain informal and expedited, they still must generally provide an opportunity "to the employee to know the accusation against him, the identity of his accusers, as well as the content of their evidence or statements, and to be given a fair opportunity to provide rebuttal evidence in his own defence.

> 5. While specific collective agreement language governs the process, an investigation generally is designed to be an open-ended inquiry into the facts. The investigation mandates evidence disclosure and provides the employee with an opportunity to call witnesses and put his/her position on the record.

21. It is worth noting that in each of the cases cited above, the procedural flaw was either a major one or cumulatively a major one, which had a direct impact on the duty to provide a fair and impartial investigation.

22. In **CROA 3214**, the Company:

> "separately interviewed the grievor's workmate, Conductor E. Spencer, with respect to the events which transpired. Unfortunately, the Company did not notify the Council or the grievor of that investigation interview, and did not afford them the opportunity to be present during the examination of the conductor…Moreover, for reasons which it best appreciates, the Company thereafter apparently refused to provide the grievor and his union representative with a copy of Conductor Spencer's statement."

23. In this matter, there was a complete denial of natural justice and a direct infringement of the collective agreement, directly affecting the outcome of the hearing. There was no "fair and impartial hearing".

24. In **CROA 3322**, the issue was whether an employee was properly discharged for making a fraudulent claim of injury. The Company had a medical opinion on which it relied to conclude that there was fraud, but it failed to provide this opinion to the Union:

> "It is difficult for the Arbitrator to conclude other than that the professional opinion of Dr. Lindzon was evidence in the hands of the Company, indeed evidence having a substantial and prejudicial bearing on the employee's responsibility within the meaning of article 82.2 of the collective agreement. For reasons which the Company's officers best appreciate, however, that evidence was never shared with the grievor, nor with his Union representative, and prior to the employee's discharge no opportunity was provided for the grievor or his Union representative to question Dr. Lindzon his opinion or to offer any rebuttal to it."

25. Again, both natural justice and the collective agreement required disclosure of this key piece of evidence. A failure to do so inevitably rendered the investigation far less than "fair and impartial".

26. In **CROA 4591**, Arbitrator Clarke was concerned about the cumulative effect of undue delay, a possible conflict of interest in the investigating officer and an unexplained refusal by the Company of a question by the Union. Ultimately, he concluded:

> "For the foregoing reasons, and on a cumulative basis, the arbitrator concludes that CP's investigation was not fair or impartial in the way the collective agreement requires. The 5-day suspension shall be removed from Mr. Wojcik's record."

27. Here, by contrast, the only witness called by the investigating officer was LE Venn himself, who had his Union representative present. This is not a matter of a secret witness or document being known to the investigating officer but not to the grievor and his Union, as was the case in **CROA 3214** and **CROA 3322**.

28. Initially, the Union representative asked for questions be posed to a number of witnesses. While contested at the time of the investigation, the refusal of the investigating officer to permit questions to be put to Messrs. Ladas, Daigle, Hayward, Marion, Brandsma, Dillabough, Cannon, Salmers and Gonyea is no longer an issue (see para 60 Union brief).

29. The narrow remaining issue is whether the fact that the Union's questions to Ms. Ogden were put in writing, rather than in person, with the Union representative present, made the investigation less than "fair and impartial".

30. The CROA investigation process is not to be confused with a traditional arbitration or civil litigation. Aggressive and close cross examination in these settings, following a close observation of the witnesses' statements and demeanor, is permitted, in order to get at the truth. In a CROA investigation, a witness is interviewed by the investigating officer, and then the Union may ask certain questions of the witness, through the investigating officer.

31. The Company argues that the Union failed to object at the time of the investigation and cannot do so now. The Union argues that it never waived its right for questions to be asked in person and for it to be present at that time.

32. A careful review of the investigation transcript is required:

> 55.Q. Mr. Eisenstadt, do you have any questions pertaining to the matter under investigation which you wish to ask for the record through the Presiding Officer?
>
> A. I do. I have 3 questions for Mr. Venn. The Union has 2 questions for Mr. Olan, 1 question for Chris Ladas, 1 question for Dave Daigle, 4 questions for Ms Ogden and one question to the company officer.
>
> Note: Mr. Eisenstadt: Requests a recess 12:59-13:39.
>
> Presiding Officer: Based on the witnesses questions the Union would like to bring forward the Presiding Officer has requested that a recess will be taken to determine the relevance of the witnesses called and the questions to be asked. Time will also be needed to contact the parties involved. Statement has been suspended September 21, 2023 at 14:10hrs with an intention to reconvene once the requested information is provided.
>
> Presiding Officer: Formal Employee statement has resumed September 28, 2023 at 10:05hrs. with the new evidence presented. Mr. Eisenstadt required a time to review. 10:07-11:13.
>
> Presiding Officer: Addition Evidence has been brought in to answer the questions asked my Mr. Eisenstadt. Will be referenced as the following.
>
> 10) Email from Mr. Mumby with the Union's questions to Ms. Ogden and her response. (2 pages).
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> 11) Email from the Company to Mr. Oland with the Union questions and his response. (2 pages).
>
> 12) Questions in hand written form from Mr. Eisenstadt. (2 pages).
>
> 13) Updated NTA for the continuation on September 28, 2023. Delivered by email (1 page).
>
> Presiding Officer: Due to the sensitive nature of this investigation the questions asked by Mr. Eisenstadt toward Mr. Oland and Ms. Ogden were given to each individual to answer in their own words and will not be present for questioning by Mr. Eisenstadt.
>
> Presiding Officer: the questioning of Mr. Daigle and Mr. Laders will not be allowed by the Company as the individuals were brough fourth in the third party investigation and as answered by Mr. Oland

> did not have any involvement in the core subject matter of the investigation. The Company agrees with this assessment.
>
> Mr. Eisenstadt: The Union objects to this investigation in its entirety as we have submitted a list of witnesses to the investigation officer prior to the investigation, and by not providing these witnesses it is unfair to the employee. Furthermore the union requests the right to ask the questions to these witnesses.

33. It is noteworthy that when the investigation resumed on September 28, 2023, one week after the initial meeting, evidence introduced included the Union questions to Ms. Ogden and Mr. Oland, together with their responses. The Presiding Officer notes that questions formulated by Mr. Eisenstadt toward Mr. Oland and Ms. Ogden "were given to each individual to answer in their own words and will not be present for questioning by Mr. Eisenstadt." No objection to this process is made by the Union representative.

34. The subsequent objection by the Union in the final paragraph of the note is to the refusal by the Presiding Officer to call Mr. Daigle and Mr. Lader for questioning.

35. As well, a careful review of the 3rd step grievance does not reveal any complaint about the Union questions to Ms. Ogden having been put in writing (see Tab 8, Union documents). The Union objects to delay and to the fact that its witnesses were not called, but does not object to the form of testimony of Ms. Ogden.

36. Finally, a review of the JSI reveals only a general reference to article 71:

> The Union objects to the Company's actions as they violated Article 71 of the Collective Agreement. Furthermore, the Union reserves the right to allege a violation of, refer to, and/or rely upon any other provisions of the Collective Agreement and/ or any applicable statute, legislation, act, or policy. The Union contends the Company has failed to meet the burden of proof or establish culpability regarding the allegations outlined above to justify such a severe penalty. The Union contends Grievor's discipline is unjustified, unwarranted, and excessive in all circumstances, including significant mitigating factors evident in this matter, in particular Grievor's tenure and record. It is also the Union's contention that the penalty is contrary to the arbitral principles of progressive discipline and constitutes disciplinary discrimination.

37. It is noteworthy that there is not even a general reference to an allegation of a failure to provide a “fair and impartial” investigation, let alone a direct reference to the form of questioning of Ms. Ogden.

38. This is unlike other cases, where an objection has been made at the time, and maintained throughout the grievance process (see, for example **CROA 4591**). Had such an objection been made, it would have afforded the Presiding Officer the opportunity to reconsider his position. It is possible that the questions could have been put to Ms. Ogden virtually, while the Union representative observed.

39. I must agree with the Company submission that making the argument only at the time of written submissions is an objection formulated too late.

40. Moreover, I do not believe that the grievor has been harmed by the method chosen for Ms. Ogden to be given the Union’s questions. The Union’s questions were asked, they obtained her answers, and the grievor was in possession of these answers before he was questioned by his Union representative. The three questions put to and given by Ms. Ogden (Q and A 64-66) confirm that she did not indicate that the words of Mr. Venn were not welcome, and only reported the incident some six months after the event.

41. As noted by other arbitrators, each case must necessarily turn on its own facts. If the fairness and impartiality of the investigation had been put into question and an objection formulated at the time, this matter could well have been decided differently. As set out by Arbitrator Picher in **CROA 3322**: “The standard to be met is basic fairness…What is contemplated is an informal and expeditious process…”. Here I find that the basic standard of fairness has been met, there was no objection to the form of question at the time and the investigation’s fairness and impartiality have not been put into question by the form of questioning of Ms. Ogden. The preliminary objection must be dismissed.

C. Was Discipline Appropriate?

Position of Parties

42. The Company submits that discipline is clearly appropriate in the circumstances. The grievor was found by an independent outside investigator to have: “engaged in persistent and sexualized conduct, including masturbating in front of the PP (Principal Party), and in doing so he engaged in unprofessional conduct in violation of the CN Code of Conduct”.

43. The Company further submits that the grievor by his actions also violated Canadian Railway Operating Rules (“CROR”) Rule A.

44. The Union argues that no discipline has been imposed on Ms. Ogden and that it would constitute discriminatory treatment to impose discipline on the grievor. It notes that there was never any touching involved and that the conversation and texting was mutual and consensual.

45. It strongly contests that masturbation occurred, which is flatly denied by the grievor.

46. The Union submits that the grievor never endangered the train as a result of these activities.

Analysis and Decision

47. The Code of Business Conduct sets out values and expectations with which all employees are expected to abide:

- Complying with applicable laws, rules and regulations;
- Being familiar and complying with the principles set out in CN policies and the Code of Business Conduct;
- Not allowing any personal interest to compromise CN’s or our own integrity;
- Providing a diverse, safe and supportive work environment;
- Treating customers, competitors, suppliers and other business partners with respect, honesty and fairness;

- Reporting promptly in good faith any violation or potential violation of the Code of Business Conduct that we may become aware of;
- Supporting others in doing the right thing and in making the right choices.

48. CROR General Rule A imposes, amongst others, the following obligations:

> ix. Conduct themselves in a courteous and orderly manner;
>
> xi. While on duty, not engage in non-railway activities which may in any way distract their attention from the full performance of their duties. Except as provided for in company policies, sleeping or assuming the position of sleeping is prohibited. The use of personal entertainment devices is prohibited. Printed material not connected with the operation of movements or required in the performance of duty, must not be openly displayed or left in the operating cab of a locomotive or track unit or any work place location utilized in train, transfer or engine control; and …

49. The grievor has admitted being trained on, being bound by and violating both the Code of Business Conduct and CROR General Rule A:

> 47.Q. Mr. Venn, based on your actions and conversations listed in exhibit #3 were you compliant with Canadian Railway Operating Rules General Rule A?
> A. No I did not comply with General Rule A. However, I did comply with the Canadian Railway Operating Rules as a whole and operated my train safely and effectively.
>
> 51.Q. Mr. Venn, based on your actions and conversations as stated in exhibit #3 were you compliant with the Code of Business Conduct?
> A. I was not. I engaged in consensual and sexual conversations that I feel horrible about.

50. As such, it is clear that the actions of the grievor must attract discipline.

51. The Union has argued that such an approach would be discriminatory, as Ms. Ogden has not been disciplined and they have been informed that she will not be the subject of investigation. The Company replies that Ms. Ogden is on approved leave and will be the subject of investigation upon her return.

52. As there is an obvious factual issue at play, I invited the Union, which bears the burden of proof, to provide evidence of any Company decision not to discipline Ms. Ogden. It declined to do so, such that there is no evidence before me of any discriminatory discipline. This argument must therefore be dismissed.

53. The Union submits that I should not accept the finding of the independent investigator (see Tab 2, Union documents) that the grievor had engaged in masturbation while on the locomotive.

> 3.2 The RP's actions did not constitute sexual harassment of the PP given that the totality of the evidence supported a finding that the PP engaged in reciprocating conduct such that the RP did not know, or reasonably ought to have known, that his conduct was unwelcome. However, the RP, engaged in persistent and sexualized conduct, including masturbating in front of the PP, and is doing so he engaged in unprofessional conduct in violation of the CN Code of Conduct.

54. The grievor was asked about this during the Company investigation and flatly denies it:

> 27.Q. Mr. Venn, do you dispute any of the facts about your interaction with Ms Ogden as summarized in exhibit #3?
> A. I do dispute the facts. I never masturbated in front of her, and I contributed to the sexualized conversation that was consensual but it was not persistent in any manner. The conversation was reciprocated and welcomed by both of us.
>
> 33.Q. Mr. Venn, do you dispute masturbating in front of Ms. Ogden?
> A. Yes.
>
> 34.Q. If you dispute this, please explain.
> A. The only time that I can think that this came out on our trip home I had to use the washroom where continued sexual conversation while I was urinating in the washroom to where she said that she was playing with herself while I was urinating and I told her that she was making me horny.
>
> Note: Mr. Eisenstadt: The Union would like it to be known for the record that Mr. Venn used the more appropriate terms that was actually stated by Ms. Ogden.

55. The Company argues that I am compelled to accept the findings of the investigator and have no jurisdiction to inquire further.

56. As noted above, before I can decide whether discipline is appropriate, I must have evidence on which to decide. With respect to the Code of Conduct and CROR Rule A allegations, the grievor does not contest the findings of the investigator and admits the violations. With respect to the issue of masturbation, the Company has led the investigation report only. It did not call either Ms. Ogden or the investigator to clarify or add additional evidence, or to contradict the testimony of Mr. Venn. The Company did not file the complete investigation report, but only a three page executive summary of the investigator's findings. The grievor, conversely, is clear in his testimony at the disciplinary hearing that masturbation did not take place.

57. The Company has the burden of proof to establish the facts underlying the discipline. Here, given the contradictory evidence, and the flat and detailed denial of the grievor, I must find that the burden of proof has not been met and that this fact has not been established. This finding does not, however, detract from the initial findings that the Company did establish that the grievor violated both the Code of Conduct and CROR Rule A.

D. Was Discharge Unreasonable, and if so, what other penalty should be imposed?

Position of Parties

58. The Company submits that termination is the only reasonable remedy in the circumstances, given the severity of the infraction. The grievor's actions not only violated the Code of Conduct and CROR Rule A, they were a serious safety violation, as he allowed himself to be distracted while operating a locomotive.

59. The Company argues that the grievor showed little if any remorse, stating throughout that all the activities were consensual. He apparently either fails to understand, or doesn't wish to acknowledge, the impact of his actions on both his colleague and the Company.

60. The Company submits that the workforce is heavily male dominant and that the conduct of the grievor undermines the obligation of the Company to provide a safe and secure workplace.

61. It points to caselaw where employees with greater seniority were terminated for cause for similar actions.

62. The Union underlines that there was a finding that there was no harassment and no retaliation. It notes that the activities were entirely consensual. It further notes that while the conversations and texting were inappropriate in a workplace, there were no actual acts of sexual touching.

63. The Union relies on a number of cases where actual sexual acts while on duty resulted in discipline of six months and submits that the Company's cases are distinguishable.

64. Finally, the Union argues that the grievor had significant service, a good discipline record, no previous history of similar conduct and he has apologized for his actions. The grievor is entirely unlikely to reoffend.

Analysis and Decision

65. I find the safety concerns of the Company wholly reasonable. CROR Rule A is in place to ensure that employees are Fit to Work and not distracted while on the job. The sexually charged conversations in which the grievor engaged could not fail to be distracting. There are simply too many examples of train disasters caused by employees missing signals, which have resulted in serious damage and even fatalities.

66. I also find the safety concerns of the Company with respect to Ms. Ogden to be entirely reasonable. The Code of Business Conduct is in place to ensure that all employees have a safe and secure workplace. The actions of the grievor did not

contribute to such an environment, either with respect to the individual, her colleagues or potential future female employees.

67. However, the jurisprudence does not support termination in these circumstances.

68. The Company cites a number of cases which I find to be distinguishable on their facts from the present matter.

69. In **Unifor, Local 2215 v IMP Group Limited** (see Tab 15 Company documents), a fifteen-year employee was terminated because he continued to masturbate in a Company washroom, despite repeated warnings. Here, I have found that the Company did not establish that the grievor masturbated while on duty, and certainly there is no evidence of such repeated conduct.

70. In **Mississauga Fire Fighters Association IAFF Local 1212 v The Corporation of the City of Mississauga** (see Tab 16, Company documents), the grievor was found to have videotaped himself while masturbating at work while wearing a firefighters uniform. He denied the activities until presented with the evidence. Again, there are a number of distinctions with the present case. There is no finding of masturbation here, there is no video and the grievor was forthright with respect to his actions.

71. In **BC Hydro and Power Authority v IBEW, 258**, 2020 BCCAAA no 78, it was found that termination of a journeyman and sub foreman who engaged in sexual activities with an apprentice at work was reasonable, even though there was no previous history of such conduct by the grievor. I find that there is a distinction between this case and the present matter, as in the present matter there was no actual sexual touching.

72. The Union cites a number of cases which show termination was not held to be reasonable, even where there had been actual sexual acts while at work.

73. In **Indusmin Ltd. and United Cement, Lime and Gypsum Workers International Union, Local 488** 1978 CanLii 3524, Arbitrator Picher found that oral sex had consensually occurred in a locomotive on company property, despite the grievor's denial. The Arbitrator reinstated both grievors without compensation after one year.

74. In **Vernon Professional Firefighters' Association, IAFF Local 1517 v Corporation of the City of Vernon** 2019 CanLii 28158, an eighteen-year Captain was reinstated without compensation after one year, together with a five-month suspension and a demotion on his record, for kissing and "intimate, playful physical conduct" with a subordinate while at work. The grievor had denied such activities until presented with video evidence.

75. In **Toronto Transit Commission and ATU Lo. 113** 1994 OLAA No 45, the grievor was discharged for having sex with a prostitute while at work. The termination was overturned and a suspension of six months imposed.

76. In **Unisource Canada Inc. v. Communications, Energy and Paperworkers Union of Canada, Local 433** a nineteen-year employee was discharged for receiving oral sex from a prostitute while in a company vehicle. He also repeatedly denied his actions. The termination was overturned and a six-month suspension and reassignment to a warehouse job were imposed.

77. In considering the above jurisprudence and the facts of the present matter, I give weight to the grievor's ten years of service and the fact that this was the first time such actions have occurred. I further accept that, unlike many of the cases cited by the Union, no physical sexual activity took place. I give less weight to the grievor's apology to Ms. Ogden and the Company, given the heavy reliance on the "consensual" nature of the actions. The actions, whether consensual or not, are entirely inappropriate in a workplace, let alone when the grievor is being distracted from his role as Locomotive Engineer. Indeed, the setting of the actions must be considered a significant aggravating factor, as

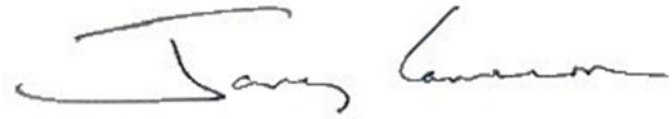
many of these distracting conversations took place on a moving locomotive. The cases cited by the Union do not have this aggravating factor.

78. I do, however, give credence to the portion of the grievor's apology where he states: "I have been an employee for CN for ten years and I have lived up to all my rules standards in my career. This lapse of judgement does not reflect my behavior in the past or in the future." (see Q and A 80)

79. The grievor was terminated on October 10, 2023. A reinstatement now would result in a suspension of some thirteen (13) months, which is similar to the discipline awarded in the **Indusmin** and **Vernon Firefighters** matters. It is more than double the discipline imposed in the **TTC** and **Unisource** matters, to reflect the greater potential harm to others.

80. Accordingly, I uphold the grievance to the extent of ordering reinstatement without compensation, but without loss of seniority.

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



December 4, 2024

JAMES CAMERON

ARBITRATOR