

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

**CASE NO. 5117**

Heard in Montreal, December 10, 2024

Concerning

**CANADIAN PACIFIC KANSAS CITY RAILWAY**

And

**TEAMSTERS CANADA RAIL CONFERENCE -  
MAINTENANCE OF WAY EMPLOYEE DIVISION**

**DISPUTE:**

Dismissal of Mr. K. Harasym.

**JOINT STATEMENT OF ISSUE:**

On November 23 2023, the grievor, Mr. K. Harasym, was advised by the Company that he was dismissed from Company service. The Form 104 provided:

Please be advised that you have been DISMISSED from Company service for your conduct unbecoming an employee of Canadian Pacific Kansas City Railway as evidenced by criminal charges laid against you for the following offences:

1. Possession of a Schedule I substance for the purpose of trafficking (Fentanyl)
2. Possession of a Schedule I substance for the purpose of trafficking (Cocaine)
3. Possession of a Schedule I substance for the purpose of trafficking (Methamphetamine)
4. Possession of proceeds of property obtained by crime under \$5000.00

A grievance was filed on December 5, 2023 and was denied by the Company on January 5 2024.

The Union contends that: 1) The charges against the grievor were pending when he was dismissed on November 23 2023. A basic legal principle is that individuals are presumed innocent until proven guilty; 2) During the investigation the grievor was honest and forthcoming and expressed confidence that he would be found innocent of the charges against him. He was nevertheless dismissed; 3) The grievor was ultimately found not guilty of any of the four criminal charges set out in the Form 104. It was wrong for the Company to have dismissed him.

The Union requests that: The Company be ordered to strike the dismissal from the grievor's record and to reinstate him into active service immediately without loss of seniority and with full compensation for all wages and benefits lost as a result of this matter.

**The Company Position:**

The Company denies the Union's contentions and declines the Union's request.

The Grievor's culpability was established through the fair and impartial investigation. Discipline was determined following a review of all pertinent factors. The Company cannot agree that the Grievor was honest and forthcoming. His version of events was far from the truth.

The Grievor was not found innocent of the charges, rather he entered a guilty plea to a “lesser included offence of simple possession” and a “forfeiture order” including \$150.00, drug paraphernalia, and two cellphones.

Conduct Unbecoming of an employee, whether on duty or off duty, needs to be appropriately dealt with. The charges were deemed to be extremely serious and egregious. This directly impacts the employment relationship and can cause reputational harm.

The Company’s position continues to be that the dismissal assessed was just, appropriate, and warranted in all the circumstances. Accordingly, the Company cannot see a reason to disturb the discipline assessed and requests that the Arbitrator dismiss the Union’s grievance in its entirety.

**For the Union:**  
**(SGD.) W. Phillips**  
President, MWED

**For the Company:**  
**(SGD.) L. McGinley**  
Director, Labour Relations

There appeared on behalf of the Company:

S. Scott – Manager, Labour Relations, Calgary

And on behalf of the Union:

W. Phillips – President, Frankford  
G. Pompizzi – Assistant to the President, Montreal

### **AWARD OF THE ARBITROR**

#### **Context**

1. The grievor was an Engineering Department employee with 2.5 years of seniority and approximately 1.5 years of active service, when he was arrested on October 16, 2023.
2. He was charged with the offences of possession of multiple illegal drugs for the purpose of trafficking, as well as being in possession of proceeds of property obtained by crime under \$5000. At the time of his arrest, he had been on a medical leave of absence for some six months. After investigation, but before his Court hearing, he was terminated on November 23, 2023 for Conduct Unbecoming.
3. On April 22, 2024, he entered a guilty plea to simple possession of 5.04 grams of crack cocaine. Although no plea was made, \$150 in cash, drug paraphernalia and cell phones were also forfeited.

4. The position held by the grievor is safety sensitive and the charges were reported in the local newspaper. The grievor lives in the village of Ignace, as do the two other individuals charged.

### **Preliminary Issue**

5. The Union advances that the Company is not entitled to rely on the Court proceedings, or at least to give little weight to them, as they did not form part of the investigation, the grievance or grievance response, or the Joint Statement of Issue.

6. I cannot agree that the Court proceedings may not be referred to in this matter, as they were referenced by both parties in the JSI. The Union contended that: "The grievor was ultimately found not guilty of any of the four criminal charges set out in the Form 104." The Company contended: "The Grievor was not found innocent of the charges, rather he entered a guilty plea to a "lesser included offence of simple possession" and a "forfeiture order"... (see JSI, Tab 2, Company documents). Both Parties refer to the transcript of the Court proceedings in their Briefs.

7. Both Parties have been fully aware of the facts of the Court proceedings and have relied on them in both the JSI and their submissions.

8. Accordingly, I find that submissions can be made based on the Court proceedings and findings. The weight given to the facts and submissions will be reviewed below.

### **Issues**

- A.** Is termination for drug trafficking reasonable?
- B.** i) Was the termination of the grievor for charges of drug trafficking reasonable?  
ii) If not, is he still subject to discipline and should he be reinstated?
- C.** If so, to what conditions should he be subject?

## A. Is termination for drug trafficking reasonable?

### Position of Parties

9. The Company takes the position that the involvement by one of its employees in drug trafficking severs the bond of trust between it and the employee. It quotes Arbitrator Picher in **CROA 4289**:

In the case at hand, the grievor clearly involved himself, and appears to have been in charge of, a significant drug trafficking operation. I am satisfied that is so regardless of the good fortune he was able to bargain with the Crown in relation to a reduction of the charges against him to possession. The elements which may drive a plea bargain do not necessarily come to bear in the assessment of appropriate discipline in the industrial employment setting. In the instant case the Company takes a position that the grievor's criminal activities were such as to irrevocably sever the bond of trust between himself and his employer. This Office is not in a position to reject or dismiss that very legitimate concern. On the contrary, I am satisfied that the grievor's conscious decision to involve himself deeply in serious criminal activity relating to drug trafficking did break the bond of trust between himself and his employer, a high profile enterprise involved in a safety sensitive industry. (Emphasis Added)

10. It further relies on an earlier decision of the same arbitrator in **CROA 2296**:

There can be little doubt of the seriousness to the Company of an employee's involvement in trafficking in narcotics. In a recent arbitration award between CP Rail and the CAW-TCA Canada, Rail Division, Local 101, (award dated November 3, 1992) the Arbitrator had occasion to consider the appropriate measure of discipline in the case of a carman discharged for his involvement in drug trafficking. At pp 4-5 the following comments appear:

Trafficking in narcotics is justly seen as a serious threat to social and legal order. As a common carrier with a high public profile, the Company is entitled to take such reasonable steps and precautions as are necessary to ensure its safe operations. This, in the Arbitrator's view, would extend to excluding from the workplace persons charged with or known to be involved in the trafficking of narcotics. As noted in CROA 1703, in a safety sensitive industry in the field of transportation, an employer may have a legitimate concern as to whether persons involved in the

trafficking of narcotics will be prompted by the profit motive to pursue their illegal activities in the workplace. (Emphasis Added)

11. The Union accepts that if the Company is able to prove actual involvement of the employee in drug trafficking, there can be little dispute that this would likely qualify as interfering with the Company's legitimate business interests and would warrant dismissal (see paras 18-19, Union Brief).

#### Analysis and Decision

12. There can be little doubt that proof of any significant involvement with drug trafficking by an employee in such a safety sensitive industry as the railways would almost certainly warrant dismissal. The employer would have legitimate concerns, as noted by Arbitrator Picher in **CROA 2296**, that such a person would have a profit motive to pursue these activities in the workplace. In my view, the employer would be entitled to consider the bonds of trust broken, if such proof was made.

**B. i) Was the termination of the grievor for charges of drug trafficking reasonable?  
ii) If not, is he still subject to discipline and should he be reinstated?**

#### Position of the Parties

13. The Company submits that the grievor occupies a safety sensitive position and works in an industry which must prioritize safety.

14. The Company submits that the actions of the grievor in associating with known drug users and the publicized charges laid against him were extremely serious. It submits that such actions and charges are incompatible with the role of the grievor. It notes that the grievor pled guilty to an included offence and was in no way found innocent of all charges. It points to several cases where terminations were upheld or lengthy suspensions imposed, even when plea deals resulted in convictions for possession rather than for trafficking (see **CROA 4289**, **CROA 2621**).

15. It notes further that the grievor had clearly been dishonest in his interview with the Company, as his story was radically different in the Court hearing where he was under oath (see paras 31-39, Company Brief).

16. The Company notes the extremely short service of the grievor and his even shorter period of active service. It further notes that the grievor had not disclosed to the Company his drug relapse in 2022.

17. The Union submits that the actions of the Company to immediately terminate the grievor on the basis of unproven charges cannot stand. It notes that the jurisprudence points to a suspension, pending a determination of the criminal charges, and not a termination, as appropriate in the circumstances.

18. The Union further submits that the Court proceedings and findings do not justify the Company decision to terminate. It pleads that the grievor was never convicted of trafficking drugs or being in possession of the proceeds of crime, and therefore was not found guilty of any of the charges found on the Form 104 dismissal letter.

19. The Union notes that the grievor had a virtually clean discipline record. It submits that the grievor, based on the premature termination, was denied a chance to be accommodated for his drug addiction.

### Analysis and Decision

20. This matter contains both a procedural and a substantive element.

21. The first issue is whether the decision to terminate was taken prematurely. At the time of the dismissal, the grievor had been charged by the police and investigated by the Company, but had not had his case heard in Court. Was the Company entitled to terminate on the basis of the charges and the internal investigation only?

22. The second issue is whether the termination should be upheld, in light of the subsequent criminal trial, trial transcript and admissions and guilty plea to an included charge.

23. With respect to the first issue, the jurisprudence is quite consistent that a suspension is the usual employer reaction to an employee being charged with serious crimes.

24. As Brown and Beatty (5<sup>th</sup>) 7.31 have noted: "Employees who are charged with criminal offences may, in certain circumstances, be suspended from their jobs pending the determination of their innocence or guilt."

25. In **CROA 1703**, the arbitrator cited **Re Ontario Jockey Club and Mutuel Employees Association**, which set out when suspensions were appropriate:

A first issue in the instant case is whether the Company was justified in holding the grievor out of service pending its investigation. The conduct for which he was criminally charged appeared, on its face, to involve activities away from the workplace and on the grievor's own time. It is well-established that the laying of a criminal charge does not, of itself, justify the suspension of an employee, particularly where the conduct giving rise to the charge does not appear to be work-related. In some cases, however, off-duty conduct that is the subject of a criminal charge may seriously affect the legitimate interests of the employer. The operative principle was well summarized by the majority of the board of arbitration in *Re Ontario Jockey Club and Mutuel Employees Association*:

... The better opinion would appear to be that the employer's right to suspend where an employee has been charged with a criminal offence must be assessed in the light of a balancing of interests between employer and employee. The employee, of course, has a legitimate interest in being considered innocent until he has been proven guilty. If, however, the alleged offence is so related to the employment relationship that the continued employment of the employee would present a serious and immediate risk to the legitimate concerns of the employer as to its financial

integrity, security and safety of its property and other employees as well as its public reputation, then indefinite suspension until the charges have been disposed of would appear to be justified. In determining the nature of the legitimate interests of the employer, it is necessary to look at the nature of the offence, the work being performed by the employee, and the nature of the employer's business. (Underlining added)

26. In **CROA 3311**, the arbitrator found that an employee charged with serious drug offences could be suspended pending a decision on the criminal charges:

In the Arbitrator's view in the circumstances disclosed it is amply within the prerogatives of the Corporation to protect its legitimate interests, including the safety of its passengers and its own reputation, until such time as the charges against Locomotive Engineer Laroche have been fully disposed of.

On the whole of the material before me I am satisfied that in the circumstances the Company is justified in suspending the grievor pending resolution of the criminal charges against him.

27. In **CROA 4661**, Arbitrator Clarke determined that a suspension was appropriate for the period up to the point at which charges were stayed, but not thereafter:

26. Moreover, the nature of the charges is an important factor. Just as in CROA 3311, Ms. Zunti's charges arose out of a major drug ring bust. Ms. Zunti was just one of twelve people charged with drug trafficking offences. The arbitrator cannot judge CN's actions based on Ms. Zunti's satisfactory explanation given years later. The arbitrator must instead evaluate CN's decision based on the information it had when it decided to hold Ms. Zunti out of service.

31. The situation changed, however, starting in December 2017.

32. The arbitrator partially upholds Ms. Zunti's grievance for the time period after CN learned that the charges against her had been stayed...

34. The arbitrator awards Ms. Zunti full compensation from January 2 to April 29, 2018. The compensation amount is remitted to the parties since there may be some statutory reimbursements in issue as well as issues concerning a delay in Ms. Zunti's availability to return to work.



28. The Company points to **CROA 4289**, in which Arbitrator Picher upheld the termination of a long service employee (unlike here) despite the fact that the initial trafficking charges were later reduced to possession. However, in that matter, very substantial quantities of drugs were seized: “As a result, police seized some seven pounds of marijuana, fifty-seven grams of cocaine, ninety-three codeine pills as well as a quantity of psilocybin (magic mushrooms). The street value of the drugs is estimated at approximately seventy thousand dollars”.

29. Arbitrator Picher found: “The quantities of narcotics and prohibited drugs found in his possession are substantial and, in my view, can only be seen as raising the inference that they were intended to be trafficked, presumably at a significant profit to the grievor”. As such, he found that, despite the reduction in charges, termination was still appropriate.

30. Based on a reading of the decision, it does not appear, however, that the issue of the prematurity of the decision to terminate was raised or decided. The grievor was terminated shortly after being charged, and his dismissal was upheld by Arbitrator Picher based on the facts and an inference of trafficking.

31. This matter differs procedurally from **CROA 4289**, as the issue of prematurity of the dismissal is central to the Union case.

32. This matter also differs factually from **CROA 4289**. Here, the quantity of drugs seized was limited to 5 grams of crack cocaine, which the grievor had been using personally. Given the quantity of drugs involved, an inference of possession for the purposes of trafficking cannot be made.

33. The weight of doctrinal and arbitral decisions is clearly in favour of employees being suspended when faced with serious criminal charges. At the time of the charges, the employee is presumed innocent of those charges. A suspension protects the Company from any reputational harm caused by having an active employee who is the

subject of criminal charges, which could potentially harm its business interests. At the same time, the employment relationship is maintained, further facts are gathered at the trial and through investigation, and an informed decision can later be made.

34. Here, I find the decision to immediately terminate the grievor to be premature. This factual situation differs sharply from the facts of **CROA 4289**, where very substantial quantities of drugs had been seized in the possession of the grievor. This permitted Arbitrator Picher to make the inference of possession for the purposes of trafficking. Here the grievor denied the charges and stated that he expected to be found non-guilty. He did not admit to any personal drug issues. At the time of the decision to terminate on November 23, 2023, the Company had an employee who had been charged with trafficking, a complete denial from the grievor, and no other facts pointing to the involvement of the grievor in trafficking illegal drugs.

35. Given the facts of this case, the grievor's denial of the charges and the presumption of innocence, it is hard to reach any other conclusion than the Company's decision at that time was premature and made without just cause.

36. On the second, substantive, issue, both Parties rely on the transcript and results of the trial to justify their positions that the initial decision should be maintained or overturned.

37. At issue is whether the grievor's termination was justified, based on "Conduct Unbecoming" a Company employee.

38. There does not appear to be a dispute between the Parties that conduct outside the workplace can have a negative effect on the Company's reputation, and may justify termination in certain circumstances (**CROA 2621, CROA 4289, CROA 2296**). The Union agrees that a conviction for the trafficking of illegal drugs is likely to have such a negative effect and may justify termination (see para. 18, Union Brief).

39. At issue, however, is whether in the circumstances of this case, the facts demonstrate such a negative effect on the Company's reputation which would warrant termination.

40. For the reasons that follow, I find that the facts shown here warrant serious discipline but do not warrant termination.

41. In **CROA 2621**, Arbitrator Picher rendered a decision in which he imposed a sentence of approximately a one year suspension for an individual who was charged, but ultimately found not guilty of drug trafficking. In that matter, the arbitrator found as follows:

In the circumstances of this case the Arbitrator cannot entirely dismiss the argument of Counsel for the Brotherhood that the alleged involvement of the grievor in drug related activity, as disclosed in the evidence, was relatively peripheral, as compared to conduct reviewed in previous cases, where discharge was found to be justified. There are substantial contrasts between the case at hand and CROA 2296, for example, which involved the discharge of an employee found in possession of a substantial amount of prohibited narcotics, as well as scales and paraphernalia normally utilized in trafficking. Further, the evidence in the instant case discloses no possession of any narcotic by the grievor, nor any preplanned involvement as a "point man" or intermediary in a drug transaction, such as was disclosed in CROA 2090.

What the case does disclose is a serious error of judgment on the part of the grievor by effectively pointing one unsavoury character in search of narcotics in the direction of another unsavoury character who he had reason to believe might have access to some. Mr. Giroux explains that the patron who supplied the drugs to the police officer had approached him earlier in the bar, asking if he was interested in buying some cocaine, to which the grievor replied in the negative. In the circumstances, however, the Arbitrator cannot share the view of Counsel for the Brotherhood as to the degree of innocence attaching to the mistake in judgment exhibited by Mr. Giroux. He knowingly placed himself in a compromising position which resulted in serious drug charges being brought against him. In the circumstances, the Arbitrator is satisfied that the Company had reason to withdraw the grievor from service, and to assess discipline against him. Given that Mr. Giroux did not, however, either possess a narcotic or, as evidenced by his

acquittal, traffic in it, I am satisfied that there is substantial reason to reconsider the penalty assessed, and that a suspension in substitution for his discharge is not inappropriate in the instant case. While the concerns which the Company had initially about the incident are understandable, as the evidence of the police officer before the court reflects, the facts suggest that, although he obviously kept bad company and carelessly became involved in a compromising situation, the grievor has not been shown to be a participant in the possession, use or trafficking of narcotics.

For the foregoing reasons the grievance is allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment, forthwith, without compensation or benefits, and without loss of seniority. The time from his discharge to his reinstatement shall be recorded as a suspension against Mr. Giroux's record.

42. It is noteworthy that the circumstances of the present matter are arguably more serious than those found in **CROA 2621**. There, the grievor did not use drugs and tested negative. He was acquitted of any crime. His involvement with the other patrons and the drug dealing were peripheral. Here, the grievor was convicted of an included offence, that of possession of illegal drugs. He had personally used illegal drugs and was high at the time of his arrest. He had a relationship with known drug users, including driving with them in his car.

43. I find that the actions of the grievor here merit discipline. As Arbitrator Picher noted in **CROA 2621**, "he obviously kept bad company and carelessly became involved in a compromising situation". There is little doubt that the arrest for trafficking of illegal drugs of three individuals from Ignace would be known to virtually everyone in the village. The employment of the grievor by the Company would be known to many and was confirmed in the public trial (see Tab 8, pages 10, 25, Company documents). The grievor had clearly engaged in "conduct unbecoming".

44. It then becomes necessary to examine whether the discipline imposed by the Company of termination was excessive or inappropriate in the circumstances.

45. The Company reviews the criteria found in the well-known **William Scott** matter and relies on criteria concerning the grievor's record, service, the seriousness of the offence, and any other circumstances which are relevant. It notes that while the grievor's record was relatively clean, he was a very short service employee, with an even shorter active service. It notes that the charges are extremely serious, particularly in light of the safety sensitive role of the grievor and the imperatives of safety in the railway industry. Finally, it notes that the grievor was clearly not truthful during the Company investigation, there was no mention of drug rehabilitation until the time of the trial, and further charges may be pending.

46. The Union highlights the good discipline record of the grievor, while acknowledging his short service. It notes that the grievor was never convicted of any offence of trafficking of drugs. While it is true that certain monies and goods were confiscated, the grievor never pled guilty to any charge other than the possession of crack cocaine.

47. It further submits that the grievor did not receive a custodial sentence, but was placed on probation, subject to multiple conditions, for a period of 12 months (see Tab 8A, Company documents). These conditions include the requirement to undergo drug rehabilitation.

48. The Union argues that he was not fired for being dishonest and further that addicts frequently lie (**CROA 4347, AH 793**).

49. In weighing the various **William Scott** factors, I give very significant weight to the safety concerns of the Company. I also note the very short service of the grievor. I am also troubled by the lack of candour of the grievor during the Company investigation. There is no doubt that the testimony found in the Court transcript and the investigation transcript are flatly contradictory. In the investigation, the grievor denies that any drugs were found in his car. In Court, he admits that the crack cocaine found in the vehicle was his, and that he had recently used it. In the investigation, no mention is made of any

personal drug involvement, yet at Trial he admits to being a drug addict. There is no doubt that the grievor was not truthful during the Company investigation.

50. However, I note the premature actions of the Company in imposing an immediate termination. It is probable that the investigation would have revealed very different facts had it been held after a suspension and a review of the transcript and Court sentence. Arbitral cases frequently note that addicts lie to cover up their addictions (see, for example, **AH 793**). Given the initial decision to terminate, the Company has prevented itself from examining addiction, rehabilitation and accommodation issues. I also note that the arrest and charges occurred outside of work and ultimately there was no conviction for trafficking.

51. In all the circumstances, I find that termination was excessive and substitute a suspension without loss of seniority but without compensation.

**C. If so, to what conditions should he be subject?**

52. Given the admission that he is an addict, the Parties should establish a Return to Work protocol to ensure that the grievor is no longer a danger to himself, his colleagues or the public.

53. I remain seized with respect to any issues of interpretation or application of this Award, including any dispute concerning the Return to Work protocol.

**February 7, 2025**



**JAMES CAMERON**  
**ARBITRATOR**