CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5172

Heard in Montreal, May 13, 2025

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Discharge of Locomotive Engineer Kevin Russell, PIN 107016.

JOINT STATEMENT OF ISSUE:

On March 8-9, 2024, the grievor worked with a female Conductor, Ms. Emma Dane, from Hornepayne to Armstrong and return. On this trip to Armstrong and allegedly beginning in transit in the company crew shuttle in the CN-provided bunkhouse and on the return trip to Hornepayne, Ms. Dane alleges that Mr. Russell engaged in inappropriate sexually suggestive conversation and behaviour towards her, including physical contact.

Ms. Dane further alleges that the grievor made other comments directed toward her boyfriend, family members, and an acquaintance of hers during and sometime after this tour of duty between March 9 and 12, 2024.

The Company engaged a third-party investigator and hired Elichai Shaffir from the firm Southern Butler Price LLP. The grievor attended a formal investigation on July 31, 2024. On August 08, 2024, the grievor was terminated from his employment relationship with Canadian National Railway for violation of CN's Code of Business Conduct and CN's Workplace harassment and violence prevention policy by engaging in in appropriate comments and sexually harassing behaviour towards a co-worker between March 8-12, 2024, as per the investigation report issued on July 25, 2024.

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 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 griever's discipline is unjustified, unwarranted, and excessive in all circumstances, including significant mitigating factors evident in this matter, in particular griever'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 Griever 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 disagrees with the Union's position.

Upon being made aware of the complaint, the Company took action to follow the proper process and regulations. A third-party investigator was appointed, without objection from the Grievor. Once the third party provided their final report, the Company completed an internal investigation in accordance with the Collective Agreement.

The Company maintains that the Arbitrator does not have the jurisdiction to challenge the findings of a neutral third-party investigator engaged under section 27(1) of the Canada Labour Code Workplace Harassment and Violence Prevention Regulations and is limited to determining whether the internal formal statement process was neutral and unbiased and conformed to the requirements of the Collective Agreement and whether any discipline issued by the employer following said informal statement is appropriate.

The investigation was conducted in a fair and impartial manner. The Collective Agreement was fully complied with. The Company determined the griever was in violation of CN's Code of Business Conduct and CN's Workplace Harassment and Violence Prevention Policy by engaging in inappropriate comments and sexually harassing behaviour towards his co- worker between March 8-12, 2024.

The Company takes these allegations seriously and maintains that there was just cause to warrant discharge in this circumstance.

For the Union:
(SGD.) M. Kernaghan
General Chairperson

For the Company:
(SGD.) T. Sadhoo
Manager Labour Relations

There appeared on behalf of the Company:

J. Nault	– Counsel, Norton Rose Fullbright, Montreal
D. Haidar	– Associate, Norton Rose Fullbright, Montreal
J-F. Migneault	– Manager Labour Relations, Montreal
A-H. Chouman	– Associate, Labour Relations, Montreal

And on behalf of the Union:

R. Church	– Counsel, Caley Wray, Toronto
M. Kernaghan	– General Chairperson, LE-C, Trenton
C. Wright	– General Chairperson, LE-C, Barrie
J. Currier	– Vice General Chairperson, LE-C, Barrie
K. Russell	– Grievor, Hornepayne

AWARD OF THE ARBITRATOR

Context

1. The Parties have agreed that the Grievor did not follow the Company's Code of Conduct of Workplace Violence and Harassment Policy and that discipline is warranted. The Parties disagree, however, as to the appropriate discipline to be imposed.

Issues

A. Is the arbitrator bound by the findings of the Third-Party Investigator?
B. Undisputed Facts
C. Disputed Facts
D. Is the discharge imposed reasonable in the circumstances or should some lesser penalty be substituted?

A. Is the arbitrator bound by the findings of the Third-Party Investigator?

Position of Parties

2. The Company takes the position that the arbitrator is bound by the findings of the Third-Party Investigator, and may not overturn or ignore its conclusions. It argues that if the Union wished to contest these findings, it could have judicially reviewed them. The Company accepts, however, that the arbitrator does have jurisdiction over the internal investigation and disciplinary decision (see paragraphs 2-4, Company Reply).

3. The Union argues that the arbitrator is not bound by the report of the investigator. It notes that the Union has no participatory rights before the investigator. It submits that the Company continues to bear a legal and evidentiary burden of proof to justify the discipline imposed.

Analysis and Decision

4. In **CROA 5096**, the same argument was advanced by the same Parties. In that matter, this Arbitrator held as follows:

> 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."

5. I find I must come to the same conclusion here. The Investigator's report must be reviewed and weighed, together with all other evidence, in reaching a decision pursuant to the Code, Collective Agreement and CROA Rules.

B. Undisputed Facts

6. There are numerous facts which the Parties do not contest.
7. The Company has a heavily male dominant workforce, with only about 10% of the employees being female. In Hornpayne, the ratio is even lower, with only 9% female employees in a workforce of 186 employees (see Tab 12, Company documents);

8. The Grievor, at the time of the incident, was a 53-year-old Locomotive Engineer with 34 years of service;

9. The Complainant was a 23-year-old Conductor with some 4 years of service;

10. There was an approximately 30-year age and seniority difference between the Grievor and the Complainant;

11. The External Investigator found that the Grievor "engaged in sexual harassment against the (Complainant) and breached the Policies and applicable law" (see Tab 6, Company documents);

12. The Grievor admits that between March 8-12, 2024, he was not compliant with CN Workplace Harassment and Violence Prevention Policy and the CN Code of Business Conduct (see Q and As 29-30, Tab 8, Company documents);

13. The actions of the Grievor were persistent, as they occurred over a 4 day period;

14. The Grievor had no active discipline on his file and no previous disciplinary history of similar allegations;

15. The Grievor received training on these issues some 2 years prior to the incidents (see Tabs 27-28, Company documents).

C. Disputed Facts

16. The following facts are disputed and require a decision from the Arbitrator:

a) Whether the Grievor touched the Complainant;
b) Whether the Grievor made sexualized comments to the Complainant;
c) Whether a proper apology had been given;
d) What steps the Grievor has taken to address his behaviour
e) Level of insight into his conduct by the Grievor;
f) Whether the medical note of the Complainant may be considered.

Analysis and Decision

a. Whether the Grievor physically touched the Complainant

17. In the Investigation Report, the investigator made the following finding concerning physical touching:

> On March 8, 2024:
>
> -He also sat next to (the Complainant) and touched her right thigh multiple times. (see Tab 6, Company documents).

18. In the Disciplinary Investigation, the Grievor stated the following:

> 12 Q. Do you dispute any of the facts about your interactions with Ms Dane as summarized in that report?
>
> 12A. Yes,
>
> section 3, 2nd bullet point:
>
> *"He also sat next to PP and touched her right thigh multiple times."
>
> I never touched her and I never would. I do not remember everything that happened on that day, but I know for a fact, that I never touched her.

19. In other portions of the Disciplinary Investigation, the Grievor does not recall incidents, or is equivocal in his responses. Here, when given the opportunity to comment on the

Investigation Report, the very first item which he contests is with respect to the allegation of physical touching. In fact, in my view it is the only allegation which is flatly denied. All other responses are qualified to some extent, with phrases such as “I do not believe” or “I don’t recall”.

20. In **CROA 5096**, this Arbitrator dealt with a similar issue, in which a Grievor denied having masturbated in front of the Complainant but admitted multiple other allegations;

> 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.

21. As in **CROA 5096**, the Grievor here is categorical that he did not touch the Complainant. The Company had the option of calling the Investigator or the Complainant. It chose not to do so. I am therefore left with the evidence presented to me, namely the summary from the Investigation Report, and the transcript of the testimony of the Grievor in the Disciplinary Investigation. In the face of a direct conflict

in the evidence, I cannot find that the Company has met its burden of proof to establish this allegation.

b. Whether the Grievor made sexualized comments to the Complainant

22. In the Investigation Report, the Investigator made multiple findings about sexualized comments being made by the Grievor to the Complainant:

On March 8, 2024:

- At the station while preparing for their trip, RP told PP multiple times that she was "pretty" and that he was glad the two of them were working together. He also sat next to PP and touched her right thigh multiple times. When RP noticed PP was uncomfortable with his actions, he told her, "You're a good kid."
- While riding in the crew bus, RP asked PP if she was texting her boyfriend to tell him she was "Working with a creep."
- During the trip to Armstrong, RP made inappropriate comments of a sexual nature. In particular:
  - RP commented that a family member of PP, who is a CN employee, was overweight.
  - RP commented that PP's friend, also a CN employee, was overweight.
  - RP asked PP whether she had lost weight and commented that it appeared that she had.
  - RP frequently spoke about sex and made comments about PP having sex with her boyfriend.
  - RP commented that his mind "lives in the gutter."

On March 9, 2024:

- While at the Armstrong bunkhouse, RP called PP's friend and coworker, while in PP's presence, a "porkchop," and commented that she had gained weight.
- During the trip to Hornepayne:
  - PP told RP she was experiencing chest pain. After expressing concern, RP told PP multiple times, while laughing, that he could help her with her chest pain.
  - RP asked PP if she was Ojibwe. After PP told RP she was, RP commented about the treatment of Indigenous peoples while mimicking a Native accent. When PP mentioned her grandmother advised her not to mention her Ojibwe heritage because of her concern about missing and murdered Indigenous women, RP stated, "I would snatch you, [PP]," and laughed.

- After PP laughed uncomfortably at one of RP's comments, RP told her, "When you laugh it makes it seem okay."
- RP asked PP whether she had plans after work, and PP advised she was going to look for dead pine trees. RP subsequently asked if PP's boyfriend would join, and when PP said he would, RP stated she would "see much more than trees, like stumps and bush." RP also told PP she would get "sexercised."
- After PP stated she might go to her grandmother's house to skin some beavers, RP said she would be "stripping" more than beavers.
- RP asked PP if she was going home to play with her toy. PP asked what RP meant, and she stated she did not have any "sleds or snow machines or toys." In response, RP stated, "You know what I mean." After PP advised she did not know what RP meant, RP stated, "You're going home to play with [your boyfriend's] dick."

On March 11, 2024:

- RP and PP worked on separate trains. When their respective trains approached the Isis siding, RP asked over the radio whether PP ended up going to look for dead pine trees. When PP responded, "Nope, we didn't," RP made a comment, while laughing, that PP never got to see "trees and stumps."

23. In the Disciplinary Investigation, the Grievor is asked whether he disputes those interactions with the Complainant:

> 11 Q. Do you dispute any of the facts about your interactions with Ms Dane as summarized in that report?
> 11 A. Yes
>
> section 3, 3rd bullet point
>
> *"While riding in the crew bus, RP asked PP if she was texting her boyfriend to tell him she was "working with a creep."
>
> I do not recall this part as it is not something I would normally say.
>
> section 3, 5th, 6th, 7th bullet point;
>
> *"RP commented that a family member of PP, who is a CN employee, was overweight."
>
> *"RP commented that PP's friend, also a CN employee, was overweight."
>
> *"RP asked PP whether she had lost weight and commented that it appeared that she had."
>
> Those comments may have been made but were not of sexual nature. section 3, bullet point #8:
>
> *"RP frequently spoke about sex and made comments about PP having sex with her boyfriend."

I do not recall having said this.

section 3, bullet point 11:

*"While at the Armstrong bunkhouse, RP called PP's friend and coworker, while in PP's presence, a "porkchop," and commented that she had gained weight."

Those comments may have been made but were not of sexual nature.

section 3, bullet point 13:

*"PP told RP she was experiencing chest pain. After expressing concern, RP told PP multiple times, while laughing, that he could help her with her chest pain"

I may have said this, but it was not sexual, I know first aid.

section 3, bullet point 14:

*"RP asked PP if she was Ojibwe. After PP told RP she was, RP commented about the treatment of Indigenous peoples while mimicking a Native accent. When PP mentioned her grandmother advised her not to mention her Ojibwe heritage because of her concern about missing and murdered Indigenous women, RP stated, "I would snatch you,and laughed"

Those comments may have been made but were not of sexual nature.

section 3, bullet point 16:

*"RP also told PP she would get "sexercised."

We were talking about her cutting wood ,and it was not intended to be sexual. I don't know where she came from with this "sexercised" because I do not believe I said that.

section 3, bullet point 17:

*"After PP stated she might go to her grandmother's house to skin some beavers, RP said she would be "stripping" more than beavers."

We did talk about learning how to skin beavers at her grandma's house but I don't recall saying she would be stripping more than beavers.

section 3, bullet point 18:

*"RP asked PP if she was going home to play with her toy. PP asked what RP meant, and she stated she did not have any "sleds or snow machines or toys." In response, RP stated, "You know what I mean." After PP advised she did not know what RP meant, RP stated, "You're going home to play with (your boyfriend's] dick."

I don't fully recall that comment but I know I would have not said this.

> section 3, bullet point #20:
>
> *RP and PP worked on separate trains. When their respective trains approached the Isis siding, RP asked over the radio whether PP ended up going to look for dead pine trees. When PP responded, "Nope, we didn't," RP made a comment, while laughing, that PP never got to see "trees and stumps."
>
> Those comments were made but were not of sexual nature.

24. It is noteworthy that the Grievor does not deny the allegations, as he did with respect to the allegation of physical touching, he either “doesn’t recall” or disputes the sexualized nature of the comments.

25. I find that many of the comments are overtly sexual and the Grievor’s explanations are not credible. For example, for section 3, bullet point 13: “PP told RP she was experiencing chest pain. After expressing concern, RP told PP multiple times, while laughing, that he could help her with her chest pain.” “I may have said this, but it was not sexual, I know first aid.” It defies belief that this comment was not of a sexual nature. The Grievor would not have been laughing had his colleague been male and made the same complaint about chest pain.

26. Here, where there is a conflict between the finding of the Investigator, and a lack of recall by the Grievor in the Discipline Investigation, I find that the Company has met the burden of proof that it is more likely than not that these comments were made. Where the Grievor contests the sexualized nature of the comment, I find that the chest pain, “snatching you”, and skinning beaver comments are sexualized. Other comments, such as the weight gain of colleagues are not, but do not convey respect for others.

c. Whether a proper apology had been given

27. The investigation shows the following with respect to an apology from the Grievor:

> 48. Q. in the HR report, it is mentioned that you went to Ms Dane to apologize. What were you going to apologize for?
>
> A. I went to apologize to the employee I called pork shop and explained my feeling of her weight gain and medical issues she may

> encounter and she said that Ms Dane was also upset about the trip and that I should go apologize or at least go talk to her which I did but no one was home.
>
> Note.1530: Presiding officer: recess
>
> 49. Q. Do you have any questions pertaining to the matter under investigation which you wish to ask for the record through the Presiding Officer?
>
> Union:
>
> Q1: If Ms. Dane had told you that she found your behavior inappropriate and asked that you stop, would you have done so?
>
> Q2: Are you willing to offer a written apology to Ms. Dane?
>
> Q3: Are you willing to undergo training as recommended in the investigation report by Southern Butler Price?
>
> A. Q1: Yes, I would have done so.
>
> Q2: Yes, I would be willing to do so.
>
> Q3: Yes, I am willing to take some training to improve myself.

28. Factually, I find that no apology has been given, although an interest in doing so has been expressed. No apology was provided through the Company or the Union at any time.

d. What steps the Grievor has taken to address his behaviour

29. The investigation shows that the Grievor has expressed willingness to undergo further training (see paragraph 27, Q3) and is getting counselling:

> I am taking counselling through EFAP, and they are helping me understand the difference from the past and how it is now. The policies may have been the same but the work environment has changed.
>
> As stated earlier in the investigation, I am willing to training to improve myself so I can become a better person.

30. The Grievor has also engaged in 4 sessions of private counselling between December 23, 2024 and February 3, 2025, with a further session scheduled for May 5, 2025 (see Tab 9, Union documents).

31. Factually, I note that the private counselling sessions took place well after the incidents in March and the discharge of the Grievor in August 2024. I note further that the invoice provided gives no indication as to the nature or the results of the counselling.

32. I find that the Grievor has taken some steps to address his behaviour, but the weight to be given to these efforts is limited. The efforts made are not extensive, and the results are inconclusive. There is no evidence from the therapists as to the efficacy of the sessions on the Grievor.

e. Level of insight into his conduct by the Grievor

33. In the Disciplinary Investigation the Grievor is questioned about multiple Company Policies relating to proper conduct in the workplace, all of which he acknowledges understanding (see Q and As 18-31, Tab 8 Company documents). On two occasions, the Grievor states that he now has a better understanding of the Policies:

> 26. Q. As per Evidence 09, CN CBC page 20, do you understand what is considered Harassment and that is is not tolerated at CN?
>
> A. I understand it better now.
>
> […]
>
> 28.Q. Do you understand that DOING THE RIGHT THING, as per the CN CBC is to Treat people fairly, openly and with respect.
>
> Do not permit coercion or intimidation in the workplace and Speak up and do not allow prohibited discrimination or harassment.
>
> You understand this?
>
> A. I understand it now, yes

34. The Grievor references his intentions concerning his future conduct:

> 31.Q. Based on the answers you provided on the questions regarding the Workplace Harassment and Violence Prevention Policy and of the questions regarding you understanding the CN Code of Business Conduct, can you explain why you did not comply with both the CN Workplace Harassment and Violence Prevention Policy and the CN Code of Business Conduct between March 08 and March 12, 2024 with conductor Emma Dane?
>
> A. After reading the evidence, I understand now that I was not compliant with the rules of CN but in past trips, I have worked with other conductors to which we had many conversations which they

> did not take offence. Not making it right but, moving forward, I will do my best to comply to both the CN CBC and CN WHVPP.
>
> […]
>
> 36.Q. Looking back on the events covered by this investigation, would you do anything differently?
>
> Please explain.
>
> A. I would stick to the rules and make sure that all conversations in the cab will remain respectful and within the policies and guidelines.
>
> Note.1445: presiding officer: recess 1456: resuming investigation
>
> […]
>
> 51.Q. Do you have anything further to add to this employee statement?
>
> A. I will try to do my best to change and be a better railroader and just do my job. For the last 5 months, I kept thinking of what will happen, what will my future be. What has put me in this position is myself and for that reason, I will change and make sure that I do not go through this huge amount of stress again. I am taking counselling through EFAP, and they are helping me understand the difference from the past and how it is now. The policies may have been the same but the work environment has changed.
>
> As stated earlier in the investigation, I am willing to training to improve myself so I can become a better person.

35. While it may well be accurate that the Grievor has a better understanding of the applicable Policies relating to workplace conduct, his focus is on the stress he is living with as a result of his actions. However, he never once refers to the stress he has caused the Complainant. He never states that his actions were wrong, but instead justifies them because “the work environment has changed” or that the Complainant never asked him to stop.

36. I cannot find that the Grievor has full insight into the consequences of his behaviour.

f. Whether the medical note of the Complainant may be considered

37. The company has produced a medical note dated March 14, 2024, from the family doctor of the Complainant (see Tab 29, Company documents).

38. The Union objects to the production of this document, as it was never provided to the Grievor or Union at any time prior to or during the Disciplinary Investigation. It submits that the discipline should be declared void ab initio, or at the very least, the document should not be admitted (see paragraphs 1-5, Union Reply Brief).

39. I do not find that this document is central to the Company's case and does not constitute a "keystone" document. However, for the reasons given by this arbitrator in **CROA 4894,** it is contrary to the Collective Agreement and to CROA Rules to produce this document at such a late date, and the document will not be considered for the purposes of this Award.

D. Is discharge appropriate in the circumstances, or should some lesser penalty be substituted?

Position of the Parties

40. The Company takes the position that its statutory obligations require a safe and secure workplace. It submits that the jurisprudence shows that discharge is the presumptive sanction for a finding of sexual harassment. It argues that the Grievor has not shown sufficient or any reasons for the substitution of a lesser penalty.

41. The Union argues that the Grievor is a very long service employee with an excellent discipline record. There are no antecedents of this kind of problem in his past. He has admitted responsibility and is taking steps to improve himself. The Union argues that appropriate discipline would be considerably less than reinstatement with time served.

Analysis and Decision

42. The Company's Code of Conduct requires all employees to treat one another with respect and does not tolerate harassment:

> RESPECT IN THE WORK ENVIRONMENT
>
> At CN, we are dedicated to providing a safe, supportive work environment where we treat one another fairly, with respect and professionalism and act with integrity at all times.

> […]
>
> DIVERSITY AND A NON-DISCRIMINATORY, HARASSMENT-FREE ENVIRONMENT:
>
> CN is committed to providing a non-discriminatory, harassment-free work environment […]. Inclusivity, diversity and tolerance are three important principles at CN […]. Employees' actions must be consistent with the Company's standards and values.
>
> At CN, there is no place for discrimination or harassment. Employees should treat each other with respect at all times and comply with Company policies, as well as relevant legal obligations […].
>
> NO HARASSMENT IN THE WORKPLACE:
>
> Harassment is behavior or communications, whether written or verbal, which a reasonable person would consider to cause offence or humiliation or affect the dignity of a person and, in the context of employment, results in an intimidating, hostile or offensive atmosphere. At CN, harassment is considered employee misconduct and is not tolerated.
>
> […]
>
> CN will respond to complaints to resolve them promptly and fairly.

43. The Workplace Harassment and Violence Prevention Policy, required by Federal Regulations, is to the same effect:

> Means any action, conduct or comment, including of a sexual nature, that can reasonably be expected to cause offence, humiliation or other physical or psychological injury or illness to an employee.
>
> Includes harassment and violence based on prohibited grounds of discrimination such as: race, national or ethnic origin, color, religion, age, sex, sexual orientation, marital status, family status, veteran status, genetic characteristics, gender identity or expression, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.
>
> […]
>
> For purposes of this Policy, CN workplaces include any location where CN employees perform work-related activities while in the scope of their employment. Examples include CN-owned or controlled buildings, parking lots, rail yards, railroad tracks, trains, machinery, company vehicles, and any other location where CN business or sponsored activity is being conducted.

44. The arbitral case law clearly recognizes the serious nature and consequences of this conduct. As was noted by Member Surdykowski in **Trillium Health Centre v Cupe, Local 4191**, 102 LAC (4th) 48:

> Sexual harassment or assault is intolerable. It is one of the most frightening and damaging things that one person can do to another. The effects of sexual harassment or sexual assault on the victim can be extreme and long lasting and incidents of this misconduct can disrupt the workplace. I am satisfied that sexual harassment falls within the same category of serious misconduct as theft and that discharge is prima facie the appropriate penalty even in the case of a first offence. This does not mean that discharge will necessarily be appropriate in every case, but the onus is on the Union and the grievor to demonstrate that it is appropriate to mitigate the penalty in a particular case.

45. Arbitrator Gray held in **Innophos Canada Inc. and USW , Local 6304 (Mummery**), 2016 CarswellOnt 8165;

> […]. Wherever an incident of harassment or sexual harassment falls on a spectrum of egregiousness, however, it flags the wrongdoer as a potential risk to co-workers and to the employer in future. That risk must be assessed in determining whether the employment should be permitted to continue. I agree that once misconduct that falls on that spectrum is established, the burden of proving that the impact on the workplace and the risk of recurrence is small enough to allow reinstatement falls on the wrongdoer. Long service and a clear prior record are not necessarily enough, by themselves, to discharge that burden.

46. Chair Casey held in **City of Calgary and ATU, Local 583 (Sebua)**,310 LAC (4th) 329:

> Sexual harassment is an especially invidious form of misconduct because it is aimed at the most intimate and vulnerable parts of a person and its victims are almost always women […]. Sexual harassment is a demeaning practice that constitutes an affront to the dignity of employees forced to endure it. Sexual harassment in the workplace attacks the dignity and self-respect of victims both as employees and human beings […].

47. CROA jurisprudence is equally clear. Arbitrator Picher held in **CROA 1791**:

> It is common ground that the [workplace] has traditionally been male dominated […]. In those increasingly exceptional circumstances where employees are either unable or unwilling to adhere to a suitable standard

> of respect for peers of the opposite sex the Company may have no alternative but to revert to disciplinary sanctions. Indeed, it would appear that a failure to take steps against sexual harassment in the work place may leave an employer under the Canadian Human Rights Act liable for the transgressions of its employees in the course of their employment […].

48. The same Arbitrator held in **CROA 4166**:

> The awards of this office are categorical with respect to condemning deliberate sexual harassment of an employee (e.g. **CROA 1791, 2751**)**.**

49. The frequently cited **William Scott** matter enjoins arbitrators to consider all mitigating and aggravating factors when determining if discipline should be upheld or a lesser penalty substituted.

50. Here the two weightiest mitigating factors in the Grievor's favour are his very lengthy service (34 years) and his excellent discipline record (no active discipline, no previous discipline for similar allegations). However, these two mitigating factors can be outweighed by aggravating factors (see **CROA 1791** and **CROA 4800**).

51. A mitigating factor to be considered are the steps taken by the Grievor to address his behaviour. This factor, for the reasons given above, must be given some, but limited weight.

52. A further mitigating factor is that the Grievor has admitted that at least some of his behaviour violated the Policies.

53. The aggravating factors, however, are numerous. The sexualized comments were made knowingly, persistently and frequently over several days. This is not the case of someone who makes a single bad joke. They are comments specifically directed at the Complainant. The comments also take place within the confines of a locomotive, in close proximity to the Complainant. She was in no position to walk away. The Grievor refers to himself as a "creep", indicating a level of awareness of his actions.

54. The level of insight into his behaviour is questionable, for the reasons given above. This lack of insight, and the lack of insight into the effect of his comments on the Complainant is reflected in the fact that no apology has yet been given. It is difficult to conclude that the Grievor is truly remorseful for his actions, other than for the impact of the investigation and termination on him.

55. The Union relies on **CROA 1791**, where Arbitrator Picher held:

> As serious as the issue of sexual harassment may be, failure to observe appropriate norms of conduct should not necessarily trigger the automatic discharge of the offending employee. Sexual harassment, like any disciplinary infraction, must be assessed having regard to the facts of the specific case, including all mitigating factors, with due regard to the general standards of conduct tolerated within the work place, the length of service of the employee who is disciplined and the quality of his prior record.
>
> …
>
> In all cases where discharge is at issue consideration must be given to the alternative of a lesser penalty. If there are indications within the evidence that rehabilitation can be achieved without resort to discharge, and that the reinstatement of the offending employee will not be unduly disruptive to the workplace, that alternative may well commend itself.

56. I do not dispute these observations, but note that Arbitrator found that the Grievor in that matter had offered no apology and had admitted to no wrongdoing. The discharge was upheld. A similar result is found in **City of Ottawa and Ottawa-Carleton Public employees' Union, Local 503 (Elmi)** 271, LAC (4th) 321.

57. In **CROA 4776**, Arbitrator Moreau found unacceptable behaviour by the Grievor, but nonetheless ordered reinstatement without compensation, in light of his long service and good record.

58. At paragraphs 73-85 of the Union Brief, a number of cases are reviewed which resulted in lesser penalties than discharge. While these cases are instructive, each is necessarily decided based on its own facts.

59. For example, in **CROA 1866** the Grievor received only a penalty of 30 Demerits, for sexual advances on a female passenger. I question whether the Company would have been as lenient today as it was some 35 years ago at the time of the incident.

60. In **CROA 3529** the Grievor received discipline of 40 Demerits for having lifted up the back of a co-worker's t-shirt to see a tattoo. I note that the discipline was upheld and that it related to a single incident, unlike the situation here.

61. In **Tembec Enterprises v USW, Local 1-2010**, 2017 OLAA no 433, Arbitrator Bendel reinstated without compensation a Grievor who had poked with his gloved hand a rip in the Complainant's jeans, where the rip was located just below her buttocks. This case involved a physical assault, unlike the present matter, which is more serious. Again, however, it was a single incident, unlike the facts of this matter.

62. In **XL Foods Inc v UFCW, Local 373 A**, 2006 CarswellAlta 2042, Chairman Tettensor reinstated without compensation a Grievor who had grabbed a co-worker by the buttocks in order to move her out of the way. There was, however, no sexual connation to the action, with both employees wearing four layers of clothing in a meat packing plant. The Grievor also apologized immediately. Again, it was a single incident.

63. In **CROA 5096**, this arbitrator reinstated a Grievor without compensation for breaches of the Code of Business Conduct for lengthy sexualized conversation with a female Conductor. However, the Investigation did not make a finding of sexual harassment, unlike the present matter, and the Grievor there had genuine insight concerning his behaviour: "This lapse of judgement does not reflect my behaviour in the past or in the future" (see paragraph 78). I find the level of insight greater in **CROA 5096** than in the present matter.

64. In **CROA 4624**, reinstatement without compensation was ordered by Arbitrator Clarke for a Grievor who had sent a sexually explicit GIF to a co-worker. I note that the Grievor in that matter, however, had apologized in writing to the Complainant within two minutes of sending the GIF file, as well as verbally apologizing. No such apologies are present here.

65. At paragraphs 86-92 of their Brief, the Union cites a number of cases awarding discipline less than discharge for serious misconduct. The cases all deal with non-sexual harassment, so I place less weight on them.

66. However, I do find the cited comments from Brown and Beatty compelling, which at para 7:4422 states the following about rehabilitation potential:

> "In assessing whether a viable employment relationship can be re-established, arbitrators put great weight on whether the employee has tendered a sincere apology and/or expressed real remorse. the assumption is that employees who do so recognize the impropriety of their behaviour and are likely to be able to meet the employer's legitimate expectations."

67. From the cases cited by the Company, I give particular weight to those cases which deal with the rehabilitative potential of the Grievor.

68. In **CROA 4800**, Arbitrator (now Justice) Flaherty considered the behaviour of a 36 year employee with no active discipline. She concluded that the rehabilitative potential did not warrant reinstatement:

> 40. I have carefully considered these mitigating and aggravating factors. In particular, I note the Grievor's long service and the fact that he has no active discipline record. In these circumstances, dismissal would only be warranted in the clearest of cases.
>
> 41. In my view, this is a clear case. The seriousness of the Grievor's misconduct coupled with his ongoing failure to acknowledge wrongdoing or accept responsibility leads me to conclude that discharge is reasonable. I am satisfied that the Grievor cannot be returned to the workplace in the circumstances.

69. In **CROA 4166**, Arbitrator Picher found that the Grievor's discharge must be upheld, given the lack of recognition of the serious nature of his conduct. In this matter, the Grievor had engaged in both physical and verbal sexual harassment of the Complainant:

> I am compelled to the reluctant conclusion that the grievor deliberately and repeatedly engaged in sexual harassment of a fellow employee. He did so without excuse and, it appears, without any recognition as to the seriousness of his own conduct. For all of these reasons the grievance must be dismissed.

70. In **CROA 5076**, Arbitrator Yingst-Bartel considered the actions of a Grievor who had engaged in serious non-sexual harassment of a fellow employee, calling him a terrorist. The Arbitrator found the lack of remorse and accountability of the Grievor to be determinative in her decision to uphold the discharge:

> [47] Of considerable concern on the facts of this case is the lack of insight demonstrated by the Grievor. He failed to take any responsibility for his actions against Mr. K., and did not demonstrate any insight or remorse. The Grievor's attempt to equate the label of the "terrorist" with being called "ramp Boyd" is only one example of this lack of insight. His attempts to rationalize that behaviour were disturbing.
>
> [48] Whether an individual shows remorse and accountability is an important Wm. Scott factor to assess in addressing whether termination is an appropriate response. This is especially the case where harassment has been found to have occurred. In such cases - when there is no recognition of the serious nature of the misconduct and no insight into how it was inappropriate - the Company has very little assurances that the behaviour will change if the Grievor is reinstated. Neither does the Arbitrator. That lack of insight does not attract an Arbitrator's discretion to interfere with a just and reasonable penalty. This is the case even if that individual is of long service and/or has a good disciplinary record. Those two mitigating factors are not sufficient to outweigh the serious aggravating factors which are present in this case.

71. I give full weight to the Grievor's very long service and clean discipline record. He is to be commended for that. However, his persistent and frequent reprehensible behaviour towards the Complainant, his lack of insight and lack of demonstrated remorse strongly militate against reinstatement, even without compensation. Despite

the able arguments of the Union, I am compelled to uphold the Company's decision to terminate his employment.

Conclusion

72. The grievance is accordingly dismissed.

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

July 21, 2025

JAMES CAMERON
ARBITRATOR