**IN THE MATTER OF A DISPUTE**

**BETWEEN:**

**TEAMSTERS CANADA RAIL CONFERENCE**

("Union")

-and-

**CANADIAN PACIFIC RAILWAY COMPANY**

("Company")

**Grievance Concerning the**
**Discharge of Stephanie Katelnikoff**

**Arbitrator:**
Richard I. Hornung, Q.C.

**For the Union**
Ken Stuebing – Counsel
Dave Fulton – General Chairperson
Doug Edward – Sr. Vice General Chairperson
Ryan Finnson – Vice General Chairperson
Stephanie Katelnikoff - Grievor

**For the Company**
Malcolm MacKillop – Counsel
Wendy Zhu - Counsel
Dave Guerin - Senior Director Labour Relations
Dave Pezzaniti - Assistant Director Labour Relations.

**Hearing**
October 15, 2019
Calgary, Alberta

# AWARD

## I

## INTRODUCTION

1. This award involves multiple issues surrounding the dismissal of Stephanie Katelnikoff for off duty social media posts which the Company alleges contained inappropriate internet content and represented conduct unbecoming.

2. It begins with a recitation of the relevant facts.

3. Thereafter it deals with the question of whether the investigation was fair and impartial and concludes that it was not.

4. It then deals with the historical consequences of a finding of an unfair and impartial investigation within the specific confines the parties' CROA agreement and discusses the impact of the recent Saskatchewan Court of Queen's Bench decision in *CN v. Fleischhaker* (*2019) SKQB 245,* which directs that, despite the unique process that CROA represents, it is incumbent on arbitrators, who find an investigation to be unfair and impartial, to nevertheless examine alternative options to voiding the discipline *ab initio.*

5. While noting my preference for CROA's unique investigatory process (and the long accepted ability of CROA arbitrators to impose the void *ab initio* option where circumstances disclose that the investigation was unfair and impartial), I respectfully accept the decision of the Court and examine the alternative options.

6. I conclude that in lieu of reconvening a hearing – and absent the evidence unfairly rejected by the Investigating Officer (IO) - an examination of the remaining admissible and uncontroverted evidence (including the Grievor's post-discharge conduct) is a practical available option.

7. After an examination of the same, I conclude that the available facts do not establish conduct sufficient to justify the Grievor's dismissal.

8. However, the same examination makes it apparent that her post grievance conduct was such that the continued employment of the Grievor is untenable.

9. I ultimately order that in place of her re-instatement the Grievor be provided with appropriate monetary compensation and I reserve jurisdiction to determine the same if the parties cannot agree.

**II**

**BACKGROUND**

10. Stephanie Katelnikoff (the "Grievor") began her employment with the Company on July 28, 2014.

11. On December 26, 2014 the train on which she was assigned derailed, due to a broken track, at West Switch Banff as it was passing over a bridge. The bridge was destroyed and 15 cars fell into the waterway below.

12. In the aftermath of that derailment, in addition to the obvious trauma, the Grievor inhaled fly dust and required medical treatment; she was absent from work and subsequently filed a WCB claim.

13. She returned to work on modified duties on January 14, 2015 and full duties as of January 19th. On January 24, 2015, she was dismissed from service for *"failing to report an on-duty injury*" (re: the fly ash as discussed above), and for speaking to the media about the derailment. Her Union grieved the dismissal.

14. The grievance was heard by Arbitrator Flynn (**CROA 4440**) who, on February 17, 2016, reinstated the Grievor while concluding that:

> *"…the grounds cited (*by the Company) *for Ms. Katelnikoff's dismissal are factually inaccurate and are unfounded. Furthermore, those allegations*

> *appear to be a camouflage of the Company's actual reasons that are discriminatory and in bad faith."*

15. And, that in arriving at his dismissal recommendation, the officer responsible:

> *"…did not act fairly and in the circumstances, the summary discharge of Ms. Katelnikoff was arbitrary and conducted in bad faith."*

16. For medical reasons, the Grievor did not return to work immediately. The day prior to her scheduled return to work on March 7, 2016 she was involved in a motor vehicle accident and was unfit for duty until June 28, 2016.

17. Following thereafter - and until her dismissal which is the subject of this grievance - the Grievor and the Company became engaged in self-serving conduct which exacerbated their already strained relationship.

18. On August 11, 2016 the Grievor's physician provided Functional Ability Forms which indicated that she would be unfit for duty until December 20, 2016.

19. On August 12, 2016 she was given a written reprimand. The letter outlined the social media conduct that the Company would not tolerate and provided its expectations of the Grievor, in that respect, going forward.

20. The Union grieved the letter and it was ultimately expunged from her record by agreement of the parties in September 2019.

21. On December 23, 2016 OHS deemed the Grievor fit to attend familiarization trips. She returned to work on January 6, 2017.

22. On March 17, 2017 the Grievor was medically assessed as unfit for duty until May 30, 2017. She returned to work on August 21, 2017.

23. On September 29, 2017, the Grievor was involved in an incident at the Red Deer Travel Lodge at the end of her tour of duty. After investigation, the Company assessed a 10-day suspension (five deferred) for failing to properly report an injury (she suffered hyperventilation) and her consequent attendance at the hospital. The Union grieved and, by agreement, the parties reduced the suspension to three days.

24. On September 30, 2017, the Grievor told CP Management that she intended to file a Human Rights complaint over the manner she was treated by the Company. On October 13, 2017, she attended a meeting with an official from the Company to discuss her concerns about discrimination and the Company's violation of her Human Rights.

25. Finally, completing this stream of the narrative, on November 6, 2017, she wrote the Company and advised that the absence of a response or apology to the events that she complained of had led her to elect to *"… file a formal complaint with the human rights commission for loss of dignity suffered as a result of the companies [sic] actions…"*.

**III**

**FACTS RE: INVESTIGATION AND DISMISSAL**

26. Where there is a conflict in the evidence, the narrative below represents my findings of fact with respect to the same.

27. The Grievor has three Facebook profiles that are relevant to these proceedings:

(1) her "*Steph Kat*" account on CP Rail's (Unofficial) Facebook site;

(2) her "*Stevie Rae*" personal account;

(3) her "*missdemeanour.xo*" personal account relative to her modelling career.

28. As well she has an Instagram profile *"@missdemeanour.xo"*

29. According to the Company, on September 5, 2017, its social media group was alerted to a photo the Grievor shared on her *missdemeanour.xo* personal site (Company Tab 8). The photo depicts the Grievor posing on a railway bridge. As I understand the Company, the offensive parts of the post are that: (i) the Grievor's appearance on a railway bridge poses a danger and implies that it is "OK" to trespass on a railway track; and, (ii) in the comment column next to the photograph, the Grievor posted a message wherein (along with 7 other hashtags) the Company was referenced by: "*#cprail*."

30. Six weeks later, on October 15, 2017, the Company says it received a complaint, through its webmaster, regarding the Grievor's "*Stevie Rae*" social media conduct. The putative complainant, Sharon Dickenson, levelled the following (verbatim) complaint (Company Tab 5):

> *Comments:*
>
> *Its seems your emplyee Stephanie Katelnikoff finds her train wreck in banff amusing as she currently hs a Facebook profile where she is quite proud what she did." …*
>
> *Contact Me: No*

31. Ms. Dickenson provided a link to the Grievor's "Stevie Rae" Facebook profile on CP's (Unofficial) Facebook page. That page is not authorized by the Company; but it is condoned; access is restricted to CP management and employees; and, it is intended to encourage dialogue between all CP's employees. On that page, the Grievor's Profile states:

> *I wanna help anyone. Model port; missdemeanour.xo Resume;* ***Google Banff train crash*** *(*laughing/crying emoji*) Life; Love it (*emphasis added*)*
> *Studied at Athabasca University.*
> *From Hell, Norway*

32. On October 31, 2017, the Grievor was served a notice to appear at a formal investigation for the following:

*In connection with conduct and actions on Instagram, on Facebook and other social media accounts, and the content of and compliance of those postings with Company policies, including those related to CP Code of Business Ethics, Acceptable Use Procedures – Policy 510 I, Internet and Email Policy–1802, railway operating and safety rules.*

33. James Taylor, Manager of Locomotives and EOTD, conducted the investigation. The investigation lasted approximately 15 hours and took place over a three-day period (November 6-8, 2017).

34. Thereafter, the Grievor was served with the following letter of termination on November 21, 2017 (Company Tab A):

*Please be advised that you have been dismissed from Company Service effective November 21, 2017 for conduct unbecoming a Canadian Pacific employee as evidenced by your failure to act in a manner that will enhance CP's reputation, your failure to refrain from making disparaging comments regarding CP and for posting inappropriate internet content on various social media platforms while employed as a Conductor at Canadian Pacific. This includes:*

*(1) The posting of photos and references to the Banff Google train derailment and "Resume: Google Banff train Crash" (Exhibits #16 & 17);*

*(2) The posting of photos showing yourself trespassing and standing on railway property and equipment (Exhibits #7, 8, 10 & 12); and*

*(3) The posting of inappropriate photos and content publicly displaying disregard for CP's interests and reputation (Exhibits #9, 14 & 15).*

*(4) This is a violation of your Social Media Warning Letter dated August 12, 2016 and the following CP Company policies:*

*Code of Business Ethics;*
*Acceptable Use Procedures-Policy 5101; and*
*Internet and E-Mail Policy-1802.*

*(5) Notwithstanding that abovementioned incident of conduct unbecoming an employee is a major offence under CP's Employee Discipline and Accountability Process warranting dismissal in and of itself, based on your previous discipline history and your August 12, 2016 Warning Letter"*

## IV

## WAS THE INVESTIGATION FAIR AND IMPARTIAL

35. The Union contends that the Company's investigation was not conducted in a fair and impartial manner. I agree.

36. In discussing the lack of impartiality, the Union, inter alia, points to three salient circumstances which manifest the unfairness and lack of impartiality of the IO.

37. At para. 120 of its Submission the Union notes:

> *At Q&A 116 Ms. Katelnikoff paused while providing her answer, and then attempted to continue. The IO abruptly told Ms. Katelnikoff she was done answering, and when she responded that she was not he reiterated "too bad". She protested "How unfair" this was and was further antagonized and misrepresented by the IO in his note at Q&A 116. This note at Q&A 116 provides a biased description of the exchange, shedding insight into the tense setting in which Ms. Katelnikoff was placed.*

38. I accept the Union's description of the circumstances surrounding Q&A 116 and draw the appropriate adverse inference against the IO. The circumstances described are consistent with similar circumstances which arise in the investigation. And, no effort was made by the Company to challenge the Union's version.

### Sharon Dickenson

39. From the outset, the Union took the position that "*Sharon Dickenson*" was fictitious and that the email address attributed to her, as well as Ms. Dickenson's persona, were opportunistically confected by the Company as a pretext to justify the investigation of the Grievor.

40. Having reviewed the evidence, I conclude that it is improbable that *"@email.com"* is a legitimate functional email address. The IO's denial of the requests relative to the alleged complainant Dickenson (Q. 207 – 211), particularly the innocuous (yet clearly relevant) question regarding the IP address from which the alleged

email originated, leaves me to conclude that the IO was not impartial nor was he intent on determining relevant facts that might challenge the Company's conclusions.

**Chris Clark**

41. At the demand of the IO (Q. 212), the Grievor provided a list of questions which she wished to ask Mr. Clark. In what appears to be a game of "cat and mouse" the IO requires the Grievor to explain the relevancy of her questions and how those questions will "*affect the fairness and impartiality*" of his investigation. He, ultimately concludes that the proposed questions to Mr. Clark are not relevant.

42. I find the relevance of the proposed questions to Mr. Clark to be obvious and clearly explained to the IO by the Grievor at Q.'s 213 – 215.

43. Additionally, the refusal of the IO to interview Mr. Clark is in direct contravention of the *Letter of Understanding* between the parties (Union Tab 25) which states:

> *There may be instances where the employee or the Union may request that certain witnesses be called on behalf of the employee under investigation.* ***Such request will not be denied unless it can be demonstrated that these people could not*** *have witnessed the incident under investigation, nor could they* ***provide any pertinent evidence in this regard****. (emphasis added)*

44. The IO, without posing the questions to Mr. Clark, could not have fairly determined whether Mr. Clark had "*pertinent evidence*". His failure to do so underscores his lack of impartiality.

45. Perhaps most egregiously, at the conclusion of Q&A 219 the IO informed the Grievor - after a multi-day investigation in an environment of stress and intimidation - that:

> *"… she would not be allowed to go home and conclude the statement unless she answered "yes" to being treated in a fair and impartial fashion…".*

46. The unfairness of the IO's demand is self-evident. I accept the Union's description and categorization of the circumstances surrounding Q&A 219. They are consistent with others that arise in the investigation. And, no effort was made by the Company to challenge the Union's version.

47. The failure/refusal of the IO to deal fairly and impartially with the issues regarding the questions surrounding his own participation (Q. 21), as well as the items discussed above, are sufficient in themselves to conclude that the investigation was neither fair nor impartial. However, I also found the following questions of concern: Q.'s 49/50; 54; 65; 67; 77; 88/89; 92; 94; 101; 119, 148; 192

48. For the reasons given, I conclude that the investigation of the Grievor was neither fair nor impartial.

## V

## CONSEQUENCES OF AN UNFAIR AND IMPARTIAL INVESTIGATION

49. The issue now arises whether the finding of a fair and impartial investigation leads to a declaration that the Grievor's dismissal is void *ab initio;* or whether, in its place, an alternative remedy should be imposed.

50. The Union argues that the lack of fairness and impartiality of the investigation compels me to void the Grievor's dismissal *ab initio*.

51. The Company asserts that even if some of the questions posed during the course of the investigation are of concern, it does not follow that discipline is rendered void *ab initio* but rather that my focus ought to be on the evidence arising from the investigation which should determine when a declaration of void *ab initio* is warranted.

52. The investigation process in CROA discipline cases has existed over many years and is a unique fact-finding procedure specifically designed by the parties to narrow the issues and expedite the arbitration process.

53. A helpful explanation of the operation and expectations inherent in the CROA investigative system is contained in the recent decision of Arbitrator Clarke in *TCRC v. CPR;* ***AH 663*** wherein he states:

> *35. Under CROA's expedited system of arbitration, the parties have agreed to use a formal investigation to identify the facts in discipline cases. The intent is to eliminate the fact-finding role arbitrators would otherwise perform in a regular arbitration. This agreement between the parties allows this Office to hear multiple cases in a single day.*
>
> *36. Certain production obligations exist to ensure an impartial and fair investigation; a failure to meet these obligations may render any discipline void ab initio.*
>
> *37. In* ***CROA&DR 2073****, this Office noted the investigation was intended to be informal, but still had to be fair and impartial: … disciplinary investigations under the terms of a collective agreement containing provisions such as those appearing in Article 34 are not intended to elevate the investigation process to the formality of a full-blown civil trial or an arbitration. What is contemplated is an informal and expeditious process by which an opportunity is afforded 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.*** *Those requirements, coupled with the requirement that the investigating officer meet minimal standards of impartiality, Ad Hoc 6639 are the essential elements of the "fair and impartial hearing" to which the employee is entitled prior to the imposition of discipline. (Emphasis added)*
>
> *38. In CROA&DR 3061, this Office noted that a faulty investigation which compromised the integrity of the record could lead to a finding of the discipline being void ab initio:*
>
> > *As noted in prior awards of this Office, in discipline cases the form of expedited arbitration which has been used with success for decades within the railway industry in Canada depends, to a substantial degree, on the reliability of the record of proceedings taken prior to the arbitration hearing at the stage of the Company's disciplinary investigation.* ***As a result, any significant flaw in the procedures which substantially compromise the integrity of the record which emerges from that process goes to the integrity of the grievance and arbitration process itself. Consequently, in keeping with general jurisprudence in this area, it is well established that a failure to respect the mandatory procedures***

> ***of disciplinary investigations results in any ensuing discipline being ruled void ab initio.*** *(Emphasis added)*

54. In **CROA 4663**, Arbitrator Clarke noted:

> *22. … a faulty investigation is not just a minor "technical" issue: For reasons elaborated in prior awards of this Office, the standards which the parties have themselves adopted to define the elements of a fair and impartial hearing are mandatory and substantive, and a failure to respect them must result in the ensuing discipline being declared null and void …* ***While those concerns may appear "technical", it must again be emphasized that the integrity of the investigation process is highly important as it bears directly on the integrity of the expedited form of arbitration utilized in this Office,*** *whereby the record of disciplinary investigations constitutes a substantial part of the evidence before the Arbitrator, and where the testimony of witnesses at the arbitration hearing is minimized*. (Emphasis added)

55. In dealing with whether or not a breach of the Company's obligation to conduct a fair and impartial investigation within the CROA framework necessarily led to a finding that the subsequent discipline was void *ab initio,* Arbitrator Sims, in **CROA 4558**, reviewed the impact of the decisions in: *Dunsmuir v. New Brunswick [2008] 1 S.C.R. 190; AUPE v. Alberta [2010] ABCA 216; Alberta Health Services v. Health Sciences Association of Alberta [2011] ABCA 306* and concluded that:

> *The impact of Dunsmuir and these subsequent cases needs to be weighed against a long line of CROA cases that clearly hold a breach of Articles like 117.2 renders the discipline void ab initio. My review of these cases leads me to conclude the CROA authorities still apply. The distinction is that the CROA cases rely not only on simple contract interpretation, but also express contractual terms, as well as on due process and fairness concerns inherent in the structure of the CROA arrangement.*
>
> *…*
>
> *… When standards have been adopted, then CROA adjudicators have viewed, and enforced them, in accordance with the following approach described in CROA 3221.*
>
> > *For reasons elaborated in prior awards of this Office,* ***the standards which the parties have themselves adopted to define the elements of a fair and impartial hearing are mandatory and substantive, and a failure to respect them must result in the ensuing discipline being declared null and void …***
>
> *The CROA system is a longstanding, unique, and consensual modification of that "normal system". By a combination of collective agreement terms (specific to each bargaining relationship) and adherence*

> *to the rules and procedures of the Canadian Office of Railway Arbitration, the parties allocate part of the "due process responsibilities" to the workplace and other parts to the CROA panels. The CROA panels that carry responsibility for the resulting decisions can only ensure that overall due process is met by requiring the parties to adhere strictly to their part of the due process bargain. This is not just a matter of contract law, but of the administrative law rules that ensure that the basic elements of fairness such as those described above, are met in individual cases.*
>
> *CROA panels achieve this by ensuring that the parties comply with the pre-termination rules they have themselves agreed to. But it is not only that they have agreed to them, it is because such agreements, despite the variety in content, are essential to the workings of the broader CROA system the parties have adopted…*
>
> *Breaches of the collective agreement pre-discipline due process terms go to the core of the CROA process. They are not (if fundamental) just oversights that can be excused because a full de novo arbitration hearing might be thought to rectify the breach. …*
>
> *CROA proceedings were clearly not adopted on the premise that the hearing would itself be a new and independent look at discipline, as is the case in mainstream arbitration where the Employer carries the onus of proof and rarely has the formal opportunity to question the grievor and have that grievor bound by their replies.*

56. Accordingly, Arbitrator Sims concluded that the discipline was void *ab initio*.

57. In a Judicial Review of that decision *(Canadian National Railway Company v. Fleischhacker (supra),* Justice Zerr of the Saskatchewan Court of Queen's Bench, set Arbitrator Sims' award aside and directed that it be remitted back to the Arbitrator to determine the appropriate remedy flowing from CN's breach and to conduct a hearing on the merits.

58. In arriving at her decision, Justice Zerr reviewed the various authorities discussed by Arbitrator Sims in **CROA 4558** and relied, *inter alia,* on a pre-Dunsmuir decision by Justice Cameron, as follows:

> *[48] On appeal, Cameron J.A. addressed the automatic voiding discipline as a consequence of a procedural breach, observing:*
>
> > *Turning, with this in mind, to the potential consequences in issue, the consequences of treating disciplinary action such as suspension or discharge as automatically null and void as a result of a failure to observe the requirement is fraught with difficulty. First, it implies*

> *presumptive and irreparable harm of the nature of that at stake, though harm of that nature does not inevitably accompany non-observance. Second, it forecloses determination of the basic issue of whether just cause existed for suspension or discharge, for to render them null and void is to render them incapable of confirmation. Third, it serves to relieve the employee, in those instances where cause does exist, of his or her breach of a term of the employer-employee relationship, a term that may be fundamental to the relationship, such as that touching theft from the employer. Fourth, it preordains reinstatement as the remedial consequence of non-observance, even though this may be inappropriate. Hence, to treat a suspension or discharge as automatically null and void as a result of any failure to observe the requirement tends to distort reality, overshoot the mark, and work serious inconvenience, injustice even.*

*[49] Having so observed, Cameron J.A. went on to consider the remedial consequences of the breach, concluding:*

> *Having regard for the real harm of the breaches, and to the extent they affected only her interests, the appropriate remedy, if possible, was to exclude the confession, determine if the company had had just cause to suspend and discharge her in the absence thereof, and then to either set aside the suspension and discharge and reinstate her, if the company did not have just cause, or to dismiss the grievance if it did. Otherwise, the remedy was destined to be excessive and inappropriate, especially in the circumstances.*

59. While recognizing that Arbitrator Sims was understandably concerned "*about the integrity of the CROA & DR arbitration process"*, and accepting that:

> *"…within that (*CROA'S) *process, the investigation is of central importance, often forming the entire evidentiary basis upon which the arbitration proceeds. Compliance with Article 117.2 represents the single, guaranteed opportunity for an employee to respond to the evidence against him or her."*

Justice Zerr, ultimately concluded that Arbitrator Sims' award:

> *[57] … **fails to recognize … the existence of alternate remedies that would preserve the integrity of the CROA & DR process without defaulting to a de novo approach.** For example, the complaints in CN's possession at the time of the investigation, as well as the third complaint received after the investigation, could have been excluded from evidence. The result of such exclusion would be to place the Grievor in the same position he occupied prior to the late disclosure, underscore the importance of Article 117.2 compliance, and allow the grievance to proceed on its merits. Alternatively, carefully circumscribed testimony from the Grievor, limited to the content of the complaints, would restore him to the same position. Failure to consider alternatives such as these, within the factual and legal context, is what renders the award unreasonable.*

> *[58] The expertise of the arbitrator is undeniable. So too the highly specialized system of arbitration in which he made his decision. Although the arbitrator's reasoning is transparent, I cannot state it is, at all times, intelligible; specifically, his reference to "express contractual terms" as a distinguishing feature of the CROA & DR authorities. In addition, insofar as the arbitrator identified his options as either voiding discipline ab initio or fundamentally altering the entire CROA & DR arrangement, his decision falls short of the reasonableness standard of review.*

60. While I accept and agree with Justice Zerr's comments in *Fleischhaker* as they relate to the application of the void *ab initio* principle – and respectfully defer to her decision herein – I prefer the conclusions of arbitrators Clarke and Sims as they relate to the unique dispute settlement process agreed to by the parties within the specific CROA framework.

61. The CROA Investigation process is fundamental to the successful operation of the entire CROA scheme relative to *"… the constructive settlement of* (the parties') *disputes*" (Canada labour Code). It often forms the entire evidentiary basis upon which the arbitration proceeds. Having been specifically agreed to by the parties for its focused CROA purpose it has been implemented and adhered to over several decades.

62. An examination of past cases - where a lack of a fair and impartial investigation is alleged - reveals that CROA arbitrators have carefully guarded the investigative process to preserve the spirit and integrity of the parties' agreement while being vigilant not to employ the void *ab initio* option in circumstances where that remedy is not warranted and thus ensuring that the parties' intentions are not thwarted (**CROA 4546**).

63. Because it was intended to obviate the need for arbitrators to fact-find, and thus expedite the hearing of cases, the CROA investigation is governed by the overarching requirement that the Employer must conduct it in a fair and impartial manner.

64. When that fails to occur – and circumstances as referred to in **CROA 4590 / 4656** are not extant - the consequences for the Employer is that it is left to the arbitrator to determine whether or not the breach of fairness and impartiality is such that, in and of itself, it warrants that the discipline imposed be deemed void *ab initio*. While that result, as observed by Mr. Justice Cameron, is conclusive and preordains reinstatement, it nevertheless reflects the parties intention which ensures that: the investigation of an incident will be put into the hands of the Employer; that the facts so obtained will be relied upon at arbitration; and, that the investigation will be fair and impartial.

65. Where the employer fails to meet its fundamental investigatory obligations it can, and should, expect effective consequences.

66. Alternatives which drive the arbitrator back into the investigative process in order to cull out those facts that are admissible or otherwise salvageable for the purpose of proceeding with another option negates the very purpose of why the parties designed and implemented the CROA investigative process in the first place.

67. As well, it effectively calls into question the labour relations reality which encourages parties in a collective bargaining relationship to arrive at resolution processes which not only save costs but are efficient, expeditious and, most importantly, are specifically designed to meet their own operational needs. The importance of doing so, is manifested in the Preamble of the *Canada Labour Code* which declares:

> *WHEREAS there is a long tradition in Canada of labour legislation and policy designed for the promotion of the common well-being through the encouragement of free collective bargaining* ***and the constructive settlement of disputes;***
> *…*
>
> *AND WHEREAS the Parliament of Canada desires to continue and extend its support to labour and management* ***in their cooperative efforts to develop good relations and constructive collective***

> ***bargaining practices**, and deems the development of good industrial relations to be in the best interests of Canada …"*

**ALTERNATIVES TO A VOID *AB INITIO* ORDER**

68. Notwithstanding that I have concluded that the investigation was not fair and impartial, I am respectfully constrained by the decision of Justice Zerr in *Fleischhacker* and left to consider what options, if any, exist that would *"… preserve the integrity of the CROA&DR process without defaulting to a de novo approach"*.

69. The application of *Fleischhaker* is made more complex in the present case because the unfairness and lack of impartiality of the IO permeated the entire investigative process and was particularly manifested by the suppression of relevant evidence.

70. While there may be others, having regard to the directive of the Court, the following options appear to be available:

    i) Conduct a new hearing on the merits;
    ii) Compel the attendance of Chris Clark and Mr. Taylor to answer the relevant questions;
    iii) Compel the disclose of the IP address and the production of Sharon Dickenson if she proves to exist;
    iv) Examine the questions objected to by the Union for their admissibility at arbitration;
    v) Then determine the case on the merits in light of the above;
    vi) Or, alternatively, examine the case on the basis of existing, admissible facts - leaving aside the suppressed evidence - and attempt to determine whether a conclusion can be reached.

71. If options (i) – (v) were chosen - and all the evidence which she sought at the investigation was favourable for Ms. Katelnikoff - the result would be that her grievance would be allowed based on the existence of bias and discrimination.

72. However, that being said the issue of remedy would remain. In arriving at a determination of the appropriate remedy, the Grievor's post discharge social media conduct, would be a factor to be considered. As would the issue of whether or not her continued employment with CP was tenable.

73. Accordingly, leaving aside that it requires putting the cart before the horse, and given my ultimate conclusion that the Grievor's immutable post discharge conduct is determinative of the appropriate remedy, the final option (vi) is the most practical and pragmatic in all the circumstances.

**VI**

**THE "MERITS"**

74. Absent the suppressed evidence, I will nevertheless deal with the merits of the Employers allegations on whether or not the conduct of the Grievor, as set out in the letter of dismissal, was culpable and warranted dismissal.

75. The relevant test for examining an employee's off duty conduct and determining his/her continued employment was recently examined in *Amalgamated Transit Union, Local 508 v. Halifax (Regional Municipality)*, [2017] N.S.L.A.A. No. 1:

> *Is the reputational interest asserted by the Employer "substantial and warranted" such that a fair-minded member of the community served by Halifax Transit, informed of all the facts, would conclude that the continued employment of the Grievor is untenable?* ***In my view, this test requires two stages of analysis. The first is whether the reputational interest asserted by the Employer is substantial and warranted such that some form of discipline is warranted. This should be assessed in light of what "a fair-minded" member of the community served by Halifax Transit, who is informed of all the facts, would conclude.*** *The further consideration is whether that "fair-minded person" would conclude that the reputational interest asserted by the Employer is substantial and warranted such that the Grievor's continued employment is untenable, when the Grievor's dismissal is the issue. (at para. 207)*

76. I have applied the above test on each of the allegations in the Company's dismissal letter which I have numbered below, for ease of reference, as (i) – (v).

**(i) The posting of photos and references to the Banff Google train derailment and "Resume: Google Banff train Crash" (Exhibits #16&17)**

77. The Grievor posted Ex. 16 on her CP Rail (Unofficial) "*Steph Kat*" Facebook site. It consists of an amateur drawing depicting four railway cars in a waterway and an engine with "Canadian Pacific" written on it on a railway bridge running above them. Her accompanying note says: "*My sister made me a picture".*

78. I am satisfied that the above post, taken together with the Grievor's post of an actual photo of the railway cars in the waterway (Company Tab 17) on her *Stevie Rae* personal account, represented disciplinable conduct which – in addition to showing poor judgement - was intended to call the Company's reputation for safety into question. However, taking into consideration the fact that the Grievor was involuntarily involved in the crash; that she would have experienced some trauma as a result; and, that she was subsequently dismissed using her post-crash behaviour as a pretext, I conclude that it should have elicited no more than a warning.

**(ii) The posting of photos showing yourself trespassing and standing on railway property and equipment (Exhibits #7, 8, 10 & 12)**

79. The postings of photos (Company Tabs 7, 8, 10 and 12) are all on the Grievor's personal modeling site (*missdemeanour.xo*). Notwithstanding the Company's submissions to the contrary, none of the impugned photos rise to the level of conduct unbecoming so as to disparage the Company; pose any real safety threat; or which a fair minded person would regard as affecting the Company's reputational interest in safety.

**(iii) The posting of inappropriate photos and content publicly displaying disregard for CP's interests and reputation (Company Exhibits #9, 14 & 15)**

80. (a) I accept the Grievor's explanation that Ex.'s 9 and 11 posted to the Grievor's *missdemeanour.xo* account - which show her in a Company vest - was

incidental and unintentional. In my view, unless one was looking for it, the CP logo would be barely noticeable; and, in all events, it does not reflect either conduct unbecoming or represent a failure to act in a manner that enhances CP's reputation. Nor does it represent *"inappropriate internet cont*ent" as suggested by the Company in its dismissal letter.

(b) In Company Ex. 14, the Grievor posted a photo on the CP (Unofficial) Facebook page, with a photo of the Company's Business Code of Ethics, stating:

> *Not sure what the occasion was but CP mailed me* ***this short fictional comedy****. It was an ok read, definitely funny though Not sure who the author is. Anyone else get one in the mail? 'Laughing Emoji'" (*emphasis added*)*

Applying the standard of what a fair-minded member of the community served by CP Rail, who is informed of all the facts, would conclude, the description of the Company's Business Code of Ethics as a "*short fictional comedy*" – even though published on the CP Unofficial site - affects its reputational interest; represents conduct unbecoming; and, is both disparaging and disrespectful. I find the Grievor's conduct to be culpable and deserving of discipline in the manner of a short suspension.

(c) Company Tab 15 is a photograph of the Grievor on the CP Rail (Unofficial) site with a" Bad Order" shipping tag attached to her ear. Her explanation is consistent with that given at the investigation and is stated above the photograph itself as:

> *After almost 20 hours in an investigation strung out over 4 days at head office and a statement that was 35 pages long.*
>
> *B/O acct unit over capacity and engine burned out*
>
> *Seriously though did I break some sort of investigation record today?"*

81. The post and photograph were distributed amongst other CP employees and are in relation to her experience of being investigated for a failure to report a hospital visit at Red Deer. It represents her (perhaps understandable) personal dismay,

as well as her emotional and physical state, after attending an investigation for approximately 20 hours over the course of four days relative to a failure to report her own medical condition. I conclude that the narrative – although not enhancing CP's reputation – is nevertheless true and the photograph was intended to reflect her emotional and physical state. In the circumstances, I cannot conclude that the post represented culpable behaviour deserving of discipline.

**(iv) This is a violation of your Social Media Warning Letter dated August 12, 2016 and the following CP Company policies:**

*Social Media Warning Letter*

82. At the time that the Grievor was dismissed on November 21, 2017, the letter of August 12, 2016 had been grieved. As the result of that grievance the Warning Letter was removed from her employment record. Simply put, for the purposes of this grievance the Warning Letter of August 12, 2016, did not "exist". Accordingly, this ground fails.

*Code of Business Ethics*

83. The Code of Business Ethics begins by setting out the parameters of its application. It states:

> *"Employees should use this Code as a tool to provide direction and assistance in their* ***business conduct in representing CP****. …"* (Emphasis added)

84. Having reviewed the: Code; the evidence; and, the submissions, I am unable to conclude that it captures (or was even intended to capture) the conduct of the Grievor in this grievance.

*Email Policy*

85. The evidence established that at the time that the Grievor was engaged in the conduct alleged, the *Email Policy* did not exist. Ergo, it does not apply.

*Acceptable Use Procedures-Policy 5101*

86. No evidence was adduced which establishes that the Grievor violated this Policy.

87. In addition, relative to all the policies listed in (iv), even had I concluded that any one of them applied, there was no evidence adduced to satisfy me that the rules established in *KVP Co. Ltd. (1965), 16 LAC 73* had been addressed or otherwise satisfied.

**(v) "….*based on your previous discipline history and your August 12, 2016 Warning Letter; this incident also constitutes a culminating incident which warrants dismissal"***

88. As indicated in (4) above, the warning letter no longer "*existed*" at the time of the hearing. The culminating incident argument based thereon does not apply.

**Accommodation**

89. The Union (para's 170-180) also raised, for the first time, that the Grievor suffered from a medical condition which contributed to her engaging in the impugned behaviour alleged by the Company. Even leaving aside the Union's failure to raise the Grievor's ADHD condition as a factor during the investigation, I am not satisfied that sufficient evidence was adduced to establish a link between the misconduct at issue and the Grievor's medical condition or that the test for *prima facia* discrimination established in *Elk Valley* (2017) SCC 30 was met.

**VII**

**CONCLUSION ON THE "OPTION/MERITS"**

90. The problem with employing an option other than void *ab initio* in this case, is that a significant aspect of the lack of fair and impartial treatment of the Grievor involved the IO's exclusion of arguably relevant and pertinent evidence. Had that evidence been favourable to the Grievor, it would have established bias or discrimination.

91. Nevertheless, the evidence adduced – even impugned as it was – only established that the Grievor's conduct warranted discipline in two of the circumstances alleged by the Company. Such discipline would not have amounted to dismissal.

92. In either event, reinstatement would ordinarily follow.

93. Taking into account progressive discipline; mitigating circumstances; the Grievor's remorse exemplified by her taking down the impugned posts as soon as she was made aware that the Company regarded them as inappropriate; and, the Company's conduct, I would have assessed an overall suspension of 3 days.

94. However, that result would leave aside any consideration of an alternative remedy having regard to the Grievor's post discharge conduct.

95. The conundrum which this leaves is that, on the one hand, a determination of void *ab initio* would deem the Grievor's discharge automatically null and void and, as noted by Justice Cameron, preordains *"… reinstatement as the remedial consequence of non-observance, even though this may be inappropriate".* However, on the other hand, pursuing an alternative option avails the prospect that an alternative remedy might be imposed.

96. This consequence allows for the Company both to breach it's unique CROA obligation to conduct a fair and impartial hearing and (contrary to the parties' agreement and practise) to rely on the arbitrator to subsequently sift through the entrails of a non-compliant (even biased) investigation to determine if some other remedy exists notwithstanding its conduct.

97. This award should not be taken as a license for the alternative discussed in the paragraph above. Even applying the directives in *Fleischhaker,* this was a clear

case for a void *ab initio* determination for which – but for the Grievor's post grievance conduct – there would not have been an alternative remedy that would *"…preserve the integrity of the CROA & DR process without defaulting to a de novo approach. …"*

**VIII**

**GRIEVOR'S POST-DISCHARGE CONDUCT**

98. Post-discharge evidence is generally admissible and considered relevant in addressing remedies as opposed to the threshold question of whether the Company had cause for dismissal in the first place: *Quebec Cartier (1995) 2 SCR 1095*

99. In the circumstances of this case, the Grievor's post-discipline conduct must be addressed.

100. The Company argues that the Grievor's post-discharge social media posts establish a complete breakdown in the Employer/Employee relationship and urges that irrespective of my decision on the merits, or the lack of a fair and impartial investigation, the Grievor should not be re-instated.

101. The impugned posts raised by the Company are as follows:

i) On December 8, 2017, at 3:19, the Grievor – via her *"Steph Kat"* handle, posted the following on the CP Rail Unofficial Facebook site:

> *"Hey #CPRAIL could someone maybe call me back about the thousands and thousands of dollars in wages you owe me? No one has returned my calls or messages but I know you lurk my social media because you fired me over modelling pics and social media what not. So anyways, hopefully this gets your attention and we can sort this out? Ex-Employee #1000980. Thanks. #canadianpacific #canadianpacificrailway #cprailway #cpr".*

ii) On December 8, 2017, at 5:47, on the same site, the Grievor posted the following:

> *"Hey CP, I know you read the posts here because you fired me citing something posted in here. Well no one is returning my phone calls or emails about the thousands of dollars in wages that you still haven't paid me. Perhaps when you see this you can have someone call me back and we can sort that out. Since my phone calls and emails aren't working. Thanks CP X-1000980"*

iii) On December 10, 2017, the Grievor, on the same site, posted photos of herself juxtaposed with three bare chested firemen while making a comparison between the apparent acceptability of the suggestive male photographs on railway tracks as opposed to the treatment she received from CP which alleged that her photographs were grounds for dismissal.

> *"I have travelled the world and have never been anywhere so dreadful as the railroad. I have dated some real a-holes and never suffered abuse like the abuse of Canadian Pacific Railway.*
>
> *The man who threatened to break into my house and rifle through my panties still has a job but I don't, because I made some dumb social media posts. What message does that send CPR? What do you think that says about your priorities? #systematicabuse".*

iv) On January 26, 2018, the Grievor – on her *"missdemeanour.xo* modelling site - posted a photo in which she is dressed as a train Conductor along with a statement that:

> *"One year I decided to be a CPR train conductor for Halloween. It was the scariest thing I could think of being."*

v) On February 3, 2018, the Grievor – on a Miss Canada associated site – the Grievor posted modelling photographs of herself along with the following note:

> *"AHHH!!! It is official. I am running for Miss Canada. What better way than to say 'I don't need you!' to CP Rail than put myself right back out there and to seize all of life's amazing opportunities?" …*

vi) On November 11, 2018, the Grievor – on her *missdemeanour.xo* site - posted suggestive nude photos of herself on a bed, tied up with ropes, along with the note:

> *"The investigating officer at CP Rail, James Taylor, called my photos graphic and suggestive. I'll show you suggestive!!"*

vii) On December 6, 2018, the Grievor posted a photo of a woman walking on a railway track with her right hand extended above her head with a protruding index finger along with a note that reads:

> *"It's been a year since the railroad fired me after raiding my social media/modelling accounts. In case I haven't made my feelings about that clear…"*
>
> *(Simmer down it's photoshopped! Stay off the tracks kids)*

viii) On April 24, 2019, the Grievor – on her *missdemeanour.xo* modelling site - posted a photo in which she appears to be standing over a railroad bridge with a gentleman along with a personal note related to her finding *"… the man I am going to grow old with…"*

ix) On July 14, 2019, the Grievor posted a photo with a comment. The post, in my view, is of no probative value cannot be said to be directed at the Company.

**IX**

**CONCLUSION RE: POST-DISCHARGE CONDUCT**

102. While it may be understandable for the Grievor to react to the Company's determination to dismiss her, the posts referred to in (i) (Company's Tab F) and (ii) (Tab G) above, express derogatory comments toward the Company.

103. Post (iii) (Company's Tab H) reflects the Grievor's level of dissatisfaction with the Company as well as her judgment that she has: *"…never been anywhere so dreadful as the railroad* "*I have dated some real a-holes and never suffered abuse like the abuse of Canada Pacific Railway...*". Although the comparative photographs make a point, and the Grievor's comments with reference to the abuse she suffered might refer to the individual employee at CP who sexually

harassed her, they allow for an inference to be drawn that the "abuse" she referred to arises from the manner in which she was treated by the Company rather than the harassing employee.

104. Similarly, in (iv) (Company Tab I), the Grievor's reference to being a: "… *a CPR train conductor for Halloween. It was the scariest thing I could think of being"* could well apply to her experience in the Banff train crash. However, it equally leads to a generalization that her job as a conductor with CP Rail was the scariest thing, she could think of doing.

105. No adverse conclusion can be drawn from post (v) (Company Tab J).

106. The Grievor's post (vi) (Company Tab K) is egregious. While the photographs are suggestive, the most egregious part of the post comes from the comment that:

> *"The investigating officer at CP Rail, James Taylor, called my photos graphic and suggestive. I'll show you suggestive!!"*

107. Even leaving aside the fact that Mr. Taylor's investigation of the Grievor was neither fair or impartial, the fact that the Grievor identified him, by name, on a public post accompanied by the suggestive photograph could both pose a danger to Mr. Taylor and speaks volumes regarding both her lack of respect for the Company and her unsuitability to return to the Company as a fully participating employee.

108. The purpose of post (vii) (Company Tab L) is clear. The raised index finger is a universal symbol, and its intent and purpose is clear and unambiguous. Again, it speaks volumes regarding her lack of respect and her unsuitability to reconnect with the Company as a fully participating employee.

109. The remaining two social media posts introduced by the Company, (viii) and (ix) (Tab M and N), are intended, in my view, to be prejudicial. They are irrelevant, of

no probative value in the determination of the issue and, in all events, cannot be said to be directed at the Company.

## X

## IS THE GRIEVOR'S CONTINUED EMPLOYMENT TENABLE

110. In cases where grounds for dismissal are not established, the arbitrator may assess the conduct of the employee and either substitute a penalty or, alternatively, arrive at a conclusion as to whether or not the continuation of the employee/employer relationship is tenable or has been permanently destroyed (*Section 60(2) of the Canada Labour Code).* In doing so, arbitrators are entitled to rely on post-discharge evidence and to order a monetary award or damages: *Canadian Regional Airlines 997 CanLII 14605 (CA LA); Re United Steelworkers of America, Local 12998 and Liquid Carbonic Inc. (1996) 135 D.L.R. (4th) 493 (Ontario Divisional Court);* ***CROA 4652***

111. In keeping with the test as set out in Amalgamated Transit Union, Local 508 v. *Halifax (Regional Municipality), [2017] N.S.L.A.A. No. 1,* I am satisfied that, given the post discharge conduct referred to above, a fair-minded member of the community served by CP Rail, and aware of all the facts, would conclude that it is inappropriate to reinstate the Grievor and that her continued employment with CP Rail is untenable.

## XI

## FINAL DECISION

112. The grievance is allowed in part.

113. The dismissal shall be set aside and expunged from the Grievor's record.

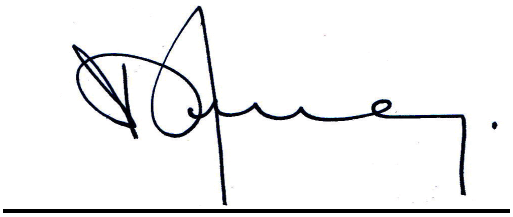
114. The Grievor shall be assessed a 3 day suspension.

115. The Grievor shall be awarded monetary compensation in lieu of re-instatement.

116. In the event the parties are unable to agree on the appropriate compensation, I shall retain jurisdiction with respect to the determination of an amount that is reasonable and fair in the circumstances.

117. In addition, I shall retain jurisdiction with respect to the implementation, interpretation and application of this award.

December 23, 2019



Richard I. Hornung, Q.C.
ARBITRATOR