IN THE MATTER OF AN ARBITRATION
(AD HOC)

BETWEEN

CANADIAN PACIFIC RAILWAY

(the “Company”)

AND

TEAMSTERS CANADA RAIL CONFERENCE-
(CONDUCTORS, TRAINMEN & YARDMEN)

(the “Union”)

RE: GRIEVANCE OF JASON ARMSTRONG

SOLE ARBITRATOR: John M. Moreau QC

Appearing For The Union:

Michael Church	-	Counsel
Dave Fulton	-	General Chairperson, CTY West-TCRC
Doug Edward	-	Senior Vice-General Chairperson, CTY West-TCRC
Brian McGiven	-	Local Chairperson, Revelstoke-TCRC/RCTC
Jason Armstrong	-	Grievor

Appearing For The Company:

William McMillan	-	Manager, Labour Relations
Don McGrath	-	Manager, Labour Relations
Jason Shaw	-	Labour Relations Officer
Ivette Suarez	-	Labour Relations Specialist

A hearing in this matter was held in Calgary, Alberta on March 4, 2020

DISPUTE:

Appeal of the 3 suspensions and dismissal of Conductor Jason Armstrong of Revelstoke, B. C.

Ten (10) Day Suspension (Deferred)

JOINT STATEMENT OF ISSUE:

Mr. Armstrong was issued a 10-day suspension on July 21, 2015 for the following reasons:
"Please be advised that you have been assessed a 10-day suspension (deferred) for the following reason(s):

In connection with your work attendance from March 12th, 2015 until July 12th, 2015".

UNION POSITION:

The Union contends that the investigation was not conducted in a fair and impartial manner per the requirements of the Collective Agreement. For this reason, the Union contends that the discipline is null and void and ought to be removed in its entirety.

The Union contends the Company has improperly applied the process of deferral in the instant matter, which therefore fails all tests required to properly establish Company policy as it pertains to assessing discipline, and is in violation of Article 70.09. It is also the Union's contention that the penalty assessed is contrary to the arbitral principles of progressive discipline.

The Union contends the Company has failed to meet the burden of proof required to sustain formal discipline related to allegations of excessive or patterned absenteeism. Additionally, it is the Union's position that the Company has failed in providing the absences in question were not bona fide.

The Union submits that Mr. Armstrong was disciplined for booking unfit, which the Company is not at liberty to assess discipline for and is contrary to the Collective Agreement (Kaplan Award).

The Union contends the discipline assessed to Mr. Armstrong is unjustified, unwarranted and excessive in all of the circumstances, including mitigating factors evident in this matter. Additionally, the Union asserts the discipline assessed violates the Collective Agreement, the Canada Labour Code as well as Company Policy. Accordingly, the Union requests the discipline be removed from Mr. Armstrong's employment record, and he be made whole for all associated loss. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

COMPANY POSITION:

It is the position of the Company that the grievor is culpable for his absences and all mitigating circumstances were taken into consideration during the fair and impartial investigation of the grievor. Further, it is the position of the Company that investigating cases of potential culpable

and / or non - culpable absenteeism is not in contrast with the Adams award or arbitral jurisprudence. Further, the Company puts forward that no violation of the Collective Agreement has occurred and refers to arbitral jurisprudence in noting that deferred discipline assessed may be replaced with a quantum of discipline served. The Company denies the allegations and declined the grievance.

Seven (7) Day Suspension (Deferred)

JOINT STATEMENT OF ISSUE:

Mr. Armstrong was issued a 7-day suspension (deferred) on March 31, 2016 for the incident that occurred on March 16, 2016.

The Form 104 reads as follows:

"Please be advised that you have been assessed with a Seven (7) Day Suspension (Deferred) for the following reason(s): For failing to properly apply a handbrake while securing your train, 866-0856 on March 16, 2016 in the Golden South Yard. A violation of Train & Engine Safety Rule Book, Section T-14 Handbrakes, item 3."

UNION POSITION

The Union submits the Company has improperly applied the process of deferral in the instant matter, which fails all tests required to properly establish Company policy as it pertains to assessing discipline, and is in violation of Article 70.09.

The Union contends that Mr. Armstrong's 7-day suspension is unjustified, unwarranted and excessive in all of the circumstances, including significant mitigating factors evident in this matter. It is also the Union's contention that the penalty assessed is contrary to the arbitral principles of progressive discipline.

The Union requests that the discipline be removed in its entirety, and that Mr. Armstrong is made whole for all associated loss. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

COMPANY POSITION

It is the position of the Company that the grievor placed himself in an unsafe position and admits to violating the Train & Engine Safety Rule Book. The Company maintains that the issuance of discipline was warranted in the given circumstances and the principles of progressive discipline were applied. Further, the Company puts forward that no violation of the Collective Agreement has occurred and refers to arbitral jurisprudence in noting that deferred discipline assessed may be replaced with a quantum of discipline served. The Company denies the allegations and declined the grievance.

Thirty (30) Day Suspension

JOINT STATEMENT OF ISSUE:

Mr. Armstrong was assessed a 30-day suspension and a prior 7-day deferred suspension was activated on May 19, 2016 as indicated on the form 104 which reads as follows:

"Please be advised that you have been assessed a Thirty (30) day Suspension from Company Service without pay (effective 0001 May19, 2016 to 2359 June 24, 2016) for the following reasons: For failing to properly release a handbrake while switching your train, 402-25 on April 25, 2016 in the Kamloops Yard and for not properly inspecting your train, 198-27 on April 28, 2016 after the crew change at Revelstoke Station. Violations of CROR General Notice, CROR General Rule A(i)(iii)(iv)(vi)(viii), Train & Engine Safety Rule Book, Section T-14 Handbrakes, item 3 and Rule Book for Train and Engine Employees, 11.7 Inspecting Passing Movements.

In addition, the Seven (7) day Deferred Suspension as outlined in Form 104 dated March 31, 2016 is henceforth activated resulting in a cumulative 37 Day Suspension effective May 19, 2016 and concluding on June 24, 2016 as noted above."

UNION POSITION

The Union contends the Company has improperly applied the process of deferral in the instant matter, which therefore fails all tests required to properly establish Company policy as it pertains to assessing discipline, and is in violation of Article 70.09. Additionally, the Company has improperly activated a penalty of suspension which was previously assessed.

The Union contends that Mr. Armstrong' 37-day suspension is discriminatory, unjustified, unwarranted and excessive in all of the circumstances, including significant mitigating factors evident in this matter. It is also the Union's contention that the penalty assessed is contrary to the arbitral principles of progressive discipline.

The Union requests that the discipline be removed in its entirety, and that Mr. Armstrong is made whole for all associated loss. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

COMPANY POSITION

It is the position of the Company that the principles of progressive discipline were appropriately applied in the circumstances. The grievor, only a month prior, had a similar incident where he was found culpable for inappropriately releasing a handbrake in a manner that contravened the Train & Engine Safety Rule Book. In addition the grievor failed to properly inspect a passing movement which constituted a further violation of the Train & Engine Safety Rule Book. The Company denies the allegations and declined the grievance.

Dismissal

JOINT STATEMENT OF ISSUE:

Following an investigation on May 19, 2017 Mr. Armstrong was dismissed from Company Service on May 31, 2017.

The Form 104 states as follows:

"Please be advised that you have been DISMISSED from Company Service effective May 31, 2017 for your conduct while staying at the Glenmore Hotel on May 10 / 11, 2017, while on Company business. After conducting a fair and impartial investigation it was determined that your conduct was unbecoming an employee of Canadian Pacific Railway as evidenced by your ripping down 7 exit lights, 12 ceiling tiles, walking naked (without any pants or underwear) through the Hotel lobby and kitchen, the general disturbance caused to guests, staff of the hotel to the point which the police had to be called, and the damage to the reputation of the Company."

UNION POSITION

The Union contends that Mr. Armstrong's dismissal is unjustified, unwarranted and excessive in all of the circumstances, including mitigating factors evident in this matter. It is also the Union's contention that the penalty assessed is contrary to the arbitral principles of progressive discipline.

It is the Union's position, on the basis of the evidence disclosed in the investigation and the information set out in grievance procedure that Mr. Armstrong has a medical condition and therefore the termination is contrary to the Collective Agreement and the *Canadian Human Rights Act.*

The Union requests that Mr. Armstrong be reinstated without loss of seniority and benefits, and that he be made whole for all lost earnings. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

COMPANY POSITION

The Company maintains that the discipline of Mr. Armstrong was warranted in all of the circumstances in reviewing all pertinent factors including the grievor's service and discipline record.

Culpability was determined following a fair and impartial investigation. The Union alleges that the grievor has a medical condition. The Union claims in their step 2 grievance, "the details of which will be forwarded to the Company." As noted in the Company's grievance response no such information has been shared with the Company to date. The Company denies the allegations and declined the grievance.

AWARD

The grievor entered the service of the Company on June 6, 2011 and worked his entire career out of the Revelstoke Terminal. He was terminated from his employment on May 31, 2017 after 6 years of service.

The arbitrator heard several grievances including: a 10-day suspension (Deferred) for work attendance issues; a 7-day suspension (Deferred) for failing a proficiency test involving handbrakes; a 30-day suspension for failing a further proficiency test involving handbrakes and for not properly inspecting his train; and, his dismissal for misconduct at the Glenmore Inn while attending a training session to qualify as a Locomotive Engineer.

THE 10-DAY SUSPENSION (Deferred)

On July 14, 2015, the grievor received a Notice to Appear for a Statement regarding his work attendance record from March 12, 2015 to July 12, 2015. Attached to the Notice was a five-page document showing the grievor's work history for that period, as well as copies of the Company's Attendance Management policies. As the Union noted in its brief, the grievor attended the investigation and answered all the questions put to him. He confirmed that he was familiar with the attendance management policies. The grievor also confirmed that he had accumulated the following in the first half of 2015: 2 sick days, 5 unfit days, 5 personal days and 2 missed calls. The grievor was asked during his Statement whether he was aware that his number of sick/unfit days were above the terminal average. The grievor responded (Q & A14) *"I didn't but I am aware now".*

The grievor explained at his statement the circumstances of his various absences:

- Booking Unfit: Friday March 13, 2015 at 00:26 to Sunday March 15, 2015 at 12:48, a total of 60 hours. The grievor stated: *"I must have been unfit"* (Q & A 17).
- Booking Unfit: Tuesday March 31, 2015 at 17:09 to 17:24 on Wednesday April 1, almost 24 hrs. The grievor stated: *"I must have been unfit"* (Q & A 23).
- Booking Sick: Saturday May 16, 2015 at 18:05, (the Saturday of the May long weekend), after booking 24 hours rest. The grievor then booked "off duty injury" on Monday May 18, 2015 at 11:45. He was "off duty injury" until he booked back on duty on Thursday May 21, 2015 at 10:38. The grievor was asked why he booked off sick during his absence. The grievor replied that he had actually sliced his knee open and had to be hospitalized. He provided the Company with medical supporting documents of his injury at his investigation (Q & A 25).
- Booking Unfit: Tuesday, June 16, 2015 04:14 until Wednesday June 17, 2015 at 10:42. The grievor admitted that it was his mistake to not to have booked proper rest after he tied up, or within the one hour allotted after he tied up. He stated that he had only been in bed a couple of hours when he was called to duty (Q & A 29).

  -The grievor also missed two calls on June 24, 2015 when he was off rest and subject to duty. The grievor stated that he *"…left my phone in a location where I could not answer it after falling asleep"* (Q & A 37).

The Union maintains that, apart from the documentation with respect to his knee injury, the grievor was not asked at any time to provide medical information to support his absences. The grievor was also never accused by the Company, prior to the investigation, of making up excuses for his absences. The grievor did his best to answer questions during his Statement about his absences, many of which had occurred months before the investigation. Bearing in mind that the onus falls on the Company to establish culpability, the Union submits there is no evidence to suggest that the grievor's absences were anything other than legitimate situations where he was either sick or not sufficiently fit and rested for duty.

The Union also expressly noted that the December 2012 interest award of Arbitrator Kaplan, now found at article 35.01 of the CTY West collective agreement, states that an *"…employee will not be disciplined for "booking unfit".* The Union asserts, based on the Kaplan award, that there is no basis for discipline for any of the allegations given that the grievor's absences must be assumed to be legitimate. Accordingly, there is no just cause for discipline and the grievor's deferred suspension should be set aside. Alternatively, the Union argues that the penalty imposed is excessive and should be substantially reduced under the circumstances.

The Company submits that it has the right to periodically review an employee's record where regular attendance becomes a concern. See: *Canada Post Corp. and CUPW (Martin*) 1992 CarswellNat 2127. The Company has indicated its view of absenteeism abuse in a letter to the four TCRC General Chairmen on October 14, 2014

indicating that article 35.01 *"should not be abused".* The Company went on to say that a formal investigation would occur *"…where it can be clearly established that a pattern of abusing or taking advantage of the booking unfit clause exists, the Company may determine if a formal investigation is required".* The Company, in this case, evidently became concerned with the grievor's record of absenteeism and asked him to attend an investigation in connection with his work from March 12, 2015 to July 12, 2015.

With respect to the two incidents in March 2015, the Company notes that most employees in the running trades require only 8 hours of sleep in order to become fit and rested to resume duty. The investigation indicates that the grievor booked unfit for 60 hours starting on Friday, March 13, 2015 through to Sunday, March 15, 2015. This absence not only provided the grievor with extended rest but also allowed him to take the weekend off. Similarly, the grievor booked unfit for a period of close to 24 hours from March 31, 2015 to April 1, 2015. On both occasions, the grievor could not recall why he was unfit for work.

The Company also pointed out that grievor's absence on May 16, 2015, after booking off 24 hours of rest, not only extended his rest days but also gave him the May long weekend off. The Company argues that this absence, in particular, raises a suspicion that the grievor was using his weekends-especially the long weekend in May-to avoid reporting to work.

Suspicions, in the Arbitrator's view, do not provide an evidentiary foundation for determining culpability, as noted in **CROA& DR 4604** at para 23: "*Discipline must result from the evidence, on a balance of probabilities, as opposed to speculation or suspicion".* Further, the Arbitrator notes that the grievor provided medical evidence that he had actually suffered lacerations to his knee on May 16, 2015 and that was the reason he booked off duty (injury) on May 18, 2015. Accordingly, in the absence of evidence that the grievor was being disingenuous about the reasons for his absence, the Company has not demonstrated on the balance of probabilities that the grievor merits discipline for this particular incident. Nor is there sufficient evidence, bearing in mind the Kaplan award and the passage of time between March and July 2015 when the grievor was interviewed, to find that the grievor's claim that he was unfit was a fabrication.

The other incidents in June 2015 are of more concern. The grievor booked 30 hours of rest between June 16 and June 17, 2015, which was 6 hours longer than his right to rest for 24 hours, as set out under article 18.01 of the collective agreement. The grievor's excuse was that he had only been in bed for a couple of hours when he was called into work. He admitted that he made a mistake and forgot to book the proper rest after his tie up.

The grievor's absence on that night of June 16/17, 2015 could have had an impact on the Company operations which counts on prompt attendance, particularly from those in the running trades, to avoid any train delays. Similarly, the grievor lacked a proper excuse for missing two calls on June 24, 2015. His explanation was that he *"…had a short*

call and left my phone where I could not answer it". As the Company explained during these proceedings, employees *"live and die"* by their phones.

After considering all the evidence, I find there is cause for discipline. For the reasons set out by this arbitrator and others, however, I do not accept that the imposition of deferred discipline is appropriate. See: **CROA& DR 4620 and 4630**. The grievor shall, in lieu of a 10-day deferred suspension, receive a written warning for both the incidents on June 16/17, 2015 of exceeding his right for rest by 6 hours and for the incident of missing the two calls on June 24, 2015. No discipline is warranted for the other incidents cited above.

THE 7-DAY SUSPENSION (Deferred)

The grievor was working as a Conductor on train 866-856, having been called on duty at 09:20 at Revelstoke on March 16, 2016. The train made its way to Golden where Trainmaster Bayliss performed an efficiency test on the grievor. Mr. Bayliss indicates in his memorandum of the incident that he observed the grievor *"…standing on the ground and reaching his right arm above his shoulder applying handbrakes"* in contravention of item 3, Section T-14 Handbrakes, *Train and Safety Rule Book* which reads:

T-14 Hand Brakes

> …
> iii. Do not apply or release wheel style hand brakes from the ground unless the bottom of the handbrake wheel is at shoulder height or below.

The grievor admitted at his investigation that he made a mistake when he applied the handbrakes with the wheel above his shoulder while standing on the ground. He stated at his investigation (Q & A 21) held on March 24, 2016: *"I apologize for any actions that may have put myself in an unsafe situation".* The grievor was assessed a 7-day suspension (Deferred) on March 31, 2016.

The Company takes the position that the discipline was an appropriate response under the circumstances. The Company recognizes that regardless of the common view that the purpose of a proficiency test is to be instructive rather than punitive, it nevertheless is significant that the grievor did not follow the rules when he was required to properly apply the handbrakes on train 866-856. The Company also submits that the grievor was a running trades employee. As such, the grievor had an obligation to ensure that all safety rules and regulations were followed to the letter. The Company further notes in that regard that the grievor could have been seriously injured as a result of his failure to follow rule T-14 of the *Train and Engine Safety Rule Book*.

The arbitrator notes that the purpose of efficiency testing, as highlighted in the Union's submissions, is set out in the Company's policy entitled *"Efficiency Test Codes and Description for Train & Engine Employees".* The *Introduction* section describes the importance of efficiency testing from the Company's perspective:

> All officers must observe compliance with all company rules, policies, special instructions and operating instructions during routine supervisory duties. Managers cannot be indifferent to violations. Managers must clearly and firmly indicate to employees that Canadian Pacific requires full compliance.

> An efficiency test is a planned procedure to evaluate compliance with rules, instructions and procedures, with or without the employee's knowledge. Testing is NOT intended to entrap an employee into making an error, but is used to measure efficiency (knowledge and experience) and to isolate areas of non-compliance for immediate corrective action. Efficiency testing is also not intended to be a discipline tool. While this may be the corrective action required, depending on the frequency, severity and the employees work history, education and mentoring will often bring about more desirable results.

As Arbitrator Hornung stated recently in **CROA & DR 4728**, *"…the purpose of the testing process is instructive rather than punitive."* Without diminishing the importance of Rule T-14, and the fact that the Company operates in a highly safety sensitive industry, the circumstances in my view fall more appropriately within the policy's intended purpose of correcting minor safety breaches through education and mentoring. In this case, telling a Conductor that he raised his arm too high when applying the handbrake is in my view a matter at first instance for counselling, rather than discipline to correct the behaviour. In addition, I note the grievor admitted at his investigation that he was at fault and apologized for putting himself in an unsafe position.

For these reasons, it is my view that the assessment of discipline is inappropriate in this case. The 7-day suspension (deferred) shall be removed from the grievor's record.

THE 30-DAY SUSPENSION

There are two incidents which led to the assessment of a 30-day suspension on the grievor.

The first incident occurred while the grievor was a Conductor on train 402-25 assigned to depart from Kamloops on April 25, 2016. He was on duty from 20:30 to 05:22 the next day. The grievor was assigned to perform a switching move at Kamloops before he departed on train 402-25. During his shift, at 23:30, a proficiency test was conducted by Trainmaster Keith Young. The grievor was observed removing the handbrake from a centre beam car while standing on the ground rather than climbing the ladder to remove the handbreak, in breach of rule T-14 of the *Train & Engine Safety Rule Book*. Rule T-14, at item 3, (as noted above) states: *"Do not apply or release wheel style hand brakes from the ground unless the bottom of the handbrake wheel is at shoulder height or below".* The grievor admitted at his investigation that he had performed the handbrake maneuver incorrectly and that he had been previously disciplined (later grieved) for a similar infraction.

The second incident occurred three days later on April 28, 2016. The grievor was assigned to work train 198-27 from Kamloops to Revelstoke. The grievor performed a live change-off with an outgoing crew upon the train's arrival in Revelstoke. The grievor was observed from an upstairs window at the Revelstoke station by Trainmaster Reid. Her memo to file for April 28, 2016 records that she saw the grievor do the following: *"Although conductor Armstrong was in a position to inspect his train, he was pacing back and forth, staring down at the ground and looking around."*

The grievor attended a formal investigation for both incidents on May 18, 2016 after being advised to do so in a letter dated May 17, 2016. Subsequent to the

investigation, on May 19, 2016, the grievor was assessed a 30-day suspension without pay as a result of the two incidents. In addition, the 7-day suspension (see above) imposed on March 31, 2016 was activated resulting in a cumulative 37-day suspension from May 19, 2016 to June 24, 2016.

The parties have provided several decisions of this Office which speak to the proper disposition in cases like the present where the employee admitted knowing the rules but failed to uphold them. The dispositions in each case turns on the individual facts.

It is worth noting that the factual basis for the first incident on April 25, 2016 is almost identical to the incident some six weeks earlier on March 16, 2016. Both of the incidents were the result of proficiency tests. The grievor admitted at both his earlier investigation for the March 16, 2016 incident, as well as the more recent investigation for the April 25, 2016 incident, that he was familiar with the T-14 rule concerning the application of handbrakes from the ground. The fact that the grievor chose not to follow the rule a second time leads to the conclusion that it was more than just simple inadvertence which led to his removal of the handbrake from the ground instead of climbing the ladder. Rather, having been already warned about the maneuver, the grievor in my view simply decided to ignore the rule.

I agree with Arbitrator Sims' comments in **CROA 4621** that the primary purpose of efficiency testing is counselling and that, as noted at p.5, *"…not every efficiency test failure should be considered a candidate for discipline".* However, the grievor's evident

reluctance to adhere to a straightforward safety rule when he was warned just weeks before about his rule infraction leads the Arbitrator to conclude that a disciplinary response was appropriate under the circumstances.

The second incident occurred on April 28, 2016. The observations of Trainmaster Reid are set out in a file memo of the same date which states:

> On April 28th, 2016 at approximately 1145 I observed conductor Jason Armstrong from the upstairs window of the Revelstoke Station. Conductor Armstrong was inspecting his train, 198-27 upon arrival in Revelstoke. Although Conductor Armstrong was in a position to inspect his train, he was pacing back and forth, staring down at the ground and looking around.

The grievor's failure to focus on his train inspection duties rather than *"pacing back and forth, staring down at the ground and looking around"* is the kind of behaviour on its face merits a disciplinary response. On the other hand, the grievor, to his credit, admitted at his interview *"…that he should be looking at the train when I am inspecting"* (Q & A 27), despite the lapse in time from the date of the incident to the date of his interview. I note in that regard the difficulty a conductor faces to try and recall the exact details of a train inspection some three weeks after it occurred, particularly when this type of task forms part of their everyday shift duties. That is a mitigating factor which must be considered in the face of the grievor's admitted violation of article 11.7, Inspecting Passing Movements, of the *Train & Engine Safety Rule Book*.

In the end, I find that a suspension is an appropriate disciplinary response for the two safety violation incidents. The grievance is therefore allowed in part. I direct that the

30-day suspension (as well as the successfully grieved 7-day deferred suspension that was activated by the Company from previous discipline imposed on March 31, 2016) be replaced with a 15-day suspension and that the grievor be compensated for the difference accordingly.

THE DISMISSAL

The grievor was sent to Calgary from his home terminal in Revelstoke, B.C. between May 1, 2017 and May 12, 2017. He was in Calgary at the time for mechanical courses as part of his Locomotive Engineer training program. The grievor was staying at the Glenmore Inn in Calgary.

The incident which precipitated the grievor's termination occurred on the night of May 10/11, 2017. The grievor stated at his interview that he went to Tim Horton's on the evening of May 10, 2017 for dinner before meeting up with fellow employee, Mr. Whitehead. Mr. Whitehead and the grievor watched the hockey game together on television that night in the grievor's hotel room at the Glenmore Inn. They began consuming alcohol together when the game started at 20:00.

During the course of the proceedings, the Company introduced both video evidence and photographs documenting the grievor's behaviour that night. The Company cited several passages from the grievor's interview about his drunken rampage that

evening which resulted in the destruction of hotel property amounting to $864.16. The grievor admitted that he had a lot to drink that evening:

> Q27 Did you have more than one alcoholic beverage on the night of May 10th?
>
> A Yes.
>
> Q28 How many did you have?
>
> A I don't recall the exact number consumed. However, I drank several beer and some Rum, it was quite a few.

Besides drinking in his hotel room, the grievor admitted to drinking in the hallways of the hotel, which is forbidden by law. The grievor also admitted to breaking a dozen ceiling tiles and seven fire exit signs during the early hours of May 11, 2017. One of the Glenmore Inn security videos actually shows the grievor ripping out ceiling tiles and one of the seven Exit signs he destroyed. Besides his callous destruction of the hotel property, the grievor admitted to running through the hallways, lobby area and staff area half-naked from his waist down. He stated in that regard at his interview:

> Q 48 Referencing Document 1 the picture with the time stamp 11/05/2017@01:37 shows you running through the lobby by the front desk with no pants or underwear on, only a sweater. Please explain why you are running around naked exposing yourself to staff and guests in the Glenmore Inn?
>
> A I can't explain this behavior.
>
> Q 49 Referencing Document 2 the email from the Operations Manager this isn't the only place you are running around naked, it states you also startled the staff by entering "employee only areas" running through their areas of work. Please explain?

> A As stated previously I can't explain why this happened, I am extremely embarrassed that this happened.

The grievor also admitted during his interview that he breached Section 2 item 2.2 from the *Rule Book for Train & Engine Employees* which states:

> (d) It is prohibited to: (i) use intoxicants or narcotics while subject to duty, or to possess or use such while on duty or when an occupant of facilities furnished by, or which will be paid from the company.

The grievor contacted EFAP the day after the incident on Friday, May 12, 2017. He was able to attend an interview with an Addictions Counsellor at Shepell Substance Abuse Program on May 26, 2017. The grievor reported to the Addictions Counsellor that he had abstained from all marijuana and alcohol use for the past 8 days. On May 29, 2017, the Addictions Counsellor from Shepell wrote a report which indicated that the grievor had been using alcohol (beer) and marijuana 5 out of 7 days per week. The Addictions Counsellor recommended that the grievor enter an in-patient treatment program to help with his substance use issues. The Addictions Counsellor further recommended that the grievor attend weekly counselling sessions until he was able to attend the in-house program. A copy of the Sheppell report was provided to the Company's OH&S representative.

In June 2017, the grievor contacted the Interior Health medical authority in Revelstoke to address his substance use issues. He received advice from a counsellor and addictions specialist. Her report of December 7, 2017 indicates that the grievor attended for an appointment on June 29, 2017 where he requested counselling and the

possibility of a residential treatment program. He notified his counsellor at Interior Health on July 4, 2017 that he would be postponing his residential treatment.

The grievor continued to work to support his family at various jobs outside of Revelstoke (Salmon Arm and Tumbler Ridge, B.C) through the summer months of 2017. The grievor called the Interior Health counsellor again on July 20, 2017 to say that he was unable to attend an appointment scheduled for July 27, 2017 due to his out-of-town work commitments. He further informed the counsellor that he had been abstinent from alcohol and would rebook once he knew his work schedule.

The counsellor from Interior Health did not hear back from the grievor until December 6, 2017 when he requested further counselling and a referral to attend a residential treatment centre in the Spring of 2018 when his work was completed. The grievor did attend the *Beyond 12 Steps Healing Centre* in Salmon Arm for 30 days of treatment from June 12, 2018 to July 10, 2018. The program included weekly evening AA meetings in Salmon Arm. An After-Care letter dated December 18, 2018 from the Centre confirms that the grievor was “clean” for over 6 months and doing well on his recovery. The Union also tabled several letters from individuals and counsellors who confirmed the grievor’s commitment to maintaining his sobriety, as well as his AA attendance records. The grievor also obtained assistance from Dr. Andreas Mostert, a family physician who confirmed the following in a letter dated December 9, 2019:

To whom it may concern:

This is to inform the reader that Mr. Armstrong has been followed by myself. He has had mental health concerns and we have been successful in managing this. Also, worth mentioning is that he has a dependency on alcohol with the worsened (sic) since about 2015. He went into a treatment program and has been clean since May 2018.

The Union submits that the grievor's termination constituted *prima facie* discrimination. The Union argues that the Company violated s. 5 and 7 of the *Canadian Human Rights Act* by terminating the grievor's employment for a reason directly related to and arising from his addiction, and without making any effort to accommodate or seek other courses of action. The Union cited the three-part test set out by the Supreme Court of Canada in *Stewart v. Elk Valley Coal Corp*, 2017 SCC 30:

> [23] To make a claim for discrimination under the Act, the employee must establish a *prima facie* case of discrimination. If this is established, the onus then shifts to the employer to show that it accommodated the employee to the point of undue hardship.
>
> [24] To make a case of *prima facie* discrimination, "complainants are required to show that they have a characteristic protected from discrimination under the [*Human Rights Code*, R.S.B.C. 1996, c. 210]; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact": *Moore*, at para. 33. Discrimination can take many forms, including "'indirect' discrimination", where otherwise neutral policies may have an adverse effect on certain groups: *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, [2015] 2 S.C.R. 789, at para. 32. Discriminatory intent on behalf of an employer is not required to demonstrate *prima facie* discrimination: *Bombardier*, at para. 40.

The Union maintains that the grievor satisfies the first part of the *prima facie* discrimination test because he suffers from a disability in the form of an addiction to alcohol, a protected characteristic under the legislation. The grievor meets the second

part of the test because he suffered an adverse impact of employment loss due to his dependency on alcohol. He also satisfied the last part of the test because the protected characteristic, his alcohol addiction, was at least one of the factors that led to the adverse treatment of termination.

The Company notes, in reply, that at no time prior to the incident did the grievor make any effort to inform the Company that he was suffering from an addiction. The Company also submits that the Union has not satisfied the onus to provide documented medical evidence that substantiates the grievor's medical condition of an alcohol addiction, nor has it established a connection between his alleged disability and his behaviour at the Glenmore Inn.

As Arbitrator Clarke noted in **CROA Ad Hoc 663** at para 71, citing *Cie minière Québec v. Québec Cartier* [1995] 2 SCR 1095*, "…an arbitrator cannot rely on post-discharge evidence unless is sheds light on the reasonableness and appropriateness of the discharge at the time it was implemented".* Arbitrator Clarke, nevertheless, adopted the broader view that it is appropriate to consider post-discharge evidence *"…particularly when further evidence arises during the investigation and after the termination which demonstrates an employee suffered from a disability".*

The arbitrator notes that the absence of a pre-incident substance abuse history in the form of medical or other supporting evidence, as is the case here, does not preclude a finding of addiction. As noted in **CROA Ad Hoc 663**. *"The arbitrator accepts that denial*

may be part of an addiction problem in some cases." However, as Arbitrator Clarke goes on to say*: "…But that does not relieve the arbitrator from still having to make findings of fact based on all the evidence in a case, including the grievor's comments".*

The arbitrator accepts that the post-incident reports from the counsellors, medical doctor, as well as the grievor's post-incident letter to the Union submitted in evidence, should be accepted to "shed light" *(Cartier)* on the grievor's condition at the time of the incident. Nevertheless, it falls on the grievor to demonstrate that he not only suffered from a disability at the time of the incident but also that his disability is connected to his unacceptable behaviour. As noted by Arbitrator Schmidt in **AH 638** (cited in **CROA 4527** at p.8):

> "In order for this grievance to succeed, the Union must establish on the face of the undisputed facts, that the grievor was not culpable for his conduct because of his disability or that the penalty of discharge is too severe, taking into account any mitigating circumstances. *The Union accepts that arbitrators require that the medical evidence proffered must substantiate a link between the misconduct at issue and the medical condition." (emphasis added)*

What we have in this case is documentation that the grievor attended for counselling to an EAP counsellor after the incident where weekly counselling and in-patient treatment was recommended. He met with another counsellor at Interior Health once on June 29, 2017 and then a second time on July 27, 2017. He did not see his counsellor at Interior Health again until December 6, 2017. The grievor also attended a Healing Centre program for a month beginning in June 2018, more than a year after the incident. During that time, he also attended a number of support group meetings including

AA meetings and Narcotics Anonymous meetings. He continued to attend regular weekly Twelve Step meetings beginning again in February 2019. In a letter dated March 22, 2019, his counsellor at Interior Health confirmed that the grievor connected with her recently and was interested with continuing with supportive counselling. His counsellor felt that the grievor *had "…been successful in making changes in his behaviours and continues to meet relapse prevention with counselling and supportive meetings ".*

There is evidence before me to find that the grievor had issues with alcohol and drugs prior to the incident in May 2017. However, as pointed out by Arbitrator Goodfellow in the *City of Toronto* case, that evidence must outline something more than a basic diagnosis:

> ... What does appear clear, however, is that there is a distinct arbitral preference for medical evidence that, if not addressing the question directly, *at least provides something beyond the basic diagnosis from which that connection can reasonably be drawn.* Without such evidence, in my opinion, the Union runs the substantial risk of a finding that the onus has not been met -- a risk that increases, not decreases, with the scope and extent of the behaviour that is in issue." (italics added)

Although there is evidence before me that the grievor has taken steps to seek counseling and address his issues with alcohol, the only medical evidence before me is the brief note from his family doctor dated December 2019, more than two years after the incident, which states: *"Also worth mentioning is that he has had a dependency on alcohol since 2015".* That single comment, combined with all the other evidence before me, including the grievor's efforts to seek counselling for his issues with alcohol and

marijuana, is insufficient to conclude that he was suffering from a “characteristic protected from discrimination under the Human Rights Code” in the form of an addiction to alcohol at the time of the incident. As noted by Arbitrator Schmidt in AH 638, cited in **CROA & DR 4653** and **4654** at page 12: *“While the assessment of a disability does not always require expert medical evidence, it requires more than what was adduced before this Court”.*

In the absence of proof of a medical disability, the arbitrator is unable to find a link between the grievor’s behaviour at the Glenmore Inn and a medical disability sufficient to establish a *prima facie* case of discrimination and trigger the duty to accommodate.

The grievor had the opportunity to train, at the Company’s cost, as a Locomotive Engineer but chose instead to abuse Company rules by drinking excessively and then embarking on a drunken tirade that caused a substantial mess to his own room. Despite warnings from his co-worker that his behaviour was being recorded by security cameras, he continued to damage roof tiles and tore out seven Exit light signs in the hallways of the hotel premises. The Exit hallway lights signs, it is worth noting, are hung near the doorways and are used to direct individuals to doorways in the event of a fire. In addition, and most offensively, the grievor walked half-naked exposing his private parts through the lobby area and service desk of the hotel.

The grievor’s culpable conduct warrants a strong disciplinary response. Given the gravity of the incident, particularly as it reflects on the reputation of the Company, and bearing in mind that the grievor is not a long-service employee, I am unfortunately unable

to consider the grievor's reinstatement on any terms. For all these reasons, the dismissal grievance is dismissed.

SUMMARY:

1) The 10-day suspension (Deferred) is substituted with a written warning.

2) The 7-day suspension (Deferred) is to be removed from the grievor's record.

3) The 30-day suspension is substituted with a 15-day suspension.

4) The Dismissal grievance is dismissed.

I shall retain jurisdiction should any issues arise with respect to the implementation of this award.

April 7, 2020

JOHN MOREAU, Q.C.
ARBITRATOR