IN THE MATTER OF AN ARBITRATION

(AH 730)

BETWEEN

TEAMSTERS CANADA RAIL CONFERENCE

(Maintenance of Way Employees Division)

(the "Union")

AND

CANADIAN PACIFIC RAILWAY

(the "Company")

RE: Grievance of Richard Cadorette

ARBITRATOR: John M. Moreau QC

Appearing for The Union:

David Brown	-Counsel
Wade Phillips	-President, TCRC-MWED
Richard Cadorette	-Grievor

Appearing for The Company:

Sonia Regenbogen	- Counsel, Matthew, Dinsdale & Clark
David Guerin	- Senior Director Labour Relations
Trisha Gain	- Legal Counsel Litigation
Complainant	- Witness

A hearing was held on November 5, 2020 (Toronto) and May 18, 2021 (Virtual)

JOINT STATEMENT OF ISSUE:

On June 29, 2019, the grievor (Rick Cadorette) was dismissed following an investigation which concluded that he "engag[ed] in the sexual harassment of a fellow employee on September 2, 2018 while working as an Extra Gang Foreman on the Northern Ontario Distribution Crew in Sudbury, a violation of CP Rail's Policy 1300 covering Workplace Harassment – Including Sexual Harassment." A grievance was filed.

The Union contends that:

1. For the reasons set out in the Union's July 15, 2019 grievance, the Company failed to conduct a fair and impartial investigation in violation of section 15.1 of the Collective Agreement. In particular, a number of witness statements were taken without the grievor having the opportunity to attend. A significant amount of CROA jurisprudence stands for the proposition that a breach of this kind is both fundamental and fatal. In one recent decision, CROA 4629, the Arbitrator found that the right of a grievor to attend other witness statements exists "to ensure the integrity of the record on which this Office relies to decide a case" and that "the appropriate remedy for this breach is to declare the discipline *void ab initio*."
2. In the alternative, the evidence the Company relied upon in reaching its conclusion to dismiss was muddied, contradictory, and after-the-fact. Given that the grievor was dismissed for sexual harassment, an allegation that will permanently impact both his professional and personal lives, the evidence against him must be of the most compelling and convincing kind. Such evidence does not exist in this case.
3. The discipline assessed the grievor was illegitimate and unwarranted.

The Union requests that the discipline assessed the grievor be declared *void ab initio* and that he be reinstated into Company service immediately without loss of seniority and with full compensation for all wages and benefits lost.

The Company contends that:

1. The grievor was justifiably terminated from employment after having engaged in the sexual harassment of an employee. Given that the grievor and Union representatives were fully aware of the facts and circumstances surrounding allegations raised by the complainant during the investigation process, any alleged impropriety with the actual wording of the Form 104 does not, on its own, vitiate the disciplinary penalty imposed.
2. The investigation into the grievor's sexual harassment of a co-worker was fair and impartial and no violation of Section 15.1 of the Wage Agreement occurred.
3. The Company's decision to dismiss the grievor for sexual harassment of a co-worker was fully justified based on the harmful and potential long-term impact on the complainant as evidenced by her statements during the investigation.
4. Sexual Harassment is an extremely serious offense that cannot be tolerated in the workplace. Given the seriousness of the misconduct, the trust inherent in the employment relationship has been irreparably damaged and continued employment is impossible.

AWARD

INTRODUCTION

The grievor was first employed by the Company in 1989 but was laid off that same year and took other employment. He was rehired in 1998 and has worked for the Company since that time.

Both the complainant and the grievor testified in these arbitration proceedings.

A confidential investigation was conducted into the incident, which led to the grievor's termination, by Ms. Alison Renton of the firm *Bernadi Human Resources Law LLP*, pursuant to s. 15 and s. 17 of the collective agreement. Ms. Renton met on two occasions with the complainant: May 1, 2019 and May 31, 2019. Ms. Renton conducted an interview with the grievor on May 2, 2019. Interviews also took place with CP employees Raymond Gaudette and Tim Blanch on May 17, 2019.

Ms. Renton provided her Workplace Investigation Report to the Company on June 24, 2019. It reads in part as follows at p. 20:

> Based on factual findings, I find that [the complainant] was sexually harassed by Richard in the early morning hours of September 2, 2018 when he entered her room at the Wawa Motor Inn, made sexual comments to her, undid her belt and pants, and sexually propositioned her. The Wawa Motor Inn is an extension of her workplace, as is recognized by the Act *[Canadian Human Rights Act]* and the policy [*CP Discrimination and Harassment Policy*]. While Richard may not have toucher her, his comments and actions still amount to sexual harassment contrary to the Act, the Regulation and the policy.

EVENTS LEADING UP TO THE INCIDENT

The events leading up to the incident between the grievor and the complainant began on the evening of September 1, 2018. The grievor's crew was staying at the Wawa Motor Inn motel ("the motel"). The complainant was working as a labourer on another crew and also staying at the motel.

The grievor was standing outside his motel room in the parking area smoking a cigarette on the evening of September 1, 2018. It was his 52nd birthday the following day, September 2, 2018. He had made arrangements with two of his crew members to meet that evening for dinner and a few drinks at the motel's restaurant and bar. Another railroad employee from CN was also invited to join in that evening to celebrate the grievor's birthday.

The grievor had also met up briefly with the complainant at that time in the parking lot area near his motel room. She had just driven her car into the parking lot area where the grievor was smoking a cigarette. He offered the complainant a beer and invited her to join him and the others in the motel bar that evening. She declined the beer, saying that she had her own alcohol mixture in her room. The complainant then returned to her room. It was located down a hill in a separate area of the motel, beneath where the grievor's room was located.

The complainant testified that she then got back in her car and went to the liquor store to purchase a mickey of rum. After returning from the liquor store, she made herself a mixed alcohol drink in her water bottle container. She left her room with her drink and

met up with the grievor and the others in the parking lot area to socialize. They agreed to meet afterwards in the motel bar.

The grievor then returned to her room and had something to eat. She later walked back up from her room to the motel bar, which was located in the main part of the motel. The grievor recalled that she had another drink or two in the bar and that her foreman, Tim Blanch, was also buying alcohol “shooters”.

The motel bar closed early and the complainant agreed to go to the Lakeview Hotel bar, located a few kilometres away, to have a few more drinks with the grievor and the others. The complainant recalled taking a taxi with the grievor and the CN employee to the Lakeview Hotel bar. They were later joined at the Lakeview Hotel bar by Mr. Blanch and another co-worker, Jean Lefebvre.

The grievor testified that she left the Lakeview Hotel in a mini-van taxi with the four men after being there for a couple of hours. She recalled having another drink and playing pool at the Lakeview Hotel bar during that time. She mentioned that “last call” was around 1:30 a.m. and that they remained in the bar until around 2:00 a.m. Everyone had to report to work early the next day September 2, 2018.

THE INCIDENT

The complainant testified that everyone went their separate ways to their respective rooms when they arrived back at the motel, sometime after 2:00 a.m. on September 2, 2018, except for the grievor. He offered to walk the complainant down the stairs leading to her room. The grievor testified that she insisted that she was fine *“…but that he persisted because he was intoxicated”.* The complainant then allowed the grievor

to accompany her to her room. She recalled going through an open area in the motel which led to a stairway down to her room. The grievor, for his part, recalled that they actually went through his room to access the stairway.

Once having arrived at her room, the grievor asked the complainant if they could have a cigarette together. They were both standing outside the grievor's room at that point and the complainant agreed to have a cigarette with the grievor.

Before having the cigarette, the complainant told the grievor that she was going to get a sweater inside her room because she was cold. She unlocked her room door, entered her room and removed a sweater from her bag. Her room had two separate beds.

When she turned around, the grievor was inside her room. He said something to the effect that *"he had not been there for a long time"* and that he would look into getting a similar room next time he was in Wawa.

The complainant further testified:

- that the grievor checked out her bathroom after he entered the room.

-that he said that he knew she was going through some personal issues; that he asked her how long it had been since she had sex; that he mentioned to her that she appeared to be stressed out and that he could "relieve" her from her stress by having sex;

-that if she wasn't interested in having sex at that time, his offer to have sex was always open;

-that he stated that he could sexually pleasure her through oral sex and that she wouldn't have to touch him;

-that while standing in front of her he touched and rubbed his pants in his penis area;

-that after moving closer to her, he undid his belt and tried to undo his zipper at which point she told him to *"get the hell out of her room";* and,that he left the room at that point saying *"she wouldn't be such a bitch if she just let him fuck her".*

The grievor testified:

- that he did escort the complainant back to her room and did go into her room uninvited after they had a cigarette when she went in to get a sweater;
- that he sat talking to her on the edge of one of the beds and that they talked for a few minutes. The complainant then began to remove her undergarment under her shirt. The grievor said that he took that as a signal for him to leave and he left the room.

In cross-examination, the grievor denied the following when these allegations were put to him by counsel for the Company:

-that he said he asked the complainant how long it had been since she had sex and that he could "relieve" her stress; that if she was not interested in sex at that time the offer was always open; that he could pleasure her through oral sex and that she would not have to perform oral sex on him; that he touched himself and rubbed himself over his zipper area of his pants

in front of her and undid his belt; that he told her that she *"wouldn't be such a bitch if she just let him fuck her"* as he left her room.

The grievor added that he never apologized to the complainant because he did not do anything wrong.

POST INCIDENT

The complainant testified that she went to work with her crew the following day but did not see the grievor or have any contact with him that day. About two weeks after the incident the complainant met up with Mr. Ray Gaudette, a machine operator and a member of the complainant's crew. The complainant stated that she trusted Mr. Gaudette more than anyone else on her crew. The complainant described the incident in her motel room with the grievor in a text message that day to Mr. Gaudette. She recalled that Mr. Gaudette replied to her in a text indicating that she should let him know if anything like that happened again. The complainant did not communicate with Mr. Gaudette afterwards about the incident.

Mr. Gaudette, for his part, indicated in his investigative statement taken on May 17, 2019 that he did hear from the complainant in a text message about the incident but that she stated it was her foreman, Mr. Blanch, that was in her room and not the grievor.

The complainant testified that she did not see the grievor again until the end of October or early November 2018, when her crew and the grievor's crew were working in the Parry Sound subdivision. The complainant testified that she was directed by her foreman Mr. Blanch on that occasion to ride in a truck with the grievor. The complainant stated that she told Mr. Blanch, and another crew member, Jason Sawyer, that she did

not want to ride with the grievor because of what occurred in the motel room when the grievor tried to take out his penis in front of her. Mr. Blanch, for his part, indicated in his investigative statement that he provided on May 17, 2019 that the complainant told him at the time: *"…she said that he [the grievor] had pulled out his friggen dick and made a move on her-words to that effect and I remember something about that…"* Mr. Blanch said that he asked the complainant to put her allegation in writing. She never did and Mr. Blanch did not follow up with her afterwards.

The complainant was laid off from her position on December 10, 2018 through to March 3, 2019. The complainant testified that she had one encounter with the grievor after returning to work in March 2019. She stated that she was in the back seat of her truck one day when the grievor approached the truck to speak with two of her co-workers, who were in the front seat. The complainant recalled that the grievor said hello to the two co-workers but did not look at her or say anything to her. She felt that he was deliberately ignoring her because of her resistance to his advances in the motel room on the morning of September 2, 2018.

The grievor testified that he recalled recognizing an employee seated in the front of the truck and approaching the truck to say hello to him. The grievor recalled speaking to the employee from the passenger side of the front window. He had no recollection of deliberately trying to ignore the complainant.

The grievor decided to speak with Trainmaster Dave Purdon in April 2019 about the incident, who she testified had helped her out in other situations and was someone she felt she could talk to instead of her own foreman. She indicated in her investigative

statement provided on May 1, 2019 that she did so at that time *"…so it doesn't happen to someone else…" and that "…she felt uncomfortable being around him [the grievor]…".* She testified that she was also frustrated that day when she spoke with Mr. Purdon because she did not want to go another year having the grievor around her at work, even though the grievor was not part of her crew.

The complainant recalled leaving work early that day because she was upset after disclosing the incident to Mr. Purdon. She nevertheless indicated to Mr. Purdon that she was prepared to meet up with a CP Human Resources person that evening at a restaurant in Sudbury to discuss details of the incident.

The complainant remained off work on stress leave for a few days afterwards. She then met with the investigator, as noted, on May 1, 2019 and again on May 31, 2019 when she provided details of the incident. The complainant also sent Ms. Renton a follow-up email on June 4, 2019. It reads in part:

> *The traumatic events that took place in September of 2018, have altered the rest of my career at CP. Rick not only breeched my my trust, but he took my dignity, damaged my self-esteem and my joy of my job, Some of which I can't fix. I've spent the last few months rebuilding what I can. Learning from the best people, bettering my career, and learning to trust again. This is no excuse for him to take my strength as a weakness. Being a woman, within a male domain industry troublesome at time. Which I why I chose to come forward. I chose to believe that Im making the right decision.*
>
> *My goal is to help someone else struggling, by having a voice. I want to prevent this situation from reoccurring, because it's too late for me. At the end of the day, I am the one who has already lost.*

SUBMISSIONS OF THE PARTIES

(a) The Union

The Union maintains that the Company violated article 15.1 of the collective agreement by conducting three witness statements which dealt directly with the circumstances surrounding the incident. The witness statements include those provided by the Mr. Gaudette and Mr. Blanch on May 17, 2019 and the May 31, 2019 statement of the complainant. The grievor was not allowed the opportunity to rebut, answer or comment on the allegations or statements made during those witness statements. Nor did he receive or was he allowed to comment on the report of Ms. Renton prior to his termination.

The Union cited several decisions regarding the importance of procedural fairness and impartiality in disciplinary investigations. Counsel for the Union noted that the CROA authorities have consistently held that the requirement for procedural fairness is so fundamental, even in the face of wrongdoing, that any discipline will be declared null and void. The result of such a declaration in a case of termination, such as occurred here, is an order that the grievor be reinstated with full compensation.

The grievor testified that he has two teenage children and has been in the same common law relationship for 20 years. The Union noted that he is a long-term employee with some 30 years of service with only one disciplinary incident dating back to 2005. The Union submits that this is not the profile of someone who would do what the complainant has alleged. The complainant, by contrast, was a junior employee who had only been with the Company for about a year. The Union maintains that the grievor has never been

involved or accused of any similar allegations of the kind alleged by the complainant or anyone else. There is no precedent for such behaviour in the grievor's life. The Union maintains that the case against the grievor boils down to a "he said, she said" situation and that the Company has failed to meet their burden of proof through clear and cogent supporting evidence. Further, the Union points out that the Company never thoroughly investigated the allegation by Mr. Gaudette against Mr. Blanch. The investigator simply discounted his evidence.

The Union requests that the discipline be declared *void ab initio* for breaching article 15.1 of the collective agreement; alternatively, that the Arbitrator find that the Company has failed to provide clear and cogent evidence to support the allegations against the grievor. The Union requests that the grievor be reinstated with full compensation.

(b) The Company

The Company submits that the collective agreement between the parties does not require under article 15.1 or article 17 that the subject of an investigation be provided the opportunity to "review, refute, rebut or comment on" each and every part of the evidence collected in the course of an investigation as the Union alleges in their brief. In the current case, the grievor was shown all of the witness statements and evidence that preceded his meeting on May 2, 2019. He was also given time to review that information with his union representative prior to the meeting being conducted. Specifically, the complainant's witness statement (which was the only investigative interview that preceded the grievor's interview) was put to him in detail for response by the investigator.

The Union is correct that the CROA decisions support the right to a fair and impartial investigation. However, that right does not necessarily require that the subject of an investigation be provided with the opportunity to review and comment on all of the witness statements and evidence collected in the course of the investigation process. Such entitlement, where it exists, must come from specific language in the collective agreement, which is not present here. See: *Bombardier Transportation Canada Inc. v. Teamsters Canada Rail Conference* [2012] C.L.A.S. 403 (Picher).

Although the investigator conducted additional witness interviews with Mr. Gaudette and Mr. Blanch subsequent to the grievor's interview, the investigator concluded that the entirety of Mr. Gaudette's evidence was not credible or reliable. In the case of Mr. Blanch, the investigator concluded that his evidence simply corroborated the complainant's evidence that she disclosed to Mr. Blanch, in a text message, the circumstances of the grievor's conduct in her motel room on September 2, 2018. Accordingly, the investigator's decision not to put the evidence of Mr. Gaudette and Mr. Blanch to the grievor at a subsequent investigation was reasonable having regard to the facts of the case, and specifically the investigator's conclusions as to the unreliability of Mr. Gaudette's evidence and the incidental relevance of Mr. Blanch's evidence.

In the end, the Company submits that the grievor's investigation was fair and impartial and satisfied all the requirements of the collective agreement. The Company further submits that in the event the investigation resulting in the grievor's termination is held to have been technically deficient, recent CROA case law does not support a finding that the discipline necessarily be declared *void ab initio*. See: **CROA 4558**

(Fleishhacker); CNR v. Sims 2019 SKQB 245 (Sask. QB); **TCRC v. CNR** 2021 SKCA (Court of Appeal); (referred to herein as "*Fleishhacker")*.

The Company further notes that the investigator's conclusions that the grievor engaged in the sexual harassment of the complainant was based on her assessment of the credibility and reliability of both the complainant and the grievor, the critical witnesses in this case. Following the conclusion of the investigation, the Company accepted the investigator's conclusions and relied on them. The Company determined that the investigator's findings that the grievor engaged in sexual harassment and reprisal as against the complainant constituted just cause for termination of the grievor's employment, having regard to his length of service and his work record. This conclusion was consistent with the Company's obligation pursuant to health and safety legislation, the Company's Discrimination and Harassment Policy as well as the well-recognized seriousness of sexual harassment in the case law.

In the alternative, in the event that the grievor's discipline is rendered *void ab initio* or is otherwise overturned, the Company submits that the appropriate remedy in the circumstances is damages in lieu of reinstatement. The Company submits, consistent with the case law in this area, that there is a very serious risk that the grievor's continued presence in the workplace would create a poisoned atmosphere. Further, the grievor has not accepted any responsibility for his wrongdoing nor has he told the truth at any stage of the investigation, as well as through to the arbitration proceedings. In the end, the Company requests that the arbitrator uphold the grievor's termination of employment for sexual harassment and dismiss the grievance.

ANALYSIS

The Union referred to the recent Court of Appeal decision in *Fleishhacker* which reversed the Court of Queen's Bench decision and upheld the award of Arbitrator Sims. Before citing from those recent decisions, it is important to review earlier decisions of this Office which deal with the importance of the investigative process under the rules established for the CROA expedited process. As Arbitrator Picher noted in his classic statement in **CROA 2073**:

> As previous awards of this office have noted (e.g. CROA 1858), 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, are the essential elements of the "fair and impartial hearing" to which the employee is entitled prior to the imposition of discipline.

And then again in **CROA 3157** he stated;

> As prior awards of this Office have confirmed, the disciplinary investigation process is an intrinsic part of the expedited system of arbitration utilized within the railway industry in Canada. Its integrity must be respected if the arbitration system of this Office is to itself be reasonably efficient and able to rely on information gathered within that process.

More recently, in **CROA 4591,** Arbitrator Clarke confirmed, in a decision from 2017, the importance of a fair investigation in the CROA process:

> Investigations are crucial to the CROA process: **CROA&DR 4549**. They provide a factual transcript for the parties' and the arbitrator's use at the expedited arbitration hearing. For over 50 years, the parties' collective efforts in developing factual transcripts has enabled this Office to provide, when compared with the alternatives, timely and cost-effective arbitration decisions.

Turning to the more recent *Fleishhacker* decision, Arbitrator Sims, in declaring the discipline to be null and void, referred as well to the significance of an impartial investigation and the result of nullifying the discipline in the event of a breach of the investigation provision:

> I now turn to the arguments about the alleged breach of Article 117.2 and the effect of any such breach on the CROA process. The Employer and Union emphasize different aspects of that process, and of the relationship between the investigation stage and a CROA hearing. The Employer refers to Arbitrator Picher's observation in **CROA 1858**:
>
> > … investigation procedures such as those contemplated in Addendum 41 are intended to provide an expeditious, fair and open system of fact finding in serious disciplinary cases. The procedure is not, however, intended to take on the procedural trappings of judicial or quasi-judicial hearings.
>
> The Union emphasizes those cases that speak of the importance of fairness and disclosure at the investigation stage without which the CROA process would deteriorate into a series of full-blown arbitrations, the antithesis of the expeditious process as the parties here hitherto known (and valued) it to be. One of the clearest expressions of this CROA approach is that given by Arbitrator Picher in **CROA 3322** (see above).
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> > It is not disputed that the foregoing provision establishes the basis for what has generally been characterized as a "fair and impartial" investigation, a precondition to the assessment of discipline against any employee. Central to the issue in the case at hand is the right of the employee "... to hear all of the evidence submitted and ... be given an opportunity through the presiding officer to asks questions of witnesses whose evidence may have a bearing on the employee's responsibility."
> >
> > … This Office has had a number of prior occasions to consider the principles which govern the application of provisions such as article 82.2 of the instant collective agreement. It is well settled that a violation of these provisions amounts to the denial of a substantive right, the consequence of which is to render any discipline void ab initio, regardless of the merits of the case. The reason for that firm rule is to safeguard the integrity of the expedited grievance and arbitration process established within the railway industry and the Canadian Railway Office of Arbitration. …
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> [Arbitrator Picher then cited CROA 1734]
>
> > In the Arbitrator's view this case raises issues fundamental to the integrity of the process of expedited hearings that is vital to the operation of the Canadian Railway Office of Arbitration. By long established practice, this Office relies on written briefs, including the transcript of investigations conducted by the Company the content of which forms the basis of the decision to assess discipline against an employee. If the credibility of the expedited hearing process in this Office is to be preserved both the parties and the Arbitrator must be able to rely, without qualification, on a fair adherence to the minimal procedural requirements which the parties have placed into the Collective Agreement to facilitate the grievance and arbitration process in discipline cases. Needless to say, irregularities at the investigation stage, particularly those which depart from the standard of full and fair

> disclosure reflected in Article 18.2(d) have the inevitable effect of undermining the integrity of the entire grievance and arbitration process so vital to the interests of both parties. (emphasis added)

The Court of Appeal in *Fleishhacker* upheld Arbitrator's Sims' analysis of the importance of the investigative process in the CROA model and emphasized the arbitrator's view that not every "trivial breach" of the process resulted in a finding that the discipline was void:

> [60] Third, the Arbitrator's analysis was nuanced. He did not say that every trivial breach of Article 117.2 must result in a finding that the discipline is void. He found that he must void the discipline in the particular circumstances of this case. As noted above, he found that the documents that CN did not disclose were keystone documents, referring to Arbitrator Keller's reference to those documents as "material". He was concerned with breaches of "fundamental" procedural requirements. Further, it was his view that such breaches could be cured at the investigative stage, or at a stage where a further investigation could be "convened". This reflects the fact that the investigative stage is not only an agreed precondition to the imposition of discipline, but in the view of the Arbitrator, a fundamental aspect of the unique CROA process.

It is my view that all the material investigative documents were not produced by the Company during the investigative process. In particular, I find that a transcript of the complainant's response from her second interview of May 31, 2019 should have been provided to the grievor. It was a keystone document to which the grievor should have been given the opportunity to review and comment. Although the statements of Mr. Gaudette and Mr. Blanch were less critical to the conclusions in the investigator's report of June 24, 2019, they were part and parcel of the investigative process and should have been turned over to the grievor and the Union as well.

In addition, the entire report itself, which contained the conclusions of the investigator, should have been disclosed to the Union and the grievor as part of the investigation process. The conclusions contained in the report were not “trivial’ in nature but were material to the investigation. All of the documents mentioned could have been produced by following the customary practice of convening a supplementary investigation with the grievor and the Union, while still maintaining the confidentiality required by article 17.10. As Arbitrator Picher stated in **CROA 3975**, the failure to disclose all material investigative documents risks prejudice to the grievor’s right to a fair and impartial investigation:

> …In the administration of this provision it must be borne in mind that fairness in the conduct of investigations must not only be done, it must also manifestly be seen to be done. How can the grievor be assured that there is not prejudicial or exculpatory information in the hands of the Company, gained through the investigation of the three other employees involved, unless he or his union representative is given notice of those investigations and full access to the final record which emerges from them? In the case at hand, at the time of the investigation the grievor’s job was at risk. There can be no responsible basis on which the Company could have done anything but to provide to him and his union representative all investigation material relating to the incident in which he was involved…

The Company breached the requirements of article 15.1 when it decided to terminate the grievor without producing all the documents (statements and investigator’s report) needed to fulfill the fairness and impartiality requirements inherent in the CROA investigative process. The discipline is therefore declared to be *void ab initio*. The next question is whether the normal and customary direction to reinstate the grievor with full compensation is in order. Before considering such a remedial order, it is important to set out my factual findings based on the evidence adduced by the parties in these proceedings.

I accept the accusations of the complainant, and the findings of the independent investigator, that the grievor sexually harassed the complainant in the early hours of September 2, 2018. The grievor, some 30 years older than the complainant at the time, was intoxicated after spending the earlier part of that evening in two bars. Instead of leaving the complainant alone to return to her room, as the other men did, the grievor insisted on walking the complainant back down to her room. The complainant reluctantly agreed to have the grievor walk her back to her room and also agreed to have a cigarette with him once they reached the room.

The grievor walked into the complainant's room uninvited when she decided to get a sweater out of her bag. The grievor sat down on one of the beds. From that point on, he did everything he could think of in his intoxicated state to try and seduce the complainant, including crudely telling her he could sexually relieve her stress with oral sex. The grievor claims that he left the room once she began to remove her inner clothing through her shirt. I find that nothing of the sort occurred.

Instead, the complainant, who was frank, open and unhesitant throughout her testimony, had to fend off the grievor's advances. He proceeded to unzip his pants and touch himself inappropriately. That last gesture triggered an angry response from the complainant and she told the grievor "*to get the hell out of her room".* It was only that assertive response which led the grievor to back off and leave. On the way out, he disgustingly remarked to the complainant *"you wouldn't be such a bitch if you let me fuck you."*

I have no hesitation in accepting the complainant's evidence which was consistent with her earlier statements during the investigation. The grievor's testimony, on the other hand, does not stand up to scrutiny. His story of what occurred in the complainant's room is simply not believable when weighed against the accusations of the complainant, who had nothing to gain by coming forward.

I accept that the complainant's main motive for reporting the incident months after it occurred, as she described it in her email of June 4, 2019 to Ms. Renton, was that she did not want to see it happen to other women in a workplace where there were very few to begin with. I find, in the end, that the grievor took sexual advantage of a young woman in a vulnerable position and subsequently lied about his behaviour in order to salvage his reputation and get his job back. Given these findings, I now turn to the issue of remedy.

In **CROA 4663**, the grievor was terminated for cause relating to the tragic Lac-Mégantic incident in July 2013. The Union grieved citing that the employer had failed to conduct a fair and impartial investigation according to the collective agreement. Arbitrator Clarke agreed and declared the discipline to be void *ab initio* "…in accordance with this Office's longstanding jurisprudence". On the issue of remedy, the union argued that the grievor should be reinstated to his position as a locomotive engineer. The employer argued that damages in lieu of reinstatement, as the Company submits here, was the appropriate remedy under the circumstances. The arbitrator agreed stating:

> Given the overall context presented by the parties at the hearing, the arbitrator has concluded that damage in lieu of reinstatement would be appropriate. Since neither party had addressed the appropriate quantum for those damages, that specific issue is remitted back to them for discussion.

I am of a similar view in this case. I find the "context" based on the facts before me leads to the inevitable conclusion that the grievor should not be allowed to return to the workplace. The facts here are of such an egregious nature involving the breach of the Company's harassment policy that it would be untenable in my view to order reinstatement.

This is not a case where the grievor published an unsavory and admittedly discriminatory letter to a newspaper laced with racial remarks as in *Fleishhacke*r. Not to diminish the seriousness of that incident, I find the callous act of sexual harassment in this case forecloses any consideration that the grievor can be returned to the workplace. Such a direction would risk being interpreted as condonation of what can only be described as an inexcusable and predatory act of sexual harassment on a vulnerable female, some 30 years the grievor's junior.

CONCLUSION

The grievance is upheld to the extent the grievor is entitled to damages in lieu of reinstatement for failing to provide a fair and impartial investigation pursuant to article 15.1.

I shall retain jurisdiction in the event the parties are unable to resolve the issue of damages.

Dated at Calgary, this 31st day of May, 2021

JOHN M. MOREAU, Q.C.
ARBITRATOR