

AH836

**IN THE MATTER OF AN ARBITRATION UNDER THE *Canada Labour Code, RSC*
1985, c L-2.**

BETWEEN:

**INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS (SYSTEM
COUNCIL NO. 11)**

(IBEW)

-and-

CANADIAN PACIFIC KANSAS CITY RAILWAY

(CPKC)

Mitchell Bursey (977022): Three grievances (4 separate disciplinary measures)

Arbitrator: Graham J. Clarke

Date: August 14, 2023

Appearances:

IBEW:

D. Ellickson: Legal Counsel

J. Sommer: Senior General Chairman

S. Martin: International Representative

N. Duncan: Regional Chairman

M. Bursey: Grievor

CPKC:

F. Billings: Assistant Director, Labour Relations

Arbitration held in Ottawa on July 26, 2023.

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Award

BACKGROUND

1. CPKC hired Mr. Bursey on June 19, 2012 as an S&C Helper. He held the position of S&C Maintainer at the material times for this arbitration.

2. The parties appointed the arbitrator to determine three grievances, involving 4 separate disciplinary measures. The IBEW contested: 1) Mr. Bursey's initial 20-day suspension; 2) a subsequent 30-day suspension; and 3) two terminations, on different grounds, imposed on the same day. In between the 30-day suspension and the dismissals, the parties had agreed on a 40-day suspension and a Last Chance Agreement (LCA).

3. For the reasons which follow, the arbitrator reduced the first suspension from 20 days to 3. The arbitrator further reduced the 30-day suspension to 10 days.

4. However, having regard to Mr. Bursey's entire disciplinary record, CPKC satisfied the arbitrator that the grievance involving "time theft" did not justify the arbitrator modifying the penalty. The arbitrator also concluded that Mr. Bursey's behaviour, while minor, allowed CPKC to rely upon the LCA it had negotiated with the IBEW.

5. The arbitrator will examine each disciplinary measure separately.

20-DAY SUSPENSION FOR THE EVENTS OF MAY 21, 2020

6. This incident involved Mr. Bursey called a manager "a fucking idiot" but apologizing soon after. The arbitrator will first summarize the facts, analyze procedural issues which also arose in other grievances, and then consider the appropriateness of the 20-day suspension.

Facts

7. The parties did not dispute the facts. Nonetheless, the chronology impacts the analysis of the procedural issues.

8. On May 21, 2020, Mr. Bursey said to a company officer, Mr. Hughes, Specialist S&C Operations: "You are a fucking idiot for shutting down 3 crews". Mr. Colin Griffith, Assistant director S&C Operations, documented the incident¹:

On May 21 at approximately 1600 S&C Wireman Mitchell Bursey approached Kevin Hughes and I at crossing Mile 70.02 Finch/ Roxboro Line Winchester Subdivision making the following comment.

"You are a fucking idiot for shutting down 3 crews. Directed to Kevin Hughes"

I then responded

"Pardon me? What did you just say?"

Mitchell then responded

"You heard me"

I then responded

"You can't talk to Kevin or anyone else like that"

Mitchell responded

"Yes Colin you are right I shouldn't have said that. Kevin I apologize for saying those words to you"

After the encounter with Mitchell, Kevin and I informed S&C Director Craig Johnstone of the incident. Approximately 15 minutes later I decided that this incident needed to be documented into the Dashboard with a One to One. Kevin then asked to speak to Mitchell away from the rest of his crew along with myself. Kevin then discussed respect in the work place and how to speak amongst other employees. Kevin then informed Mitchell that this conversation was going to be entered into the Dashboard as a One to One with the exact comments made from him along with our follow up discussion. Once again Mitchell apologized for his comments.

Colin Griffith

Assistant Director S&C Operations

9. CPKC representatives documented the matter in Dashboard as they had told Mr. Bursey they would.

¹ IBEW documents, Page 12/250; June 2, 2020 Griffith Memorandum

10. On June 9, 2020, CPKC issued a notice to appear² for Mr. Bursey. The investigation took place on June 17, 2020. Mr. Bursey did not dispute Mr. Griffith's memorandum and explained why he had spoken that way³. Mr. Bursey acknowledged that CPKC does not tolerate profanity and that it can be viewed as harassment towards others⁴.

11. On June 30, 2020, CPKC issued a 20-day suspension as summarized in its Form 104⁵:

Please be advised that you have been assessed a (20) day suspension for your conduct unbecoming towards a manager. This is a failure to comply with Appendix 7 Company Policy HR 1300 and Appendix 8 SPC 41 1.2 Employee Responsibilities item (g), which occurred on May 21, 2020, at Crossing Mile 70.02 Finch/Roxboro Line Winchester Subdivision.

Summary of Rules Violated:

- Appendix 7 Company Policy HR 1300
- Appendix 8 SPC 41 1.2 Employee Responsibilities item (g)

As a matter of record, a copy of this document will be placed in your personnel file.

12. On August 3, 2020, the IBEW filed its Step One grievance. CPKC submitted its response via its Grievance Management System (GMS). The IBEW progressed the matter to Step Two and objected to CPKC's use of the GMS to send a grievance response. It further relied on collective agreement (CA) articles 12.12 and 12.4 to support its argument that CPKC's failure to respond properly meant the arbitrator had to uphold the grievance.

Do the time limits in article 12.12 oblige CPKC to pay the claim?

13. The IBEW argued that CPKC failed to respond to its grievance properly at Step One⁶ which obliged the arbitrator to uphold the grievance.

² IBEW Documents, Page 11/250.

³ IBEW Documents, Bursey Statement; Page 15/250.

⁴ IBEW Documents, QA20; Page 19/250.

⁵ IBEW Document, Page 24/250.

⁶ See [Canadian Pacific Railway Company v IBEW, System Council No. 11, 2020 CanLII 49847](#) (Kaplan) which held that CPKC could neither unilaterally implement the GMS nor use it for grievance responses.

14. Article 12.8 of the CA requires CPKC to respond to the grievance “electronically” within 35 days:

12.8 The Company's decision shall be rendered electronically within thirty- five calendar days of receipt of appeal at Steps I and also electronically within thirty-five calendar days of receipt of the appeal at Step II.

Grievances filed prior to the effective date of the changes outlined in this paragraph 12.8 will be progressed pursuant to the existing provisions.

(Emphasis added)

15. The IBEW argued that article 12.12 set out the consequences for CPKC’s failure to respond properly to the grievance:

12.12 When a grievance based on a monetary claim is not progressed by the Union within the prescribed time limits, it shall be considered as dropped. When an appropriate officer of the Company fails to render a decision with respect to such a claim within the prescribed time limits, the claim will be paid. The application of this rule shall not constitute an interpretation of the collective agreement.

(Emphasis added)

16. In short, the IBEW argued that an application of article 12.12 to the instant case required that “the claim will be paid”.

17. CPKC argued that it had replied and that, even if it had not, article 12.12 did not apply to Mr. Burse’s disciplinary grievance:

16. Notwithstanding the fact the Company did in fact reply to the step 1 grievance, the Company maintains that even if they hadn’t, the grievance would have naturally progressed to the next step in the process via the Union submitting a step 2 which they did and which the Company replied to. As such, the Company maintains that no violation of 12.8 of the Collective Agreement has occurred.

18. For the following reasons, the arbitrator respectfully disagrees with the IBEW’s suggested CA interpretation.

19. First, the parties have not defined article 12.12's use of the expression "a grievance based on a monetary claim". Prior to 2018, the CA used the expression "unpaid wages" in the predecessor article⁷:

12.11 When **a grievance based on a claim for unpaid wages** is not progressed by the Union within the prescribed time limits, it shall be considered as dropped. When an appropriate officer of the Company fails to render a decision with respect to such **a claim for unpaid wages** within the prescribed time limits, the claim will be paid. The application of this rule shall not constitute an interpretation of the collective agreement.

(Emphasis added)

20. In the arbitrator's view, the current article 12.12 cannot be interpreted as broadly as the IBEW suggests. The agreed-upon consequences, for both the union and the employer missing the CA's time limits, apply only to "grievances based on monetary claims". Since arbitrators generally remedy contractual breaches via the payment of money, an overly broad interpretation of "monetary claims" could cover almost any dispute between the parties.

21. Had the parties wished to arrive at this result they then could have simply deleted the expression "based on a monetary claim" to obtain a far broader consequence for a failure to respect time limits. The provision might thus have read:

12.12 When a grievance is not progressed by the Union within the prescribed time limits, it shall be considered as dropped. When an appropriate officer of the Company fails to render a decision within the prescribed time limits, the claim will be paid. The application of this rule shall not constitute an interpretation of the collective agreement.

22. The parties did not negotiate this type of expansive language. They instead limited the impact of missing a time limit to grievances "based on a monetary claim". The arbitrator notes that the word "based" is more specific than if they had used the word "involving". The current wording, while perhaps slightly broader than before, remains comparable to the concept of "unpaid wages" used in the predecessor article.

23. Second, the concept of a "monetary claim" necessarily restricts the application of article 12.12. Collective bargaining often distinguishes between monetary and non-monetary items. Article 12.12 focuses on grievances which dispute a monetary

⁷ IBEW Brief; Paragraph 27.

entitlement under the CA. Routinely requested financial remedies in disciplinary grievances fall outside article 12.12.

24. Third, article 12.12's concluding sentence reinforces the view that the grievance must raise a specific monetary entitlement under the CA:

The application of this rule shall not constitute an interpretation of the collective agreement.

25. In other words, article 12.12 contemplates a specific CA article providing a monetary benefit. The application of the "penalty" in article 12.12, if either the IBEW or CPKC miss the required time limits, does not bind them for any future interpretation of that monetary article. A disciplinary grievance's remedial request falls outside this exceptional regime the parties have negotiated for monetary claims.

26. Fourth, the parties did not provide any context behind their change from "unpaid wages" to "monetary claim". The Supreme Court of Canada in *Sattva Capital Corp*⁸ now allows parties, even in the absence of any ambiguity, to produce contextual evidence and information⁹.

27. Fifth, the parties have not negotiated the consequences for a failure to respect time limits for non "monetary claims". The CA remains silent¹⁰. Nonetheless, under the principle *expressio unius est exclusio alterius*¹¹, the arbitrator cannot apply article 12.12 generally when the parties have already restricted it to specifically identified situations.

28. For those reasons, the consequences in article 12.12 do not apply to the circumstances of this case.

⁸ [Sattva Capital Corp. v. Creston Moly Corp., 2014 SCC 53](#)

⁹ See, in addition, [Canadian Union of Public Employees, Air Canada Component v Air Canada, 2023 CanLII 13776](#)

¹⁰ Compare AH801 which illustrates how parties might deal with grievances not involving time claims: [Teamsters Canada Rail Conference \(CTY-West\) v Canadian National Railway Company, 2022 CanLII 112672](#).

¹¹ [Canadian National Railway Company \(CN\) v International Brotherhood of Electrical Workers System Council No. 11, 2018 CanLII 121547](#)

Did CPKC hold the investigation within the collective agreement's time limits?

29. The IBEW alleged that CPKC "investigated" immediately following the incident on May 21, 2020. The June 17, 2020 investigation therefore became redundant and did not interrupt the CA's 28-day time limit which had allegedly started running as of May 21, 2020.

30. Paragraph 33 of the IBEW's Brief summarized its position:

33. In the Union's respectful submission, there are at least two ways the Company's actions can be viewed: (1) the Company had investigated at the time of the incident, decided on the appropriate outcome and any attempt to impose a new and different penalty is an abuse of process; and/or (2) the "investigation" of June 17, 2020 was a redundancy as the matter had previously been investigated.

31. The IBEW relied on articles 12.1 and 12.4 to support its timeliness argument:

12.1

...

Investigations will be held as quickly as possible, not to exceed 30 days from the time the incident becomes known to the Company, unless the employee is unavailable, or the investigation should be delayed due to circumstances beyond the control of the Company.

Notwithstanding the foregoing, an Officer who may be on the ground when the cause of the investigation occurs may hold an immediate investigation.

12.4 A decision shall be rendered within twenty-eight days of the date that the investigation is completed -- i.e., the date that the last statement in connection with the investigation is taken except as otherwise mutually agreed. A copy of the decision issued will be sent to the General Chairman/Senior General Chairman electronically.

(Emphasis added)

32. In its Brief, CPKC argued that providing feedback to an employee at the time of an incident does not constitute an investigation under the CA:

21. The Company maintains that handling any alleged non-compliance at the time of an incident and providing feedback to employees by no means

constitutes as an investigation. If this were the case, the Company would not be able to speak with employees at any time to correct behavior and remedy serious safety issues in the moment without being bound by 12.1 of the agreement. This is not only not what the CBA states but also its illogical and unreasonable.

22. Furthermore, arbitrators have determined that having a conversation with an employee or having them fill out an initial incident report does not constitute as the commencement of an investigation.

...

33. CPKC added orally during its reply that it uses Dashboard to document its Efficiency Tests and that entering a “coaching moment” does not limit its ability to investigate under the CA.

34. The arbitrator has concluded that CPKC did not conduct an investigation in May 2020.

35. The parties have negotiated extensive protections in articles 12.2 and 12.3 to ensure an investigation’s fairness. This includes providing prior notice to the employee, ensuring the IBEW’s participation and disclosing the relevant evidence:

12.2 When an investigation is to be held, the employee will be provided forty-eight (48) hours written notice of the time, place and subject matter of such hearing. He will have a Union designated fellow employee and/or an accredited representative of the Union present at the hearing and shall be furnished with a copy of his own statement and, copies of all evidence taken, which will also be supplied electronically to an accredited representative. The employee subject to the investigation will not suffer any loss in regular earnings. A copy of the notice shall be given to the General Chairman/Senior General Chairman electronically.

If a representative cannot be made available for the time set for the hearing, the employee, either directly or through an accredited representative, may seek a delay in the hearing sufficient for the Union to have an accredited representative made available.

12.3 All material and necessary witnesses must be notified to appear. An employee shall have the right to be present during the examination of any witness whose evidence may have a bearing on his or her responsibility or be accorded the right to read the evidence of such witness and offer rebuttal thereto.

(Emphasis added)

36. These negotiated protections confirm that no investigation took place in May, 2020. Article 12.4, *supra*, explicitly notes that the 28-day time limit starts after the taking of the final statement in the investigation:

A decision shall be rendered within twenty-eight days of the date that the investigation is completed -- **i.e., the date that the last statement in connection with the investigation is taken** except as otherwise mutually agreed.

(Emphasis added)

37. In short, the discussions on May 21, 2020 did not constitute an “investigation” as the parties have used that term in the CA. The arbitrator will leave for another day the task of interpreting how to apply the parties’ wording in article 12.1 “Notwithstanding the foregoing, an Officer who may be on the ground when the cause of the investigation occurs may hold an immediate investigation”.

38. CPKC respected the CA’s time limits when conducting its investigation.

Should the arbitrator intervene to modify the 20-day suspension?

39. CPKC demonstrated it had grounds to discipline Mr. Bursey for his behaviour towards two of its managers. Calling a manager a “fucking idiot” for decisions he had made the previous day, in the presence of a second manager, is clearly insubordinate. CP has the obligation to ensure a harassment free workplace and regularly enforces its policies to attain this goal¹².

40. The question then becomes whether the arbitrator should modify the penalty in accordance with section 60(2) of the *Canada Labour Code*¹³ (*Code*):

60(2) Where an arbitrator or arbitration board determines that an employee has been discharged or disciplined by an employer for cause and the collective agreement does not contain a specific penalty for the infraction that is the subject of the arbitration, **the arbitrator or arbitration board has power to substitute for the discharge or discipline such other penalty as to the arbitrator or arbitration board seems just and reasonable in the circumstances.**

¹² The arbitrator will expand on the *Code*'s requirements, *infra*.

¹³ [RSC 1985, c L-2](#)

(Emphasis added)

41. Since the parties have not negotiated specific penalties into the CA, the *Code* requires the arbitrator to consider whether to substitute a just and reasonable penalty.

42. The IBEW satisfied the arbitrator that a 20-day suspension was excessive for what was essentially a first offence. CPKC's supporting case law dealt with significantly more serious situations.

43. In AH794¹⁴, the arbitrator commented on the importance of context when relying on other cases to justify a disciplinary measure:

17. During its argument, the TCRC amended its Brief to clarify that it was no longer contesting that CN had cause to impose some discipline. However, it argued that 25 demerits for a first offence went far beyond the appropriate penalty for running through a switch.

18. The arbitrator agrees with the TCRC. The imposition of 25 demerits for a recently qualified conductor's first offence appears excessive.

19. **It is not enough to rely on previous cases which may have awarded a penalty of 25 demerits for running a switch. The parties must consider the context of each case they put forward since the underlying facts remain crucial to any analysis.**

(Emphasis added)

44. The Record demonstrated that Mr. Bursey had only been disciplined once (5 demerits) in the previous 7 years before this incident¹⁵.

45. The IBEW and Mr. Bursey acknowledged the inappropriateness of using profanity when addressing a manager but emphasized it was a singular event. Mr. Bursey apologized right away, albeit only after Mr. Griffith had explained the inappropriateness of his comments.

¹⁴ [Teamsters Canada Rail Conference v Canadian National Railway Company, 2022 CanLII 9594](#)

¹⁵ IBEW Documents; Bursey Discipline Record; Page 5/250; IBEW Brief; Paragraphs 4 and 42.

46. Other railway awards have examined situations involving the use of profane language directed at a supervisor or manager. While every fact situation is distinct, those cases provide some guidance on the appropriate penalty.

47. In [CROA 3569](#), Arbitrator Picher reduced a 30-day suspension to 5 days for an employee who spoke to his supervisor in an “extremely profane and disrespectful manner”. Arbitrator Picher summarized the facts before him:

The record reveals, without substantial controversy, that the grievor spoke to his supervisor in an extremely profane and disrespectful manner on March 29, 2000. While the grievor was in the course of his tour of duty as yard conductor on the 0755 Clover Bar yard assignment, he was approached by Transportation Supervisor Tom Otteson who inquired about the state of the work being performed and, among other things, asked why the crew had taken a late lunch. **The Arbitrator is satisfied that at that point the grievor responded: "I'm not fucking talking to you. The last time I talked to you I almost got fired, so fuck off." When Supervisor Otteson attempted to explain that he was entitled to make inquiries as to the work being done, the grievor further responded: "I'm tired of your stupid fucking questions and I don't want to fucking talk to you." At that point Mr. Carroll walked away from Mr. Otteson, essentially refusing to speak with him.**

(Emphasis added)

48. Arbitrator Picher found such conduct merited discipline regardless of what might have happened in the past between those involved:

The Arbitrator is satisfied that in the circumstances the Company had just cause to assess discipline against Mr. Carroll. **Whatever his opinion of Mr. Otteson, and whatever may have transpired between them in the past, Mr. Carroll could not cloak himself with those events to essentially deny the supervisory authority of Mr. Otteson and engage in open defiance and disrespect towards him.** The issue then becomes the appropriate measure of discipline in all of the circumstances.

(Emphasis added)

49. Arbitrator Picher explained why he reduced the suspension from 30 to 5 working days:

In all of the circumstances the Arbitrator is satisfied that a suspension for a period of five working days would have been sufficient to bring home to the grievor the importance of being respectful to his supervisor. Given his prior record and the history of his relationship with Mr. Otteson, a

mitigating factor discussed above, I must conclude that the assessment of a full one month suspension was unduly punitive in the circumstances.

The grievance is therefore allowed in part. The Arbitrator directs that the grievor's record be amended to reflect a suspension of five working days, with the grievor to be compensated for the difference in wages and benefits lost.

(Emphasis added)

50. In [CROA 4439](#), Arbitrator Flynn dealt with a grievor's momentary profane outburst:

On September 24, 2014, at approximately 09:42, the OHS Coordinator, Ms. Brenda Land, contacted the Grievor to schedule a random test within the next 24 hours of the call. She could not understand the Grievor and asked that he call back. **Within the next hour, three telephone conversations ensued. During those calls, the Grievor was angry, behaved in a bullying manner and used foul language. For instance, he stated, "What the fuck are you doing? Why are you harassing me? Don't I have anything better to do then fuck up his life? Fucking sick of me personally, I caused him to lose money that last time. I must fucking love this and better be careful". Ms. Land felt threatened, uncomfortable and emotionally upset and reported the incident the same day.**

(Emphasis added)

51. Arbitrator Flynn noted the important difference between a momentary flare-up and a pattern of behaviour:

A reading of the awards submitted by both parties reveals that arbitrators tend to downgrade the gravity of momentary flare-ups which are not too serious in nature, while holding the principle that a pattern of abusive or belligerent behaviour will not be tolerated and will ordinarily justify discharge, given that each case turns upon its own peculiar mix of facts.

52. As a result, Arbitrator Flynn overturned the termination, but reinstated the grievor without compensation:

For the foregoing reasons, the Arbitrator allows the grievance in part and orders that the Grievor be reinstated into his position, without loss of seniority, without compensation for any wages or benefits lost, and that his disciplinary record stand at thirty-five (35) demerits. In addition, the Relapse Prevention Agreement

in force at the time of the dismissal shall be extended until December 31, 2016¹⁶.

53. For the circumstances examined in [CROA 4643](#), Arbitrator Sims replaced a 93-day suspension with one of 7 days:

The grievor agrees that, after his telephone call with Mr. Dalke, in frustration, he made an unprofessional and derogatory statement. He says it was about Mr. Dalke but directed to his co-worker Mr. Contos. They differed, in a later call and throughout the investigation, as what was said. **The grievor says he said “fucking arrogant bastard”. Mr. Dalke and his co-worker Mr. Shuttleworth say he said “fucking ignorant cock”. My sense is that Mr. Dalke’s version is closer to what was actually said, but using a subsequent word that would complete a sentence not infrequently used in the vernacular.** If so, it supports the view that what the grievor said occurred just as he was hanging up the phone.

(Emphasis added)

54. Arbitrator Sims concluded that the initial disciplinary penalties had been “extraordinarily harsh”:

I agree with the Union that the initial termination as well as the later reduced penalty were both extraordinarily harsh. The penalties are set aside and replaced with a 7 day suspension, for the insulting language, but not for a refusal to follow directions. The grievor is otherwise to be made whole, with interest. I remain seized of any remedial issues that cannot be resolved between the parties.

55. In considering these and other authorities found in the Record, the arbitrator has reduced Mr. Bursey’s 20-day suspension to one of 3 working days. Mr. Bursey’s comments to a manager, while completely unacceptable, were nonetheless momentary and followed almost immediately by an apology. Nonetheless, Mr. Bursey’s profane language towards CP managers constituted insubordination and hindered CP’s efforts to maintain a respectful workplace.

¹⁶ In [CROA 4398](#), Arbitrator Silverman considered another situation involving profanity and a manager. She replaced a termination with 20 demerit points. Under the Brown System some railways use, a total of 60 points results in an employee’s dismissal.

30-DAY SUSPENSION FOR THE EVENTS OF SEPTEMBER 27, 2020

56. CPKC imposed a 30-day suspension for an alleged altercation between Mr. Bursey and another bargaining unit member, Mr. Symoens. The IBEW raised similar timeliness arguments to those examined above for the original 20-day suspension.

Facts

57. On March 29, 2021, CPKC issued its Form 104¹⁷ setting out its reasons for disciplining Mr. Bursey:

A formal investigation was issued to you in connection “with your tour of duty on September 27, 2020 and any and all events surrounding the alleged Altercation between yourself (Mitchell Bursey) and Corey Symoens”

Following the formal investigation conducted on March 1, 2021, it has been concluded that you were found in violation of the following rules/policies:

Policy 1300- discrimination and harassment policy

CP code of business ethics

SPC 41

Please be advised that you are hereby assessed a Thirty (30) day suspension, effective March 29 2021.

First day served is March 30, 2021 with the return date of May 11, 2021.

58. The September 27, 2020 incident occurred when Mr. Bursey exercised the role of acting foreman. Mr. Bursey had advised an S&C manager that he had had an argument with Mr. Symoens. From October 2020-February 9, 2021, Mr. Bursey went off on disability leave¹⁸.

59. In October 2020, Mr. Symoens reported the incident to the IBEW. The IBEW advised Assistant General Manager – S&C Operations Dale Strilchuk. At Mr. Strilchuck's request, Mr. Symoens prepared this written account:

There was an altercation on Sunday September 27 between myself & Mitch Bursey. That same morning the crew got out at 0700 in the parking lot of best western Milton. Earl Stubbs asked me if I had thrown out the garbage bags that were in my truck and I answered: no since it's not Cp's property, I can stop at a tool house's dumpster or Toronto yard. **Afterwards I had to bring Earl to Cornwall to pick up his boom truck, then out of nowhere Mitch took my**

¹⁷ IBEW Documents; Tab 24; Page 123/250.

¹⁸ IBEW Brief; Paragraph 52.

truck and floored it in front of us and slammed the brakes violently, then he put the truck in reverse making the tires scream and the tailgate was open the whole time with my shoes on. And then he got out and threw my shoes out of the truck and into the parking lot, continuing with his fit, he grabbed the garbage bags and threw it in the hotel bin and left in his work truck. Earl and I left towards Cornwall afterwards. Later on when I came back to Milton east, the crew was dumping rocks and shovelling under the bungalow. **I asked Mitch to get out so I could do it for him. Instead of letting me help, he turned around and accused me of calling him an asshole this morning at the hotel when I was in the parking lot. I answered him no, I never called you names.** I repeatedly told him. Everyone was in the hotel parking lot at that moment except for Brent & Nikki.

Then Mitch threw his shovel and was squishing his fists in an aggressive way and stood up in my face yelling and told me to leave his job site, and that's what I did. He looked really angry and I didn't want to create any problems. Honestly, it seemed like he wanted to hit me and this is not what I signed up for! So I drove to Milton west (not sure where I was supposed to go) to see Josh, Garrett and Doug, I told them what happened at Milton east. After 10 minutes I drove back to the hotel. Earl had just got back as well at the hotel. I told him what happened and that Mitch kicked me out of the job site.

The Next day Mike Monteith showed up with Adam May. Earl had come to me that morning and told me that Mitch had spoken to Adam and had already told his side of the story. Earl had said to me that Adam was going to come see me to hear my version of the facts. So I waited all day But he never came to see me, so that's why I called Mike Monteith, so that I was following chain of command.

Mitch Was going to be the foreman the coming shift because Earl was on vacation and Brent had to be elsewhere.

I will not tolerate to be put in this kind of working atmosphere, someone with this kind of behaviour clearly puts me and my colleagues in a nervous state and it's not because we are all men that this violence should be tolerated. Respect is the key To feel safe and it would be much appreciated if you could follow your own guidelines. With all my respect, (sic).

(Emphasis added)

60. From January 12-14, 2021, CPKC took statements from several of the other employees present when the September 27 incident occurred, including from Mr. Symoens¹⁹. After Mr. Bursey returned from his disability leave, he provided his

¹⁹ IBEW Documents; Tabs 16-21.

statement²⁰. Mr. Bursey acknowledged he had not acted appropriately but did not agree with all the allegations made against him.

61. In his statement, Mr. Bursey provided his version of the events:

Q18. In your own words can you please describe what happened on the Morning of September 27, 2020 at the hotel?

A18. Earl had come out that morning and asked if the garbage has been thrown out by Corey. Corey had replied no. I which point he said he would take t to the yard when he was on his way to drop Earl off in Cornwall. **At this point I took it upon myself to get into the truck which had all the garbage in the back. I drove the truck over to the dumpster and as I was reversing all the windows were down in the truck and I heard Corey make a comment- ah cause he is an asshole and used an arm gesture towards my general direction. At this point I finished backing up to the dumpster the tailgate was down. I seen Corey's shoes on the tail gate. I put my arm down and swiped the shoes off the tailgate.** I hoped in the back of the truck and started to throw the garbage in the dumpster at the hotel in Milton and a couple other helpers helped me with this task. Once done Michelle and I jumped in my assigned vehicle and headed towards Milton West. The rest of the crew showed up we did a job briefing and were assigned a task. Later that day Corey showed up he never said a word to me he was moping around the job site. At this time Curtis laundry showed up with another load of gravel. **While shoveling the gravel under the bungalow Corey attempted to grab the shovel out of my hands and said I'll do that. At that point I told him if you don't want to do what is asked of you I don't want you here. It was at that point that Corey began to argue with me about what happened earlier. It was at that point I said- if you want to call me an asshole I will show you what an asshole looks like and I told him to get the fuck off my jobsite.** At this point Corey left and went to Milton West where Josh Holloway told him to go back to the hotel. That was all I heard about it until Earl called me to question what had happened. (sic).

(Emphasis added)

62. Mr. Bursey also commented on Mr. Symoens' allegations:

Q21. Referencing Corey Symoens Statement Q&A 21 States the following-

Q21. You mentioned Mitch was yelling and came towards you aggressively with closed fist, did you feel threatened by Mitch on September 27, 2020 at the Milton East jobsite?

²⁰ IBEW Documents; Tab 23.

A21. Yes, he came right into my face, he said I called him an asshole and told me to get the fuck off my jobsite. He was yelling and very aggressive. He wasn't happy when I got there. I drove to Cornwall and came back to Milton and that happened.

Did you get into Corey's face yelling to get the Fuck of his job site?

A21. Not in his face no.

Q22. Referencing Corey Symoens Statement Q&A 19- it states-

Q19: Could you please provide your version of the events that took place when you arrived at the Milton East Job site on September 27, 2020?

A 19: So I left Cornwall and Earl told me to Join the rest of the gang. I showed up at Milton East. The crew was dumping bags from the 10 ton around the bungalow when I got there. I asked Mitch to get out so I could do it for him. **He was shoveling so I asked if he wanted me to shovel instead. Instead of letting, me help, he turned around and accused me of calling him an asshole this morning in the hotel parking lot. I answered him no I never called you names. I repeatedly told him. Then Mitch threw his shovel and he had his fisted closed tight towards me in an aggressive way yelling at me and told me to leave his jobsite. I left the jobsite. He looked really angry and honestly he looked like he wanted to hit me.** This is not what I signed up for.

At the Milton East job site did you throw your shovel and approach Corey yelling and clinching your fists in an aggressive way on September 27, 2020?

A22. I did not throw the shovel. I let go of the shovel and it fell to the ground and we started arguing like I stated earlier. I did not cinch my fist. We continued to argue and that's when I said get the fuck off my job site.

Q23. Did you lose your temper on September 27, 20 at the Milton East job site?

A23. I believe I handled myself poorly as my leadership role as foreman yes

(Emphasis added)

63. Mr. Bursey acknowledged his behaviour with Mr. Symoens had been inappropriate:

Q25. Referencing Procedure# H&S 5340 definition

Harassment- would Include unwelcome or unwanted words or gestures that may cause an employee to become frightened, threatened or physically intimidated. This could include. but not be limited to, bullying and/or stalking. by an individual or by a group of persons.

Do you understand that when you yell at someone and tell them to get the fuck off your job site that it may could be considered harassment?

A25. Afterwards yes, I realized afterwards I was wrong in how I handled it. After thinking about it I wouldn't have liked to been talk to that way regardless of who was right or wrong. I realize I made Corey uncomfortable.

(Emphasis added)

64. Mr. Bursey also provided a written statement when asked if he wished to add anything (QA 23):

I feel as a person, and in my opinion, a valuable asset to this company. That I have been letting things get to me personally. These things are incidents that far out of my control, such as fellow employees who may not take the same pride or workmanship the same way I do. Also, employees that may not get a long with me or in reverse I may not get along with. I still have a job to do and I do everything I can with the best of my ability. Unfortunately, I cannot say the same when it comes to dealing with fellow employees.

I hold myself to a higher standard than I would anyone else. I'm ashamed that I let my anger overtake reasonable thinking. Especially when it comes to instances like this one with Mr. Symoens where I should have let Earl deal with the employee instead of taking it so personally when he did not want to do what was asked of him. Things like these outbursts are costly and taxing. Not only on myself, but on my co-workers and friends and family alike.

I need help. I need coaching and which is something I have tried seeking out personally through friends and family, Railroad and non-Railroad alike. They are costly and taxing on my family like my wife and young son. The stress and feelings leak over and back to and from home/work life. I'm more than willing to do what is necessary as an employee and person that takes pride in everything I do, to get what is needed and do what I have to do, so that I no longer have these outburst and personal cases against me. So that I can go home and come to work with the feeling that I am not making anyone uncomfortable to the point they don't want to work with me.

I regret the way I handled myself with Mr. Symoens, mainly because that is something that should have never happened as well as, that is not something I take pride in sharing at the end of the day.

(Emphasis added)

65. The Record contains multiple statements from other witnesses. While not everyone's recollection is the same, multiple witnesses indicated that Mr. Burse operated his truck at an accelerated speed²¹; threw or swiped Mr. Symoens boots off the truck's tailgate²²; yelled at Mr. Symoens to "get the fuck of my job site" and had his fists clenched when doing so²³.

Do the time limits in article 12.12 oblige CPKC to pay the claim?

66. For the same reasons set out above for the original 20-day suspension, the arbitrator must dismiss the IBEW's time limit argument. This disciplinary matter did not involve a "monetary claim", as that term is used in article 12.12.

Did CPKC fail to conduct its investigation in a timely manner?

67. The parties have agreed at article 12.1 of the CA to conduct timely investigations:

...

Investigations will be held as quickly as possible, not to exceed 30 days from the time the incident becomes known to the Company, unless the employee is unavailable, or the investigation should be delayed due to circumstances beyond the control of the Company.

68. In its Brief, the IBEW argued that CPKC failed to investigate quickly:

76. The Company was aware on September 28, 2020 that there had been an argument between the Grievor and Mr. Symoens the day before and that the Grievor had told Mr. Symoens to "get the fuck off my jobsite." Despite this, no action was taken by the Company at this time.

77. Further, Mr. Strilchuk was aware of the incident by October 10, 2020. He then conducted what appears to be an investigation into the incident (albeit not in accordance with the requirements of the Collective Agreement) by interviewing a number of individuals including Mr. Symoens and the Grievor in October and November, 2020.

78. For any or all of the foregoing reasons the Union respectfully submits the grievance ought to be allowed.

²¹ IBEW Documents; Tab 18; Tanner Baker QA14; Tab 19; Tyler Lowe; QA11.

²² IBEW Documents; Tab 16; Josh Holloway; QA11

²³ IBEW Documents; Tab 19; Tyler Lowe; QA18; Mr. Burse disputed some of these recollections in his Statement.

69. The arbitrator prefers CPKC's position²⁴ that no undue delay occurred. Two main reasons lead to this conclusion.

70. First, CPKC looked into the matter once the IBEW brought it to its attention. As the arbitrator understands the Record²⁵, CPKC and the IBEW had several discussions during this time which included the union providing a list of witnesses on November 17, 2021. Preliminary interviews also took place, including one with Mr. Bursey. The arbitrator would hesitate to uphold a grievance on the basis of delay where the Record showed that CPKC and the IBEW had been having discussions about the matter.

71. Secondly, article 12.1 acknowledges that a delay may occur where "the employee is unavailable". Mr. Bursey was absent from October until February 2021. The Record does not indicate that Mr. Bursey was willing to proceed with a formal investigation despite being on disability leave. An employee going on medical leave might delay an investigation²⁶. The arbitrator cannot conclude that CPKC's decision to await Mr. Bursey's return from medical leave created a delay which justified granting the grievance.

Should the arbitrator intervene to modify the 30-day suspension?

72. The parties have adopted this expedited arbitration process and request arbitrators to hear multiple matters in a single day. On July 26, 2023, the arbitrator heard 4 grievances involving i) the duty to accommodate for a different employee and ii) Mr. Bursey's 4 separate disciplinary measures.

73. There is an evident challenge for an arbitrator to determine the facts based solely on a written Record. Arbitrators in railway cases rarely hear oral evidence. Nonetheless, they regularly make credibility decisions based on the parties' written Record²⁷.

74. Given this underlying context, the arbitrator has concluded that CPKC had cause to discipline Mr. Bursey for the events of September 27, 2020. However, the IBEW has persuaded the arbitrator to reduce the 30-day suspension²⁸.

²⁴ CPKC Brief at paragraphs 25-26.

²⁵ IBEW Documents; Tab 15; December 29, 2020 Memo of Dale Strilchuk.

²⁶ [Conférence ferroviaire de Teamsters Canada c Via Rail Canada inc., 2023 CanLII 17658](#) at paragraphs 8-11.

²⁷ See, for example, [CROA 4533](#) and [CROA 4756](#).

²⁸ See the arbitrator's comments about s.60(2) of the Code earlier in this award when reducing the original 20-day suspension.

75. The IBEW questioned the reliability of the witness statements. CPKC noted that it provided Mr. Bursey with an opportunity to question other witnesses who might have relevant information after the IBEW raised these credibility issues²⁹:

Witness list provided but not with all employees who were there both parking lot and Milton east incident. Witness list is said to be union provided but was provided by Corey and therefore may be biased.

Company officer response- Noted-

Company officer: Q1 Other than the 6 statements already taken regarding this incident, is there any other persons that may have relevant information to the altercation that allegedly to place on September 27-2020 at the hotel parking lot or the Milton East job site?

Mitch Bursey: A 1 Yes Eric Liziecki, Michelle Lavalee and Curtis laundry all 3 are currently working on Brent Kennedy's crew now.

Company officer: Q2 Would you like to question these employees as witnesses today?

Mitch Bursey A2 No.

76. The arbitrator must evaluate the Record as it stands and not as it might have been had Mr. Bursey added more evidence to support his position.

77. The arbitrator has concluded that Mr. Bursey acted inappropriately on September 27, 2020 by driving a truck aggressively, either swiping or throwing Mr. Symoens' shoes and speaking in an aggressive and profane manner to him.

78. The arbitrator previously reduced Mr. Bursey's 20-day suspension to 3 days as discussed above. This 30-day suspension involves a repetition of that behaviour but at a more serious level. This impacts the analysis as Arbitrator Flynn commented in [CROA 4439](#), *supra*:

A reading of the awards submitted by both parties reveals that arbitrators tend to downgrade the gravity of momentary flare-ups which are not too serious in nature, while holding the principle that a pattern of abusive or belligerent behaviour will not be tolerated and will ordinarily justify discharge, given that each case turns upon its own peculiar mix of facts.

²⁹ IBEW Documents; Tab 23; Bursey Statement; Page 106-107/250.

79. CPKC satisfied the arbitrator that Mr. Bursey not only used profane language towards a colleague, but his driving and physical demeanour caused Mr. Symoens to feel harassed and personally threatened. Given the previous incident for which the arbitrator substituted a 3-day suspension, Mr. Bursey's inability to control his behaviour towards others raises serious concerns.

80. CPKC requires a respectful workplace. It has adopted policies designed to achieve this goal. The *Code* itself, in Part II "Occupational Health and Safety", similarly seeks to eliminate harassment and violence³⁰:

Definitions

122 (1) In this Part,

...

harassment and violence means any action, conduct or comment, including of a sexual nature, that can reasonably be expected to cause offence, humiliation or other physical or psychological injury or illness to an employee, including any prescribed action, conduct or comment;

81. In AH830³¹, Arbitrator Bartel maintained a 30-day suspension for the harassment of a disabled employee via text message. The award described the gravity of the situation:

9. The February 2021 comments were intended to – and did – offend and humiliate the Grievor based on his personal attributes of weight, skill, intelligence, disability and perceived disability. I am led to the clear conclusion that those messages meet the definitions in both the Canada Labour Code for discriminatory conduct against Mr. Thompson on the basis of disability, and the definition of Personal Harassment in Company Policy 1300. The comments were unwelcome, derogatory and degrading. Discipline was warranted...

(Emphasis added)

82. The grievor in AH830 did not apologize and attempted to minimize the seriousness of his actions:

17. The Grievor has a long service record and has not received any discipline for the prior six years, which I accept are both significant mitigating factors. However, in this case, there are also aggravating factors for discipline, which

³⁰ See also *Code* s.124 and the [Work Place Harassment and Violence Prevention Regulations, SOR/2020-130](#)

³¹ [AH830 - CP v. TCRC MWED \(Lavallee\)](#); Ex-5; Tab 8.

serve to reduce the impact of these mitigating factors. Doubt has been cast on the sincerity of the Grievor's level of remorse and his understanding of his wrongdoing. **While the Grievor indicated in the Investigation that he did not recall sending the February 2021 texts and felt "terrible" and embarrassed on seeing them the next morning, he did not then take any steps to apologize to Mr. Thompson. The Grievor's level of understanding of what was inappropriate was lacking. He sent texts he was aware were demeaning – and for which he apologized – in May of 2019 and yet sent even more offensive texts in 2021. The Grievor also indicated in the Investigation that certain of his family members might not even find the comment offensive. This comment was an attempt to diminish the seriousness of his comments and minimize his responsibility.** This impacts the Grievor's understanding of his wrongdoing for his highly offensive comments...

(Emphasis added)

83. In [CROA 4800](#), Arbitrator Flaherty examined a serious situation where a grievor provided implausible justifications for the comments made to a female colleague:

28. At the investigation, the Grievor provided implausible justifications for his comments. For example, the Grievor explained that his final series of messages was an attempt to lighten the mood with a "well-known internet joke," in which an individual offers "dirty pics" before sending a non-sexual image of a horse in mud. This is not borne out by the language the actual messages, in which the Grievor wrote "I have pics of you...dirty ones."

29. Similarly, the Grievor explained that his messages were not harassment or intimidation, but mostly Shakespearean references. Even accepting that the words "by the knife" are from a Shakespearean sonnet, they form part of a barrage of hostile messages directed at his Coworker. That they may be a literary reference does not take away from the fact that the words were used in a manner that could reasonably be expected to cause offence, humiliation, or physical injury.

30. Based on the Grievor's own explanation, his use of the words "by the knife" is a remark about his Coworker's age and physical appearance. At a minimum, these comments are disparaging, unwelcome, and a violation of the Harassment Free Environment Policy. In my view, however, the Grievor's remarks are more serious than this. The words "fare thee well..." followed immediately by "by the knife" can reasonably be understood as a threat of physical violence.

(Emphasis added)

84. Despite the grievor having no active discipline, Arbitrator Flaherty upheld the dismissal:

39. A number of attempts have been made to minimize the Grievor's misconduct. As noted, the Grievor offered implausible explanations for his comments. **At the hearing, the Union described the Grievor's messages as "a conversation between friends." I reject this characterization. Even accepting that the Grievor and his Coworker had a longstanding personal and professional relationship, the Grievor's messages were highly one-sided and anything but friendly.**

40. **I have carefully considered these mitigating and aggravating factors. In particular, I note the Grievor's long service and the fact that he has no active discipline record. In these circumstances, dismissal would only be warranted in the clearest of cases.**

41. **In my view, this is a clear case. The seriousness of the Grievor's misconduct coupled with his ongoing failure to acknowledge wrongdoing or accept responsibility leads me to conclude that discharge is reasonable. I am satisfied that the Grievor cannot be returned to the workplace in the circumstances.**

(Emphasis added)

85. In [CROA 4650](#), Arbitrator Sims concluded CN had just cause to discipline three grievors for harassing a female colleague:

I find that CN had just cause to discipline all three grievors; indeed I find it had a statutory obligation to take action as a result of this conduct, and its harassing and threatening impact upon Ms. Thomas.

This is not a situation amenable to any "boys will be boys" explanation. I suspect each grievor, individually, is capable of more maturity than they exhibited collectively. **However, the fact they acted in concert and in a "mobbing way" adds substantially to the gravity of the offence. Ms. Thomas is correct in saying, in her complaint:**

What upsets me is that Joel, Mike and Christian don't think what they did is wrong. The "boys will be boys" excuse is just not acceptable to me anymore. We are all adults in a workplace where we are all entitled to a safe, respectful harassment free workplace. I have lowered my boundaries so much and still that is not enough. What standard of behavior are we willing to live with?

(Emphasis added)

86. Arbitrator Sims declined to modify the penalty and, like in the other cases reviewed above, considered a lack of remorse as a key factor:

The grievances are each dismissed. There are few mitigating factors. None have a bank of long term service to draw upon, so length of service is neutral. **The conduct is serious, contrary to law and expressed policies. It is the type of conduct that calls for a degree of deterrence. I find precious little acceptance or understanding by the grievors of the unacceptable nature of their behaviour. Further, in each case, I found their testimony to be disingenuous; rationalizations as to how what they were doing might be perceived rather than truthful accounts of what in fact they were doing. Collectively that conduct amounted to harassing, bullying, and intimidating the grievor to keep her in line. The grievors lack of candor and insight, and their continued efforts to deny or minimize what happened persuades me that this is not a case where it would be just to reduce their discipline.**

(Emphasis added)

87. For Mr. Bursey, this second incident within less than a year merits a significant disciplinary measure. CPKC had cause to follow progressive discipline with Mr. Bursey to ensure he understood the continued inappropriateness of his behaviour.

88. However, unlike in the cases summarized above where arbitrators decided not to intervene, the arbitrator finds certain differences which warrant intervention. First, Mr. Bursey expressed significant remorse³². Second, the incident with Mr. Symoens was a one-off situation rather than a continuing course of conduct directed at him. This does not excuse Mr. Bursey's outburst, but those are relevant factors an arbitrator will consider when intervening under s.60(2) of the *Code*.

89. Given these circumstances, the arbitrator will reduce Mr. Bursey's suspension from 30 to 10 working days.

APRIL 16, 2021: 40-DAY SUSPENSION FOR ALTERCATION WITH ANOTHER EMPLOYEE AND LAST CHANCE AGREEMENT

90. The arbitrator is not tasked with examining the events which lead to Mr. Bursey's 40-day suspension and LCA. The parties resolved the appropriate discipline themselves. Nonetheless, the 40-day suspension remains relevant to the arbitrator's analysis of one

³² IBEW Documents; Tab 23; QA23.

of the two dismissals CPKC imposed. The second concurrent dismissal alleged that Mr. Bursey violated the LCA.

91. Following a February 23, 2021 altercation with a co-worker, Mr. Bursey accepted CPKC's proposed LCA³³. The LCA imposed a 40-day suspension, anger management training and highlighted a non-exhaustive list of behaviours which would constitute violations:

This is in reference to the investigation of S&C Maintainer Mitchell Bursey in connection with his tour of duty on February 23, 2021 and the events surrounding the altercation between himself and a fellow coworker.

While the Company considers that it had just cause to terminate the employment of Mr. Bursey for the aforementioned incident, as a matter of managerial leniency, **the Company is prepared to offer Mr. Bursey with continued employment on last chance terms. Should Mr. Bursey wish to continue his employment with the Company, he will be required to comply the following terms and conditions:**

- 1. Mr. Bursey will receive a 40 day suspension for his conduct unbecoming on February 23, 2021.**
2. Mr. Bursey will be required to successfully complete an EFAP provided anger management training by October 31, 2021.
- 3. Mr. Bursey's employment with the Company remains in jeopardy if he commits a future similar offense, including but not limited offenses pertaining to behavior such as conduct unbecoming, insolent and/or defiant behavior, insubordination, harassment and discrimination, and violence in the workplace for which discipline is proven warranted. Any alleged violation or failure to comply with any terms of this Agreement will result in a formal investigation.**

(Emphasis added)

92. The LCA further set out the consequences for any violation by Mr. Bursey:

5. If, following a fair and impartial investigation, the Company determines that Mr. Bursey violated or failed to comply with any of the terms and conditions of this Agreement:

- a. It shall be considered just cause for the termination of Mr. Bursey;**

³³ IBEW Documents; Page 143/250.

b. The Company, [in] its sole discretion, may elect to dismiss Mr. Bursey from Company service or impose a lesser disciplinary penalty;

c. Any grievance regarding the discipline assessed shall only be for the purpose of determining whether Mr. Bursey violated or failed to comply with the terms and conditions of this Agreement; and

d. The arbitrator in respect of any such grievance shall not have jurisdiction to substitute a lesser penalty for any discipline imposed if he or she finds that Mr. Bursey violated or failed to comply with any of the terms and conditions of this Agreement.

6. This is a full and final settlement of any and all claims with respect to this incident and there shall be no grievance advanced in respect of this Agreement.

7. This Agreement will remain on the employment record of Mr. Bursey and may be utilized in the event that he appears before an arbitrator regarding this proceed and/or any future proceeding. This Agreement will remain in effect for two years from the date signed. Any time where Mr. Bursey is not in active service will be added to this two year period.

(Emphasis added)

93. The parties' agreement for this incident remains relevant when evaluating the two subsequent dismissals. The first dismissal arose from various allegations, including time theft. The second dismissal concerned the LCA and its reference to "a future similar offense".

DISMISSAL FOR EVENTS BETWEEN OCTOBER 7, 2021 AND DECEMBER 7, 2021

94. CPKC dismissed Mr. Bursey for, *inter alia*, time theft³⁴:

A formal investigation was issued to you to develop all the facts and circumstances surrounding the allegations in connection "with any and all events surrounding your attendance, SAP claims and alleged misuse of company assets between October 7, 2021 and December 7, 2021."

Following the formal investigation conducted on January 6, 2022, your culpability was established and it has been concluded that you were found in violation of the following rules/policies:

- SPC 41 1.2 Employee responsibility's
- Vehicle Fleet Procedure 2.5

³⁴ CPKC Documents; Ex-6/7; Tab 2; Page 23/607.

- Vehicle Fleet Procedure 2.6
- Code of business ethics- use of assets
- Conduct unbecoming- Time theft

Please be advised that you are hereby Dismissed, effective February 1, 2022.

95. During his statement³⁵, Mr. Bursey commented on multiple events where he arrived late for work, used CPKC vehicles for personal use, and/or entered incorrect times into SAP for payment purposes. Mr. Bursey also alleged that some of the incidents occurred due to his relationship with his manager, Mr. Shannik.

96. A lengthy extract from Mr. Bursey's statement provides the context for the arbitrator's analysis:

Q30: Referencing Statement Mitch Bursey January 5, 2021 Q&A 16 it states:

Q16 Were you agitated when Mr. Shannik inquired If you were running late on December 7, 2021?

A16 I was frustrated at myself for being late, not at Mr. Shannik. I was not agitated towards Mr. Shannik prior to any phone call.

Did you contact a company official to advise them you were running late for work on December 7, 2021

A30: No I did not. "I would like to reference HR1300 Canada. Effects and Consequences. "Discrimination and harassment can result in tension, anger, fear and frustration on for the individual experiencing it as well as fellow employees, resulting in physical ailments, lower productivity, and absenteeism. It can also lead to the loos of employees who choose to leave their employment rather than deal with the problem. This may result I the discrimination or harassment continuing against the next person who fills the position. Another consequence is that the Company or manager or both could be found liable for not taking action to prevent the continuation or repetition of the discrimination or harassment. And, very importantly, the offender could be found personally liable". (sic).

Q31: Referencing GPS records it shows you leaving your home residence at 0621 December 7, 2021 arriving at Trenton tool house at 0650. Can you explain why you were 50 minutes late on December 7, 2021?

³⁵ IBEW Documents; Tab 34; Page 162/250.

A31 : I was up all night with my kids. They had not been sleeping very well. And neither have I due to dealing with events pertaining to my letter in regards S&C manager Daniel Shannik.

Q32: SAP records show you entered 8 hours regular time for December 7, 2021. Was this scheduled to be a 9 hour work day?

A32: Yes it was

Q33: Can you explain why you only entered 8 hours regular time on December 7, 2021?

A33: I was 15 minutes late to report to work that day.

Q34: What caused you to be late?

A34: Up all night with my kids as they were not sleeping very well. Also dealing with the events and frustrations in regards to my letter about S&C manager Daniel Shannik.

Q35: On December 6, 2021 your scheduled shift is 0600 to 1500 correct?

A35: Correct

Q36: Referencing Appendix GPS records it shows you leaving your home address at 0702 on December 6, 2021 arriving at what appears to be a McDonald's drive thru at 0723. Was this stop at the McDonalds restaurant on December 6, 2021 for personal or business purposes?

A36: Personal. I was getting coffee for the morning.

Q37: GPS records on December 6, 2021 show L 13019 leaving your Home residence at 0702, going through a McDonald's drive thru at 0723 then commuting to 1431 Melrose rd. which appears to be Lonsdale siding back track location arriving at 0800, where you are parked and idling for 3 hours and 15 minutes. Can you explain why you were 2 hours late reporting for duty on December 6, 2021?

A37: Up all night with my kids as they were not sleeping very well. Also dealing with the events and frustrations in regards to my letter about S&C manager Daniel Shannik.

Q38: Did you inform a company officer you were late for work on December 6, 2021?

A38: No I did not.

...

Q45: GPS records for L 13019 Show you arriving at Lonsdale siding at 0800 and departing 676 Dundas St. W Belleville at 1445. This puts you at work for 6

hours 45 minutes. Can you explain the discrepancy between your SAP entry and your actual time at work?

A45: I must have missed calculated my time.

...

Q54: GPS records show L13019 leaving Aikens rd. Grade crossing at 1312 on December 3, 2021, arriving at 510 Dundas St E which appears to be the Dugout Grill, Belleville ON at 1329 where you are stopped for 1 hour 23 minutes. Can you explain this stop?

A54: I was not at the dug out. I noticed a family friend working up the road so I stopped to talk

Q55: Was this stop for 1 hour 23 minutes at the Dugout Grill for personal or business purposes on December 3, 2021?

A 55: It was personal but not at the Dug Out.

056: What company business was conducted during the stop at 510 Dundas St E, Belleville on December 3, 2021?

A56: None. I was talking to a family friend.

057: Did you have permission to be absent for duty on December 3, 2021 between 1312 and 1452?

A57: No I did not.

...

Q61 : GPS records L 13019 show L 13019 departing your home residence at 0633 December 3, 2021 arriving at 217 Montrose Rd Belleville ON, at 0704, Can you explain why you were 1 hour 4 minutes late for your shift?

A61: I would like to reference my letter pertaining to Daniel Shannik. As well as Effects and Consequences under HR policy 1300.

062: Did you advise a company officer that you were late for your shift?

A62: No I did not.

Q63: Can you explain why you did not start at your headquartered location?

A63: I woke up late.

...

066: SAP records show you entered 9 hours regular time on December 2, 2021. GPS records show L 13019 arrive at the first work location at 0702 and depart

at 1436. Totalling 7.75 hours. Can you explain the discrepancy between when you were at work and your time entry?

A66: I forgot to take time of for my late start and as well as leaving early.

Q67: Was your schedule shift 0600 to 1500 on November 24, 2021?

A67: Yes

Q68: GPS records show L 13019 departing your home residence at 0602 November 24, 2021 arriving at 386 RCAF RD, at 0627, Can you explain why you were 27 minutes late for your shift?

A68: My kids did not sleep well again that night. Reference my letter pertaining to Daniel Shannik.

Q69: Did you advise a company officer that you were late for your shift?

A69: No I did not.

Q70: Can you explain why you did not start at your headquartered location?

A70: I was running late and I knew I had some 10 east to do. Drove to RCAF Rd to start a 6 month crossing test.

Q71 : Referencing GPS records L 13019 it shows L 13019 departing the 48 Dundas St West Belleville Appears to be Mary St crossing at 1426 on November 24, 2021, commuting to 54 Frankford Rd, Foxboro which appears to be a Foodland grocery store arriving at 1444. Was this a personal stop at the Foodland Grocery store?

A71: Yes it was

Q72: Did you have permission to be absent from duty between 1426 and 1500 on November 24,2021?

A72: No I did not.

Q73: SAP records show you entered 9 hours regular time on November 24, 2021 . GPS records show L 13019 arrive at the first work location at 0627 and depart at 1426. Totalling approximately 8. hours. Can you explain the discrepancy between when you were at work and your time entry?

A73: I missed entered time. I obviously didn't account for the late start.

Q74: Was your schedule shift 0600 to 1500 on November 23, 2021?

A74: Yes it was.

Q75: GPS records L 13019 show L 13019 leaving your home residence at 0659 on November 23, 2021, arriving at 386 RCAF Rd Trenton On at 0727. Can you explain why you were 1 hour 27 minutes late to work?

A75: I would like to reference my letter pertaining to Daniel Shannik. As well as Effects and Consequences under HR policy 1300.

Q76: Did you advise a company officer that you were late for your shift?

A76: No I did not.

...

Q78: GPS records L 13019 show you turning around at 0727 November 23, 2021 heading to 406 Fairground Rd, Quinte West arriving at 0756 where L 13019 is stopped and idling for 1 hour and 5 minutes. Departing at 0902. Can you please explain the business purpose of this stop?

A78: This is my mother and fathers residence. I Left my medication at there residence and I had to go find my medication. It's imperative that I take my pills daily.

Q79: Did you have permission to be absent from duty on November 23, 2021 between 0727 and 0909?

A79: No I did not.

Q80: GPS records L 13019 shows L 13019 stopping at a Tim Horton's at 0933. Was this a personal stop?

A80: Yes it was.

Q81: Referencing GPS records L 13019 it shows L 13019 arriving at RCAF Rd at 0727 and you arrive at your home residence at 1616. Your SAP records show you have claimed 9 hours regular and .50 hours Overtime For November 23, 2021. Can you explain this time entry?

A81: I didn't account for being late and miss placing my medication that day. Overtime was for Hinchey for wires hanging low and I was asked to hi-rail my section for damage for a possible train incident.

Q82: Was your schedule shift 0600 to 1500 on November 16, 2021?

A82: Yes it was

Q83: GPS records L 13019 show L 13019 leaving your home residence at 0557 on November 16, 2021, arriving at 1431 Melrose Rd, Marysville ON at 0638. Can you explain why you were 38 minutes late to work?

A83: The night of the 15th to the 16th my kids were sick feeling ill. I was taking care of my kids. Also I would like to reference my letter pertaining to Daniel Shannik. As well as Effects and Consequences under HR policy 1300.

Q84: Did you advise a company officer that you were late for your shift?

A84: No I did not.

...

Q89: Referencing SAP entries for November 16, 2021 you have claimed 9 hours regular pay, Can you please explain the discrepancies of the hours claimed and your hours actually at work?

A89: I missed entered my time entry and didn't account for my late start.

Q90: Was your schedule shift 0600 to 1500 on November 09, 2021?

A90: Yes it was.

Q91: GPS records L 13019 show L13019 leaving your home residence at 0616 on November 09, 2021, arriving at the Trenton tool house at 0647. Can you explain why you were 47 minutes late to work?

A91: I would like to reference my letter pertaining to Daniel Shannik. As well as Effects and Consequences under HR policy 1300.

Q92: Did you advise a company officer that you were late for your shift?

A92: No I did not.

...

Q98: Referencing SAP entries for November 08, 2021 you have claimed 9 hours regular pay, Can you please explain the discrepancies of the hours claimed and your hours actually at work?

A98: I missed calculated my time entry and did not adjust for my time leaving early.

...

Q113: Referencing SAP entries for October 25, 2021 you have claimed 9 hours regular pay, Can you please explain the discrepancies of the hours claimed and your hours actually at work?

A 113: I didn't account for me leaving early or me stopping to refill my medication.

...

Q123: GPS records L13019 show L13019 leaving your home residence at 0630 on October 13, 2021, arriving at Trenton tool house at 0657. Can you explain why you were 57 minutes late to work?

A123: I slept in. I would like to reference my letter pertaining to Daniel Shannik. As well as Effects and Consequences under HR policy 1300.

Q124: Did you advise a company officer that you were late for your shift on October 13, 2021?

A124: No I did not.

Q125: SAP records show you have enter 9 hours regular time for October 13, 2021. Can you please explain the discrepancies between the time you were at work and the time you claimed in SAP.

A125: I missed calculated my time entry. I didn't account for my late start.

97. Following QA130, Mr. Bursey filed a long statement explaining his issues with Mr. Shannik³⁶. He apologized for being late, his time entries and offered to repay the time owed to CPKC³⁷:

I realize I didn't keep track or show up on time. I realize all those minutes of arriving late or leaving early add up to a good chunk of time. In the big picture of things. I do apologize for miss [sic] calculating my time entries at not reporting myself late or leaving early. If possible I would like to have the chance to re-pay that time that is owed to the Company.

Parties' Positions

98. CPKC argued the Record clearly showed Mr. Bursey repeatedly arrived late for work and used corporate vehicles for personal use. Moreover, it argued that he knowingly entered incorrect times into SAP which resulted in CPKC paying him for time he did not work³⁸:

78. As confirmed by the Grievor throughout his statement, on numerous days he entered time for which he did not work. The Grievor's lack of candor and repeated explanation that he miss calculated his time entry and didn't account for his late is not credible. A 10-year employee knows that he should only enter and be paid for the time he actually worked.

79. The Company submits there was substantial evidence confirming the Grievor repeatedly and consciously submitted improper hours, allowing himself to be paid for time that he did not work. The Grievor incorrectly entered time on

³⁶ IBEW Documents; Tabs 34 and 35.

³⁷ IBEW Brief; Paragraph 98.

³⁸ CN Brief; Ex-3; Page 20/607.

several occasions despite having properly submitted claims in other instances. This was not a momentary aberration or mind lapse on the Grievor's part.

99. CPKC relied on CROA 4438 and AH722 to support the penalty of dismissal for time theft. In [CROA 4438](#), Arbitrator Flynn wrote:

In the present matter, the grievor admitted that she submitted fourteen unjustified wage claims from January 19 through February 5, 2015. She therefore committed fraud (theft). Theft constitutes a major employment offence and generally results in the discharge of the offending employee. The Union contends that dismissal is not the appropriate measure because the grievor was suffering from a major depression at the time of the events and should be therefore accommodated. The Union also asserts that given the circumstances, her conduct is so aberrant that she cannot be held responsible.

I share, arbitrator Shime's analysis regarding employers rights to discipline an employee that committed a serious offense (theft) even when the employee is entitled to some rights (accommodation) under the Canadian Human Rights Act:...

100. In [AH722](#), Arbitrator Hornung emphasized the importance of trust in an employer-employee relationship:

13. The time period over which the Grievor filed the false claims extended from September to December 2019. Unlike the circumstances discussed in AH 723, his actions were not an aberration related to a single incident or a single repetitive entry code related to the same work. The false claims were submitted by the Grievor, over a period of 3 months, on 13 separate occasions, using 9 separate codes. The entries by the Grievor were not aberrations or unintentional entries which involved a lapse of judgment. Rather, the inescapable inference, given the number of claims made; the various codes which needed to be entered; and the manner in which they were done, over the time in question, is that the Grievor knowingly engaged in a scheme to increase his pay in a manner he knew, or reasonably should have known, was inconsistent with the Honour System and the Collective Agreement. Regrettably, I must conclude that his conduct was intentional and fraudulent.

14. As such, the conduct of the Grievor was a form of theft (CROA 2669) which undermined the relationship of trust essential to the nature of the Grievor's job and warrants the most serious measure of discipline.

101. CPKC asked the arbitrator not to intervene and modify the dismissal it imposed.

102. The IBEW argued that local management had targeted Mr. Bursey³⁹. It raised his apology, an offer to pay the money back⁴⁰ and the context in which the events occurred:

112. As noted in the Union's grievance, the Company's treatment of the Grievor is at odds with how other employees in the Belleville area have been treated. The Grievor's concerns with being singled out and targeted have been properly documented. Notwithstanding his requests to the Superintendent for assistance prior to his termination, nothing was done by the Company to address the situation.

113. Mr. Bursey has never previously disciplined for attendance or record keeping and has acknowledged he was at fault and offered to repay any wages improperly received.

114. The Union respectfully submits that there is no clear and cogent evidence that Mr. Bursey undertook a deliberate campaign to deceive the Company. In these circumstances, the Union respectfully submits that the Grievor is at worst guilty of carelessness or indifference...

...

117. The above cases reflect the exacting standard of proof to which the Company is held by railway Arbitrators in respect of serious allegations of fraud—particularly when the Company has lowered the ultimate penalty against the Grievor.

103. The IBEW also referred to cases where arbitrators intervened when the evidence showed carelessness rather than fraud. In [CROA 3409](#), Arbitrator Picher noted that the employer had had a role in creating some confusion:

In the Arbitrator's view, when the facts of this case are considered in tandem with those reviewed in greater detail in CROA 3401, what emerges is an unfortunate lack of judgement of the part of both the grievor and his superintendent, Mr. Eric Blotzyl. At the outset, it was Mr. Blotzyl's ill considered proposal of a continuing employment contract which placed the grievor's status into what can fairly be characterized as a confused state during the events of May, 2003. It is also significant that the grievor is an employee of relatively long service, being in his twentieth year of employment. There is nothing in his prior disciplinary record to suggest that he has been dishonest or reckless with the truth in his dealings with the Company.

104. As a result, Arbitrator Picher reduced the penalty due to the confusion:

³⁹ IBEW Brief; Paragraph 89.

⁴⁰ IBEW Brief; Paragraph 113.

That is not to say that the grievor is without fault in the case at hand. Clearly he knew, or reasonably should have known, by the terms of the agreement of May 28, 2003 that he was not to be compensated for the period of his suspension. While I am satisfied that there was a genuine degree of confusion in the mind of the grievor as to the actual dates of that period of suspension and that he did not act out of dishonesty, the fact remains that he committed a serious error of judgement or carelessness, the nature of which was bound to cause the Company understandable concern as to his willingness to adhere to the terms of the agreement which he signed, if not to his good faith and honesty.

In the result, the Arbitrator is satisfied that by reason of the grievor's serious error in judgement, this is not an appropriate case for compensation. It is, however, an appropriate case for reinstatement, as I am satisfied that the Company has not established a basis upon which to claim that the bond of trust between the grievor and the Company is irrevocably broken. On the contrary, no fraudulent intent on the part of the grievor is established on the evidence. The Arbitrator therefore directs that the grievor be reinstated into his employment forthwith, without compensation and without loss of seniority, with his disciplinary record to stand again at the level of forty-five demerits⁴¹.

Should the arbitrator intervene to modify the penalty of dismissal?

105. The IBEW advised at that hearing that it would not pursue its preliminary argument contained in the JSI⁴² contesting the fairness of CPKC's investigation.

106. CPKC satisfied the arbitrator that it had grounds to discipline Mr. Bursey. CPKC further persuaded the arbitrator not to intervene to modify Mr. Bursey's dismissal.

107. There are several reasons for this conclusion.

108. First, CPKC satisfied the arbitrator, based on the applicable standard of a balance of probabilities⁴³, that it was more probable than not that Mr. Bursey knowingly submitted time claims which he knew were inaccurate. He had worked for CPKC for a long time and knew the process.

109. Unlike in CROA 3409, *supra*, Mr. Bursey's submission of time claims did not result from some confusion to which CPKC had contributed in some way. Neither was it a

⁴¹ See also [CROA 2854](#).

⁴² IBEW Documents; Tab 29.

⁴³ [CROA 4500](#)

momentary aberration. The evidence instead showed that Mr. Bursey entered incorrect time claims on multiple occasions.

110. Second, while the arbitrators cited above have highlighted the seriousness of fraudulent time claims, they still retained the discretion under s.60 of the *Code* to substitute a different penalty. The arbitrator has considered the IBEW's argument that Mr. Bursey had not had a history of lateness and erroneous time claims in the past.

111. However, the arbitrator cannot ignore Mr. Bursey's unenviable disciplinary record. As noted above, even after the arbitrator's significant reductions for the 2 suspensions reviewed earlier in this award, Mr. Bursey still had a 3-day suspension, a 10-day suspension and a mutually agreed 40-day suspension. While CPKC did not raise the LCA in support of this specific dismissal, Mr. Bursey clearly knew he was on thin ice due to his past behaviour.

112. Notwithstanding his extremely precarious employment situation, Mr. Bursey, on multiple occasions, showed up late for work, used his CPKC vehicle for personal use and entered incorrect time claims into the SAP payroll system. This clearly broke the essential bond of trust that CPKC must have with its employees.

113. Third, while Mr. Bursey suggested that somehow his relationship with Mr. Shannik contributed to his actions, the Record contains no evidence suggesting that he filed any formal grievances or complaints. It is one thing to make allegations that you are not fully responsible for your actions, especially following a termination.

114. But it is another to prove those facts. Had complaints been made under applicable policies, or grievances filed, they might have provided mitigating facts an arbitrator could weigh. The Record does not contain those facts.

115. For the above reasons, the arbitrator dismisses Mr. Bursey's grievance contesting his dismissal for, *inter alia*, time theft.

DISMISSAL FOR EVENTS OF DECEMBER 7, 2021 AND LCA

116. This second dismissal has seemingly become moot given the arbitrator's conclusion that CPKC had cause to dismiss Mr. Bursey for, *inter alia*, time theft.

117. CPKC invoked its rights under the LCA to terminate Mr. Bursey based on his December 7, 2021 interaction with Mr. Shannik. The Form 104⁴⁴ states:

Please be advised that you are hereby Dismissed, effective February 1, 2022 for the following reasons:

A formal investigation was issued to you to develop all the facts and circumstances surrounding the allegations in connection with "your tour of duty on December 7, 2021 and any and all events surrounding the conversation that occurred between yourself and S&C Manager Daniel Shannik."

Following the formal investigation conducted on January 5, 2022, it has been concluded that you were found in violation of the following rules/policies:

- Policy 1300 - Discrimination and Harassment policy
- SPC 41 1.2- Employee Responsibilities
- Offer of Last Chance Agreement - Continued Employment Agreement signed April 16, 2021.

Notwithstanding the aforementioned, the Company also considers this to be a culminating incident, warranting your dismissal.

118. Mr. Shannik⁴⁵ alleged that Mr. Bursey acted aggressively and used inappropriate language with him during a phone call on December 7, 2021:

On the Morning of December 7, 2021. I called Mitch Bursey at 0637 regarding a task that was assigned to him and multiple emails that were circulating regarding a directive that was given. I instructed Mitch Bursey and Scott Martin to assist with a leaning pole repair and spread gravel around the Belleville CTC bungalow. It's to be noted an email regarding the gravel was sent on Friday December 3rd to Mitch and the mobile maintainer Natasha to complete this task Monday December 6, 2021. Due to Natasha not able to come into work on Monday December 6 2021 a text message was sent to Mitch asking if he would like to postpone the task he responded "yes". The alternate maintainer (Scott Martin) was on vacation December 6, 2021. Natasha was assigned to work with the contractor straightening the pole on December 7, 2021 but she was absent on that date also. Mitch and Scott were assigned the task to work with the contractors straightening the pole and working with the stone slinger via email at 0542 December 7, 2021- Mitch responded to this email with -

- On Dec 7, 2021, at 06:25, "I've got 10 easy [SIC] to catch up on. I'm unable to baby sit."

⁴⁴ IBEW Documents; Page 212/250.

⁴⁵ IBEW Documents; Tab 33; Page 159/250.

I immediately checked Mitch's RailDOCS to do list and noticed he only had two 30 day crossing inspections due towards the end of the week. I responded to his email at 0636-

- December 7, 2021 6:36 AM Thanks guys, I understand you have Rail/Docs to complete. I have directed you both to assist with a task at the Belleville west location. Please head there now.

I was concerned by the earlier email that Mitch and Scott would not be heading to the location as directed. Contractors were arrange to be on site first thing in the morning. As it was almost 40 minutes into Mitch's shift I checked the GPS of CP unit #L13019 as this is the assigned vehicle for position Trenton East which Mitchell Bursey holds permanent, to ensure Mitch was in route to the Belleville west location. That is when I discovered Mitch was still on his way from his home location to work. I called Mitch at 0637. I asked if he was running late He stated "ya", I asked why and he responded aggressively "I do not know maybe because I've got two fucking kids at home". After a brief conversation the phone call was ended. I went back a couple days on CP unit# L13019's record to see if Mitch has been late in the recent past. His regular start time is 0600 and Shift end time is 1500. The expectation is that all employees reporting to myself are to start at their headquartered location. If an alternate location is needed a text message or phone call the day before must be sent advising of the change of start location. This email was sent to Mitch on October 25, 2021.

The following information was discovered for CP unit number L13019 during the 2 previous shifts December 6, 2021 and December 3, 2021. (sic)

119. Mr. Bursey⁴⁶ denied saying "two fucking kids at home" and indicated he had used the word "freaking":

Q14 Referencing appendix Daniel Shannik's Memo he states you made the following comment, "I do not know maybe because I've got two fucking kids at home· is that correct?

A14 No

Q15 In your own words, "What was said in the conversation with Mr. Shannik?

A15 "Yeah, I was up all night with the freak'n kids"

Q16 Were you agitated when Mr. Shannik inquired if you were running late on December 7, 2021?

A16 I was frustrated at myself for being late, not at Mr. Shannik. I was not agitated towards Mr. Shannik prior to any phone call.

⁴⁶ IBEW Documents; Bursey Statement; Tab 32.

120. CPKC argued that, given Mr. Bursey's past behaviour towards others, the arbitrator should prefer Mr. Shannik's view of what transpired. The arbitrator agrees.

121. As noted above, credibility findings are sometimes challenging in the parties' negotiated arbitration process. Nonetheless, arbitrators regularly decide which evidence is more credible based on the written Record⁴⁷. In the instant case, the arbitrator concludes Mr. Bursey did speak to Mr. Shannik as alleged. Mr. Bursey's alleged language appears consistent with how, when agitated, he has spoken to both managers and fellow employees in the past.

122. In addition, had Mr. Bursey calmly used the word "freak'n", it seems unlikely Mr. Shannik would have pursued the matter. It appears instead that Mr. Bursey's aggressive tone and language persuaded Mr. Shannik to review the vehicle's GPS records.

123. The issue then becomes whether Mr. Bursey's attitude when speaking to his manager on December 7, 2021 and his use of "because I've got two fucking kids at home" allows CPKC to invoke its rights under the LCA. Article 3 of the LCA described the prohibited behaviour:

3. Mr. Bursey's employment with the Company remains in jeopardy if he commits a future similar offense, including but not limited offenses pertaining to behavior such as conduct unbecoming, insolent and/or defiant behavior, insubordination, harassment and discrimination, and violence in the workplace for which discipline is proven warranted. Any alleged violation or failure to comply with any terms of this Agreement will result in a formal investigation.

124. Arbitrators show considerable deference to LCAs that experienced parties have negotiated. LCAs often seek to limit an arbitrator's jurisdiction to intervene. They are close, though clearly not the same, to a situation where the parties have negotiated specific penalties into a collective agreement. Collective agreement provisions like this would remove an arbitrator's remedial authority under s.60(2) of the *Code*:

60(2) Where an arbitrator or arbitration board determines that an employee has been discharged or disciplined by an employer for cause **and the collective agreement does not contain a specific penalty for the infraction that is the subject of the arbitration**, the arbitrator or arbitration board has power to

⁴⁷ See, for example, [CROA 4533](#) and [CROA 4756](#).

substitute for the discharge or discipline such other penalty as to the arbitrator or arbitration board seems just and reasonable in the circumstances.

(Emphasis added)

125. The arbitrator agrees with Arbitrator Picher's views in [CROA 2632](#)⁴⁸ about the importance of respecting the parties' freely negotiated LCAs:

The Arbitrator can see no basis to interfere with that decision. To do so would be tantamount to disregarding or amending the conditions agreed to between the parties, as reflected in the settlement relating to Mr. Haydock's reinstatement. As a matter of general policy, such settlements should be encouraged. **As reflected in Canadian arbitral jurisprudence, arbitrators do not interfere with the terms of such settlements, as to do so would tend to discourage parties from resorting to them and, ultimately, undermine their utility as an important instrument for resolving disputes. For reasons which the parties best appreciate, they fashioned the terms and conditions which had to be met by Mr. Haydock as part of his reinstatement, and he failed to meet those terms. The Company was therefore entitled to deny him reinstatement, as agreed.**

(Emphasis added)

126. The arbitrator is satisfied that Mr. Bursey's initial refusal to follow Mr. Shannik's work direction fell within the LCA's terms "insolent and/or defiant behavior, insubordination"⁴⁹. This obliged Mr. Shannick to repeat his direction. Mr. Bursey then compounded the situation by acting aggressively and by using profanity when Mr. Shannick contacted him to ask him why he was late.

127. The arbitrator accepts that there can be a difference calling someone a "fucking idiot", which was Mr. Bursey's expression which led to his initial 20-day suspension which the arbitrator reduced to 3 days, and using an occasional "F bomb" at the workplace.

128. But Mr. Bursey's outburst was of a hybrid nature. He was speaking to his manager whose work direction he had initially refused. That refusal obliged Mr. Shannick to repeat his direction. When Mr. Shannick then realized that Mr. Bursey was running late, he had to call him.

⁴⁸ See also Arbitrator Picher's further comments in [SHP648](#).

⁴⁹ [CROA 3982](#)

129. Is the consequence for a minor LCA violation harsh? Yes. In normal circumstances, the exchange might have only warranted a written warning for an employee with no disciplinary record.

130. But the parties' LCA changed the landscape completely. The LCA had as its foundation Mr. Bursey's disciplinary record containing, after the arbitrator's interventions in this award, a 3-day suspension; a 10-day suspension and a 40-day suspension. Those three suspensions all involved Mr. Bursey's inappropriate treatment of others.

131. The parties to the LCA further agreed the arbitrator should not intervene if a breach occurred:

5. If, following a fair and impartial investigation, the Company determines that Mr. Bursey violated or failed to comply with any of the terms and conditions of this Agreement:

...

c. Any grievance regarding the discipline assessed shall only be for the purpose of determining whether Mr. Bursey violated or failed to comply with the terms and conditions of this Agreement; and

d. The arbitrator in respect of any such grievance shall not have jurisdiction to substitute a lesser penalty for any discipline imposed if he or she finds that Mr. Bursey violated or failed to comply with any of the terms and conditions of this Agreement.

132. Accordingly, had this dismissal not been moot, the arbitrator would have also upheld CPKC's reliance on the LCA, even for a relatively minor disciplinary event. That event constituted a fourth incident involving Mr. Bursey's ongoing pattern of inappropriate interactions⁵⁰ with CPKC managers and/or employees. It was the exact behaviour at which the LCA had been directed.

133. The arbitrator dismisses this second grievance contesting Mr. Bursey's LCA dismissal.

DISPOSITION

134. As the Record demonstrates, CPKC and the IBEW spent a considerable amount of time preparing for this arbitration which examined Mr. Bursey's 3 grievances, involving

⁵⁰ See [CROA 4439](#) (Flynn), *supra*.

4 separate disciplinary measures. Both parties have had some success but on different issues.

135. For the foregoing reasons, the arbitrator concludes and/or orders:

1. CPKC will reduce Mr. Bursey's 20-day suspension to 3 working days and compensate him accordingly;
2. CPKC will reduce Mr. Bursey's 30-day suspension to 10 working days and compensate him accordingly; and
3. The IBEW's grievances contesting Mr. Bursey's two dismissals are dismissed.

136. The arbitrator remains seized for any remedial issues arising from this award.

SIGNED at Ottawa this 14th day of August 2023.



Graham J. Clarke
Arbitrator