

**CANADIAN RAILWAY OFFICE OF ARBITRATION  
& DISPUTE RESOLUTION**

**CASE NO. 4790**

Heard in Gatineau and via Zoom Video Conferencing, July 15, 2021

Concerning

**CANADIAN PACIFIC RAILWAY**

And

**TEAMSTERS CANADA RAIL CONFERENCE**

**DISPUTE:**

Appeal of the dismissal of Conductor P. Kambo of Coquitlam, B.C.

**JOINT STATEMENT OF ISSUE:**

On November 6, 2018, the Grievor received a Form 104 that dismissed him from Company Service "For arriving for work for 200-21 on October 21, 2018 at Mile 111.9 Cascade Subdivision under the influence of alcohol. A violation of the Rule Book for Train and Engine Employees, Section 2, 2.1 (i), 2.2 (a), (viii), 2.2 (d) Items (i)(ii)(iii) and OHS Policy 4100 (Alcohol and Drug Policy) Dated January 1, 2012."

**Union Position:**

The Union submits the Company has failed to recognize Mr. Kambo's medical condition as requiring accommodation, which has resulted in a discriminatory treatment. The Union contends the Company's actions are contrary to the terms of the Collective Agreement, Company Policy, and the Canadian Human Rights Act.

The Union contends that Mr. Kambo's dismissal is unjustified, unwarranted and excessive in all of the circumstances, including significant mitigating factors evident in this matter.

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

**Company Position:**

The Grievor failed to disclose any use of drugs or alcohol that may affect his ability to work safely prior to commencing work. The onus is on the employee to disclose the use of alcohol and /or drugs prior to the commencement of duty. It is also the employee's responsibility to request assistance prior to commencing duty or prior to an incident occurring.

The Company disagrees with all of the Union's contentions. The Company also denies that the Grievor has been treated in a discriminatory fashion.

The Company maintains the discipline assessed was just, appropriate and warranted in all the circumstances. The Company cannot see a reason to disturb the discipline assessed and

denies the Union's request. The Company requests the Arbitrator be drawn to the same conclusion and dismiss the Grievance in its entirety.

**FOR THE UNION:**

**(SGD.) D. Fulton**

General Chairman

**FOR THE COMPANY:**

**(SGD.) L. McGinley**

Assistant Director, Labour Relations

There appeared on behalf of the Company:

- |             |  |
|-------------|--|
| I. Suarez   | – Labour Relations Officer, Calgary            |
| L. McGinley | – Assistant Director Labour Relations, Calgary |
| E. Allen    | – Labour Relations Officer, Calgary            |

And on behalf of the Union:

- |            |   |
|------------|---|
| M. Church  | – Counsel, Caley Wray, Toronto          |
| D. Fulton  | – General Chairman, Calgary             |
| D. Edward  | – Vice General Chairman, Medicine Hat   |
| J. Hnatiuk | – Vice General Chairman, Port Coquitlam |
| R. Finnson | – Vice General Chairman, Wynyard        |
| P. Kambo   | – Grievor, Port Coquitlam               |

**AWARD OF THE ARBITRATOR**

1. The Grievor was employed as a Conductor, a safety-critical position. On October 21, 2018, at approximately 0400, he accepted a call to report for duty at 0600. He did not show up at the scheduled time. After unsuccessful attempts by other Company Officers, Assistant Superintendent McGraw was able to reach the Grievor by phone at approximately 0640 – the Grievor was awoken by his call. The Grievor claims he arrived at work at approximately 0715, that he dressed for work at his locker, reported for duty and was asked to wait for the Trainmaster. At approximately 0810, the Grievor met with Trainmaster Verch who observed him stumbling awkwardly and putting a lot of weight on a handrail to support himself while going up stairs, as well as a strong smell of alcohol on his breath and red and bloodshot eyes. Trainmaster Verch suspected the Grievor was impaired and sought a second opinion from Trainmaster Rohan who observed the Grievor and also suspected impairment. When questioned over the phone by Assistant

Superintendent McGraw, the Grievor denied having consumed drugs or alcohol. The Grievor was taken to a drug and alcohol testing facility (the "Collector"). After administering the test, the Collector's technician indicated the result was "positive" for alcohol and that the Grievor was not fit to drive a vehicle. A Company Officer drove the Grievor home.

2. The Grievor provided an investigation statement on October 28, 2018. He explained that he had consumed alcohol from approximately 1300 to 2030 the day prior to the incident and went to bed at 2200. He stated that he had looked at the employee lineup several times throughout the day and estimated he would be required to report for duty at 0900. He believed he would be fit for duty by then. He added that had he known he was being called for duty at 0400, he would have "booked unfit".

3. The Grievor explained that, since the beginning of the year, he had lost two close relatives, had separated from his fiancée and had recently suffered an injury that had precluded him from working, all of which had taken an emotional toll on him, suggesting this was the reason for his excessive alcohol consumption on the eve of the incident.

4. The Grievor was dismissed for showing up for work under the influence of alcohol on October 21, 2018, in violation of the Company's drug and alcohol policy and the *Rule Book for Train and Engine Employees* (the "Rule Book").

5. The documentary evidence shows that, at the time of the incident, there was some inconsistency in terms of the applicable drug and alcohol policy, as the incident occurred when the Company had just transitioned to a new version of its policy.

6. On its face, the *Alcohol and Drug Policy #HR 203* (the “2018 D&A Policy”) was in effect at the time of the incident, as it shows an effective date of October 17, 2018. In fact, the *Alcohol and Drug Testing Acknowledgement Form* signed by the Grievor, authorizing DriverCheck and the Collector to obtain a breath specimen refers to the *2018 D&A Policy*.

7. However, documents presented to the Grievor during the investigation, the Form 104 confirming his dismissal (the “Form 104”) and his discipline record, refer to the Company’s previous drug and alcohol policy, dated January 1, 2012, and titled *Policy OHS 4100* (the “2012 D&A Policy”). At the hearing, the parties presented their respective case based on that version of the policy. Accordingly, my analysis will rely on the *2012 D&A Policy*. This is relevant to the outcome of this matter, as the 2012 and 2018 drug and alcohol policies set out different cut-off levels as indicative of a “positive” test for alcohol.

8. During the grievance process, the Union sought and obtained from the Company, disclosure of the DriverCheck detailed report showing the quantitative results of the Grievor’s alcohol test. Until then, the Union and the Grievor had only received a summary report, showing a “positive” result. At the hearing, the Company objected to the Union

filing the detailed report. I reject the Company's objection, as the quantitative results are relevant to determining the appropriate level of discipline, if any.

9. In argument, the Union relied strongly on the Company's failure to abide by certain timelines set out in the collective agreement regarding the grievance process, specifically pertaining to finalizing the Joint Statement of Issues ("JSI"). However, as acknowledged by the Union, it filed no formal objection on the issue. In the circumstances, I am not inclined to give any weight to the Company's alleged delay in finalizing the JSI.

10. On the merits, the issues to be determined are whether the Grievor violated the Company's *2012 D&A Policy* and, if so, whether discipline was warranted and dismissal appropriate. In the event of a policy violation, it may be relevant to determine whether the Grievor suffered from an alcohol addiction at the time of the incident, triggering the Company's duty to accommodate.

### **Did the Grievor violate the 2012 D&A Policy?**

11. The *2012 D&A Policy* refers to *OHS 5100 Alcohol & Drug Procedures* (the "*2012 D&A Procedure*"), which provides implementation details. The relevant provisions of the *2012 D&A Policy* and *Procedure* read as follows:

#### ***Policy OHS 4100***

##### **2. Policy Statement**

- All employees must report for work in a condition that enables them to safely and effectively perform their duties.
- All employees must report fit to work and remain fit for work as scheduled and be able to perform their duties free from the negative effects, including the after effects of alcohol, illicit or illegal drugs, other

mood altering substances or medications, any of which can have the potential to adversely affect the way a person thinks feels or acts.

- It is prohibited to be in control of a CP vehicle or moving equipment, (either on or off duty), while under the influence of alcohol and drugs, including the after-effects of such use.
- Employees must comply with these requirements when on call.

### **3. Authority**

This Policy is adhered to, achieved and implemented through the accompanying procedure, OHS 5100 Alcohol & Drug Procedures (Canada Only). These procedures include:

[...]

- Consequences of a violation

[...]

#### ***Procedure # OHS 5100***

### **3. Alcohol & Drug Testing Procedures for Safety Critical & Safety Sensitive Positions**

#### **3.1 Standards to be Met**

[...]

In addition to the above, employees holding Safety Critical or Safety Sensitive positions are prohibited from having:

[...]

- an alcohol test result of 0.04 BAC or higher as determined through the testing program.

[...]

In addition, employees holding Safety Critical or Safety Sensitive positions are subject to the following requirements:

- Anyone who has an alcohol test result of .02 to .039 BAC may be subject to progressive discipline.

[...]

12. It is uncontested that the Grievor reported for duty unable to work safely. Specifically, he was under the effects or after-effects of alcohol upon reporting for work. Physical signs of impairment (described above) were observed by two Company Officers, which triggered the drug and alcohol testing. The Grievor's alcohol test shows a

quantitative result of 0.023, which is within the range set out in the *2012 D&A Procedure* as warranting discipline (0.02 to 0.039 BAC).

13. In the circumstances, I find that the Grievor violated the provisions of the *2012 D&A Policy and Procedure* set out above.

14. As stated by the Company in the Form 104, the Grievor also violated provisions of the *Rule Book*. These provisions are similar to those of the *2012 D&A Policy* cited above. Therefore, it is not useful to reproduce them here.

#### **Was discipline warranted?**

15. The Grievor held a safety-critical position. On the eve of the incident, he was dealing with personal struggles causing him stress but was aware that he was drinking to the point of impairment. That is why he monitored the employee lineup throughout the day to assess when he would be called for duty. Based on his assessment, he believed he would be called for 0900 the next day, at which time he would, in his view, be fit for duty. On the day of the incident, he showed up for work late and visibly impaired by the effects of alcohol, after being woken by a Company Officer.

16. The Grievor acknowledged during his investigation statement that he was aware of the Company's alcohol policy. While there was some inconsistency on which version applied at the time, both the 2012 and the 2018 policies clearly set out employees' responsibility to be fit to work safely, when on call or on duty.

17. The Grievor chose to consume alcohol based on his estimated start time, as opposed to the time when he would become on call. That is a serious mistake on his part, and he must bear the consequences of relying on his incorrect prediction.

18. By his behaviour, the Grievor demonstrated a serious lack of commitment towards safety. That is unacceptable given the position he held, considering the risk for himself, other workers and the public. The Grievor had only 19 months of service at the time of dismissal. In the circumstances, and in the absence of strong mitigating factors, severe discipline is warranted, subject to the existence of a disability.

**Was the Grievor disabled by an alcohol addiction?**

19. The Union acknowledges that the onus of establishing a *prima facie* case of discrimination lies with it.

20. During his statement on October 28, 2018, the Grievor made no reference to an alcohol addiction. In its Step 1 grievance letter dated January 1, 2019, the Union argued that the Grievor deserved another chance to demonstrate that he could be a safe and productive employee, adding that he was attending regular counselling sessions through EFAP and had taken measures to ensure that he never reported for duty unfit again. The Union did not mention a disability. Rather, this was raised in the Step 2 grievance letter dated May 1, 2019, referring to an alcohol addiction and indicating that the Grievor was



regularly attending Alcoholics Anonymous (“AA”) meetings and was seeking admittance to a treatment program.

21. On May 13, 2019, the Company responded to the allegation of disability in a letter titled “Post Dismissal Actions”. The Company indicated that to consider mitigation of the Grievor’s dismissal, it required proof and details regarding treatment. It also indicated that any reinstatement would be subject to certain conditions, such as a last chance agreement. On June 3, 2019, the Company followed up with the Union. The same day, the Union replied that the Grievor was going through counselling, attending AA meetings, had a sponsor and was reviewing treatment programs. The Company declined the Step 2 grievance on June 30, 2019.

22. On September 5, 2019, the Union submitted to the Company a Certificate of Completion for a six-week “Daytox Program” (from July 11 to August 20, 2019) and letters dated August 2019 from a substance use services organization, confirming the Grievor’s participation in group therapy sessions. On September 10, 2019, the Company asked for confirmation of AA attendance, which the Union provided on September 27, 2019.

23. The Union followed up with the Company, seeking a decision on reinstatement on several occasions, including on January 6, February 14, May 19 and August 17, 2020. Although I appreciate that the Company’s delay in responding to the Union was regrettable, there is no evidence of bad faith as argued by the Union, nor is there evidence of the delay having caused meaningful harm to the Grievor.

24. The Union views the Company's correspondence, asking the Grievor to present evidence of his addiction and whether he would be willing to consider a last chance agreement if reinstated, as a recognition by the Company that he suffered from an alcohol addiction. I do not accept that argument. The Company's willingness to consider the Union's assertion that the Grievor suffered from a disability should not be held against it.

25. At the hearing, the Union submitted a list of the AA meetings the Grievor attended, from March 15, 2019 to February 21, 2021, for a total of approximately 80 meetings. The Union also filed a medical note dated October 27, 2020 from the Grievor's family physician, stating the following:

I have been Mr. Kambo's family physician since July 2020. I have reviewed all the reports including the drive check medical assessment, emails and statements from management regarding the incident, AA meeting reports, and Counselor reports. It is my professional opinion that Mr. Kambo likely did have an [addiction] to alcohol at the time of his breathalyzer test on Oct 21, 2018. A person who has an alcohol [addiction] has difficulty with control over choosing to use alcohol at a given time, even if was inappropriate or unsafe to do so. Alcohol [addiction] does impact an individuals [sic] ability to be honest and truthful about the details of their alcohol use when asked to do so.

Since going through counselling and the AA programs, Mr. Kambo has remained sober and has gained control over his previous [addiction]. He does not exhibit risk of relapse or reoccurrence and is willing to be tested at any time.

26. On March 30, 2021, the Grievor's family physician issued another note, indicating that the Grievor had been attending AA meetings weekly for the past two years and remained sober.

27. While I do not question the family physician's credibility, I give little weight to his opinion about the "likely" existence of a disability at the time of the incident. He is not a substance abuse expert, nor is his opinion grounded on any medical or scientific evidence. Furthermore, his opinion was formulated in October 2020, some twenty-one months after the incident, as he had just recently become the Grievor's physician.

28. Also, the Grievor and the Union did not raise the existence of a disability until May 2019, some six months after the incident. The earliest evidence suggesting a disability is the AA meeting report showing the Grievor's attendance, starting in March 2019, some four months after the incident.

29. Having regard to the evidence in the circumstances, the Union has not met its burden of proving, on a balance of probabilities, that the Grievor suffered from an alcohol addiction at the time of the incident on October 21, 2018. Therefore, the Grievor's dismissal was not discriminatory.

30. The evidence shows that the Grievor did suffer from an alcohol addiction, *post facto*.

### **Was dismissal excessive?**

31. A review of the Grievor's discipline record is warranted to determine the appropriate level of discipline. At the time of the incident, his record showed a safety violation unrelated to drug or alcohol consumption, which had resulted in the assessment

of a 10-day suspension. That suspension is the subject of a pending grievance. In light of the order in which the parties have progressed the grievances to arbitration, the outcome of the suspension grievance remains unknown. Therefore, I will assume the Grievor's discipline record is clean.

32. As noted above, the *2012 D&A Policy* provides, through its related *Procedure*, that employees holding a safety-critical position are prohibited from having an alcohol test result of 0.04 BAC or higher, and that a test result of 0.02 to 0.039 BAC may lead to progressive discipline.

33. Considering that the Grievor tested under the 0.04 BAC cut-off level prohibited under the *2012 D&A Policy* and *Procedure* and that he was at the lower end of the range of test results identified as triggering progressive discipline, I find dismissal to be an excessive measure.

### **Remedy**

34. In view of the circumstances of this case, notably the application of the more lenient *2012 D&A Policy* and *Procedure*, I order that the Grievor be reinstated in his employment, effective the date of this award, despite the serious nature of the incident. All time lost is to serve as a disciplinary suspension. Considering that the Grievor suffered from an alcohol addiction after his dismissal, the Company may take all reasonable measures to ensure the Grievor's safe return to work, including but not limited to requiring medical clearance, training and terms and conditions of a last chance agreement. I make this

order in view of the evidence that the Grievor made significant and successful efforts to overcome his addiction and had been sober for more than two years at the time of the hearing.

35. I remain seized with respect to the implementation of this decision.

November 26, 2021



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**JOHANNE CAVÉ**  
**ARBITRATOR**