CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4823

Heard in Calgary, Alberta, May 17, 2023

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The Company's release of Ms. Mindi Lee Hackett on January 20th, 2022.

JOINT STATEMENT OF ISSUE:

Conductor Trainee Mindi Hackett commenced her employment with New Brunswick Eastern Territory Railroad (NBET) on August 16, 2021 which was ended by way of a letter on January 20, 2022 handed to her by a Company Officer.

Union's Position:

It is the Union's position, however not limited hereto, that the Company violated Article(s) 2, 24, 27.2(c)(3) of the Memorandum of Agreement between CN and TCRC governing the New Brunswick Eastern Territory, when the Company discharged Conductor M. Hackett.

The Union submits that the NBET agreement does not contain any provision laying out the requirements of training, length of training or when probationary employees become seniority employees. Given the fact that the NBET Agreement is absent language governing such issues then the parties must default to the provisions of the *Canada Labour Code*, which identifies the probationary period as a three-month timeframe beginning with the time the grievor was hired.

The Union further submits, given the above, that Conductor Hackett exceeded this probationary period.

The Union alleges that Conductor Hackett was treated in an arbitrary, discriminatory, and bad faith manner as the Grievor was entitled to a fair and impartial investigation consistent with Article 24 but was denied that right.

The letter provided to Conductor Hackett on January 20th, 2022 was riddled with inaccuracies, including but not limited to the Collective Agreement which applied to her.

The Union seeks to have Conductor Hackett reinstated, compensated for all lost wages, benefits and pension, without mitigation, from the time of her discharge, without loss of seniority, or in the alternative, a remedy that the Arbitrator deems appropriate.

Company's Position:

The Company disagrees with the Union's position. The decision to release Ms. Hackett was due to her unsuitability for the position of conductor, and in no way arbitrary or discriminatory. The Company denies the Union's allegations in this regard. The Company further denies the allegation that the Collective Agreement was violated or that the articles relied on by the Union are relevant or that a Remedy under Addendum 123 is applicable. Moreover, there was no request for a Remedy in the Union's Step 3 grievance.

It is the Company's position that notwithstanding the error of collective agreement made in the release letter of January 20, 2022, the collective agreement is not silent on training, length of training or probationary period. Article 2.1 and 2.2 of the NBET-QET collective agreement applies and Ms. Hackett has been found unsuitable for the conductor job during the training program. It is also the Company's position that no investigation was required as per article 24 of the collective agreement as conductor trainee Hackett was not disciplined but released for failing to meet the requirements of the position.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) J. Lennie	**(SGD.) J. F. Migneault**
General Chairperson	Manager, Labour Relations

There appeared on behalf of the Company:

J. F. Migneault	– Manager Labour Relations, Montreal
M. Boyer	– Senior Manager, Labour Relations, Montreal

And on behalf of the Union:

M. Church	– Counsel, Caley Wray, Toronto
J. Lennie	– General Chairperson, Smiths' Falls
M. Hackett	– Grievor, Moncton
P. Boucher	–President, TCRC (Observor)
R. Finnson	–Vice-President, TCRC (Observor)

AWARD OF THE ARBITRATOR

1. This Grievance concerns the dismissal of the Grievor - a Conductor trainee - during her training period.

2. The relevant Collective Agreement will be referred to as the "NBET [New Brunswick Eastern Territory] Agreement".

3. The facts are relatively straightforward. In August of 2021, the Grievor was hired to be a Conductor. She did not have the skills to perform that job on hire and was placed into the Company's training program. When she was dismissed on January 20, 2022, the Grievor was training in the field (Block "D"; weeks 12-24). She was supervised by an employee who the Company had designated as her "Trainer". She was evaluated by four different individuals who were noted to be her "Trainer" in the performance logs, with the most evaluations coming from the designated Trainer.

4. In these performance logs, the Grievor was noted to be an eager learner, with a good work ethic and a good attitude. There is no suggestion she did not try her best to complete her training.

5. The Grievor was given the opportunity to formally assess this designated Trainer by completing a "Trainer Evaluation" Form. She evaluated thirteen trips taken between November 9, 2021 and January 14, 2022. The evaluation covered eight metrics, including "being encouraging" and "explaining the work clearly". The Grievor either "agreed" or "strongly agreed" with all statements. The last evaluation she completed of her Trainer took place just eight days before her dismissal.

6. During her training, the Grievor also had contact with Graeme Bailey, her "on the job Training" contact (OJT), who both observed her work and provided her with reviews of her performance.

7. In December of 2021, the Grievor was seen crying on the lead, shortly after she had received negative feedback from her Trainer. Both she and her Trainer separately contacted Mr. Bailey to discuss this incident. Several days later, Mr. Bailey reported the incident to Scott Johnson, an Assistant Superintendent at CN, in an email dated December 26, 2021. In that email, Mr. Bailey stated, in part:

> She [the Grievor] also stated that she was overwhelmed because of her recently leaving her job of 15 years, this job is long hours, there is a lot to learn and she didn't feel like she was catching on fast enough….after speaking with Nicole she helped me realize that if that was a man that cried on the lead I would have told you about it so you knew about the moment of instability in a job that requires full attention. I want to apologise for not addressing this immediately.

8. Shortly after this incident occurred, the Grievor went on medical leave (off December 22, 2021 to January 15, 2022). She returned on January 16, 2022.

9. On January 22, 2022, after completing 33 of her 45 training trips, the Company determined the Grievor was not suitable for the role of Conductor, removed her from the training program, and dismissed her. This Grievance was filed against that decision.

Preliminary Objection

10. Two days after her dismissal, the Grievor wrote a lengthy letter outlining her position that her dismissal was arbitrary and discriminatory and that there were "different rules for women" depending on where you trained. This was followed by an eight-page document provided to the

Union the next day (January 25, 2022) The Grievor's complaints of discrimination and harassment first raised after she was dismissed were investigated by the Company and on July 11, 2022 was found not to be substantiated. The Grievor filed a human rights complaint with the Canadian Human Rights Tribunal, relating to these alleged human rights violations, which has not yet been adjudicated. That Complaint itself was not in evidence.

11. At the hearing, the Union sought to file these letters as evidence and rely on this information, as well as letters from current and former Company employees. The Union urged the Grievor's letters were an important opportunity for the Grievor to provide "her side of the story", as no Investigation was undertaken. The Company objected. It noted this is evidence that was created after the Grievor's dismissal; the allegations were not part of the Union's grievance; the allegations were not raised or processed in the grievance procedure; were added to the Union's case after the last step of the Grievance procedure was concluded and these allegations were not included in the JSI. In response, the Union indicated it did not intend to focus in its oral submissions on this information.

12. Allegations relating to harassment and abuse were contained in the Union's written submissions, and the Union pointed to the alleged abuse as the explanation for the Grievor crying on the job.

Decision on Preliminary Objection

13. It is well-established that arbitrators have jurisdiction to address allegations of human rights violations, in those case where the essential character of the dispute arises inferentially or expressly from the interpretation, application, administration or violation of the collective agreement.[1] The Supreme Court has recently clarified that the jurisdiction of a labour arbitrator over these matters is *exclusive*, unless the applicable human rights legislation expressly carves out concurrent jurisdiction to that tribunal.[2] At issue in this arbitration is the Company's evaluation of the suitability of the Grievor. She has responded after her dismissal that in her training, she was abused and harassed and discriminated against on the basis of gender (among other reasons).

14. I have no hesitation in determining that the essential character of this dispute - including the Grievor's allegations of discrimination and harassment - arise from the employment relationship, which is governed by the NBET Agreement. As the arbitrator appointed to hear this dispute, I have jurisdiction to address the issue of any alleged human rights violation during the Grievor's training – and the evidence relating to that issue - when that issue is properly brought before me as part of this dispute.

15. The Company objected that it was not.

16. The scope of an arbitrator's jurisdiction arises from the Grievance document which frames the dispute. In the CROA process, the parties have agreed that the issues that are to be

[1] *Weber v. Ontario Hydro* [1995] 2. S.C.R. 929.
[2] *Northern Regional Health Authority v. Horrock*s 2021 SCC 42 at para. 5 (CanLII).

considered by an arbitrator must be included in the JSI[3]. The purpose of both the grievance document, (and the grievance procedure) - as well as the JSI - is to outline and narrow the issues between the parties and ultimately brought before the arbitrator for resolution. In resolving this objection, I have had regard to both documents.

17. The Grievor's letters regarding her alleged abuse and discrimination during training were written and provided to her Union immediately after her dismissal in late January, 2022. The Grievance was filed more than two months later, on March 2, 2022. There was no reference in the Grievance to the Grievor being subject to harassment or abuse as alleged in her letters, or at all. The JSI likewise does not raise an issue that there had been a violation of the Grievor's human rights. As the parties have agreed that a claim not included in the JSI cannot be put in issue for the first time during the hearing[4], I am drawn to the conclusion that the issue of whether the Grievor was discriminated against on the basis of gender or harassed during her training has not been properly placed into issue before me for resolution. As such, any evidence contained in letters relating to that allegation is not evidence that is relevant to my determination in this case.

18. I make no assessment whether the legislation has carved out the necessary concurrent jurisdiction for this issue to be determined by the Canadian Human Rights Tribunal, as that will be a question for that tribunal.

A. <u>Relevant Collective Agreement Provisions</u>

19. The following collective agreement provisions are relevant:

> Article 1.2: Employees must have the appropriate qualifications in order to maintain their employment with the Company in accordance with the railway Employee Qualifications Standards Regulations.
>
> Article 2.1: Employees will be required to successfully complete Company training programs.
>
> Article 2.2: If, during the training program, it is determined that a candidate is not suitable for employment, the training will be discontinued and representatives of the Company and the Union will review each case on an individual basis for final disposition.
>
> Article 24: INVESTIGATION – DISCIPLINE
> 24.1 … At the outset of the investigation the employee will be provided with all evidence the Company will be relying upon, which may result in the issuing of discipline…
> 24.2 An employee will not be disciplined or dismissed without having had a fair and impartial hearing and his or her responsibility established…

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[3]Article 14; Memorandum of Settlement dated January 10, 2023, under which the Office of the CROA&DR currently operates.
[4] Item 14, *ibid.*

> 24.6 … When the Local Chairman of the union requests a copy of the discipline history of an employee who has a pending investigation, the discipline history shall be provided.
> 24.7 An employee will not be held off unnecessarily in connection with an investigation, lay-over time to be used as far as practicable.
> …
> Article 14: DISCIPLINE
> 14.1 An employee may be held out of service for a maximum of three days for investigation…

B. Arguments of the Parties

The Company

20. The Company's position was that Articles 1.2, 2.1 and 2.2 of the Collective Agreement require successful completion of training as a precondition to employment and – if not successful – the Grievor could not qualify as a Conductor: Article 1.2. It urged it retained discretion to determine if successful completion of training had occurred. It argued this was not a "disciplinary" termination attracting an investigation, or subject to arbitration. Rather, it was an appropriate exercise of discretion by the Company to release an under-performing and unsafe trainee, as contemplated by Article 2.2: **AH665; CROA 1568.** It urged the applicable standard was akin to a "probationary period", which is a "lighter" standard of proof. As such, it argued it was only required to defend the decision as not arbitrary, not taken in bad faith and not discriminatory, which it has been able to satisfy in this case: **CROA 4086**; **4774**.

21. The Company argued the Grievor was appropriately observed and evaluated during her training, with 14 of those evaluations raising safety concerns or shortcomings. Her evaluations included that she had a difficult time with mainline and yard locks with keys, a difficult time with the shunt list; had a lack of attention to which traffic goes where; maintained too slow of a pace; had difficulties focusing on one move at a time; had difficulties with over-thinking some moves; had difficulties with radio procedure (stopping instead of giving complete sentences); had a lack of focus; needed to pay more attention; had difficulties with consecutive tasks; had a difficult time with hose bags in cold weather; had difficulties with planning ahead; had a hard time keeping pace; checked the switch list multiple times before starting (lack of confidence) and was out of breach easily. The concerns of the Company with the Grievor also stemmed the observation of her crying after receiving negative feedback from her Trainer. The Company urged the Grievor was given substantial and continual feedback regarding areas for improvement during the training, some verbally, some in writing and some through text messages.

22. The Company pointed out the Grievor admitted she was having difficulties with certain tasks on more than one occasion. It argued that a review of the performance logs wholistically demonstrated that the automatically generated "performing as expected" comment was not accurate in this case. It was the Company's position the Grievor lacked the appropriate ability to work safely and perform the duties of Conductor and a determination was therefore made that she was not suitable for employment.

23. It argued the reference made in the termination letter to the wrong collective agreement was a clerical error that was also made by the Union in its request to forward the grievance to

arbitration, and that it did not undermine the discipline. Regarding the requirement to meet with the Union under Article 2.2, the Company argued that a review with the Union before "final disposition" referred to not just to what occurred surrounding the Grievor's dismissal but included the discussions up to and including the hearing, so its obligation was met.

The Union

24. For its part, the Union argued the Collective Agreement is "silent" on the requirements of training, length of training, or when probationary employees become seniority employees, so that issue must be determined by reference to the *Canada Labour Code.* It argued that under that legislation, any probationary period had elapsed and the Grievor was subject to the full protections of the NBET Agreement. The Grievor was therefore a seniority employee, entitled to an Investigation under Article 24 prior to her dismissal. The failure to conduct that Investigation was a fatal flaw, undermining any dismissal decision: **CROA 4663**.

25. The Union also argued the criteria as established in *Re Edith Cavell Private Hospital and Hospital Employees' Union, Local 180* [1982] B.C.C.A.A.A. No. 495 were not followed by the Company. It urged the requirements of that case are dispositive of this issue, as the factors for establishing incompetence have not been met.

26. Alternatively, the Union argued the Company acted in an arbitrary, bad faith and discriminatory manner in dismissing the Grievor: *The Clarendon Foundation v. Ontario Public Service Employees Union, Local 593 (Pellew Grievance)* 1997 CarswellOnt 7274; *Re Hotel Fort Garry and Canadian Brotherhood of Railway, Transport & General Workers* 1993 CarswellMan 572; **AH731**. It urged that prior to January 22, 2022, when she was terminated, the Grievor was not told there were any concerns with her performance or progress, there is no evidence she was "unsafe" and no managers ever evaluated her. While the Union agreed there was room for improvement – since the Grievor was in training - it pointed out she never had a "red" box in any of her Conductor-training feedback reviews. It urged that this fact - combined with the lack of daily feedback and the admonitions by the Company to "keep doing what you're doing" - are indications the Grievor was on the right track. The Union also noted that there were large gaps in time frames for training reports by the Company and that this indicated there were no concerns with the Grievor's progress. The Union pointed to documentation demonstrating positive and supportive evaluations from the Grievor's OJT and the training documentation, which noted she was "performing as expected". The Union also argued it was arbitrary to judge the Grievor on only 2/3 of the trips she was to perform. The Union argued the Company did not have serious concerns with the crying incident, as it noted the failure by the Company to document any concerns.

27. Regarding the Grievor's physical ability, the Union relied on the Grievor's background as a firefighter and a paramedic to demonstrate she was strong and able physically perform the functions of a Conductor. It also noted the evidence was she was willing and eager and had a good attitude. The Union noted the Grievor had contracted COVID 19 on December 22, 2021 and was off for three weeks, returning January 12, 2022 (10 days before her dismissal). It argued she had general fatigue and weakness upon returning to work and was still on antibiotics and a puffer for breathing, as was noted in her letters written after her termination. As the Company did not give the Grievor the opportunity to tell her side of the story, this information was not considered before her dismissal.

28. Regarding Article 2.1 and 2.2, the Union noted there were no temporal or other timelines on successful completion of the Grievor's training under the Agreement. It noted there are no automatic penalties and the word "probation" is not used in this collective agreement as it is in other agreements between the same parties. The Union also pointed out the Company failed to follow Article 2.2 of the NBET Agreement, which required it to consult with the Union when a candidate is determined to be not suitable for employment during training. Had it done so, it would have obtained information and explanation from the Grievor, including the impacts of COVID19 on her work and the outcome may have been different. It urged this breach was also fatal to its decision to terminate the Grievor, resulting in any discipline being *void ab initio.*

29. The Union also noted the Company cited the wrong collective agreement in the Grievor's termination letter, where it provided her reasons for dismissal (Article 58.1 of the 4.16 Agreement, which applied to employees in the Central Region, rather than those in New Brunswick). It urged that as those reasons were not correct, the Company cannot now rely on other reasons for dismissal, and this also voids the discipline.

C. <u>Analysis and Decision</u>

30. I have reviewed and carefully considered all submissions, evidence and jurisprudence.

31. The initial question that must be determined is what rights the Grievor earned as a trainee under the NBET Agreement. The answer to this question is not influenced by the ability of the Grievor, her background and situation, how hard she worked to become a Conductor, or even how she was evaluated by the Company. This is a legal question, involving interpretation of the Collective Agreement.

32. An important element of the "modern principle" of contract interpretation is that the articles of a collective agreement must be read together, in their "entire context", harmoniously, to determine meaning. It is accepted in applying this modern principle that all words are assumed to have meaning, and that parties are not assumed to have used superfluous words.[5].

<u>i/ The Requirements of the NBET Agreement</u>

33. As the Union has pointed out, the NBET Agreement does not define either a probationary employee or a probationary time period. However, I disagree the NBET Agreement is therefore "silent" on the status of the Grievor as a trainee, such that the probationary period as established by the *Canada Labour Code* must govern.

34. Assigning probationary status to a new employee is one method by which an employer can evaluate a new employee. However, it is not the only method to do so. I accept the parties are free to negotiate in their collective agreement how a trainee employee will be evaluated, when that individual is hired into a role for which they do not have competency, and in what

[5] The modern principle was accepted by the Supreme Court in *Re Rizzo and Rizzo Shoes Ltd.* [1998] 1 SCR 27, at page 41. Arbitrators have long-accepted that this principle applies to the interpretation of collective agreements, and have accepted the "canons of construction" that have developed to provide guidance to that interpretive task. See a listing in *AHS and AUPE (Named Holidays Grievance)* 2022 CanLII 22226, at p. 13.

circumstances those employees can be dismissed. In this case, I find the parties have expressly negotiated terms for how a trainee is to be evaluate and – if that evaluation is found lacking – that dismissal can occur.

35. In Article 1.2, the parties have agreed that employees “must” have the “appropriate qualifications” to maintain their employment. The word “must” is mandatory language. I accept that the Company is not under an obligation to employ an individual who does not have – or is unable to obtain - the appropriate qualifications. The Grievor did not have the skills of a Conductor on hire. To gain that qualification – and to maintain her employment as a Conductor - the Grievor needed training. Article 2.1 then speaks to that situation. It states, “employees will be required to successfully complete Company training programs”. I find the Grievor was required to “successfully complete” the Company’s program of training as required by Article 2.1, to gain the qualifications of a Conductor, which qualification was required for her to maintain her employment. I further accept that satisfying Company training is not an optional requirement: The word “will” – which is mandatory - is used in Article 2.1. Nor is the requirement met simply by the Grievor “completing” the training. In the NBET Agreement, the parties have agreed that the Grievor must “successfully” complete training. If the Grievor cannot *successfully* complete her training, she cannot satisfy the requirements of either Articles 2.1 or 1.2.

36. Article 2.2 contemplates that not every trainee will be successful in training. In that Article, the Company has retained for itself the ability to determine if a “candidate” in training is “suitable for employment”. A “candidate” is defined in the Collins English Dictionary as “someone who is being considered for a position”. I am satisfied that an evaluation of the Grievor’s “success” is therefore built into Article 2.2 and that success is a condition for remaining employed by the Company.

37. I cannot agree with the Union that the passage of time has determined the Grievor’s status as a seniority employee. If that were the case, there would be no need for the Company to determine if the trainee was “suitable for employment” under Article 2.2, as time would make that determination and provide “just cause” protections, regardless of the suitability of a trainee to perform the very job for which they were hired. The provision reserving to the Company the ability to determine “suitability” through training would be rendered superfluous if that were the case. As parties are not assumed to have an intention that renders a clause superfluous, I do not accept that this was the parties’ mutual, objective intention.

iii/ Determining Incompetence

38. The Union has offered the authority in *Re Edith Cavell Private Hospital* - and the factors outlined in that case for establishing incompetence - as being dispositive of this case. In *Edith Cavell,* a long-term employee working as a chief cook was alleged to not be performing to standard. That case was not a training situation.

39. As noted in **AH665** (at p. 15), *Edith Cavell* does not impact the ability of the parties to agree on how an employee will be evaluated during a training program, nor does it prevent the parties from setting out specific consequences if a trainee is unsuccessful.

40. While certain of the *Edith Cavell* factors may be captured in a determination of whether a decision was taken in "bad faith" (such as the requirement for the employer to set a standard and communicate it), not all of the *Edith Cavell* factors would be appropriate. In this case, the collective agreement has already "occupied" the field by specifically reserving to an employer the ability to evaluate the "suitability" of a trainee. That case is distinguishable.

iv/ Right to an Investigation Under Article 24

41. The Union has argued the Grievor had a right to a fair and impair Investigation under Article 24, and was denied that right, which rendered her dismissal *void ab initio*.

42. As noted in **AH665,** (at p. 13, 14) there are two forms of dismissal: disciplinary (culpable) and non-disciplinary (non-culpable). In this case, the Grievor's dismissal was for failure to obtain qualifications. It is important to review Article 24 as a whole. Article 24 is titled "Investigation – Discipline". According to Article 24.1, the evidence relied upon by the Company in an Investigation under Article 24 is evidence "which may result in the issuing of discipline". Article 24.2 refers to the "responsibility" of the employee being established. Article 24.7 refers to an employee not being "held off" unnecessarily. This relates back to Article 14.1 titled "Discipline" where employees "may be held out of service for a maximum of three days for investigation". Reading this Article as a whole, an Investigation is contemplated for *culpable* conduct for which the employee is "responsible" and not for *non-culpable*, *non-disciplinary* conduct for which they are not.

43. In this case, there is no suggestion the Grievor did not give her full effort to the training, or that her dismissal was based on culpable conduct. The Grievor's non-culpable, non-disciplinary dismissal did not trigger a right to an Investigation under Article 24.

v/ Did the Company Appropriately Exercise its Discretion?

44. The next question is the limited review that an Arbitrator is entitled to conduct of the Company's decision that the Grievor was "unsuitable".

45. In **AH665,** the parties had agreed on specific metrics for when an individual would fail training (failure of two exams). The parties have not done so in this case. However, the Company does not have *carte blanche* in deciding "suitability". I accept that in determining suitability, the Company is exercising a discretion under the collective agreement. In exercising that discretion, the Company must not make that decision in a manner which is arbitrary, in bad faith or is discriminatory[6]. The requirement that decisions taken under a contract be ones which are made in "good faith" or by practicing a duty of "honest performance" has also been recognized by the Supreme Court of Canada[7].

46. This leads to an analysis of what those three characteristics require, and if they have been met in this case.

47. As noted recently by the Supreme Court in *Wastec Services Ltd. v. Greater Vancouver Sewerage and Drainage District* [2021] SCC 7*,* an exercise of discretion made under a contract

[6] *Re Hotel Fort Garry and Canadian Brotherhood of Railway, Transport & General Workers,* at para. 11; *Re The Clarendon Foundation Inc. and Ontario Public Service Employees Union, Local 593* at p. 7. Also see *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District, et cl* [2021] SCC 7.
[7] *Bhasin v. Hrynew* [2014] SCC 71, at para. 86.

cannot be defended if it is exercised "in a manner unconnected to the purposes underlying the discretion" or arbitrarily or capriciously (at para. 4). The decision in *Re Clarendon Foundation* summarizes this standard (at p. 7). It notes that discretion cannot be exercised by considering extraneous, discriminatory factors which are not related to performance or aptitude as there must be a "rational connection between the circumstances and the outcome" to avoid an allegation of bad faith. It also states that a decision cannot be "capricious, perfunctory, or based on uninformed opinion" or on ill will, malice or not allowing the employee to demonstrate her capabilities.

48. As noted by Arbitrator Picher, a decision which meets this standard is one that is taken for a "valid business purpose, having regard to the requirements of the job and the performance of the individual in question": **CROA 1568,** p. 2. Arbitrator Picher also recognized that determining "suitability" provides to the Company "substantial discretion".

49. Put another way, the Company must be able to draw a connection between its decision and the performance of the Grievor, and there must not be evidence that extraneous and unrelated factors influenced that decision.

50. At the risk of belabouring the point, I wish to emphasize it is not the role of an Arbitrator to step in the shoes of the Company and determine if the Grievor could adequately perform the role of a Conductor. That is not the question that must be determined. The narrow question is whether the Company's decision of "unsuitability" can meet these three criteria.

51. In considering the Company's actions in this case, I make four preliminary comments.

52. First, I have focused on the evaluations which occurred later in the Grievor's training period. I take the Union's point that the Grievor – like other trainees – would have been in a significant learning phase during the early part of her training and not expected to have yet developed competency for her role.

53. Second, I accept that manipulating hose bags is a difficult component of the job for all Conductors in winter, due to the difficulty of manipulating these hoses when they are very cold. I do not find the evidence established this was any different for this Grievor than for any other individual.

54. Third, I did not find the "coaching point" in evidence was relevant to the question of "suitability". While this was no doubt a good reminder and demonstrated the instruction given by the Company to the Grievor, there was no evidence she was reminded of this point due to any issues with her own performance.

55. Fourth, it is not disputed that the Grievor had areas of strength. The Grievor's performance logs indicated she was eager to learn, had a good attitude and had a good work ethic. This was not called into question.

56. The Union has urged it was arbitrary to evaluate the Grievor after only 2/3 of the training was complete. I am satisfied that Article 2.2 does not require the Company to wait until a set time, or until the end of the training, to determine "suitability". While an early evaluation could potentially call into question the legitimacy of the ability of the Company to evaluate performance, in this

case the Grievor had completed 33 of her 45 field trips, which was a substantial – and reasonable - number on which to base an evaluation.

57. The email of December 26, 2021 was internal between Mr. Bailey and his own superiors. It reasonably demonstrated the Company did have a concern with the fact the Grievor was seen crying on the job, as this demonstrated an "instability in a job that requires full attention". I accept that how the Grievor emotionally handled negative feedback was a legitimate – and significant - performance issue in a safety-critical role. While the Union argued the information in Mr. Bailey's email was "hearsay", a CROA arbitrator is entitled to consider hearsay which she finds relevant.[8] There was no contradictory evidence.

58. The consideration of the Grievor's emotional distress by the Company was not arbitrary nor was it considered by the Company in bad faith. It was also not discriminatory as it was legitimately related to her aptitude for the role. It cannot be said the Grievor was unaware of her own emotional response.

59. The Grievor's contact with Mr. Bailey also indicated she was capable of reaching out for support, when she had difficulties with her Trainer, or issues she wished to explain, as she did in late December of 2021.

60. The evidence established the Grievor was given feedback by Mr. Bailey:

- Mr. Bailey told the Grievor in November of 2021 that she needed to work on her confidence and focus and he also commented on a "near miss" that had just happened the day before. While Mr. Bailey noted the "near miss" was not "discipline", that event legitimately forms part of the Company's assessment of the Grievor's abilities during her training period and demonstrates she was aware of performance issues.
- On November 23, 2021, Mr. Bailey sent an "informal" email to the Grievor to provide to her an update on what had been going well and what needed "improvement", based on his own review of her work, the locomotive engineer's comments "as well as management if they have observed you over the week and spoken to me about it".
- On December 20, 2021 the Grievor was sent another email by Mr. Bailey. This noted that the Grievor "struggled physically with some switches and locks"; that "knowledge of territory needs improvement" and that – while a plan was made, the Grievor "had to confirm the plan too many times, so either not a clear understanding or confidence". This was *before* the Grievor went on medical leave;
- In a text message on January 13, 2022, the Grievor noted she was trying hard to improve, because she had read Mr. Bailey's mid-way review, which had indicated she had troubles with locks and switches. This was written by the Grievor approximately one week before she was removed from training.

[8] Item 13, CROA&DR Memorandum of Settlement

61. The Company was also entitled to rely on the performance logs as a basis for its decision. Four individuals contributed to those performance logs (and not just the Trainer designated as such by the Company). The logs demonstrate there were consistent issues with the Grievor's performance including radio transmissions, working at an appropriate pace, not questioning her own decisions (confidence, which was also noted by Mr. Bailey, above) and working in complete sentences.

62. Considering the evidence as a whole, I accept the Company *was* providing feedback to the Grievor, that she herself was aware of her own struggles, and that she was aware of her own significant emotional response to negative feedback in late December of 2021. This incident alone should have provided valuable information to the Grievor and caused her concern regarding how she was perceived. I also accept that Mr. Bailey was trying to be as encouraging as possible. Even so, the evidence does not support that the Grievor was unaware there were legitimate concerns with her performance and aptitude.

63. I do not accept the Union's position that the Grievor must be evaluated by "managers" for a decision of "suitability" to be made appropriately or not to be made in "bad faith". The authority of *Re Clarendon* on which the Union relied for this proposition did not make this strong of a connection, but only suggested that it was a good practice, when feasible. According to that same authority, "bad faith" requires evidence of capriciousness, or a review of irrelevant and unrelated factors. That evidence is lacking in this case. Further, it is often the case – especially in large organizations – that dismissal decisions are made not by front line managers, but by individuals who have the appropriate training and expertise to look at the performance of an individual wholistically and consider *all* circumstances, as well as understand the requirements imposed by a collective agreement. Nor is it practical for a manager to double-check each fact reported in a performance log by an employee trainer, or for an employer to ensure a training log is made for each trip, in order to evaluate suitability. An employer is entitled to take a wholistic view and to determine if patterns emerge, as well as to consider single, noteworthy events.

64. The assessment of "suitability" in this case was not made arbitrarily, was not in "bad faith" and was not discriminatory as relying on factors outside the Grievor's performance and aptitude. There is no evidence that ill will, malice or irrelevant factors were relied upon.

vi/ Failure to Comply with Article 2.2

65. A determination of that issue does not resolve this case, however. The Union has argued the Company failed to review its decision with it prior to dismissal, as required by Article 2.2. Article 2.2 states "…representatives of the Company and the Union **will** review each case on an individual basis for final disposition" (emphasis added). The word "will" is mandatory language.

66. There was no suggestion the Union had a role to play in deciding "suitability". It did not bargain for itself that role, nor would it be well-positioned to make that determination. There was also no requirement that the parties agree upon suitability in a review undertaken under Article 2.2, or that the Union be consulted *before* training was stopped. However, in Article 2.2, the Union *has* bargained for itself the ability to "review" each case of unsuitability with the Company, before "final disposition".

67. I cannot agree with the Company that proceeding through the grievance procedure is a "review" which satisfied this requirement. A grievance and the procedure which follows results from the Union's allegation that the collective agreement was *already* breached. It does not satisfy the requirement in Article 2.2.

68. I find the Company failed to undertake a review of the Grievor's case with the Union, as was required by Article 2.2. The next question is the impact of that failure.

69. Arbitral jurisprudence has developed general principles for addressing the impact of breaching a collective agreement on a dismissal or discipline decision, where the consequences for that breach are not set out in the agreement itself[9]. If the provision contains a mandatory obligation of a substantive nature, arbitrators have generally found the breach will render the dismissal *void ab initio* or "void from the outset". An example of a breach of a substantive nature is a right to union representation. The reasoning is that – if a union had been given its representation rights when required - the employer may well have been persuaded to reach a different result.

70. Article 2.2 is a clause which provides to the Union a substantive opportunity to represent the Grievor's interests to the Company, *before* she is dismissed from employment. Whether or not the Company would have been persuaded to change its mind in this case, the relevant fact is the opportunity for which the Union bargained for to represent the individual case of the Grievor when suitability was not found, was not provided.

71. As such, the dismissal of the Grievor in this case is rendered *void ab initio.*

72. In view of this finding, it is not necessary to address the argument relating to deficiencies in the Company's reasons.

vii. Remedy

73. The Union sought reinstatement and a "make whole" order.

74. Arbitrators have considerable discretion in fashioning an appropriate remedy which is just and reasonable in all of the circumstances. As a general principle, remedies for breach of contract are intended to put the aggrieved party in the position it would have been in had the contract not been breached.

75. I agree with the Union that the Grievor should be reinstated and provided another opportunity to establish she is suitable for the role of a Conductor, in view of the breach of Article 2.2. This was the best outcome the Grievor could have hoped for, had the Article not been breached and she entitled to the benefit of any doubt the Union could; have achieved that result.

76. However, the second issue requesting a "make whole" order is complicated by the Grievor's status as a trainee, who had not yet qualified as a Conductor. While a "make whole" order can compensate a loss of an opportunity [10], it has been accepted by arbitrators that an award based on a contingency – which may or may not occur – is subject to a discount "to reflect

[9] The leading case is *Hickeson-Langs Supply Co. and Teamsters, Local 419* (1985) 19 L.A.C. (3d) 379
[10] M. Mitchnick and B. Etherington, Labour Arbitration in Canada, at p. 191

the chances that the grievors would not have been successful, even if granted the opportunity for consideration"[11]. The significance of that discount is dependent on the facts and circumstances of that particular case.

77. The Grievor's ability to earn income as a Conductor remains contingent on her successful completion of her training after her reinstatement into the training program, which status is not automatic. This is not a situation where a grievor has lost a job as a Conductor due to the Company's breach of the collective agreement.

78. Applying a discount for contingencies is by nature inexact and speculative. It requires consideration of the totality of the evidence and a certain amount of "crystal ball gazing" regarding future events. In determining the appropriate discount, I have considered all of the facts and circumstances in this case carefully. These include: the determination made in this Award that the Company appropriately exercised discretion in determining the Grievor was not suitable as a Conductor; the Union's claim there was other information that was relevant to that determination, (including the Grievor's medical issue with COVID19) and that the issues relating to the Grievor's performance noted by the Company (which include her emotional reaction to negative feedback raising issues with her stability) were issues which occurred prior to the date she went off on a medical leave.

79. While there was a comment made regarding manipulating air brake hoses after her return from medical leave, I have considered that there is a general difficulty of manipulating that equipment in the cold and do not consider this to be a negative statement relating to her job performance.

80. Considering the issues and evidence in totality, the Grievor is entitled to financial compensation under the following formula:

- The amount she would be entitled to as if she had not been dismissed, had completed her training and began work as a Conductor (from the date that training would have continued to the date of her reinstatement) will first be determined;
- That amount will then be reduced by 66 2/3% for the contingency the Grievor would not have been found suitable to be a Conductor, even if given that opportunity back in January of 2022; and
- That amount will be further reduced by the financial results of the mitigation efforts the Grievor has taken, while she has been dismissed.

D. Conclusion

81. The Grievance is allowed.

82. A declaration will issue that the Company has breached Article 2.2. of the NBET Agreement.

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[11] *Ibid.*

83. The Grievor will be reinstated to the position of Conductor trainee.

84. If there are any claims the Grievor has failed to mitigate her losses – and the parties are unable to resolve that issue – either party can approach for further direction. I remain seized regarding the amount of financial compensation to be awarded to the Grievor.

85. I also remain seized to address any issues regarding the implementation or application of this Award.

June 15, 2023

CHERYL YINGST BARTEL
ARBITRATOR