CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4873

Heard in Montreal, October 17, 2023

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the assessment of dismissal to Locomotive Engineer K. Drew of Winnipeg, Manitoba.

JOINT STATEMENT OF ISSUE:

Following an investigation, Engineer Drew was dismissed from Company service for reasons described as follows:

"In connection with the positive results from your Breath Alcohol initial post-incident test and confirmation post-incident test performed September 23, 2022 (in connection with the authority violation incident which you were found culpable and assessed a 30 Day Suspension); and your confirmation during your formal investigation of having consumed alcohol between 15:00 and 22:00-22:30 on September 22, 2022 then later woke up and consumed more alcohol prior to accepting your call for duty at 05:30 on September 23, 2022.

The investigation as a whole established your culpability for violations of:

- Policy HR 203
- Procedure HR 203.1
- CROR Rule G."

Union's Position:

Mr. Drew was involved in an incident regarding exceeding his limits of authority and ultimately received a positive post-incident substance test for alcohol. He was honest and forthcoming in his statement. He made it clear that he thought his health issues with alcohol were manageable and, until his failed post-accident test, did not affect his ability to perform his duties Q&A's 38 and 40. Through self-reflection he has realized the addiction is greater than what he thought and has sought professional assistance in recovering.

Mr. Drew has acknowledged and taken responsibility for his illness and continues to take the right steps towards recovery. The Union contends addiction issues have been recognized by the DSM V as a disorder. Further, within the Canadian Railway Medical Rules Handbook, Section 4.8 "Substance Use Disorders", it is recognized that employees "often are unaware of the magnitude of their problem, so are unwilling to seek help". Moreover, the Canadian Human Rights Act recognizes substance use problems as a disability, and individuals with such disability are subsequently afforded the assistance and protection inherent. The failure to

recognize and accommodate Mr. Drew's addiction/disability is a violation of the Canadian Human Rights Act and the Collective Agreement.

The Union asserts that when an employee is diagnosed with substance dependence, they have a right to be accommodated by their employer—just as anyone else with a disability. As a result of the Act, Employers have a duty to accommodate an employee's needs when they are based on any of the grounds listed in the Canadian Human Rights Act.

The Union contests the excessive and arbitrary application of discipline on this long-term employee with minimal discipline up until now. Policy HR 203.1 3.2.2 Disclosure and Requests for Assistance states, "The Company recognizes that substance use disorders are medical conditions and that early intervention and ongoing monitoring and accountability greatly improves the effectiveness and success of treatment."

The Union also alleges the investigation was neither fair nor impartial. The Union asserts the memo submitted by Assistant Superintendent Bob Dales, went far beyond preliminary fact-finding. The Union maintains that Mr. Dales immediate goal was to entrap both crew members into making a clear assumption of responsibility, which is a violation of Article 39. The Company had their test results, so further questioning was not necessary. The Union also objected to the inclusion of Appendix H, Expert Opinion Paper Regarding Substance Use in the Workplace as it appears by the authors own admission to be the result of a Google search.

The Union maintains CROA is filled with cases similar to Mr. Drew's involving employees with dependency disabilities where reinstatement was awarded at arbitration. In most cases listed herein, the account of the circumstance leading up to the incident were worse than that of Mr. Drew's. CROA 3335, 4054, 2716, are some where reinstatement was ordered. Further, in CROA 4059, 4094 and 4328 where there was evidence of clear and compelling rehabilitation efforts, reinstatement was ordered with return to work conditions imposed.

Engineer Drew has recognized his addiction and has embraced sobriety, making every effort to obtain the assistance that he required. He has reached out to Lifeworks to assist in getting help for recovery. Mr. Drew has spoken with his Family Doctor for assistance for the appropriate steps in a positive recovery. He has attended a four- month rehab at the Bruce Oake Recovery Centre and received a certificate of graduation acknowledging the completion of the program. Mr. Drew continues to attend Alcoholics Anonymous meetings daily. He provides updates regarding his recovery to the Union. These steps are themselves a huge undertaking, and it is obvious that Mr. Drew is working diligently to overcome this addiction.

For the foregoing reasons the Union requests that the Arbitrator reinstate Locomotive Engineer Kevin Drew without loss of seniority and that he be made whole for all lost wages and benefits. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

Company Position:

The Company disagrees with the Union's positions and denies the Union's requests.

The Company maintains that discipline was assessed after a fair and impartial investigation and a review of all factors, including those the Union describe as mitigating.

The Company maintains that following a TOP violation the Grievor was properly subject to Post-Incident testing, where his results came back positive for alcohol.

The Grievor held a Safety Critical position and confirmed he knew and understood the Company's Alcohol & Drug Policy and Procedures. The Grievor confirmed that he drank between the hours of 15:00 and 22:00-22:30 on September 22, 2022 and later woke up at an unknown time and drank more, despite being available to be called at 01:09 September 23, 2022. The Grievor was well aware that under the Company's Alcohol & Drug Policy and Procedures it is prohibited for employees to report for duty while under the effects of alcohol. The Grievor not only blatantly disregarded the Company's Drug & Alcohol Policy and Procedures, but he put himself, his colleagues and the general public at risk when he chose to attend work unfit.

The Company's Alcohol and Drug Policy and Procedures are clear that employees must disclose a substance abuse problem before a workplace incident occurs and that disclosure after an event will not prevent an employee from being subject to discipline up to and including dismissal. The Grievor had a responsibility to notify the Company before an incident occurred.

The Company maintains no violation of the duty to accommodate occurred as the Grievor never sought medical consultation, nor did he ever request for an accommodation from the Company prior to the incident, in order to substantiate any alleged medical disability and/or substance use disorder.

The Company maintains the discipline assessed was appropriate, warranted and just in all the circumstances. Accordingly, the Company cannot see a reason to disturb the discipline assessed and requests the Arbitrator be drawn to the same conclusion.

FOR THE UNION:
(SGD.) G. Lawrenson
General Chairperson, LE-W

FOR THE COMPANY:
(SGD.) L. McGinley
Director, Labour Relations

There appeared on behalf of the Company:

D. Zurbuchen	– Manager Labour Relations, Calgary
A. Cake	– Manager, Labour Relations, Calgary

And on behalf of the Union:

D. Ellickson	– Counsel, Caley Wray, Toronto
G. Lawrenson	– General Chair, LE-W, Calgary
H. Makoski	– Vice General Chair, LE-W, Winnipeg
M. Yanchuk	– Local Chair, Winnipeg
K. Drew	– Grievor, Winnipeg

AWARD OF THE ARBITRATOR

Context

This matter concerns the termination of Train Engineer Drew, who was dismissed after a post incident test and confirmation showed positive results for Breath Alcohol. At the time, he had seventeen (17) years of service, with a good discipline record.

Issues

- **A.** Is the discipline void ab initio because the investigation was not fair and impartial?
- **B.** Has the Union established a prima facie case of discrimination?
- **C.** If so, has the Company accommodated the grievor to the point of undue hardship?
- **D.** If not, what is the appropriate remedy in the circumstances?

A. Is the discipline void ab initio because the investigation was not fair and impartial?

Position of the Parties

1. The Union takes the position that it was improper for Superintendent Dales to question Engineer Drew concerning the positive test results, prior to the formal investigation. It also argues that one of the questions in the investigation was both leading and showed bias on the part of the investigating officer.

2. The Union further objects to the calculation of blood alcohol levels based on the report by Dr. Snider-Adler at Appendix H.

3. The Company submits that the memo from Superintendent Dale merely documented two questions. The Union could have questioned Superintendent Dale at the investigation, but chose not to do so.

4. The Company submits that the validity of the expert report from Dr. Snider-Adler has already been established in **CROA 4798**.

Analysis and Decision

5. It is well established that employees are entitled to a fair and impartial investigation, both under the collective agreement and pursuant to CROA jurisprudence. If the investigation is not fair and impartial, any discipline can be found to be void ab initio.

6. Article 39.05 sets out the following:

> <u>Employees will not be disciplined or dismissed until after a fair and impartial investigation has been held and until the employee's responsibility is established by assessing the evidence produced. No employee will be required to assume this responsibility in their statement or statements.</u> The employee shall be advised in writing of the decision within 20 days of the date the investigation is completed, i.e. the date the last statement in connection with the investigation is taken except as otherwise mutually agreed. Failure to notify the

> employee within the prescribed, mandatory time limits or to secure agreement for an extension of the time limits will result in no discipline being assessed.

7. CROA jurisprudence has highlighted the importance of a proper investigation. Arbitrator Picher in **CROA 3061** held:

> As noted in prior awards of this Office, in discipline cases the form of expedited arbitration which has been used with success for decades within the railway industry in Canada depends, to a substantial degree, on the reliability of the record of proceedings taken prior to the arbitration hearing at the stage of the Company's disciplinary investigation. As a result, <u>any significant flaw in the procedures which substantially compromise the integrity of the record which emerges from that process goes to the integrity of the grievance and arbitration process itself.</u> Consequently, in keeping with general jurisprudence in this area, it is well established that a failure to respect the mandatory procedures of disciplinary investigations results in any ensuing discipline being ruled void ab initio. (Tab 37).

8. In **CROA 3221**, he noted that a faulty investigation is not just a minor technical issue:

> For reasons elaborated in prior awards of this Office, <u>the standards which the parties have themselves adopted to define the elements of a fair and impartial hearing are mandatory and substantive, and a failure to respect them must result in the ensuing discipline being declared null and void (CROA 628, 1163, 1575, 1858, 2077, 2280, 2609 and 2901). While those concerns may appear "technical", it must again be emphasized that the integrity of the investigation process is highly important as it bears directly on the integrity of the expedited form of arbitration utilized</u> in this Office, whereby the record of disciplinary investigations constitutes a substantial part of the evidence before the Arbitrator, and where the testimony of witnesses at the arbitration hearing is minimized.

9. Arbitrator Picher found in **CROA 2934** and 3952 that discipline imposed was void ab initio as the investigating officer's questions did not reflect general impartiality.

10. Here, the Union objects to the questions posed and the memo produced by Superintendent Dales (see Tab 5D, Company documents). When informed that Engineer Drew had produced a positive breath post incident test, he spoke to the grievor:

> "When Kevin got on the phone I asked him if he was drinking while at work, given the BAC level found, Kevin stated he had not been drinking at work but he had been drinking the night before. I asked him if he knew how much and he said he couldn't remember how much but that he had stopped between 2200 and midnight".

11. In the formal investigation, the grievor was asked similar questions and responded in a similar manner:

> Q24. Please explain in your own words why both post incident rests would procure a positive result?
> A24. The previous day I had started drinking in the afternoon at approximately 1500 till approximately 22-2230 went to bed and woke up at some point after that to go to the bathroom and had a couple more drinks and then went back to bed I am unsure what time as I didn't look at a clock at any point.
>
> Q25. As per the previous question, how many drinks did you consume the night before?
> A25. Don't recall.
>
> Q26. As per the previous question did you consume alcohol at all during your tour of duty on the 346-914?
> A26. I did not.

12. It appears clear that Superintendent Dales was well aware of the possibility of substantial discipline for the grievor, given the positive breath tests. Given that the parties have agreed to a formal investigation process following an incident, in which procedural safeguards are built in and the Union plays an active role, it does not appear appropriate for employees to be questioned prior to the investigation. This is particularly the case as they may be without Union representation, as was the case here.

13. However, given that the questions and answers posed prior to and at the investigation were substantially similar, I do not find that the grievor was prejudiced. The conclusion here might well be different had the facts been different.

14. The Union also objects to a leading question in the investigation:

> Q28. As per your previous answer and appendix H page 10 it states that "if a BAC level has declined between the screen and the confirmation test one can then extrapolate levels with the recommendation on erring on the conservative side (using 0.015

> decline versus 0.020 decline) and looking back each hour prior to the test to indicate what the blood alcohol concentration may have been at any given time prior to the test." With this information you BAC would have been estimated at .19 and 0.268% at the start of your tour of duty, is this correct?
> A28. I don't know how to answer it really, I am not an expert.
>
> Note from Union Representative – the Union Objects to the question as it is leading.
>
> Note from Investigating Officer – Noted. Please answer.
>
> The Union would like to object that BAC levels and their correlating effects are general and based on individuals who do not have functional tolerance in regards to alcohol consumption.
>
> Mr. Drew, based on the objection of your Union, can you please advise if you commonly drink prior to being available for duty.
> A. No, I do not.
>
> Mr. Drew do you commonly drink?
> A. yes.

15. The question is undoubtedly a leading one, to which the Union properly objected. However, it is an isolated incident and not indicative of the tenor of the vast majority of the questions posed by the investigator. This is not like the investigation in **CROA 2934**, where the investigator showed a persistent bias in his questioning.

16. The Union also objects to the introduction of Dr. Snider-Adler's Expert Opinion Paper Regarding Substance Use in the Workplace (see Tab 5H Company documents), submitting that it is little more than a google search. For the reasons given by Arbitrator Cavé in **CROA 4798**, I find that Dr. Snider-Adler is an expert in addiction and her report is accepted into evidence.

17. The Union further objects to the use of the formula provided for in Dr. Snider-Adler's report for estimating BAC levels at previous times, using .015 decline per hour from the time of the test. Based on this formula, the grievor is estimated to have a BAC at the beginning of his tour of duty between 0.19 and 0.268. The Union suggests that the BAC can vary depending on the individual. However, I find that the actual BAC level at the start of his shift is immaterial. The grievor was clearly impaired at the time. More

than 11 hours after his shift started, he was still showing a BAC of 0.088 and 0.075. His impairment level was still so high that he was not permitted to drive his car home.

18. Arbitrator Picher, in **CROA 3061**, noted the following concerning the investigation:

> Any significant flaw in the procedures which substantially compromise the integrity of the record which emerges from that process goes to the integrity of the grievance and arbitration process itself.

19. I do not find that any flaws in the existing investigation are so "significant" that they have "substantially compromised the integrity of the record". Accordingly, I cannot agree that the investigation and the discipline arising therefrom should be declared void ab initio.

B. Has the Union established a prima facie case of discrimination?

20. The Supreme Court of Canada in Stewart v. Elk Valley Coal Corp, 2017 SCC 30, reviewed the obligation to prove prima facie discrimination:

> (24) To make a case of prima facie discrimination, "complainants are required to show that they have a characteristic protected from discrimination under the Human Rights Code…; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact"

21. Arbitrator Clarke in **CROA 4667** at paragraphs 31-40, reviewed the requirements to establish prima facie discrimination. He dealt with a similar fact situation to the present matter, with a Locomotive Engineer who was tested with a BAC of 0.08, but with the additional fact that he had consumed alcohol while on duty. He concluded:

> …the TCRC met the three elements needed to demonstrate prima facie discrimination in this case. The evidence in the record reveals that i) LE Paisley suffered from alcohol addiction; ii) he suffered an adverse impact when he lost his employment and iii) that his alcoholism was a factor leading to this adverse impact.

Did LE Drew suffer from an alcohol addiction?

22. At the Hearing, the Company argued that the Union had failed to establish that Engineer Drew had an alcohol dependency, and hence the argument concerning prima facie discrimination must fail.

23. The Union submitted that this argument had never been raised during the grievance process, or in the JSI, and the Company was precluded from advancing a new argument, contrary to the CROA Rules. In the alternative, it argued that the facts clearly showed that the grievor was alcohol dependent.

24. The Company submitted in Reply that the issue had been raised in the second last paragraph of the JSI, such that it was not a new argument.

<u>Analysis and Decision</u>

25. For the reasons which follow, I find that the Union objection should be upheld. Even if the argument could be considered, I find that the Union has established that LE Drew suffered from an alcohol dependency.

26. In Step 1 of the grievance, the Union repeatedly invoked an alcohol dependency and the need to accommodate: "Mr. Drew has developed an illness in regards to Alcohol consumption. After this incident, Mr. Drew went to see his doctor and was placed off injured. He then undertook the process to hear from his illness."; "The Union asserts…CP Rail has obligations under the CHRC…and a duty to accommodate"; "the Union respectfully requests that Mr. Drew be returned to service and considered for an accommodation until his medical issues have been resolved". The February 24, 2023 response to the grievance does not address dependency or accommodation.

27. The Step 2 grievance has multiple references to alcohol dependency, steps Mr. Drew is taking to deal with his addiction and the employer's duty to accommodate. The June 26, 2023 response does acknowledge the Union "claim that the Grievor has taken steps to recovery from his alcohol dependency starting on September 25, 2022, after the incident…Respectfully, the Company cannot agree this mitigating factor".

28. Thus, by the end of the grievance process, the Union had repeatedly raised alcohol dependency and the need to accommodate, while the Company either did not respond to these arguments, or did not view them as a mitigating factor. Nowhere, however, does the Company deny an alcohol dependency.

29. In the JSI, the Union repeated its arguments. The Company took the position that any substance abuse problem must be disclosed prior to any incident:

> "The Company's Alcohol and Drug Policy and Procedures are clear that employees must disclose a substance abuse problem before a workplace incident occurs and that disclosure after an event will not prevent an employee from being subject to discipline up to and including dismissal. The Grievor had a responsibility to notify the Company before an incident occurred.

30. The Company maintains no violation of the duty to accommodate occurred as the Grievor never sought medical consultation, nor did he ever request for an accommodation from the Company prior to the incident, in order to substantiate any alleged medical disability and/or substance use disorder."

31. The focus of the Company's argument in the JSI was the failure to disclose prior to an incident. Nowhere does the Company say: "Mr. Drew was impaired while on duty, but he does not have an alcohol dependency or a disability".

32. The CROA rules are clear that arguments not raised during the grievance process or the JSI may not be raised at the Hearing:

> The decision of the arbitrator shall be limited to the disputes or questions contained in the joint statement submitted by the parties or in the separate statement or statements as the case may be, or, where the applicable collective agreement itself defines and restricts the Page 4 of 10 issues, conditions or questions, which may be arbitrated, to such issues, conditions or questions. (see Rule 14).

33. Accordingly, I may not consider the new argument that Mr. Drew does not have an alcohol dependency or a disability.

34. If I am wrong in this, I still find that Mr. Drew clearly had an alcohol dependency at the time of the incident.

35. He admitted drinking heavily on the day before and night before his shift:

> The previous day I had started drinking in the afternoon at approximately 1500 till approximately 22-2230 went to bed and woke up at some point after that to go to the bathroom and I had a couple more drinks and then went back to bed I am unsure what time as I didn't look at a clock at any point. (Tab 5, Q&A 24).

36. During the investigation, he was asked:

> Q28 Mr. Drew do you commonly drink?
> A28. Yes.
>
> Q38 Mr. Drew do you suffer from any condition that the company should be made aware of with the (sic) regards to alcohol?
> A38. I do, a year ago I started having health issues that were related to alcohol I did not believe that there was a problem at the time that would affect work or anything else until this incident occurred and made me realize that the problem was larger than I thought. I am taking the steps now to deal with my problem.
>
> Q49 Do you have anything further you wish to add to this investigation?
> A49. I would like to say that I am sorry for what happened and I am great full that no one was hurt or injured in the incident I am deeply saddened and extremely disappointed and angry with myself for not listening and heading to the words from my friends and loved ones to sooner seek medical help I need. As of Sunday September 25th I started attending daily AA meetings Monday the 26th I was able to get in to see my family Doctor Tuesday the 27th I opened a file with life works Wednesday the 28th I reported to Superintendent Devin Cole that I had a Doctors note and provided it to him I will be attending a meeting today at noon or 1800 depending on when we finish this investigation And as of tomorrow October 6th I will be attending a 4 month Alcohol recovery program at the Bruce Oak Recovery Center.

37. It is noteworthy that the Bruce Oak recovery program is a four month residential program, which the grievor paid for himself.

38. The grievor successfully completed the program, as attested to by the Program Director:

> Kevin Drew entered Bruce Oake on October 6, 2022, and completed treatment on February 3, 2023. During his treatment Kevin consistently demonstrated the willingness and dedication it takes to establish his recovery foundation. Kevin's daily responsibilities, treatment manual work and 12-step meeting requirements were consistently met. Kevin plans on implementing the knowledge and tools learned here to ensure he achieves long-term stable remission. Kevin also demonstrated a consistent responsibility to working on his goals including rebuilding relationships with his family and improving his physical and mental health. (Tab 15).

39. The Lead Counsellor wrote:

> Throughout his treatment, Kevin made significant progress. Each participant at Bruce Oake lays out self specific and self-tailored treatment goals to complete before transitioning home. Kevin completed the following treatment goals: reconnect with family, exercise regularly, improve diet, attend five 12-step meetings per week, find a 12-step sponsor, read recovery-related literature and complete program in full. All of Kevin's daily requirements were met. Kevin completed phase 1 programming February 3rd, 2023. Kevin returned to live with his family and has remained involved in the 12-step program. Kevin gained access to our Alumni program, our outreach counselling team and will remain closely involved with our center. Kevin plans on returning to work while simultaneously sustaining his recovery (Tab 16).

40. Since August 2023, the grievor has been working as a Locomotive Engineer for a different railway, where he has signed and abides by a Relapse Prevention Agreement:

> Total abstinence from all illegal or illicit drugs and other moodaltering substances (which includes alcohol and any potentially addictive medications) for as long as you are working in a Safety Critical Position.
> 2. Compliance with all of the medical monitoring terms through the Structured Relapse Prevention Program (SRPP) which include:
> • Verification of participation in counseling and continuing care meetings as required.
> • Verification of the maintenance of a Sponsor.
> • Verification of participation "in person" Mutual Support Group meetings recommended by [TREATMENT CENTRE NAME], a minimum of [#] meeting per week with supporting documents to be provided to the SRPP Counsellor.
> • The submission of Mutual Support Group meeting attendance sheets from each meeting as required.
> • Contact and participate in face to face meetings with Counsellor as recommended for the duration of this agreement.
> • Notify the Counsellor of any relapse behaviors immediately including the use of any prohibited substances such as illegal or illicit drugs and

> other mood-altering substances (which includes alcohol and any potentially addictive medications.
> 3. Participation in a Biological Substance Testing Program for a twoyear period as per protocol and as detailed in the information included with this Agreement.
> 4. Compliance with the treatment program recommendations made by Bruce Oake Recovery Centre. (Tab 19)

41. It is noteworthy that the grievor has attended some 200 AA meetings since the time of the incident and continues to do so approximately three times per week (Tab 13).

42. An addiction is often documented by a medical diagnosis. However, an addiction or dependency can also be shown by the facts (see CROA 4813). On the basis of the facts set out above, it is clear that the grievor had a heavy drinking problem to the point that it was affecting his health for a year prior to the incident. Since that time, a four month residential treatment program with on-going care and attendance at AA meetings have permitted him to remain sober. He is currently the subject of a Relapse Prevention Program, which requires, amongst other obligations, random testing to confirm sobriety. The facts, both prior to and subsequent to the incident, all confirm that the grievor had an alcohol dependency which is currently under control.

43. I therefore conclude that the first branch of the prima facie test has been made out.

Was there an adverse impact on LE Drew?

44. It would appear to be clear that there was an adverse impact on the grievor, as his employment was terminated.

Was his alcoholism a factor leading to the adverse impact?

45. The Company took the position that the grievor was fired, not for his alcoholism, but for the fact that he had a positive BAC, had confirmed that he had consumed

alcohol on the day and night prior to his tour of duty and had violated Policy HR 203, Procedure HR 203.1 and CROR Rule G (see termination letter Tab 1, company documents).

46. At paragraphs 63-69 of its Brief, the Company relies on Elk Valley and the reasoning accepted by the Tribunal and ultimately the Court, that "Mr. Stewart was fired not because he was addicted, but because he had failed to comply with the terms of the Policy".

47. The Union argues that the interpretation given to Elk Valley by CROA arbitrators has been considerably more nuanced. It points to the extensive review done by Arbitrator Sims of Elk Valley in **CROA 4652**. He notes that much of the decision is about deference to the Tribunal making the initial decision and secondly, that there were three sets of reasons. Arbitrator Sims ultimately concludes:

> This evidence of considerable rehabilitation effort, which is unchallenged, brings the grievor within the range of circumstances previously accepted by CROA arbitrators as justifying a conditional second chance. <u>Nothing in the Elk Valley decision undermines that approach.</u>

48. The Union also argues that Arbitrator Clarke's decision in **CROA 4667** also shows a more nuanced approach to the application of Elk Valley. There, he found that the grievor had an alcohol addiction, that CP had terminated him for a violation of Policy, but also because he had used intoxicants while on duty. He found that the Union had met its burden to prove prima facie discrimination.

49. Here, I have found that the evidence has established that LE Drew was addicted to alcohol. I find that his vast consumption of alcohol on the day and night prior to his tour of duty was related to his illness. This was not an otherwise healthy employee who decided to over-consume at a party. Here, the grievor drank over a period of some 7-8 hours, went to bed, woke up in the night and continued to drink. The problem was of some duration, as identified by the grievor during his investigation. The corrective measures have not been rapid or easy, demonstrating the depth of the problem. I find

that his alcoholism led to his over-consumption and his breach of the various policies prohibiting impairment while on duty. This breach then led to the termination of his employment.

50. Consequently, I find that the Union has met its burden of proof to show a prima facie case of discrimination.

C. If so, has the Company accommodated the grievor to the point of undue hardship?

51. Once the Union has met its burden of proof concerning a prima facie case of discrimination, the burden then shifts to the Company to establish that they have accommodated the grievor to the point of undue hardship (see **CROA 4652 and 4667**).

52. As Arbitrator Clarke noted in **CROA 4667**, a duty to accommodate does not excuse the conduct of the grievor, but does require an examination of accommodation efforts:

> 54. The duty to accommodate does not excuse LE Paisley's conduct. No one argued his actions were acceptable, including the TCRC and LE Paisley himself. LE Paisley's conduct put his safety, that of his colleagues and that of the general public at risk.
>
> 55.But, once *prima facie* discrimination is shown, the jurisprudence requires an arbitrator to evaluate whether an employer could have accommodated an employee suffering from a disability without undue hardship[1].
>
> 57.This Office has frequently dealt with situations like that of LE Paisley. The older cases in this area which CP advanced in its Brief (E-1; CP Brief; Paragraph 35) should be read with circumspection, as suggested in CROA&DR 2716:
>
>> The Arbitrator cannot accept the argument of the Company's representative, nor the reasoning of certain cases decided in the earlier years of this Office, which predate current human rights legislation and arbitral jurisprudence, to the effect that an employee discharged for the possession or consumption of alcohol or non-prescription drugs cannot, thereafter, legitimately

[1] The SCC examined an arbitrator's duty in this regard in McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal, [2007] 1 SCR 161, 2007 SCC 4.

> claim that he or she should be reinstated based on rehabilitation efforts undertaken after the discharge. Both legislation in Canada, such as the Canadian Human Rights Code, and an extensive body of arbitral jurisprudence, clearly recognize that alcoholism and drug addiction are a form of illness, and are to be treated as such. **When, as in the instant case, an employee can demonstrate by clear and compelling evidence that he or she has made substantial strides in gaining control of an addictive condition, even if it be after the culminating and sometimes galvanizing event of discharge, it is incumbent upon a board of arbitration to take full cognizance of that reality in considering whether to exercise the board's statutory discretion to reduce the penalty of discharge.** (Emphasis added)
>
> 58.Given the focus of CP's submissions on discipline, the arbitrator must conclude that undue hardship has not been shown. The appropriate remedy therefore will be comparable to those which this Office has ordered in past cases.

53. As in **CROA 4667**, the focus of the Company's Brief was on discipline, not accommodation. Here, the Company has not led any evidence of efforts to accommodate the grievor, or that such efforts led to undue hardship. Consequently, I too must conclude that the Company has not met its burden to demonstrate accommodation to the point of undue hardship.

D. If not, what is the appropriate remedy in the circumstances?

54. The strong thrust of CROA jurisprudence has been to order reinstatement without compensation, for grievors suffering from a disability, having breached Company non-impairment Policies, but having demonstrated a sincere, concerted and substantial effort to rehabilitate (See **CROA 4054, 4094, 4347, 4375, 4472, 4652, 4667, 4773, AH 725**).

55. CROA jurisprudence which has not ordered reinstatement deals with situations where a disability has not been established (**AH 758**, **CROA 4813**), no sincere, concerted and substantial efforts to rehabilitate have been made (**AH 704**), the grievor has not been honest (**CROA 4798**) or where undue hardship has been established after multiple accommodation efforts (**CROA 3415**).

56. Here, I find that LE Drew was forthright during the investigation and has clearly made every effort to rehabilitate himself, as set out in the facts above. Moreover, a separate Railway employer has already hired him and he is working in a safety critical role as an Engineer. There, he is subject to extensive controls to ensure his on-going sobriety.

57. Accordingly, I find that LE Drew should be reinstated without loss of seniority. There will clearly need to be multiple measures put in place to ensure that he can perform his role safely. The Parties have requested that I provide them with a 60 day period to work out these measures, together with any issues with respect to compensation.

58. I retain jurisdiction to deal with these issues should the Parties not be able to reach an agreement, as well as any issues of interpretation or application of this Award.

November 21, 2023

JAMES CAMERON
ARBITRATOR