CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5107

Heard in Calgary, January 14, 2025

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The appeal of the May 23, 2023 dismissal of Locomotive Engineer Shane Joubert ("the Grievor") from Company Service.

JOINT STATEMENT OF ISSUE:

Following a formal investigation, the Grievor was dismissed from Company service on May 23, 2023 for the reasons as follows:

"Please be advised that you are DISMISSED from Company service, effective immediately.

This Discipline Letter is in connection with your post-incident substance test performed on April 12, 2023 (in connection with 439 violation which you were found culpable and assessed a 30 day suspension) which showed a positive result in your urinalysis for Amphetamine level at 619 ng/ml and Methamphetamine level at 4868 ng/ml; and positive resolution oral fluid for Amphetamine level at 122 ng/ml and Methamphetamine level at 1300 ng/ml which, in a formal investigation you confirmed was a result of your consuming the morning of April 12, 2023.

A violation of:

CP's Alcohol and Drug Policy HR203
CP's Procedure HR 203.1"

Union Position:

60 days pass after the Step 2 appeal submission and the Company failed to provide a response.

On Aprill 12, 2023, Mr. Joubert, assigned to work train 4WNI-12, completed his duties without reporting any signal issues. Later that day, Trainmaster Kosheluk alleged a Rule 439. Violation, leading to Mr. Joubert's post incident drug & alcohol testing. The urine and oral swab tests returned non-negative results for Amphetamines and Methamphetamines, while breathalyzer showed no alcohol presence.

Investigations on April 25 and May 3, 2023, examined the rule 439 violation and drug testing. During the investigation, Mr. Joubert requested accommodation for his disability under the Canadian Human Rights Act, as well as reassignment to a non-safety-critical position, as per

Company Policy 3.0. It was also requested under Policy 3.0 Consequences; Item 3.2 that Mr. Joubert be reassigned to a non-safety-critical position pending the completion of an assessment of the employee's fitness to work.

On May 23, 2023, the Company dismissed Mr. Joubert for the violations of its Alcohol and Drug Policy HR203 and Procedure HR 203.1, citing the positive drug test results.

The Union raises further objection to the investigation appendices providing quantitative values of the testing results being provided to an investigating officer, citing a violation of Mr. Joubert's privacy rights. Additionally, this contravenes the award and supplemental award of Arbitrator Kaplan, as company supervisors are only entitled to restriction information, not medical details. This procedure, deemed illegal, nullifies the discipline itself**.** The Union maintains that the Company lacked "just cause" to perform a post-incident substance test, thereby violating Alcohol and Drug Procedures Policy 203.1, Mr. Joubert's Canadian Human Rights, and the Substance Test Agreement from June 16, 2010.

In the appeal of the alleged CROR Rule 439 violation, the Union maintains that Mr. Joubert was not responsible for the said violation which initiated the drug and alcohol testing in the first place.

The absence of fatalities, injuries, property damage, or near-miss incidents raises questions about the justification for testing as outlined in policy 203.1. Additionally, the Company officers that dealt with Mr. Joubert in person, did not note any suspicion of impairment in any way to justify post-incident testing at the scene. The Company has overlooked the fact that Mr. Joubert was consistently forthright and honest during the investigative process as he readily acknowledged his disability and earnestly sought Company's assistance.

Despite this, the Company chose to ignore this and outright dismissed Mr. Joubert instead of allowing him to get assistance, receive benefits, and be accommodated under a Return-to Work accommodation.

The Union relies on the provisions of the Canadian Human Rights Act, specifically regarding the Company's duty to accommodate employees with recognized disabilities, including substance dependence. The Union contends that the Company failed to meet this duty by not accommodating Mr. Joubert's disability, which is protected under the CHRA.

Furthermore, there was never an investigation leading to work accommodations for Mr. Joubert while he sought assistance for his disability. Despite admitting to being an alcoholic/addict no less than 11 times in the investigation, Mr. Joubert was terminated without any Company efforts to assist him in battling his acknowledged disability. Nowhere in this act is it stipulated that there is a specific timeframe for an employee to disclose their disability before an incident occurs.

Indeed, Mr. Joubert privately and successfully addressed his alcoholism with the help of AA long before this incident, achieving over five years of continuous sobriety in that program. He maintains his April 2018 dry date, remaining free of alcohol. While it is commendable that Mr. Joubert successfully kept his alcoholism at bay, it is clear that his recent addictions were not limited to alcoholism; he also battled drug addiction. The fact that he did not request accommodation with the Company prior to the incident to substantiate this medical disability and/or substance use disorder does not negate the reality that he is afflicted with this disability, and he should now be accommodated.

Since the incident, Mr. Joubert has been drug free and re-employed. The Union relies on all supporting letters including; supporting medical evidence, AA sponsor letter confirming

community activity in AA/NA, letter from his current employer confirming employment in a safety critical role subject to D&A testing.

Mr. Joubert has secured employment since his dismissal, showcasing his hardworking character and fitness to work. To further affirm his drug-free status and employment, his current employer has issued a letter dated December 6, 2023. The Company refers to all CPKC employees as part of a "family," both externally and internally. The Union contends that if this sentiment holds true, then Mr. Joubert, particularly as a proven asset with long service, deserves the chance to demonstrate he has learned from the incident and has reached the necessary turning point. Additionally, Mr. Joubert is willing to agree to measures that safeguard the Company's legitimate interests.

For all of the reasons and submissions set forth in the Union's grievances, which are herein adopted, the Union requests that Mr. Joubert be reinstated to his position of

Locomotive Engineer, and he be compensated all loss of wages with interest, benefits, and without loss of seniority or pensionable service.

The Union further requests Mr. Joubert be accommodated as per Company Policy for Workplace Accommodation, the Canadian Human Rights Act, The Commission's Workplace Accommodation, and the policy requirements under CHRC alcohol and drug testing, as well as any other policy, law, past practice/prejudice, right, or regulation that may apply.

In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

Company Position

The Company's disagrees and denies the Union's request.

The Union suggests the Company has effectively failed to respond to the Step 2 grievance and in doing so allegedly failed to fulfill the requirements of the Collective Agreement. While the Company cannot agree with the Union's allegations pertaining to the grievance response, Consolidated Collective Agreement Article 40.04 is clear in that the remedy for failing to respond is escalation to the next step. Based on the submission of the Union's final step grievance to arbitration, it is also clear the Union acknowledges Article 40.04 and has progressed to the next step of the grievance procedure.

The Union claims the Company has failed to accommodate the Grievor; however, it is well known amongst all CPKC employees, particularly those working in a Safety Critical capacity, that in accordance with the Alcohol and Drug Policy and Procedures, the Grievor ought to have disclosed this information to the Company prior to any incident occurring.

The Company maintains that any allegations of violations against the Grievor's privacy rights, his rights under the CHRA, the collective agreement or otherwise have been unfounded as the Grievor had never sought medical consultation, nor did he ever request for an accommodation relating to substance use with the Company prior to the incident, in order to substantiate any alleged medical disability and/or substance use disorder. Moreover, the Company maintains that there was no indication that the Grievor had a substance issue and in fact the Grievor advised the Company throughout his career that he had no such issues.

The Company maintains the Grievor's culpability as outlined in the disciplinary letter was established through a fair and impartial investigation. The Grievor himself admitted to consuming methamphetamine/amphetamine the morning of his shift where he was involved in the 439

violation and his Post Incident Testing. Discipline was determined following a review of all pertinent factors, including those described by the Union. Moreover, the discipline was properly assessed in keeping with the Company's Hybrid Discipline and Accountability Guidelines. Furthermore, the assessment of discipline is in line with the principles of progressive discipline. The quantum of discipline assessed was in no way excessive nor unjust, given the circumstances.

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

For the Union:
(SGD.) J. Bishop
General Chairperson LE-E

For the Company:
(SGD.) F. Billings
Director Labour Relations

There appeared on behalf of the Company:

D. Zurbuchen	– Manager Labour Relations, Calgary
F. Billings	– Director Labour Relations, Calgary
M. Thomas	– Team Lead, DHS, Calgary

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
J. Bishop	– General Chairperson, LE-E, Severn
T. Tubman	– Local Chairperson, Schreiber
S. Joubert	– Grievor via Zoom

AWARD OF THE ARBITRATOR

Background & Issue

[1] This matter was originally set down to be heard in the November 2024 CROA session. It was held over to the January 2025 CROA Session on agreement of the parties.

[2] Two preliminary issues have been raised by the Union. The first relates to infringement of the Grievor's privacy rights by disclosure of his test results to the Investigating Officer.

[3] The second was a request that this Award be anonymized. Although the Union indicated at the hearing that it would not be pursuing its request to anonymize this Award (since the Grievor was proud of his sobriety), given that this is only one several cases now being heard by this Office where the Union has taken a similar position for anonymization, it remains appropriate to address this issue in this Award.

[4] Although this is an expedited arbitration process, with timelines to produce decisions, both parties filed extensive primary and supplemental submissions, and multiple books of exhibits and authorities in support of their positions. This decision will focus on the evidence and authorities which are relevant for determination of the issues between the parties.

[5] The Grievor is a long-service employee of 22 years. At the time of these events, the Grievor was working as a Locomotive Engineer in Schreiber, in Northern Ontario and had been at that location since 2014.

[6] The Grievor's safety-critical role involves operating multi-ton industrial equipment and responsibility for the transport of dangerous cargo on the Company's rail network. The position of Locomotive Engineer is a safety-critical one in what has been recognized in the jurisprudence as one of the most highly safety-sensitive industries in this country.

[7] The Company Alcohol and Drug Policy (Canada) and Procedures[1] (the "Policy") states:

> 1.3 CPKC recognizes that substance use disorders are treatable illnesses and that early intervention and sustained accountability greatly improves the probability of a lasting recovery. Early identification of problems arising from the use of alcohol and/or drugs, before they progress to a substance use disorder, is in the best interest of all stakeholder.
>
> 1.4 CPKC provides assistance by way of assessment, facilitating treatment, aftercare support and resources for employees who have concerns or are experiencing problems or negative consequences related to their use of alcohol and/or drugs.
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> ….
>
> 2.2 Employees must report fit for work and remain fit for work. All employees must remain free from the adverse effects of alcohol and/or drugs including acute, chronic, hangover and after-effects of such use.
>
> 2.3 Employees are prohibited from being in control of a CPKC vehicle, railway equipment or moving equipment, (whether on or off duty), or any vehicle on CPKC property or roads, while under the adverse effects of alcohol and/or drugs.

[1] HR 203 and HR203.1

> ….
>
> 2.7 All Employees are accountable for their actions and are expected o comply with the Policy and Procedures, including those who may have an alcohol and/or drug use problem.
>
> Employees who have an alcohol and/or drug use problem or an emerging problem are required to seek advice, to follow appropriate treatment and to disclose appropriately within CPKC their issues including any restrictions and/or limitations. This ensure \s that appropriate restrictions and limitations can be implemented before a workplace incident occurs...
>
> 2.8 Employees who voluntarily request assistance with an alcohol and/or drug use problem will not be disciplined or dismissed for requesting assistance. However, this voluntary request and disclosure must be made before a workplace incident occurs, an investigation is initiated, a violation of the Policy and Procedures occurs, and before unsafe or unsatisfactory performance is identified. Subsequent disclosure or requests for assistance after an event (as detailed above) will not prevent an employee from being subject to an investigation(s) and discipline up to and including dismissal.
>
> CPKC Company Officers and Co-workers, under Procedure HR 203.2 are responsible for reporting employees who appear to be unsafe or have satisfactory work performance due to the possible use of alcohol and/or drugs.

[8] Given his position is safety-critical, the Company is federally mandated to review the Grievor's fitness to work periodically.

[9] The Company has a Fitness to Work Medical Policy (HS4000) and Procedures. Certain medical guidelines for safety critical positions are also federally mandated and are contained in the *Railway Medical Guidelines*.

[10] As part of this mandated medical review to determine if the Grievor is "fit for duty", the Grievor must answer certain questions – as must his doctor (with the Grievor attesting that information is true). One of the questions that must be addressed on his medical review is whether the Grievor has ever suffered from a substance use/abuse disorder.

[11] A question of whether he has a substance use/abuse disorder is obviously an important one for the Company to understand in assessing an employee's fitness for this duty.

[12] The Grievor always answered "no" to this question. This answer was always given, despite the Grievor's evidence that he had an alcohol addiction while employed for the Company (between 2013 and 2018), which he successfully fought. His "dry date" was in 2018. He described himself as a "recovering alcoholic".

[13] While he battled that addiction, the Grievor continued to work for the Company, because he also failed to disclose that addiction, even *after* he gained sobriety in 2018.

[14] The Grievor's doctor has treated the Grievor for all of the years he has been an employee of the Company. That continuity is relevant to the issues in this case.

The Events of April 12, 2023

[15] The parties are not in dispute that on April 12, 2023, before the Grievor reported for work, the Grievor took methamphetamines (also described as an "upper pill" or "bean").

[16] He was required to take control of a multi-ton Train on that same day.

[17] The Company alleged that a violation of Rule 439 occurred when the Grievor proceeded through a stop signal while connecting the cars, as required. The Union disputes that there was cause to test the Grievor in this case.

[18] While it has filed a separate grievance regarding the Rule 439 violation, that grievance was not brought forward at the January 2025 session with this grievance.

[19] The Grievor was subject to drug and alcohol testing after that violation, both by urinalysis and oral fluid. In this case, both types of testing were positive for prohibited substances. These test results are not surprising, given the Grievor admitted in the Investigation that he consumed methamphetamines on the same morning he was called to work.

[20] The Grievor tested positive for methamphetamines in his oral fluid at 1300 ng/ml, which is 26x the cut-off levels for that drug in the Company's Alcohol & Drug Policy (Canada); Policy and accompanying Procedures #HR203 and 203.1 (the "Policy). The Grievor's results for amphetamines were 122 ng/ml, which is 2.5x the cut-off levels in the Policy.

[21] While there are concerns raised in the jurisprudence with the accuracy of urinalysis for determining impairing levels - given that it is a waste product test - no such concerns exist for testing via oral fluid. It is well-accepted that oral fluid testing can establish impairment.

[22] During the Investigation after the event, the Union requested an accommodation for the Grievor. It maintained the Grievor had a substance use/abuse disorder.

[23] I am satisfied the positive oral fluid results – and his own evidence of prohibited drug use on the morning he worked - resulted in the Grievor being impaired on April 12, 2023, while operating this multi-ton train.

[24] While the Union has argued in the JSI that the Rule 439 violation did not properly trigger this test, that argument has been overtaken by the Grievor's admission in his Investigation that he suffers from a substance use/abuse disorder and his request for accommodation for that disorder. He also admitted that he ingested methamphetamines before coming to work on April 12, 2023.

[25] The Company did not consider it had an obligation to accommodate the Grievor, given he failed to disclose his substance use disorder to the Company until *after* the event occurred, which was contrary to the requirements under its Policy.

[26] It should be noted at this juncture that the Policy of the Company aligns with that at issue in *Stewart v. Elk Valley Coal Corporation* [2017] 1 S.C.R. 591. In that decision, the employee worked in a mine – a dangerous work site – driving a loader. To ensure its safe operations, the employer implemented a policy that required that employees disclose any dependence or addiction *before* any drug-related incident took place. If they did so, the employer would offer treatment. If an employee failed to disclose that situation and were involved in an incident and tested positive for drugs, they would be terminated. The

employee was involved in an incident, had not disclosed his addiction and was dismissed. His dismissal was upheld on appeal to the Supreme Court of Canada. The Court noted that the policy in that case was "*to ensure safety by encouraging employees with substance abuse disorders to come forward and obtain treatment before their problems compromised safety"* (at para. 1). In that case, the Union argued the employee had been terminated for his addiction, which constituted discrimination under human rights legislation in British Columbia. That is the same argument being made in this case, in the face of a similar policy. More will be said about that case later in this Award.

[27] As in *Stewart v. Elk Valley Coal Corporation,* the Grievor did not make any disclosure to the Company and tested positive for drugs. The Company dismissed the Grievor.

[28] The Union has grieved that discipline. It has argued the Company is required to accommodate the Grievor for his substance use/abuse disorder.

[29] Several issues arise:

a. Has the Union met its burden to displace the Open Court principle resulting in Anonymization?

b. Was the Grievor's privacy violated by disclosure of information to the Investigating Officer?

c. Has the Union met its burden to establish a *prima facie* case of discrimination?

d. If so, does the Company have a duty to accommodate the substance abuse/use disorder of the Grievor? and

e. If not, was the discipline just and reasonable?

f. If not, what discipline should be substituted by an exercise of the Arbitrator's discretion?

[30] For the reasons which follow:

a. The Union has not met its burden to displace the presumption of the Open Court principle. The decision will not be anonymized;

b. As the Grievor consented to the disclosure of his medical information to Company Officials, no infringement of privacy has occurred;

c. As the Union has not met its burden to establish a *prima facie* case of discrimination has occurred, the Company did not have a duty to accommodate the Grievor;

d. The discipline of dismissal was just and reasonable; and

e. The Grievance is dismissed.

Preliminary Issues: Privacy and Anonymization

[31] Prior to moving to consideration of the merits, two preliminary issues must be addressed. The first relates to privacy issues, which the Union argued rendered the dismissal as *void ab initio.*

[32] The Union has argued the Grievor's privacy was violated in the Investigation by disclosure to the Investigating Officer of details of his drug use. It argued this was a violation of the Grievor's privacy and was contrary to a June 2010 agreement between the parties.

[33] It is unnecessary to address the impact of the 2010 agreement to resolve this Grievance. The reach of that agreement is a dispute of a long-standing nature between these parties. For the purposes of this case, the Union's position can be addressed by referring to the documentation which the Grievor signed, agreeing to release the details of his drug results to the Company, as pointed out by the Company in its submissions.

[34] While the Union has argued this authorized release to the Grievor's "supervisors", the agreement is broader than that, and includes an agreement that the results may be released

> …as required to Company representatives for the purposes of investigating Company policy violations and participating legal, regulatory or administrative proceedings or such threatened proceedings including but not limited to grievances, arbitrations, or claims, or other proceedings (p. 25 MRO Report, executed by the Grievor on April 12, 2023; and witnessed)

[35] That agreement is broad enough to cover the release of the Grievor's drug results to the Investigating Officer.

[36] It cannot therefore be maintained the Grievor's privacy rights were invaded when he himself agreed to release drug results to the Company.

[37] The second issue relates to anonymization. While this is an expedited process, with limited deadlines imposed on Arbitrators to write decisions, and where decisions have historically been fairly short and concise, the time has come to address this issue in more detail, given the Union's continuing position.

[38] As recognized by the Supreme Court of Canada, there is a presumption that judicial proceedings are "open"; which includes decisions which contain factual details which can be personal to an individual. This is known as the "open court" principle.

[39] A party requesting anonymization bears the burden to establish why that presumption should be displaced. In this case, that party is the Union.

[40] It was not suggested by either party that quasi-judicial proceedings would not be subject to the same presumption and in fact there are often observers at CROA hearings; and CROA decisions are published; both on a website maintained by the Office; and by reporting services, such as CanLII.

[41] While not addressing the *Sherman Estate* test set out below, in 2019 the Arbitrator in **AH725** noted the following regarding a request to anonymize:

> …labour arbitration is not a private system of dispute resolution but rather one that is statutorily mandated under the *Canada Labour Code* and an essential component of the collective agreement between the parties. In the absence of an agreement between the parties, and despite the disclosure of the health-related history of the grievor, I do not find a compelling basis to deviate from the

> normal practice of this office of including the Grievor's name in this Award (at p. 6).

[42] In **CROA 5021**, which is a recent decision, anonymization occurred, but was not objected to by the Company.

[43] In *Sherman Estate v. Donovan et al.* [2021] 2 S.C.R. 75, the Supreme Court of Canada reviewed the existing jurisprudence and developed the test to be applied. There are three parts to the test that must be met by the parting seeking to rebut the presumption of openness:

> a. "Court openness poses a serious risk to an important public interest;
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> b. The order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
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> c. As a matter of proportionality, the benefits of the order outweigh its negative effects"
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> (at para. 38);

[44] The Union argued that the Grievor's name should be anonymized, as "*nothing about the nature of this dispute militates in favour of publishing the Grievor's name*" and that there is a "*clear and compelling privacy interest that warrants anonymization*" (at para. 33).

[45] While the Union did not present any argument on this issue in its submissions in Chief, its Reply argued that the *Sherman Estate* test had been met, as substance use disorders related to a "stigmatized medical condition", which could give rise to a "serious risk" if the Grievor's identity were disclosed, as health conditions which were previously private would be disclosed. It argued that anonymization "minimally limits" the open court principle, while offering to the Grievor necessary protection and serving the public interest regarding the protection of privacy and preservation of dignity, as well as the prevention of "*irreparable harm*" with "*little or no effect*".

[46] For its part, the Company argued the *Sherman Estate* test had not been met in this case. It argued that the Grievor's use of methamphetamines/amphetamines does not satisfy the first part of the test. It argued that open court proceedings could cause "*discomfort and embarrassment*" but that that "*intrusions on privacy are generally seen as of insufficient importance to overcome the presumption of openness*" (at para. 56, *Sherman Estate*). It argued there has not been any physical harm advanced by the Union in this case. It also argued the Union failed to meet the second step of this test, as there were alternative measures to "*prevent any serious risk to the public interest*" (t para. 33; Supplemental Submissions), should the Arbitrator find that appropriate. It argued this satisfied the third step requiring proportionality. It further argued that "*great deference*" should be given to the open court principle and that the Grievor's name should not be redacted.

Analysis: Anonymization

[47] **CROA 5105, CROA 5108; CROA 5109** and **CROA 4877-A** are all decisions in which CROA Arbitrators have recently addressed the test for anonymization of CROA Awards. Each case is dependent on its own factual circumstances.

[48] As recognized by this Arbitrator in **CROA 5105**, it is a "starting point" that decision-makers should only refer to those facts which are required to resolve a particular dispute, given that that there is a "*responsibility that accompanies knowledge of sensitive medical information*" (at para. 12). It was also recognized by this Arbitrator in **CROA 5109** that it is "*good practice*" for a quasi-judicial maker such as a labour arbitrator to "*limit disclosure of factual material evidence in an Award to only that required to address the issues presented in a particular case, whether a request for anonymization has been made or not*" (at para. 11).

[49] While **CROA 5109** involved a Grievor who had used "magic mushrooms" – an illegal substance – there was no evidence of a substance use/abuse disorder in that case. It was held that the Award could be anonymized without reference to the Grievor's specific medical condition (which he had been "self treating" with use of this illegal drug), which was a reasonable alternative to anonymization. However, it was also determined in that

case that there was no public interest for protecting the Grievor's choice to "self treat" his medical condition with illegal substances. That same reasoning was stated to be applicable to an employee's decision to recreationally use other prohibited drugs.

[50] However, that case did not address the situation where the Grievor had been diagnosed with a substance use/abuse disorder relating to drug use, which is itself a recognized medical condition, or where the existence and knowledge about that condition was central to resolving the dispute.

[51] To understand the findings in *Sherman Estate,* it is necessary to consider the reasoning in some detail. In *Sherman* Estate, the Court began its decision by noting the importance of the Open Court principle:

> This Court has been resolute in recognizing that the open court principle is protected by the constitutionally-entrenched right of freedom of expression and, as such, it represents a central feature of a liberal democracy. As a general rule, the public can attend hearings and consult court files and the press – the eyes and ears of the public – is left free to inquire and comment on the workings of the courts, all of which helps make the justice system fair and accountable.
>
> Accordingly, there is a strong presumption in favour of open courts. It is understood that this allows for public scrutiny which can be the source of inconvenience and even embarrassment to those who feel that their engagement in the justice system brings intrusion into their private lives. But this discomfort is not, as a general matter, enough to overturn the strong presumption that the public can attend hearings and that court files can be consulted and reported upon by the free press.
>
> Notwithstanding this presumption, exceptional circumstances do arise where competing interests justify a restriction on the open court principle. …. the applicant must demonstrate, as a threshold requirement, that openness presents a serious risk to a competing interest of public importance. That this requirement is considered a high bar serves to maintain the strong presumption of open courts….
>
> The applicant must still show that the order is necessary to prevent the risk and that, as a matter of proportionality, the benefits of that order restricting openness outweigh its negative effects (at paras. 1-3; emphasis added; see also para. 37).

[52] The Court considered that the appeal being considered offered

> …an occasion to decide whether privacy can amount to a public interest in the open court jurisprudence and, if so, whether openness puts privacy at serious risk here so as to justify the kind of orders sought by the appellants (at para. 6, emphasis added).

[53] The Court recognized that the Open Court principle could lead to "*dissemination of highly sensitive personal information that would result not just in discomfort or embarrassment, but in an affront to the affected person's dignity*." However, it held that where *that* "*narrower dimension of privacy*" was shown to be at "*serious risk*", an exception to the open court principle could be justified (at para. 7).

[54] The Court ultimately did not consider that "*narrower dimension of privacy*" was evident in the request of the estate of the Shermans. The trustees had sought to keep probate details private, in the face of intense media scrutiny into the double homicide of these prominent citizens, which interest the trustees considered '*morbid*'. The estate sought to stem further intrusions into the privacy of the Sherman family.

[55] In considering what constitutes this "*narrower dimension of privacy*", the Court recognized that limits on court openness had only been granted "*sparingly*" and with an "*eye to preserving the strong presumption that justice should proceed in public view*" (at para. 30). The Court considered that the "*narrower dimension*" it was willing to protect did not stem from the "*fact"* of dissemination but the "*impact*". It did not stem from whether the information was "*personal*", but "*whether because of its highly sensitive character, its dissemination would occasion an affront to their dignity that society as a whole has a stake in protecting*" (at para. 33)`. The Court described this as a "*high bar – higher and more precise than the sweeping privacy interests relied upon here by the Trustees*" (at para. 34):

> This public interest will only be seriously at risk where the information in question strikes at what is sometimes said to the core identity of the individual concerned; information so sensitive that its dissemination could be an affront to dignity that the public would not tolerate, even in service of open proceedings" (at para. 34).

[56] The Court further explained that an applicant cannot just "*state*" that their "*dignity is compromised any more than they could by an unsubstantiated claim that their physical integrity is endangered*", but would have to

> …show that the information in the court file is sufficiently sensitive such that it can be said to strike at the biographical core of the individual and, in the broader circumstances, that there is a serious risk that, without an exceptional order, the affected individual will suffer an affront to their dignity (at para. 35).

[57] When considering the "*scope*" of the public interests to be protected, the Court noted that this can be done in the abstract "*at the level of general principles that extend beyond the parties to the particular dispute"*; but whether that is a "*serious risk*" is a "*fact-based finding…made in context*" by the decision-maker (at para. 42).

[58] The Court noted that even where there is a *"serious risk*", that interest would have to have the "*requisite important public character as a matter of general principle"*. The Court disagreed that an "*unbounded interest in privacy qualifies as an important public interest under the test*…" (at para. 46). The Court noted that

> …personal concerns of a litigant, including concerns about the very real emotional distress and embarrassment that can be occasioned to litigants when justice is done in public, will not, standing alone, satisfy the necessity branch of the test (at para. 47; quoting from other judgments of the Court)

[59] The Court did recognize that "*the protection of privacy is, in a variety of settings, in the interests of society as a whole*" (at para. 48) but also noted that the "*public importance of privacy cannot be transposed to open courts without adaptatio*n" (at para. 49). It noted that "*caution is required for deploying this concept* [protection of privacy*] in the test for discretionary limits on court openness*" (at para. 56).

[60] The Court went on in that same paragraph to state:

> It is a matter of settled law that open court proceedings by their nature can be a source of discomfort and embarrassment and these

> intrusions on privacy are generally seen as of insufficient importance to overcome the presumption of openness….the requirement to show a serious risk to an important interests is a key threshold component of the analysis that must be preserved in order to protect the open court principle. *The recognition of a public interest in privacy could threaten the strong presumption of openness if privacy is cast too broadly without a view to its public character.* (emphasis added)
>
> And
>
> …the open court principle brings necessary limits to the right to privacy. While individuals may have an expectation that information about them will not be revealed in judicial proceedings, the open court principle stands presumptively in opposition to that expectation…the open court principle presumes that this limit on the right to privacy is justified. ..Saying that any impact on individual privacy is sufficient to establish a serious risk to an important public interests for the purposes of the test for discretionary limits on court openness could render this initial requirement moot…Further, recognizing an important interest in privacy generally could prove to be too open ended and difficult to apply.
>
> (at paras. 58, 59, 60; emphasis added).

[61] The Court further held that "*in order to pass the first stage of the analysis one must not simply invoke an important interest, but must also overcome the presumption of openness by showing a serious risk to this interest*" (at para. 62; emphasis added). It further held:

> It is never sufficient to plead a recognized important public interest on its own. The demonstration of a serious risk to this interest is still required. What is important is that the interest be accurately defined to capture only those aspects of privacy that engage legitimate public objectives such that showing a serious risk to that interest remains a high bar. In this way, courts can effectively maintain the guarantee of presumptive openness…an important public interest concerned with the protection of dignity should be understood to be seriously at risk only in limited cases (at para. 62 and 63)
>
> Nothing here displaces the principle that covertness in court proceedings must be exceptional. Neither the sensibilities of individuals nor the fact that openness is disadvantageous,

> embarrassing or distressing to certain individuals will generally on their own warrant interference with court openness
>
> …
>
> These principles do not preclude recognizing the public character of a privacy interest as important when it is related to the protection of dignity. They merely require that a serious risk be shown to exist in respect of this interest in order to justify, exceptionally, a limit on openness, as is the case with any important public interest… (at para. 63; emphasis added).

[62] The Court also noted that "*shame*" is "*not a sufficient reason to order those proceedings be held in camera…"* (at para. 63). The Court focused on issues of "dignity", which it noted would be "*rarely in play*", as it would be seriously at risk "*only where the sensitivity of the information strikes at the subject's more intimate self*" (at para. 74). The details revealed must be "*intimate or personal details about an individual – what this Court has described as the "biographical core*" (at para. 75).

[63] Turning to the facts in this case, the Union starts with a "high bar" in establishing that the Open Court principle should be displaced. The starting point is that disclosure is presumptive.

[64] While the Union argued that a "*private health condition*" could be exposed if this Award is not anonymized, that a matter is "*private"* does not protect from disclosure. As noted by the Court, it is "*settled law*" that private matters become public, which can cause discomfort and embarrassment to litigants.

[65] Even if information is sufficiently sensitive to qualify under the first question of the test, there must also be a "*serious risk*" which results from that disclosure. The Court clearly noted that whether this exists is a fact-based inquiry made in context; and was "*fact specific*" (at para. 76). The burden lands on the Union as the party seeking anonymization to establish that risk.

[66] The only risk outlined by the Union is what it calls the "*stigmatism*" associated with substance abuse disorders. However, stating a concern does not equate to establishing factually that there is a "*serious risk"* from disclosure. The Union offered no substance

behind its stated concern of stigmatism of this disorder, such as studies reflecting societal attitudes, or some other basis on which its statement could rest. While there are over 900 decisions that have considered the *Sherman Estate* test, the Union also did not offer any jurisprudence to support its argument against disclosure for a substance use/abuse disorder. A decision-maker is not in a position to '*assume*' that a stigmatism exists in society or to imply a risk without an evidentiary basis. In fact, the evidence filed in this case falls against such a stigmatism. The Grievor was re-employed shortly after his dismissal (within 6 weeks); his current employer has hired him into a safety-critical role; is aware of these proceedings and in fact wrote a letter of commendation on his behalf, which was filed in to evidence.

[67] That does not demonstrate a stigmatism against the Grievor.

[68] Therefore, even if it were accepted that the protection of the Grievor's medical information in this case qualified as an important public interest which strikes at his "*biographical core*" – and that need not be determined in this case - the Union's argument falters at establishing there would be a "*serious risk*" to the Grievor from disclosure, which is also a threshold issue under the first aspect of the test.

[69] A further issue with the Union's position if that - if the Union were correct that issues of substance abuse disorder should be protected by anonymization - that would not result in there being only "limited cases" protected from the Open Court principle, as anticipated by the Supreme Court in *Sherman Estate*. As noted in the last excerpt quoted, the Supreme Court considers that evidence of a "*serious risk"* to the "*protection of dignity*" would only occur in "*limited cases*". If the Union were correct, anonymization would not be "exceptional".

[70] I therefore disagree that "*nothing about the nature of this dispute militates in favour of publishing the Grievor's name*", as argued by the Union, given the existence and the resolute nature of the protection given to the Court Openness principle, as recognized by our highest Court; its recognition that private matters become public during litigation; and its requirement of the establishment of a "serious risk" from disclosure, even if a public interest to protect is found, which has not been established in this case.

[71] As the “key” and threshold question has not been established by the Union in this case, the first threshold question of the *Sherman Estate* test has not been met: The request for anonymization on these facts is denied.

Analysis of the Merits

[72] The arguments of the parties are as set out in the JSI and also will be addressed as appropriate in the analysis, below.

[73] It is not disputed the Company’s Policy required that the Grievor disclose his substance use/abuse disorder *prior to* an incident occurring, and that if he did not do so, he could be subject to dismissal. This is the same type of Policy which was at issue in *Stewart v. Elk Valley Coal Corporation*. The Company would not be alone in developing such a Policy after that decision was released.

[74] The Union has argued that the Company did not discipline the Grievor for failure to disclose his substance use/abuse disorder, but for his positive test results, and that failure to disclose cannot be considered as it is a “new” argument. The Company has argued it noted the Grievor had breached its Policy in the Form 104 and the JSI by his misconduct, which includes a requirement that a Grievor disclose his substance use/abuse disorder *prior* to an event. It argued the Grievor breached that requirement and that the Union has not established its duty to accommodate has arisen as it argued, as it failed to meet its burden and establish *prima facie* discrimination had occurred.

[75] In this case, the Union has taken the position the Company is required to accommodate the Grievor, as required by human rights legislation, given the Grievor suffers from a substance use/abuse disorder. The Company has argued it is not required to accommodate the Grievor in these circumstances, which include a lack of a connection between the Grievor’s inability to follow its Policy to disclose his disorder *before* an incident occurs, as was required. It argued the Union has failed to meet its burden to establish a *prima facie* case of discrimination has occurred. If the Company is correct, the analysis will move to a disciplinary one, under the well-accepted *Wm. Scott* framework.

The Company maintained that was the appropriate framework, given its belief the Union could not establish *prima facie* discrimination.

[76] To address the Union's argument, an analysis must be undertaken to determine if the duty to accommodate was triggered and; if so; whether it was met. The Union has based its arguments on the fact that the Company *did* have such a duty. To assess if a duty to accommodate has been triggered, it must first be assessed whether the Union has established a *prima facie* case of discrimination. The Union carries that initial burden. If that burden is *not* met, the duty to accommodate is not triggered and the Grievor's misconduct would then be assessed on a disciplinary basis. If the initial burden *is* met, then the duty to accommodate is triggered and the burden shifts to the Company to demonstrate it has accommodated the Grievor to the point of undue hardship.

[77] The Union cannot maintain that the Company is required to accommodate the Grievor, without the Union also establishing that *prima facie* discrimination has occurred. It is not a 'new' issue for the Company to defend against the Union's claims by arguing the Union has not met that burden, given the wording of its Policy.

[78] The Union relied on **CROA 4652**, where the Grievor was reinstated and given a "second chance". However, the facts in that case are distinguishable. In **CROA 4652**, the Grievor had not been diagnosed with a substance use/abuse disorder prior to the incident at issue and was only referred to AA meetings after the incident had occurred, which was when he also had reached out to his doctor and to the EFAP program.

[79] Termination in that case occurred less than two months after the release of the Supreme Court of Canada's decision in *Stewart v. Elk Valley Coal Corporation*. The majority decision of the Supreme Court made it clear that the assessment of *prima facie* discrimination in the face of a Policy requiring disclosure of an addiction is not based on whether the Grievor's disability was a factor in his termination decision, but on whether it was a factor in the Grievor's inability to follow the Company's Policy, which in that case – as in *Stewart v. Elk Valley Coal Corporation* – required disclosure *before* an incident occurred. The majority in *Stewart v. Elk Valley Coal Corporation* stated:

> **It cannot be assumed that Mr. Stewart's addiction diminished his ability to comply with the terms of the Policy.** *In some cases,*

> *a person with an addiction may be fully capable of complying with workplace rules. In others, the addiction may effectively deprive a person of the capacity to comply, and the breach of the rule will be inextricably connected with the addiction. Many cases may exist somewhere between these two extremes.* **Whether a protected characteristic is a factor in the adverse impact will depend on the facts and must be assessed on a case-by-case- basis**. The connection between an addiction and adverse treatment cannot be assumed and **must be based on evidence.**
>
> It was the Tribunal's task to determine whether the reason for the termination of employment or the impact of the Policy on Mr. Stewart established a *prima facie* case of discrimination. There is ample evidence to support the Tribunal's conclusion that there was no *prima facie* case and, therefore, no basis to overturn it…
>
> (at para. 39, 40; emphasis added)

[80] While the Union has argued that denial occurs "in every case" of a substance use/abuse disorder, I cannot agree, given the above analysis by the Supreme Court of that issue. As noted by that Court, it cannot be "*assumed*" from the fact of an addiction that the addiction also *prevented* an individual from complying with a workplace rules – such as that requiring disclosure - or that the breach of a rule was connected to that addiction. While it *can* be the case that "denial" can impact the ability of an addicted individual to comply with a Policy to disclose their addiction, it also can be the case that the symptom of "denial" was not acting. That Court determined that is a question of "fact" to be determined in each case.

[81] According to the majority's decision in *Stewart v. Elk Valley Coal Corporation,* whether the disability was a "factor" in the termination does not result simply from the fact the Grievor has a disability with drugs or alcohol and then tested positive for drugs and alcohol and was terminated. That is not the "adverse impact" that must be considered in a *prima facie* analysis when a policy exists requiring disclosure. A more in-depth analysis is required. In such cases, the *issue* is whether the employee's disability *prevented an employee from complying with the Policy which required disclosure as one of its elements, and thus explained the breach.*

[82] While it can be the case that individuals often must hit "rock bottom" by losing their employment before they recognize they *have* a disorder and therefore disclose it – and take steps to treat it, it can also be the case that denial of their disorder does not explain their breach.

[83] The Supreme Court of Canada's analysis in *Stewart v. Elk Valley Coal Corporation* is binding on an Arbitrator.

Application to the Facts

[84] Given that in this case the Company has a Policy on disclosure which has been properly placed into issue; and given the Grievor is seeking to be accommodated, the Union must first establish that a *prima facie* case of discrimination in fact occurred in this case. To do so, the Union must establish the Grievor was unable *due to his disability* to disclose his substance use/abuse disorder, as that Policy required. Simply establishing the Grievor *had* a substance use/abuse disorder is insufficient to meet that burden. As noted above, if a *prima facie* case is not first established, no duty to accommodate is triggered, and the matter would proceed on a disciplinary analysis.[2]

[85] For the following reasons, the Company has persuaded me that the Union has not met its burden to establish a *prima facie* case of discrimination on these facts.

[86] The duty of the Company to accommodate the Grievor's disorder did not, therefore, arise.

[87] As no duty to accommodate arises, the Grievor's impairment at work stands to be assessed on a disciplinary analysis.

[88] The Union has valiantly argued the Company is required to accommodate the Grievor, in a non-safety critical position and subject to conditions, as is the case in the jurisprudence. Its effort is described as "valiant" as in this case, the facts are strongly stacked against it.

[2] For a detailed analysis of *prima facie* discrimination, see **CROA 4667** paragraph 31 and following

[89] The medical evidence filed by the Union (dated July 29, 2024) indicates the Grievor had a diagnosed "*substance use disorder*". That evidence stated he had a "*noted diagnosis of substance dependence documented in his clinical chart going back to August 25, 2020*" and "*opioids dependency documented in his chart, going back to August 23, 2019*". The fact of the Grievor's disorder is not an issue. However, as noted above, stating that fact and that the Grievor was terminated after a positive substance test, does not resolve the question of whether the Union has established *prima facie* discrimination.

[90] The Grievor gave the following evidence in his Investigative Interview:

> a. When asked in Q/A 31 why he would test positive for amphetamine-methamphetamine, the Grievor responded "*I'm an addict*";
>
> b. The Union then added to that question that the Grievor "*had been a member of AA for many years and having contacted his doctor regarding addictions in the past has a disease*... "and requested accommodation;
>
> c. At Q/A 38, the Grievor disclosed for the first time that he takes "*suboxone*". According to the medical information, that was prescribed by his doctor *instead* of opiates after his knee surgery, to prevent a relapse;
>
> d. The Grievor's use of "*suboxone*" was not disclosed to the Company. Had it been disclosed; the Company's medical personnel may well have asked further questions;
>
> **e.** At Q/A 49 when asked about the Company's Policy regarding the need for disclosure, the Grievor stated "…*I am a recover* [sic] *alcoholic and obviously I have addiction issues* ***and I understand very well. With someone that attends AA and NA regularly but I do not agree with that*****;**(emphasis added)
>
> f. At Q/A 50 when asked if he requested assistance from the EFAP prior to the incident, the Grievor stated "*As an alcoholic addict I convinced myself that I was taking the proper steps*";
>
> g. At Q/A 53 when asked if he understood his positive oral test suggests he was using drugs while on duty, the Grievor stated "*Yes, and I have acknowledged that I have taken these drugs and have been open about it as I also struggle with addiction*"
>
> h. At Q/A 57, when asked if he ever reported for duty under the influence of a prohibited substance, the Grievor answered "*I am an alcoholic and an addict";*

> i. At Q/A 66, when asked if he had anything to add, the Grievor stated "*I want it to be known that I accept full responsibility. I have been sober for 5 years and believe my work record demonstrates as such. My sobriety is the #1 thing in my life and without it I have nothing. As of recently I have become overconfident and complacent in treating my sobriety as such and have substituted one vice for another…I recognize what I have done, unfortunately it took this incident to do that…*"

[91] After the Grievor's knee surgery, his doctor prescribed "suboxone" to him, a drug used *instead* of opioids, to prevent a "relapse".

[92] The information which would cause a concern about a relapse had to have come from the Grievor.

[93] To recognize he had "relapsed" I am satisfied the Grievor would have had to recognize he had a substance use/abuse disorder, and in fact that disorder was noted in his medical file. I am satisfied the Grievor was aware he had a substance use/disorder "*going back to August 25, 2020*", including an opioid dependency "*going back to August 25, 2020*", at least as early as 2022, before this incident. As of 2022, the Grievor and his doctor were both aware of his addiction and had been addressing his addiction by avoiding the use of opioids after his knee surgery.

[94] The evidence demonstrated that the Grievor, the Grievor's doctor – and even the Local Chairman of the Union – were well aware the Grievor struggled with addiction "*for years*" and that neither the Grievor nor his doctor properly filled out medical information which would have disclosed that addiction to the Company.

[95] Like his drug addiction, the Grievor's alcohol addiction was also never disclosed to the Company, even though he described himself as a "recovering" alcoholic, who had been sober "five years". *Even after gaining that sobriety*, the Grievor failed to disclose his addiction to the Company. The Grievor's "dry date" was five years earlier in 2018.

[96] Prior to this incident occurring in April of 2023, the Grievor was attending AA/NA meetings for his drug use (the meetings were combined in his area); and the Union argued he had in fact "relapsed" a year before, in 2022. Upon review of the evidence, I am satisfied the Grievor had awareness that he was both an alcohol addict (recovering and

sober for 5 years and attending AA meetings) and also a drug addict *at the time of this incident,* and that he was actively seeking treatment for that addiction. The Grievor was not in "denial" of that addiction.

[97] It is also important evidence that when the Grievor was confronted at his Investigation with the Company's Policy requiring disclosure and asked about that requirement, he stated he "*did not agree with that*" requirement; he did not "*agree"* that he had disclose his addictions to the Company as per the Policy.

[98] The Grievor made no apologies for that lack of disclosure in his investigation. He had no explanation for it in his Interview other than that he did not "*agree*" with that Policy, yet he confirmed he was "an addict". His evidence was he was making adequate efforts against it on his own. While the Local Chairman indicated the Grievor never brought his addiction "*to work*", that is obviously not the case. On April 12, 2023, the Grievor took methamphetamines prior to reporting for work.

[99] I am satisfied the Grievor consciously and with capacity chose not to disclose either his alcohol or his drug addiction to the Company, *even after he gained sobriety* for his alcohol addiction back in 2018.

[100] The evidence does not therefore disclose an individual who "hit rock bottom" when he lost his employment; or who then sought treatment for an addiction that was diagnosed. Rather, on the facts in this case, the Grievor had *already* reached that point and was fighting his addiction with the help of his doctor at the time this incident occurred.

[101] This is not a case where the Grievor was unable to understand he *had* an addiction in the first place and so could not disclose that addiction to the Company; this is not a case where "denial" is a symptom of the substance use/abuse disorder, which denial prevented the Grievor from complying with the Company's Policy to disclose his addiction *before* an incident occurred. Rather, this is a case where the Grievor – with knowledge he was an addict and while actively seeking treatment of that addiction – made a choice to fight his addiction himself, on his own terms – as he had done with his alcohol addiction – instead of disclosing that addiction to the Company *before* an incident occurred, as he was required to do. This is a case where the Grievor – and his doctor and (to a lesser extent) his Local Chairman were all aware of the Grievor's addiction; where the Grievor

– with the assistance of his doctor – were taking steps to fight his known addictions; where the Grievor was being prescribed drugs to avoid a "relapse" of that addiction, also *before* the incident occurred.

[102] On the facts of this case, the Grievor simply did not agree with the Company's requirement that he should be required to disclose any addiction to the Company. That belief is demonstrated not just by his own statement in the Investigative interview, but by the fact that even after he gained sobriety for his alcohol addiction, the Grievor did not disclose his history of addiction to the Company. That same belief was maintained through his drug addiction. From a review of the evidence, I am satisfied it was the Grievor's intention to keep his addictions private and so be able to continue in his safety-critical work and to earn the corresponding income. He took a chance he would not be caught out by his addictive behaviour and that he could continue to work in his safety-critical role while he sought treatment from his substance use/abuse disorder, through his own efforts.

[103] There was no evidence offered that the Grievor's desire to keep his medical information private and his disagreement with the Company's Policy was connected to his disability.

[104] The Grievor's failure be upfront about his addiction was then compounded by his failure to truthfully answer the Company's questions relating to his health on his medical reviews. As a safety-critical employee – and given his long service - the Grievor has been subject to multiple medical reviews to determine his fitness to work in this industry. As noted above, those reviews are federally mandated.

[105] When the Grievor was asked on his repeated fitness for duty assessments whether he had ever suffered from a substance use disorder, he answered "no".

[106] The Grievor was no stranger to addiction. The evidence from his medical caregivers was that the Grievor had been suffering from addiction for most of his life. He was a "recovering alcoholic" as of 2018, which disease was also fought while he maintained his employment, as it was never disclosed to the Company, even though it occurred while the Grievor was employed. Despite gaining sobriety and insight about that disease, it was never disclosed to the Company.

[107] The Grievor had capacity to understand the answer of “no” was false. The Grievor was not only *aware* he had a substance use/abuse disorder relating to drugs *prior to* this incident and that he was an addict, but he was also actively seeking treatment for that addiction before this incident occurred. The Grievor was not truthful about his current or past addictions in the multiple medical reviews performed by the Company. The same pattern of behaviour can be seen in his drug addiction. Disclosure would have resulted in the Grievor’s removal from his safety-critical role while he battled his addiction.

[108] There was no evidence his failure to advise the Company of his addictions as required by the Policy; or his failure to be truthful in his medical reviews was connected to the impact of his disability or to a denial that he suffered from a disability. He had that awareness and capacity to answer truthfully, but chose not to do so.

[109] When viewed wholistically and comprehensively, the evidence supports – and I so find – that the Grievor made a conscious decision *not* to follow the Company’s disclosure requirement and instead to rely on his own judgment and his own efforts to treat his addiction(s), which were known to him. I am satisfied the Grievor had full awareness he had a disability and was not impaired by that disability from disclosing that information to the Company.

[110] I am further satisfied the Grievor did not disclose that disability to the Company as required, because he simply did not “agree” with any requirement to disclose his information to the company, which position was maintained at his Investigation. He maintained – even after recovering from his alcoholism – that he did not have to disclose his addictions to the Company.

[111] There is a deliberateness about the Grievor’s choices that is often not seen in these types of disputes. In making his choice not to disclose and continue working in his safety-critical role throughout both of his addictions, the Grievor created significant risk for the Company; for his fellow employees; and for the public.

[112] The facts in this case are distinguishable from the jurisprudence – relied upon by the Union – which questions the application of *Stewart v. Elk Valley Coal* in circumstances where denial is evident on the facts, such as *Unifor Local 900 and Imperial Oil – Drug and Alcohol Policy Grievance* (unreported); and *Legal Aid Lawyers Assn v. Manitoba*

(Fawcett Grievance) [2009] M.G.A.D. No 6; and **CROA 4667**, where the grievor did not have insight that he was an alcoholic until *after* the event.

[113] Further, several of the Union's authorities were decided prior to the Supreme Court of Canada's decision in *Stewart v. Elk Valley Coal* in 2017 and the development of policies which sought to align with that decision, by requiring disclosure before an incident: **CROA 4347; 4375**; **4297**; **4472; 4095; 4059; 4143; 3415; 3355; 2716**

[114] Those cases decided *after Stewart v. Elk Valley Coal Corporation* and filed by the Union have facts which are distinguishable. **CROA 4667** was already referenced. A further example is **AH725**, where the long-service Grievor had "*been managed for almost 20 years by CP's OHS professionals*" for struggles with mental health issues, ultimately becoming addicted to cocaine*, to the Company's knowledge*. At one point he entered into a treatment program and signed a "*Contract for Successful Treatment*" prepared by the Company's EFAP and OHS personnel and was also removed from service when he tested positive. That is the type of monitoring this Grievor denied to the Company when he failed to disclose his disorder.

[115] In **AH725**, the Arbitrator found *prima facie* discrimination had been found. As disclosure had occurred in that case, those facts are distinguishable.

[116] In **CROA 4473**, the Grievor violated a last chance agreement. That is also distinguishable from these facts in terms of establishing *prima facie* discrimination. It was not clear in the Award what the details were when that last change agreement was offered to him.

[117] In **CROA 4873**, the Grievor did not undertake a process to "*hear from his illness*" until *after* the incident occurred; he attended 200 AA meetings after that point. That is also distinguishable from these facts.

[118] In **CROA 5021**, the Grievor had repeatedly denied he had a drug problem *"to both his own doctors and to the Company*" which again is not the facts for this Grievor. The Arbitrator in that case found that denial was established as a nexus or connection to the Grievor's disability. That connection has not been found in this case.

[119] While I have no doubt the Grievor has *now* realized what he lost by his actions and has fought his addiction with apparent success in a short six-week period of time - as demonstrated by the letter from his current employer - there is no evidence in this case that his addiction impacted his ability to follow the Company's Policy to disclose his disability *before* an incident occurred, as was required. In this case, the Grievor was not in denial regarding his disability and had been seeking treatment.

[120] To summarize, no nexus has been found between the Grievor's disability and his inability to disclose that disability to the Company *before* an incident occurred. I am therefore satisfied that this is the type of case to which the reasoning in *Stewart v. Elk Valley Coal Corporation* would properly apply. The Grievor had an awareness of his disability at the time the incident occurred and was not in denial but was actively seeking treatment. The Grievor made a conscious decision with that knowledge to address his addiction without advising the Company he suffered from that addiction. He failed to disclose that addiction *before* an incident occurred as required by the Company's Policy because he did not "agree" with the Company's requirements. Instead, he chose to keep working for the Company in a safety-critical role and fight his known addiction with his own efforts (which he acknowledged were not as successful as when he fought his alcohol addiction years earlier). The Grievor also consciously and deliberately stated on multiple medical forms that he had never had a substance use/abuse disorder, when he was aware that was not true. Certain of those representations were made in 2022 after knee surgery, at a time when he was being treated by his doctor with a particular medication to "prevent a ***relapse***" of that disorder, which he also failed to disclose. In this case, there was no evidence that choice had a connection to his disability. As in *Stewart Valley Coal,* the Grievor had capacity to comply with the terms of the Policy and chose not to.

[121] Without a connection between the Grievor's disability and his lack of disclosure, the Union has not met its burden to establish that *prima facie* discrimination has occurred.

[122] As no *prima facie* case of discrimination has occurred, no duty to accommodate is therefore triggered for the Company to meet.

The Disciplinary Analysis

[123] As no *prima facie* discrimination has been established, this Grievance stands to be assessed under a disciplinary analysis, with consideration of the questions under what is known as a *Re Wm. Scott* framework. Those questions are: a) is cause for discipline established? b) was the Company's discipline just and reasonable in all of the circumstances? and, if not c) what is a reasonable form of discipline that should be substituted by the exercise of this Arbitrator's discretion?

[124] Addressing culpability or "cause" for discipline under the first question, there is no dispute the Grievor failed his oral fluid test and that he consumed methamphetamines on the same day he reported to work. Hours later, the levels of that drug in the Grievor's fluid remained extremely high. I am satisfied from the evidence that the Grievor was working impaired in April of 2023, while managing this multi-ton train.

[125] Cause for discipline has been established.

[126] The second question is whether the Company's choice of discipline was just and reasonable. The presumptive discipline in CROA jurisprudence for working while impaired is dismissal: **CROA 4707**; **SHP726; CROA 4798; AH843.**

[127] Even in such cases, however, consideration must be given to both mitigating and aggravating factors. The Grievor's discipline record is mixed. Even if the 30-day suspension for this Rule 439 is not considered, the Grievor had a previous 30-day suspension in 2019 for going by a Stop signal, which is the same violation at issue in this case. The bulk of the Grievor's other discipline relates to absenteeism.

[128] While the Grievor did offer an apology at the end of his Investigative Interview, I am not convinced the Grievor had the corresponding insight that – *whether he agreed it was necessary or not* – he was *required* to comply with the Company's Policy and disclose his substance use/abuse disorder. Even at his interview, he noted the did not "*agree*" with the Company's Policy. This was after he his positive test result and his request for accommodation. That demonstrates a lack of insight and casts doubt on the sincerity of his remorse.

[129] The Union offered extensive post-discharge efforts. The Grievor was able to address his addiction within six weeks of his dismissal and hopefully he can maintain his sobriety moving forward.

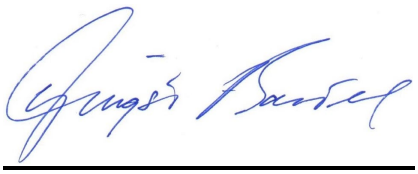
[130] Given the disposition of this case, it is unnecessary to determine if review of the Grievor's post-discharge efforts is appropriate in a disciplinary analysis or not. *Even if those efforts are properly considered* – and weighed along with the Grievor's long service, his disciplinary record and his level of remorse and insight - those mitigating factors would be insufficient to outweigh the severe and significant misconduct of working to operate a multi-ton Train while his ability to do so was impaired by the use of methamphetamines.

[131] Upon consideration of the facts and the extensive jurisprudence filed, and with due consideration of the mitigating factors, I am satisfied that the Company's discipline of dismissal was just and reasonable.

[132] The third question in a *Wm. Scott* analysis does not therefore arise.

[133] The Grievance is dismissed.

I retain jurisdiction for any questions relating to the implementation of this Award. I also remain seized to correct any errors; and to address any omissions, to give this Award its intended effect.



March 7, 2025

CHERYL YINGST BARTEL
ARBITRATOR