AH911

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

BETWEEN:

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, SYSTEM COUNCIL NO. 11

(IBEW)

-and-

CANADIAN NATIONAL RAILWAY COMPANY

(CN)

Mr. B Discharge: 60 Demerits and Positive Drug Test

Arbitrator:	Graham J. Clarke
Date:	July 21, 2026

Appearances:

IBEW:

K. Stuebing:	Legal Counsel
J. Sommer:	Sr. General Chairman
G. Badesha:	General Chairman
B. McCue:	Regional Chairman CN GLD
P. Mueller:	Chairman of the Board of Trustees
S. Martin:	International Representative
Mr. B:	Grievor

CN:

A. Hernandez Gutierrez:	Labour Relations Associate, Edmonton
F. Daignault:	Director Arbitration & Corporate LR, Montreal
G. Stirpe:	Sr Manager Occupational Health Services, Montreal
J-B. Gilbert:	Sr Manager S&C Maintenance, Montreal
S. Sayah:	Sr HR Compliance Specialist, Montreal
L. Stacenko:	Nurse Case Manager, Montreal

Arbitration held in Montreal on June 23, 2026.

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Award

BACKGROUND

1. At the parties' joint request, the arbitrator has anonymized this award.

2. On June 23, 2026, the parties pleaded multiple matters in Montreal. This award, while nominally a single arbitration for Mr. B, involved three separate Form 780's imposing discipline. Those Form 780s raised two main issues: i) the appropriate demerit points for alleged safety violations and ii) Mr. B's alleged disability and the duty to accommodate.

3. The other June 23, 2026 matter, which a separate award will resolve, involved a complex collective agreement interpretation.

4. On October 16, 2024, Mr. B worked with an apprentice, Mr. S. During their workday, a locomotive struck Mr. S who suffered a broken ankle. On November 19, 2024, CN dismissed Mr. B.

5. The parties' first Joint Statement of Issue (JSI) concerned CN's two Form 780s imposing demerits. The first one dismissed Mr. B on the basis that the safety incident which contributed to Mr. S's injury deserved 60 demerit points. The second Form 780 dismissed Mr. B for an accumulation of demerits given the existing 20 demerit points on his disciplinary record.

6. The second JSI involved Mr. B's dismissal after he tested positive for THC in an amount roughly 10 times the allowable limit of 10ng/ml in CN's Policy to Prevent Workplace Alcohol and Drug Problems (Policy).

7. The IBEW argued that CN imposed an unreasonable number of demerits for the safety incident and asked the arbitrator to reduce that number and reinstate Mr. B. The IBEW further argued that post dismissal medical evidence demonstrated that Mr. B suffered from Cannabis Use Disorder and that CN had failed to accommodate him.

8. CN argued the seriousness of Mr. B's safety failures which led to Mr. S's injury justified, by itself, 60 demerit points. CN also justified the termination under progressive discipline principles given that Mr. B. already had 20 demerits on his file for another safety rules incident.

9. CN further argued that the arbitrator must evaluate the decision it made on Mr. B's drug test results based on the evidence it had at the time. It argued that the arbitrator should not consider the later medical evidence the IBEW provided.

10. For the reasons which follow, the arbitrator finds that the October 16, 2024 incident, while extremely serious given Mr. S's injuries, did not merit 60 demerits. The arbitrator substitutes 35 demerits. Mr. B's discipline record will stand at 55 demerits.

11. The IBEW further satisfied the arbitrator that Mr. B suffered from a disability at the time of the October 16, 2024 incident. CN did not investigate the possibility of accommodation. The arbitrator will accordingly reinstate Mr. B, but on strict terms and conditions to protect both parties' interests.

CHRONOLOGY

12. For context, this chronology will highlight the key points from the parties' Record.

13. **June 5, 2017**: CN hired Mr. B.

14. **May 19, 2019**: Mr. B. transferred to MacMillan Yard to work as an SC Maintainer, a safety sensitive position.

15. **January 29, 2024**: CN provided Mr. B with a non-disciplinary coaching letter[1] about track protection:

> With regard to the incident on January 9th, 2024 where you and a fellow maintainer had acted on an authority without verifying first and as of consequence did not have protection on the track that you intended.

[1] CN Documents, PDF page 63/427.

> The investigation has concluded and I am providing this letter as reference, and for your file, as a means to reinforce the conversation that we had regarding the incident.
>
> Note that this letter is non-disciplinary as discipline was assessed at the conclusion of the investigation (ref: Incident Number 2024011711-187172 - Type: Formal).
>
> Always verify your protection. There are many locations on CN where you will be working that are complex plants, like the location in this incident, Location 12. They have many tracks and switches and track circuits - all of which are worded very similar to each other. You must be completely and entirely aware of your exact location you intend to work and what protection you have (or require) to work there.
>
> I know you have taken additional personal steps already to mitigate a recurrence of this issue and I applaud you for that, however you are also reminded that verifying your protection is a requirement of CROR rules and therefore this requirement is not replaced by personal mitigation process you put in place.
>
> And lastly, when approaching a trouble call it is important to know/appreciate any recent history of recent calls but do not hyper focus on past resolutions. Again, they are important, but you must troubleshoot each unique issue individually using your troubleshooting techniques and processes.

16. **October 16, 2024**: A fellow employee asked Mr. B to complete a Pin Brazing job and to take along Mr. S, an apprentice. During that work, a locomotive struck Mr. S and he broke his ankle.

17. **October 16, 2024**: Mr. B underwent drug testing by DriverCheck, the results of which came back positive for marijuana[2]:

> Positive for marijuana - THC Parent. Quantitative Level = 106 ng/mL

CN's Policy has a 10ng/ml THC threshold.

18. **November 4, 2024**: CN conducted Mr. B's Statement[3] into the events which led to Mr. S's injury, the salient points of which were as follows[4]:

---

[2] CN Documents, PDF page 124/427.
[3] CN Documents, PDF page 9/427.
[4] At the hearing, the IBEW noted that while Mr. S had provided an October 24, 2024 email describing the incident, CN had not conducted a formal statement with him under CBA article 13.4(d).

12.Q. Please describe in your own words, the events of October 16th, starting when you started duty at 12:00.

A. I would have arrived at around d11:40 that day. I guess the first thing I was instructed to do was to change the burnt out lights in South Receiving. Before I was going to perform this task I received a call from Kevin Vu informing me that track department had broken a bond in South Receiving. I asked [Mr. S] if he would like to join me. We drove out to South Receiving, we saw the track gang parked. As we approached the tamper I did inform [Mr. S] that we had no protection of our own at this time. I told him I was going to find out what protection was in place and get our own protection. I proceeded to talk to the operator on the tamper who had the protection. He told me they were getting ready to travel soon and I should call Par, who was running the block. I called Par and while on the phone discussing what their plans were and what they were doing, the tamper operator started to honk his horn frantically, at which point I was told my guy just got hit. I immediately exited the tamper, saw [Mr. S] lying on the ground, called out emergency out three times on the Radio, stating "Maintainer down in South Receiving". At this point I went over to see if [Mr. S] was ok and asked if he had any head injuries then proceeded to stay with him to keep him talking until help arrived. I also called Jesse Patterson to inform him of what was going on.

...

14. Q. [Mr. B], did you indicate to [Mr. S] at any time that he was going to be a safety watch?

A. I don't recall, I asked him to come watch me work, so yes, I guess so, yes.

15. Q. [Mr. B], when you indicated that [Mr. S] he was going to be a safety watch, did you have a job briefing specifically about being a safety watch?

A. No.

16. Q. [Mr. B], did you do a job briefing at the beginning of your shift?

A. No, and I should have.

17. Q. [Mr. B] do you typically have a job briefing at the beginning of your shift?

A. Usually.

18. Q. [Mr. B], did you have a job briefing with [Mr. S] regarding the task that you were going to perform in South Receiving that day?

A. I told him what we were going to do.

19. Q. Did you fill out a job briefing book after that conversation?

A. No

...

23.Q. [Mr. B], do you recall what protection and limits that the track gang had?

A. I had not found out their exact limits other than they had protection on York 2.

24.Q. [Mr. B], when you exited the machine the first time, you and [Mr. S] walked south for a distance, then walked north toward the machine again. What protection did you have during this time?

A. No protection.

25. Q. At this time you walked north of the machine, then back to the machine. What protection did you have at this time?

A. Still no protection. I was looking for the protecting foreman.

...

28. Q. [Mr. B], what kind of protection would you need to repair a broken bond on York 2 if you found one?

A. Pink Protection.

Note. Jim Varga provides context as to what "Pink Protection" means in terms of protection.

29. Q. [Mr. B], at any time that afternoon after arriving in Receiving Yard did you have any form of protection for the activities you did thus far?

A. No.

30. Q. [Mr. B], between you and [Mr. S] - who was in charge of this call, for example, who was leading the call and who was responsible for worktime, if required?

A. I was leading the call, and I would be responsible for getting the time.

...

44. Q. Referring to GEi 2.0 (I) Job Briefings and (J) GEI 5.0 Safety Watch. Do you feel that you complied with these GEIs as written on the day of October 16th?

A. With the Job Briefings, no I did not and I should have. With the Safety Watch, he was not meant to be my designated safety watch.

45.Q. The information provided in this statement will allow me to continue my investigation and I appreciate your input so far. If further clarification is required on anything in this statement I will reach out to you for a supplemental statement, as per process.

Mr. [B], do you have any questions to the matter under investigation which you wish to ask for the record through the Presiding Officer or any clarifications?

A. Clarifications: when we were talking about me being north of the limits and foul - Lonnie had pointed out south of his equipment where the broken bond was, at which point I just went and had a quick look and when I went north of the equipment where there was no protection, I was not looking for broken bonds at this point, I was looking for the ATS if i could see where he was parked. The second clarification i wanted to make was [Mr. S] was not brought out there to be my designated safety watch, he was there to watch me work, once we acquired our own positive protection. I needed to talk to Par because they were intended on traveling soon so I needed to know what their plans were so I could implement my own positive protection.

(sic)

19. **November 4, 2024**: CN conducted a second Statement[5] regarding Mr. B's positive drug test results:

12. Q. Mr. [B], the Saliva test was performed at 17:20 on October 16th. How do you account for the levels of THC in your system at the time of the test?

Union Objects (noted below) and Mr. [B] Responds;

A. I was shocked at the results and cannot explain how the swab test failed.

Note. Union Objects - Mr. [B] is not a doctor or scientist so he would not know how to account for specific numbers of the testing.

13. Q. Mr. [B], THC Parent tests for Marijuana. At what time did you last consume marijuana prior to your shift start at 12:00 on October 16, 2024

A. 11:30 PM, the previous night.

14. Q. 11:30 PM the previous night is some 12 and a half hours before your shift start, is that correct?

A. Correct.

15. Q. On October 15th, were you subject to duty by means of being on-call?

A. No, I was not.

[5] CN Documents, PDF page 128/427.

16. Q. What was the method of consumption at 23:30 on Oct 15th? (i.e. smoke, ingested, etc.)

A. Smoking

17 A. Mr. [B], what is the quantity of marijuana did you smoked at 23:30 on Oct 15th?

A. A joint the size of a cigarette, roughly.

...

20. Q. Could I ask you if this use of marijuana at 23:30 on October 16th was medically authorized (prescription) or recreational?

A. Recreational

21. Q. Mr. [B], how frequently do you consume cannabis (times per week/month), and in what quantities?

A. I smoke regularly when not on call in the evenings.

...

24. Q. Mr. [B], you state that you are are a regular recreational user of marijuana. With consideration to CROR Rule G and the Drug and Alcohol policy, how do you ensure you are free from the affects of marijuana when you report for your regular assigned shift?

A. I have always ensured that I have never consumed marijuana within 12 hours of my shift or on call, and not to excessively consume on a work night.

...

27. Q. Mr. [B]. The information provided in this statement will allow me to continue my investigation and I appreciate your input so far. If further clarification is required on anything in this statement I will reach out to you for a supplemental statement, as per process.

Mr. [B], do you have any questions to the matter under investigation which you wish to ask for the record through the Presiding Officer or did you wish to provide any further clarifications?

A. I want to just say that I thought I was taking the necessary precautions to ensure that I was not impaired on the job. After seeing the results of this test, I have abstained from the use of marijuana since. I would be willing to talk to a medical professional or counselling, and follow whatever processes are available for me to ensure that safe work environment and drug free environment, to ensure that everyone is safe and I am not using any narcotics

> in the future. It has been surprisingly challenging giving it up recently, and I willing to undergo any process that CN would have me do.
>
> (sic)

20. **November 19, 2024**: CN's first Form 780[6] imposed 60 demerit points for the following reason:

> Your responsibility in the incident on October 16, 2024, during which a junior employee that you Invited to be under your guidance was seriously injured In MacMillan Yard, Concord ON., where the resulting investigation revealed that your actions were in contravention with various Rules, notably; GEI 2.0 Job Briefings (requirement to have a complete and documented Job briefing) including Peer To Peer - Appendix A, GEI 5.0 Safety Watch (requirement to have a Safety Watch Job briefing when utilizing this protection), as required by GEI 1.0 (requirement to have protection when foul of track).

21. **November 19, 2024**: CN's second Form 780[7] discharged Mr. B for "an accumulation of demerit points". The Form 780 noted Mr. B had 60 demerit points from the October 16 incident and another 20 already on his discipline file.

22. **November 19, 2024**: For the drug testing results, CN's Form 780[8] discharged Mr. B and stated:

> Your responsibility in your violation of CROR Rule G, CN's Policy to Prevent Workplace Alcohol and Drug Problems, and the CN Business Code of Conduct in relation to the results of the post incident drug and alcohol testing conducted on Wednesday October 16th, 2024, In MacMillan Yard, Concord, ON.

23. **December 5, 2024**: Dr. Gaylord Albrecht, Mr. B's family physician, provided this medical note:

> Please be advised that I am the family physician for Mr. B and have been following him since 2010. I can confirm that based on my assessment in office today, [Mr. B] has a diagnosis of Cannabis use disorder. He informed me today that he has not been using marijuana in any form in the past 6 weeks and he is willing and eager to pursue in a community treatment program if and when this becomes available.

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[6] IBEW Documents, Tab 5, PDF page 41/513.
[7] IBEW Documents, Tab 5, PDF page 42/513.
[8] IBEW Documents, Tab 17, PDF page 172/513.

24. **December 13, 2024**: The IBEW filed a grievance at Step 1[9] and provided CN with Dr. Albrecht's December 5 diagnosis of Mr. B's cannabis use disorder:

> Notwithstanding the above, an additional mitigating factor in this incident is [B]'s medical condition. During the investigation of this incident, evidence was revealed that [B] may have been under the residual influence of cannabis that had been consumed (by way of inhalation, i.e., smoking). Considering this life altering experience for [B], he has consulted medical professionals regarding his use and now realizes that he has a cannabis use disorder. [B] was examined by Dr Gaylord Albrecht (Professional Medicine Corporation, Guelph, ON) and was diagnosed with "Cannabis use disorder." (Documentation attached.)
>
> [B] has been abstaining from the use of Cannabis since this incident, supported using CN's EFAP program. [B] has also been referred to the Community Alcohol and Drugs Services in Guelph, ON, to undergo treatment for his disabling medical condition of addiction. The Union full supports [B]'s commitment to receive treatment, and we feel that with ongoing medical support, sobriety, and proper coaching, [B] can be an effective and valuable team member at CN.

25. **August 20, 2025**: In response to CN's request, the IBEW provided a March 26, 2025 letter[10] from Homewood Community Addiction Services about Mr. B's assessment and sessions:

> Homewood Community Addiction Services (CADS) provides both individual and group counselling for individuals who identify problematic: substance use. gambling and/or technology use behaviours. Support is also offered to family members. An individual assessment of needs based on the client's self-report is conducted and a treatment plan is formulated with the client.
>
> [Mr. B] attended December 19 2024 for his initial assessment on and has attended follow-up sessions on January 29, February 7, February 20, March 6. and March 20, 2025. Over the course of these sessions. the client completed the Moving Forward Curriculum. Moving Forward is a designed for individuals who are looking for educational information on how to make changes to their substance use, and reduce or stop using one or more substances. Topics covered include Understanding Addiction, Triggers and Trip Ups, Dealing with Boredom and Stress, Sleep Hygiene, Values and Strengths, Stigma, Harm Reduction, Mental Health, the Stages of Change and Goal Setting. (sic)

The IBEW also included a January 20, 2025 letter from Telus Health:

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[9] IBEW documents, tab 6, PDF page 45/513.
[10] IBEW Reply, tab 1, PDF page 1.

> Although I cannot disclose the details or a client's session, I can provide you with the dates of Mr. [B]'s attendance here at Telus Health, in one of counselling programs.
>
> Mr. [B] first accessed service on November 13, 2024. His first appointment took place November 15, 2024. Appointments took place December 2 and December 18, 2024 and the last session was held today, January 20, 2025.
>
> Mr. [B] attended all appointments and participated honestly and sincerely during each session. I am closing his file today.

The IBEW added Dr. Albrecht's diagnosis as well, a document originally included with the grievance.

26. **November 25, 2025**: The IBEW provided CN with Mr. B's entries from his logbook[11] of Narcotics Anonymous (NA) meetings.

27. **April 7, 2026**: Dr. Albrecht provided this update to the IBEW about Mr. B's situation:

> Please be advised that I am the family physician for Mr. [B] and have been following him since 2010. I can confirm that based on my previous assessments, [Mr. B] had a diagnosis of Cannabis use disorder. [Mr. B] has been very proactive about his condition and has taken many positive steps to address his cannabis use. At this point he has not used cannabis in any form for almost 18 months. He has attended and successfully completed a Homewood Community Addictions Services program as well as a Narcotics Anonymous program that started in April of 2025 and continues to this day, with monthly visits. [Mr. B] has also seen his mental health counsellor throughout this period of time, which allowed for additional support through this time period of ongoing cannabis abstinence. Letters confirming his attendance and completion of these programs are attached, along with this letter of support.
>
> [Mr. B] will be undergoing hair follicle analysis for cannabis detection in the near future and this test will aid in confirming his successful long-term abstinence from cannabis use.

28. **June 18, 2026**: CN emailed the arbitrator objecting to the IBEW filing late evidence about Mr. B's medical situation:

> The Company writes to object to the Union's disclosure of new medical evidence received on June 16, 2026. This material was not disclosed earlier in

[11] IBEW Reply, Tab 1, PDF page 8/17.

> the proceedings, and its late introduction raises concerns of procedural fairness, as the Company has not had a meaningful opportunity to review or respond.
>
> The Company therefore objects to its admission and requests a brief case management call at the Arbitrator's convenience to address this issue.
>
> The Company is available on short notice. Thank you for your consideration.

Later that same day, CN amended its objection:

> Following discussions with the Union, the Company writes to amend its preliminary objection regarding the recent disclosure of medical information.
>
> The Company maintains that the doctor's note from April 7, 2026, and testing results constitute new evidence. This material was not disclosed earlier in the proceedings, and its late introduction raises concerns of procedural fairness, as the Company has not had a meaningful opportunity to review or respond.
>
> The Company continues to object to the admission of this material.

29. The arbitrator will apply the law to these facts when deciding the various issues the parties pleaded.

DID CN HAVE CAUSE TO TERMINATE MR. B ON DEMERIT POINTS?

Positions

<u>CN</u>

30. In its Brief, CN justified the appropriateness of the demerit points it gave Mr. B for his actions. Several paragraphs provide a helpful summary:

> 81. The Union's reliance on a comparative range of ten (10) to thirty (30) demerits for track protection violations is misplaced. The authorities establishing that lower range concern isolated, single-rule infractions that did not result in injury, and in which the absence of harm was expressly treated as fortuitous rather than mitigating. The present case is materially different. It involves the simultaneous breach of multiple fundamental safety rules—job briefings, track protection, and safety watch—committed by the employee in charge of the work and resulting in a serious injury to a junior employee. Where multiple safety rules are breached in a single event, this Office has sustained substantially higher assessments, including thirty (30) demerits for a cluster of protection and communication failures and forty-five (45) demerits where two rules were violated and a collision resulted.
>
> 82. The resulting injury is a significant aggravating factor that distinguishes this case from violations that create only a risk of harm. Arbitral jurisprudence

confirms that misconduct arising from negligent behaviour that results in a potential safety threat, or in an actual injury, is grounds for significant discipline up to and including dismissal, and that the seriousness of a safety incident does not depend on the occurrence of physical injury. Here, the consequences were not merely potential but actual, as a junior employee was struck by a locomotive and seriously injured as a direct result of the grievor's failures.

83. Discipline must be both progressive and proportional, and no system of progressive discipline requires rigid, lock-step adherence regardless of the gravity of the misconduct. As confirmed in CROA 5097, the principle of progressive discipline does not prevent the imposition of discharge for serious incidents; the controlling question is whether the nature and degree of the misconduct has rendered the employment relationship no longer viable. The more serious the misconduct, and the fewer the mitigating factors, the more significant the appropriate disciplinary response.

31. In its Reply, CN urged the arbitrator to discount the IBEW's reference to the demerit points imposed in other disciplinary cases:

7. The Company submits that this matter cannot be characterized as a "momentary lapse." Rather, the evidence establishes a sequence of failures: the Grievor failed to conduct a job briefing, failed to secure track protection, failed to designate a safety watch, and nevertheless proceeded to bring a junior employee into a hazardous track environment. Each of these failures independently violates fundamental safety rules; together, they represent a complete breakdown in the application of basic safety principles. This sequence is further corroborated by objective evidence, including phone records showing the Grievor was actively attempting to coordinate protection while already in the field, rather than prior to commencing work.

8. The Union's reliance on comparator discipline cases is unpersuasive and fails to account for material distinctions. The cases cited (Mr. Albert – 15 demerits, Mr. Lacasse – 15 and 30 demerits, Mr. Formosa – 10 demerits) involve isolated rule violations where no injury occurred. The present case is materially different: it involves multiple concurrent violations of core safety rules (GEI 1.0, 2.0, and 5.0), committed by the employee in charge, resulting in a serious physical injury to a subordinate employee. Arbitral jurisprudence consistently recognizes that where misconduct results in real harm, it is a significant aggravating factor warranting elevated discipline.

IBEW

32. In its Brief, the IBEW, in its alternative argument, asked the arbitrator to reduce the demerit point penalties CN imposed:

9. In the alternative, the Union submits that sixty (60) demerits was excessive for the alleged violations of GEI 1.0, GEI 2.0, and GEI 5.0. The Union relies on

its position that comparable track protection violations are often addressed through discipline in the range of ten (10) to thirty (30) demerits.

...

91. If the Grievor's actions are found to be deserving of discipline, the Union submits that an Arbitrator must then engage in the second stage of the analysis, which is whether the quantum of discipline issued is justified. The Union respectfully submits that the severe penalty of 60 demerits (i.e., dismissal) must fall under this scrutiny.

...

94. The following recent assessments of discipline involve employees were assessed demerits for Main track authority violations. Specifically, the following discipline involve failure to have track protection (verify limits) and to have job briefings. Each employee was found to be in breach of GEI 2.0 (job briefings and peer-to-peer) and GEI 1.0 (protection requirements when foul of track).

...

106. In the circumstances, there can be no justification for tripling the quantum of demerits from Mr. [B]'s prior infraction.

...

108. The Union respectfully submits that the foregoing considerations and mitigating factors, including in particular the lack of any recklessness, weigh in favour of a significantly lesser quantum of discipline than 60 demerits (automatic discharge). The Union submits that the employment relationship is very much repairable and that the penalty should be mitigated on such terms as the Arbitrator deems just in the circumstances to permit the Grievor to continue his career with the Company.

33. In its Reply, the IBEW noted the lack of any precedent for imposing 60 demerit points for a situation like that of Mr. B:

9. Regardless, even if culpability is established, CN has put forth no authority that justifies the application of 60 demerits in response to breaches of GEI 2.0 (Job Briefings), GEI 1.0 (Track Protection), and GEI 5.0 and 5.2. The authorities cited by CN do not speak to these rules and are not analogous.

...

14. In short, none of CN's cases justify the application of 60 demerits (outright dismissal) for breaches of GEI 2.0 (Job Briefings), GEI 1.0 (Track Protection), and GEI 5.0 and 5.2—particularly when, as demonstrated in IBEW's submissions in chief, CN regularly applies far lesser penalties in response to

established breaches of this nature—particularly in the more severe circumstances of Mr. Lacasse's second incident in a month in August 2023.

Decision

34. CN clearly met its burden to show that it had grounds to discipline Mr. B for his safety failures on October 16, 2024. The resulting injury to the apprentice Mr. S clearly aggravated the situation.

35. Despite the seriousness of the matter, CN did not demonstrate that that incident, by itself, justified 60 demerit points and automatic termination. One of the cases on which CN relied, CROA 4794[12], involved both multiple safety violations, and an employee being dishonest about it[13]. Moreover, he had had a similar incident just 6 weeks before.

36. The issue then becomes whether, under a progressive discipline analysis, Mr. B's existing 20 demerit points, combined with the October 14 incident, collectively justified dismissal. CN did not persuade the arbitrator in this regard.

37. Clearly, CN takes safety rule violations very seriously. The IBEW's Brief noted how CN had disciplined other employees for safety lapses. The IBEW suggested such failures fell within the 10-30 demerit points range.

38. The arbitrator has concluded that Mr. B's safety violation merited 35 demerit points. His situation appears similar to the of Mr. Lacasse who received 15 demerits on August 10, 2023 for failing to verify his limits and a further 30 points on August 29, 2023 while working with an apprentice[14]. While Mr. B's two disciplinary incidents were further apart than those of Mr. Lacasse, the arbitrator cannot ignore Mr. S's unfortunate injury.

39. As a result, the arbitrator substitutes 35 demerit points for the October 16, 2024 incident. That brings Mr. B's total demerit points to 55. This decision regarding the appropriate demerits essentially provides Mr. B with a final chance to demonstrate his value as a CN employee[15].

---

[12] *La Compagnie des chemins de fer nationaux du Canada c. Le syndicat des Métallos – Local 2004, (25 janvier 2022)*.

[13] CROA 2017 on which CN relied similarly had the added factor of an employee deliberately disregarding safety.

[14] IBEW Brief, paragraphs 98-100.

[15] See CROA 1974.

40. The arbitrator will now examine Mr. B's positive drug test.

DID CN HAVE CAUSE TO DISMISS MR. B FOR HIS POSITIVE DRUG TEST?

What type of case is this?

41. In AH663[16], the arbitrator noted the practical difficulty when parties plead a duty to accommodate case along with multiple other grievances during a single arbitration day:

> 93. The nature of CROA's monthly expedited arbitration regime requires an arbitrator to hear up to 7 cases in a day over three consecutive hearing days. The MOA requires arbitrators to issue all awards within 30 days.
>
> 94. The original arbitrator issued 12 awards for the July 2014 session. For CROA&DR 4328, he did not have the benefit of multiple hearing days. In the instant case, both parties, and the arbitrator, benefited from the submissions made by specialist labour lawyers pleading a complex case.
>
> ...
>
> 97. As noted in CROA&DR 4667 at paragraph 38, some cases, like those involving the duty to accommodate or alleged harassment, fit uncomfortably within CROA's monthly expedited arbitration regime. When complex and developing legal issues are at stake, an ad hoc or even a regular arbitration with full viva voce evidence might be more appropriate.

42. The arbitrator respects the parties' choice of procedure. But pleading a duty to accommodate case in a single day, along with other grievances, will not reduce the parties' obligation to provide a full factual record and legal analysis for this difficult area of the law.

43. The correct legal characterization of a case matters immensely when the evidence discloses that an employee worked while impaired. In a previous CN case (AH734[17]), the arbitrator described the importance of this legal characterization (footnotes omitted):

> 11. The arbitrator must first characterize this case properly.
>
> 12. Mr. Moore's situation differs from those where an employee's urine tested non-negative, but the oral swab test came back negative. In those types of cases, arbitrators have generally concluded that the evidence failed to establish an employee's impairment at work.

[16] *Teamsters Canada Rail Conference v Canadian Pacific Railway*, 2019 CanLII 89682

[17] *Teamsters Canada Rail Conference v Canadian National Railway Company*, 2022 CanLII 5833

> 13. Neither is this a case where an employee suffered from a disability, an allegation which mandates a duty to accommodate analysis.
>
> 14. Instead, this case falls within the category of cases where testing demonstrated that an employee worked while impaired. Railway arbitrators have often had to consider cases where employees worked in safety sensitive positions when under the influence of alcohol or narcotics.
>
> 15. In AH689, the arbitrator quoted Arbitrator Picher who in these situations considered termination the "prima facie disciplinary response" and further emphasized the importance of deterrence...

44. As noted in AH734, arbitrators hearing a clear disciplinary case generally consider termination the *prima facie* disciplinary response for an employee who works while impaired[18]. This arbitral practice also incorporates the importance of deterrence in a safety sensitive industry.

45. But as AH734 further noted, that legal analysis changes if the employee suffers from a disability. A legitimate disability leads to a duty to accommodate analysis. Rather than just arguing that undue hardship exists, an employer must provide the detailed factual and legal elements which support that conclusion.

46. In this case, CN treated Mr. B's situation mainly as a disciplinary matter. It did not investigate the possibility that Mr. B suffered from a disability. In AH793[19], the arbitrator had previously mentioned CN's possible duty to inquire when faced with this type of scenario.

47. CN had known since December 13, 2024 that the IBEW would argue Mr. B suffered from a disability. The grievance included a copy of Dr. Albrecht's diagnosis. The above chronology demonstrated that in the Fall of 2025 CN asked for and received from the IBEW additional documentation about Mr. B's attendance at Homewood Community Addiction Services, Telus Health and Narcotics Anonymous meetings.

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[18] See, as recent examples, SHP751- *Unifor, local 100 c Compagnie des chemins de fer nationaux du Canada*, 2026 CanLII 66943; AH866 - *Teamsters Canada Rail Conference – Maintenance of Way Employees Division v Canadian Pacific Kansas City Railway Company*, 2026 CanLII 60171; and CROA 5021.

[19] *Teamsters Canada Rail Conference v Canadian National Railway Company*, 2022 CanLII 102424.

48. CN's Brief suggested that changes in Labour Relations had impacted its ability to consider this medical evidence:

> 108. The Company further notes that earlier medical information had been shared with former Labour Relations representatives who are no longer employed by the Company, as well as with one representative who is currently on long-term disability. As a result, the Company's current representatives did not have the benefit of this information during the course of the proceedings...

49. The arbitrator fully appreciates the challenges which can arise from personnel changes. It resembles a lawyer having to take over a colleague's case halfway through an arbitration. But the challenges caused by those changes do not impact the legal analysis the arbitrator must apply.

50. Cases examining issues like *prima facie* discrimination, including whether a disability existed, often require multiple hearing days. In the Supreme Court of Canada's (SCC) decision in *Elk Valley*[20], the original case[21] included an agreed statement of facts, as well as *viva voce* evidence from four witnesses, including two medical experts. The SCC's majority decision noted the importance of determining the facts in each case:

> [39] **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: Health Employers Assn. of British Columbia v. B.C.N.U., 2006 BCCA 57, 54 B.C.L.R. (4th) 113, at para. 41.
>
> (Emphasis added)

51. The SCC emphasized how essential the parties' evidence remained for the legal analysis. No presumption existed that an employee could have complied with a policy that required disclosure in advance. That determination required evidence.

[20] *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30
[21] *Bish v. Elk Valley Coal Corporation*, 2012 AHRC 7

52. At the hearing, CN also suggested orally that the cannabis use disorder arose as a result of the dismissal and did not exist at the time of the October 16, 2024 incident. But no evidence exists to support this suggestion, in part since no investigation took place into Mr. B's medical note indicating he had an addiction[22].

53. Even in railway arbitrations, disputes about the medical evidence can lead to prolonged hearings for issues such as *prima facie* discrimination. In AH663[23], the parties pleaded the case over 4 separate hearing days. They then filed additional written submissions. That case also included expert evidence.

54. In AH663, that resulting extensive Record convinced the arbitrator to give little weight to the grievor's medical evidence suggesting he suffered from a disability[24]. Instead, that case fell within the category of "working while impaired" discipline cases[25].

55. With this background regarding the importance of evidence and the accurate characterization of a case, the arbitrator will now address the issues the parties raised.

Should the arbitrator exclude updated medical evidence on the basis the IBEW failed to produce it until a few days prior to exchanging Briefs?

56. The railway model of arbitration only works if the parties jointly prepare a full factual Record for the arbitrator. The secret of the parties' longstanding success comes from their ability to marshal all the relevant facts themselves before the hearing. Ambushing the other party, however innocently, undermines the integrity of this process and can result in harsh remedies[26].

CN

57. CN asked the arbitrator to exclude the updated medical evidence the IBEW produced a few days prior to the agreed upon date for the exchange of the parties' briefs:

> 105. **The Company objects to the Union's attempt to rely on medical evidence that was disclosed only four (4) days prior to the exchange of briefs**. **This evidence includes a doctor's note dated April 2026 and drug testing dated May 25, 2026, which constitute new evidence**. This material

[22] See the arbitrator's comments about railway arbitrations and the need for evidence to resolve factual conflicts: AH837 - *International Brotherhood of Electrical Workers (System Council No. 11) v Canadian National Railway Company*, 2023 CanLII 99782

[23] *Teamsters Canada Rail Conference v Canadian Pacific Railway*, 2019 CanLII 89682

[24] AH663 at paragraphs 109 and 123.

[25] See these similar CN cases: CROA 3928, CROA 4775 and CROA 4787.

[26] See, for example, the void *ab initio* remedy discussed in AH793 - *Teamsters Canada Rail Conference v Canadian National Railway Company*, 2022 CanLII 102424

> was not introduced during the investigation, nor at any stage where it could be properly reviewed, tested, or responded to by the Company.
>
> 106. This constitutes a fundamental breach of procedural fairness. The timing of the disclosure deprives the Company of any meaningful opportunity to assess the reliability of the medical information, seek clarification, obtain rebuttal evidence, or otherwise challenge the conclusions being advanced. As such, the Company has been denied the ability to make full answer and defence.
>
> 107. **The Company further notes that the Union was in possession of this information well in advance of its disclosure. The doctor's note is dated April 2026, and the drug testing is dated May 25, 2026, yet the documents were only disclosed to the Company on June 16, 2026, just days before the exchange of briefs on June 19, 2026**. The Union has provided no explanation for this delay. This late disclosure compounds the prejudice to the Company and reflects a decision to introduce new evidence at the final stage of the process, thereby denying the Company any meaningful opportunity to review, test, or respond to the material.
>
> (Emphasis added)

<u>IBEW</u>

58. In its Brief, the IBEW argued more generally that the jurisprudence allowed a party to file post dismissal evidence. In its Reply Brief, the IBEW responded to CN's specific objection and emphasized that CN had known of Mr. B's medical diagnosis for years:

> 15. Regarding Mr. [B]'s second dismissal for breach of Rule G, IBEW relies on its submissions in support of the admissibility of post-dismissal evidence. The Company's objection is founded on authorities - CROAs 4836 and 4695- which have no bearing. Those decisions involve the Company's inability to rely on new expert reports that were not previously disclosed during the disciplinary investigation, contrary to the strict disclosure obligations during the investigation process. That is unlike how railway arbitrators treat post-discharge evidence of disability and efforts at recovery.
>
> 16. **The Company argues "The prejudice to the Company is concrete" and that "the timing of disclosure effectively prevents any meaningful response." To the contrary, the Union repeatedly disclosed the reporting and updates in a timely manner (see Tab 1) Critically, the Company has known that the Grievor suffers from a diagnosed cannabis use disorder in respect of which he was actively seeking rehabilitation and recovery since the December 13, 2024 step one grievance** (Tab 6, Union Exhibits). The objected-to April 7, 2026 report and Hair Follicle test results can come as no surprise to the Company—its lack of meaningful response since December 13, 2024 is at its own peril.
>
> (Emphasis added)

59. In oral argument, the IBEW maintained that CN had never requested disclosure of any medical evidence, a situation which distinguished the instant case from that examined in AH793[27]. It suggested it had sent the additional medical evidence as a courtesy. The IBEW's Reply, however, suggested to the arbitrator that in 2025 CN had in fact asked for such information. The IBEW promptly provided it.

Decision

60. CN mentioned during its presentation that it objected to the IBEW filing additional case law with its Reply. The arbitrator dismisses this objection. Both parties have a duty of candour to ensure the arbitrator receives the relevant authorities. Case law differs from evidence.

61. Given the IBEW's position that this is a duty to accommodate case, it had the obligation to provide CN with any new medical evidence as soon as that information became available. The duty to accommodate is a tripartite process. Holding onto new information, however innocently, until days before the due date for the Briefs remains unhelpful to this expedited arbitration regime.

62. Nonetheless, the arbitrator will consider the IBEW's updated medical evidence. That evidence merely confirmed what the IBEW had been advising CN about Mr. B's situation. The IBEW advised CN shortly after the termination that they would argue Mr. B had a disability. They provided a medical diagnosis.

63. In the Fall of 2025, at CN's request, the IBEW provided additional information about Mr. B's disability and his rehabilitation efforts. Given this context, the updated medical information merely updated and confirmed the evidence the IBEW had already given to CN.

64. In AH793[28], an earlier CN case, the arbitrator commented on the importance of disclosure for the parties' expedited arbitration regime (footnotes omitted):

> 4. **As will be expanded upon below, the arbitrator has significant concerns about the Record the parties put together and its impact on the railway model of arbitration the parties want to follow. In this case, the TCRC, despite agreeing otherwise, failed to produce key medical documentation until a few days before the arbitration when it filed its**

[27] *Teamsters Canada Rail Conference v Canadian National Railway Company*, 2022 CanLII 102424.
[28] *Teamsters Canada Rail Conference v Canadian National Railway Company*, 2022 CanLII 102424

Brief. However, CN, despite knowing of Mr. Weseen's request in 2019 for accommodation due to a disability, did not appear to inquire into it.

...

52. In the Introduction to this award, the arbitrator expressed concern about the disclosure in this case. The expedited railway model of arbitration, which, when it works, can hear multiple cases in a single day, cannot function without proper disclosure and a complete Record.

...

55. At the arbitration, CN advised the arbitrator that it had sent a June 2022 email to the TCRC requesting certain medical documentation. In a return email, the TCRC apparently agreed to the request. The arbitrator cannot find this evidence in the parties' extensive materials, perhaps due to a lack of bookmarks, but no one disputed that CN had made that request in June 2022.

56. At the arbitration, Mr. Stuebing candidly took responsibility for the failure to produce the medical information, despite CN's June 2022 request. That failure arose in part from an accident he had suffered and from this case having originally been scheduled to be heard by a different arbitrator.

57. However, CN did not explain why it could not have obtained the medical information following Mr. Weseen's November 4, 2019 interview. Employers generally have a "duty to inquire" in such circumstances. CN did not describe the extent to which it attempted to respect this duty.

58. **Multiple CROA cases have described the tri-partite process required for potential human rights cases. The tri-partite process allows the parties to learn the facts and then determine the appropriate legal analysis. An employer which focuses mostly on discipline, rather than on the duty to accommodate when the case requires it, may have difficulty meeting its burden of proof**.

59. Employees must cooperate when asking for accommodation, including by sharing the medical information on which they base their request, or they may have their grievance dismissed...

...

60. A trade union also has important legal obligations in the tri-partite process, including those involving the challenges of balancing an employee's needs with those of the bargaining unit.

61. **While the arbitrator has significant concerns about the TCRC's June 2022 failure to respect its agreement and produce relevant medical information, CN did not satisfy the arbitrator that it could not have investigated Mr. Weseen's 2019 request for accommodation. That**

> **investigation would have allowed CN to evaluate Mr. Weseen's past efforts to treat his addictions and eliminated the need to rely on inferences in its Brief**.
>
> (Emphasis added)

65. CN's knowledge of the IBEW's legal position regarding Mr. B's diagnosis distinguishes the current situation from one where a party raises a new issue on the eve of arbitration.

66. For example, in AH689[29], the arbitrator upheld CN's objection and did not allow the IBEW to add a new disability allegation to an arbitration (footnotes omitted):

> 31. The arbitrator agrees with the sentiments expressed by these experienced railway arbitrators. The situation may well be different in regular arbitration where the parties have not negotiated the types of procedures which exist in this expedited regime. A regular labour arbitration system can also take many days to hear a single grievance, which allows for more leeway than does the parties' expedited regime in this case.
>
> 32. The parties benefit from an extremely efficient expedited arbitration system. In order to obtain those benefits, they have negotiated clear provisions which require that all issues be identified and discussed during the grievance procedure. A vague oral reference to alcohol and 3 AA meetings during the investigation, especially given the IBEW's burden of proof for prima facie discrimination, infra, was insufficient for CN to know that Mr. S alleged that his rights under the CHRA had been violated. Documentation was only produced for this issue roughly 18 months after Mr. S's termination.
>
> 33. **There is further prejudice which can arise from the addition of a new issue close to the arbitration date. CN could not explore that issue during its investigation or conduct a timely supplementary investigation. The arbitrator notes further that the CHRA contains time limits for complaints**.
>
> 34. **The IBEW expanded its grievance beyond that which was discussed throughout the grievance procedure. The arbitrator accordingly upholds CN's objection. This conclusion, however, would not apply to situations where a party was willfully blind to a clear duty to accommodate situation**.
>
> (Emphasis added)

[29] *Canadian National Railway Company (CN) v International Brotherhood of Electrical Workers System Council No. 11*, 2019 CanLII 123925

67. While a party must provide medical updates as soon as the information becomes available, especially when requesting accommodation, the delay in this case did not change the IBEW's long disclosed position that Mr. B had an addiction and that he had dealt with it successfully.

Can the arbitrator consider post dismissal evidence?

CN

68. While CN took different positions at times about the legitimacy of Mr. B's diagnosis, it argued in any event that the arbitrator cannot give it any weight since it first arose roughly 50 days following the October 16, 2024 incident. CN argued that Mr. B had an obligation to disclose his situation prior to the incident:

> 177. The timing of the diagnosis, coming only after the incident and resulting discipline, raises concerns regarding its evidentiary weight. **While the Company does not dispute the legitimacy of the diagnosis itself, its late emergence limits its relevance to the events in question**. On a balance of probabilities, the diagnosis does not provide a sufficient explanation for the grievor's conduct at the time of the incident.
>
> 178. **The grievor's diagnosis of Cannabis Use Disorder was obtained on December 5, 2024, approximately 50 days after the incident of October 16, 2024. At the time of the incident, there is no evidence that the grievor had disclosed any dependency, sought assistance, or made the Company aware of any medical condition. As such, the Company was not in a position to consider or implement any form of accommodation at the material time**.
>
> 179. **Employees who require assistance for substance-related issues are expected to come forward and seek support through available Company resources, including the EFAP and Occupational Health Services**. These programs are designed to enable early intervention and accommodation where appropriate. In this case, however, the grievor did not seek assistance or disclose any dependency prior to the incident of October 16, 2024. Instead, the issue of a substance use disorder was raised only after the incident and resulting discipline, with a formal diagnosis obtained approximately 50 days later. As a result, the Company was deprived of any meaningful opportunity to consider accommodation at the material time.
>
> ...
>
> 187. **In summary, there is no credible evidence to establish that the grievor was suffering from a disability at the material time that would engage the protections of the Canadian Human Rights Act. To the contrary, the evidence demonstrates that the grievor did not disclose any dependency, did not seek assistance, and reported for duty relying on his own**

> **assessment of fitness. The subsequent diagnosis obtained after the incident cannot retroactively alter these facts or give rise to a duty to accommodate. In these circumstances, the Company had no obligation to accommodate**, and the grievor's actions constituted a clear violation of CROR Rule G and the Company's Policy to Prevent Workplace Alcohol and Drug Problems.
>
> (Emphasis added)

IBEW

69. In its Brief, the IBEW relied, *inter alia*, on a previous CN case, AH793[30], in which the arbitrator had accepted post discharge evidence (footnotes omitted):

> 144. In AH 793, you relied on OSSTF and admitted the post-discharge evidence in that matter for the same reasons that IBEW submits such evidence should be admitted in the instant dispute. You stated:
>
> > 63. The arbitrator previously examined a similar request to exclude post discharge evidence in AH663. For the reasons expressed in AH663, the arbitrator will admit Mr Weseen's post discharge evidence:
> >
> > > 76. The arbitrator agrees with the TCRC that evidence does not permanently crystallize as of the date of termination, particularly when further evidence arises during the investigation and after the termination which demonstrates an employee suffered from a disability. Ignoring that evidence would cause the same error the SCC found in the TBE case.
> >
> > 64. The SCC described when arbitrators must admit such evidence:
> >
> > > 74. It is true that the third letter is, to some extent, "subsequent-event evidence" since it was written after the dismissal of Mr. Bhadauria. However it has been decided that such evidence can properly be considered "if it helps to shed light on the reasonableness and appropriateness of the dismissal": Cie minière Québec Cartier v. Quebec (Grievances Arbitrator), 1995 CanLII 113 (SCC), [1995] 2 S.C.R. 1095, at p. 1101. In this case, it would not only have been reasonable for the arbitrators to consider the third letter, it was a serious error for them not to do so.
> >
> > 65. But, as the arbitrator further noted in AH663, the admission of post discharge evidence does not mean that it necessarily has much weight, particularly if it was created years after the events:

[30] *Teamsters Canada Rail Conference v Canadian National Railway Company*, 2022 CanLII 102424

123. For the foregoing reasons, even though the arbitrator admitted Dr. Chiasson's report into evidence since it does comment on some of the same issues about which Dr. Snider-Adler had testified, the overall context nonetheless obliges the arbitrator to give it little weight for the specific issue of a cocaine dependency in 2012-2013.

66. Given the SCC's comments as cited above, the arbitrator admits the post discharge evidence since it "helps to shed light on the reasonableness and appropriateness of the dismissal". That resolves the October 11, 2022 objection CN made over the TCRC's lack of disclosure. (Tab 31)

Decision

70. CN did not explain why the arbitrator should distinguish Mr. B's situation from the existing case law on post discharge evidence. Post discharge evidence, seemingly by definition, includes evidence which had not existed prior to the incident in question.

71. A significant difference exists between admitting such evidence "to shed light on the reasonableness and appropriateness of the dismissal" compared with determining the weight to give it[31].

72. In AH663[32], the arbitrator respectfully declined CPKC's detailed legal argument contesting the post-discharge evidence:

> 70. CP contested the post-discharge evidence the TCRC filed, i.e. i) Mr. A's May 8, 2013 email and medical referral; ii) Mr. A's documents from the Laval Addiction Rehabilitation Centre; iii) Hair test results of March 10 and July 5, 2018 (U-2; Tabs 17A & 17B); and iv) Dr. Chiasson's medical report dated October 25, 2018.
>
> 71. In CP's view, an arbitrator cannot rely on post-discharge evidence unless it sheds light on the reasonableness and appropriateness of the discharge at the time it was implemented. CP relied on the SCC's comments in Cie minière Québec Cartier v. Quebec (Grievances arbitrator)10(Quebec Cartier):
>
> [Citation omitted]
>
> 72. CP further contested the value of the post discharge evidence. For example, the May 8, 2013 Walmart note did not reference a cocaine dependency. Rather, it simply referred Mr. A to a psychiatrist for a dependence on opioids. Similarly, CP contested Dr. Chiasson's report, given that the

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[31] *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, 1997 CanLII 378

[32] *Teamsters Canada Rail Conference v Canadian Pacific Railway*, 2019 CanLII 89682

> consultation took place almost six (6) years after the derailment incident. In short, CP argued that such evidence did not address the reasonableness of CP's decision to terminate Mr. A.
>
> ...
>
> 79. The arbitrator accepts the parties' material into evidence. The main question is what weight, if any, to give to this material, especially for those elements which came into existence many years after the original December 2012 incident.

73. The post discharge evidence filed for this case remains admissible subject, as always, to weight.

Did the IBEW demonstrate *prima facie* discrimination?

<u>IBEW</u>

74. The IBEW argued it had met its burden to demonstrate *prima facie* discrimination:

> 149. In other words, in this Grievor's case, "but for" his cannabis abuse disorder, the Grievor would not have engaged in the consumption that led to his non-compliance. By terminating the Grievor based on actions directly related to his addiction, there is clearly an adverse impact on the Grievor arising from his disability.
>
> ...
>
> 155. In this case, the Union respectfully submits that the same conclusions apply here. Prima facie discrimination has been established, on the strength of the Grievor's disclosure of his substance use disorder and the facts which led to his discharge, which weigh in favour of a finding that the Grievor had a problem, and the resulting adverse impact which resulted to him.
>
> 156.The Union emphasizes that this is not a case of a healthy employee who made a choice to consume cannabis 12.5 hours before commencing his work. The record confirms that Mr. [B] suffered from cannabis dependence disorder at the time of his November 2024 dismissal, and that his substance use disorder was a factor leading to the adverse impact of losing his employment.
>
> 157. The Union respectfully submits that on the balance of probabilities, the evidence before the Arbitrator confirms a 'connection or factor' between the Grievor's cannabis use disorder and his positive oral fluids test on October 16, 2024.

CN

75. CN's Brief at times alleged Mr. B did not suffer from a disability, but at other times seemingly accepted he did[33]. CN's main position asked the arbitrator to decide the case based solely on the information CN had in its possession at the time of the October 16, 2024 incident:

> 104. The Company had no duty to accommodate the grievor under the Canadian Human Rights Act. **CN argues that there is no evidence the grievor suffers from a disability warranting accommodation**, and in the further alternative CN submits that the after the fact purported disability does not shield the employee from the consequences of a breach of its Policies, Code of conduct and Rule G. The Company maintains that the accommodation sought would have amounted to undue hardship.
>
> ...
>
> 170. **Notwithstanding its position with regard to the admissibility of the Union's contentions with respect to the CHRA, the Company submits that the grievor has failed to provide evidence that he suffers from a disability under the Canadian Human Rights Act**, and by extension has failed to show prima facie discrimination.
>
> 171. The Company submits that the Union's reliance on the grievor's post-incident treatment and subsequent diagnosis of Cannabis Use Disorder is misplaced. **The appropriateness of discipline must be assessed based on the information available to the Company at the time of the incident and discharge**. Developments occurring after the fact cannot retroactively alter that assessment or impose a duty to accommodate where none was engaged at the material time. In this case, the grievor's diagnosis and treatment arose only after the incident of October 16, 2024, and therefore do not mitigate the misconduct or diminish the seriousness of the violations established.
>
> ...
>
> 173. No medical evidence had been provided establishing a diagnosis of addiction to marijuana, much less that such a condition existed prior to the grievor's termination. While the grievor was subsequently diagnosed with Cannabis Use Disorder, the evidence establishes that this diagnosis was obtained after the incident in question.
>
> ...
>
> 177. The timing of the diagnosis, coming only after the incident and resulting discipline, raises concerns regarding its evidentiary weight. **While the Company does not dispute the legitimacy of the diagnosis itself, its late emergence limits its relevance to the events in question**. On a balance of

[33] Compare its Brief at paragraphs 104, 170, 177 and 187.

probabilities, the diagnosis does not provide a sufficient explanation for the grievor's conduct at the time of the incident.

...

180. The grievor's purported efforts following the incident that led to his termination does not constitute mitigation for his actions. As expressly set out by the Supreme Court, employees who do not seek assistance for a purported substance abuse condition until after a workplace incident leading to their termination, do not establish prima facie discrimination unless they meet the stringent evidentiary threshold established in Elk Valley Coal. The grievor plainly did not meet that burden.

76. In its Reply, CN commented further on *prima facie* discrimination:

> 12. The Company rejects the Union's assertion that the Grievor's discharge constitutes discrimination on the basis of disability. The Union's position relies heavily on post-incident and post-discharge developments, including a subsequent diagnosis and rehabilitation efforts, which do not alter the facts before the Company at the time discipline was imposed. No prima facie case of discrimination has been established on the record as it existed at the material time.

Decision

77. The arbitrator previously noted in CROA 4667[34] the complexity of the legal analysis in this type of case:

> 56. CROA&DR 4609 summarized some of the key duty to accommodate principles. This area remains exceedingly complex for both parties and decision makers. Elk Valley showed that three judges on the SCC could not agree on how to apply these challenging principles.

78. The IBEW satisfied the arbitrator that *prima facie* discrimination existed. The arbitrator has considered the test in previous cases[35] and will not reproduce the previously detailed analysis here. The test requires answers to these three questions[36]:

1. Does Mr. B have a characteristic that is protected from discrimination (i.e. a disability (drug addiction))?
2. Did Mr. B suffer an adverse impact from CN's termination of his employment? and

[34] CROA 4667
[35] See, in particular, CROA 4667 for a case very similar to that of Mr. B.
[36] See *Moore v. British Columbia (Education)*, 2012 SCC 61 at paragraph 33 and AH807-S - *Teamsters Canada Rail Conference v Canadian Pacific Kansas City Railway*, 2025 CanLII 32982

3. Was Mr. B's protected characteristic (disability - drug addiction) a factor in the adverse impact?

79. While not always consistent, CN generally appears not to contest Mr. B's family doctor's diagnosis of cannabis use disorder[37] but rather "its late emergence". This case accordingly differs from those, such as CROA 2716[38], which cautioned against accepting spurious rehabilitation claims without proper evidence. The evidence on Record satisfied the arbitrator that that Mr. B had a cannabis use disorder and that he has made successful efforts to deal with it.

80. Similarly, Mr. B suffered an adverse impact when CN terminated his employment.

81. The IBEW further demonstrated that Mr. B's drug addiction, which came to light shortly after the October 16, 2024 incident, had played a role in leading to this adverse impact. That addiction impacted his ability to comply with CN's Policy.

82. As noted above, *Elk Valley*, *supra*, had sufficient evidence to satisfy a majority of the SCC that the employee could have complied with that policy's advance disclosure requirement. No similar evidence exists in this case. The arbitrator must decide these types of cases based on the evidence rather than conclusory arguments.

83. The IBEW has met its burden to show *prima facie* discrimination.

Did CN demonstrate it had reached the point of undue hardship?

CN

84. CN suggested Mr. B did not have a disability and therefore no duty to accommodate arose. In the alternative, CN suggested Mr. B's disability did not shield him from the consequences of his actions:

> 102. The material facts are unequivocal: the grievor tested positive for marijuana at a level ten times the prescribed threshold, placing him in clear violation of the Company's Policy to Prevent Workplace Alcohol and Drug Problems. Such a result is incompatible with the expectations of a safety-sensitive workplace and constitutes a serious breach of CROR Rule G and the Company's Code of Conduct.

[37] See CN's Brief at paragraph 177.
[38] CROA 2716. See also CROA 4334 and CROA 4653-4654.

> 103. Given the severity of his actions as a safety-sensitive employee, discharge was an appropriate disciplinary action. Jurisprudence supports the Company's position.
>
> 104. The Company had no duty to accommodate the grievor under the Canadian Human Rights Act. CN argues that there is no evidence the grievor suffers from a disability warranting accommodation, and in the further alternative CN submits that the after the fact purported disability does not shield the employee from the consequences of a breach of its Policies, Code of conduct and Rule G. The Company maintains that the accommodation sought would have amounted to undue hardship.
>
> …
>
> 187. In summary, there is no credible evidence to establish that the grievor was suffering from a disability at the material time that would engage the protections of the Canadian Human Rights Act. To the contrary, the evidence demonstrates that the grievor did not disclose any dependency, did not seek assistance, and reported for duty relying on his own assessment of fitness. The subsequent diagnosis obtained after the incident cannot retroactively alter these facts or give rise to a duty to accommodate. In these circumstances, the Company had no obligation to accommodate, and the grievor's actions constituted a clear violation of CROR Rule G and the Company's Policy to Prevent Workplace Alcohol and Drug Problems.

85. CN further commented, in the alternative, that reinstating Mr. B would cause undue hardship:

> 188. Even if a duty to accommodate were engaged, reinstatement is not appropriate. The grievor held a safety-sensitive, supervisory role and was responsible for a junior employee who was seriously injured, reflecting a significant breach of trust and judgment. In these circumstances, the employment relationship is irreparably damaged. Reinstatement, even with conditions, would undermine the deterrent purpose of the Company's Drug and Alcohol Policy and compromise safety. In a highly safety-sensitive environment, any such accommodation would constitute undue hardship.
>
> 189.To the extent that the grievor's documentation is accepted as evidence of a disability and of prima facie discrimination, CN submits that reinstatement is not a viable remedy in this case, and would amount to undue hardship. During his brief tenure with the Company, the grievor has demonstrated unacceptable disregard for the legislative, regulatory and policy framework intended to maintain a safe working environment. As noted by the Alberta Court of Appeal in Kellogg Brown, "extending human rights protections to situations resulting in placing the lives of others at risk flies in the face of logic"…

86. In its Reply, CN further argued:

> 15.The Union's assertion that the Company was required to provide accommodation prior to the incident is not supported by the evidence. The Company's policies expressly provide for assistance through EFAP and encourage employees to seek help proactively. However, the Grievor did not seek such assistance or disclose any concern prior to reporting for duty. Arbitrators have consistently recognized that the duty to accommodate is engaged based on the information available to the employer at the time; the Company cannot accommodate a condition that had not been disclosed or identified.
>
> 16. The Company submits that the Union has not established discrimination within the meaning of the Canadian Human Rights Act. The Grievor's discharge arose from a serious breach of Rule G and fundamental safety obligations in a safety-sensitive role, not from any prohibited ground. Even if a disability is found to exist, the totality of the evidence demonstrates the Company met its obligations and that the Grievor's conduct justified termination.

<u>IBEW</u>

87. The IBEW noted that CN had the obligation, once *prima facie* discrimination existed, to show why undue hardship prevented it from accommodating Mr. B:

> 164. The Union respectfully submits that the Company has not accommodated Mr. [B]'s disability to the point of undue hardship, as required under the Canadian Human Rights Act. The Union respectfully submits that the Company is required to offer the Grievor accommodation and an opportunity to continue his career with the Company.
>
> 165. In short, the Union respectfully submits that it would not constitute undue hardship for the Company to have given the Grievor a further chance, in the circumstances, and not to have rigidly applied the D&A Policy (to the extent the policy even calls specifically for discharge).
>
> …
>
> 190. Mr. [B]'s post-discharge rehabilitation efforts, under the guidance of his treating health professional, have successfully helped him achieve and maintain ongoing sobriety. The Union submits that, at present, returning Mr. [B] to employment does not constitute any significant risk to safety, and that terms can be fashioned to ensure his safe reintegration into the workplace to continue his career with the Company with dignity.
>
> 191. The Union submits that it would not constitute undue hardship to accommodate Mr. [B]'s conditional return to work with the Company. As Arbitrator Schmidt held in CROA Case No. 4297 (Tab 50), the accommodation exercise must balance the "grievor's individual circumstances" against the undue hardship threshold. We submit that the Grievor's efforts towards

regaining control over his disability and commitment to ongoing rehabilitation warrant further accommodation as outlined above.

Decision

88. CROA 4667 resembles Mr. B's case. The arbitrator described the context in the first few paragraphs of that award:

> 1. CP terminated locomotive engineer (LE) Greg Paisley on September 15, 2017. The parties did not dispute that LE Paisley had brought alcohol onto his train and had later consumed some of it during his tour of duty.
>
> 2. The resolution of this case depends on its characterization. CP viewed the case essentially as a disciplinary matter. The TCRC argued it was instead a duty to accommodate case. At the arbitrator's request, the parties provided supplemental submissions focusing on principles arising from the Supreme Court of Canada's (SCC) decision in Stewart v. Elk Valley Coal Corp (Elk Valley).
>
> 3. For the reasons which follow, the TCRC satisfied its burden of proving prima facie discrimination. CP did not meet its resulting burden of proof of demonstrating that it could not accommodate LE Paisley without experiencing undue hardship.

89. In that award, the arbitrator commented on the applicable legal analysis:

> 29. However, if the TCRC meets its burden of showing *prima facie* discrimination, then the SCC had set out, as summarized briefly in CROA&DR 4648, supra, how an arbitrator's legal analysis changes.
>
> 30. A finding of *prima facie* discrimination shifts the burden to CP to demonstrate that it could not have accommodated LE Paisley without incurring undue hardship. Under the applicable jurisprudence, it is no longer enough to show that the conduct, absent a protected ground under the CHRA being involved, would have attracted a severe disciplinary measure.

90. In multiple cases, employers have focused on the disciplinary aspect of a case rather than analyze the admittedly complex issue of the duty to accommodate. For example, in CROA 4667, the arbitrator concluded:

> 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.
>
> ...

> 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.

91. Arbitrator Cameron recently noted a similar employer focus on discipline in CROA 5182[39] despite the evidence showing the employee had an addiction:

> 67. The actions and submissions of the Company focused on the disciplinary aspects of the matter. There was little to no evidence led or submissions made on whether accommodation would result in undue hardship to the Company.
>
> 68. The Grievor has clearly made very extensive efforts to overcome his addiction. I am further comforted by the fact that he tested negative for drugs on November 22, 2023 following his addiction recovery program (see Tab 15, Union documents) and again on May 7, 2025, shortly before the arbitration (see Tab 23, Union documents). He has also been employed in a safety sensitive industry for approximately the last 18 months.
>
> 69. Accordingly, I find that the Company has not established undue hardship.

92. The arbitrator acknowledges that CN in its Brief stated Mr. B's reinstatement would cause it "undue hardship". But the term "undue hardship" represents a conclusion, not a presumption. Without conducting the tripartite accommodation process for Mr. B's disability claim, CN could not furnish the obligatory factual and legal analysis to support a claim of undue hardship.

93. A party with the burden of proof must present all the evidence it gathered to support an allegation of undue hardship. Instead, CN focused mainly on discipline and cases involving employees who worked while impaired but who had no disability.

94. A large body of railway case law has repeatedly examined situations comparable to that of Mr. B[40]. CN's submissions did not demonstrate that accommodation would cause it undue hardship. The arbitrator will accordingly reinstate Mr. B, but on strict conditions.

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[39] *Canadian Pacific Kansas City Railway v Teamsters Canada Rail Conference*, 2025 CanLII 84711

[40] See the summary in the IBEW's Brief at paragraph 167 and following.

DISPOSITION

95. The parties pleaded the legal issues separately in Mr. B's case. The arbitrator will follow that same format for the remedial orders.

Demerit points

96. As noted above, the arbitrator found excessive the 60 demerits points CN imposed for the safety rules incidents. Accordingly, the arbitrator orders CN:

1. Reduce the 60 points to 35 so that Mr. B's disciplinary record stands at a total of 55 points;
2. Remove Mr. B's dismissal from his disciplinary record based on the two Form 780s imposing 60 and 80 points respectively;
3. Reinstate Mr. B in his employment, but without compensation for any wages and benefits lost.

Positive drug test

97. The evidence indicated that Mr. B suffered from a disability. The evidence further demonstrated that Mr. B has succeeded in his ongoing rehabilitation efforts. CN did not present evidence to support its conclusion that undue hardship would occur if the arbitrator reinstated Mr. B.

98. In similar situations, the arbitrator has ordered reinstatement with conditions. These conditions are designed to protect CN's legitimate business interests while also acknowledging an employee's disability.

99. Accordingly, the arbitrator issues the following remedies:

1. CN shall reinstate Mr. B into his employment, without compensation for any wages and benefits lost;

2. Mr. B shall not return to work until such time as CN's medical staff have confirmed his fitness to work. Such analysis may include testing for any substance abuse issues which staff deem appropriate;

3. For a period of two years (Period) from the date when Mr. B starts performing services for CN, he will be subject to random, unannounced drug and alcohol testing, to be administered in a non-abusive fashion. During the Period, Mr. B must abstain from the consumption of alcohol or any unprescribed drugs which would cause impairment. For greater clarity, Mr. B shall keep CN informed of all prescribed drugs he takes to allow for a safety analysis;

4. For the same Period, Mr. B shall continue to attend regular NA meetings and will further engage in such periodic contact and follow-up with CN's Employee and

Family Assistance Program (EFAP) program as the parties may agree is appropriate, or, failing their agreement and if requested, as the arbitrator may determine; and

5. If Mr. B violates any of these conditions, he shall be liable to termination with recourse to arbitration only for the purpose of determining whether a violation of any of these conditions has occurred.

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

SIGNED at Ottawa this 21st day of July 2026.

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Graham J. Clarke
Arbitrator