

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

CASE NO. 4789 SUPPLEMENTARY

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

Written submissions received on January 7, 17, 21 and 26, 2022.

SUPPLEMENTAL AWARD OF THE ARBITRATOR

1. The Grievor was employed as a Trainman (Conductor), a safety-critical position. He was dismissed for violating the Company's *Alcohol and Drug Policy (Canada) – Policy # HR 203 (Alcohol and Drug Policy)*.
2. On September 22, 2021, this Office issued **CROA 4789**, in which I ordered the Grievor's reinstatement, because the evidence did not establish his impairment while on duty. However, the Grievor had disclosed a substance use disorder after testing positive for marijuana post-incident. For this reason, I ruled that the Company should not have terminated the Grievor's employment but should instead have taken reasonable steps to ensure his safe return to work, based on appropriate terms and conditions. I referred the issue of the Grievor's return to work to the parties, but I remained seized with respect to the implementation of my decision.

3. The parties were unable to agree on appropriate terms and conditions for the Grievor's return to work and therefore seek a supplemental award. At my direction, the parties provided written submissions.

4. The Company submits that the Grievor's return to work should be governed by the *Return to Work Agreement (RTWA)* which it adopted on October 29, 2021. The Union disagrees and takes the position that certain aspects of the RTWA are unreasonable.

5. The Union does not propose specific terms and conditions for the Grievor's return to work. It acknowledges that, had the Grievor voluntarily disclosed his substance use disorder outside the circumstances which led to his dismissal in October 2019, he would have been required to enter into the Company's Relapse Prevention Agreement (RPA) which was in effect at the time. However, the Union states that certain aspects of the RPA should not apply in the Grievor's circumstances.

6. In essence, the Union seeks tailored terms and conditions for the Grievor's return to work, which would be less demanding than either the RTWA or the RPA.

7. In determining the terms and conditions of the Grievor's return to work, the Company submits that I have no jurisdiction to rule on the reasonableness or validity of the RTWA, the RPA or the *Alcohol & Drug Policy*, as applicable. It sought an opportunity to make oral submissions on this issue at a hearing.

8. Based on the parties' written submissions and for the reasons that follow, I find that the RPA applies, without adjustments. In reaching this finding, it is not necessary for me to make any general conclusions about the reasonableness or validity of the RTWA, the RPA or the *Alcohol & Drug Policy*. Accordingly, an oral hearing is not required.

The Facts

9. As mentioned above, the Grievor was dismissed in October 2019. At the time, the Company's RPA had been in place for several years and was unchallenged by the Union. The RPA set out the terms and conditions of continued employment for employees in safety-critical positions who had disclosed a substance use disorder.

10. **CROA 4789** was issued on September 22, 2021. The order states:

In view of the circumstances of this case, I order that the Grievor be reinstated in his employment without loss of service, with compensation and benefits, while taking into account the fact that he disclosed a substance abuse disorder on October 9, 2019. Specifically, the compensation and benefits shall reflect the steps that would have been taken by the Company had the Grievor's disclosure occurred, on October 9, 2019, outside the context of post-incident testing. The Company may take all reasonable steps required to ensure the Grievor's safe return to work, including, for example, medical clearance, training, terms and conditions.

11. The RPA was still in effect as of the date of my award in **CROA 4789**, issued on September 22, 2021. On October 21, 2021, the Company adopted the RTWA, which replaced the RPA.

12. On November 9, 2021, as part of the reinstatement process, the Company required that the Grievor sign the RTWA.

13. The Grievor did not sign the RTWA, as the Union contends that some of its terms and conditions are unreasonable. Specifically, the Union takes issue with the following aspects of the RTWA:

- a. In the pre-treatment phase, the Grievor must submit to all medical assessments or requirements deemed necessary under the terms and conditions directed by Health Services or Disability Management;
- b. The arbitrator shall have no jurisdiction to substitute a lesser penalty for any discipline imposed for a violation of any of the terms and conditions of the RTWA;
- c. The Grievor must ensure that he maintains enough head and body hair to be able to provide a sufficient sample at each testing event; and
- d. The absence of an exception or discretion to use alcohol-based hand sanitizer in the context of the COVID-19 pandemic, notwithstanding the current pandemic and despite the fact that there is no evidence that the Grievor has an alcohol dependence.

14. The last two aspects of the RTWA listed above (the conditions related to head/body hair and the use of alcohol-based hand sanitizer) were also part of the RPA.

15. The Company emphasizes that its RTWA reflects the terms proposed in the sample RPA provided in the *Canadian Railway Medical Rules Handbook*¹ issued by the Railway Association of Canada (RAC). Despite the differences between the RPA and the

¹ Subsection 4.8 – Substance Use Disorders, Appendix III – Substance Use Disorders Relapse Prevention Agreement

RTWA, there is no dispute that the RPA also reflects the proposed terms of the RAC sample RPA.

Decision

16. The purpose of the reinstatement order included in **CROA 4789** is to make the Grievor whole and place him in the position he would have been in but for his unjust dismissal in October 2019. At the time, the Grievor would have been required to sign and comply with the Company's RPA, which set out what were then the Company's standard terms and conditions applicable to employees who had disclosed a substance use disorder.

17. The Company has put forward no reasonable justification for imposing stricter conditions for the Grievor's return to work than those in the RPA. Notably, the evidence does not show that the conditions of the RPA are insufficient to ensure the Grievor's safe return to work. In addition, imposing stricter conditions on the Grievor would be inconsistent with the purpose of the reinstatement order, namely to place him in the position he would have been in but for the unjust dismissal. Moreover, considering the RTWA was implemented one month after the reinstatement order in **CROA 4789**, allowing the Company to rely on the RTWA, rather than the RPA, would allow the Company to benefit from its delay in implementing the award.

18. Similarly, the Union has not satisfied me that the Grievor should be relieved from complying with certain aspects of the RPA. It is significant that the Union did not challenge

the reasonableness or validity of the RPA when it was in effect. Specifically, the Union did not challenge the requirement for employees with a substance use disorder to maintain sufficient hair to allow for testing during the term of the RPA, nor did it challenge the prohibition on the use of alcohol for those employees.

19. In any event, in this case, the Union has not advanced any reason why the Grievor would be unable to comply with the requirement to have enough head or body hair to allow for testing while working under the terms and conditions of the RPA. Notably, it has not raised any disability which may trigger a duty to accommodate.

20. Similarly, I am not persuaded by the Union's concerns regarding the use of hand sanitizer. The RPA states that the use of hand sanitizer that contains alcohol is unlikely to result in a positive test, although it is best to limit exposure and avoid breathing the fumes. In its submissions, the Company explains that it has adjusted its process in this regard given the pandemic and the more prevalent use of hand sanitizer. The Company also underscores that positive laboratory test results are always reviewed by a Medical Review Officer (MRO) who considers whether there are explanations for the positive result, including the use of hand sanitizer, in which case the MRO may communicate the test result as negative to the Company. The Union has not previously objected that the use of hand sanitizer has caused problems for employees who have been subject to the RPA during the pandemic. Given the Company's process and approach around the use of hand sanitizer, along with its obligation to act reasonably, and given, ultimately, the availability of recourse through the grievance procedure, I do not find that the requirement

of the RPA relating to hand sanitizer would be unreasonable in the Grievor's circumstances.

21. I make no finding as to the reasonableness or validity of the RPA generally. However, I find that in the Grievor's particular circumstances, the conditions contained in the RPA are appropriate. As I describe in **CROA 4789**, the Grievor had a substance use disorder which he did not report for a period of eight months, until he was tested post-incident, contrary to his obligations under the *Alcohol & Drug Policy* and despite the safety risks that entailed. Therefore, in my view, the RPA should apply in its entirety and there is no basis to remove certain conditions in the Grievor's case.

22. For these reasons, I order that the Grievor return to work under the terms and conditions of the Company's RPA which was in effect at the time of his dismissal, in October 2019.

23. The Grievor shall be made whole for any loss of service, compensation and benefits arising from the delays in the reinstatement of his employment, as he is not responsible in any way for those delays.

February 11, 2022



**JOHANNE CAVÉ
ARBITRATOR**