

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

CASE NO. 4831

Heard in Edmonton, June 21, 2023

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The Company's outright discharge of Conductor Trainee M. K. Kuna from the Company's service on November 24th, 2021.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Conductor Trainee Kuna commenced his employment with CN in August of 2021. Upon successful completion of the theoretical portion of the Conductor Training Program he began the practical portion of his training within the terminal of Toronto South in mid-October 2021. During his short training there were four (4) completed performance evaluations all by the same conductor.

Conductor trainee Kuna commenced his training trips at West Control, within the confines of MacMillan Yard, on November 16th, 2021.

On November 24th, 2021, after a single week of training, on the strength of four performance evaluations, from one trainer, Conductor Trainee Kuna was released from the Company training program absent reasonable cause in an arbitrary, discriminatory manner and in bad faith.

The Union grieved the outright discharge of Conductor Trainee Kuna. The Company elected to ignore their contractually negotiated obligations under Article 84.2(c)(3) and failed to render their decision in writing within the prescribed time limits.

It is the Union's position, however not limited hereto, that the Company blatantly and indefensibly violated Articles 58.1, 65A, 82, 84, 85, 85.5, Addendum 123 and 124 of Collective Agreement 4.16 as well as Arbitral Jurisprudence, the Canadian Charter of Rights and Freedoms, the Canadian Human Rights Act and the Canada Labour Code, when they discharged Conductor Kuna on November 24, 2021, absent reasonable cause in bad faith and in an arbitrary and discriminatory manner.

The Union submits that the decision to dismiss Conductor Kuna was grossly excessive, arbitrary, discriminatory, unwarranted, unjustified and in bad faith.

The Union further submits that the Company failed to articulate the reasons for Conductor Kuna's outright discharge. The letter provided to support the Company's position indicated unsuitability and not meeting performance standards, absent any documented event or conversations.

The Union asserts that Conductor Trainee Kuna was not provided with an opportunity to demonstrate his suitability for the job. The Company acted on the strength of a single Conductor's opinion, in the infancy of Conductor Trainee Kuna's training.

The Union views the Company's actions in determining an outright dismissal, prior to any discussion with the employee as a dereliction of duty and completely irresponsible. The cumulative effect amounts to an abuse of power, process and managerial rights. Contrary to the Company's commitments under Article 85.5 of Collective Agreement 4.16, it cannot be said that the Company exercised its rights reasonably.

The Union, as a result of the significant abuse, submits that a remedy in the application of addendum 123 of Collective Agreement 4.16 is appropriate.

The Union consequently seeks that Conductor Kuna be reinstated into the Company's training program to continue his training and be compensated for any/all lost wages and benefits, without loss of seniority, or as the Arbitrator deems reasonable and appropriate.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

Conductor Trainee Kuna commenced his employment with CN in August of 2021. On November 24, 2021 following the completion of the theoretical portion of the Conductor Training Program he began the practical portion of his training within the terminal of Toronto South in mid-October 2021, the Company determined Mr. Kuna was unsuitable for the position of Conductor. The Company met with the grievor, informed him of the Company's decision and provided him with a letter confirming the Company's decision.

The Company noted in the letter "In review of your progress to date, including a review of your work performance, the Company has determined that you are unsuitable for the role of conductor and has decided to release you from employment with CN".

The Company is filing a preliminary objection as it is the Company's position that the grievance falls outside the Arbitrator's jurisdiction.

The Company disagrees with the Union's position. The decision to release Mr. Kuna was due to his unsuitability for the position of conductor, and in no way arbitrary or discriminatory. The Company denies the Union's allegations that the Company failed to give an opportunity to demonstrate his suitability for the job or articulate the reasons for his release. The Company further denies the allegation that the Collective Agreement was violated or that the articles relied on by the Union are relevant or that a Remedy under Addendum 123 is applicable.

FOR THE UNION:

(SGD.) J. Lennie

General Chairperson

FOR THE COMPANY:

(SGD.) A. Borges

Labour Relations Manager

There appeared on behalf of the Company:

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| A. Borges | – Manager, Labour Relations, Montreal |
| F. Daignault | – Director, Labour Relations, Montreal |
| A. Hernandez Gutierrez, | – Labour Relations Associate, Edmonton |

And on behalf of the Union:

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|-------------|--------------------------------------|
| K. Stuebing | – Counsel, CaleyWray, Toronto |
| J. Lennie | – General Chairperson, Smiths' Falls |
| E. Page | – Vice General Chairperson, Oakville |

AWARD OF THE ARBITRATOR

1. The issue raised by this Grievance is the dismissal of the Grievor during his training program to become a Conductor.
2. The Collective Agreement at issue is referred to in this Award as “Agreement 4.16”. It applies to Conductors, Train Service Employees and Yardhelpers.
3. The Grievor was hired in August of 2021 and dismissed in November of 2021. At the time of dismissal, the Grievor had completed the classroom portion of his training but was in the early stages of the second portion of his training, which was familiarization training.
4. The Company raised a preliminary objection that the Grievor was not inarbitrable as the Grievor was not a bargaining unit employee and was not a probationary employee under Agreement 4.16.
5. Prior to addressing the preliminary objection, it is appropriate to set out the findings of fact.

A. Findings of Fact

6. Upon review of the totality of the evidence, I am satisfied of the following facts.
7. The operations of the Company include the movement of hazardous goods near and through highly populated areas of the country. These operations are highly safety sensitive and dangerous. The job of a Conductor is safety-critical and – after training is completed - is largely unsupervised.
8. The Grievor took his classroom training in Winnipeg, between August 2, 2021. He had four weeks of classroom training, followed by four weeks of field training, which began September 1, 2021. Field training was performed with the assistance of qualified Engineers and Conductors/Yardpersons, and was performed by two instructors; an “on the job trainer” (OJT), which is a unionized employee. During his classroom training, the Grievor was taught by an Instructor Supervisor.
9. The Grievor had a good attitude towards his training and several positive comments were made, including: an ability to line switches; make various joints safely; maintain

separation around equipment; coupling air hoses and changing knuckles and aligning drawbars. He also had good understanding of certain rules.

10. However, there were difficulties with communication and comprehension even in the classroom stage. During his early classroom training in August of 2021, the Grievor was difficult to understand when he was asking questions in class. His Instructor Supervisor noted difficulties with communication and that the Grievor was unable to consistently use correct radio procedures and pronounce instructions clearly. Concerns regarding the Grievor's radio use were also made by the OJT, including with the Grievor's ability to follow instructions and that he did not understand the sequencing required to communicate simple instructions over the radio, even when provided the exact words to repeat: "Radio needs work. Even when I tell Murali exactly what too [sic] say he says it completely different and scrambles all the words". It was also noted that during classroom training, the Grievor would repeatedly interrupt the teaching to ask questions unrelated to the material being taught. He was unable to follow instructions to "park" those questions when they did not pertain to what was being taught.
11. The Company gave the Grievor a second chance to pass his final rules examination, although that was not required.
12. On September 30, 2021, almost two months into his training, things had to be explained to the Grievor two or three times before he fully comprehended; a query was made whether there was a language barrier. In October 13, 2021, it was noted the Grievor had "some improvement" in the area of pronunciation; but still needed "some work" in this area.
13. The Grievor was provided instruction and feedback during his training regarding the importance of clarity over the radio, but this continued to be an issue and he continued to mumble his words. The Grievor remained at a 1 out of 11 for radio use and hand signals at 11 weeks of training, which correlates to "needs improvement".
14. I am satisfied the Grievor had difficulty with understanding proper sequencing of actions and difficulties with comprehension, as late as mid to late October of 2021, even after clear instructions were given and coaching had been given regarding this

issue. Difficulties with red flag procedures were noted to be a particular concern despite ongoing coaching on this important rule. The Grievor was not able to correctly answer questions related to the red flags:

“Murali understand that you cannot go by a red flag! Even after explaining the process of getting permission, he seemed very confused about who to call and when? [sic] We took the entire class out on the mainline and through an actual fore mans [sic] limits. and [sic] even after these explanations Murali had several questions that were very odd considering we just performed the task”.

15. In addition to the OJT and instructor, the Grievor’s radio issues also impacted his crew mates as they had difficulty understanding what he was saying. It was noted that one of the Grievor’s issues with radio communications was that he “always sounds muffled and is really hard to understand. We coached him on this out in the field various times”.
16. I am satisfied the phrase “Student Conductor is performing as expected” in the training records is a default phrase which is included in the training report, but it is not a phrase which is written by a trainer. I am also satisfied that the entirety of the comments need to be considered, as those comments do conflict with this default phrase.
17. The following remarks were made regarding the Grievor’s training:

Difficult to understand in person and very difficult on the radio. Has a tendency not to listen to (or understand) instructions. First day on beltpack has been difficult getting instructions across.

Still has difficult understanding what is being said. Is extremely difficult to understand in person and on the radio. Has improved using beltpack and has fairly good control on the movements, but is quickly become overconfident. When instructed to do something he either doesn’t listen or understand at times does what he wants.

Continues to be difficult to understand and for him to be able to understand instructions. Still tending to be overconfident at some aspects of the job, not in a dangerous way, bur for someone in their fourth day; too overconfident. Beltpack control is good, but instructions like, keep the brake on, have ended up in him releasing it.

He is extremely difficult to understand with any kind of outside noise ... he acts without thinking of what is going on around him, whether there are conflicting movements or switches wrong. Twice today he attempted to make moves without identify other movements that were conflicting with ours and I was forced to tell him to stop. One time he was instructed to slowly

stretch while waiting for another yard engine to go by. After getting the movement going he put it into 15 [the maximum speed] while we had a switch against us and a yard engine about to go past us. I immediately instructed him to stop and re-instructed him as to what he was doing wrong and why. Whether he understood, I don't know.

Yardmaster could not understand him on the radio and my mate also had a lot of difficulty understanding. In a job that is reliant upon clear communication it should be a mandatory requirement upon hiring on for transportation that the person has a voice that can be understood by all. I'm not being racist here. This is a safety issue.

18. The Grievor attended an additional week of switch camp training. While "major improvements" were made in the second week of switch camp, it was noted the Grievor still asked lots of "odd questions which makes me feel like he doesn't fully understand what is going on". It was further noted that "some further assessments should be done while he is out in the field to ensure his knowledge is progressing in the right direction".
19. The Grievor began his training trips out in the field at the end of switch camp. The Grievor had completed 7 of trial trips when he was dismissed. During one of his field trips, the Grievor was observed by a different trainer, who has trained numerous trainees, who also noticed difficulties with communication, listening and following instructions, which were consistent with the concerns noted by the Instructor and the OJT. Concerns were also noted by another individual, the Senior Manager Training.
20. The reference to putting the beltpack "to 15" – which is the maximum speed - involves a "near miss" incident which occurred on November 19, 2021. I am satisfied this was a serious incident. The Grievor did not follow directions to "slowly" stretch his train while using the belt pack, while waiting for another train to pass by. Instead of following this instruction, the Grievor put the movement at 15mph, which is the maximum allowable speed. The Company described this as a "close call" and I am satisfied that is an appropriate explanation. Without the intervention of the trainer, a sideswipe could have occurred with the approaching yard engine.

B. Preliminary Objection

21. The Company's preliminary objection requires consideration of the interplay between several collective agreement provisions. It also requires a determination of the different types of trainees which Agreement 4.16 contemplates, and a determination of which provisions apply to which types of trainees.

Collective Agreement Provisions

Definitions

- A. **Employee:** An individual holding seniority rights who is working under this agreement¹.
- B. **Road Service Employee:** An employee covered by this agreement who performs the duties of a Conductor, Assistant Conductor, Conductor Pilot, Baggage Handler, Flag person and/or Engine Service Employee, and, on Seniority Districts 11 to 15 inclusive employees who perform service in yards other than those listed in paragraph 47.9.
- C. **Yard Service Employee:** An employee covered by this agreement who performs the duties of a Yard Conductor, Yard Helper, Car Retarder Operator, Engine Hostler and Motorperson/Fireperson Helper at Oshawa in the yards listed in paragraph 47.9

Article 58 Promotion Period

58.1 An employee will be considered as on probation until he has completed 90 tours of service under this Agreement. If found unsuitable prior to the completion of 90 such tours, an employee will not be retained in service and such action will not be construed as discipline or dismissal but may be subject to appeal by the General Chairman on behalf of such employee.

Article 59 Experience of Employees

59.1

- (a) Where an assistant conductor is required pursuant to Article 11, conductors will not be required to work without the assistance of an employee who has completed the Company training course for new train/yard service employees.
- (b) Conductor (yard) will not be required to work without the assistance of an employee who has completed the Company training course of new train/yard service employees

¹ No Article Number; contained on p. xxvii

- (c) The Training course new train/yard service employees shall consist of classroom training and 45 trial trips as a train/yard service employee trainee of which 30 must be in road service and 15 must be in yard service except that at Toronto Terminal Yards and Montreal Terminal Yards, the training course will require 60 trial trips of which 30 must be in road service and 30 must be in yard service.

Article 60 - Promotion

60.1 Employees shall rank on seniority lists as of the date of successful completion of the Company's training course for new train and yard service employees in accordance with their relative standing in the group with which they qualified.

(a) Those candidates who are already in the service of the Company shall rank ahead of new employees in their group and their relative standing shall be based on their service date. Should two or more employees have the same service date, their relative standing shall be determined in the same manner as described in (b) below, with the lottery restricted to such employees only; or

(b) Each new employee other than those described in sub-paragraph (a) hereof shall write his name on a slip of paper which will be deposited in a container. In a second container shall be deposited slips of paper, numbered to correspond with the number of names in the first container (i.e. 1, 2, 3 etc.). The group will then select a leader who will conduct a draw from the container with the name slips. As a candidate's name is drawn, such employee shall then draw from the numbered slips, and the number selected shall be the employee's rank in the group (i.e. 1,2,3, etc.).

Article 65 Training Programs

Promotion to Conductor

65.1 The following conditions will apply to employees required to undertake the Company's training course for qualification and promotion to Conductor

...

Article 65A Conductor Training Course Road/Yard New Employee

Article 65A.1

(a) During the time an employee is assigned to the Company's Conductor Training Course, trainees will be paid at the all-inclusive rate per 40 hour week:...

[classroom and familiarization pay rates set out]

(b) The rates of pay and conditions shall also apply to employees who transfer from other bargaining units, except that if the employee is governed by another collective agreement which has rates of pay for training which exceed those governed by this Article, then those rates will apply. Upon request, the General

Chairman will be provided with relevant information pertaining to employees who are attending the training course that are from another bargaining group.

...

65A.5

(a) An individual commencing the training program outlined herein, will be required to qualify as a conductor/yard Conductor within six (6) months after commencing the Conductor Training Program.

(b) The Company's Conductor training program shall consist of areas of instruction such as but not limited to, the Canadian Railway Operating Rules, Dangerous Goods Training, Belt Pack training and Familiarization/experience training which may be expanded to address the requirements of local operations....

Classroom Training

65A.6

(a) Each Trainee will be required to attend eight (8) weeks in the classroom training program, if successful the Trainee will be certified as a Conductor Trainee, herein after referred to as a Trainee.

(b) *[concerning Trainees who do not pass the classroom portion or rules examination]*

Familiarization Training

65A.7

(a) Following the classroom training program, the Trainee(s) will be provided with training tours in switching and road/yard operations, the mixture of which shall be locally determined by the appropriate officer of the Company and the Designated Trainer(s). The shifts or tours of duty to be worked shall be mutually agreed by the Local Company officer and the Designated Trainer(s) taking into consideration the purpose of maximizing the experience gained by the Trainee. The shifts or tours of duty to be worked shall be mutually agreed by the Local Company Officer and Designated Trainer(s) taking into consideration the purpose of maximizing the experience gained by the Trainee. Any dispute in the number of shifts or tours of duty to be worked shall not prevent the commencement of the training tours, and the issue shall be brought to the immediate attention of the Joint Review Committee for resolution. Trainee(s) shall also be provided experience tours at locations to which they would be assigned or in other services, such as, but not limited to passenger service, which shall consist of:

- i. A minimum of 45 trial tours of duty as locally arranged, followed by:
- ii. Certification as Conductor/Yard conductor, followed by;

- iii. Successful completion of the Belt Pack and CLO training courses, followed by;
 - iv. Collective Agreement probationary period
[further note as to when the probationary period begins in a certain situation which is not applicable]
- (b) Trainees will receive on the job training in road/yard operations with a Designated Trainer. These employees will counsel, assist in the training of, and evaluate Trainees during the training process.
- (c) In addition, for familiarization training purposes, each Trainee will be assigned with a Designated Conductor Trainer(s), hereinafter referred to as a Designated Trainers [sic]. Designated Trainer's will be mutually chosen from employees currently working the position of conductor/yard conductor. The designated trainer will submit to the appropriate Company Officer an evaluation on the Trainees' progress together with specific recommendations which will assist the Company in determining those areas where the candidate requires further assistance. Copies of these progress reports will also be supplied and reviewed with the Local Chairman.
- (d) During such tours the Trainee will assume the Designated Trainer's Conductor/Yard Conductor position. The Designated Trainer will, consistent with the defined evaluation criteria, counsel, oversee the activities of and evaluate the Trainee. All crew member shall continue to be held responsible for the safe observation of their train/movement including the observance of such areas as operating rules, timetable special instructions and other related regulations.
- (e) During the practical portion of the training program, each Trainee(s) progress will be monitored by the Designated Trainer's and reviewed on a regular basis with the appropriate Company Officer. Through feedback from the Supervisor and Designated Trainer(s), Trainees will be advised of their progress to date, and which specific areas, if any, that employees require additional effort or counselling. Where required, the Company will make the additional instruction available to the Trainee.
- (f) Trainee who fails to demonstrate the ability to perform the duties associated with the position to the satisfaction of the appropriate officer of the company or Designated Trainer, may be provided additional instruction or additional training tours. Any Trainee who fails to successfully qualify, upon completion of additional instruction or training, will be dispensed with.
- (g) After completing the shifts or tours of duty as outlined in the training program and upon recommendation by the Designated Trainer(s) and the appropriate Officer of the Company, the Trainee will be required to work a minimum of one tour of duty in road service and/or one shift in yard service during which they will be assessed by a Company Officer who will qualify the Trainee as a

conductor/yard conductor consistent with the pre-defined criteria. Such Trainee will perform all duties of the regular employee when qualifying.

Note: A Trainee will not be classed as a qualified Conductor/Yard Conductor prior to the six month period defined in Article 65A.6 without the concurrence of the Designated Trainer(s).

...

New employees with former Railway operating experience

65A.8

- (a) Former CN Rail employees or employees of other Railroads who have been previously qualified as a conductor or yard conductor within three (3) years of the date of hire may not be required to complete this course, but will be considered as qualified provided they can pass the necessary examinations...
- (b) Trainees outlined herein, will be provided with training tours in switching and road/yard operations, the mixture of which shall be locally determined by the appropriate officer of the Company and the Designated Trainer(s).

Article 65A.9

- (a) Current employees who have not obtained the requisite 18 or 24 months service and/or have not yet had the opportunity to qualify as Conductor/Yard Conductor will be provided an opportunity to be examined for promotion to Conductor...]
- (b) The Conductor (Trainee) shall come within the scope of the collective Agreement at such time as they work their first shift or tour of duty, at which time they will be ranked on the seniority list in the manner applied on each respective General Chairman's territory. Trainees will be placed on the Conductor's seniority lists behind those employees already in service.
- (c) Conductor (Trainee's) governed by this agreement shall not be regarded as permanent until completion of the training program specified herein, including any probationary periods outlined in the Collective Agreement.
- (d) A Conductor (Trainee) governed by this Agreement will be considered as on probation until they have completed 90 tours of service. If found unsuitable prior to the completion of the training program or the 90 such tours, the Trainee will not be retained. The Trainee involved will be interviewed and explained the reason for termination. Such action will not be construed as discipline or dismissal but may be subject to appeal by the General Chairman on behalf of such employee

Note: In the application of this clause, each twenty four (24) hour period, or less, in which compensated service is performed shall be treated as a separate “tour of duty”.

Article 65A.10

The provisions of the Articles 59.1(c) Experience of Employees and Article 60 (Promotion – with the exception of paragraphs 60.1 and 60.9) shall not apply to new employees during the training period.

Article 82.1

Employees will not be disciplined or dismissed until the charges against them have been investigated.

....

Arguments: Preliminary Objection

22. The Company argued the Union does not enjoy an “all employee” bargaining unit and cannot represent all employees just because they work within a certain geographic area. It noted the Grievor was not on regular payroll on a working ticket, which would occur for probationary employees, but on a flat trainee rate, which was negotiated outside the collective agreement. It argued the Grievor was not a bargaining unit member, did not pay any dues to the Union and did not have the ability to access the arbitration procedure under the Collective Agreement.
23. The Company argued that “trainees” are a separate classification from Conductor. Specifically, it argued Article 65A.9(b) treats them as two separate classifications by the terms “Conductor (Trainee)”, which are both capitalized. It argued this must be given effect. The Company argued the Grievor was not a “probationary Conductor” under Article 58.1 as he had not completed any tours of service. Rather, he was a “trainee” Conductor. As the Grievor was merely “in training” and not a probationary employee” under Article 58.1, he was not entitled to any “right of appeal” which was conferred upon a probationary employee by that Article. It was also the Company’s position that trainees are not entitled to accumulate seniority until they complete their tours of service.
24. Since the Grievor did not have any rights under the Collective Agreement, the Company argued it was not obliged to conduct an Investigation, prior to terminating the Grievor’s employment.

25. The Company argued jurisdiction is a matter of law. The failure to raise the issue at Step 3 of the grievance process cannot confer jurisdiction on the arbitrator where none exists. It argued the arbitrator has no jurisdiction to hear this dispute and the Grievance should be dismissed.
26. The Union argued that this was the first time the Company had raised a preliminary objection regarding the arbitrability of the discharge of Conductor Trainees and that this issue was first suggested late in the process at the Step 3 response on May 5, 2023; 15 months past the Union's Step 3 grievance. It urged the Grievor's employment is clearly covered by the agreement, including Article 65A. It notes the Grievor was hired to be a Conductor, who is governed by the agreement and he is paid in accordance with the rates set out in Agreement 4.16. The Union noted the trainee rate is not "negotiated outside of the collective agreement" but rather is contained in Article 65A.1, and that the Grievor was on the payroll at a weekly rate.
27. The Union argued the Grievor was a seniority employee at the time of his dismissal, as seniority accumulates from the time the Grievor started his employment in Winnipeg. When he successfully completed the theoretical portion of his training, he left that training with a card identifying him as a "Conductor", which falls within the bargaining unit. When he returned to his home terminal, a seniority draw was performed and he was thereafter a seniority employee. The Union noted that Union dues are taken once a month after individuals complete their classroom training, and that the Grievor having returned from Winnipeg would have had dues collected but was dismissed prior to that taking place. It was the Union's position that the Grievor was not covered under Article 65A.9(b), as he was not a new employee with former Railway experience, but he was covered by Articles 65A.1 through 65A.7.
28. Even if the Grievor was somehow not a probationary employee under the Agreement, he was under the *Canada Labour Code* and could not be dismissed absent cause and a fair and impartial Investigation: **AH 731**. It argued **CROA 1568, 2496** and **1932** are distinguishable.

Analysis and Decision: Preliminary Objection

29. To determine the preliminary objection, it is necessary to determine if the Grievor was a probationary employee.

Was the Grievor an "Employee"?

30. The Company has argued the Grievor was not a bargaining unit member and did not have any rights under Agreement 4.16.

31. For the reasons which follow, I cannot agree with the Company's characterization. In my view, the Grievor was an "employee" under Agreement 4.16.

32. An "Employee" is defined as an "[a]n individual holding seniority rights who is working under this agreement". Article 60.1 states that "employees shall rank on seniority lists as of the date of successful completion of the Company's training course for new train and yard service employees...".

33. As noted in the seminal decision in *Tung-Sol of Canada Ltd. and U.E., Local 512*², a collective agreement will be strictly construed against an interpretation which undermines or causes an individual to lose seniority rights.

34. Agreement 4.16 refers to both "seniority rights" and the "seniority list". A seniority "right" belongs to an employee. I agree with the Union that every day the Grievor maintained his employment with the Company, he was accruing seniority rights. "Ranking" on a seniority list *vis-à-vis* other individuals is a different concept. If the Grievor finished his training, the Company could not have taken a position he did not have a seniority "right" to a certain rank on the "seniority list", *vis-à-vis* its other employees. The "list" applies the "right" that the Grievor had earned.

35. I am prepared to conclude that the Grievor was an "employee" under Agreement 4.16 as being an individual who had accruing "seniority rights" during the time he was "working" under Agreement 4.16.

36. The next question is which provisions were applicable to the Grievor as an "employee" under Agreement 4.16?

² (1964) 15 L.A.C. 161

The Three Types of “Trainees”

37. Parties are able to negotiate different rights for distinct types of trainees. Upon review of Agreement 4.16, I am satisfied there are three types of individuals who may become a Conductor trainee:
- a. Former CN Rail employees or employees of other Railroads who have previously been qualified as a conductor or yard conductor within three (3) years of the date of hire;
 - b. Current employees of the Company, including individuals from other bargaining units; and
 - c. Individuals who are hired to be Conductors, who have no experience and must receive training from the Company.
38. The Grievor is the third type of trainee.
39. All trainees are captured generally under Article 65.1 as “employees required to undertake the Company’s training course for qualification and promotion to Conductor. I am satisfied their rate of pay is as set out in the Agreement, as are the conditions under which they will work, how they will be trained and how they will rank in seniority *vis-à-vis* each other when their training is complete.
40. I am satisfied the first type of trainee “comes within the scope of the Collective Agreement “at such time as they work their first shift or tour of duty, at which time they will be ranked on the seniority list in the manner applied...”. (Emphasis added).
41. The seniority ranking of the second and third types of trainees are as noted in Article 60.1 (which Article 65A.10 states still applies to trainees). These types of trainees do not rank on seniority lists until the date they successfully complete their training.
42. If the Grievor were also covered by Article 65A.9(b) the two provisions would be in conflict: Article 60.1 provides trainees are not ranked until completion of their training, while Article 65A.9(b) indicates ranking “in the manner applied on each respective General Chairman’s territory”. It cannot be the case that both provisions apply to the Grievor. The parties are not assumed to intend in interpretation where provisions come into conflict. I am satisfied the Grievor is not governed by Article 65A.9 (b), but was covered under the other provisions of Article 65A(1) to (7).

43. I am also prepared to find that Articles 65A.9(c) and (d) are distinct from Article 95 A.6(b) and apply to *all three* types of trainees. Those two articles refer to a Conductor (Trainee) who is *governed by the Agreement* (emphasis added). Article 65.9(b) does not have that wording. When parties use different words, they are assumed to intend different results. I am prepared to interpret that phrase as broad enough to capture *all* trainees, wherever they may be referred to in Agreement 4.16.
44. Under Article 65A.7 which is “Familiarization Training”, a trainee is to be provided “training tours in switching and yard operations”. Their training was to consist of four different stages:
- a. The completion of 45 “trial tours”;
 - b. Certification as a Conductor/Yard Conductor;
 - c. Belt Pack and COL Training course completion; and
 - d. *Collective Agreement probationary period* (emphasis added)
45. The Union has argued the Grievor was a probationary employee either under Article 58.1 or the *Canada Labour Code*.
46. I cannot agree with the Union that the Grievor was already subject to the probationary period as established by Article 58.1 at this stage of his training. Article 65.A(7) makes it clear he does not reach the “Collective Agreement probationary period” – which I am satisfied is Article 58.1 - until he completed the previous three steps.
47. That said, I agree the Grievor was a probationary employee under the terms of Agreement 5.16, due to the application of Article 65A.9(c) and (d). Under Article 65A.9(c), Conductor Trainee’s are not “permanent” until completion of training “including any probationary periods”. Article 65.9(d) provides:
- A Conductor (Trainee) governed by this Agreement **will be considered as on probation** until they have completed 90 tours of service. If found unsuitable prior to the completion of the training program or the 90 such tours, the Trainee will not be retained. The Trainee involved will be interviewed and explained the reason for termination. Such action will not be construed as discipline or dismissal

but may be subject to appeal by the General Chairmen on behalf of such employee.

48. The “Note” after this clause makes clear that each 24 hour period or less in which “compensated service” is performed is “tour of duty”.
49. As the Grievor had not yet reached 90 tours of duty when he was dismissed in November of 2021, I am satisfied the Grievor was in a probationary period during his time of training to become a Conductor, which period was separate and apart from the probationary period he would *also* have to serve under Article 58.1 at the end of his training. As a probationary employee, the Company was entitled to dismiss him if he was found to be “unsuitable”.
50. While I agree with the Company that arbitrability is a question of jurisdiction and that an arbitrator cannot be given jurisdiction by the actions of one or the other parties, in this case, jurisdiction arises from the terms of Agreement 4.16.
51. The Grievor’s dismissal is arbitrable on a limited basis of review of the Company’s decision of “suitability”.

C. Merits: Did the Company’s Decision Meet the Required Standard?

52. The Union argued the decision to dismiss the Grievor was arbitrary, discriminatory, and taken in bad faith. It noted the Company relied on the opinion of only one individual during the training; that the Grievor also had many positive comments; that he was able to communicate well enough to be successful at the interview stage and that he had passed his classroom training. The Company urged it had a basis on which to determine the Grievor was not suitable for the position of Conductor and made its decision appropriately.
53. The Company urged that it appropriately determined the Grievor was unsuitable under Article 58.1, due to “continual concerns” with the Grievor’s communication with others and failing to follow instructions which resulted in safety concerns. It noted the degree of trust required was high due to the safety concerns inherent in the work of a Conductor and the fact the Grievor would be working unsupervised once training was completed.

54. The jurisprudence is well-established that the Company had “broad” discretion to determine suitability of a probationary employee during a probationary period, but that this discretion is not unlimited. The decision to dismiss a probationary employee must not be arbitrary, discriminatory (as based on factors not related to job requirements and performance) or taken in bad faith: **CROA 1568; CROA 2496; AH 665; CROA 4823.**
55. It should be emphasized it is not the job of an arbitrator to re-evaluate the Company’s decision, or to weigh for herself the strengths and weaknesses of the Grievor’s performance and understanding. Rather, the role of this process is limited to an assessment of whether that decision was arbitrary, discriminatory as being based on factors other than the job requirements and the Grievor’s performance, or taken in bad faith.
56. Upon review of all of the evidence, arguments, and jurisprudence in this case, I am satisfied the Company has met the required standard, in this case.
57. I am satisfied an Investigation was not required. Article 65A.9(d) specifically states the dismissal was not to be construed as disciplinary, so it is a non-culpable dismissal. Article 82 - which requires investigation of the “charges” against an employee to determine whether a dismissal is “unjust” - is not triggered with a non-culpable, non-disciplinary dismissal: **CROA 4823.**
58. The Union has argued the Grievor was in the infancy of his training and that the Company did not have a sufficient basis of work to determine his suitability even on a more limited, probationary standard. It noted he had completed the first classroom section of his training without any difficulties with comprehension or language and had successfully completed an interview prior to that. Its position in its Statement of Issues was that this dismissal at this early stage – and based on one Trainer - was “completely irresponsible”, arbitrary, discriminatory, and taken in bad faith.
59. Regarding the level the Grievor was at in his training, the Grievor had been employed for more than three months. While the Grievor was early in his *field* training, he had already spent almost three months learning the theoretical basis for his job in the classroom and a further month in the field.

60. There are two types of training in the Company's training program: classroom and familiarization experience: Article 65A.5 and 65A.6. This type of program allows an individual to demonstrate their classroom learning in the field.
61. It is not unusual that when an individual reaches the field, it may be that what he is capable of learning in a classroom does not translate to field work, especially if the issues are related to communication and comprehension for field tasks. Not every trainee will be successful at both elements of the training program.
62. While there may be situations where timing can be an issue, I am not satisfied this is that case. It must be recalled there were issues noted with the Grievor's comprehension *even in the classroom*, given the instruction that had been provided and the questions the Grievor was asking after that instruction. Concerns were raised with his comprehension at that early stage, as well as with his communication skills. This continued into his field work.
63. The evidence was that while there was improvement over time, the Grievor's radio communication – and his comprehension – remained a significant concern.
64. The Union has argued it was arbitrary for the Company to rely on the evaluation of one person. There are two answers to this argument.
65. First, I do not find the Company only relied on the evaluation of one individual in making its decision, as noted in the facts, above. Second, even if that were the case, Article 65A.7 contains comprehensive detail regarding the role of the Designated Trainer in evaluating trainees during the training program: 65A.7(b), (c), (d) and (e). In Article 65A.7(f) if a trainee "fails to demonstrate the ability to perform the duties associated with the position to the satisfaction of the Company or Designated Trainer" (emphasis added), that individual may be provided additional instruction. It then goes on to say that "any Trainee who fails to successfully qualify, upon completion of additional instruction or training, will be dispensed with".
66. I am satisfied the parties have agreed that Designated Trainers are to have a substantive evaluative role; can make key determinations about a trainee's progress; and that the Company *is* able to place significant faith in the evaluative

opinions of the Designated Trainer during the training period. I therefore cannot agree it was completely irresponsible or arbitrary for the Company to rely on the opinions of such trainers when assessing suitability of a trainee, as alleged by the Union. I do not agree the comment “I am not being racist here” in the comments meant that the Trainer was in fact “being racist” or discriminatory. I accept that clear radio communications are an important part of the role of Conductor. I further accept that individuals of any ethnic origin can mumble while on the radio and that it would be a job requirement for all individuals – no matter their ethnic origin – to speak so they can be understood when using that equipment.

67. However, the opinions of others is not the only evaluation in this case. The Grievor also had a “near miss” in the field. I am satisfied on reviewing the evidence that either the Grievor did not understand the instruction given regarding using the Belt Pack – or he was careless and overconfident. Either way, it was not arbitrary for the Company to have concerns with the suitability of the Grievor following this “near miss” incident in the field, especially when combined with the other issues as noted by several individuals. The Grievor’s termination took place shortly after this incident occurred.
68. The Union also raised issue with the sufficiency of the reasons. The Company indicated its reason was unsuitability, based on failure of the Grievor “to meet the established standards and expectations”, which “included a review of [the Grievor’s] work performance. While I can appreciate the Grievor’s desire to know as many details as possible, I cannot agree that as a probationary employee he was entitled to comprehensive or detailed reasons, as alleged.
69. On the facts of this case, I am satisfied the requirements of Agreement 4.16 for providing the Grievor reasons for his dismissal have been met.

D. Conclusion

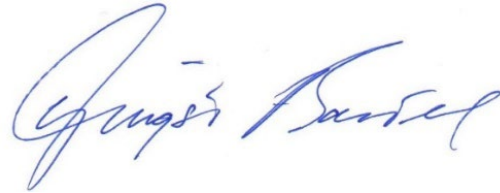
70. The Grievor was serving a probationary period during his training.
71. Training involves considerable expenditure of both time and resources on the part of the Company. I am satisfied the Company had a legitimate business reason for

determining the Grievor was not suitable to continue training as a Conductor at the point in time that decision was taken. That decision was not arbitrary; was not discriminatory as based on factors unrelated to the Grievor's performance and the job requirements; and was not taken in bad faith.

72. The Grievance is dismissed.

73. I remain seized to address any issues regarding the implementation of this Award and to correct any errors or omissions to give it the intended effect.

July 28, 2023



CHERYL YINGST BARTEL

ARBITRATOR