

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

CASE NO. 4854

Heard in Montreal, August 8, 2023

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the employment file closure of Conductor M. Ferrada of Revelstoke, BC.

JOINT STATEMENT OF ISSUE:

Under Transport Canada's Ministerial Order dated October 29, 2021, all employees of Canadian Pacific Railway Company were required to have received at least one dose of an approved COVID-19 vaccine, unless they had received an approved exemption, and to have provided an attestation regarding their vaccination status by no later than November 15, 2021 (Tab 1).

On November 5, 2022, Mr. Ferrada filed a request for a religious exemption. This request was denied on November 8, 2022. (Tab 2) On November 12, 2021, Mr. Ferrada attested as being unvaccinated (Tab 3).

On November 16, 2021, a Notice of Non-compliance was issued requiring compliance by November 23, 2021 (Tab 4). System Bulletins, Vaccination Mandate Policy and FAQs issued to employees in the fall of 2021 are available at Tab 5.

On November 18, 2021, Mr. Ferrada was called for work, and after a discussion with the Crew Dispatcher, the Crew Dispatcher placed him in an off (Sick) status. (Tab 6)

Mr. Ferrada was issued a Notice of Investigation for December 22, 2021 in connection with "Your alleged excessive absenteeism; extending from November 18th to present." (Tab 8) Mr. Ferrada responded, explaining that he would not be able to attend the investigation, and provided reasons for his inability to attend.

The Company sent Mr. Ferrada subsequent Notices of Investigation on December 31, 2021 for "Your failure to appear for a company-scheduled investigation at the Revelstoke GYO on December 22nd, 2021 at 15:00.", and "Your alleged absenteeism; extending from November 18th to present." On January 6, 2022, further Notices of Investigation were sent to Mr. Ferrada for "Your failure to appear for two company-scheduled investigations at the Revelstoke GYO on December 22, 2021 at 15:00, and January 5th, 2022 at 11:00.", and "Your alleged excessive absenteeism; extending from November 18th to present." (Tabs 9-12) Mr. Ferrada again responded on January 7, 2022, explaining why he would not be able to attend.

Mr. Ferrada's employment file was closed on January 9, 2022 (Tab 13). This matter was grieved by the Union (Tab 14).

On September 19, 2022, the Company offered to reinstate Mr. Ferrada under certain terms and conditions. This offer was declined the following day. (Tab 15) The Company advised Mr. Ferrada of its decision to unilaterally reinstate him into Company service. On September 29, 2022, Mr. Ferrada refused the Company's unilateral reinstatement. The Union subsequently advised Mr. Ferrada was prepared to accept reinstatement; however, as he had moved, he required to book on in Kenora, ON. The Company did not agree to this request; however, maintained its intent to reinstate Mr. Ferrada into his employment at his Home Terminal of Revelstoke. Mr. Ferrada did not return. (Tab 16).

Union Position

The Union contends that Mr. Ferrada was not afforded a fair and impartial investigation under the requirements Article 39 of the Collective Agreement. For this reason, the Union contends that the dismissal/file closure is null and void and ought to be removed in its entirety and Mr. Ferrada be made whole. The Union argues the Company would have suffered no prejudice nor undue hardship had they rescheduled the investigation for a later date or utilized other means to conduct the formal investigation.

The Union contends the Company has failed to meet the burden of proof or establish culpability regarding the allegations outlined above. The Union further argues the facts do not translate into an indication that Mr. Ferrada was no longer interested in the employment relationship.

The Union contends the termination of Mr. Ferrada is discriminatory, arbitrary, and excessive in all of the circumstances.

The Union requests that the Company show Mr. Ferrada reinstated without loss of seniority and benefits, and that he be made whole for all lost wages with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

Company Position

The Company has reviewed the grievance in its entirety and cannot agree with the Union's contentions nor the requested resolution.

The Company maintains the grievor's culpability as outlined in the discipline letter was established and based on all the facts on hand. Discipline was determined following a review of all pertinent factors, including those described by the Union.

The Company has carefully reviewed the objections raised as well as details of the Union's allegations in its grievance. The Grievor chose on his own accord to not attend any statement and get his version of events on record. Therefore, the Company had no choice than to make a decision based on the facts before them.

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

FOR THE UNION:

(SGD.) D. Fulton

General Chairperson

FOR THE COMPANY:

(SGD.) L. McGinley

Director, Labour Relations

There appeared on behalf of the Company:

L. McGinley – Director Labour Relations, Calgary
J. Bairaktaris – Director Labour Relations, Calgary

And on behalf of the Union:

M. Church – Counsel, Caley Wray, Toronto
D. Fulton – General Chairperson, Calgary
J. Hnatiuk – Vice General Chairperson, Calgary
R. Finnsen – Vice President, TCRC, Ottawa

J. Lind – Local Chairperson, Revelstoke (via Zoom)
M. Ferrada – Grievor, Revelstoke (via Zoom)

AWARD OF THE ARBITRATOR

Background

1. The grievor is a new conductor, having some six months of seniority in November, 2021, when he was first called for work and did not attend. Other than for the present matter, he has a clean discipline record.

2. This matter plays out against the backdrop of Transport Canada Ministerial Orders requiring railway workers to get vaccinated, subject to certain exceptions, and Mr. Ferrada's religious beliefs that he could not get vaccinated, nor be subject to regular nasal swab testing.

Submissions of the Parties

Company Submissions

3. The Company submits that the grievor had proper notice and a fair and impartial hearing. The Company had his written submissions. The grievor or his Union could have requested a postponement of the investigation or alternate arrangements, which were never raised. The grievor's religious exemption had been turned down, he was not available and did not attend multiple investigation dates. Instead, the grievor chose to leave Revelstoke for Manitoba for other employment. The grievor made no effort to verify with the Company whether his belief that he could not return to work was valid. The decision of the Company that the grievor had abandoned his employment was justified in the circumstances. The grievor turned down two reinstatement offers by the Company.

Union Submissions

4. The Union submits that the grievor had a sincere religious belief that he could not be vaccinated or perform regular nasal swab testing. This belief was confirmed in his demand for a religious exemption, the letter from his Pastor and his multiple letters to the Company. The Union points to the Ministerial Orders and the Bulletins of the

Company, which all prohibited unvaccinated employees not performing regular nasal swab testing from being on Company property. It notes the jurisprudence concerning employees who attend work in violation of public health and Company rules is harsh.

5. It submits that the grievor was in constant communication with the Company and clearly had no intention of abandoning his position.

6. The Union submits that a fair and impartial hearing is imperative, or otherwise the discipline is void ab initio. Here, the grievor was not permitted an opportunity to be heard by the investigating officer, when the Company could have postponed the hearing or held it using other means.

7. The Union submits that the decision to terminate for absenteeism is clearly arbitrary and discriminatory and the grievor should be reinstated and made whole.

Issues

- a) Did the grievor receive a fair and impartial investigation?
- b) If so, did the Company have just cause to terminate his employment?
- c) If the answer to the first two issues is no, is the grievor entitled to reinstatement and damages?

Decision

Did the grievor receive a fair and impartial investigation?

8. For the reasons that follow, I find that he did not, and therefore the discipline is void ab initio.

9. Article 39.05 of the Collective Agreement between the parties reads as follows:

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

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

10. The CROA jurisprudence is constant and longstanding concerning the critical importance of a fair and impartial hearing. As Arbitrator Picher noted in **CROA 3061** (see Tab 24, Union documents):

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

11. In **CROA 3221** (see Union documents, Tab 25) he again set out the reasons for requiring such a hearing:

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

12. In **CROA 4663**, Arbitrator Clarke dealt with the failure to hold any investigation before the termination of the Locomotive Engineer:

"This case is unique in the arbitrator's experience, since the issue is not about the adequacy of the investigation but rather the total absence of an investigation. However, both an unfair investigation and the total absence of an investigation inevitably lead to the same result: a finding that the discipline is void *ab initio*".

13. The grievor was properly summoned on three occasions to attend an investigative hearing. He did not attend, for the reasons given in writing by the grievor to the Company.

14. Both the Company and the Union plead that the other could have sought a postponement of the hearing or requested an alternative mode of holding the meeting. Given that the meeting is being held at the instigation of the Company, the importance of the meeting and the consequences to the grievor, and given at least a prima facie plausible explanation for the inability of the grievor to attend, I find that the Company should have explored alternatives to a face to face meeting.

15. Clearly, the meeting could have been held over Zoom, with written questions and answers, by telephone, or it could have been postponed until the grievor could attend. The Company already had announced that non-vaccinated employees would be placed on Leave Without Pay and possibly other sanctions including termination. However, this change did not apply to those employees with an approved exemption (see Company Bulletin CPSB-106-21, Union Exhibits, Tab 9).

16. The grievor was never given the opportunity to explain further his reasons for not taking the vaccination or participating in on-going swab testing. If he had, it is possible that his religious exemption could have been fleshed out and granted, thereby avoiding entirely the ensuing termination. The grievor was never given the opportunity to accept work without a vaccination, which apparently had occurred in the Revelstoke area.

17. For these reasons, I find that the grievor was not given a fair hearing. Based on the collective agreement and the CROA jurisprudence, I find his discipline void ab initio.

Did the Company have just cause to terminate his employment?

18. Even if there had been a fair and impartial investigation, for the reasons that follow, I find that the Company did not have just cause to terminate the employment of the grievor.

19. In his January 6, 2022(2) email to the grievor, Trainmaster Kulbidky issued a third Notice to Appear in connection with “Your alleged excessive absenteeism; extending from November 18th to present” (see Union documents, Tab 14). In the termination letter, the Company made the following decision (see Union documents, Tab 16):

...”Of note, there has been no attempt on your behalf to reschedule these above listed investigations, nor to find an alternative means of attending.

20. Therefore the Company can only assume that you are no longer interested in maintaining your employment relationship with Canadian Pacific Railway. In this regard, your employment record is being closed effective immediately.”

21. The discipline was based on the absenteeism from work of the grievor from November 18, 2021 until the date of termination, together with his failure to appear for three properly scheduled investigation dates. The Company concluded that in light of the on-going absence of the grievor, that it was entitled to “assume” that he had abandoned his position.

22. This flies in the face of the facts, known to the Company:

- 1) It knew the reasons for the failure of the grievor to respond to a call to work on November 18, 2021;
- 2) It knew the reasons for the failure of the grievor to attend any of the three scheduled investigation hearings;
- 3) The grievor had not simply left town and failed to communicate with the Company. The grievor did respond twice in lengthy emails to explain his absences;
- 4) The grievor, in the view of the Company, could be wrong in his perception that he could not attend on Company property. The Company never attempted to correct this view;

- 5) The grievor expressly did not resign from his position and maintained that he had enjoyed his time as a Conductor. As set out in his December 21 email to Trainmaster Kulbisky (Union documents, Tab 12):

I lost my apartment and had to find other work to continue supporting myself. This is why I cannot make it tomorrow as I am working hard making a living. I worked hard for CP and I will continue to have a good work ethic. My morals/religious beliefs do not change due to hardship, extortion or coercion. God has taken care of me all my life and will continue to do so. I know that not following your mandates for injections will result in termination. I would prefer to be terminated in good standings but I understand that termination usually is a black mark on an employment history. I will not resign. I enjoyed my employment with CP Rail while it lasted and the managers, trainers, and employees I worked with were all kind and helpful.

23. The Company could have potentially disciplined the grievor for his absences. However, it was not reasonable for the Company to conclude that he had abandoned his position. As noted in by Arbitrator Flaherty in **CROA 4820**:

If the Company was dissatisfied with the Grievor's information or believed he was ignoring directions, it had a number of available options, possibly including discipline. However, faced with ongoing and regular contact from the Grievor, it was entirely unreasonable for the Company to conclude that he had abandoned his job.

24. It was also Company policy to put unvaccinated employees on a Leave Without Pay. (See Company Bulletin CPSB 106-21). Instead of following their own Policy, the Company chose to terminate the employment relationship on the basis of abandonment. The grievor was not afforded the same treatment offered to other employees in similar circumstances.

25. The decision to terminate the employment relationship was clearly arbitrary and cannot stand.

26. I therefore find that the Company did not have just cause to terminate the employment of the grievor.

If the answer to the first two issues is no, is the grievor entitled to reinstatement and damages?

27. Given my findings on the first two issues, the grievor is entitled to reinstatement.

28. The Company, to its credit, came to the same conclusion and offered the grievor reinstatement on two occasions. The first, on September 19, 2022, came with other conditions and was rejected by the grievor (see Company Exhibits, Tab 15). The second, on September 29, 2022 (see Company Exhibits, Tab 16), was an offer of unilateral reinstatement. This too was refused by the grievor as he wished to be reinstated in Kenora, rather than in Revelstoke, which was refused by the Company.

29. I find that the grievor is entitled to reinstatement in Revelstoke, unless his seniority permits him to bid elsewhere.

30. I also find that the grievor is entitled to damages less mitigation, for periods in which he was legally able to work after June 22, 2022. I remit to the parties the issue of damages after this period, in light of both mitigation and the offers of reinstatement.

31. I remain seized of this matter for matters of interpretation and application, together with the issue of damages, should the parties not be able to arrive at an agreement.

September 18, 2023



JAMES CAMERON
ARBITRATOR