

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

CASE NO. 5062

Heard in Montreal, July 16, 2024

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Discharge of Conductor J. Gillis for non-compliance with his Continuing Employment Contract and Relapse Prevention Agreement on December 12, 2023.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Conductor Gillis was discharged from employment on December 12, 2023, for "Violation of your Continuing Employment Contract and Relapse Prevention Agreement due to your non-compliance as per OHS."

The Grievor, an employee of approx. 13 years' service, has a diagnosed substance abuse disorder, a recognized disability under the *Canadian Human Rights Act*. In July of 2023 Mr. Gillis was made subject to conditions set out in a continuing employment contract (CEC) which subjected him to random tests as scheduled by OHS for a period of five years.

UNION'S POSITION:

It is the Union's position, however not limited hereto, that the Company's actions are contrary Article(s), 82, 85, 85.5, Addendum 123 and 124 of Collective Agreement 4.16, arbitral jurisprudence, and the *Canada Labour Code* when Conductor Gillis was issued the ultimate penalty of discharge on December 12, 2023, for an alleged violation of his continuing employment contract.

The Union contends that contrary to the terms of the CEC that was signed by the parties in July of 2023, Conductor Gillis was never returned to work and he was not offered an accommodation. The Company ignored and continues to ignore its contractual and legal obligation owed to Conductor Gillis.

The Union submits that on September 27, 2023, through October 4, 2023, the Company's OHS department contends that Mr. Gillis missed two appointments that made for him in accordance with his continuing employment contract, but the Grievor was not aware of these appointments as he was out of town moose hunting. These appointments were never confirmed

by the Grievor, around the same time period, the Grievor had a relapse and was charged with a DUI.

The Union further submits that the Grievor has since commenced an intensive in-patient rehabilitation program, is presently in his seventh month of a 12-month program.

The Union further submits that Conductor Gillis suffers from a recognized disability, namely substance use disorder, but is now attending a rehabilitation program and has recovered. The Union is seeking accommodation pursuant to the *Canadian Human Rights Act* on behalf of the grievor and submits that a suspension of time served be substituted for the termination and that he be reinstated into employment on certain conditions.

The Union requests that Conductor Gillis be reinstated to his employment on terms deemed appropriate by the Arbitrator. The Union further requests that Conductor Gillis be coded 30/50 which would afford him short term disability payments due to the Company holding him out of service due to his recognized disability and that he be compensated for all lost benefits since July 2023 when the CEC was signed.

The Union contends that given the Company failed to exercise its right reasonably as set out in Article 85.5 and continues to do so at a record pace.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

On August 2, 2022, the grievor signed a Confidential Relapse Prevention Agreement with Occupational Health Services. On May 26, 2023, the grievor was rejected from the monitoring process for cause of non-compliance as evidenced by a positive test result. On June 16, 2023 the grievor was offered, and accepted, a Continuing Employment Contract.

On September 29 and October 3rd, 2023, the grievor failed to attend a Company secured appointment. The Company conducted an investigation and determined that the grievor had violated his Continuing Employment Contract conditions, and discharged the grievor.

The Company's Position:

The Company disagrees with the Union's contentions. The grievor failed to comply with the agreement after signifying his concurrence to the terms and conditions. The Company made several attempts to accommodate the grievor. The grievor failed to keep in contact with the Company despite his obligation under the Relapse prevention agreement. Additionally, it took 2 months from the date he failed to attend his appointment until the Company was able to reach him. The grievor showed no remorse during the investigation and evidence supported that the grievor was non-compliant with the terms and conditions of his agreement.

For the Union:
(SGD.) J. Lennie
General Chairperson

For the Company:
(SGD.) A. Borges
Labour Relations Manager

There appeared on behalf of the Company:

A. Borges	– Manager, Labour Relations, Toronto
F. Daignault	– Director, Labour Relations, Montreal
S. Matthews	– Senior Manager, Labour Relations, Montreal
A. Campbell	– Nurse Case Manager, OHS, Montreal

And on behalf of the Union:

R. Church	– Counsel, Caley Wray, Toronto
J. Lennie	– General Chairperson, Hamilton
G. Gower	– Vice General Chairperson, Brockville
E. Jung	– Local Chairperson, Sarnia
J. Bedard	– Secretary Treasurer, Montreal
E. Page	– Vice General Chairperson, Hamilton
M. Kernaghan	– General Chairperson, Trenton

AWARD OF THE ARBITRATOR

Context

1. This matter concerns the discharge of Conductor Gillis, a thirteen year employee, for the breach of a Continuing Employment Contract (“CEC”) and Relapse Prevention Agreement (“RPA”). It is undisputed that the grievor has a lengthy history of drug addiction.

2. The grievor has a good disciplinary record, with no active discipline and only 55 total demerits during the course of his career.

Preliminary Issues

3. The Company raises a preliminary objection whether evidence of post termination rehabilitation efforts can be considered. It submits that this evidence was only brought forward in the Union Ex Parte Statement, which was filed only on the day the Briefs were due, and objects to paragraphs 8-11 and 42 of the Union Brief, as well as the documents referenced therein.

4. The Union objects to certain allegations made in the Company Brief with respect to possible tampering by the grievor with urine and hair samples provided for testing.

Analysis and Decision on Preliminary Issues

5. For the reasons that follow, I do not agree with the Company objection.

6. The issue of the rehabilitation efforts of the grievor has been a live issue from the outset. It was addressed in the Investigation:

54Q. Mr. Gillis have you applied to attend a rehabilitation center?

A. Yes

55Q. Mr. Gillis have you been accepted to a rehabilitation center?

A. I have been accepted to one in London or Renfrew for January, I started the process back in July.

7. It was raised by the grievor with OHS personnel and the updates on his efforts are contained in their notes (see Tabs 8-9, Union documents).

8. It was raised specifically in Step 3 of the grievance process (see Tab 12, Union documents):

“The Company has failed to demonstrate that it has reached the point (of) undue hardship especially given that Mr. Gillis has not even attended a treatment program, something the Company was acutely aware of”.

“...as such also must accept the fact that relapse is part of recovery, especially those medical professionals in the OHS department certainly must be aware that these setbacks occur especially before an individual is able to attend a certified treatment program. Mr. Gillis was on a waiting list at two facilities and finally scheduled to go in January 2024”.

“He is just now able to get into a treatment centre in January of 2024 and up to this point he was largely left on his own to try and navigate the demons of addiction ...”.

9. The Union Ex Parte notes:

“The Union further submits that the Grievor has since commenced an intensive in-patient rehabilitation program, is presently in his seventh month of a 12-month program”.

10. In my view, the Company was not taken by surprise that the grievor is engaged in rehabilitation efforts, and that the Union will be arguing that these efforts should be considered in this Award.

11. The objection, based on these particular facts, is therefore dismissed.

12. I agree with the Company, however, that a late filed Ex Parte statements from either or both Parties is not conducive to the proper functioning of the CROA process. This has been raised with the Parties and with the CROA Committee Chairs. Neither Party has properly followed the CROA Rules which require a good faith effort from both to reach a Joint Statement of Issues. Future CROA litigants should be aware that a JSI is the norm and permission will be required to file an Ex Parte Statement.

13. A final objection was raised by the Union concerning allegations by the Company that the grievor in mid-September had diluted his urine and provided a hair sample that could not be tested. As these matters were not put to the grievor during the investigation and were not mentioned in his termination letter, I will not consider them further.

Merits of Case

Position of Parties

14. The Company argues that the grievor has breached both his RPA and his CEC by consuming alcohol and drugs, and failing to make himself available for testing as required.

15. It argues further that the grievor has been the subject of repeated accommodations, such that the Company is now at the point of undue hardship to accommodate him further. It submits that the jurisprudence is clear that Last Chance Agreements negotiated by the Parties should not be overturned in the face of clear breaches.

16. It argues that the grievor holds a safety sensitive position and that despite repeated accommodations, does not have his addiction under control.

17. The Union argues that the grievor has a diagnosed addiction and that those with such illnesses are subject to relapses. It submits that the Company has the burden to show that undue hardship has been reached, which it has not done. It relies on the evidence of very strong post-discharge rehabilitation efforts.

Analysis and Decision

18. There are a number of facts which are uncontested in this matter.
19. The grievor self-disclosed a drug dependency for cocaine in 2022. In August, 2022, he signed a Relapse Prevention Agreement (see Tab 3, Company documents), in which he agreed to the following:

CN Relapse Prevention Agreement for Substance Dependence in an Individual in a Safety Critical Position

Dated: July 29th, 2022

This agreement is meant to help your recovery and prevent relapse. It is also to encourage you to inform your OHS team in case you experience a relapse crisis.

I **Jason R. Gillis** acknowledge having been diagnosed with substance use disorder, and understand the need to adhere to a Relapse Prevention Agreement, which includes the following:

- a) I agree to participate fully in an Addiction Treatment Program as determined by a Medical Addiction Physician and the CN Chief Medical Officer, listing all necessary behaviors expected from me as part of my rehabilitation.
- b) I agree to abstain from the use of alcohol, cannabinoids and illegal drugs at all times for the duration of this agreement and as long as I will be employed by CN in a safety critical position. I also agree to report to CN OHS the use of any prescribed or over-the-counter medications.
- c) I agree to have telephone consultation with a representative of CN Occupational Health Services (OHS), in order to monitor my fitness for duty, identify signs or symptoms of impending relapse, and confirm compliance with all components of this agreement. I understand that these consultations with CN OHS may take place at intervals determined as medically necessary by the CN Chief Medical Officer (CMO) or delegate.
- d) I understand that this monitoring process will start at the time of my signature and will be **on-going for 2 years from the date of my initial return to work with possible extension by the CN CMO if there is medical evidence that further monitoring is required.**
- e) I understand that this follow-up period may be terminated by the CN CMO in the event of my failure to comply with any component of this agreement. Under this circumstance, CN OHS, upon recommendation from the Chief Medical Officer, will inform management of my removal from the monitoring process for cause of non-compliance, and consequently of the decision not to medically support my fitness-for-duty.

- f) I understand that during the monitoring period and at any time judged necessary by the CN CMO or delegate, unannounced urine or hair testing for drug and alcohol may take place in order to confirm my compliance to this agreement. In order to arrange for these unannounced tests, I agree to provide the CN CMO or delegate with a contact phone number at which I may be reached. I agree that if I change work locations or residence that have the effect of changing my phone number, I will advise the CN CMO or delegate of a new contact phone number at which I may be reached. I acknowledge that if the CN CMO or delegate is unable to contact me within 24 hours, I may be considered non-compliant with this agreement.
- g) I agree that CN OHS, in order to assess my compliance with this agreement, may exchange pertinent information with any medical professionals I consulted, including my treating physician, any specialist consultants and the Employees and Family Assistance Program (EFAP) Counsellor.
- h) I consent that a letter be sent to: Dr. Abdulhusien with a copy of this Relapse Prevention Agreement advising him/her about the requirements for total abstinence from any mood-altering drug (with the exception of nicotine and caffeine). If there is a medical requirement for prescribing a mood-altering drug, OHS should be consulted prior to usage.
I have read this document; I fully understand its content and state that I am ready to adhere to all components of the Relapse Prevention Agreement.
Signed: Jason R. Gillis August 2, 2022
CN OHS: L. Stanton August 12, 2022.

20. In May, 2023, the grievor tested positive for illegal drug use, a clear breach of the RPA. As a result, in July, 2023 he and his Union signed a new CEC Agreement (see Tab 6, Company documents). This document is the same as the RPA, with the exception that the period of random testing is extended to five years from the date of signature.

21. On September 28, 2023, the grievor was involved in a car crash, while driving under the influence. He plead guilty to an impaired driving charge and received a \$1500 fine and a one year license suspension.

22. The grievor admits that he had been drinking and explains that he had suffered a relapse:

23Q. Mr. Gillis Item 3 of your CEC (Continuing Employment Contract) states "For the duration of this contract, you are required to comply with the terms of medical treatment and rehabilitation for your condition, as established in a Relapse Prevention Agreement, listing all necessary behaviors expected of you. These necessary behaviors include total abstinence from all substances, both on and off duty, and all other requirements for treatment, counselling, medical examinations, and blood, urine, hair, breath, and any other biological tests.

How is being arrested for impaired driving complying with this contract?

23A. I relapsed.

23. While the previous facts are undisputed, there is a substantial disagreement between the Parties as to whether the grievor met the other requirements of the CEC to be available for random testing and to participate in such testing to confirm on-going sobriety.

24. The grievor has alleged that he changed his phone number, and had indicated to the OHS officials that they would need to contact him by email (see Q and A 34-39). He did not tell them that he was going to be in an area with no cell service while moose hunting (see Q and A 40-48).

25. The grievor was not in contact with OHS between when his phone was disconnected on September 26-27 and the week of October 10, when he contacted them by phone after his return from moose hunting. The attempts by OHS to have the grievor tested were delayed from September 28 until well after his return.

26. I find it troubling that the grievor would be in a car crash on September 28, for which he later pleads guilty to a DUI, and the next day he absents himself from contact with OHS. Under the CEC, he has a positive obligation to remain available for random testing, which he completely failed to do:

c)) I agree to have telephone consultation with a representative of CN Occupational Health Services (OHS), in order to monitor my fitness for duty, identify signs or symptoms of impending relapse, and confirm

compliance with all components of this agreement. I understand that these consultations with CN OHS may take place at intervals determined as medically necessary by the CN Chief Medical Officer (CMO) or delegate.

f) I understand that during the monitoring period and at any time judged necessary by the CN CMO or delegate, unannounced urine or hair testing for drug and alcohol may take place in order to confirm my compliance to this agreement. In order to arrange for these unannounced tests, I agree to provide the CN CMO or delegate with a contact phone number at which I may be reached. I agree that if I change work locations or residence that have the effect of changing my phone number, I will advise the CN CMO or delegate of a new contact phone number at which I may be reached. I acknowledge that if the CN CMO or delegate is unable to contact me within 24 hours, I may be considered non-compliant with this agreement.

27. However, the disagreement between the Parties about whether the grievor failed to appropriately test pursuant to the CEC is made somewhat moot by the fact of the DUI. There is no need to argue a negative inference from a failure to test: the grievor has pleaded guilty to driving under the influence. Pursuant to the CEC, the grievor had undertaken to remain free from alcohol and drugs, and was repeatedly tested for both.

28. This fact of the DUI alone means that the grievor has breached the CEC. If it were necessary, I would also find that he further breached the CEC by failing to remain available for random testing.

29. Given this finding that the grievor has breached both the RPA and the CEC, an analysis is now necessary of the human rights obligations of the Parties.

30. The jurisprudence is clear that drug addiction is an illness protected by human rights legislation. As noted by Arbitrator Picher in **CROA 2716**:

Both legislation in Canada, such as the *Canadian Human Rights [Act]*, and an extensive body of arbitral jurisprudence, clearly recognize that alcoholism and drug addiction are a form of illness, and are to be treated as such. When, as in the instant case, an employee can demonstrate by clear and compelling evidence that he or she has made substantial strides in gaining control of an addictive condition, even if it

be after the culminating and sometimes galvanizing event of discharge, it is incumbent upon a board of arbitration to take full cognizance of that reality in considering whether to exercise the board's statutory discretion to reduce the penalty of discharge. Any other approach would, in my respectful view, run contrary to current statutory standards which prohibit discrimination on the basis of an illness such as alcoholism or drug addiction, and specific statutory provisions which now compel employers and unions alike to explore means of reasonable accommodation for persons so afflicted".

31. It is uncontested that the grievor has a diagnosed Substance Abuse Disorder (see Tab 16, Union documents).

32. It was not strongly contested that the grievor's addiction was a factor in the decision to terminate him. His termination letter cites: "Violation of your Continuing Employment Contract and Relapse Prevention Agreement due to your non-compliance as per OHS" (Tab 11, Union documents). His substance abuse issues led to the RPA and CEC and his on-going substance abuse issues led to his violation of these agreements and to his termination.

33. In my view, the grievor has met the three part test for prima facie discrimination set out in **Stewart v. Elk Valley Coal Corp.**, 2017 SCC 30:

- 1) That he has a characteristic that is protected from discrimination under legislation (a diagnosed substance abuse disorder);
- 2) That he has experienced an adverse impact (his employment was terminated);
- 3) That the protected characteristic was a factor in the adverse impact (his diagnosed substance abuse disorder led to breaches of the RPA and CEC and his subsequent termination).

34. As such, the grievor has made out a prima facie case of discrimination and the Company now bears the onus of establishing undue hardship. Under s. 15(2) of the Canadian Human Rights Act, prima facie discrimination is not discriminatory if:

"Accommodation of the needs of an individual or a class or individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost"

35. The strong focus of the Company's submissions is that it has offered repeated accommodations to the grievor, which have proven to be unsuccessful in having the grievor overcome his addiction. The Company invokes the RPA, the CEC, multiple extensions of time as examples where it has been flexible and understanding in accommodating the grievor.

36. However, the Company properly argues that a safety sensitive role cannot be held by an employee who would put the safety of fellow employees and the public at risk because of that addiction.

37. If further argues that the grievor has signed a Last Chance Agreement, agreed to by the Union, and such agreements should not be overturned. It points to multiple cases where CROA arbitrators have upheld such agreements (see, for example: **CROA 4234, CROA 3258, CROA 4046, CROA 2632**).

38. I am sympathetic to these arguments and in other circumstances might well be convinced to follow the cases cited by the Company.

39. However, each case is necessarily decided on its own facts. Here the grievor was given two chances to overcome his addiction, and he has breached both the RPA and the CEC. He has finally made a concerted and sustained effort to overcome his illness by embarking on a 12 month residential rehabilitation process, which finishes in January 2025. At the time of the hearing, some seven months into the program, the results are promising, with the grievor apparently sober since Fall 2023.

40. The jurisprudence indicates that relapses are part of the illness (see **CROA 4375, CROA 4439, CROA 4652**). It indicates further that even RPAs and CECs must be examined within a human rights context (see **CROA 4439, CROA 4143**).

41. However, the obligation of the employer to accept the consequences of an employee's addiction is not infinite. The obligation of the employer is to accommodate only up to the point of undue hardship.

42. In **CROA 3588** Arbitrator Picher accepted that relapses were to be accommodated. However, that duty ended when the grievor relapsed for a third time, after breaching both a RPA and a CEC. He upheld the termination of the grievor, despite his 32 years of service.

43. In my view, the grievor has already been substantially accommodated by the Company. He is to be given a final chance to get his addiction under control. The Parties are directed to negotiate a further CEC for a period of five years from the date of signature. It should be clearly understood that any further breach will presumptively constitute undue hardship to the Company and termination will therefore be appropriate.

44. The grievor is therefore reinstated without loss of seniority.

45. The Union has requested that internal document coding be changed to permit the grievor to receive short term disability payments. I agree that the grievor should be entitled to whatever benefits are available to sick employees.

46. Accordingly, the grievance is allowed. The matters of the signature of the new CEC and the sick benefits to which the grievor may be entitled are remitted to the Parties.

47. I retain jurisdiction with respect to the interpretation and application of this award.

September 16, 2024



JAMES CAMERON
ARBITRATOR