

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

CASE NO. 5135

Heard in Montreal, February 11, 2025

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The Union is requesting reimbursement of short-term disability benefits that were denied to Locomotive Engineer Ryan Gilby for the period from November 9th, 2021, to August 5th, 2022.

JOINT STATEMENT OF ISSUE:

On November 9, 2021, the grievor was involved in a car accident. After the accident, he contacted his employer to be placed in sick status. He did not sustain serious injuries in the accident and therefore did not necessitate emergency treatment. Nevertheless, he made a medical appointment for November 23, 2021, in order to discuss his condition.

On November 19, 2021, while still being away from work, he sustained a broken foot when falling down a ladder. He immediately received treatment for that injury. Following his November 23 doctor's appointment, he submitted a short-term disability claim to Canada Life on November 24, 2021.

On December 15, 2021, Canada Life denied his claim stating that he had lost his coverage as of November 15, 2021, because he was being held out of service for non-compliance with the employer's vaccination mandate. The grievor appealed the decision with Canada Life but the insurer maintained its position.

UNION'S POSITION:

The Union doesn't understand why the grievor's status was unilaterally changed from "sick" to "held out of service" by a first line officer at a time when the employee was still sick and was waiting for a doctor's appointment. These actions had the direct effect of depriving the grievor from the benefits he was entitled under article 79 of the collective agreement.

The medical notes from his physician also confirm that he was unable to perform his duties as a locomotive engineer as of November 9, 2021, due to his condition at that time.

The Union contends that the Company had no reason to unilaterally alter Mr. Gilby's status when he was away from work for medical reasons. This action triggered a retroactive denial of his claim by the insurer.

COMPANY'S POSITION:

The Company disagrees, on November 9, 2021, following his car accident, the grievor did not apply for short-term disability. On November 15, 2021, as per the direction of the government of Canada, the company had to change his status of employment to leave of absence without pay, as he was not compliant with the vaccination mandate policy. Then, On November 19, 2021, while still being away from work, he sustained a broken foot when falling down a ladder. When the grievor applied for short-term disability, he had already lost his coverage for short term. The grievor only came back to work once the vaccination mandate was lifted on August 5, 2022. The Company decline the grievance.

The parties do not agree and wish to submit the dispute to arbitration.

For the Union:

(SGD.) J-M. Hallé
General Chairperson

For the Company:

(SGD.) J-F. Migneault
Manager Labour Relations

There appeared on behalf of the Company:

W. Hlibchuk	– Counsel, Montreal
F. Daignault	– Director Labour Relations, Montreal
J. Deschamps	– Counsel, Montreal

And on behalf of the Union:

F. Shayegh	– Lawyer, MMGC
J-M. Hallé	– General Chairperson, Montreal

AWARD OF THE ARBITRATOR**Context**

1. The grievor is an eighteen (18) year employee, working as a locomotive engineer. He is claiming disability benefits from November 10, 2021 until his return to work on August 5, 2022.

2. His demand for benefits was refused by Canada Life, the administrator of the benefits plan on behalf of the Company.

Issues

- A. Was the grievor entitled to STD benefits from November 10, 2021?
- B. Did the grievor lose this right, based on his failure to become vaccinated by November 15, 2021?

A. Was the grievor entitled to STD benefits from November 10, 2021?**Position of Parties**

3. The Union submits that the grievor was fully entitled to STD benefits. When he drove off the road from falling asleep on November 9, he was suffering from severe sleep deprivation and daytime somnolence due to the crying of his newborn baby. He booked off sick and called his doctor for an appointment, for which the earliest date was November 23, 2021. Before seeing his doctor, he suffered a fall from a ladder on November 19, breaking his heel bone.

4. The Company submits that Canada Life properly rejected the grievor's claim for STD benefits arising from his November 10 absence from work. On November 15, the grievor's status changed to leave without pay, based on his failure to comply with a Ministerial Order concerning Covid-19 vaccination. When the grievor had his accident on November 19, he was therefore ineligible for benefits.

Analysis and Decision

5. All unionized employees at the Company are part of a group benefits plan administered by Canada Life (see Tab 37, Union documents). A booklet (see Tab 3, Union documents) sets out the benefits for which Locomotive Engineers are eligible.

6. Short Term Disability Benefits for Locomotive Engineers are defined in the Booklet as follows:

“Short Term Disability is compensation you receive for loss of wages because of non-occupational accident, injury or illness for which you are wholly and continuously disabled and have been seen and are being treated by a licensed medical doctor.”

7. The benefits begin on: “the fourth day in cases of sickness, including disability caused by a sprain, strain or hernia if seen by a physician and the physician confirms disability from the first day.”

8. Article 79 of the Collective Agreement incorporates these benefits into the Agreement:

Benefit Plan for Train and Engine Service Employees

79.1 Benefits shall be available in accordance with the terms of the Agreement dated August 18, 2986, as amended. The Agreement of August 18, 1986 is not reproduced here.

9. As part of the Collective Agreement, breaches of article 79.1 may be grieved. As noted in **CROA 4848**:

“The CROA jurisprudence is consistent that a decision of the insurer can be challenged, but only if the decision has been made in bad faith, is arbitrary or discriminatory (see **CROA 2849, 4270 and 4779**).”

10. Canada Life’s final position is clearly set out in the letter of Yvonne Lemay, Senior Complaint Liaison, Ombudsman Office (Tab 23, Union documents):

After careful review of this matter, I can’t approve your request.

Please let me explain why.

- The letters Canada Life sent you about your claim provided accurate information. The decisions were based on the information from you, your medical providers and your employer. The decisions were made according to the terms of group policy 165765 (the “Policy”).
- As Sonia’s Mar 11th letter states, the information about the Nov 9th car accident doesn’t describe the severity, frequency and duration of your symptoms. It doesn’t quantify any restrictions or limitations preventing you from performing the essential duties of your job.
- You confirmed you didn’t sustain any injuries from the accident, so didn’t go to emergency. You didn’t file an incident report with the RCMP at the time.
- You didn’t see a doctor until Nov 23. On Nov 19th, you sustained a heel bone injury from falling off a ladder. You reported to Dr. Wadden that both incidents, the car accident and the heel bone injury, were due to sleep deprivation.
- During your Nov 23 telephone consultation with Dr. Wadden, you told him you fell asleep at the wheel and drove off the road but weren’t injured. You stated that you’d booked yourself off work as you deemed yourself unfit to operate a train.

- Dr. Wadden's Feb 2 letter to Canada Life relayed the information you had reported to him. He states "Mr. Gilby stated that he was unfit to drive an automobile to work or anywhere else."
- You provided Canada Life with two prescriptions from Dr. Wadden, dated Jan 13 and Mar 9. Both state that you are medically incapable of working. However, neither of those provide details of the cause and severity of symptoms that prevent you from performing the essential duties of your job.
- You're responsible for providing Canada Life with all information in support of your claim. Canada Life asked you to provide a copy of the incident report for the car accident. You said you filed one only after Canada Life asked you for it. You didn't provide a copy of it.
- The Jan 25 letter you sent us from Nathan McDonald states that when he stopped to help you on Nov 9th, you were okay and alert. You weren't sure how you ended up off the road. He offered to tow your home, but you drove. He followed you to ensure there were no issues with your vehicle.
- Nathan's account does not replace an RCMP incident report.
- Your employer advised Canada Life that you were held out of service as of Nov 15th.
- As such, you weren't covered under the Policy as of that date. Accordingly, the Nov 19th heel bone injury isn't eligible for coverage under the Policy.
- The appeals process deadline for this claim expired on Feb 13th.

In light of the above, I can't find a reason to approve your request.

I realize this is not the decision you were hoping for but I hope the information I provided will

help you understand our decision. This letter represents Canada Life's final position.

11. The decision of the insurer to refuse short term disability benefits to the grievor is challenged here on the basis that the refusal was both incorrect and arbitrary.

12. For the reasons that follow, I find that the decision of Canada Life was both incorrect and arbitrary.

13. Firstly, Canada Life acknowledges that it never considered the November 19 heel bone injury. This injury put the grievor in a below the knee cast and made him incapable of driving a car, let alone operating a locomotive engine.

14. Canada Life knew that the grievor believed that his accident on November 19 was also caused by poor judgment, brought on by continuing sleep deprivation. In his appeal letter of December 19, 2021, he stated: "On November 9th I sustained injuries in an automobile accident and subsequently my symptoms have prevented me from being able to perform my occupational duties as well as most basic tasks up to and including being unable to sleep and be properly rested for duty. Working a Safety Critical position at CN, employees when reporting for duty are expected to be fit and properly rested" (see Tab 6, Union documents).

15. Canada Life also knew that the grievor's doctor believed that his patient was unable to work. His primary diagnosis was 'sleep disturbance due to young infant daughter crying frequently at night', while his secondary and/or complications note was "commuted calcaneal fracture" (see STD Claim Physician's Statement, Tab 4, Union documents).

16. Despite this knowledge, Canada Life failed to assess this continuing condition, which had caused, from the grievor's perspective, two accidents.

17. Canada Life relied on its understanding that the grievor was not eligible for coverage under the Policy at the time. In my view, for the reasons given in the following section, this view was incorrect.

18. Secondly, Canada Life asserts that the severity, frequency and duration of the grievor's symptoms was never provided. However, the grievor's doctor, Dr. Robert Wadden, wrote to Canada Life confirming severe somnolence until December 20, 2021, which prevented him from working:

Date: February 2, 2022

Dear Ms. Barrette

Re: Ryan Gilby

Please be advised that my patient, Mr. Ryan Gilby, although not physically injured as a result of the November 9, 2021 motor vehicle accident, he was nevertheless disabled from operating an automobile and therefore a locomotive due to severe somnolence. This drowsiness was, in fact, the cause of the MVA. This was a direct result of severely disrupted sleep due to his newborn baby. Mr. Gilby stated that he was unfit to drive an automobile to work or anywhere else. The disrupted sleep and drowsiness persisted until December 20, 2021.

I hope this is of assistance.

Yours sincerely,

Robert Wadden, MD Inc.

19. Thirdly, Canada Life relies on the fact that no police report was provided for the November 9 accident. However, the fact of the accident is attested to by the report of Nathan McDonald (see Tab 22, Union documents), as well as the evidence of the grievor. There is no evidence to the contrary.

20. Fourthly, Canada Life relies on the fact that the grievor did not immediately see a doctor after the November 9 accident. However, the grievor did contact his family doctor on or about November 10, and obtained the first possible meeting with his doctor on November 23 (see Tab 7, Union documents).

21. Fifthly, while Canada Life acknowledges the multiple notes from the treating physician attesting to the inability of the grievor to work, it gives little to no weight to these medical opinions (see Tabs 12,20,21 and 33, Union documents) It is perplexing that it could do so, when there is no countervailing medical evidence.

22. Sixthly, Canada Life, who has administered these benefit plans for the Company for many years, must be familiar with the job requirements of a locomotive engineer. As such, it must know that engineers are required to be fit when going to work, including meeting the sleep requirements of Transport Canada. Engineers are

required to self-assess their fitness to work and to not attend work in an unfit condition. Here, the grievor clearly self-assessed himself as unfit to work:

November 9, 2021 – Car Accident – I fell asleep while driving and drove my car off the road into the ditch due to sleep deprivation. I was sleeping no more than 2-3 hours max. of broken sleep per night. Approximately one week leading up to and beyond the accident my baby was sleeping for no more than 30 min at a time. There were no physical injuries to report other than minor soreness, although mentally it was a different story. The injuries sustained were related to sleep deprivation, mainly due to having a 4-month-old at home and the stresses that come with being a new parent. I was experiencing anxiety, irritability, fatigue, poor and risky decision making, all as a result of not being properly rested. I booked off sick as I knew I was unfit and not healthy enough to fulfill my duties in a safety critical position as a locomotive engineer. Soon after I booked an appointment with my doctor. The earliest I could get an appointment was for November 23, 2021.

November 19, 2021 – Fell Off Ladder – While leading up to my November 23, 2021 appointment regarding the November 9, 2021 accident, I fell 12 ft off of a ladder changing batteries in a fire alarm, while barefooted and onto hardwood floor. I placed a 16ft ladder on a rug and proceeded to climb. While changing the batteries, the rug and ladder started to slide out at the base as well as down the wall from the top, and I had no choice but to avoid faceplanting straight down to the floor. Sleep deprivation contributed to this as I made decisions on this day were out of character, that I know I wouldn't have made with a clear, rested and healthy state of mind. I; ladder on rug, barefoot, no assessment of dangers before attempting and not having someone holding the ladder. I don't know what I was thinking on this day especially since I have worked safety critical positions for the past 20 years of my life and have received formal training on risk assessment on multiple occasions.

23. In my view, the evidence from the facts, the evidence from the grievor and the medical evidence, all clearly show that the grievor was not fit for work from November 9. This lack of fitness was caused by sleep deprivation, which continued until December (see Tab 17, Union documents). This lack of fitness was exacerbated by his fall on November 19th, which injury kept him off work until August 5, 2022.

24. I find that Canada Life has failed to properly address the continuing unfit condition of the grievor, concentrating as it did only on the November 9 accident. In so doing, it ignored the on-going severe daytime sleep somnolence which prevented the grievor from working. To do so renders its refusal of benefits arbitrary. The jurisprudence has clearly found that arbitrary decisions by insurers to deny coverage cannot stand (see **CROA 4834** and **CROA 4848**).

B. Did the grievor lose this right, based on his failure to become vaccinated by November 15, 2021?

Position of Parties

25. The Union notes that neither the Ministerial Policy nor the Company Policy on Covid 19 vaccinations is in issue. It submits, however, that the Company failed to follow both policies when it changed the status of the grievor to inactive, leave without pay, as of November 15, thereby rendering the grievor ineligible for benefits. It submits that there is a specific exemption in the vaccination requirement for employees who are already on leave, such that there was no requirement for the grievor to be vaccinated until he was ready to come back to work.

26. The Company takes the position that it is bound by the Ministerial Policy to ensure that all employees have at least begun the vaccination process by November 15, 2021, or otherwise they are required to put the employee on leave without pay.

27. It submits that the Union arguments that the grievor was unaware of the requirement are without foundation, as all employees were notified. The grievor did not overlook the requirement; rather he was an active opponent of the requirement and participated in litigation against it.

28. It submits that the decision of Canada Life was entirely reasonable and should not be disturbed.

Analysis and Decision

29. An Order was given by the Minister of Transport Canada to all railway companies to ensure that their employees had received a first dose of the Covid-19 vaccine by November 15, 2021. As set out in the Order pursuant to Section 32.01 of the Railway Safety Act (MO 21-07) Vaccination Mandate for Employees (see Tab 9, Company documents):

“s. 3 c. require all persons employed by the railway company have received their first dosage of an approved COVID-19 vaccine by no later than November 15, 2021, unless they fall within an exception as described in Section G;

...

s. 3 e. apply to all persons employed by the railway company who are not on leave....”

30. The Company, as it was required to do under the Transport Canada Order, adopted a company-wide Mandatory COVID-19 Employee Vaccination Policy-Canada (see Tab 11, Company documents). The Company Policy required all employees to receive the first dose of a Covid-19 vaccine by November 15, 2021, or otherwise placed on unpaid leave or terminated. The section entitled Scope of Policy and Application notes the following:

Any CN Employee who is absent on authorized medical leave or another authorized leave pursuant to applicable legislation or Company policy will not be required to comply immediately with the timelines set forth below in this Policy. However, any such employee remains subject to this Policy and will be required to comply with this Policy and to provide proof of COVID-19 vaccination before being authorized to resume active service for CN.

31. Clearly, unless the grievor was on leave as of November 15, 2021, both the Ministerial Order and the Company Policy would require him to have received his first vaccine, or to be placed on unpaid leave. The Exemptions set out in Section G of the Ministerial Order do not apply to the grievor. If the grievor was properly placed on unpaid leave pursuant to the Order and Policy, it is uncontested that he would be ineligible for Short Term Disability Benefits.

32. At issue, then, is whether the grievor had been properly placed on unpaid leave, or whether he should have received Short Term Disability Benefits, thereby obviating the vaccine requirement as of November 15, and only requiring proof of vaccination when returning to work. In reality, Transport Canada repealed its Order on June 17, 2022, the grievor only returned to work on August 5, 2022, and no proof of vaccination was ever provided.

33. The grievor must establish that he was “on leave” pursuant to the Ministerial Order or “on authorized medical leave or another authorized leave pursuant to applicable legislation” pursuant to the Company Policy.

34. For the reasons given above, I find that the grievor should have been placed on Short Term Disability benefits by Canada Life. As such, he should have been on an approved leave from the Company. As an employee on an approved leave, he would not be required, by the terms of the Ministerial Order and the Company Policy, to provide proof of vaccination by November 15, 2021. The personal views of the grievor with respect to vaccination, based on these findings, are not relevant.

35. Arbitrator Richardson came to a similar conclusion in **Canadian Union of Public Employees, Local 964 v Tri-County Regional Centre for Education**, 2022 CanLii 109498:

73. The only question is whether on November 30th the grievor was on a “Leave of Absence” within the meaning of section 3.6.1 of the Protocol. If he was (as the Union contends) then the Union says he should have continued to receive sick pay pursuant to Art.25.1 of the Collective Agreement. If he was not (as the Employer contends), then the Employer says he was no longer entitled to sick pay under Art. 25.1 because his inability to work was not “due to illness or injury which prevents an Employee from performing work for the Employer”—rather, it was his lack of vaccination.

86. That being the case, the grievor’s continuing absence from work due to a sleep-related illness that prevented him from performing work was a leave of absence within the meaning of section 3.6 of the Protocol. He accordingly remained entitled to the benefits available to him under Art. 25 of the Collective Agreement. I

accordingly allow the grievance and award the 15 days sick pay for the period December 1 to 20, 2021 claimed by the grievor.

36. Arbitrator Filliter in **O'Connell v. New Brunswick Community College**, 2022 Canlii 78873 and Arbitrator Poirier in **Le Syndicat des infirmières et infirmiers du Nouveau Brunswick c. Le Conseil de Gestion**, 2024 CanLii 22615 both came to similar conclusions.

37. The grievor is therefore entitled to STD benefits from November 10, 2021 until his return to work on August 5, 2022.

38. I remain seized for any questions of interpretation or application of this Award.

March 19, 2025



**JAMES CAMERON
ARBITRATOR**