

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

CASE NO. 5149

Heard in Edmonton, March 11, 2025

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The Company's decision not to grant the request of James Cale (the "Grievor") for a religious exemption from the requirement to be vaccinated against COVID-19 between November 23, 2021 and February 18, 2022 in relation to the "Ministerial Order" regarding the COVID-19 vaccination. The parties are also in dispute about whether the Company's action of placing him on unpaid leave constituted a suspension.

JOINT STATEMENT OF ISSUE:

Effective November 23rd, 2022, the Company placed the Griever, a TCRC Conductor, on "unpaid leave" under the Ministerial Order. The Union contends that this was actually a disciplinary action by the Company. The Griever's application for a religious exemption was initially denied by the Company and ultimately approved on February 18, 2022.

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 when Conductor Cale was assessed a discharge as a result of the Company's refusal to allow his religious exemption.

The Union contends that the discipline assessed was excessive, unwarranted, unjustified and in bad faith.

The Union contends Conductor Cale did request an exemption because his religious beliefs preclude vaccination. This steadfast belief is shared in conformity with his church to ignore all of the information provided by the Griever and denied Conductor Cale his rights, causing him significant financial and personal harm.

The Union argues that the Company acted arbitrarily when allowing religious exemptions, as Mr. Cale's brother was also allowed an exemption.

The Union submits that the Company failed to adhere to Article 82 of 4.16 by failing to conduct an investigation.

The Union argues that this breached Conductor Cale's substantive rights under the Collective Agreement by failing to hold a fair and impartial investigation. Therefore, it should render the discharge void ab initio.

Due to the violations, the Union requests that Conductor Cale be compensated for all his lost wages, benefits, and pensionable service for the time he was out of service.

The Union seeks a remedy in accordance with Addendum 123 for the blatant and indefensible violation of Mr. Cale's substantive rights.

The Union further seeks an order that the Company cease and desist from these types of actions, as the Company is clearly unable to make that determination.

COMPANY'S POSITION:

The Company disagrees with the Union's allegations and disputes the grievance.

The Ministerial Order required certain railways, including the Company, to implement a company-wide vaccination policy mandating every employee to be vaccinated unless subject to an exception. As an alternative to implementing such a policy, any affected railway could verify that every operating employee (as defined within the Ministerial Order) provides proof of vaccination unless subject to an exception and implement a testing regime for all employees who entered onto the premises of any company location frequented by operating employees.

Transport Canada also issued guidance for the assessment of requests to be exempt from the requirement to be vaccinated against COVID-19, including on religious grounds. CN introduced its Mandatory COVID-19 Employee Vaccination Policy - Canada (the "Policy"), which defines a process for the consideration of religious accommodation requests. The Policy is required under the Ministerial Order, is consistent with both the Ministerial Order and Transport Canada guidance and is otherwise reasonable in the context of a global pandemic.

Both the Ministerial Order and the Policy provide that non-exempt employees who have not received their first dose as of November 15, 2021, or are not fully vaccinated as of January 24, 2022, will be subject to leave without pay as the minimum sanction.

The Grievor failed to comply with the applicable deadlines and was placed on an unpaid administrative leave, effective November 22, 2021. Contrary to the Union's allegations, the Grievor's placement on an unpaid leave was not disciplinary in nature.

Following several exchanges between the grievor and the Company, the request for religious exemption was ultimately approved effective February 18, 2022.

The Company maintains that its actions were in full compliance with the Ministerial Order and public health guidelines. Clear communication was provided to the Grievor regarding deficiencies in the request, and the exemption was granted once sufficient information was submitted.

The Company rejects the Union's claims that its actions were in any way arbitrary, discriminatory, or bad faith, and denies the grievance in its entirety. It affirms that its actions were consistent with policies, laws, and procedures.

The delays for the application to be approved were caused by the grievor and as such, no liability is incumbent upon the Company maintains that its decision to deny the religious exemption and place the Grievor on unpaid leave was lawful and a reasonable exercise of management's rights.

The Union's request for compensation and a remedy under Addendum 123 is also denied.

For the Union:

(SGD.) J. Lennie

General Chairperson

For the Company:

(SGD.) S. Matthews

Senior Manager Labour Relations

There appeared on behalf of the Company:

S. Matthews	– Senior Manager Labour Relations, Toronto
R. Singh	– Senior Manager Labour Relations, Edmonton
A. Liaquat	– Specialist LR & HR Compliance, Edmonton
C. Fremont	– Director Labour Relations, Montreal
T. Ullrich	– Occupational Health Nurse, Edmonton
A. Hernandez Gutierrez	– Labour Relations Associate, Edmonton
F. Daignault	– Director Labour Relations, Montreal
T. Sadhoo	– Manager Labour Relations, Toronto

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
J. Lennie	– General Chairperson, Hamilton
G. Gower	– Vice General Chairperson, Hamilton
M. Kernaghan	– General Chairperson, Edmonton

AWARD OF THE ARBITRATOR

Background, Arguments, Issue & Summary

[1] This Grievor is employed as a Conductor. As noted in the JSI, he was placed on unpaid leave for refusing vaccination for COVID19, for a period of time between late 2021 and early February 2022.

[2] This Grievance was filed against that decision.

[3] As the Grievor's exemption was ultimately approved, this Grievance is limited in time to the period between November 15, 2021 when the Grievor was placed on leave, and February 18, 2022, when the Grievor was approved for an exemption.

[4] The arguments are well set out in the JSI, above. The Union maintained that *prima facie* discrimination had been established on the basis of religion, given the evidence provided by the Company to the Grievor. It pointed out that evidence began in the early Fall of 2021. It also pointed out the Grievor provided an Affidavit that he believed that "all vaccines" interferes with divine providence, and "by injection anything into my body goes against God's commands". That Affidavit was sworn on November 22, 2021. It pointed out his brother's exemption was granted, and he has the same religious beliefs. It argued the Company failed in its corresponding burden to accommodate the Grievor by exempting him from the requirement be vaccinated for COVID19, on religious grounds and he was improperly placed on leave without pay. It also raised issue with whether an

Investigation should have occurred prior to the Grievor being placed on leave, which leave it argued was disciplinary. The Union also raised issue with the Company's failure to respond to its Grievance. It requested the Grievor be made whole, and that damages be assessed for the denial of his human rights. The Union filed and relied on various authorities, including this Arbitrator's recent Award in **CROA 5024**, which is further discussed, below.

[5] The Company maintained its three member committee charged with evaluating requests for exemption fairly and properly assessed the Grievor's claim. It argued the Grievor had initially failed to establish his belief was religious in nature, prevented full vacation, or that it was sincerely held. It pointed out he initially provided a "form letter" from a church in Hawaii, which was available to anyone, as it was located on their website. It argued the Grievor had initially failed to identify the religious opposition to all vaccines as a religious belief, until February of 2022 and its burden to accommodate did not arise until that time. The Grievor then provided information that he avoided vaccines in his day-to-day life, and that his doctor no longer asks him about such vaccines. When he provided that information, the Company reasonably and properly acted to grant the exemption prior to that time. It argued its actions were reasonable and defensible as it argued it followed the guidance issued by Transport Canada in denying the Grievor's claim. It pointed out that just because his brother was granted an exemption that did not result in the Grievor receiving an exemption, as each request was independently considered.

[6] The issue in this Grievance is: Did the Company fail in its duty to accommodate the Grievor's request for an exemption from COVID19 vaccination, on religious grounds?

[7] For the reasons which follow, I am satisfied the answer to that question is "yes".

[8] The Grievor has satisfied his burden to establish that *prima facie* discrimination had occurred against him with the application of the Company's policy. The Company failed to properly accommodate him with a religious exemption from COVID19 vaccination.

Analysis & Decision

[9] Between September of 2021 and April of 2022, CN received 171 requests for exemption from COVID19 vaccination, on religious grounds. It granted five of those requests.

[10] In May of 2024, this Arbitrator issued a lengthy and comprehensive decision involving the duty to accommodate a religious exemption from COVID19 vaccination, as between these parties: **CROA 5024**. That Award resolved an accommodation request made by a Rail Traffic Controller, for accommodation from the requirement to obtain COVID19 vaccination, on religious grounds. It was held in that case that the Grievor had established a *prima facie* claim of discrimination in that case, and that the Company had failed in its duty to accommodate that Grievor.

[11] **CROA 5024** outlined the background to the development of the Company's policy which required vaccination for COVID19 (the "Policy"); included a detailed and comprehensive analysis of the requirements of Transport Canada; recognized that the government of the day was "telegraphing" through its communiques that "*the exemptions would be narrowly construed and would be difficult to receive*" (at para. 8); outlined and applied the test to applied for religious discrimination, which arises from the Supreme Court of Canada's decision in *Syndicat Northcrest v. Amselem* 2004 SCC 47; and outlined

the general law of accommodation. That Award was lengthy and comprehensive to provide direction and assistance to the parties in resolving these types of claims.

[12] Given the comprehensiveness of the analysis in **CROA 5024** – and the expedited nature of this process – it is unnecessary to repeat that analysis in detail in this Award. Rather, a direction is issued that **CROA 5024** is to be read with this Award, for any precedential use.

[13] Two further relevant and recent Awards are **CROA 4867** and **AH815**, which both determined that placing an individual on leave when they did *not* satisfy the burden of establishing *prima facie* discrimination for COVID19 vaccination was not a disciplinary decision, but rather was an administrative decision, due to behaviour that was “non-culpable” (discussion at paras. 42 to 70 in **CROA 4867**).

[14] The issues which arise in this case are similar to those raised in **CROA 5024**. The *Amselem Test* must be applied to the facts of this case – as they were in **CROA 5024** - to determine a) if the Grievor has met his burden to establish that *prima facie* discrimination was established, and b) if so, whether the Company failed to accommodate his religious beliefs by exempting him from the requirement to be vaccinated against COVID19. Relevant for this analysis is the basis on which the Company itself considered the Grievor’s burden was met, and whether that basis was established by November of 2021.

The Amselem Test

[15] It is appropriate to set out the following excerpt from **CROA 5024** regarding the elements of the *Amselem Test* [footnotes have been omitted]:

There are two broad aspects to the *Amselem* test and three sub-requirements. The two primary elements – and at least one of the “sub-elements” noted below, must be satisfied for freedom of religion to be “triggered”. The elements were described by the Court as follows:

Thus, at the first stage of a religious freedom analysis, an individual advancing an issue premised upon a freedom of religion claim must show that the court that he or she has a [i] practice or belief, having a [ii] nexus with religion, which [iii] calls for a particular line of conduct, either by being [a] objectively or [b] subjectively obligatory or customary, or [c] by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual’s spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials; and [iv] he or she is sincere in his or her belief. “Only then will freedom of religion be triggered (emphasis added).

[the separation of the elements by “i, ii, iii” and “a, b, c” in this quotation were added by this Arbitrator, as noted in the Footnote in **CROA 5024**, which has been omitted]

The Court did not ascribe any particular special meaning to the word “nexus”.

According to the Merriam Webster Online Dictionary, the word “nexus” means a “connection or link.” The word “nexus” and “connection” will be used interchangeably.

Under the first element of the *Amselem Test*, an individual must establish a “link” or “connection” between the practice or belief they espouse (in this case resistance to accepting a vaccination developed with fetal cell lines) and religion. This connection between the two is a key and important aspect of the *Amselem Test*. It is also one of the central issues between these parties (are at para. 66, emphasis added).

After the nexus or connection is found, it must be determined what line of conduct is “called for” in that religion, regarding that connected practice or belief. The Court in *Amselem* reinforced that – while an individual need not be “mainstream” in their beliefs – and while their beliefs need not be shared widely by others within that religion – to trigger protection as a “religious belief”, an individual *must* establish there is a “nexus” between that practice or belief and a “religion” (at para. 67, emphasis added).

This is also described in *Amselem* as determining if a practice or belief is “experientially religious in nature”. To be “experiential in nature”, the Court noted a belief can be:

- (a) objectively required by the religion being professed; **or**
- (b) subjectively believed by that individual to be required by the religion professed; **or**,

(c) the practice “engenders a personal, subjective connection to the divine or the subject or object of his or her spiritual faith”.

(at para. 68)

I accept that to establish this element of the *Amselem Test*, a person is not required “to prove that his or her religious practices are supported by any mandatory doctrine of faith”. The Court found that would be “dubious, unwarranted and unduly restrictive”. The Court noted that decision-makers enter a “forbidden domain” when they try to define the “very concept of religious “obligation”, as “it is not within the expertise and purview of secular courts to adjudicate questions of religious doctrine” (at para. 69; emphasis in original).

The last element relates to whether that belief is “sincerely held” (at para. 70).

While the Court did not find it was necessary to require “proof of the established practices of a religion to gauge the sincerity of belief”, the Court did outline what it described as the limited and “minimal” role for an adjudicator in assessing “sincerity of belief”. It noted that inquiry was to be “as limited as possible”. The Court adopted a scholarly opinion that: “...given the widening understanding of what constitutes religion in our society, the very rights ostensibly protected by the free exercise clause might well be jeopardized by any but the most minimal inquiry into sincerity”. The Court continued by outlining three elements that should be considered to determine sincerity:

Indeed, the court’s role in assessing sincerity is intended only to ensure that a presently asserted religious belief is [a] in good faith, [b] neither fictitious nor capricious, and [c] that it is not an artifice. Otherwise, nothing short of a religious inquisition would be required to decipher the innermost beliefs of human beings.

Whether an individual employee has met the requirements of the *Amselem* test will be a question of fact and therefore of evidence.

(at paras. 71, 72)

[16] The *Amselem Test* requires a “nexus” or “link” between an individual’s belief or practice and religion. While the Company argued it was up to the Grievor to establish the sincerity of his belief and quoted **CROA 5024**, that Award has been misconstrued in their analysis. What the Court was establishing – and **CROA 5024** recognized - was that it is *inappropriate* to delve too deeply into sincerity, to avoid “*religious inquisition*”. That does not then result in a requirement the Grievor must establish sincerity *beyond* what the

Court described as “*the most minimal inquiry*” that his belief was a) “in good faith”; b) “neither fictitious or capricious” and c) not an artifice” as noted in *Amselem*.

[17] While the Grievor began providing information to the Company in late September of 2021, the time period in issue in this Grievance is November 22, 2021 to February of 2022, as the Grievor was placed on leave in November of 2021. The Company maintained it was only when it received the Grievor’s “personal testimony” in February of 2022 that he avoided all vaccines in his “day-to-day life” that it considered he had established the evidence required to grant the religious exemption.

[18] The Company’s argument was that it did not receive this information that the Grievor’s religious beliefs precluded *all* vaccination – and were therefore sincere – until February of 2022. It is on this point that the Company’s arguments must fail.

[19] Leaving aside whether that was a sufficient basis to use to assess the Grievor’s entitlement to the exemption, I cannot agree with the Company that it did not have this information prior to February of 2022. The evidence established it had this information as early as September of 2021. While the parties have limited this Grievor to the period between November 22, 2021 and February of 2022, all information received by the Grievor is relevant to its decision of whether the *Amselem Test* was satisfied, and duty to accommodate obligations were triggered. The Grievor’s first request in September of 2021 stated:

My name is James Cale, and I am...writing this letter to explain my religious views and to why I’m unable to receive vaccinations, including the Covid-19 vaccination. I am of Christian faith and Dutch Christian Reformed denomination... To my understanding, I was created in God’s image and my body is the temple of the Lord. Injections of foreign substances into my body goes against God’s word and my beliefs... (emphasis added)

[20] On November 22, 2021, the Grievor *also* provided a sworn Affidavit which provided this same information to the Company again.

[21] The Grievor's Affidavit on that date was filed into evidence. It stated:

*The Dutch Reformed Church believes **all vaccines** interfere with the divine providence and by **injecting anything** into my body goes against God's commands. My body is God's temple and I am told not to defile it, for it is sacred [Bible references] (emphasis added).*

[22] The information in that Affidavit was that it was "all vaccines" which "*interfered with the divine providence*", under the Grievor's belief system which was based in the Dutch Reformed denomination, and the belief was not just against COVID19 vaccination. The Grievor also provided information – again – that he was part of the Dutch Reformed denomination, and had been since he was a child. The Company offered no information to dispute that claim. Had the Company considered this underlying denominational information, they may have also discovered that the Dutch Reformed denomination was one of the few denominations whose members had a pre-existing stance against vaccination, prior to the COVID19 pandemic.

[23] Regardless, I am satisfied that *as early as September 22, 2021*, the Company was in possession of the *same information* that it argued it required to *grant* the Grievor's exemption, on religious grounds, in February of 2022. In September of 2021, the Company knew – or should have known – that by using the plural of "vaccinations" and the word "*including*" when combined with the Grievor's information that he was opposed to "*injecting foreign substances*" in to his body and was a member of the Dutch Reformed congregation, the Grievor had established that his religious beliefs prevented him from

taking any vaccine. Even if that were not the case, the Company was made aware again in November of 2021 that the Grievor's religious belief was against "*all vaccines*" and "*injecting anything*" into his body, and again that he was a member of the Dutch Reformed congregation.

[24] It is therefore unnecessary to determine if the Company's model of assessment was – or was not – in compliance with *Amselem*, since even on the Company's own assessment model, I am satisfied it had the same information in September of 2021, which was confirmed in November of 2021, as it claimed it required but only received in February of 2022.

[25] That was information it considered sufficient to provide the exemption.

[26] The Grievance is upheld. A declaration will issue that the Company discriminated against the Grievor by failing to accommodate the Grievor's religious beliefs when it failed to grant him an exemption from vaccination for COVID19.

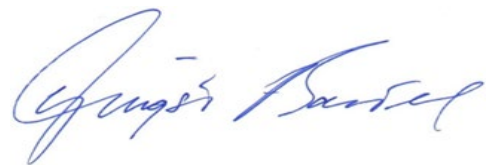
[27] As the Grievance is upheld, it is unnecessary to address the Union's objection that the Company failed to properly respond to this Grievance. That question will remain for another day.

[28] The Grievor is to be made whole for the difference between an exemption granted in February of 2022 and one that should have been granted when he was first placed on leave in November of 2021. The matter of that amount is remitted to the parties, for their discussion and agreement. If they are unable to agree, that issue may be scheduled as a remedy case, at a future CROA Session over which I preside. Should that be necessary, the Office is directed to schedule that case on an expedited basis.

[29] The Union has also sought damages for the breach of the Grievor's human rights. I am not satisfied this is an appropriate case for damages to be awarded. COVID19 presented an unprecedented situation in assessing religious exemptions for vaccination to access the workplace – at least in this industry. While I am mindful of the Company's obligations, it is also relevant when considering the appropriateness of a damage award for breach of human rights obligations that the government had chosen to telegraph to this industry that the exemptions should be "*narrowly construed*" and difficult to achieve, and had in fact provided "guidance" on how to assess those exemptions. There is no basis in the law of accommodation for an assessment of religious belief to be "*narrowly construed*". Given this tension in what the law required and what the government directed, I have determined this is not an appropriate case for a damage award to issue.

I retain jurisdiction for any questions regarding the implementation of this Award; for any issues relating to remedy; to correct any errors and to address any omissions, to give this Award its intended force and effect.

May 8, 2025



**CHERYL YINGST BARTEL
ARBITRATOR**