

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

**CASE NO. 5019**

Heard in Montreal, March 14, 2024

Concerning

**CANADIAN PACIFIC KANSAS CITY RAILWAY**

And

**TEAMSTERS CANADA RAIL CONFERENCE**

**DISPUTE:**

Appeal of the Company's new Return to Work Agreement ("RTWA" or the "Agreement") provided to JB ("Grievor") on January 10, 2022 (version dated October 21, 2021) and the impact that this had on the Grievor's return to the workplace including lost wages and other entitlements.

**JOINT STATEMENT OF ISSUE:**

The Union grieves the Company's January 10, 2022 RTWA (version dated October 21, 2021) that was not signed by the Grievor or Union, specifically the terms that do not appear in the RTWA that was ultimately signed by the Company, Union, and Grievor on April 14, 2023.

The period of time at issue for the Grievor is between January 10, 2022 and April 14, 2023.

Effective October 29, 2021, the Company introduced the RTWA as a replacement of the previous Relapse Prevention Agreement ("RPA"). The Grievor in this case, had disclosed a substance dependence disorder and as part of the Duty to Accommodate was required to sign the RTWA along with his Union before returning to work on January 10, 2022 (it must be noted that the date shown below Dave Guerin's signature of 2021 was an error).

**Union Position:**

The Union specifically pleads and relies on its grievance letters dated March 4 and June 10, 2022.

The Union contends that the provisions that appeared in the January 10, 2022 RTWA for the Grievor that do not appear in the signed April 14, 2023 RTWA are not reasonable, are arbitrary as well discriminatory and caused the Grievor to be held off duty unnecessarily.

The Union's position is that as a result of these terms that resulted in the Company holding the Grievor off duty until the RTWA was signed is a violation of Articles 34, and 36, and the Company's responsibility to administer the Collective Agreement reasonably and in good faith.

The Union requests that the Company compensate the Grievor for the period of time between January 10, 2022 and April 14, 2023 for any lost time, benefits, seniority and any other lost entitlements flowing from this new improper RTWA. The Union seeks redress by way of appropriate damages payable by the Company and any other redress deemed appropriate by a Board of Arbitration or sole Arbitrator.

Company Position:

The Company disagrees with the Union's position and refutes the Union's allegations. It relies on its grievance replies.

The Company's January 10, 2022 proposed Return To Work Agreement (RTWA) was reasonable as part of the duty to accommodate process and did not result in any violation of the collective agreement. The Company takes issue with the Union's use of the terminology of "arbitrary" and "unreasonable."

The rights and interests being balanced are that of management of the workplace, safety obligations, and duty to accommodate.

The Union's requested remedy is unreasonable.

The Company requests that the Arbitrator dismiss the grievance.

**FOR THE UNION:****(SGD.) W. Apsey**

General Chairperson, CTY-E

**FOR THE COMPANY:****(SGD.) F. Billings**

Asst. Director, Labour Relations

There appeared on behalf of the Company:

- |              |   |
|--------------|---|
| D. Zurbuchen | – Manager Labour Relations, Calgary             |
| F. Billings  | – Assistant Director, Labour Relations, Calgary |
| S. Scott     | – Observer, Labour Relations, Calgary           |

And on behalf of the Union:

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|---------------|--|
| K. Stuebing   | – Counsel, Caley Wray, Toronto                     |
| W. Apsey      | – General Chairperson, LCTY-E, Smiths Falls        |
| D. Psychogios | – Senior Vice General Chairperson, CTY-E, Montreal |
| JB            | – Grievor  |

**AWARD OF THE ARBITRATOR****Context and Issues**

1. This matter arises within the context of an employee who self-reported a drug problem in August, 2021. He was off work and receiving treatment until January 2022, when there was a proposed Return to Work. The Company sought a Return to Work Agreement ("RTWA"), which the grievor and the Union refused to sign. Ultimately the grievor was off work until April 2023, when a revised RTWA was signed.

2. The issues are as follows:

- A.** Preliminary objection by Company re expansion of arguments beyond those in the JSI;
- B.** Was the January 2022 RTWA arbitrary, discriminatory or in bad faith?

- C. If so, was the grievor held off work unreasonably?
- D. If so, what compensation is owed to the grievor between January 10, 2022 and April 14, 2023?

**A. Preliminary objection by Company re expansion of arguments beyond those in the JSI**

Position of the Parties

3. The Company argues in its Reply Brief, as set out in Tab 1, that a large number of paragraphs in the Union Brief represent arguments beyond those found in the JSI. The number of contested paragraphs represent approximately 30% of the total Union Brief.

4. The Company is essentially arguing that any submissions about the Return to Work Protocol (“RPA”), or the 2022 RTWA, outside differences with the signed 2023 RTWA are both irrelevant and contrary to the CROA Rules.

5. The Union contests the Company position, noting that the JSI specifically sets out: “The Union specifically pleads and relies on its grievance letters dated March 4 and June 10, 2022”.

Analysis and decision

6. In my view, the Union position is to be preferred.

7. The grievance process clearly sets out a policy grievance challenge to the 2022 RTWA, with extensive submissions being advanced to contest or support the RTWA (see Tab 1, Company documents, pp. 2-21).

8. The Union clearly based its JSI submissions on the exchanged grievance letters. Equally, however, the Company based its JSI submissions on its earlier submissions: “The Company disagrees with the Union’s position and refutes the Union’s allegations. It relies on its grievance replies”.

9. I therefore find that submissions from either Party which find their genesis in the grievance documents and JSI are appropriate and will be considered.

10. However, at the heart of the dispute between the Parties is a narrower issue, namely whether the unsigned 2022 RTWA was reasonable, by comparison with the signed 2023 RTWA, and if not, what the consequences should be.

### **B. Was the January 2022 RTWA arbitrary, discriminatory or in bad faith?**

#### Position of the Parties

11. The Union takes the position that the RTWA was adopted without Union involvement, contrary to the obligation that accommodation is a tripartite responsibility. It points out that there is no expressed need for a new RTWA, as the Company’s Relapse Prevention Agreement (“RPA”) had been in place for many years without issue.

12. The Union notes a panoply of issues with the new RTWA which render it both arbitrary and discriminatory. These issues include the fact that no accommodation happens until the RTWA is signed, it is not based on an individualized assessment, medical information is provided to managers, and the Agreement is effectively a Last Chance Agreement.

13. The Company pleads that there is no evidence that the January 2022 RTWA language was arbitrary or discriminatory with respect to the grievor.

14. It submits that any duty to accommodate must be looked at through the prism of an obligation for the Company and its employees to operate safely in a highly dangerous industry.

15. It argues that the language of the Agreement needs to be read as a whole. Changes were made to the RPA to increase Union involvement, given the tripartite responsibility for accommodation. It notes that some of the arguments made by the Union relate to language which it has agreed to in the 2023 RTWA.

### Analysis and decision

16. This appears to be the first case to deal squarely with at least portions of the new RTWA.

17. In **CROA 4789-Supp**, Arbitrator Cavé dealt with the October 2019 dismissal of a grievor with a drug addiction, shortly before the new RTWA was adopted. Ultimately, she found that the RPA was still applicable to the grievor. However, she did offer some comments about the genesis and effect of the RTWA:

16. The purpose of the reinstatement order included in **CROA 4789** is to make the Grievor whole and place him in the position he would have been in but for his unjust dismissal in October 2019. At the time, the Grievor would have been required to sign and comply with the Company's RPA, which set out what were then the Company's standard terms and conditions applicable to employees who had disclosed a substance use disorder.

17. The Company has put forward no reasonable justification for imposing stricter conditions for the Grievor's return to work than those in the RPA. Notably, the evidence does not show that the conditions of the RPA are insufficient to ensure the Grievor's safe return to work. In addition, imposing stricter conditions on the Grievor would be inconsistent with the purpose of the reinstatement order, namely to place him in the position he would have been in but for the unjust dismissal. Moreover, considering the RTWA was implemented one month after the reinstatement order in **CROA 4789**, allowing the Company to rely on the RTWA, rather than the RPA, would allow the Company to benefit from its delay in implementing the award. (underlining added)

18. Based on the above comments, it would appear that Arbitrator Cavé accepted that the RTWA contained terms which were stricter than those found in the RPA. For the reasons that follow, I find that the January 2022 version of the RTWA presented to the grievor and Union was not only stricter, but also arbitrary and discriminatory.

19. The purpose of the analysis which follows is not to provide an exhaustive review of the whole of the RTWA, but rather to examine the primary elements which justify, in my view, the refusal of the Union and grievor to sign the January 2022 RTWA.

20. The 2022 RTWA contained language giving the Company substantial powers:

4. If, following a fair and impartial investigation, the Company determines that you have violated or failed to comply with any of the terms and conditions of *Step 1: Pre Treatment* of this Agreement the following will apply:

- a) It shall be considered just cause for discipline under the Company's current discipline handling guidelines at the time of the violation or non-compliance;
- b) The current discipline handling guidelines are the Hybrid Discipline & Accountability Guidelines. Any violation or non-compliance will be considered a major offence under these guidelines.
- c) Any grievance regarding the discipline assessed shall only be for the purpose of determining whether you violated or failed to comply with the terms and conditions of *Step 1: Pre Treatment* of this Agreement; and
- d) The arbitrator, in respect of any such grievance, shall not have jurisdiction to substitute a lesser penalty for any discipline imposed if they find that you violated or failed to comply with any of the terms and conditions of this Agreement or the Canadian Pacific Railway Alcohol and Drug Policy and procedures (HR-203, HR 203.1 & HR 203.2)...

9. If following a fair and impartial investigation, the Company determines that you violated or failed to comply with any of the terms and conditions of *Step 2: Post Treatment* of this Agreement the following will apply:

- a) The Company, at its sole discretion, may elect to terminate employment in the following instances:
  - Failure to disclose a relapse;
  - Use of prohibited substances prior to any incident;
  - Positive biological test.
- b) Any other violation shall be considered just cause for discipline under the Company's current discipline handling guidelines at the time of the violation or non-compliance.
 

The current discipline handling guidelines are the Hybrid Discipline & Accountability Guidelines. Any violation or non-

compliance under item 9.b. will be considered a major offence under these guidelines. Any continued employment will be subject to a last chance agreement including a review of fitness to work.

- c) Any grievance regarding the discipline assessed under item 6 shall only be for the purpose of determining whether you violated or failed to comply with the terms and conditions of *Step 2: Post Treatment* of this Agreement; and
- d) The arbitrator, in respect of any such grievance, shall not have jurisdiction to substitute a lesser penalty for any discipline imposed if he or she finds that you violated or failed to comply with any of the terms and conditions of this Agreement or the Canadian Pacific Railway Alcohol and Drug Policy and procedures (HR-203, HR 203.1 & HR 203.2).

21. These powers were substantially reduced in the 2023 RTWA:

4. If, following a fair and impartial investigation, the Company determines that you have violated or failed to comply with any of the terms and conditions of Step 1: Pre Treatment of this Agreement, you may be subject to discipline up to and including dismissal...

9. If, following a fair and impartial investigation, the Company determines that you violated or failed to comply with any of the terms and conditions of Step 2: Post Treatment of this Agreement you may be subject to discipline up to and including dismissal.

22. The RTWAs deal with a) Step 1 (Pre-Treatment) and b) Step 2 (Relapse Prevention). Each version of each Step will be compared.

### Step 1 (Pre-Treatment)

23. The 2022 RTWA Step 1 notes that a violation or failure to comply “shall be considered just cause for discipline” (para 4a) and “any violation or non-compliance will be considered a major offence” (para 4b). It is noteworthy that the language is mandatory.

24. The 2022 RTWA Step 1 limits the extent to which a grievance may be filed: “Any grievance regarding the discipline assessed shall only be for the purpose of determining whether you violated or failed to comply with...Step 1” (para 4c). Moreover, it limits the

discretion of the arbitrator: “shall not have jurisdiction to substitute a lesser penalty for any discipline imposed” (para 4d).

25. The 2023 RTWA Step 1 is missing the mandatory language of para 4a and 4b, and the limitations of para 4c and 4d. All the new language says is: “...you may be subject to discipline up to and including dismissal” (para 4).

### Step 2 (Relapse Prevention)

26. The 2022 RTWA Step 2 notes that the Company has discretion to terminate employment in certain circumstances: “The Company, at its sole discretion, may elect to terminate employment in the following circumstances instances...” (para 9a). Other violations will be considered a major offence and will be subject to a last chance agreement: “Any other violation shall be considered just cause for discipline, ...will be considered a major offence,,, Any continued employment will be subject to a last chance agreement including a review of fitness to work” (para 9b).

27. The 2022 RTWA Step 2, as in Step 1, likewise limits the scope of a potential grievance and the power of an arbitrator to substitute a lesser penalty (paras 9c and 9d).

28. The 2023 RTWA Step 2, as in Step 1, simply notes “you may be subject to discipline up to and including dismissal” (para 9).

29. In my view, it is clear that the language of the 2022 and 2023 RTWAs is substantially different. The 2022 language is prescriptive and mandatory. The right to grieve is limited and the powers of the arbitrator are circumscribed. The 2023 language is permissive and non-mandatory. The right to grieve and the powers of the arbitrator are not limited by the Agreement.

30. In my view, the language of the 2022 RTWA ignores the obligation of the Company to make an individualized assessment of the facts concerning each individual.



The language permits the Company to terminate for particular violations and to subject the individual to a “Last Chance” agreement for other violations. It limits the right to grieve and the power of the arbitrator to impose a lesser penalty.

31. All of the above provisions in the 2022 RTWA fail to recognize the assessments which are routinely done by arbitrators to assess whether the duty to accommodate up to the point of undue hardship has been met (see, for example, **CROA 4273** and **4503**). Instead, the language permits the Company to terminate, while limiting the ability of the grievor to contest the decision.

32. The language also fails to recognize the human rights and CROA jurisprudence which has repeatedly recognized that drug and alcohol addictions may lead to occasional relapses, because of the nature of the illness. Again, the language permits the Company to terminate, while limiting the ability of the grievor to contest the decision.

33. Accordingly, I find the language of paragraphs 4 and 9 in the 2022 RTWA to be both arbitrary and discriminatory.

### **C. If so, was the grievor held off work unreasonably?**

#### Position of the Parties

34. The Union argues that article 34 of the Collective Agreement was breached, as the grievor was held off work and placed effectively on a leave of absence. It argues that no such leave is foreseen by article 34, which identifies a limited number of leaves of absence.

35. The Union further argues that by holding the grievor off work, the Company also breached article 36 of the Collective Agreement, which foresees a tripartite duty to return injured or sick employees to work through appropriate accommodation as quickly as possible.

36. The Company argues that the 2022 RTWA was an effort to balance the need for safety with the tripartite responsibility to accommodate the grievor. It argues that until this balance could be assured, the grievor could not return to work.

#### Analysis and decision

37. I find that the grievor was held off work unreasonably for the following reasons.

38. Firstly, given the expressed concerns of the Union and grievor with the RTWA, the Company could have had the grievor sign the existing RPA. The RPA has been in use for many years, has been accepted as reasonable by many arbitrators and would not have held up the grievor's return to work. The 2022 RTWA could have been litigated as a policy grievance, without involving the grievor directly.

39. Secondly, once prima facie discrimination has been established, the Company has a legal obligation to accommodate an employee with a disability, up to the point of undue hardship. The grievor had established that he had a disability, namely a drug addiction. The Company then had the burden of proof to show reasonable accommodation. The Company held the grievor off work until an amended RTWA could be signed. It led no evidence about any attempt to offer the grievor other work, including non safety-sensitive work, prior to the signing of the 2023 RTWA.

#### **D. If so, what compensation is owed to the grievor between January 10, 2022 and April 14, 2023?**

#### Position of the Parties

40. The Union seeks full compensation for the grievor between January 10, 2022 and April 14, 2023.

41. The Company asks that the matter be remitted to the Parties, noting outstanding factual issues as to when the grievor was available to work.

42. The Union objects to the raising of these factual issues, but argues that the grievor was available to work and deserves full compensation.

Analysis and decision

43. I find that the grievor is entitled to full compensation for all periods he was available to work after January 10, 2022 until April 14, 2023.

44. The matter is remitted to the Parties to discuss implementation of the remedy.

45. I remain seized with respect to any questions of interpretation or application of this Award, as well as with respect to remedy, should the Parties be unable to reach a solution.

June 4, 2024



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**JAMES CAMERON**  
**ARBITRATOR**