

**IN THE MATTER OF AN ARBITRATION UNDER THE *Canada Labour Code, RSC*
1985, c L-2.**

BETWEEN:

International Brotherhood of Electrical Workers (System Council No. 11)

(IBEW)

-and-

Canadian National Railway Company

(CN)

Grievance of R. Koetsier – Issues involving CN’s Covid-19 Vaccination Policy

Arbitrator: Graham J. Clarke

Date: May 15, 2023

Appearances:

IBEW:

K. Stuebing: Legal Counsel
J. Sommer: Senior General Chair
G. Badesha: General Chair Western Canada
S. Martin: International Representative, IBEW
B. McCue: Regional Chair – CN Rail Great Lakes District
R. Koetsier: Grievor

CN:

R. Charney: Legal Counsel
L. Yaacoub: Legal Counsel
F. Daignault: Director, Labour Relations
J. El Shamey: Sr. Manager, Labour Relations

Arbitration held via videoconference on April 27, 2023.

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Award

BACKGROUND

1. The parties dispute¹ whether CN placed S&C Maintainer Mr. Koetsier on an unpaid leave or suspended him for his decision not to get vaccinated under CN's Covid-19 Employee Vaccination Policy² (Policy). This award also examines CN's decision not to grant Mr. Koetsier a religious exemption.

2. The IBEW argued that CN disciplined Mr. Koetsier and failed to conduct the mandatory investigation under article 13 of the collective agreement (CA)³. It further alleged that CN failed to consider properly Mr. Koetsier's request for a religious exemption. The IBEW also argued that the CA at article 14 prevented CN from imposing a leave of absence.

3. CN argued that it implemented its Policy as required by Ministerial Order 21-07⁴ (MO). The MO required CN's Policy to "include leave without pay as the sanction applicable to employees who are not fully vaccinated"⁵. Mr. Koetsier sent CN a "Notice of Liability"⁶ suggesting CN, *inter alia*, was unlawfully practising medicine by requiring vaccination.

4. On November 15, 2021, CN placed Mr. Koetsier on unpaid leave due to his not being vaccinated. After being placed on unpaid leave, Mr. Koetsier filed a Religious Exception Request Form. CN denied his request and argued that he did not demonstrate he had a sincerely held religious belief. When the Minister lifted the MO in June 2022, CN brought Mr. Koetsier and other unvaccinated employees back to work.

¹ Joint Statement of Issue (JSI): IBEW Exhibits, Tab 1

² CN Mandatory COVID-19 Employee Vaccination Policy – Canada; IBEW Exhibits, Tab 6

³ The parties' collective agreement must be read along with a Memorandum of Settlement (MOS) dated March 20, 2017 for the years 2017-2021. There is currently no consolidated collective agreement. The MOS updated article 13.

⁴ October 29, 2021, [Order pursuant to Section 32.01 of the Railway Safety Act \(MO 21-07\) Vaccination Mandate for Employees](#). The Minister amended this MO on several occasions.

⁵ Section B; 3(f)

⁶ CN Exhibits; Tab 16

5. For the following reasons, the arbitrator concludes that article 14 of the CA did not prevent CN from placing Mr. Koetsier on an unpaid leave of absence pursuant to the MO and the Policy. The arbitrator further concludes that while its documentation contemplated possible discipline, CN only placed Mr. Koetsier on leave under the Policy. CN did not discipline Mr. Koetsier. Finally, the limited evidence, particularly when compared with the evidence in the multiple arbitral awards the parties submitted, did not satisfy the arbitrator that Mr. Koetsier had a sincerely held religious belief when requesting a religious exemption.

CHRONOLOGY OF FACTS

6. The arbitrator has reviewed and considered the entire Record, which exceeded 1000 pages. This Chronology will highlight the most salient facts given their importance to the determinations the arbitrator must make.

7. **August 22, 2016:** CN hired Mr. Koetsier and promoted him to the position of S&C Maintainer in 2018. An S&C Maintainer constructs, installs and maintains various railway signal and communications systems.

8. **August 13, 2021:** The Government of Canada announced⁷ that it would require federally regulated workers in the transportation sector to be vaccinated.

9. **September 8, 2021:** CN wrote⁸ to its employees, including Mr. Koetsier, to announce that it would introduce the Policy and require mandatory vaccination, subject to medical or religious exemptions:

Effective November 1, 2021, we will require all CN employees in Canada to be fully vaccinated against COVID-19 as a condition of employment. The Company's vaccination mandate will extend to employees of our wholly owned subsidiaries as well as CN's contractors, consultants, agents and suppliers and anyone who accesses CN properties in Canada. CN will consider, on an individual basis, requests from employees for exemptions based on legitimate medical conditions or established, personally held religion that prohibit vaccination.

(Emphasis added)

⁷ News Release: [Government of Canada to require vaccination of federal workforce and federally regulated transportation sector.](#)

⁸ IBEW Exhibits; Tab 7; Page 26/354

10. **September 14, 2021**: Mr. Koetsier sent CN a “Vaccine Notice of Liability”⁹ (VNOL), a document that Action4Canada.com¹⁰ suggested employees serve on their employer. The 5-page document included these extracts (footnotes omitted):

Re: COVID-19 injections recommended or administered to employees

This is an official and personal Notice of Liability.

You are unlawfully practising medicine by prescribing, recommending, and/or using coercion to insist employees submit to the experimental medical treatment for Covid-19, namely being injected with one of the experimental gene therapies commonly referred to as a “vaccine”.

To begin with, the emergency measures are based on the claim that we are experiencing a “public health emergency.” There is no evidence to substantiate this claim. In fact, the evidence indicates that we are experiencing a rate of infection consistent with a normal influenza season.

...

Under the Crimes Against Humanity and War Crimes Act of Canada, a crime against humanity means, among other things, murder, any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law, conventional international law, or by virtue of its being criminal according to the general principles of law are recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission. The Act also confirms that every person who conspires or attempts to commit, is an accessory after the fact, in relation to, or councils in relation to, a crime against humanity, is guilty of an offence and liable to imprisonment for life.

Under sections 265 and 266 of the Criminal Code of Canada, a person commits an assault when, without the consent of another person, he applies force intentionally to that other person, directly or indirectly. Everyone who commits an assault is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, or an offence punishable on summary conviction.

It is a further violation of the Canadian Criminal Code, to endanger the life of another person. Sections 216, 217, 217.1 and 221.

...

⁹ CN Exhibits; Tab 16; Page 150/850

¹⁰ CN Exhibits; Tab 17; Page 157/850; <https://action4canada.com/>

In conclusion, administration of vaccines is defined as a “medical procedure”. In what other medical context could non-doctors and non-pharmacists prescribe, promote and help distribute pharmaceutical drugs? This is unauthorized practice of medicine.

Therefore, I hereby notify you that I will hold you personally liable for any financial injury and/or loss of my personal income and my ability to provide food and shelter for my family if you use coercion or discrimination against me based on my decision not to participate in the COVID-19 experimental treatments.

(Emphasis added)

11. **September 17, 2021:** CN responded to Mr. Koetsier’s VNOL by reminding him of the November 1, 2021 deadline:

Hello Robert,

CN’s initiative follows the Government of Canada’s announcement that it will require employees of all federally regulated transportation companies to be vaccinated by the end of October. It is also aligned with the recommendations of Health Public Authorities. It is important to remember that (i) CN expects employees to be vaccinated with a vaccine approved by the Public Health Authorities in their jurisdiction; and that (ii) CN mandates vaccination as a condition of employment; **employees can always choose not to be vaccinated, on the understanding that their privilege to work for CN will then be suspended or terminated. Effective November 1, 2021, we will require all CN employees in Canada to be fully vaccinated against COVID-19 as a condition of employment. Employees that are not fully vaccinated will not be allowed to continue work after November 1, 2021, whether they submit a Vaccine Notice of Liability form or any similar form.**

We encourage you to consult the FAQs on CN’s COVID-19 webpage found here.

(Emphasis added)

Roughly an hour and a half later, Mr. Koetsier sent CN an updated VNOL¹¹.

12. **September 24, 2021:** CN wrote¹² again to Mr. Koetsier about his choice not to get vaccinated, or obtain an exemption, and advised he would be placed on an unpaid leave

¹¹ CN Exhibits; Tab 19, Page 183/850

¹² IBEW Exhibits; Tab 8; Page 29/354

of absence effective November 1. CN advised him of the approach it would take regarding mandatory vaccination while the pandemic continued:

As a result, the Company understands that you do not intend to be vaccinated or obtain an exemption by November 1 and as such considers that you will not be available to work. **You will be placed on an unpaid leave of absence effective November 1, 2021 until (i) you provide proof of vaccination; or (ii) the Public Health Authorities consider that the risk associated with COVID-19 has abated and no longer recommend vaccination to prevent the spread of the virus, or, (iii) if the Pandemic is prolonged and there's no indication from Public Health of a safe return to the workplace for those unvaccinated, and in this case, CN reserves the right to terminate those employees.**

(Emphasis added)

13. **October 14, 2021:** CN emailed¹³ Mr. Koetsier advising him it was extending the vaccination deadline to November 15 and referenced the possibility of termination. It reiterated that some employees might be eligible for an exemption on medical or religious reasons:

Employees who are not fully vaccinated by November 15, 2021:

Any employee who is not fully vaccinated by this date will be placed on leave without pay or, as the case may be, terminated. The following two exceptions apply:

- If you received your first shot no later than November 15, 2021 and you intend to get your second shot no later than January 24, 2022, you may continue to work providing you get tested every 72 hours during this period and provide a negative result. According to the Ministerial Order, the federal government only accepts molecular testing (for example, PCR) and only up until January 24, 2022. After this date, you will be put on leave without pay if you have not yet received your second shot. Testing must be acquired and paid for at your own expense.

- **If you have received an exemption from CN's vaccination policy (for medical or religious reasons), you may continue to work after November 15, 2021.** The regulation requires that you are tested every 72 hours and provide a negative result. For those employees who have obtained an exemption, CN will pay for the costs of testing.

(Emphasis added)

¹³ IBEW Exhibits; Tab 9; Page 32/354

14. **October 29, 2021:** The Minister's delegate issued MO 21-07 which mandated vaccination. Section B 3(f) noted the sanctions a vaccination policy must include:

3 A company-wide vaccination policy must:

...

f. include leave without pay as the sanction applicable to employees who are not fully vaccinated and do not fall within an exception as described in Section G as of January 24, 2022;

Section G provided for a religious exemption:

Section G: Exceptions

1. Subject to section H¹⁴, a railway company is not required to verify proof of vaccination credential or to ensure an employee is fully vaccinated for any employee who has not completed a COVID-19 vaccination regime due to a medical contraindication or the employee's sincerely held religious beliefs.

...

3. For the purpose of section G(1), a railway company must only accept, in the case of an employee or a person hired by the railway company to provide a service, an exception on the basis of an person's sincerely held religious belief if the railway company is obligated to accommodate the employee on the basis of this ground under the Canadian Human Rights Act, or other applicable legislation, by providing such an exception.

4. For the purposes of section G(1), a railway company must only accept an employee's sincerely held religious belief if the employee submits an attestation, sworn by the employee, that the employee has not completed a COVID-19 vaccination regime due to the employee's sincerely held religious beliefs.

15. **October 29, 2021:** Transport Canada issued "Guidance Material" for railways¹⁵ which included the following regarding religious exemptions:

Each request is to be evaluated on a case-by-case basis. Managers should consider the information provided by the employee to substantiate the request for accommodation based on religion. The information must clearly demonstrate the following three elements:

¹⁴ Accommodation Measures.

¹⁵ CN Exhibits; Tab 8

1. That the belief is religious in nature:

- Religion typically involves a particular and comprehensive system of faith and worship as well as the belief in a divine, superhuman or controlling power (e.g., “I don’t believe in vaccination” would not in itself be a reason).

- It does not apply to beliefs, convictions or practices that are secular, socially based or only conscientiously held; nor does it protect false empirical beliefs about the development, the contents, effects, or purpose of the vaccines.

Note: it is not necessary for the employee to prove that the religious belief is objectively recognized as valid by other members of the same religion or that it is required by official religious dogma or is in conformity with the position of religious officials (e.g., confirmation by a priest, rabbi, imam or other spiritual leader).

2. That the belief prevents full vaccination:

- The information provided by the employee must demonstrate how the religious belief prevents vaccination.

- It is not sufficient for the employee to say they have a certain religious belief and they cannot be vaccinated. They must explain how vaccination would conflict with their religious belief in a way that is not trivial or insubstantial (i.e., being vaccinated conflicts with the employee’s genuine connection with the divine).

3. That it is sincerely held:

- Where the employee provides a sworn affidavit, this can be a sign of the sincerity of the belief since this becomes a record with legal standing. Swearing a false affidavit is a serious offence and would constitute perjury under the Criminal Code. The seriousness with which an affidavit is sworn before a Commissioner of Oaths is a safeguard of the accuracy of the information contained within.

- Factors that indicate whether the belief is sincere could include: the overall credibility of the employee’s statement as well as the consistency of the belief with the employee’s other current religious practices (it is, however, inappropriate to rigorously focus on past religious practices since these can evolve over time).

16. **November 4, 2021:** CN sent a form letter¹⁶ to employees, including Mr. Koetsier, advising that those who failed to disclose their proof of vaccination status “will not be

¹⁶ IBEW Exhibits; Tab 9; Page 35/354

allowed to continue work at CN thereafter”. The letter contained a table which mentioned termination as one of the possible consequences for unvaccinated employees¹⁷:

- Will be placed on an unpaid leave of absence, and may result in the termination of their employment;
- May result in the termination of their employment; and
- Will be placed on an unpaid leave of absence, and may result in the termination of their employment.

17. **November 13, 2021**: CN issued its Policy¹⁸ which included references to termination and disciplinary measures for those employees who failed to get vaccinated:

Employees who fail to comply with the timeline above will be placed on an unpaid leave, or as the case may be, terminated. Any other violation of this Policy may result in disciplinary and/or administrative measures, up to and including termination of employment.

Annex B of the Policy also contained a “Religious Exception Request Form”, a document that Transport Canada had provided¹⁹.

18. **November 16, 2021**: By letter²⁰, CN advised Mr. Koetsier that he had been placed on unpaid leave and referenced “the administrative release of your employment” if he did not provide proof of vaccination:

CN has determined that you have not complied with the Company’s requirement and the Ministerial Order dated October 29, 2021 that all employees of federally regulated railway companies have at least one shot of a COVID-19 vaccine by November 15, 2021. This means you did not comply in one or more of the following ways:

- You provided no information or incomplete information on your vaccination status through CN’s Vaccine Tracker that would allow CN to determine whether you received one dose of a COVID-19 vaccine by November 15, 2021; or
- You indicated that you are not getting vaccinated; or

¹⁷ Ibid. Page 36/354

¹⁸ CN Exhibits; Tab 9; Page 84/850

¹⁹ CN Exhibits; Tabs 8 and 9; Page 96/850

²⁰ IBEW Exhibits; Tab 10; Page 38/354

· You initially chose “prefer not to disclose” as your vaccination status and failed to upload information after that option was removed from CN’s Vaccine Tracker.

You have also not provided us with any legitimate basis for your failure to comply. As a result, you have been placed on an unpaid leave effective November 15, 2021. You have until November 29, 2021 to get your first shot of a Health Canada approved COVID-19 vaccine and provide proof of vaccination to CN’s Occupational Health Services. Failure to do so will result in the administrative release of your employment, without further notice to you.

If you have questions about the information you uploaded to the CN Vaccine Tracker, or have decided to get your first vaccination shot, please email ohs_vaccination@cn.ca.

(Emphasis added)

19. **November 22, 2021:** The Government of Canada confirmed²¹ that CN’s Policy complied with MO 21-07.

20. **November 24, 2021:** Mr. Koetsier provided CN with a completed Religious Exception Request Form²² which described his religious beliefs:

My religious beliefs prevent me from experimenting on my body with untested and unsafe drugs, vaccines and medical procedures when the risks of said procedures outweigh the illnesses or diseases or medical conditions that they are supposed to prevent or hinder.

My religious beliefs also prevent me from being coerced into doing things against my will.

My religious beliefs require me to honour the sanctity of human life including pre-natal human life and therefore protect unborn children from medical experimentation in the production of some vaccines.

21. **November 26, 2021:** By email²³, CN’s Religious Exemption Committee (Committee) denied Mr. Koetsier’s request:

Thank you for your submission, Mr. Koetsier. Having reviewed it carefully, we are denying your request for religious accommodation.

²¹ CN Exhibits; Tab 10

²² CN Exhibits; Tab 22

²³ CN Exhibits; Tab 24; Page 202/850

You have provided us with a statement that establishes that you are religious, however you have failed to establish that you have a faith-based practice or belief that precludes vaccination.

It appears to us that you have made a personal choice not be vaccinated and this is not a choice we are required to accommodate.

We encourage you to be vaccinated without any further delay.

22. **November 29, 2021:** By email²⁴, Mr. Koetsier asked CN “where the confusion lies regarding my religious exemption”:

I'm not sure where the confusion lies regarding my religious exemption. **Since these vaccines are within trial stages and no long term studies have been established to determine their safety long term.** Getting any covid-19 vaccine would directly contradict my religious beliefs regarding experimentation of my body. **There is also ever increasing evidence of many short term ailments and serious adverse reactions including death from getting these experimental injections that have also been scientifically proven that they do not prevent the spread of SARS-COV 2, nor do they prevent the person from getting the virus.**

Would someone be able to explain in detail how you came to your conclusion regarding the denial of my religious exemption?

(Emphasis added)

CN responded²⁵ a few hours later and stated:

Good afternoon,

The company has reviewed the facts that you have submitted surrounding your request for an religious exemption. Based on the facts that you have submitted, the company has taken a final position that your request is not approved.

Therefore, you are required to comply with CNs policy to be fully vaccinated.

23. **November 29, 2021:** A revised MO, MO 21-07.1²⁶, amended Section B 3(f) and added, *inter alia*, the expression “minimum sanction”:

²⁴ CN Exhibits; Tab 25, Page 204/850

²⁵ IBEW Exhibits; Tab 13; Page 46/354

²⁶ [Order pursuant to Section 32.01 of the Railway Safety Act \(MO 21-07.1\) Vaccination Mandate for Employees](#). Section B 3(f) remained unchanged in later amended MOs: [MO 21-07.2](#) and [MO 21-07.3](#).

3. A company-wide vaccination policy must:

...

f. include leave without pay, or termination of compensation, as applicable, as the minimum sanction, to employees who do not fall within an exception as described in Section G and either have not received their first dose as of November 15, 2021, or are not fully vaccinated as of January 24, 2022;

24. **November 30, 2021:** CN wrote²⁷ to Mr. Koetsier about the requirement to get vaccinated and advised that, if he failed to meet this condition by January 10, 2022, he would be “released from your employment on a with cause basis”:

We are following up on our letter dated November 16, 2021, in which we indicated that you have been placed on an unpaid administrative leave of absence, and the failure to receive and provide proof of partial vaccination (1 dose of a Health Canada approved vaccine) by November 29 would result in your termination.

According to our records, CN has determined that you have still not complied with the Order pursuant to Section 32.01 of the Railway Safety Act (MO 21-07) Vaccination Mandate for Employees dated October 29, 2021 (Ministerial Order), and CN’s requirement that all employees of federally regulated railway companies be partially vaccinated by November 15, 2021 and fully vaccinated by January 24, 2022, as per CN’s company-wide vaccination policy. This means you did not comply in one or more of the following ways:

...

As result, considering that you are in violation of a fundamental term of your employment flowing from a legal requirement under the Ministerial Order and CN’s company-wide mandatory COVID-19 vaccination policy, you are being released of your employment on a with cause basis, effective January 11, 2022, unless you satisfy the following condition. For greater clarity, failure to satisfy the following condition will result in your release of employment as aforesaid:

- **You provide OHS with proof of having completed a COVID-19 dosage regimen, by no later than January 10, 2022.**

(Emphasis added)

²⁷ CN Exhibits; Tab 29; Page 221/850

25. **December 1, 2021:** CN issued Mr. Koetsier a Record of Employment²⁸ which described the “Reason for issuing” as “M. Dismissal or suspension”. CN did not choose the options of “N. Leave of Absence” or “K. Other”.

26. **December 17, 2021:** The IBEW filed a detailed grievance²⁹ alleging, *inter alia*, that CN had violated article 13 of the CA by failing to conduct the mandatory investigation before disciplining Mr. Koetsier. The IBEW also raised article 14 regarding Leaves of Absence as well as CN’s refusal to grant Mr. Koetsier a religious exemption. The grievance contained these extracts:

Without dispute, the ways and means of determining one’s culpability must be calculated by a fair and impartial investigation. There is no bypass mechanism that can be triggered by CN, no matter the circumstances. This alone has breached all rights Mr. Koetsier is entitled to in the CA by these arbitrary, discriminatory and illegal actions when so blatantly breaching Article 13 and holding Mr. Koetsier out of service. It is left to openly inquire has CN done this covert and illegal practice of suspending an employee in the past for alleged violation of any CN Policy without adhering to Article 13 in its entirety?

...

There is no ambiguity in the contractual language that would even remotely convince the reader that this language can be used to place an employee on an unpaid leave of absence, let alone have this unpaid leave be done solely at the Company’s discretion. These two Articles, but not limited to, show the attempt by CN to use some perceived broad brushed approach in violating employees’ rights, veiled behind the Ministerial Order (in the name of the Covid-19 mandatory vaccination). The same mandatory Covid vaccination that has now shown to be less effective than the annual voluntary flu shot.

...

It is imperative to note that Mr. Koetsier, in an attempt to comply with his own personal beliefs and the Company’s illegal edict to be vaccinated, applied for a religious exemption. The Company without explanation or further inquiry or research to this exemption request dismissed it outright. Due in part to the limited response provided with the denial, it is unclear what guidelines, or parameters if any were applied to protect Mr. Koetsier’s Canadian Human Rights.

²⁸ IBEW Exhibits; Tab 15; page 50/354

²⁹ CN Exhibits; Tab 27; Page 208/850

27. **January 10, 2022:** CN wrote again to Mr. Koetsier³⁰ with the Re line: “Unpaid Leave of Absence Maintained” and, due to litigation, advised that it was “deferring your termination date for an indefinite period only”:

In a letter dated November 16, 2021 you were advised that you were placed on an unpaid leave of absence for your failure to comply with the Ministerial Order requiring employees of federally regulated railway companies to have at least one dose of a COVID-19 vaccine by November 15, 2021 and to be fully vaccinated by January 24, 2022. CN later informed you, in a letter dated November 30th, that due to your failure to comply with the Ministerial Order, your employment would be terminated effective January 11, 2022.

In a recent development, the Ministerial Order has been challenged in legal proceedings that will take place in the coming weeks. While CN firmly believes the Ministerial Order is valid, we are for the time being deferring your termination date for an indefinite period only. You will remain on an unpaid leave for now, and in due course we will provide you with two weeks’ prior notice of the new termination date.

All accrued vacation will be paid out to you.

If you have decided to comply with the Ministerial Order and be fully vaccinated, please email ohs_vaccination@cn.ca or communicate with your Team Leader.

(Emphasis added)

28. **January 20, 2022:** CN responded³¹ to the IBEW’s grievance and noted, *inter alia*:

The Ministerial Order makes vaccination a condition of employment, however, employees can always choose not to be vaccinated for their own personal reasons, on the understanding that, employees who were not vaccinated as required by the Ministerial Order, did not receive a religious or medical exemption or failed to disclose their vaccination status by November 15, 2021 would not be allowed to continue work at CN thereafter.

29. **January 27, 2022:** CN wrote again to Mr. Koetsier³² regarding the conditions for a “return to work at the conclusion of your leave” and included wording about requesting a religious exemption:

On October 29, 2021, the Minister of Transport made an Order requiring all employees of federally regulated railways to be fully vaccinated before January

³⁰ CN Exhibits; Tab 29; Page 222/850

³¹ IBEW Exhibits; Tab 23; Page 75/354

³² IBEW Exhibits; Tab 16, Page 53/354

24, 2022. In accordance with the Order, Canadian National Railway introduced a mandatory COVID-19 vaccination policy on November 15, 2021. The Policy mandates that all CN employees be fully vaccinated by January 24, 2022. Per the Ministerial Order, a “fully vaccinated person” means a person who, at least 14 days prior, has completed, a COVID-19 vaccine dosage regimen. A copy of the Vaccination Policy is attached for your reference.

The purpose of this letter is to advise you that, in accordance with the Vaccination Policy, you must be fully vaccinated in order to return to work at the conclusion of your leave. CN requires government-issued documentation (or documentation issued by an officially authorised nongovernment entity) confirming receipt of a complete series of doses of a Health Canada approved vaccine that provides protection against COVID-19. Please email your documentation to ohs_vaccination@cn.ca.

Should you fail or refuse to provide documentation confirming your full vaccination status **by your return to work date**, you will be placed on an unpaid leave of absence, or terminated, as the case may be.

Requests for exemption and/or accommodation in respect of the mandatory vaccination requirement will be considered in accordance with the Policy. If you are seeking a medical exemption, please direct your inquiry to ohs_vaccination@cn.ca. **If you are seeking a religious accommodation, please direct your inquiry to hr_vaccination@cn.ca.** For all general inquiries about the Policy, you can reach out to the HR Centre by contacting 1-877-399-5421.

(Emphasis added)

30. **March 24, 2022:** Service Canada³³ denied Mr. Koetsier’s claim for Employment Insurance because “...you lost your employment with Canadian National Railway on November 14, 2021 as a result of your misconduct”. Service Canada also denied a Request for Reconsideration³⁴.

31. **April 1, 2022:** Mr. Koetsier obtained a letter from his Pastor³⁵ entitled “Religious Exemption To Decline the Covid-19 Vaccine”. That same day he also signed a “Christian Declaration on Freedom from Vaccination Coercion”³⁶ provided by Liberty Coalition Canada.

³³ IBEW Exhibits; Tab 19; Page 61/354

³⁴ IBEW Exhibits; Tabs 20 and 21

³⁵ IBEW Exhibits; Tab 17; Page 55/354

³⁶ IBEW Exhibits; Tab 18; Page 57/354

32. **June 20, 2022:** MO 22-02³⁷ repealed MO 21-07 which ended an employer's requirement to have a mandatory Covid-19 policy.

33. **June 28, 2022:** CN wrote to Mr. Koetsier advising him of the suspension of the Policy and the ending of his unpaid leave of absence:

On June 14, 2022, the Government of Canada announced that as of June 20th, employers in the federally regulated rail sector will no longer be required to have a mandatory vaccination policy in place for employees. Under the circumstances, CN is suspending its vaccine mandate. In light of the above, CN is ending your unpaid leave of absence.

You will be contacted by phone by a CN representative to schedule your return to work as soon as possible. We will use the phone number we have on file for you. If your contact information has changed since your leave of absence began, please contact your CN supervisor or the Crew Management Centre, if applicable.

Depending on your role and the length of your leave of absence, a medical assessment may be required before your return to work. Medical assessments for operating employees will not be required for absences of less than 12 months unless the assessment was already due because of regulatory requirements. If this situation applies to you, you will also be contacted by Occupational Health Services once you have confirmed your return with your supervisor.

The Government of Canada has also indicated that it will continue to adjust based on the latest public health advice and science to keep Canadians safe, up to and including the imposition of new vaccination mandates in federally regulated workplaces. CN reserves the right to reinstate its vaccination mandate if need be.

Vaccination continues to be one of the most effective tools to protect Canadians, our health care system and our economy. Employers are encouraged to continue following public health measures and advice to maintain workplace health and safety. Employees are also encouraged to keep up to date with recommended COVID-19 vaccines, including booster doses to get ready for the fall. If you have decided to be vaccinated during your leave of absence, we request that you to share that information by updating the CN Vaccine Tracker upon your return to work.

In closing, I would like to acknowledge that the past seven months have been challenging on every level. Our goal is to bring all CN employees back to work as swiftly as possible and we will strive to return to a positive

³⁷ [Order pursuant to Section 32.01 of the Railway Safety Act \(MO 22-02\) Order Ending Vaccination Mandates for Passengers and Employees.](#)

working environment for everyone. I sincerely hope that we will see you back on the property soon.

(Emphasis added)

34. **July 5, 2022:** The Superior Court of Quebec³⁸ upheld the constitutional validity of the Ministerial Orders which had required mandatory Covid-19 vaccination policies.

35. **July 26, 2022:** Mr. Koetsier returned to work at CN.

36. **October 12, 2022:** In an unreported award involving CN and the Steelworkers³⁹, Arbitrator Schmidt found reasonable both CN's Policy and its decision to adopt mandatory vaccination instead of a testing regime [Footnotes omitted]:

34. I find the reasoning of Arbitrator Stewart in *Alectra Utilities Corporation v Power Workers' Union* and Arbitrator Somjen in *BC Hydro and Power Authority v International Brotherhood of Electrical Workers, Local 258* to be particularly persuasive. Even though Union members perform work outdoors, their duties require close proximity at times and they also interact with each other in indoor and enclosed settings. Accordingly, they remain at risk of contracting and transmitting this terrible disease.

35. **Meanwhile, the medical evidence in this case indicates quite plainly that a testing regime is not a reasonable alternative to vaccination as testing cannot identify all infectious individuals and cannot prevent transmission.** Further still, even a robust testing regime cannot detect all positive cases. Arbitrator Kaplan also reviewed expert evidence with the same conclusions in *Toronto District School Board and CUPE, Local 4400*, finding that the employer's mandatory vaccination policy was reasonable as the expert evidence was clear that vaccination is safe and more effective than rapid tests in reducing the risk of becoming infected and spreading COVID-19.

36. **Beyond health and safety, I also find that the Policy was necessary to ensure CN's continued operations.** In *Métallos*, the Quebec Superior Court wrote:

Had there been no vaccination obligation, there would have been a much higher risk of absenteeism due to serious illness, with the associated risk of disruptions to the railway network in particular. It is difficult to replace employees. A continuous testing regime would not have been safe.

³⁸ [Syndicat des métaux, section locale 2008 c. Procureur général du Canada, 2022 QCCS 2455](#)

³⁹ CN Exhibits; Tab 7: *Canadian National Railway Company v. United Steelworkers, Local 2004*, unreported, October 12, 2022.

37. I find the Court's determination to be highly persuasive. Union members play a key role in ensuring the safe operation of CN's trains, which are crucial to the provision of essential goods for the public and the Canadian economy overall. In these circumstances, a higher risk of employee absenteeism was simply unacceptable. In addition, a testing regime would have involved significant disruption to CN's ability to conduct its business. Similar to Arbitrator Herman in *Bunge Hamilton Canada, Hamilton, Ontario v United Food and Commercial Workers Canada, Local 175*,¹³ I find that the Policy was therefore also reasonable in light of the integrated nature of CN's operations and employee mobility across a vast rail network.

38. Finally, I acknowledge the requirement to comply with the Ministerial Order as well as the Canada Labour Code and the Railway Safety Act. In the context of a rapidly changing and unpredictable global health pandemic, CN was entitled to rely on the precautionary principle in the satisfaction of these legal obligations.

(Emphasis added)

37. January 13, 2023: The parties appointed the arbitrator to hear the IBEW's December 17, 2021 grievance.

38. March 23, 2023: Counsel for CN requested⁴⁰ particulars and document production:

The decision to deny the Grievor's religious exemption request was based on all of the information provided to CN during and around the time of the request. To date, CN has not been advised of any religious affiliation by the Union or the Grievor as part of his religious exemption request. As such, with respect to particulars, we request responses to the following:

1. What religion does the Grievor purportedly follow and/or belong to?
2. How long has the Grievor been an adherent of this religion?
3. Particulars regarding the Grievor's religious practices, including the nature and duration of any religious practice.
4. Has the Grievor received any vaccines, taken any pharmaceutical medications or undergone any medical procedures since adhering to this religion? If so, please provide the name of any vaccine and date(s) of receipt, the nature and date(s) of any medical procedure and the name of

⁴⁰ CN Exhibits; Tab 33; Page 292/850

any pharmaceutical medication and the frequency of use (e.g. use of ibuprofen once a month, as needed).

5. Particulars respecting any legislation and the applicable provisions which the Union alleges CN to have violated, if any.

Second, we request production of the following:

A. The Grievor's records of vaccination (or non-vaccination) from the date on which the Grievor joined the religion in question or from March 11, 2019 (one year prior to the onset of the pandemic), whichever occurred earlier, up to and including November 24, 2021 (the date of the Grievor's request for accommodation);

B. Any health records from the Grievor's primary care physician and, if applicable, naturopath for the period from March 11, 2019 to November 24, 2021;

C. Should the Grievor not have a primary care physician, any health records from any hospital, emergency care and specialist from March 11, 2019 to November 24, 2021;

D. Any health records from the Grievor's dentist for the period from March 11, 2019 to November 24, 2021;

E. Any documents that the Union intends to rely on at the hearing of this matter; and

F. Any notes, communications, documents or records between the Grievor and the Union with respect to the COVID-19 vaccine and the Grievor's exemption request.

39. **April 12, 2023:** Counsel for the IBEW provided the requested information⁴¹, on a without prejudice basis, and suggested that the request for particulars confirmed the merits of the grievance:

I am writing in response to your March 23, 2023 request.

Please be advised that the nature of your request confirms the merits of the Union's grievance. The principal position in the Union's grievance is that the Company violated Article 13 of Agreement No. 11.1 between Canadian National Railway Company and the Canadian Signals and Communications System Council No. 11 of the IBEW when the Company

⁴¹ CN Exhibits; Tab 34. Both legal counsel provided the information requested in their respective letters of March 23 and April 12, 2023. The arbitrator will examine some of that information, *infra*.

placed Robert Koetsier on an unpaid suspension without providing him a fair and impartial investigation.

In circumstances such as these—where the Company has decided to withhold an employee from the workplace—the parties’ railway arbitration process depends on a fulsome and balanced investigation process as set forth in the Collective Agreement. The instant grievance challenges that your client arbitrarily breached its strict obligation to conduct the investigation.

The particulars and information that you are seeking in your letter are precisely the kinds of information that the Company was obligated to elicit, in the course of a fair and impartial investigation, prior to withholding Mr. Koetsier from service. The very fact that you need to write to request such information to prepare for arbitration confirms the necessity of the investigation.

(Emphasis added)

The IBEW attached this documentation:

• Religious Related Documents:

- Baptismal record
- Private Christian school diploma
- FBC religious exemption letter.
- Picture of Nelson bible given to Mr. Koetsier for graduating Sunday school at Vineland free reformed church
- Picture of NIV Bible given to me at my grade school graduation
- Christian declaration signed
- Notarized copy of religious exemption request

40. **April 27, 2023:** The parties pleaded this arbitration in less than a day.

ISSUES

41. This matter raises three issues⁴² which the arbitrator must resolve:

1. Did CN violate Article 14 of the CA (Leaves of Absence)?
2. Did CN breach Article 13 of the CA by failing to hold an investigation prior to removing Mr. Koetsier from the workplace? and
3. Did CN discriminate *prima facie* against Mr. Koetsier by denying his religious exemption request?

⁴² See, *inter alia*, IBEW Brief; Paragraph 61; CN Brief; Paragraph 68

42. The arbitrator will analyze these issues in the above order.

ISSUE 1: DID CN VIOLATE ARTICLE 14 OF THE CA (LEAVES OF ABSENCE)?

43. The IBEW did not persuade the arbitrator that article 14 of the CA limited CN's ability to place IBEW members on leave due to the pandemic.

44. Articles 14.2 to 14.4 are the key provisions reflecting the parties' agreement about leaves of absence. Employees apply for these CA leaves:

14.2 Leave of absence for other reasons, including personal, for a period not in excess of one year, may be granted at Management's discretion in accordance with Company policy.

14.3 Applications for leave of absence for periods of one (1) calendar month or more must be in writing and must state the reason for such leave and the period for which leave is requested, and must be made to the appropriate officer of the Company in sufficient time to permit relief arrangements being made. Authorization for such leave of absence must be obtained in writing.

14.4 Extension of leave of absence may be granted when supported by application in writing to the appropriate officer of the Company. Such applications must be received in ample time to obtain authorization or if authorization is not granted, to enable the employee to return to work at expiration of his leave. Failure to obtain extension or to report for duty on or before the expiration of a leave, unless such failure to report is explained to the satisfaction of the Company, will cause the employee to forfeit his seniority.

45. The IBEW argued⁴³ that CN followed none of article 14's mandatory steps:

88. This language clearly specifies what is required by an employee prior to being placed on a leave of absence. CN followed none of these mandatory steps when unilaterally placing Mr. Koetsier on an unpaid leave of absence.

89. Accordingly, IBEW respectfully submits that CN has breached Article 14 by withholding Mr. Koetsier from service as of November 15, 2021.

46. The arbitrator has difficulty concluding that an article in a collective agreement prevented CN, during a pandemic, from complying with a Ministerial Order requiring

⁴³ IBEW Brief; Paragraphs 88-89

mandatory vaccination. As noted in the Chronology, *supra*, the Quebec Superior Court upheld the MO's validity. Similarly, albeit for a different bargaining agent, Arbitrator Schmidt upheld the validity of CN's Policy, *supra*.

47. CN's actions arose from the legal obligations imposed upon it by Transport Canada. If one needs to reference the CA, then the Policy and the placing of unvaccinated employees on unpaid leave constitutes a reasonable exercise of CN's management rights. Article 14 may govern employee-initiated leaves of absence, but that does not mean it prevents different types of leave of absence, such as those mandated by the MO.

ISSUE 2: DID CN BREACH ARTICLE 13 OF THE CA BY FAILING TO HOLD AN INVESTIGATION PRIOR TO REMOVING MR. KOETSIER FROM THE WORKPLACE?

Introduction

48. The IBEW argued that CN disciplined Mr. Koetsier when it placed him on leave. The parties have negotiated a mandatory investigation process for disciplinary matters. This provides a helpful transcript as part of the Record in expedited railway arbitrations. A failure to conduct the investigation can lead to an arbitrator declaring the discipline void *ab initio*.

49. The revised Article 13 found in the MOS described the mandatory nature of the investigation before CN could impose any discipline (extract only):

Discipline and Grievances

Discipline

13.1 Except as otherwise provided herein, **an employee who has 150 working days' service will not be disciplined or discharged until he has had a fair and impartial investigation.** Investigations will be held as quickly as possible, not to exceed 30 days from the time the incident becomes known to the Company, unless the employee is unavailable, or the investigation should be delayed due to circumstances beyond the control of the Company.

(Emphasis added)

50. The arbitrator must determine whether the facts show that CN "disciplined" Mr. Koetsier.

What happened to Mr. Koetsier?

51. The arbitrator can understand the IBEW's concern since CN's documentation at times included comments which went beyond imposing a leave of absence for unvaccinated employees. For example, on October 14, 2021, CN advised Mr. Koetsier that those employees who were not vaccinated would "be placed on leave without pay, or as the case may be, terminated"⁴⁴.

52. Similarly, CN's November 4, 2021 letter to employees included a reference to "the termination of their employment". CN's Policy⁴⁵ also employed the language that employees would "be placed on leave without pay, or as the case may be, terminated". CN further referenced the "administrative release of your employment" if Mr. Koetsier did not get vaccinated by November 29, 2021⁴⁶. These references all occurred prior to Mr. Koetsier's request for a religious exemption.

53. On November 30, 2021, CN then extended the time for Mr. Koetsier to get vaccinated and advised him that if he failed to do so by January 10, 2022 he would be "released from your employment on a with cause basis"⁴⁷. CN further provided a Record of Employment to Mr. Koetsier and ticked off the term "Dismissal or suspension" despite having the options of "Leave of Absence" or "Other"⁴⁸.

54. The IBEW then filed its grievance on December 17, 2021 contesting, *inter alia*, the lack of an investigation under article 13⁴⁹.

55. Subsequent to the grievance, and due to covid-related litigation, CN advised Mr. Koetsier that he would remain on his unpaid leave of absence and "we are for the time being deferring your termination date for an indefinite period only"⁵⁰.

56. Arbitrators have often had to decide whether specific actions constituted discipline or not. The case law the parties submitted noted that this determination is a question of

⁴⁴ IBEW Exhibits; Tab 9

⁴⁵ CN Exhibits; Tab 9

⁴⁶ IBEW Exhibits; Tab 10

⁴⁷ CN Exhibits; Tab 29

⁴⁸ IBEW Exhibits; Tab 15

⁴⁹ CN Exhibits; Tab 27

⁵⁰ CN Exhibits; Tab 29

fact. In *Participating Nursing Homes v Ontario Nurses' Association*⁵¹, Arbitrator Stout noted:

[66] In the matter before me no employee has been disciplined or suspended. At its' highest, employees have not been permitted to work because they have been deemed by the Federal or Provincial Governments to pose a hazard or risk to other employees and the Homes' fragile residents. In the context of a LTC home during a global pandemic, where the government has issued Directives and Orders that mandate the employer's conduct, I find that the Homes conduct was entirely reasonable and justified.

57. The facts satisfy the arbitrator that CN's actions did not constitute discipline. Mr. Koetsier's leave of absence did not require an investigation under article 13 of the CA. The arbitrator must focus on what CN did as opposed to what it said it might do. Simply put, CN placed Mr. Koetsier on unpaid leave for being unvaccinated. It brought him back to work once it lifted its mandatory vaccination policy.

58. CN placed Mr. Koetsier on leave in accordance with its Policy. Its actions respected the "wait and see" approach set out in its September 24, 2021 letter⁵²:

You will be placed on an unpaid leave of absence effective November 1, 2021 until (i) you provide proof of vaccination; or (ii) the Public Health Authorities consider that the risk associated with COVID-19 has abated and no longer recommend vaccination to prevent the spread of the virus, or, (iii) if the Pandemic is prolonged and there's no indication from Public Health of a safe return to the workplace for those unvaccinated, and in this case, CN reserves the right to terminate those employees.

(Emphasis added)

59. In other words, CN placed Mr. Koetsier on leave since he was not vaccinated. And as soon as the mandatory vaccination requirement ended, CN brought Mr. Koetsier back to work as contemplated by scenario #2 in its September 24, 2021 letter.

60. Other than CN's oral reference during argument that it followed an ESDC bulletin regarding the proper code to use, the parties did not provide other evidence about how EI worked for the unvaccinated who found themselves on unpaid leaves of absence. For current purposes, regardless of what CN ticked off on the EI form, the facts confirm that

⁵¹ [2020 CanLII 36663](#)

⁵² IBEW Exhibits; Tab 8

it never dismissed or suspended Mr. Koetsier. The EI form does not change the reality of the situation.

61. CN had clearly contemplated further steps given its multiple references to “termination”, but those future possibilities did not change what occurred in this case.

AH823⁵³

62. The IBEW argued that the arbitrator’s award in AH823 (VIA) applied to Mr. Koetsier’s situation. In other words, it argued that CN disciplined Mr. Koetsier without first conducting the mandatory investigation. CN distinguished AH823 on the facts.

63. The arbitrator agrees with CN.

64. In AH823, VIA terminated Mr. Tessier’s employment⁵⁴ for failing to provide proof of vaccination by a set date. The arbitrator found that the termination was disciplinary for several reasons. For example, while the MO referred to leave without pay (congé sans solde), VIA proceeded with Mr. Tessier’s termination instead⁵⁵.

65. While both VIA in AH823 and CN in this case refer to discipline in their respective policies, only VIA took a clear disciplinary step⁵⁶. AH823 also noted that VIA had previously advised Mr. Tessier that it would take a wait and see approach as it evaluated the pandemic situation. However, AH823 concluded that VIA had not applied this approach, despite its earlier communication to Mr. Tessier⁵⁷.

66. In contrast, CN had adopted a similar, if not identical, wait and see approach and had advised Mr. Koetsier of it. As noted above, and despite some wavering, CN ultimately followed its wait and see approach. As soon as the MO no longer required mandatory vaccination, CN recalled Mr. Koetsier back to work.

⁵³ [Conférence ferroviaire de teamsters Canada c VIA Rail Canada Inc., 2023 CanLII 18498](#). [Google translate](#) provides a roughly accurate English translation of this French award.

⁵⁴ AH823 at paragraph 12.

⁵⁵ AH823 at paragraphs 20-21.

⁵⁶ AH823 at paragraphs 22-23.

⁵⁷ AH823 at paragraphs 27-29.

67. In short, while VIA dismissed Mr. Tessier in AH823 for his decision not to get vaccinated, CN only put Mr. Koetsier on leave, as contemplated by the MO, and then returned him to work once the law changed.

68. AH823 does not assist the IBEW but instead supports CN's position that no discipline occurred in this case.

ISSUE 3: DID CN DISCRIMINATE PRIMA FACIE AGAINST MR. KOETSIER BY DENYING HIS RELIGIOUS EXEMPTION REQUEST?

Preliminary comments

69. The arbitrator has noted previously that the highly efficient railway model of arbitration sometimes struggles with fact intensive duty to accommodate⁵⁸ and harassment⁵⁹ cases. For example, since those types of non-disciplinary cases do not require an investigation under the CA, the Record contains no transcript of the grievor's evidence.

70. The parties have defined the JSI⁶⁰ and agreed that it "...shall contain the facts of the dispute and reference to the specific provision or provisions of the collective agreement where it is alleged that the collective agreement had been misinterpreted or violated". In this case, while the JSI provides context, it is not comparable to an agreed statement of facts like those found in some of the awards the parties submitted.

71. The lack of a transcript, or a JSI setting out the detailed facts, make a case like this one challenging for legal counsel. Railway arbitrations rarely have *viva voce* testimony. As some of the non-railway arbitral awards the parties submitted illustrate, requests for religious exemptions can involve substantial in-person hearing time: *Island Health (Rostas)*⁶¹ (6 days)⁶²; *Public Health Sudbury*⁶³ (4 days) and *Halifax Regional Municipality*⁶⁴ (3 days).

⁵⁸ See, for example, AH793: [Teamsters Canada Rail Conference v Canadian National Railway Company, 2022 CanLII 102424](#) at paragraphs 4, 42-43.

⁵⁹ See, for example, AH671 (Fr.): [Fraternité internationale des ouvriers en électricité \(conseil no. 11, réseau\) c Compagnie des chemins de fer nationaux du Canada, 2020 CanLII 19578](#) at paragraphs 7-20.

⁶⁰ [Rule 10, Memorandum of Agreement Establishing the CROA&DR](#)

⁶¹ [Island Health v United Food & Commercial Workers Local 1518, 2022 CanLII 127683](#)

⁶² See also [Island Health v United Food & Commercial Workers Local 1518, 2023 CanLII 2827 \(Zall grievance\)](#)

⁶³ [Public Health Sudbury & Districts v Ontario Nurses' Association, 2022 CanLII 48440](#)

⁶⁴ [Nova Scotia Union of Public & Private Employees, Local 13 v Halifax Regional Municipality, 2022 CanLII 129860](#)

72. Those cases included oral testimony, agreed statements of facts and/or will-say statements. The arbitrators in those cases had the benefit of cross-examination.

73. In one railway model arbitration, AH785⁶⁵, Arbitrator Hodges heard oral evidence about the grievor's religious circumstances which helped him judge the grievor's current religious practices and the sincerity of the belief:

84. The Grievor is 34 years old, has been married 12 years and has two children. The Grievor, gave testimony that consenting to receipt of the Coronavirus vaccine and enter his body would violate his lifelong commitment to good health and his fundamental freedom of conscience and religion. The Grievor gave detailed evidence of being a deeply committed Christ follower in his faith, a worship leader, a committed Church member and active as a Church Board member.

85. The Church's letter of support for his exemption confirmed the Grievor's testimony of being an elected Board Member and entrusted by the congregation to make scripturally based decisions. He gave evidence and supporting video of himself as a person who serves the Church faithfully on an ongoing basis. To be vaccinated is deeply disturbing to him even though his Church does not encourage members to reject COVID vaccination.

74. The *Code* is no stranger to religious exemptions. Section 70 contains a non-temporal⁶⁶ religious exemption for someone objecting to joining a trade union or paying union dues. While the *Code* does not oblige the CIRB to hold oral hearings, the Board inevitably holds one for this type of complex legal matter examining religious exemptions⁶⁷.

75. The parties have negotiated and prefer to follow an expedited arbitration process which requires initial intense effort on their part preparing the Record and Briefs. An arbitrator then holds a short hearing lasting often just a few hours. The parties expect the arbitrator to issue an arbitral award shortly thereafter. The arbitrator respects the parties' procedural preference which avoids, *inter alia*, the scheduling challenges and daily costs associated with regular labour arbitrations.

76. Nonetheless, railway awards must be read with this procedural context in mind especially when the key issues before the arbitrator depend on findings of fact.

⁶⁵ [TCRC-MWED v. Canadian Pacific Railway Company, October 18, 2022](#)

⁶⁶ Compare s.52 in the [Labour Relations Act, 1995, SO 1995, c 1, Sch A](#)

⁶⁷ See, for example, [Sonja Paulina Farrell v Canadian Union of Postal Workers, 2015 CIRB 794](#).

What is the proper scope of this matter?

77. The arbitrator has some initial conceptual concerns about the scope of the analysis when examining CN's refusal to grant Mr. Koetsier's religious exemption. In November 2021, CN had a limited amount of material before it when it rendered its two decisions denying an exemption. CN's decisions led to the IBEW's December 2021 grievance.

78. However, as the above Chronology shows, Mr. Koetsier seemingly gathered more material afterwards in support of his position but, as far as the arbitrator can discern from the Record, without providing any of it to CN. CN first learned of the new material a few weeks prior to the arbitration after making its request for particulars and documentation.

79. The arbitrator respectfully disagrees with the IBEW's argument that CN's request for particulars and document production demonstrated the inadequacy of CN's November 2021 decision making process. Given the expedited nature of a railway arbitration, the parties have a mutual interest in confirming the content of the Record to avoid surprises and potential prejudice during the short hearing⁶⁸.

80. The parties pre-hearing exchanges led to three distinct types of "evidence" in this case. First, one has the documents Mr. Koetsier submitted to CN in November 2021 (Original Evidence). Second, we have documents which existed in November 2021, but which Mr. Koetsier never submitted to CN during the time he was off on leave (Available Evidence). Third, there are documents which Mr. Koetsier only obtained after November 2021 and which were not provided to CN until the request for particulars and documents (New Evidence).

81. How should the arbitrator treat these 3 differing types of evidence?

82. Conceptually, the arbitrator has difficulty relying on evidence which CN's Committee never had before it when making its November 2021 decisions. Nothing prevented Mr. Koetsier from sending the Available Evidence to CN. On at least one occasion in 2022, albeit in a form letter, CN reminded Mr. Koetsier of the process to obtain a religious exemption⁶⁹. He could have made a new request to CN and added the Available Evidence.

⁶⁸ [Teamsters Canada Rail Conference v Canadian Pacific Railway Company, 2023 CanLII 875](#) at paragraphs 25-29.

⁶⁹ IBEW Exhibits; Tab 16

83. This is not a criticism of Mr. Koetsier. It is challenging to bring forward a request for a religious exemption. Transport Canada's Form may have suggested that an applicant did not need to provide much information. But challenges existed for everyone. CN, in the middle of a pandemic, had to create its Policy to conform to the MO and consider both medical and religious exemption requests.

84. By way of analogy only, the CIRB holds an oral hearing for self-represented litigants (SRL) who ask for the s.70 exemption from joining a trade union and paying union dues. While Mr. Koetsier was in a slightly better position than SRLs since he had the benefit of the IBEW's representation, the process remained challenging for everyone.

85. Nonetheless, as the arbitral awards described below note, these types of exemption requests require labour arbitrators to make a factual determination about, *inter alia*, the sincerity of the applicant's belief.

86. While CN's Committee was evidently not an administrative tribunal, the conceptual difficulty remains when the arbitrator must evaluate whether the Available Evidence and the New Evidence should be considered when examining CN's two exemption decisions. By analogy to administrative law, a reviewing court generally does not allow a party to add new facts and legal arguments when contesting the original decision maker's decision⁷⁰. Similarly, a tribunal reconsidering one of its own decisions, like the CIRB, does not accept the addition of new facts which could have been put before the original panel⁷¹.

87. CN commented on the evidence before its Committee at paragraph 118 of its Brief while still addressing the Available Evidence and New Available:

118. While CN maintains the position that it was justified in denying the Grievor's request for religious exception based on the information it had before it at the time, the Company submits that any additional information it has received since its denial similarly fails to reveal a nexus between the Grievor's beliefs and religion. Moreover, CN maintains that it would have reached the same decision had this additional information been before it at the time it evaluated the Grievor's request.

⁷⁰ [Bradford v. National Automobile, Aerospace, Transportation and General Workers' Union of Canada \(CAW-CANADA\), 2015 FCA 84](#)

⁷¹ See, for example, [Bomongo, 2015 CIRB 768](#) at paragraphs 4-10.

88. Other arbitrators have also commented on this evidentiary issue. In *Wilfrid Laurier University v United Food and Commercial Workers Union*⁷²(*Wilfred Laurier*), Arbitrator Wright commented on post grievance evidence:

84. **In characterizing the Grievors' religious reasons for declining to be vaccinated I have relied only on the information the Grievors provided to the University prior to their religious exemption applications being denied, and their respective testimony with respect to that information.** Apart from some biographical details, I have not relied on Lemon's email from July 27, 2022, or the testimony associated with it to support her application for an exemption, as it was filed too late. Similarly, I have not relied on the May 10, 2022, letter that Pinksen provided from the Principal of the Christian school her children attend.

(Emphasis added)

89. To avoid any issues arising from the arbitrator's comments on the relevance of the Available Evidence and the New Evidence to the December 2021 grievance, the arbitrator will examine both scenarios.

The Law

90. The seminal case in this area comes from the Supreme Court of Canada (SCC) in *Amselem*⁷³ which provides key guidance to decision makers, especially when assessing the sincerity of the religious beliefs an individual puts forward:

53 **Assessment of sincerity is a question of fact that can be based on several non-exhaustive criteria, including the credibility of a claimant's testimony (see Woehrling, supra, at p. 394), as well as an analysis of whether the alleged belief is consistent with his or her other current religious practices.** It is important to underscore, however, that it is inappropriate for courts rigorously to study and focus on the past practices of claimants in order to determine whether their current beliefs are sincerely held. Over the course of a lifetime, individuals change and so can their beliefs. Religious beliefs, by their very nature, are fluid and rarely static. A person's connection to or relationship with the divine or with the subject or object of his or her spiritual faith, or his or her perceptions of religious obligation emanating from such a relationship, may well change and evolve over time. **Because of the vacillating nature of religious belief, a court's inquiry into sincerity, if anything, should focus not on past practice or past belief but on a person's belief at the time of the alleged interference with his or her religious freedom.**

⁷² [2022 CanLII 120371](#)

⁷³ [Syndicat Northcrest v. Amselem, 2004 SCC 47](#)

(Emphasis added)

91. The SCC also described the burden of proof which falls on someone requesting a religious exemption:

56 Thus, at the first stage of a religious freedom analysis, an individual advancing an issue premised upon a freedom of religion claim must show the court that (1) he or she has a practice or belief, having a nexus with religion, which calls for a particular line of conduct, either by being objectively or subjectively obligatory or customary, or 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 (2) he or she is sincere in his or her belief. Only then will freedom of religion be triggered.

92. The aforementioned s.70(2) of the *Code* involving religious exemptions requires an application of those principles:

70(2) Where the Board is satisfied that an employee, because of their religious conviction or beliefs, objects to joining a trade union or to paying regular union dues to a trade union, the Board may order that the provision in a collective agreement requiring, as a condition of employment, membership in a trade union or requiring the payment of regular union dues to a trade union does not apply to that employee so long as an amount equal to the amount of the regular union dues is paid by the employee, either directly or by way of deduction from their wages, to a registered charity mutually agreed on by the employee and the trade union.

93. Given the negative financial impact on trade unions if the CIRB granted religious exemptions too readily, its fact-based analysis focuses on several issues. The Board will require an applicant to demonstrate, on a balance of probabilities, the sincerity of the religious belief. In addition, the Board may also examine whether the applicant rationalized the stated objections to trade unions after becoming aware of the provisions of the *Code* and the Board's jurisprudence⁷⁴.

94. Evidently, the CIRB's multi-step analysis, which involves a balancing of the freedom of association and the freedom of religion, does not apply to this case. In this case, the arbitrator must make a factual determination about the sincerity of Mr. Koetsier's

⁷⁴ [Bradford v. National Automobile, Aerospace, Transportation and General Workers' Union of Canada \(CAW-CANADA\), 2015 FCA 84.](#)

belief having regard to, as the SCC described it in *Amselem*, “an analysis of whether the alleged belief is consistent with his or her other current religious practices”.

95. Fortunately, the arbitrator has benefitted from other labour arbitrators examining mandatory covid vaccination policies and employee requests for religious exemptions.

96. In *Public Health Sudbury*⁷⁵, *supra*, Arbitrator Herman, after considering the parties’ agreed statement of facts and hearing oral testimony, concluded the grievor had a sincere belief which warranted protection:

57. At the same time, the grievor’s testimony must be assessed in context. **The grievor has been a devout Roman Catholic for many years, and her faith has formed a major part of her life and motivated and guided her beliefs and her conduct for many years in many aspects of her life. She has for a number of years been a devout and active member of the Latin Mass community, a more traditional and more orthodox subset of the Catholic Church. She has for a number of years conducted herself in a manner consistent with her understanding of Latin Mass doctrine and consistent with her beliefs as to how that doctrine should be applied to her life.** Her evidence about her religious beliefs and how she has generally conducted her life according to her faith is credible.

58. **Despite the inconsistencies discussed above, it is unlikely that the grievor has fabricated or simply “latched” on to a creed-based claim for an exemption in order to avoid getting vaccinated. It is unlikely that a long-standing devout member of the Latin Mass community has in effect fabricated the assertion that her faith requires this of her. To do so would require a substantial repudiation of the grievor’s long-standing system of beliefs and how she exercises her faith.**

59. **In balance, I consider it more likely that the grievor sincerely believes that to get one of the COVID-19 vaccines would be to act in a manner inconsistent with her beliefs and what her faith and creed require of her, and would in her mind amount to condonation of, cooperation with, or participation in abortion.**

60. **Since the grievor holds a sincere belief, with sufficient nexus to her creed, that to get vaccinated would interfere with the exercise of her faith and her relationship with the divine, the grievor is entitled to an exemption based on the provisions of the Code, on the grounds of creed.** It follows that the grievor was *prima facie* discriminated against when the Employer applied its vaccine policy to deny the grievor’s requested exemption.

⁷⁵ [2022 CanLII 48440](#)

(Emphasis added)

97. In *Wilfred Laurier, supra*, Arbitrator Wright analyzed a situation where employees raised both secular and religious reasons when opposing mandatory vaccination:

95. **Even though Lemon then grieved the denial and proceeded to arbitration, it was not until the early hours of the day of the hearing that Lemon provided Union counsel with the further information about her religious beliefs that had been requested by the Union almost two weeks earlier. While I have found that this document is too late to be considered in Lemon's religious exemption application, the timing of its completion does reflect negatively on Lemon's commitment to obtaining a religious exemption.**

96. **In addition, and by contrast, Lemon was quite engaged in challenging the Policy on secular grounds. Not only did she set out several secular arguments against COVID-19 vaccines and mandates in her email of October 28, 2021, but she signed and sent four University administrators standard form letters from Action4Canada which essentially put them on notice of their alleged liability for enforcing a vaccine mandate. Even at the hearing she testified that she would prefer to challenge the Policy on Constitutional grounds but getting a religious exemption would be "okay." While secular opposition to the Policy does not, as discussed, preclude the possibility of obtaining a religious exemption, it does suggest, in Lemon's case, that she was more committed to challenging the Policy on secular grounds than she was on protecting her religious freedom.**

...

107. **In the result, I find that both Lemon and Pinksen have a sincerely held subjective belief, with a nexus to their creed, that was a factor in their decisions not to get vaccinated.** They were consequently put off work on temporary unpaid leave of absence, which is an adverse effect within the meaning of the Code. That they both opted to take summer leave instead of returning to work when invited to do so in May of 2022, is irrelevant to this finding.

108. **On the facts and evidence before me, therefore, I find that the Grievors have each established a prima facie case of discrimination based on creed.**

(Emphasis added)

98. In *CUPE Local 79 v. City of Toronto*⁷⁶, Arbitrator McLean found *prima facie* discrimination and rejected the suggestion that the grievor had used religion as a pretext:

77. The result would likely be different if the Grievor was completely wrong about the origins of the vaccine, but the evidence submitted in the various cases which have considered the issue would suggest otherwise. The fact is that the vaccines likely have these origins which, however distant, offends the Grievor's religious conscience. **It would also be different if I were to find that the Grievor's religious explanations were just a pretext for opposition on other nonreligious grounds. I do not accept that is the case here.** I am satisfied that the Grievor's conscience comes from a religious place, one that believes that abortion is wrong and forbidden by her God and that she believes that the vaccines, which are derived from aborted fetuses even long ago, are contrary to her religious beliefs.

(Emphasis added)

99. In *Halifax Regional Municipality*⁷⁷, *supra*, Arbitrator Poirier concluded that the grievor did not have a sincere belief:

[193] **With this advice in mind, I reviewed the testimony of the grievor. Her first response to questions about her refusal to become vaccinated weighed very heavily on the fact that she does not believe the science is sufficiently advanced with respect to the development of the COVID 19 vaccine for her to feel that what she would be receiving is safe and effective. She refers to the vaccine as experimental, a poison, and she proceeded to recount an anecdote of a person she knew who was hospitalized due to COVID 19 despite being fully vaccinated.** She was convincingly unconvinced of the science supporting the vaccine mandates, despite the Union's support for vaccines as a workplace safety measure. **Being at peace with the decision to not take the vaccine because this was required by her religion was added on during prompting by Union counsel. Significantly, she never testified that her religious beliefs require that she refuse the vaccine.**

[194] She testified that her body is a temple and that she does not need to take the vaccine, because she has everlasting life. However, she also testified that she had taken the flu vaccine in the past, but that based on her experience that it was not effective at preventing the illness it targeted, she would not take it again. She did not indicate that it was a sin for her to do so at that time. **Her understanding of the effectiveness of the vaccine is also one of the justifications for her refusal to take the COVID 19 vaccine. This is not a religious belief, but clearly a secular belief.** When she took the flu vaccine,

⁷⁶ IBEW Exhibits; Tab 35: *CUPE Local 79 v. City of Toronto*, April 11, 2023 (unreported).

⁷⁷ [2022 CanLII 129860](#)

she believed it would be effective, so one would conclude that it was permitted by her religion at that time. She decided afterward that the flu vaccine was ineffective – a secular, science-based belief – and so she no longer takes the flu vaccine. Her perception of religious obligation is not argued to have changed between the time she decided to take the flu vaccine and the time of her refusal to take the COVID vaccine. What changed was the medical and scientific situation in which she found herself and the information available to her. This suggests a belief leading her to make decisions which is based on scientific, secular and social reasons. **In essence, her belief is that she is entitled to make any decision she's at peace with. In many ways, this is a belief held by secular people for a variety of non-religious reasons.**

[195] **When I consider that the real credibility test of the truth of the grievor's story is that it must be in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions, I conclude that she is not credible in her belief that her religion prevents her from adhering to the conditions of the Policy.**

(Emphasis added)

100. These awards demonstrate that arbitrators can arrive at opposite conclusions about *prima facie* discrimination depending on the facts before them.

Based on the Original Evidence, did CN violate Mr. Koetsier's rights by refusing a religious exemption?

101. As noted above, the arbitrator will first consider only the Original Evidence Mr. Koetsier provided which led to CN's two decisions and the IBEW's December 2021 grievance.

102. For the following reasons, the IBEW did not satisfy the arbitrator that Mr. Koetsier had a sincere religious belief when he requested a religious exemption.

103. First, the Chronology shows that on September 8, 2021 CN advised Mr. Koetsier of the possibility of a religious exemption, but he did not apply for one at that time. Instead, he sent CN the September 14, 2021 VNOL⁷⁸ which contested the existence of a public health emergency and alleged, *inter alia*, that CN was unlawfully practising medicine. The VNOL does not reference religion.

⁷⁸ CN Exhibits; Tab 16

104. When CN advised Mr. Koetsier on September 17, 2021 that he would not be allowed to work past November 1 if he failed to get vaccinated, he sent a slightly modified VNOL⁷⁹ that same day.

105. The arbitrator does not dispute the IBEW's position that one can have a sincerely held religious belief and also contest the covid-19 vaccination for secular reasons. As noted above, other awards have confirmed that principle. But Mr. Koetsier's initial positions, just as with someone who opposed a trade union's certification and then requested a s.70 exemption from union membership and union dues, remain relevant to the legal analysis.

106. Second, after CN had placed Mr. Koetsier on leave, he filed his Form⁸⁰ requesting a religious exemption and provided these three reasons in support:

My religious beliefs prevent me from experimenting on my body with untested and unsafe drugs, vaccines and medical procedures when the risks of said procedures outweigh the illnesses or diseases or medical conditions that they are supposed to prevent or hinder.

My religious beliefs also prevent me from being coerced into doing things against my will.

My religious beliefs require me to honour the sanctity of human life including pre-natal human life and therefore protect unborn children from medical experimentation in the production of some vaccines.

107. CN did not accept Mr. Koetsier's reasons⁸¹:

You have provided us with a statement that establishes that you are religious, however you have failed to establish that you have a faith-based practice or belief that precludes vaccination.

It appears to us that you have made a personal choice not be vaccinated and this is not a choice we are required to accommodate.

108. Mr. Koetsier then commented further about his request⁸²:

⁷⁹ CN Exhibits; Tab 19

⁸⁰ CN Exhibits; Tab 22

⁸¹ CN Exhibits; Tab 24

⁸² CN Exhibits; Tab 25

I'm not sure where the confusion lies regarding my religious exemption. Since these vaccines are within trial stages and no long term studies have been established to determine their safety long term. Getting any covid-19 vaccine would directly contradict my religious beliefs regarding experimentation of my body. There is also ever increasing evidence of many short term ailments and serious adverse reactions including death from getting these experimental injections that have also been scientifically proven that they do not prevent the spread of SARS-COV 2, nor do they prevent the person from getting the virus.

Would someone be able to explain in detail how you came to your conclusion regarding the denial of my religious exemption?

109. The arbitrator agrees with CN that Mr. Koetsier's position, consistent with the VNOL he sent on two occasions, continued to be secular and focused on scientific allegations.

110. Third, unlike in some of the awards like *Public Health Sudbury, supra*, where Arbitrator Herman had the benefit of extensive evidence about the grievor's current religious practices, Mr. Koetsier provided no comparable information⁸³. At best, the IBEW's Brief suggested he attended church "as frequently as practicable"⁸⁴. This lack of evidence makes it challenging for the arbitrator to apply the SCC's test in *Amselem* requiring "an analysis of whether the alleged belief is consistent with his or her other current religious practices".

111. The requirement of sincerity ensures that someone cannot merely say they are religious and then put forward grounds which other cases have accepted when granting a religious exemption. If it were otherwise, again by analogy to s.70 of the Code, opponents of a certified trade union could undermine its financial viability simply by saying they were religious and relying on grounds the CIRB had accepted in previous cases. The legal analysis requires the arbitrator to go beyond that.

112. On a balance of probabilities, the arbitrator concludes that Mr. Koetsier did not have a sincerely held religious belief in November 2021. The lack of any evidence about his "current religious practices" leads to this conclusion. On the facts, Mr. Koetsier's submission of the VNOL, without any reference to religion, as well as his comments to CN after the refusal to grant a religious exemption, indicate his concerns remained grounded in the alleged inefficacy and safety of the covid vaccine.

⁸³ See also Arbitrator Wright's review of the evidence about the grievors' religious practices and beliefs in *Wilfred Laurier, supra*, at paragraphs 16-46.

⁸⁴ IBEW Brief; Paragraph 29

Does the Available Evidence and New Evidence change this conclusion?

113. If the arbitrator is wrong about the proper analytical scope for the December 2021 grievance, does the Available Evidence and the New Evidence change the above conclusion about the sincerity of Mr. Koetsier's belief?

114. For the following reasons, the arbitrator concludes it does not.

115. The Chronology described the Available Evidence:

Baptismal record (March 24, 1991)⁸⁵

Private Christian school diploma (June 23, 2005)⁸⁶

Picture of Nelson bible given to Mr. Koetsier for graduating Sunday school at Vineland free reformed church⁸⁷

Picture of NIV Bible given at grade school graduation⁸⁸

116. The Available Evidence, which dated back 15 years or more, merely suggested that Mr. Koetsier, when still living at home in his youth, attended church and received a religious education. The SCC in *Amselem, supra*, cautioned that decision makers "should focus not on past practice or past belief but on a person's belief at the time of the alleged interference with his or her religious freedom". As noted above, the arbitrator's conclusion about the lack of a sincere religious belief arose in part due to the lack of any evidence of Mr. Koetsier's "current religious practices".

117. Mr. Koetsier obtained the New Evidence roughly 4 months after filing his grievance. It was first disclosed to CN on April 12, 2023 in response to its request for particulars.

FBC religious exemption letter (April 13, 2022)⁸⁹

Christian Declaration on Freedom from Vaccination Coercion (April 13, 2022)⁹⁰

118. Neither document assists the arbitrator in analyzing whether Mr. Koetsier had a sincerely held religious belief. While Mr. Koetsier obtained a letter from his pastor⁹¹, that

⁸⁵ IBEW Exhibits; Tab 2

⁸⁶ IBEW Exhibits; Tab 4

⁸⁷ IBEW Brief; Paragraph 25

⁸⁸ IBEW Exhibits; Tab 5

⁸⁹ IBEW Exhibits; Tab 17

⁹⁰ IBEW Brief; Paragraph 49; IBEW Exhibits; Tab 18

⁹¹ IBEW Exhibits, Tab 17

letter merely concluded Mr. Koetsier should receive an exemption. It did not assist the arbitrator when examining the sincerity of Mr. Koetsier's current religious beliefs.

119. Similarly, the Christian Declaration on Freedom from Vaccination Coercion⁹², while making references to possible reasons which might justify granting a religious exemption, provided no information about Mr. Koetsier's personal situation. It failed to assist the arbitrator with the required analysis about the sincerity of Mr. Koetsier's beliefs.

120. Even if the arbitrator were to consider the Available Evidence and the New Evidence, something which the arbitrator noted above appeared problematic, that evidence would not have changed the conclusion reached on this issue.

DISPOSITION

121. For the reasons expressed above, the arbitrator dismisses the IBEW's grievance.

122. Article 14 of the CA did not prevent CN from putting Mr. Koetsier on a leave of absence when he failed to comply with the Policy. Since this case did not involve discipline, but rather the application of the MO and the Policy, CN had no obligation under article 13 of the CA to conduct an investigation.

123. The IBEW did not satisfy the arbitrator, given the Record in this matter, that Mr. Koetsier had a sincerely held belief when he requested a religious exemption. That conclusion applies even if the arbitrator considers the Available Evidence and the New Evidence. As a result, no *prima facie* discrimination existed in this case.

124. The grievance is dismissed.

SIGNED at Ottawa this 15th day of May 2023.



Graham J. Clarke
Arbitrator

⁹² IBEW Exhibits; Tab 18