CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4867

Heard in Edmonton, September 14, 2023

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The dispute involves the placement of Conductor Nelson Rousseau on an administrative leave without pay, pursuant to Ministerial Order 21-07 and the Company's Vaccination Mandate Policy which the Union claims amounts to a constructive dismissal among other things.

JOINT STATEMENT OF ISSUE:

Mr. Nelson Rousseau was placed on an administrative leave without pay on April 5, 2022 pursuant to Ministerial Order 21-07 and the Company's Vaccination Mandate Policy. Mr. Rousseau is not provided any accommodations.

Union Position

For all the reasons and submissions set forth in the Union's grievances which are herein adopted, the Union submits Mr. Rousseau has been subject to unwarranted disciplinary action in violation of Article 39 (Investigation and Discipline) of Collective Agreement and in particular clauses 39.01, 39.03, 39.04, 39.05, 39.06 and discrimination/harassment in violation of CPKC Policy 1300 (Discrimination and Harassment), Policy 1500 (Employment Equity), *Canadian Human Rights Act,* Employment Equity Act, the Company's Vaccination Mandate Policy, the *Canada Labour Code*, and all relevant privacy legislation, including PIPEDA.

Mr. Rousseau's vaccination status became known to all other employees thus his personal and private medical information is no longer protected as provided by law.

Mr. Rousseau was discriminated against. Other employees in other terminals were allowed to continue working when they are not adhering to the government mandate or CPKC Policy. Some were allowed to continue working past April, while Mr. Rousseau was sent home.

Further discrimination exist account certain employees (like Mr. Rousseau) were discriminated against as Company Policy did not provide exemptions for employees with natural immunity, or those with conscientious objections.

The Union further submits that Mr. Rousseau should have at the very least been accommodated, the Company refused any such aspect, nor did they attempt to even look into, a violation of Article 36, and 37 where Mr. Rousseau was no longer afforded any benefits.

The Company continues to blame the government mandate as justification for why it had to implement its Vaccination Mandate Policy but refused to explain why other employees (such as Mr. Rousseau) were allowed to continue working after January 24, 2022 and why others

continued to keep working. The Company is more than aware what has/is going on with some allowed to work, some sent home in January, some in April, others still continue to work. It is abundantly clear the Company did not follow the government mandate and picked and chose who it would allow to continue working and who would be constructively dismissed/sent home without pay-benefits.

Mr. Rousseau was constructively dismissed and discriminated against by virtue of being placed on an unpaid leave. These in part provide for any damages to be paid. The Union seeks a declaration that Mr. Rousseau was improperly placed on an unpaid leave, and that he be made whole for all loss of earnings with interest, recalculation of EDO/AV entitlement, without loss of benefits, pension accrual and seniority.

The Union further requests an order of substantial damages for the violations of Mr. Rousseau's rights where they have been clearly violated in all circumstances. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

Company Position

The Company disagrees and submits the Union is not entitled to any of the relief sought as outlined above.

1. Transport Canada issued Ministerial Order 21-07 on October 29, 2021. The Ministerial Order required vaccination against COVID-19 for federally regulated employees in the transportation sector unless an employee was exempt for religious or medical reasons. The Ministerial Order further required that employees who fail to comply must be placed on an unpaid leave of absence unless an exemption is obtained.
2. Under the terms of the Ministerial Order and CPKC's Vaccination Mandate Policy, the Grievor had to submit proof that he was fully vaccinated by no later than January 24, 2022. The Grievor did not satisfy this requirement and, as a result, continued to work until he was placed on an unpaid administrative leave effective April 5, 2022 due to operational requirements.
3. The Grievor was not disciplined or constructively dismissed as alleged by the Union.
4. The Company denies that it applied its Vaccination Mandate Policy in a discriminatory, inequitable or unreasonable manner as alleged by the Union.
5. Given the circumstances, the Company was not in violation of the *Canadian Human Rights Act*, *PIPEDA*, *Employment Equity Act*, Articles 39.01, 39.03, 39.04, 39.05, 39.06 or any other provisions of the Collective Agreement and any other identified or applicable Company policies and procedures.
6. The Ministerial Order was repealed on June 20, 2022 and Mr. Rousseau returned to work on or about July 8, 2022.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) W. Apsey	**(SGD.) F. Billings**
General Chairperson	Assistant Director Labour Relations

There appeared on behalf of the Company:

T. Gain	– Counsel, CPKCR, Calgary
A. Cake	– Manager Labour Relations, Calgary
A. Harrison	– Manager Labour Relations, Calgary
S. Scott	– Manager, Labour Relations, Calgary

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
W. Apsey	– General Chairperson, CTY-E, Smiths' Falls
N. Rousseau	– Grievor, *via Zoom*

AWARD OF THE ARBITRATOR

Background

[1] The Grievor is a Conductor, employed by the Company since 2018. He is based in Chapleau, Ontario.

[2] On March 11, 2020, the World Health Organization declared a Public Health Emergency due to the outbreak of COVID-19. Governments at various levels responded to the worsening of the pandemic in this country, throughout 2020 and 2021.

[3] This Grievance arises from the Government of Canada's response, as it applied to the railway industry. More specifically, it concerns the Government's requirement that railway employees be vaccinated against COVID-19 to continue working.

[4] The Grievor did not provide proof of his vaccination status and was placed on unpaid administrative leave between April of 2022 and early July of 2022 (the "Leave"). This Grievance raises several issues relating to that Leave.

Issues and Summary:

[5] The issues in this Grievance are:

a. Was the Company required to accommodate the Grievor?
b. Was the Grievor's privacy breached by being placed on Leave?
c. Was the Leave disciplinary?
d. Did the Company discriminate against the Grievor?

[6] For the reasons which follow:

a. The Company did not have an obligation to accommodate the Grievor.
b. The Grievor's privacy was not breached.
c. The Leave was not disciplinary.
d. The Company did not discriminate against the Grievor.

[7] The Grievance is dismissed.

Facts

[8] The facts are not in dispute.

[9] On October 29, 2021 Michael DeJong, Director General, Rail Safety of Transport Canada issued Ministerial Order 21-07 (the "Order").

[10] The Order was a comprehensive, 10 page document, which mandated that certain steps be taken by railway companies, to respond to the global pandemic caused by the spread of COVID-19. It was issued pursuant to section 32.01 of the *Railway Safety Act,*[1] under authorization of the Minister of Transport of the Government of Canada (the "Minister").

[11] The Order had application to the railway industry broadly, including to the Company. The Order was amended twice before early December 2021. It required that employees were to have received their first dose of a COVID-19 vaccine by no later than November 15, 2021 and be fully vaccinated no later than January 24, 2022 unless they fell within limited exemptions (on medical or religious grounds). If not vaccinated by November 15, 2021, they were to be tested on a regular basis until fully vaccinated.

[12] The Order also required that the "… sanction applicable to employees who are not fully vaccinated and do not fall within an exception…" was to be placed on an "unpaid administrative leave".

[13] That requirement is at the heart of this dispute.

[14] The railway companies listed in the Order – including the Company – were to either follow the dictates of the Order or develop and implement their own company-wide vaccination policy by October 30, 2021. That policy was required to include the terms of the Order. Policies of companies were to be amended as the Order was amended. There were also reporting requirements by the Company to Transport Canada included in the Order.

[1] R.S. 1985, c. 32 (4th Supp.)

[15] The Company created its Vaccine Mandate Policy[2] (the "Policy"), dated October 30, 2021. Amendments were made to the Order, with corresponding changes made by the Company to the Policy (December 1 and 3, 2021). That Policy stated the dictates of the Order, as was required.

[16] On November 8, 2021, the Grievor emailed the Company that he would not be disclosing his vaccination status. The Grievor's reasons were not based in medical or religious grounds (which were the only exemptions set out in the Order). His position was he was "under no legal obligation to disclose…private protected information" and that any such demand "constitutes an unlawful request for information". The Grievor applied for an exemption on that basis, but was notified on November 9, 2021 that he did not meet the criteria.

[17] In a letter dated November 16, 2021, the Company contacted the Grievor, as he had not received at least one dose of COVID-19 vaccination and had not attested to his vaccination status. The letter directed that the Grievor was to bring himself into compliance by November 23, 2021 or the Grievor "may" be subject to "sanctions up to and including unpaid administrative leave, discipline, and termination of employment".

[18] In the next paragraph of that letter, it was noted that if the Grievor was not "fully vaccinated" by January 24, 2022, the Grievor "will be placed on unpaid administrative leave and may be subject to further discipline up to and including termination of employment". The Grievor was therefore made aware of what would occur if he did not declare his status, and that there would be financial consequences related to that choice.

[19] The Grievor did not provide any attestation of his vaccination status to the Company by January 24, 2022.

[20] The Company texted the Grievor on February 2, 2022 that his COVID-19 vaccination required was not updated.

[2] Dated October 30, 2021

[21] The Grievor again provided written reasons to the Company by email late on February 3, 2022. He repeated the same reasons noted in his earlier correspondence, in almost identical language.

[22] On February 4, 2022 and March 23, 2022, the Company made further inquires of the Grievor as to whether he intended to update his vaccination status or whether he was able to produce a negative test result if not double vaccinated (the latter only in the message from March 2023).

[23] The Grievor did not attest a vaccination status.

[24] On April 5, 2022, the Grievor was called into work and told he would be put on Leave due to his failure to declare his status. He received a letter dated the same day which indicated he was being "placed on an unpaid administrative leave effective immediately", as he had not complied with the requirements of the Order.

[25] The Grievor returned to work in early July 2022, shortly after the Ministerial Order was repealed.

[26] The Company acknowledged it had difficulty complying with the requirements of the Ministerial Order due to various events, including shortage of trained personnel; the B.C. floods in 2022; because certain employees were "essential" to the safe operation of the railway; because of the continued operations of critical supply chains"; and due to employee shortages. The Union argued the Company provided no factual evidence of those stated difficulties.

[27] The Company developed certain factors to determine who was necessary to keep working and who was put on Leave. The Company also maintained that Transport Canada was aware of its need to keep certain non-compliant employees working beyond the dates in the Order, and that it advised Transport Canada it would place employees on Leave as soon as reasonably possible. It noted that Transport Canada required detailed information in response to that information and that Transport Canada "did not engage in any enforcement action against CPKC". The Union also noted the Company did not provide any evidence of that correspondence.

Arguments

[28] The Union argued that the Grievor had been constructively dismissed. It urged the Grievor was kept working by the Company to help the Company get through the busy winter months and was then placed on Leave. It argued it was disciplinary for the Grievor to be placed on Leave and the Company considered it to be discipline; that the Company failed to conduct an Investigation as required before imposing discipline, which rendered that discipline *void ab initio*; that the Grievor's choice should have been accommodated to the point of undue hardship, and he should have been allowed to continue working as he had done between January 24, 2022 and April 5, 2022; that it was a breach of privacy legislation for the Company to seek the Grievor's vaccination status; and that he was discriminated against and treated arbitrarily when other employees who were also unvaccinated were allowed to continue working and he was not, (even though his vaccination status did not change between January 24, 2022 and April 5, 2022).

[29] The Union relied on **AH785**; *Re Riverdale Hospital and CUPE Local 79 (Reyes); Brock University and Brock University Faculty Association (Schimmelpenninck Grievance)* 2018 CanLII 125959; **CROA 4663**; *Lumber & Sawmill Workers' Union, Local 2537 and KVP Co. Ltd.; B.C. Rail and CUTE, Local 6 (Hope, unreported); CEP, Local 30 and Irving Pulp & Paper Limited* [2013] 2 S.C.R. 458; *B.C.G.S.E.U. v. British Columbia (Meiorin Grievance)* [1999] 3 S.C.R. 3; *Lagana v. Saputo Dairy Products Canada* 2012 HRTO 1445; *Winners Merchants International LP v. Workers United Canada Council, Local 152* 2015 CanLII 59191; **AH834**.

[30] The Company argued its Policy was reasonable and was mandated by Transport Canada; that it did not discipline the Grievor by placing him on Leave and so no Investigation was required; that it acted reasonably in its efforts to comply with the Ministerial Order and considered several factors in reasonably determining which specific employees would continue working; that the Company had been transparent with Transport Canada and reasonably assumed when Transport Canada did not enforce its Order that it was satisfied with the Company's rationale and information; that it did not treat the Grievor arbitrarily, unreasonably

or unfairly; that it placed individuals on leave in compliance with the Order when it was able to do so (as it trained more personnel and operational requirements allowed); and that the Grievor had chosen not to be vaccinated or disclose his vaccination status and did not meet an exemption criteria. It argued the jurisprudence supported that vaccination polices with unpaid leave for failure to comply were reasonable and that jurisprudence also supported the finding that such a Leave did not amount to constructive dismissal.

[31] The Company relied on *Air Canada v. IAMA (*May 2023; unreported; Ready); *B.C. Re Ferry Services and BCFMWU* 2023 CarswellBC 1883; *Parmar v. Tribe Management Inc.* 2022 BCSC 1675 (CanLII).

Analysis and Decision

The General Context

[32] When considering the jurisprudence in this area, it is clear that during the pandemic, some employers responded to the pandemic with policies which required vaccination, created by that employer out of the exercise of its management rights under the collective agreement, rather than because they were *mandated* to do so. The reasonableness of those policies has been subject to arbitral consideration under the analysis as developed in *KVP.*

[33] However, other employers were subject to Ministerial Orders from provincial or federal levels of government, which *required* the creation of a policy to mandate vaccination to continue to work, and which dictated to the employer the terms that policy must contain.

[34] Those policies did not arise from a unilateral exercise of management rights in the same way that the policy at issue in *Re Lumber & Sawmill Workers and KVP* did, with terms determined – and unilaterally promulgated by – an employer by exercise of its management rights. Rather, those policies were developed to comply with the requirement of the Ministerial Order, which had been taken by a level of government to respond to an unprecedented global pandemic.

[35] That was the case for this Company, in this industry.

Did the Company Fail to Accommodate the Grievor?

[36] To trigger the duty to accommodate, the Union must first establish the Grievor has a protected ground (such as disability, race, religion), in addition to experiencing an adverse impact due to that protected ground. It is only after that burden is met that the burden then shifts to the Company to establish it accommodated the Grievor to the point of undue hardship.

[37] In this case, the Union has not met its initial burden. There is no protected ground – in human rights legislation, in jurisprudence or in the Collective Agreement – which shields an individual from release of medical information when it feels the request was "illegal".

[38] While protecting medical information instead of attesting to his vaccination status was the Grievor's choice, it did not trigger any requirement of the Company to accommodate that decision.

Was the Grievor's Privacy Breached?

[39] The Ministerial Order accounted for issues of privacy in Section I, requiring railway companies to respect the provisions of the *Privacy Act* and the *Personal Information Protection and Electronic Documents Act (PIPEDA)* in the information it collected, including ensuring that data related to personal information was only accessed on a "need to know basis": Section H.

[40] Policies which place employees on an unpaid administrative leave if not vaccinated have been determined in the jurisprudence to be reasonable in the context of the unprecedented worldwide global pandemic of COVID-19[3]. As noted in *Air Canada v. IAMAW,* such policies have been determined to be *"an appropriate balancing between the interests of affected employees and the employer."*[4]

[3] See for example *B.C. Hydro and Power Authority v. IBEW, Local 258* 2022 CanLII 25764; and *Maple Leaf Foods Inc., Brantford Facility v. UFCW, Local 175* 2022 CanLII 28285; see also *Air Canada v. IAMAW* (unreported) at pp 24 and 25 which described this finding as a "fairly consistent arbitral consensus" and which discussed the "precautionary principle".
[4] *Ibid,* at p. 25.

[41] I therefore cannot agree with the Union that the Grievor's privacy rights were breached by the request made to attest to that vaccination status.

Was the Leave Disciplinary?

[42] The Union has argued:

a. The Leave amounted to a constructive dismissal; and
b. Placing the Grievor on Leave was disciplinary and triggered an Investigation under Article 39 which did not occur. That discipline is therefor void *ab initio.*

[43] The burden for establishing that the Leave was a disciplinary response rests on the Union.

a) Was the Grievor Constructively Dismissed?

[44] Dealing first with the argument of constructive dismissal, the requirement to place the Grievor on leave appears in Ministerial Order 21-07. Its Policy was required to – and did – mirror that requirement.

[45] Even where vaccination was not *mandated* by government, jurisprudence has determined that placing an employee on Leave when that employee has made a personal choice not to be vaccinated against a Company Policy was a reasonable response during the COVID-19 pandemic.[5]

[46] In *Parmar v. Tribe Management, Inc.,* an employee argued constructive dismissal due to the impact of the Employer's vaccination policy (in a situation where they were not entitled to an exemption). The Court dismissed the applicant's claim. The Court considered the approach was a "reasonable" and "lawful" response (at para. 134), "given the uncertainties then presented by the pandemic" (at para. 99). The Court found it was the employee's choice both to resign, and to remain unvaccinated, and that she was not constructively dismissed by the employer.

[47] Viewed in combination with the jurisprudence which has determined such policies are reasonable, I am persuaded by the reasoning in *Parmar* and am satisfied the

[5] See for example *B.C. Hydro and Power Authority v. IBEW, Local 258* 2022 CanLII 25764; and *Maple Leaf Foods Inc., Brantford Facility v. UFCW, Local 175* 2022 CanLII 28285, both arbitration decisions

requirement to place an employee on Leave did not amount to constructive dismissal.

b) <u>Was The Leave Disciplinary?</u>

[48] In labour relations, there is a difference between conduct which is "culpable" and conduct which is "non-culpable". Culpable conduct is intentional, with a level of "fault"; terms such as "responsibility" and "accountability" for behaviour are often used to describe such conduct. The same degree of "fault" and "responsibility" for an alleged offence are not present in non-culpable conduct. An example of non-culpable conduct is an illness or injury results in frequent absences.

[49] For the reasons which follow, I am satisfied that the Leave in this case resulted from a "non-culpable" choice made by the Grievor not to vaccinate and was not disciplinary (culpable) but was administrative (non-culpable). As such, it did not trigger a right to an Investigation before being implemented.

[50] Looking at an Investigation from a broad viewpoint, CROA jurisprudence – including **AH785** on which the Union relied – has recognized that an Investigation is to ensure than an employee knows the "accusations" against him/her/they and are given the opportunity to meet that case. Discipline can be imposed if that responsibility is determined.

[51] The starting point for determining the requirements for an Investigation in this case is Article 39 of the Consolidated Collective Agreement.

[52] Upon review of the entirety of Article 39, I am satisfied that an Investigation is only triggered where there is an allegation an employee has engaged in "culpable" conduct, rather than non-culpable conduct.

[53] A review of the Article in its entirety supports this conclusion: An Investigation may determine an employee's *responsibility* for an alleged "offence": Article 39.06; an employee can also "admit responsibility for an incident" and waive the right to a formal investigation: Article 39.12, which presupposes a level of fault for particular incident. By Article 39.13, an individual "who has been found

responsible for an incident in circumstances that are not by themselves dismissible….." can have discipline deferred. This again presupposes responsibility for an "incident" to support discipline.

[54] The Union focused on Article 39.05. That Article states, in part:

> Employees will not be disciplined or dismissed until after a fair and impartial investigation has been held ***and until the employee's responsibility*** is established by assessing the evidence produced. No employee will be required to assume this responsibility in their statement or statements… Failure to notify the employee within the prescribed, mandatory time limits or to secure agreement for an extension of the time limits ***will result in no discipline being assessed*** (emphasis added)

[55] I am satisfied that Article also makes reference to an employee's "responsibility" for culpable behaviour.

[56] The next question is whether choosing not to be vaccinated and/or not to attest vaccination status is culpable conduct which can result in discipline, or non-culpable conduct which does not.

[57] I am comfortable taking judicial notice of the fact that requirements of mandatory vaccination created divisions across this country. Those divisions were reflected broadly in society and were not only reflected in the workplace. Protesters gathered and debates raged.

[58] The railway industry was not exempt from that impact.

[59] I am satisfied that within this context of concerns with personal choice and bodily integrity pitted against issues of safety, security, economic stability and movement of goods, the Government of Canada chose to step into the fray and balance these competing interests, for this industry.

[60] I am further satisfied its choice of wording as used in the Order was deliberate. That choice was that the leave was to be considered as an "administrative leave". I am also satisfied this type of leave is distinct from a "disciplinary suspension".

[61] This choice of wording is consistent with the recognition the Grievor did not do anything "wrong" in this case. There was no "fault" associated with taking the

position which he did. Employees were entitled to take whatever stance they considered appropriate during the pandemic, which stance was not always based on either religious or medical grounds, which were the two recognized exemptions.

[62] The Grievor took a stance based on an unprotected ground related to his personal belief about the legality of the request. He was not terminated by the Company – which would be a disciplinary response – but rather was allowed to return when his stance no longer conflicted with his employment.

[63] Naming such a leave as "administrative" is also consistent with the recognition that not all leaves are disciplinary. If a Grievor is placed on an administrative leave when no reasonable accommodation can be found, that is not a culpable, disciplinary issue, even if is ultimately determined the Company has not established undue hardship. There is no "fault" in the Grievor for actions taken.

[64] The letter from November of 2021 referred to the possibility of administrative leaves *as well as* the possibility of "further discipline". I do not agree that reference to "further discipline" changed the character of an "administrative" leave into a "disciplinary" one, as argued by the Union. An administrative leave was one of several choices listed. That an administrative leave was chosen as the response was consistent with the letter dated April 5, 2022, which advised the Grievor he was being placed on leave, without any reference to that being a "disciplinary" measure.

[65] The Union has argued this was *effectively* a disciplinary response, since going on Leave was not the Grievor's choice but the Company's, and it resulted in financial impact for the Grievor in loss of wages.

[66] I find I cannot agree with this logic. I am not satisfied the Grievor had no "choice" in this Leave occurring or that the financial impact of his unprotected choice meant that the "administrative" leave was thereby converted to a "disciplinary" one. The Grievor always had an avenue to keep working during the pandemic but chose not to be vaccinated and to not make any attestation. There was no "fault" in that choice; it arose from his own personal belief system; it was not right or wrong. It

was "non-culpable". However, that stance *did* had financial consequences, of which the Grievor was made aware before he made that choice. I agree with the Company that the Grievor bears the responsibility for the financial consequences of his own personal beliefs when those beliefs prevent him from attending at work. As was noted in *Air Canada and I.A.M.:*

> *While workplace mandatory vaccination policies may give rise to a difficult choice for some employees,* ***they still allow the employee a choice****. Employees under the impugned Policy were free to choose not to be vaccinated and accept the consequences of that choice in the context of a global pandemic*[6]*(emphasis added).*

[67] That arbitrator went on to state:

> *The interests of unvaccinated employees in their privacy and bodily autonomy are significant and should not be discounted. Employees who chose not to be vaccinated were unable to work and lost their livelihood…Fortunately, these consequences were only temporary, with the Employer allowing them to return to work once pandemic conditions changed. None of these employees were dismissed or lost their employment permanently. I find that in the temporary and unique context of a global pandemic the Employer's policy struck an appropriate balance between its significant interests in protecting its employees, customers, the public and its operation, and the privacy and bodily autonomy interests of unvaccinated employees.*[7]

[68] In this case it was the Government of Canada – and not the Company – that was undertaking that balancing of interests and dictating the result.

[69] Consequently, the Union has not met its burden to establish the Grievor was constructively dismissed or that he was disciplined when he was placed on Leave, triggering an Investigation under the terms of the Consolidated Collective Agreement.

[70] As a non-culpable and administrative response - rather than a disciplinary response - the placement of the Grievor on leave did not trigger a right to an Investigation under Article 39.

[6] At p. 26
[7] At p. 27

Did the Company Discriminate Against the Grievor?

[71] The final issue raised by the Union is alleged discrimination and arbitrary treatment under the Policy, when the Grievor was not allowed to continue working in breach of the Ministerial Order after April 2022, but other unvaccinated employees were allowed to continue working. In essence, the Union seeks a resolution that would require a determination the Company should have continued in non-compliance with the Order for this Grievor, since it did so for others.

[72] The Union bears the burden to establish this ground.

[73] The Union relied on **AH785** as strongly persuasive. As this is a recent case between the same parties (although with employees working in different divisions), a close look at the *ratio* of that case is necessary.

[74] Unlike in the case before me, in **AH785**, the grievor was placed on an unpaid administrative leave by the Company effective January 25, 2022. That was the day after full vaccination was required. As of that date, he had not attested to his status. In that case – unlike in this case – the grievor had previously made a claim for a *religious* exemption, which was one of the two possible grounds for exemption from vaccination, in the Ministerial Order. The exemption request was denied by Company as not meeting the criteria.

[75] The issue in that case was the reasonableness of the Company's denial of the Grievor's exemption and its decision to place him on leave, when it provided what the arbitrator described as "unilateral exemptions" to multiple other employees who keep working.

[76] In **AH785** the grievor was an employee in the Maintenance of Way Division. At issue in that case was section 15 of the collective agreement. That is a different collective agreement than is at issue in this case. In that case – unlike in this case – that collective agreement referred to *initial* "investigations", which was important phrasing to the reasoning of the arbitrator.

[77] The Arbitrator determined the Company discriminated against the Grievor. The Arbitrator found the Collective Agreement required at least "initial investigative contact" with the Grievor before denial of his exemption, which did not occur. He noted the Company had not in fact allowed any religious exemptions.

[78] In the case before me, the Grievor was one of the employees who *kept* working, even after he could have been put on administrative leave by the Company. He was not an individual who claimed an exemption on an allowed ground, whose exemption was denied. At issue in *this* case therefore is whether the Grievor was entitled to *continue* in that employment – and benefit from the Company's non-compliance with the Ministerial Order – until the end of the pandemic, rather than being required to go on Leave by the Company part way through the pandemic, as part of its attempts to achieve compliance.

[79] That is a different issue than what was addressed in **AH785**.

[80] I do not agree **AH785** supports the position of the Union. I read that case as being narrow in scope and limited to a particular factual context.

[81] Turning to the factual context of *this* case, there is no requirement in Article 39 for "initial investigations" which the Company failed to take. On its own, that is sufficient to dispose of the Union's argument on this ground.

[82] However, I will also note that in this case, there *was* discussion between the Grievor and the Company regarding his specific situation, prior to his leave. The Grievor communicated his position regarding his belief – in writing – that it was illegal for the Company to request the information it was required to seek – and his intention was *not* to comply with the Policy, in response to the Company's repeated queries regarding his status. His wording in each response is almost identical. He repeated that position twice. In this case, the Company was in no doubt as to the Grievor's intentions; it was not acting in a vacuum or with a lack of information.

[83] It is clear on these facts the Grievor had no intention to meet those requirements, even though further inquiries were made by the Company as to whether he had changed his mind, (February 4, 2023 and March 23, 2023).

[84] As between the Company and the Union, I have considerable difficulty with the argument of the Union that – because the Company chose not to *continue to "breach*" the Policy *vis-à-vis* this Grievor, that action classified as an inconsistent application of the Policy under *KVP*[8] standards and resulted in discrimination. Taking the Union's argument to its logical conclusion, it would be like suggesting that it is acceptable for the Company to breach a policy, so long as it acted consistently and breached it for everyone.

[85] I have considerable difficulty with that premise. *KVP* protects employees who suffer inconsistent treatment from the *application* of a policy; it does not provide employees a right to insist that the Company must act consistently in a *breach* of a Policy – or continue breaching a policy – under the guise of "fairness" or "consistency". While I can appreciate the Union's desire to address the Company's non-compliance with the Order and its uneven impact on its members, such a result turns the *KVP* standard on its head.

[86] Therefore, I find I cannot agree that the Company's conduct in allegedly breaching the Ministerial Order provided to the Union a basis on which to insist that the Company must *continue* with its non-compliance to act "consistently" under *KVP*; and could not take steps towards compliance with the Ministerial Order.

[87] I also cannot agree that result would follow fundamental arbitral principles. It is difficult to conceive of a basis on which an *arbitrator* could make a finding which would require the Company to continue in <u>non-compliance</u> of a Ministerial Order, so the Grievor could continue working. An arbitrator would not have such jurisdiction. In my view, any finding which would reach that conclusion would be unreasonable and would not be consistent with the requirements of *KVP.*

[8] *Re Lumber & Sawmill Workers' Union, Local 2537 and KVP Co. Ltd. [1965] O.L.A.A. No. 2.*

[88] The Company did not discriminate against the Grievor when it complied with the Ministerial Order and placed him on an unpaid administrative leave.

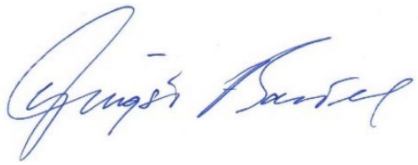
Other Arguments Arising From Non-Compliance

[89] The Union argued the Company failed to bring evidence of its communications with Transport Canada to support its claims.

[90] In my view, what Transport Canada knew – or did not know about the Company's compliance or non-compliance – and what Transport Canada chose to do – or not to do – about that non-compliance with its Order is not relevant and is a red herring to the issues in this case. The Ministerial Order – while it was acting – was binding on the railway companies. It was for Transport Canada to decide to enforce that Order – or not – and to decide whether to require strict compliance in the circumstances facing that industry, at that time. Whatever communication occurred around that issue is a matter between the Company and Transport Canada and does not involve the Union. The Company's compliance – or non-compliance with the Ministerial Order *vis-à-vis* Transport Canada is an issue which is beyond the scope of this arbitrator's jurisdiction.

Conclusion

[91] The Grievance is dismissed.



January 10, 2024

CHERYL YINGST BARTEL
ARBITRATOR