CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3501

Heard in Edmonton, Wednesday, 13 July 2005

concerning

CANADIAN PACIFIC RAILWAY

and

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Mr. Brian Martin's claim for pay pursuant to article 25.08 of the parties' collective agreement.

JOINT STATEMENT OF ISSUE:

Article 25.08 of the collective agreement between the Union and the Employer provides as follows:

> Article 25.08 – Payment for Periodic Medical and Rules Examination
> (i) Periodic Medical Examinations
> An employee required to take a Periodic Medical Examination during their off-duty hours shall be allowed of three hours' pay at the basic rate of their regular position.

The Employer initially provided Mr. Martin with three hours' pay as contemplated by article 25.08. On June 12, 2004 the Employer rescinded the pay provided to Mr. Martin. The Employer found that the medical examination Mr. Martin attended on May 12, 2004 did not constitute a periodic medical examination as contemplated by the collective agreement.

Mr. Martin works in a safety critical position and has a medical condition that requires monitoring on an ongoing basis. The Employer takes the position that the medical examination Mr. Martin attended on May 12, 2004 was required by RAC Railway Medical Guidelines and was therefore not "periodic". The Employer takes the position that article 25.08 does not contemplate payment for medical examinations so required.

The Union contends that employees who are required to attend medical examinations so as to monitor ongoing health problems ought to be compensated for their time in accordance with article 25.08 of the collective agreement. The scope of article 25.08 is broad enough to encompass Mr. Martin's May 12, 2004 examination and the Company's unilateral decision to impose a narrow interpretation of the ambit of this article is unwarranted and disingenuous. The Union contends that Mr. Martin's attendance at a medical examination on May 12, 2004 constitutes a "periodic" medical examination, the terms of which are governed by article 25.08 of

the collective agreement. The Union contends that the Employer's failure to provide the compensation referred to in article 25.08 is in violation of the collective agreement and constitutes a violation of the *Canadian Human Rights Act*.

The Employer denies the Union's contentions and Mr. Martin's claim.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) D. FINNSON	**(SGD.) J. R. MACPHERSON**
GENERAL CHAIRMAN	**FOR: GENERAL MANAGER – FIELD OPERATIONS**

There appeared on behalf of the Company:

J. R. McPherson	– Labour Relations Officer, Calgary
D. T. Cooke	– Manager, Labour Relations, Calgary
Dr. J. Cutbill	– Chief Medical Officer, Calgary
Dr. S. Ross	– Clinical Professor of Medicine, University of Calgary
R. V. Hampel	– Manager, Labour Relations, Calgary

And on behalf of the Union:

D. Ellickson	– Counsel, Toronto
D. Finnson	– General Chairman, Calgary
D. Able	– General Chairman, Calgary
S. Kuiaz	– Local Chairman, Edmonton

AWARD OF THE ARBITRATOR

At the outset of the hearing the Company filed a preliminary objection to the intention of the Union to plead certain aspects of the **Canada Labour Code** and the **Canadian Labour Standards Regulations**. Notice of the Union's intention was provided to the Company only on July 5, 2005, after the filing of the joint statement of issue. When the Arbitrator indicated to the Union that the objection was well founded, and that at best the Union would be faced with an adjournment should it insist on proceeding with the alternative pleadings, the Union withdrew any submissions with respect to the **Canada Labour Code** and the **Canadian Labour Standards**

Regulations, without prejudice to its ability to raise those issues in any future case. In the result, the hearing proceeded on the basis of the joint statement of issue, as filed.

At issue is the application of article 25.08 of the collective agreement, reproduced in the joint statement. As mandated by federal law, all employees are required to take a periodic medical examination. When they do so, under the terms of article 25.08 they are entitled to the payment of three hours at their basic rate if the examination is taken during their off duty hours.

It is common ground that under the **Canadian Railway Medical Rules** a person in a safety critical position is required to undergo a periodic medical assessment. The timing of the assessment is every five years until the age of forty and every three years thereafter until retirement. It is also common ground that under those rules, and in particular under the **Railway Medical Guidelines** article 3.1, entitled “Frequency of Assessment”, the following appears:

> **(b)** The Chief Medical Officer (CMO) of a railway company may determine different periodicity when there is medical evidence that more frequent assessment is required.

The grievor is a Type I insulin dependent diabetic. It is not disputed that for a person with his condition the Company’s Chief Medical Officer has applied the guidelines of the **Railway Medical Rules** which, it appears, contemplate a Type I

diabetic being evaluated every six months, specifically at the six month point by his or her personal physician and at the twelve month point by a specialist.

The issue in the instant case is relatively narrow. Were the medical assessments which the grievor was required to undertake, and in particular the medical examination he attended on May 12, 2004, tantamount to “a periodic medical examination” within the meaning of article 25.08 of the collective agreement?

Without regard to the **Canadian Human Rights Act**, and based entirely on the language of the collective agreement, the Arbitrator has substantial difficulty with the interpretation advanced by the Company. There is no dispute that the medical assessment which Mr. Martin took on May 12, 2004, was an assessment he was “required to take”. Article 25.08 makes no reference as to what the origin of the requirement might be. The fact that it is a requirement which flows from the federal law and regulations governing railways does not make it any less of a requirement. Moreover, a purposive examination of the article plainly discloses that it is intended to address itself to those medical examinations which railway employees are required by law to undertake on a periodic basis. The issue then becomes whether an examination required to be undertaken by an employee with a particular condition which would be in excess of the number of examinations which another employee might be required to undertake would fall within the ambit of the article.

The Arbitrator can see no basis upon which it would not. The medical examination undertaken by Mr. Martin was clearly a periodic examination. It is not disputed that it would occur every six months, in accordance with the judgement of the Company's Chief Medical Officer, in accordance with the **Railway Medical Rules**. Mr. Martin was no less compelled by the rules or by federal law to undertake his medical assessment than any other employee to whom article 25.08 would apply. When regard is had to the language of article 25.08 the Arbitrator can come to no conclusion other than that its terms plainly apply to the medical examination which the grievor was compelled to undertake as an ongoing condition of his employment, as mandated by federal law. It was, in other words, a required periodic medical examination within the meaning of article 25.08 of the collective agreement, and on that basis the grievor was entitled to the payment of three hours' pay at the basic rate of his regular position.

If the Arbitrator is incorrect in the foregoing interpretation of the provisions of the collective agreement, the Union's position must also be sustained by an application of the **Canadian Human Rights Act**. As the Union argues, the grievor was plainly placed in a position that was discriminatory when regard is had to his treatment as compared to other employees. Employees who do not suffer from an illness such as diabetes are compensated for the regular, required periodic medical examinations which they take, by the operation of article 25.08. If the Company's interpretation is accepted, persons suffering from a medical disability, as in the instant case the grievor with diabetes, do not have the same protection in the application of that article of the collective agreement. In other words, while the disabled employee is required to undertake more

frequent periodic medical examinations, he or she is declined compensation for the off duty time taken solely by reason of the disability which makes those more frequent examinations necessary. That, in the Arbitrator's view, is plainly discrimination on the basis of disability in violation of the **Canadian Human Rights Act**. It is simply not open to the parties to negotiate a provision of their collective agreement which would give benefits to non-disabled employees that are not available to the disabled by reason of their very disability. (*See,* ***CROA 3060****,* ***Re Ontario Nurses' Association and Orillia Soldiers Memorial Hospital*** *(1999), 169 D.L.R. (4th) 489*).

For the foregoing reasons the Arbitrator declares that the Company violated article 25.08 of the collective agreement by denying compensation to the grievor in the circumstances of his medical assessment on May 12, 2004. The Company is directed to compensate the grievor forthwith for the examination and for all medical examinations similarly mandated. The Arbitrator retains jurisdiction in the event of any dispute concerning the interpretation or implementation of this award.

July 19, 2005

(signed) MICHEL G. PICHER
ARBITRATOR