CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4092

Heard in Montreal, Thursday, 16 February 2012

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE
MAINTENANCE OF WAY EMPLOYEES DIVISION

EX PARTE

DISPUTE:

Despite involving Mr. K. Bal.

JOINT STATEMENT OF ISSUE:

By way of agreement dated October 7, 2011, the Company, the Union and the grievor entered into a last chance agreement that provided for the grievor's return to work. On November 3, 2011, a grievance was filed that objected to the length of time it was taking the Company to return the grievor to his former position.

The Union contends that the October 7, 2011 agreement was entered into just days prior to the date the grievor's case was docketed to be heard at the CROA&DR. the grievor has followed the terms of the agreement to the letter. The Union also contends that the Company's actions, or inactions, are unreasonable, in bad faith and in violation of the October 7, 2011 agreement.

The Union requests that the Company return the grievor to his former safety sensitive position immediately and compensate him for all wages, including overtime, and benefits, including pensionable service, lost as a result of this matter.

The Company denies the Union's contentions and declines the Union's request.

FOR THE UNION:
(SGD.) WM. BREHL
PRESIDENT

There appeared on behalf of the Company:
M. Shannon – Counsel, Calgary

M. Moran	– Manager, Labour Relations, Calgary
Dr. G. Lambros	– Chief Medical Office, Calgary
L. Trueman	– Director, OHS, Calgary
P. Wadja	– General Manager, Human Resources Planning and Development, Calgary
G. Wilson	– Vice-President, Safety, Environmental and Regulatory, Calgary
M. Chernenkoff	– Labour Relations Officer, Calgary

There appeared on behalf of the Union:

Wm. Brehl	– President, Ottawa
D. Brown	– Legal Counsel, Ottawa
A. R. Terry	– Vice-President, Ottawa
K. Bal	– Grievor

AWARD OF THE ARBITRATOR

The material before the Arbitrator confirms that the grievor was dismissed on June 24, 2011. That dismissal was the consequence of his having reported for work under the influence of alcohol, in violation of CROR Rule G and Company Policy 1806 on May 14, 2011. On that occasion he was found to have recorded a blood alcohol concentration of 0.058.

Prior to the arbitration of the grievor's discharge grievance the parties reached an agreement, on October 7, 2011. That agreement agreed to the reinstatement of the grievor subject to a number of conditions typical of such arrangements, including mandatory unannounced substance testing for a period of two years. The agreement also contained the following requirement as a condition prior to the grievor's recommencing duty:

> 2. Before actually recommencing duty or training, Mr. Bal must first submit to a safety sensitive medical examination, including a substance test and any other medical assessment deemed necessary under the terms and

> conditions directed by the Occupational Health Services (OHS) department. In this regard, Mr. Bal must first be determined as medically fit to return to service in a safety sensitive position by the Chief Medical Officer or his delegate.
>
> It is agreed that Mr. Bal must first comply with the conditions set forth in item 2 before any of the remaining conditions contained in this agreement have application.

The Company's Chief Medical Officer had concerns with respect to the grievor's condition, based on the state of the information which he provided in relation to the amount and timing of his consumption of alcohol on the evening prior to the breathalyzer reading which was obtained. Simply put, the grievor's assertion that he had had two or three drinks at a period of time substantially removed from the taking of his breath sample was inconsistent with his blood alcohol content at the time of the test. Alternatively, if his account was accurate as to the time, it raised substantial concerns as to the quantity of alcohol which had in fact been consumed. Based on that information the Company's physicians decided that there should be a further assessment by an addiction medicine physician with respect to the grievor's fitness to work in a safety sensitive position.

The doctor to whom the grievor was first referred, Dr. Ray Baker, noted the inconsistency between the amount of alcohol the grievor claimed to have consumed, and the time at which he drank it and the relatively high BAC reading found some eleven hours later. He reported, in part: "I am unable to determine, based upon the information available to me and listed in this report whether or not Mr. Bal is fit to return to work in a safety sensitive position." He further recommended that a more extensive occupational addiction medicine evaluation be conducted by an expert physician. To

that end the grievor's case was submitted to Dr. Paul Sobey, a recognized consultant in addiction medicine.

On November 21, 2011 the Company's Chief Medical Officer, Dr. George Lambros, advised the Company's Occupational Health Services that based on the fitness to work medical assessment Mr. Bal was fit to return to work in a non-safety sensitive position, although he should not drive Company vehicles or operate equipment for a period of six months after which time he should be reassessed to determine whether he is fit to return to safety sensitive duties. The grievor returned to work as a track maintainer on January 4, 2012, with the modification that he not perform duties which are safety sensitive. He was in fact compensated for wages at the rate of pay for a track maintainer for the period from November 28, 2011 to January 4, 2012 when he returned to active duty.

The Union maintains that the Company unduly delayed the grievor's return to work, thereby violating the terms of the parties' written last chance agreement of October 7, 2011. I cannot share that perception. The unchallenged fact, as expressed by Dr. Lambros, is that the medical authorities involved with the grievor's file all shared a common concern. The grievor's explanation of the amount of alcohol he consumed, and the time at which he consumed it, was grossly inconsistent with the BAC reading which emerged from his breathalyzer test. That fact, coupled with elevated liver enzyme readings, caused concern that the grievor may in fact be alcohol dependent or, alternatively, have an insufficient appreciation of the impact of his alcohol consumption.

That concern, which I consider was entirely legitimate, prompted the Company to obtain the more extensive medical examinations and reports which it deemed important before returning the grievor to safety sensitive duties. In my view that way of proceeding was entirely consistent with paragraph 2 of the last chance agreement of October 7, 2011. That agreement expressly contemplated that the grievor should be subject "any other medical assessment deemed necessary under the terms and conditions directed by the Occupational Health Services department. In this regard, Mr. Bal must first be determined as medically fit to return to service in a safety sensitive position by the Chief Medical Officer or his delegate."

As emerged at the arbitration hearing, Mr. Bal did in fact misrepresent the manner in which he consumed alcohol, and the quantity of alcohol consumed, on the night and early morning preceding his positive alcohol test. Unfortunately, as a result of a problem of the grievor's own making, the medical experts dealing with his file were left with a substantial concern as to the discrepancy between his blood alcohol count and the amount and time of the alcohol consumption which he had first admitted to. As is evident from the foregoing account, that discrepancy caused a substantial change in the complexity of medical examinations and reports that became necessary, thereby delaying the implementation of the agreement of October 7, 2011. Indeed, at the hearing the Company's Chief Medical Officer commented that now being in possession of the truthful account of the grievor's alcohol consumption there may be a basis to discuss with the Union and reconsider the extent of the six month restriction placed upon the grievor.

On the whole of the material before me, I cannot accept the submission of the Union that the grievor's reinstatement to service was unduly or improperly delayed by the Company's actions. The grievor's violation of rule G was a serious safety infraction, the nature of which gave rise to concerns as to whether the grievor had larger issues with respect to a possible alcohol dependence or addiction. That he does not is something which could only emerge in the fullness of time with proper medical assessment. In my view the actions of the Company were entirely consistent with the terms of the last chance return to work agreement negotiated between the Company and the Union on October 7, 2011. On that basis the instant grievance must therefore be dismissed.

February 20, 2012

(signed) MICHEL G. PICHER
ARBITRATOR