CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4514

Heard in Calgary, November 10, 2016

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The Union advanced an appeal of the file closure / dismissal of Locomotive Engineer M. Bretherton, of Calgary, AB.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

On June 17, 2015 Engineer Bretherton was notified that the Company had not received any updated medical information to suggest a prognosis of his return to productive employment. The letter further advised that his employment record had been closed effective immediately.

On February 17, 2014, in CROA Award 4286, the Arbitrator directed: "that the grievor be reinstated to his employment status, and that he be permitted to continue on his medical leave of absence. However, should the grievor's condition remain unimproved, or should there be no prognosis for his return to productive employment forthcoming within the period of one year from this Award, at the expiry of that time the Company shall be at liberty to consider a non-disciplinary closure of the grievor's employment file, for medical incapacity."

Within the time directed by the arbitrator, Mr. Bretherton provided the company with information and a program designed for his return to work. This included his participation in a program, in consultation with his physician and through Alberta Workers Compensation (WCB) that had, as a mandatory component, a two week reintegration to work in the rail industry. Mr. Bretherton sought to fulfill this requirement. However the Company refused to allow him permission to attend on Company property. The Union contends, this action of the Company is further discrimination in employment by the Company on the basis of Mr. Bretherton's disability.

The Union contends, the Company has not accommodated Mr. Bretherton's disability to the point of undue hardship, or at all and on the basis of the Company's refusal to allow Mr. Bretherton on its' property, Mr. Bretherton was unable to complete the WCB program. The Company has provided no reasonable, or any, explanation for its actions. The Union also contends that under the Canada Labour Code, the Canadian Human Rights Act, and the Alberta Workers Compensation Act and Article 41 of the (LE) Collective Agreement, the Company has collective and legal obligations to accommodate Mr. Bretherton's disability, and it is also obligated to carry out the directions of the CROA Arbitrator, all of which the Company has violated.

The actions of the Company have effectively prolonged and thwarted Mr. Bretherton's recovery.

The Union further that Mr. Bretherton be reinstated without loss of seniority and benefits and that he be made whole for all lost wages and benefits, plus interest from the time of his dismissal. The Union further requests an order directing the Company to participate in Mr. Bretherton's Return to Work Plan, including reasonable access to Company property for the purposes of the return to work program developed through WCB, and in consultation with his physician.

The Company disagrees with the Union's request.

FOR THE UNION: **FOR THE COMPANY:**
(SGD.) G. Edwards **(SGD.)**
General Chairman

There appeared on behalf of the Company:

D. Pezzaniti	– Labour Relations Officer, Calgary
B. Medd	– Manager Labour Relations Calgary
M. Brace	– WCB Specialist, Calgary
J. Goldade	– Manager Disability Management, Calgary
E. DiFruscia	– Disability Management Specialist, Calgary

There appeared on behalf of the Union:

D. Ellickson	– Counsel, Caley Wray, Toronto
G. Edwards	– General Chairman, Calgary
M. Bretherton	– Grievor, Calgary
G. Lawrenson	– Vice General Chairperson, Calgary
T. Doherty	– Alberta Legislative Board Chair, Calgary

AWARD OF THE ARBITRATOR

The grievor, a locomotive engineer, is 52 years old. He has almost 20 years of service with the Company, having been hired on October 20, 1997. The grievor worked his last shift on July 2, 2011. He was involved in a work-related accident on June 7, 2011 where a member of the public was killed at a crossing. The incident led to the grievor being diagnosed with PTSD and a depressive disorder.

The grievor's file was closed on February 28, 2012. A grievance was filed and Arbitrator Picher reinstated the grievor on February 17, 2014 in **CROA&DR 4286** with conditions, which are set out below:

> How, then, is the instant dispute to be resolved? Firstly, it should be stressed that the Arbitrator is in possession of medical documentation which now appears to confirm that the grievor has suffered "severe stress". A report by his physician reviews the employment related stress suffered by the grievor and diagnoses his condition as "Post Traumatic Stress Disorder". On the basis of the material filed, I am prepared to accept the submission of the Union that the Company's action in closing the grievor's employment file may arguably have been hasty, and done without a full appreciation of his condition. I should stress, however, that the Company is in no way at fault in that regard, as it is plainly clear that the grievor did not provide to the Company the kind of medical documentation which it requested and to which I am satisfied it was entitled. Most fundamentally, however, I must agree with the Union's representatives that the facts of the instant case raise compassionate grounds for a reinstatement of the grievor to his employment, albeit on conditions fashioned to protect the Company's interests.
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> The grievance is therefore allowed, in part. The Arbitrator directs that the grievor be reinstated to his employment status, and that he be permitted to continue on his medical leave of absence. However, should the grievor's condition remain unimproved, or should there be no prognosis for his return to productive employment forthcoming within the period of one year from this Award, at the expiry of that time the Company shall be at liberty to consider a non-disciplinary closure of the grievor's employment file, for medical incapacity.

Subsequent to his reinstatement on compassionate grounds, the grievor, on the advice of his physician, applied for WCB benefits. As part of the WCB claims process, the grievor was assessed by a psychologist, Dr. Michael Maclean. In his report of September 8, 2014, Dr. Maclean confirmed the grievor was still suffering from PTSD due to the same work-related accident. He noted that the grievor would experience anxiety if he returned to his position as an engineer without psychological treatment. Dr. Maclean also expressed the view in his report that the grievor could perform modified

duties, such as a trainer. He further indicated that the grievor would benefit from enrollment in a traumatic psychological injury ("TPI") program.

The grievor was enrolled in full-time studies at the time and could not participate in the TPI program for that reason. The grievor, however, attended for regular psychological counseling at the recommendation of WCB starting in January 2015 and through to May 2015.

On January 19, 2015 the Union wrote to the Company advising that the grievor's claim for WCB benefits had been approved. The letter also states:

> Since the award of Arbitrator Picher in this matter, Engineer Bretherton has had his medical condition recognized as a bona fide workplace injury by the Worker's Compensation Board of Alberta. We understand the Company is fully aware of this development as evidenced by your active participation in the adjudication of his claim. Mr. Bretherton is being treated for his condition and we have every reason to believe that he will be able to return to productive employment.

On March 10, 2015, the Company sent a letter to the grievor requesting a medical update report from the grievor's treating physician. The grievor said that he did not receive a copy of the letter until the Company produced his OHS file after he was terminated. The Union was not copied on the letter to the grievor.

On April 28, 2015, the Company's WCB Specialist, Melanie Brace, wrote an email to the grievor's Case Manager at WCB noting that the grievor had completed his semester at University in April 2015. The email went on to ask whether the WCB *"...had*

any recent discussions with him regarding a TPI referral? If so, is he agreeable to attend when he is done this semester?"

On April 30, 2015, the WCB Case Manager emailed Ms. Brace confirming that the grievor was scheduled for a TPI screen on May 11, 2015. The email went on to say *"...I do anticipate a program will be recommended and, as there are currently no modified work duties for Mark, it will likely be a level III program. Should CP be able to identify modified work duties, I would discuss moving him to a level II program with the treatment team."*

On May 11, 2015, the grievor attended for his scheduled TPI screen. The WCB Return to Work Services branch recommended on May 19, 2015 that the grievor be enrolled in the TPI Level III program. The eight-week program involved treatment by a variety of therapists.

The grievor's Case Manager at WCB wrote to the Company's Ms. Brace again on May 20, 2015. The email states in part the following:

> One of the comments made in the report [TPI Screen] was that Mark's success would be likely impacted by CP's allowance for on-site exposure (specifics to be discussed with the occupational therapist following development of a fear hierarchy) and willingness to offer modified work. CP certainly has an opportunity to be supportive of Mark's recovery (and thus reduce claims costs) or be another barrier in the recovery (and thus increase claims costs). As we get a better idea of what the occupational therapist would like access to for exposure therapy, I'm optimistic we can work together to overcome any barriers that may arise.

On May 21, 2015, the WCB Case Manager was advised by Ms. Brace, in response to the above May 20, 2015 email, that the grievor's employment was terminated. Her email of May 21, 2015 states:

> CP rail has terminated Mark's employment. This is within the ruling that he was to provide medical documentation to CP Rail within one year of the date of the ruling. To date, he has not complied. This is not CP putting up a barrier to Mark's recovery but rather Mark putting barriers up in regard to his own recovery and potential of working with CP rail again.
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> Please note that I am unsure if Mark is aware at the present time that his employment has been terminated. This communication will come from another department within CP rail.

On June 5, 2015, the WCB case manager wrote to the grievor, with a copy of the correspondence to the Company, indicating that *"...our plan is moving along and we are making progress towards your successful return to work. We have changed the goal to achieve full fitness for work by July 18, 2015".*

On June 17, 2015, the Company wrote to the grievor listing the numerous occasions that it had try to contact him without success by mail or by phone from March 14, 2014 through to March 15, 2015. The Company concluded by stating that in the absence of updated medical information to suggest a prognosis for his return to work, it had no choice but to close his employment file effective that day.

I note at the outset there is no indication that the WCB were involved at the time **CROA&DR 4286** was issued by Arbitrator Picher on February 17, 2014. The grievor only applied for WCB on May 5, 2014 after meeting with his physician. The Company received Dr. Maclean's comprehensive psychological report dated September 8, 2014.

Dr. Maclean suggested in his report that the grievor was a good candidate for the TPI program and *"...could also perform modified duties given his ability to excel in his academic studies".*

As noted by the Union, the Company was fully aware that the grievor was participating in the WCB return-to-work program with the Company's WCB specialist. The Union's letter of January 19, 2015 to the Company confirms that the grievor was receiving treatment and was expected to return to full-time duties. The Company was also being kept informed through the grievor's WCB case worker's ongoing correspondence to the Company's WCB Specialist, Ms. Brace. I note in that regard that Ms. Brace confirmed in her April 28, 2015 email to the WCB case worker that the grievor was to finish his university semester at the end of April 2015. Ms. Brace also inquired in the same email about the pending TPI referral. The grievor's case worker confirmed in a reply email that the grievor was being assessed on May 11, 2015 for his enrollment in the TPI program.

I do not find in the end that the grievor breached the conditions set out in **CROA&DR 4286**. The Company did in fact have a *"...prognosis for his return to productive employment forthcoming within the one year period from this Award"* set by Arbitrator Picher. That information flowed from the ongoing WCB correspondence, and particularly the letter of June 5, 2015 where it indicated that the grievor was likely suited for his pre-accident duties once he completed the TPI program.

I understand the Company's frustration with the grievor's ongoing refusal, particularly during the March 2014 to March 2015 period, to answer their correspondence. Given the grievor's neglect in promptly answering the Company about his medical condition, this is not an appropriate case for compensation. It is fortunate for the grievor that the WCB kept the Company apprised of his medical progress and his suitability for returning to work, particularly after May 2014 when he applied for WCB benefits.

The grievor's employment file shall be reopened. I would urge a tri-partite effort involving the grievor, the Union and the Company to engage in the accommodation process in order to determine: (a) whether the grievor currently suffers from a PTSD disability which prevents him from returning to his previous duties as a locomotive engineer (b) if so, whether he can be accommodated to the point of undue hardship.

I shall retain jurisdiction should the parties encounter any issues in the implementation of this award.

December 5, 2016

JOHN MOREAU
ARBITRATOR