CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4537

Heard in Calgary, February 7, 2017

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE – DIVISION 105

DISPUTE:

Appeal on behalf of Conductor Matt Campbell of North Vancouver, BC appealing the declination of a stand-alone claim of two (2) hours for a medical examination and the cost to obtain documentation of an illness as required.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

The Company required Conductor Campbell to provide medical documentation to verify his absence.

The Union 's position is that under Section 239 in Part III of the Canadian Labour Code the Company may request medical documentation however under Article 107 (D) Conductor Campbell is entitled to two (2) hours pay and to recover the cost of the documentation the Company has requested, twenty-five (25) dollars.

The Union filed a grievance on behalf of Conductor Campbell, the Company has declined the grievance at Step 1 and Step 2. The Union has filed a Joint Statement of Issue to which the Company has not responded to.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

Vancouver Conductor Matt Campbell was absent from work March 25 – April 1, 2014. Upon his return to work April 2, 2014 the Company requested he obtain a Doctor's note to support his reported absence from work. Mr. Campbell obtained a Doctor's note on April 11, 2014 and submitted a time claim for two (2) hours pay under Article 107(D)(1) of the Division 105 Agreement for obtaining the Doctor's note.

The Union submits that the request for a Doctor's note falls within the definition of a required medical examination found in Article 107(D)(1) and therefore seeks a ruling for payment of two (2) hours pay.

The Company submits the procurement of a Doctor's note was never negotiated or defined as a required medical examination nor has it ever been administered as such by the Company since the inception of this provision, more than thirty-six (36) years ago. The Company submits the Union's interpretation is inaccurate and unfounded.

FOR THE UNION:
(SGD.) M. Piche
Staff Representative

FOR THE COMPANY:
(SGD.)

There appeared on behalf of the Company:

D. Crossan	– Manager, Labour Relations, Prince George
K. Morris	– Senior Manager, Labour Relations, Edmonton
J. Boychuk	– General Manager, Prairie Division

There appeared on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
J. Holliday	– General Chairman, Vancouver
M. Campbell	– Grievor, Langley

AWARD OF THE ARBITRATOR

The facts of this matter are not in dispute. On March 25, 2014, the Grievor advised the Company that he had a respiratory illness and, in full compliance with procedures for obtaining sick leave, booked off sick. He returned to work on April 2, 2014.

That same day he was asked to provide a doctors certificate to support his absence from work. The request reads as follows:

> "Company records indicate that you booked off sick March 29th, 2014 in this regard, CN Rail will require you to provide medical documentation, as per section 239 in Part III of the Canada Labour Code, to verify this absence from work.
>
> This documentation must include that you were not able to work and what specific period of time and dates. Please provide this information to this undersigned by April 10th, 2014."

He obtained the doctor's certificate on April 11 and submitted a time claim for two hours pay pursuant to the provisions of *Article 107(d)(1)* of the Division 5 Collective Bargaining Agreement.

The Company declined the claim on the basis that a doctor's note is not, and has not been, defined as a required medical examination as anticipated by Article *107(d)(1)*.

The Union grieved.

APPLICABLE PROVISIONS:

Collective Agreement (Division 105)

Article 107(d)(i)

> (d) Payment for required medical examinations and required attendance at instructional programs:
>
> (i) Employees who are required by the Railway to be medically examined will be paid two (2) hours at the pro rata rate of the service the employee last performed. This applies to off-duty hours.

Canada Labour Code

Section 239:

> (1) Subject to subsection (1.1) no employer shall dismiss, suspend, lay off, demote or discipline an employee because of absence due to illness or injury if the employee has completed three consecutive months of continuous employment by the employer prior to the absence;
>
> (b) the period of absence does not exceed twelve weeks; and
>
> (c) the employee, if requested in writing by the employer within fifteen days after his return to work, provides the employer with a certificate of a qualified medical practitioner certifying that the employee was incapable of working due to illness or injury for a specified period of time, and that the period of time coincides with the absence of the employee from work.

UNION'S SUBMISSIONS:

The Union argues that Mr. Campbell initially attended a physician's office on March 26, 2014; was diagnosed with an upper respiratory tract infection; and, was prescribed one week of rest. When he returned to work on April 2, Trainmaster, Bob Steward presented him with a letter which requested that: "*CN Rail will require you to provide medical documentation, as per Section 239 in part 3 of the Canada Labour Code to verify this absence from work.*"

The Union argues that when an employee is directed to obtain a note from his/her doctor pursuant to Article 107(D)(1), it necessitates that he/she be "*medically examined*" by the doctor before that report can be completed. Following thereon, after such medical examination has taken place, the Employer is required, by the provisions of Article 107(D)(2), to pay for *"**All** medical examinations and travel costs related thereto".* The Union argues that the language of article 107(D) is clear on its face and it does not afford the Company the luxury to distinguish between types of medical examinations. Accordingly, in that the Grievor's doctor's certification was required by the Employer, his claim must be paid as part of "*all medical examinations*"

In addition to arguing that the language is clear on its face, the Union contends that if the Company sought to exclude medical examinations incurred in obtaining medical certificates, then it was open to the Company to negotiate language specific to

that effect. Having failed to do so, it argues that Section 107(D) must be interpreted as all encompassing.

It suggests that the decision of Arbitrator Philips in *Thunder Bay (city*) and *ATU, Local 966* (1992) 28 C.L.A.S. 311 is determinative of this case. There, Arbitrator Philips interpreted the following article:

> "18.05 The EC Corporation will pay the full cost of **any compulsory medical** examinations required under the regulations of the ministry of transport and communications or **any other medical examination** required by the corporation to determine eligibility for continuance of employment."

In interpreting the above article, the arbitrator concluded that the employer is responsible for paying the costs incurred by employees supplying medical certificates required by management.

For its part, the Company argues that the provisions of Article 107(D) apply only to those periodic or non-periodic medical examinations administered by CN Occupational Health Services. It asserts that the Grievor was never instructed to undergo a full Medical Examination as intended under article 107(D)(1) but was simply requested to provide a medical note to support his absence in accordance with Section 239 of the *Canada Labour Code*.

The Employer contends that the application of article 107(D)(1) - to only those periodic or non-periodic medical examinations as discussed - is a long standing past practice which applied over a period of thirty-six years. It allows that, over the period

2011 - 2014, 110 doctors notes were requested pursuant to section 239 of the *Canada Labour Code* and no demand was made by the Union for the two hour payment made in similar circumstances to those before us here.

While the Company also takes the position that Article 107(D)(1) is clear on its face and supports its position, it nevertheless relies on the past practice just mentioned. In addition, it relies on the parties' experience in collective bargaining. It points out that in the 2013 National Bargaining round (Ex. 14), the Union initially requested an amendment to the National Agreement which would require the Company to pay the two hours, as well as the practitioner's costs, for employees who are required to provide doctor certificates in the circumstances of the present case. In the course of that bargaining, the Union abandoned that demand.

The Company points out that if, in fact, the provisions of article 107(D)(1) were clear on its face there would have been no need to attempt to bargain the provisions set out in Ex. 14. The language has not changed between 2014 and the present. Accordingly, the onus falls to the Union to point to clear and unequivocal language which would require it to make payments in excess of the current minimum. In this respect it relies on **CROA&DR 2665** wherein the arbitrator states:

> "…awards generally require that an employee claiming payment in excess of the minimum guarantee be able to point to clear collective language to support their claim".

DECISION

The grievance is dismissed.

I do not accept the Union's argument that the decision in *Thunder Bay v. ATU* is determinative of the current case. In point of fact, the provision on which Arbitrator Philips relied, specifically states that:

> "The Corporation will pay the full cost of any compulsory medical examinations required under the regulations...**or any other medical examination required by the Corporation** to determine eligibility for the continuance of employment." (Emphasis added)
>
> The language in that provision is significantly different than the Collective Agreement here which refers only to employees "who are required by the Railway to be medically examined."

The ambiguity in the current language can be interpreted in light of: past practice regarding its application; the conduct of the parties at bargaining; and, the applicable legislation.

The past practice of the parties is that the phraseology used in Article 1.07(D) relates to the periodic and non-periodic medical examinations referred to earlier in this award. For thirty-six years the parties followed that practice.

Secondly, given that the Union specifically requested a change in the language during the 2014 negotiations - to include payments for **all** medical certificates requested by the Company - it is apparent that the Union did not regard the existing provisions as being all-inclusive as it now argues.

Finally, as reflected in the letter provided to the Grievor (Employer Ex. 2), the Employer's request for medical documentation was made pursuant to Section 239 of Part III of the *Canada Labour Code*. Pursuant to that legislation:

> "...an employer may make a written request to the employee within 15 days of the employee's return to work to have the employee provide it with a certificate of a qualified practitioner certifying that the employee was incapable of working due to illness or injury."

Arbitral jurisprudence is clear that an employee who claims payment in excess of the minimum guaranteed, be able to point to clear collective agreement language to support his/her claim (See **CROA 2655, 2790**). While the Employer is statutorily entitled to request that an employee provide: "… a certificate of a qualified practitioner certifying that the employee was incapable of working due to illness or injury", there is no suggestion in the *Code,* or elsewhere in the Collective Bargaining Agreement, that the costs associated with the medical certificate would fall to the Company.

Given all of the above, the provisions of Article 1.07(d)(1) do not apply to medical certificates requested by the Company pursuant to Section 239 of the Code.

The grievance is accordingly dismissed.

March 22, 2017

RICHARD J. HORNUNG
ARBITRATOR