CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4679

Heard in Montreal, April 10, 2019

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Lost wages and benefits of Conductor X (the "Grievor").

JOINT STATEMENT OF ISSUE:

On October 17, 2016 Mr. X booked off on off duty injury "FO" status. On October 20, 2016, Mr. X's physician submitted a Functional Abilities Form (FAF) to the Company's Health Services' department.

On November 3, 2016, Mr. X submitted a WIB benefit form to Manulife in order to receive benefits.

On November 16, 2016, Mr. X's claim was denied by Manulife. Mr. X appealed Manulife's decision, and his appeal was subsequently denied by Manulife on January 3, 2017.

On March 7, 2017, Mr. X returned to work.

The Company did not respond to the Union's Step 3 grievance.

Union's Position:

Mr. X went on "off-duty injury/illness" status not on account that he was in need of an unpaid holiday but for the very reasons he discussed with the Trainmaster. Mr. X did this as he was not 100% fit to perform his duties as a Trainman. This in itself is what the purpose of such a benefit is for; an employee is "unfit/sick" to perform work as intended. Based on this decision and subsequent benefit-appeal and grievance decline a clear message has been sent by the governing parties (Manulife and CP). Employees when unfit/sick will now have to go to work in a distressed condition as they will be denied their entitled benefits.

CP is absolutely in position to allow Mr. X's benefits be paid, CP was absolutely in position at the very minimum to provide on compassionate reasons that an employee in distress needed to be off work to attend to his ailing wife. Is this really the position of CP not to provide needed benefits? There was nothing in Mr. X's position that could be conceived as being in violation of being paid his entitled benefits, there was nothing in violation that would have stopped CP from ensuring Mr. X's benefits were paid to him.

The Union also asks why no RTW Accommodations were provided for Mr. X. Mr. X is refused his benefits and no attempt to provide any accommodation is considered by the Company. The Company is well aware of the Collective Agreement provisions, the RTW

Accommodation Policy and process, and the *Canadian Human Rights Act* and the wages associated under the *Canada Labour Code* Part III Section 132(5).

The Company is in violation of Article 69 Health and Welfare, all modifications to payment through relevant language in Memorandum of Settlements and Awards, Disability and Life Insurance Plan Agreement, Weekly Indemnity Benefit Claim for Unionized Employees at Canadian Pacific, Manulife Benefits at a Glance, *Canadian Human Rights legislation*, *Canada Labour Code* statutes, in addition to any and all other provisions.

The Union requests the approval of Mr. X's WIB and compensate him accordingly without loss of seniority or pension. In the event his Benefits are not paid the Union request all lost wages with interest with no loss of benefits/seniority wherein Mr. X should have been accommodated during said period of time as per policy and in addition to such other relief as the Arbitrator sees fit in the circumstances.

Company's Position

The Company's Health Services department is required to evaluate medical information supplied in the form of a Functional Abilities Form in making Fitness to Work determinations.

Manulife, the Company's third party benefits administrator, adjudicates claims based on the evaluation of pertinent policy provisions and relevant medical documentation.

On November 15, 2016, the Company was advised that Mr. X's claim had been declined on the basis that "he is not totally disabled within the meaning of the contract." The Company was further advised that Manulife did not receive evidence of ongoing appropriate and ongoing treatment or a severity of condition that would prevent Mr. X from working beyond October 17, 2016. While Mr. X was provided a letter outlining specific medical information received and the specific information used in reaching this decision, due to the confidential nature of the information, Manulife did not supply the same to the Company.

The Company maintains that the Grievor's WIB claim was appropriately denied because the Grievor's claim did not meet the requirements to be eligible for WIB.

Accordingly, it is for these reasons the Company denies this Grievance.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) W. Apsey	**(SGD.) A. Jansen**
General Chairperson	Labour Relations Officer

There appeared on behalf of the Company:

D. Pezzaniti	– Assistant Director, Labour Relations, Calgary
J. Bairaktaris	– Director, Labour Relations, Calgary
M. MacDonald	– CP Legal, Calgary

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
W. Apsey	– General Chairperson, CTY-E, Smiths Falls
D. Fulton	– General Chairperson, CTY-W, Calgary
D. Edward	– Senior Vice General Chairperson, CTY-W, Medicine Hat
H. Makoski	– Senior Vice General Chairperson, LE-W, Winnipeg

AWARD OF THE ARBITRATOR

The Company raised a preliminary objection claiming that the grievance was not arbitrable. The Union objected to the preliminary objection of the Company.

The Union's position is that the preliminary objection was not raised within the steps of the grievance procedure. The Union notes that the Company has only submitted a response to the merits of the grievance leading up to these arbitration proceedings. The Union further notes that, as set out in Rule 10 and Rule 14 of the Memorandum, the JSI should only contain the facts and a reference to the provisions of the collective agreement in dispute. The Company cannot raise a point of dispute unless it is contained in the JSI. By failing to do so, it has waived its rights to raise a preliminary objection.

The Company, in response, states that it filed its preliminary objection with the CROA office on March 13, 2019 just over a week after the JSI was filed on March 5, 2019. The Company points to Appendix C of the Memorandum which reads as follows:

> **Preliminary Objections**
>
> Preliminary objections concerning the arbitrability of a dispute should be filed as soon as possible after the dispute is submitted to the Office of Arbitration. The objection must be in writing, outlining the reasons for the objection. A copy of the objection is also to be filed with the other party to the dispute at the same time and in the same manner.
>
> If a request for the hearing of a preliminary objection is made after the grievance is filed in the Office of Arbitration and before the matter has been scheduled for hearing, the hearing shall be solely to deal with the preliminary objection. **However, if a preliminary objection is filed after a dispute has been scheduled for hearing, the hearing shall be for the purpose of dealing with both the preliminary objection and the merits of the grievance.**

I agree with the Company that the Appendix C note is quite clear that a preliminary objection will be heard with the merits, and not separately, if it is filed after the JSI. The Company in my view has the right to address both its preliminary objection to the grievance and the merits of the grievance

Briefly, the substance of the Company's preliminary objection is that the denial of benefits to the grievor was in accordance with the terms of the Manulife Plan, which is administered by Manulife as the service provider, and is therefore not grievable. I agree with the Union that this argument is without merit.

The Union points out that article 69.01 of the collective agreement refers directly to the Disability and Life Insurance Plan:

> **69.01 Weekly Indemnity and Life Insurance**
>
> Benefits shall be available in accordance with the terms of the Disability and Life Insurance Plan Agreement dated November 29, 1988, establishing the Benefit Plan for Train and Engine Service Employees, as amended

The fact that article 69.01 clearly refers to the benefits being available pursuant to the Plan leaves no doubt about the parties' intention that the Plan is part of the collective agreement, and may be enforced under the terms of the collective agreement. As stated in **CROA 2945**:

> The first issue to be resolved in this dispute is whether, as the Company contends, the grievance is inarbitrable. The Company submits that the weekly sickness indemnity benefits which the grievor claims are not a matter arising out of the collective agreement, but rather that they relate entirely to the application and administration of the weekly indemnity plan document overseen by Sun Life.

> The Arbitrator cannot sustain the Company's position on the issue of arbitrability. As Counsel for the Brotherhood points out, the insurance policy which is the subject of this dispute is fully incorporated by reference within the terms of the collective agreement. In this regard article 41.1 provides as follows:
>
> > 41.1 Health and Welfare benefits will be provided in accordance with Employee Benefit Plan Supplemental Agreement (the "EBP") dated July 25, 1986, as revised, amended or superseded by any agreement to which the parties to this collective agreement are signatory.
> >
> > **I am satisfied that by the foregoing provision the parties agreed that the Company bears the collective agreement obligation to provide benefits as described in the plan referred to, and that any failure to provide such benefits is a matter which can be grieved as part of the enforcement of article 41.1. Consequently, the rejection of an employee's claim for reasons which are arguably beyond the terms of the benefit plan must itself be arbitrable.** Any doubt about the Arbitrator's jurisdiction in this regard is now, in my view, fully resolved by recent jurisprudence pleaded by Counsel for the Brotherhood, including the decision of the Supreme Court of Canada in *St. Anne-Nackawic Pulp & Paper Co. Ltd v. Canadian Paper Workers Union, Local 219* (1986), 28 D.L.R. (4th) 1, as well as the decision of the same court in *Weber v. Ontario Hydro* (1995), 125 D.L.R. (4th) 583, and, more specifically, the decision of the *Ontario Court of Appeal in Pilon v. International Minerals & Chemical Corporation (Canada) Limited et al* (1996), 31 O.R. (3rd) 210. As pointed out by Counsel for the Brotherhood, an arbitrator's jurisdiction in such circumstances was thoroughly reviewed and analysed by Arbitrator M.G. Mitchnick in *Re Honeywell Ltd. and CAW - Canada* (1997), 65 L.A.C. (4th) 37.

The Company's preliminary objection regarding arbitrability is therefore dismissed. To recap, I fully endorse the comments of Arbitrator Picher in **CROA 2945** that the rejection of an employee's disability claim, as occurred with the grievor in this case, is in itself proper subject matter for a grievance and arbitration.

Turning to the merits, it is important to note at the outset that the WIB carrier in this case, Manulife, is the service provider and administrator of the WIB plan. Under the terms of the plan at clause 1.22, it is *"…responsible for the daily administration and operation of the plan".* It is Manulife who determines eligibility for benefits under the plan, in this case WIB benefits, as set out in clause 7.2: *"Payment for any benefit under the plan will be subject to the Service Organization being given written proof of claim satisfactory to it."* In order to be eligible for WIB, an employee must satisfy the policy definition of total disability. Total disability under the terms of the policy means that an employee must be wholly and continuously disabled so as to prevent them from performing the essential duties of their regular occupation.

The facts are that the grievor booked off duty on October 17, 2016. Three days later, on October 20, 2016, the grievor's family physician, Dr. Saari, completed a CP Functional Abilities Form ("FAF"). He noted that he examined the grievor on October 13, 2016. He further noted that the grievor was suffering from anxiety, not sleeping, low energy and poor concentration. He also checked a box which indicated that the grievor was *"Totally Unfit for any work, including sedentary, non-safety sensitive modified work or work hours."*

The day after the grievor booked off-duty, on October 18, 2016, the Company's Employee Service Representative submitted a Manulife Employer Statement for WIB on behalf of the grievor. The reason listed for the employee's absence from work was "illness" (since October 16, 2016) and confirmed that he was employed in a "safety

sensitive" Trainperson Road position. The grievor, for his part, filled out a Manulife Group Benefits Employee Statement on October 28, 2016 verifying his work information. He faxed it to Manulife on November 4, 2016.

Dr. Saari completed a Manulife Physician Statement on November 3, 2016 identifying that the grievor suffered from *"high anxiety with depression symptoms".* He identified *"anxiety/depression"* as his primary diagnosis with symptoms including fatigue, low energy, anxiousness and poor sleep. In terms of treatment, Dr. Saari recommended *"rest, exercise, counselling".* Dr. Saari further indicated in a section entitled *"For Canadian Pacific Occupational Health Services"* that the grievor was *"unable to work at present time".* He went on to say in a handwritten note on the same Physician Statement the following *"I suspect patient will be able to return to full duties with time. Hopeful to return to work given patient is extremely motivated and willing to follow Tx plan".*

On November 16, 2016, the grievor's WIB claim was denied by Manulife. The letter of denial states in part:

> We discussed your claim on November 16, 2016. You confirmed you still have trouble with focus and concentration and sleep. You are not attending any counseling and are mostly walking to help your symptoms. You were recently diagnosed with diabetes.
>
> In order to qualify for WI benefits, you must be under appropriate and active treatment. You have not initiated any counselling; you have not been prescribed medication.
>
> The evidence on file is not supportive of total disability with appropriate treatment. As such, your claim for WI benefits is declined.

The grievor began counselling sessions on November 25, 2016 after a scheduled first consultation was cancelled on November 18, 2016. Those sessions continued on three further occasions: November 30, December 7 and December 21, 2016.

On December 19, 2016, the Union appealed Manulife's decision to deny the grievor WIB benefits. The appeal documents included a letter from the grievors' counselor acknowledging the ongoing counselling sessions. The grievor's appeal was denied on January 3, 2017. The letter of appeal indicated that the grievor initiated appropriate counseling treatment on November 25, 2016 but did not support that he was totally disabled from his own occupation. The letter went on to say:

> In our conversation of January 3, 2017, you confirmed that you remain off sick due to caring for your wife during your illness.
>
> You say that you are unable to return to work due to having to take your wife to doctors' appointments and you have indicated you do not have access to home care through your community.
>
> You are able to drive to your wife's doctor's appointments and to attend to chores without any concentration and focus issues.
>
> You have indicated that you do have some issues with sleep but it is related to your wife's current medical condition and her waking throughout the night.
>
> In summary, the medical evidence received does not support a condition that would prevent you from performing your own occupation as a Conductor.

The Union's position is that it disagrees with Manulife's Case Manager's conclusion. The Union maintains Dr. Saari's medical evidence confirms a generalized anxiety/depression condition which prevents the grievor from performing his safety sensitive duties as a conductor.

The arbitrator notes that deference to the plan administrator, in this case Manulife, in arriving at eligibility decisions for employees covered under the plan is a long-held feature of these types of disability plans. The only limitation on the ability of a company such as Manulife to make such eligibility decisions is that they must be not be motivated by any purpose that is arbitrary, discriminatory or in bad faith. As Arbitrator Picher noted in **CROA 2849**:

> As is apparent from the foregoing, the parties have contractually agreed to establish Metropolitan Life as the primary judge of the merit of an individual employee's claim to weekly indemnity benefits. The Arbitrator is satisfied that the insurance company's opinion is to govern, subject only to it being given for reasonable and valid business purposes, and not for motives that are arbitrary, discriminatory or in bad faith. There is no suggestion of that before me.

I also note the comment of Arbitrator Picher in a more recent decision, **CROA 4270**, dealing with similar facts:

> It is well established that in a case such as this to overturn the considered conclusion of a Company such as Manulife, evidence must be adduced to establish that the decision of the insurer proceeded on a basis found to be arbitrary, discriminatory, or in bad faith. That has been repeatedly confirmed by this Office, since the award in CROA 2849.
>
> At best, what the instant case reveals is a difference of opinion between the grievor's own physician and the physicians and consultants of Manulife. On the whole, therefore, the material before me does not allow me to conclude, on any responsible basis, that in the instant case the insurer Manulife, or the employer, have acted in a manner that is arbitrary, discriminatory or in bad faith in relation to the assessment of the grievor's entitlement to disability benefits.

The grievor did not attend for counselling until his absence from attending to this part of his treatment program was brought to his attention by Manulife in a telephone conversation of November 16, 2016. This was well after the grievor had been examined by Dr. Saari on October 13, 2016 when counseling was recommended as part of his

treatment program for anxiety and depression. Further, and more importantly, Manulife's appeal denial indicates that the primary reason for the grievor's absence was not related to his own anxiety issues, but rather the need to provide care to his wife who was being treated for alcoholism and was waking up throughout the night.

The grievor's eligibility for WIB benefits was properly addressed by Manulife on the basis of the medical information and personal discussions with the grievor about his day-to-day activities. The conclusion that the grievor was not eligible for benefits was not based on some arbitrary assessment on their part that had no basis in fact. They were hired to bring their expertise to the assessment of claims and properly fulfilled that role in my view when assessing the grievor's claim for WIB. Accordingly, I do not find any basis to support or interfere with Manulife's decision to decline WIB benefits to the grievor.

This is also not a case that supports a finding that the Employer failed in its duty to seek an accommodation for the grievor in the form of modified duties while he was absent from work, as argued by the Union. The Manulife Attending Physician's Statement prepared by Dr. Saari on November 3, 2016, indicates in response to whether the grievor was able to work *"modified, gradual or regular duties"* (section 8) that the grievor was *"unable to work present time".* More importantly, CP's own FAF of October 20, 2016, as noted, states that the grievor, in Dr. Saari's opinion, was *"Totally Unfit for any work, including sedentary, non-safety sensitive modified work or work hours"* because he was *"suffering with anxiety-not sleeping, low energy, poor concentration*."

At no time after he first booked off duty on October 17, 2016 did the grievor or his physician indicate to either Manulife or CP that the grievor had progressed from being "totally unfit for all duties" to being in a position to perform modified duties, including non-safety sensitive duties. In the absence of such medical evidence, the grievor cannot claim that the Company failed to find suitable work or accommodate him during the period he was absent from work. The Company met all of its human rights obligations to accommodate the grievor with the information it had on hand and was under no obligation to seek updated medical information from the grievor or Dr. Saari.

Finally, over the objection of the Company, I do find that this is an appropriate case to anonymize the name of the grievor. I do so because of the personal circumstances of the grievor's spouse, as set out herein, and the importance of ensuring her condition is not the subject of any unwarranted publicity. I note there is precedent for anonymizing the grievor's name in a case from this Office with almost identical facts, **CROA 4270**.

For all the above reasons, the grievance is dismissed.

May 1, 2019

JOHN M. MOREAU, Q. C.
ARBITRATOR