CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5141

Heard in Montreal, February 12, 2025

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE MAINTENANCE OF WAY EMPLOYEE DIVISION

DISPUTE:

The Company requires medical documentation to establish and confirm an employee's fitness to return to work following medical absences of more than three (3) consecutive days.

The Union alleges this requirement, specifically the application of the Code mandated 10-day Medical Leave, violates s. 239 of the *Canada Labour Code* ("***Code***"). The Company disagrees and submits that medical documentation to determine an employee's fitness to return to work does not violate the *Code*.

JOINT STATEMENT OF ISSUE:

The Union's Position:

The Union contends that:

1. Section 239(2) of the Canada Labour Code provides that "*the employer may, in writing and no later than 15 days after the return to work of an employee who has taken a medical leave of absence of at least five consecutive days, require the employee to provide a certificate issued by a health care practitioner certifying that the employee was incapable of working for the period of their medical leave of absence*."
2. Interpretation Circular IPG-118 provides that "*in line with subsection 239(2), an employer may require a medical certificate from an employee who takes medical leave with or without pay no earlier than after 5 days of consecutive leave and no later than 15 days after the employee's return from leave*."
3. In a clarification sought and received from Labour Canada, the Labour Canada representative stated that "*an employee's entitlement to medical leave cannot be limited through the imposition of medical certificate requirements in excess of those provided for under the Code"* and *"subsection 239(2) of the Code is clear that an employer only has the authority to impose such a requirement* (i.e. for a medical certificate) *in specific circumstances, that is, when the duration of the absence is at least five consecutive days."*
4. The Company may not implement and enforce internal policies that do not conform with the minimum standards set out in the Code and other legislation. With regard to section 239, section 168(1) of the Code provides that "*this Part and all regulations made under this Part apply notwithstanding any other law or any custom, contract or arrangement, but nothing in this Part shall be construed as affecting any rights or benefits of an employee under any law, custom,*

contract or arrangement that are more favorable to the employee than his rights or benefits under this Part."

The Union requests that the Arbitrator:

1. *declare that the Company is in violation of the applicable provisions of the Canada Labour Code and other minimum standards set for employers under Federal jurisdiction;*
2. *order the Company to amend its internal policies in order to bring them in line with applicable law;*
3. *order the Company to take the steps necessary to ensure that all employees who have been forced to take additional days in order to provide unnecessary documentation have those days returned to them for use as paid sick leave.*

COMPANY POSITION:

Preliminary Objections:

1. Filing of Policy Grievance – Section 15 of the Wage Agreement specifically relates to discipline, interpretation or alleged violation of the Agreement, or an appeal by an employee who believes he has been unjustly dealt with. The Union's policy grievance was not properly filed and is therefore not within the jurisdiction of the arbitrator.
2. Timeliness Objection – The Union has been aware for numerous years of the requirement to provide documentation prior to returning to the workplace following a medical absence of more than 3 days. This awareness pre-dates the change to the *Canada Labour Code*. Even with the change to the *Canada Labour Code* in December 2022 it has been close to two years. To raise a concern at this time is untimely and the Company maintains estoppel applies.

Notwithstanding the above preliminary objections, the Company disagrees with the Union's contentions and submits as follows:

1. Medical Leave with pay pursuant to s. 239 (1.2) of the *Canada Labour Code* and the Company's disability management and weekly indemnity benefit processes serve different purposes, notwithstanding the fact that both may require an employee to submit medical documentation.
2. CPKC's workplace is governed by the *Railway Safety Act* and the Fitness to Work Medical Policy and Procedure (HS 5000) and outlines that MWED members are in a safety-sensitive roles. HS 5000 outlines the medical fitness to work requirements.
3. Furthermore, CPKC's Disability Management Policy 4000 and Procedure 5000 state that where an employee is unable to return to work within three (3) consecutive days for non-occupational medical reasons, a Status Change Form ("SCF") must be submitted to Employee Services. The submission of an SCF initiates the disability management process under Procedure 5000 and the potential entitlement to Weekly Indemnity Benefits ("WIB") provided pursuant to he Collective Agreement and Administered by Telus Health.
4. Once these processes have been initiated, TELUS HEALTH will contact the employee and request that the employee complete the necessary forms to initiate a claim for WIB benefits. The request will include medical documentation to assist TELUS HEALTH in determining whether the employee is totally disabled and therefore entitled to WIB. During the employee's absence, he/she will also be requested to provide regularly updated Functional Abilities Forms completed by their treating physician confirming/updating their medical status and expected return to work date, as well as any associated limitations/restrictions.
5. Section 239(2) of the *Canada Labour Code* provides employers with a procedure when it doubts the validity of the absence due to illness or injury. Employers may ask in writing and within 15 days of the return to work that the employee obtain a medical certificate once he/she returns to work in order to substantiate the illness or injury.

6. The purpose of the Disability Management process is to manage an employee's medical absence (including any WIB benefits to which he/she may be entitled) and facilitate his/her return to work once medically cleared to do so. The process does not conflict or violate s. 239(1.2) of the *Canada Labour Code* as employees remain entitled to any paid medical leave days they have accrued when absent for medical reasons and any medical information being requested is not for the purpose of substantiating the legitimacy of the employee's absence pursuant to s.239(2) of the *Code*.
7. The Company's Fitness to Work Medical Policy and Procedure (HS 5000), disability management and WIB processes do not conflict with nor violate s.239(2) of the *Code*. As such, the Company submits the Union is not entitled to the remedies it is seeking and the grievance must be dismissed.

For the Union:
(SGD.) W. Phillips
President, MWED

For the Company:
(SGD.) L. McGinley
Director Labour Relations

There appeared on behalf of the Company:

T. Gain	– Legal Counsel Labour & Employment, Calgary
D. Zurbuchen	– Manager Labour Relations, Calgary
S. Scott	– Manager Labour Relations, Calgary
J. Bessey	– AVP Acquisition & Occupational Health, Calgary

And on behalf of the Union:

W. Phillips	– President, Frankford, Ontario
M. Foster	– Director, Belleville, Ontario

AWARD OF THE ARBITRATOR

Context

1. The Medical Leave provisions in the Canada Labour Code were amended in 2022 to provide greater leave and paid medical leave to federal employees, other than those working directly for the federal government.

2. The changes resulted in the following applicable provisions:

> **DIVISION XIII - Medical Leave**
>
> **Entitlement to leave**
>
> **239 (1)** Every employee is entitled to and shall be granted a medical leave of absence from employment of up to 27 weeks as a result of
>
> - personal illness or injury;
> - organ or tissue donation;
> - medical appointments during working hours; or
> - quarantine.
>
> […]
>
> **Leave with pay**

> **(1.2)** Subject to subsection (1.21) and the regulations, an employee earns, as of the first day on which this subsection applies to the employee,
>
> - after completing 30 days of continuous employment with an employer, three days of medical leave of absence with pay; and
> - following the period of 30 days referred to in paragraph (a), at the
> - beginning of each month after completing one month of continuous employment with the employer, one day of medical leave of absence
> - with pay.
>
> **Maximum of 10 days**
>
> **(1.21)** Subject to the regulations, an employee is entitled to earn up to 10 days of medical leave of absence with pay in a calendar year.
>
> […]
>
> **Certificate**
>
> **(2)** The employer may, in writing and no later than 15 days after the return to work of an employee who has taken a medical leave of absence of at least five consecutive days, require the employee to provide a certificate issued by a health care practitioner certifying that the employee was incapable of working for the period of their medical leave of absence.
>
> […]

3. The current dispute arises from the interpretation of the Company Policy which permits the Company to request a Functional Abilities Form from an employee before a return to work, where that absence has been greater than 3 days. The Union contends that this is in conflict with s. 239 (2) of the Code, while the Company contends that it is not.

Testimony of Witness

4. The Company called Jennifer Fox Bessey, who is the Assistant Vice President, Talent Acquisition and Occupational Health for the Company. It provided a Will-Say Statement, which reads as follows:

> I am currently the Assistant Vice President - Talent Acquisition and Occupational Health for CPKC. I have held this position since September 2024. Prior to being named AVP in September 2024, I was Managing Director - Talent Acquisition and Occupational Health and had all of the same responsibilities as I do now.
>
> As, AVP - Talent Acquisition and Occupational Health, I am responsible for developing and driving CPKC's North American Talent Acquisition strategy, overseeing benefits design and strategy, managing occupational health initiatives (including fitness for duty requirements and alcohol and drug testing programs in Canada, the U.S and Mexico) as well as leading CPKC's North American disability management programs and strategy. I

report to Maeghan Albiston, Senior Vice President & Chief Human Resources Officer.

More specifically, I am responsible for the management and oversight of CPKC's Health Services, Disability Management, Benefits and Workers Compensation departments, all of whom manage employee absences due to medical reasons and who may request medical information from employees.

I was originally hired by CPKC in June 2017 as Assistant Vice President - Total Rewards. In this role I had responsibility for CPKC's Benefits Department.

Non-Occupational Injury/Illness and Weekly Indemnity Benefits (WIB)

Where an employee suffers a non-occupational injury or illness that may impact their ability to attend work, an employee must report the non-occupational injury/illness to their manager. The employee assesses whether the illness or injury is expected to exceed three (3) consecutive working days.

If the employee remains unable to return on the fourth (4^{th}) consecutive day, a status change form **("SCF")** is submitted to Employee Services by the employee's manager/supervisor. If the 4^{th} day is a weekend or the employee is not otherwise scheduled to work, then an SCF is not submitted if the employee can return on his/her next scheduled work day.

The submission of an SCF initiates the Weekly Indemnity Benefit Plan **("WIB")** process to determine whether the employee is "totally disabled" within the meaning of the plan and therefore entitled to benefits. The purpose of this process is to ensure the employee does not suffer any wage loss during any absence to the extent possible by expediting the WIB process which coincides with the three-day waiting period for WIB benefits.

The submission of an SCF also initiates the return-to-work planning process which is managed by the Company's Disability Management department, and whose responsibility it is to facilitate an early, safe and sustained return to work of the employee where appropriate.

Once Employee Services receives the SCF, it sends a referral to TELUS HEALTH (the Company's benefit administrator for WIB) to determine whether the employee is "totally disabled" and therefore eligible for WIB benefits.

TELUS HEALTH then contacts the employee and begins the claim process which typically occurs on the 5^{th} or 6^{th} business day. As part of this process, employees are asked to provide details of their illness or injury. Depending on the severity and duration of their absence, employees may be asked to provide medical documentation to assess whether they meet the eligibility requirements for entitlement to WIB benefits.

Medical information requested by TELUS HEALTH is used for the purpose of assessing entitlement to WIB benefits. TELUS HEALTH may also provide Disability Management with information relating to the

employee's restrictions and/or limitations in order to support the employees eventual return to work.

The Company has no involvement in TELUS HEALTH's assessment process, and the outcome does not affect the employee's entitlement to medical leave under the *Code.*

An employee may not be eligible for WIB or decide not to participate in the WIB process. In this instance, the Company would request a Functional Abilities Form **("FAF")** be completed to support the employee's eventual return to work. The ability to use medical leave under s.239, is not affected by any of the above.

Occupational Injury/Illness and Workers Compensation

Where an employee sustains an occupational injury or illness, he/she must report it to their manager. If the employee seeks medical attention beyond first aid and/or incurs lost time, the Company may request that a FAF be completed to determine restrictions and limitations and confirm the employee's ability to safely return to work.

The purpose of the FAF is for immediate and safe management of the return-to-work process based on abilities and limitations arising out of the occupational injury/illness.

Managing Absences & Return to Work

An employee's use of medical leave under the *Canada Labour Code* is managed by the employee directly with his/her manager. If the manager has reason to doubt the legitimacy often employee's use of medical leave, the manager may request that the employee provide a medical certificate in order to validate the illness or injury. The Managers are expected to comply with s.239 of the *Code.*

FAF forms are used to assist the Company in managing the employee's return to work following an absence due to injury or illness and to facilitate a safe and healthy return. This includes an understanding of any restrictions/limitations that may require accommodation in order for the employee to return to work safely.

The information requested in a FAF form relates solely to the employee's current status, prognosis for return and any restrictions or limitations that require accommodation in order to facilitate a return to work whether temporary or permanent.

FAF's will be requested at different times depending on the circumstances. FAF's are not requested or used by the Company for the purposes of validating a medical leave under the *Code.*

The purpose of these processes is not to validate the injury or illness, but rather to assess the employee's capacity to return to work safely and plan for that eventuality which is outside the scope of s.239(2) of the *Code.*

The above policies, procedures and practices and more specifically the processes for both non-occupational and occupational injury and illness have been in place for at least the last five years, if not more.

> In the event CPKC is prohibited from requesting medical information for the purposes of establishing entitlement to WIB and/or managing and planning for the employee's eventual return to work until after the 5th consecutive day of absence, it may take longer to assess an employee's entitlement to WIB benefits if applicable, and the return-to-work process may be delayed
>
> I am providing this will-say statement in connection with this arbitration and for no other purpose.
>
> This statement has been prepared by me or under my instructions and I hereby confirm its accuracy.

5. Ms. Fox, who is responsible for some 140 people, manages the process at the Company by which employees Return to Work and receive benefits. She notes that all employees who are off work for more than 3 days are directly managed by Telus Health. She testified that employees are entitled to 10 paid sick days under the Code and eligible for Weekly Indemnity Benefits of approximately $850-$900 thereafter.

6. She testified that if an employee is absent for 2-3 days and have used sick days, they just return to work. If the employee is absent for 4-5 days, they are required to supply management with additional information. If they are ready to Return to Work after 5 days, the process usually ends there. Of some 10,000 cases in the last 3 years, only 12 have been required to provide additional information. These few cases could have been due to error, surgeries or addictions.

7. In response to a question from the arbitrator, she stated that employees who were ready to Return to Work, but awaiting confirmation from their doctor, would use sick days or WIB.

8. In cross-examination, she explained that Day 4 triggers a status change, getting Telus involved. She noted that the significance of the change of status was to begin the WIB process. If the 3-day requirement was changed to 5, many employees who do not have more than 3 medical days left would suffer a loss in pay until WIB could kick in.

9. She was not aware of any employees not getting paid because of a FAF requirement. Normally, they would get either sick leave or WIB payments.

10. She confirmed that there is nothing in Policy HS 5000 which requires a FAF after 3 days, but it is the policy behind it.

11. She had not reached out to ESDC following the Union's communications with them. She was unaware whether her Legal Department had done so.

Issues

A. Preliminary objection of the Company concerning both the nature and timeliness of the current grievance.

B. Does a FAF requirement after 3 days of a medical absence conflict with the primacy of s. 239 (2) of the Code?

A. Preliminary objection of the Company concerning both the nature and timeliness of the current grievance.

Position of Parties

12. The Company takes the position that a policy grievance is not possible under section 15 of the Collective Agreement. It further argues that s. 239(2) of the Code has existed in various forms prior to December 1, 2022, when paid medical leave was introduced. The Union has never challenged this requirement, in place for at least 5 years. This leads the Company to claim either that the grievance is untimely or that an estoppel argument exists against the Union.

13. The Union takes the position that the Union is entitled to file grievances based on Code violations and has frequently done so. It points to s. 60 of the Code which confers on arbitrators the power to interpret a statute in relation to employment matters. It further points to section 6B of the CROA Memorandum, which permits "other disputes" to be referred to arbitration.

14. The Union argues that a FAF requirement after 3 days of medical leave based on a Company Policy is in clear violation of s. 239(2) of the Code, which clearly can be challenged. It argues that each such violation of the Code is a fresh violation, such that the grievance is clearly timely. It contends that the Company agreed that the grievance could be filed.

Analysis and Decision

15. For the reasons which follow, I find that I do have jurisdiction to hear the grievance. I find further that the grievance is not untimely and that estoppel against the Union has not been established.

16. Firstly, with respect to the jurisdictional issue, the Supreme Court of Canada decision in **Weber v Ontario Hydro** 1995 CarswellOnt 240 established that arbitrators have the power and duty to apply both the common law and statutes.

The Court in **Parry Sound v Opseu Local 234** 2003 SCC 42 similarly found that arbitrators must apply employment related statutes as if they were part of the collective agreement. There can be little doubt that the Canada Labour Code is an employment related statute. Moreover, s. 60 of the Code specifically empowers arbitrators to "interpret, apply and give relief in accordance with a statute relating to employment matters, whether or not there is conflict between the statute and the collective agreement".

17. As a practical matter, many arbitral decisions deal with alleged Code violations, including cases dealing with railways and other transportation companies (see for example, **AH 890** and **Teamsters, Local Union 987 of Alberta** and **Purolator Inc**, 2024 Canlii 21937).

18. Here there is squarely an allegation that an employer policy is in conflict with the Canada Labour Code. I find that both the Code and the jurisprudence provide jurisdiction to an arbitrator to deal with such a conflict. I find as well that the CROA memorandum "other disputes" reference in section 6B would encompass such a dispute.

19. Secondly, I do not find that the grievance is untimely. While the Code had been amended in December 2022, the specific dispute only arose in late May, early June 2024 concerning Mr. Dubois (see Tab 11, Union documents). The Union investigated and corresponded with Labour Canada, hearing back from the Department on June 18, 2024 (see Tab 10, Union documents). It provided this information to the Company, hearing back from them on July 24, 2024 (see Tab 8, Union documents). A grievance was filed on July 31, 2024 (see Tab 1, company documents). I therefore find that the grievance was filed in a timely manner.

20. Thirdly, I do not find that estoppel is applicable here. In **CROA 5042**, I reviewed the jurisprudence with respect to estoppel. The requirements for a finding of estoppel are as follows:

> Estoppel is established where:
>
> - A representation is made either verbally or through conduct;
> - There is an intention that the representation would be relied upon;
> - There is actual reliance on the representation; and
> - A detriment is suffered as a result of the reliance.

21. Here, the Company's own witness, Ms. Fox, set out how very rarely a request for a FAF prior to a 5-day medical leave occurs. The Union was advised of Mr. Dubois' situation and followed up, as set out above. The Company has not provided evidence of the Union acquiescing to similar problems in the past. Nor has the Company established actual reliance by the Company on the Union conduct or any detrimental reliance, based upon the Union conduct. The facts underlying **CROA 5042** were quite different from those here. For these reasons, I find that estoppel has not been established.

B. Does a FAF requirement after 3 days of a medical absence conflict with the primacy of s. 239 (2) of the Code?

Position of the Parties

22. The Union submits that s. 239(2) of the Code is clear that a medical certificate may only be requested by an employer after the employee has been on medical leave for 5 days or more. It argues that any conflict between the company Policy on FAFs after 3 days must be found inoperative, in light of the primacy of the Code provision.

23. The Union contends that Labour Canada has confirmed its interpretation of the Code and the Policy, but the Company continues to refuse to follow the Code. The Union submits that the Company may not contract out of the Code.

24. The Company submits that it is in no way in breach of the Code. It argues that Division XIII of the Code deals with medical leave and not fitness to return to work. It submits that employees are entitled to and do receive the full paid medical leave foreseen by the Code. The restriction on the ability of Companies to require a medical certificate until 5 medical leave days have been taken does not deal with a medical certificate confirming that the employee is fit to return to work.

Analysis and Decision

25. For the reasons that follow, I find the Company submissions compelling and must reject the grievance.

26. When interpreting a statute, it must be read as a whole and with a purposive approach (see, for example, **Dynamex Canada Inc. v. Mamona**, 2003 FCA 248 (Canlii).

27. Part II of the Code deals with Occupational Health and Safety. Section 124 imposes on the employer a duty to ensure the health and safety at work of every

employee. Section 126 imposes duties on each employee to ensure their own safety and the safety of others.

28. Part III of the Code sets out Standard Hours, Wages, Vacations and Holidays for defined federal employees, including rail employees, establishing minimum wage and benefit entitlements. Part III contains 16 Divisions, including Division XIII, dealing with medical leave.

29. Within Division XIII, section 239 sets out the paid and unpaid benefits available to employees for medical leave. Section 239 (1.21) notes: “Subject to the regulations, an employee is entitled to earn up to 10 days of medical leave of absence with pay in a calendar year”. Section 239 (2) provides that an employer may require a medical certificate in certain circumstances:

> **Certificate**
> **(2)** The employer may, in writing and no later than 15 days after the return to work of an employee who has taken a medical leave of absence of at least five consecutive days, require the employee to provide a certificate issued by a health care practitioner certifying that the employee was incapable of working for the period of their medical leave of absence.

30. It is noteworthy that the purpose of the certificate is to certify “that the employee was incapable of working for the period of their medical leave of absence”. The certificate from the doctor is solely to verify the validity of the leave taken. It in no way addresses whether the employee is fit to return to work. In fact, the certificate may be requested up to 15 days after the employee has returned to work.

31. In contrast, the FAF form (see Tab 10, Company documents) seeks information from the employee’s doctor about his current condition and whether he is fit to return to work, or needs to be subject to certain limitations. The focus of the FAF report is entirely about the current and future condition of the employee. It does not address whether the employee was unable to work in the past, or eligible for medical leave.

32. The entitlement to medical leave and the ability to safely return to work are two separate concepts. An employee may have been entirely eligible for medical leave, paid and unpaid, with or without verification under s. 239 (2), without ever addressing the Company concern whether he can currently safely return to work. An example will illustrate this point. If an employee has a serious concussion, they may be off work for a lengthy period, getting medical leave and then WIB. Given the seriousness of the injury, it is highly unlikely that the Company would avail itself of any right of verification concerning the paid medical leave. It is certain, however,

that a FAF would be required before the employee is returned to work. If the concussion was minor, and the employee sought to return to work after three days, the Company could not seek to verify the validity of the leave under s. 239(2) but would still be entitled to verify through a FAF that the employee was fit to return. As indicated by Ms. Fox, the employee would receive medical leave or WIB pending that return-to-work process.

33. A close review of the communications between the Union and Labour Canada (see Tabs 10, 11, Union documents) does not reveal an answer to the present issue. Labour Canada is quite clear that: "An employee's entitlement to medical leave cannot be limited through the imposition of medical certificate requirements in excess of those provided for under the Code". The letter addresses medical leave. A FAF request deals with, as set out above, whether the employee is fit to return to work and not whether they are eligible for paid medical leave. The Company does not, as explained by Ms. Fox, limit Code benefits, even if a FAF has been requested.

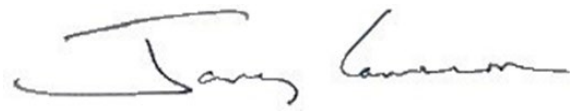
34. With respect to the individual employee referenced by the Union, Mr. Dubois was off work from May 27 to June 6, 2024. During this period, he received paid medical leave for 3 days and then pay for the remaining days through WIB (see Tab 1, Company documents). The evidence does not show whether Mr. Dubois had previously used the other paid medical leave to which he may have been entitled.

35. Given the differing purposes of medical leave verification under s. 239(2) of the Code and a FAF request, I do not find that such a request is an infringement of the Code. This view is buttressed by the fact that the FAF request does not affect the medical leave entitlement.

Conclusion

36. The grievance is therefore dismissed.

37. I remain seized with respect to any issue of interpretation or application of this Award.



May 8, 2025

JAMES CAMERON

ARBITRATOR