CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4597

Heard in Calgary, November 16, 2017

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The Union advanced an appeal of the Company's decision to withhold from service Engineer B. Reimer of Saskatoon, SK since March 17, 2016.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

On January 12, 2016, Engineer Reimer received a prohibition order which did not include the direction to not operate railway equipment. On March 17, 2016 the Company informed him that he been removed from service.

The Union contends there is no evidence to support removing him from service or disallowing him to operate railway equipment. The prohibition order contained no restriction on operating railway equipment and the Union contends the Company has not provided any evidence to support their position. The Union contends the onus falls upon the Company to demonstrate that his removal from service is justified, in this case that burden has not been met and the Company has further and otherwise not been reasonable in the handling of this employee.

The Union contends the Company has not provided any firm evidence that would support removing Engineer Reimer from service and not allowing him to work. The Union contends that by withholding Engineer Reimer from employment breaches the Collective Agreement and the Canadian Human Rights Act, including its duty to accommodate him under the Act.

As the Company has not met the requisite standard, the Union requests Engineer Reimer be reinstated into suitable work until he returns to his position as Locomotive Engineer at a time when he is able to with no loss of seniority, as well as be made whole for all wage loss with interest including benefits. The Company has denied the Union's request.

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

FOR THE COMPANY:
(SGD.)

There appeared on behalf of the Company:

S. Oliver	– Labour Relations Officer, Calgary
L. McGinley	– Manager Labour Relations, Calgary

There appeared on behalf of the Union:

K. Stubeing	– Counsel, Caley Wray, Toronto
L. Daley	– Vice General Chairman, Revelstoke
D. Spence	– Local Chairman, Saskatoon
B. Reimer	– Grievor, Saskatoon

AWARD OF THE ARBITRATOR

I

The facts of this case are not in dispute.

The Grievor resides in Saskatoon. He is 45 years old. Until August 11, 2016, he was an employee at CP Rail with twenty five years of discipline free service, other than two informal discussions in 2009.

On December 22, 2015, the Grievor was charged with impaired driving pursuant to section 255 (1) and 253(1) (b) of the *Criminal Code*. The Grievor immediately notified the Company of this charge; and, the Company immediately held the Grievor out of service effective that date.

On January 12, 2016, the Grievor pled guilty to the offence and was prohibited from operating a "*motor vehicle*" for a period of one year. On that day the Grievor was referred to the Substance Abuse Program (SAP) by the Company's Occupational Health and Safety (OHS) department. The OHS referral notes reflect that the Grievor was to be "*held from service awaiting the SAP report*". Although the Grievor ultimately

completed the two day course arising from this referral, he was not put back into service by the Company.

II

The Company refused to return the Grievor to service based on its interpretation of the *Order of Driving Prohibition (Company Submissions, Tab 1)* which cites subsection 259 (4) of the *Criminal Code* stating:

> "Everyone who operates a motor vehicle, vessel or aircraft or any railway equipment in Canada while he is disqualified from doing so, other than an offender who is registered in an alcohol ignition interlock device program established under the law of the Province in which the offender resides and who complies with the conditions of the program,
>
> Is guilty of an indictable offence and is liable to imprisonment for a term not exceeded 5 years; or
>
> Is guilty of an offence punishable on summary conviction.

The Company took the view that the above subsection prohibited the Grievor from operating both a motor vehicle and railway equipment.

As the documents reflect, there were discussions between the Union, the Grievor and the Company with respect to him being reinstated through the Interlock Program or a revision of the *Order of Driving Prohibition*. Notwithstanding assurances from the Saskatchewan Government Insurance (SGI) Office (which deals with the relaxation of driving prohibitions under the *Ignition Interlock Device Program*) that there was no prohibition relative to the Grievor's operation of a locomotive, the Company maintained its position (as reflected in the letter of Superintendent Squires on March 12, 2016 (*Company Submissions; Tab 6)* that the *Order of Driving Prohibition* restricted the

Grievor from operating rail equipment; and, that he would be held off work awaiting supervisory approval.

The Company refused to reinstate the Grievor unless the court, that issued the Order, provided the Grievor with specific permission to operate a locomotive. Again, as reflected by the materials, the Grievor's attempt in that respect were deflected by the Saskatchewan Provincial Court back to the SGI. The Company takes the position that the SGI was not the appropriate authority to make a determination with respect to the application of the driving prohibition in the circumstances and therefore maintained its position that the Grievor would not be permitted, in absence of a Court directive otherwise, to serve as a locomotive engineer or a conductor.

A reading of the decisions of the *Saskatchewan Court of Queen's Bench* decision in *R v. Ball (1998) S.J. 186,* and the *Supreme Court of the Northwest Territories in R v R.D.F. (1997) NWT.J 34* makes it apparent that the word "*or*", as used in *section 259 (4)* of the *Criminal Code*, is to be read disjunctively. Accordingly, the prohibition referred to in *section 259 (4)* is - in the case of the Grievor who was guilty of impaired driving - a prohibition against his driving a motor vehicle.

> As stated by the Court *in R v RDF:*
>
> 31. …The words "as the case may be" do not add anything to sub-paragraphs (a), (b) and (c) which are clear standing on their own. This suggests to me that the words in question must refer back to the type of vehicle to be prohibited, which in turn must have a connection with the type of vehicle involved in the commission of the offence…

> 35. In the result, the word "or" is to be read disjunctively, so that the court shall make the order prohibiting the person convicted from operation a motor vehicle, or operation an aircraft or operating a vessel or operating rail equipment, as the case may be depending on what was involved in the commission of the offence…
>
> 36. … the words "as the case may be" simply indicated to me that a connection is required between the type of vehicle involved and the commission of the offence and the prohibition."

While the Company is entitled to require compliance with its OHS directives - including performance management and return to work evaluations - the interpretations provided in the *Ball* and *R.D.F.* decisions, make it clear that the provisions of the *Criminal Code* did not restrict the Grievor from operating railway equipment. As well, as conceded by the Company during the course of an *Employment Insurance Tribunal* hearing relative to the Grievor's employment insurance benefits (*Union Submissions; Tab 8*), a valid driver's licence is not a condition of employment for operating railway equipment; and, as earlier noted (*Union Submissions; Tab 6)* the SGI indicated that they had no issues with the Grievor operating railway equipment.

Finally, as is apparent from Mr. Squires' letter to the Grievor of March 17, 2016 (*Company Submissions; Tab 6),* the Company did not view the Grievor's impaired driving conviction - in and of itself - as just cause for discipline in that, by then, some three months had passed since the incident and the Company was still discussing what it was that the Grievor needed to do in order to return to work.

Taking the above into consideration, other than its misinterpretation of the prohibition contained in the *Order of Driving Prohibition*, the Company has not provided

any other rationale or explanation for its decision to hold the Grievor out of service past the *SAP* report stage.

In the circumstances, it was reasonable for the Company to require an evaluation of the Grievor pursuant to its *OHS* standards; and, reasonable to hold him out of service until such time as the *SAP* report was completed and reported to the Supervisor. However, having regard to my earlier conclusion that the driving prohibition against the Grievor did not contain a restriction on operating railway equipment, and the Company's concession that a valid driver's licence was not a condition of employment *(Union Submissions; Tab 8)*, there is no reasonable explanation for the Company's decision to hold the Grievor out of service past the SAP report stage, particularly having regard to the Grievor's seniority and disciplinary free performance.

Accordingly, I conclude that the Grievor shall be compensated for being held out of service for that period of time after the Company's SAP report was completed to the date of his resignation on August 11, 2016.

III

The Grievor resigned his employment with the Company effective August 11, 2016 *(Company Submissions; Tab 3).* There is no evidence with respect to the Grievor's rationale for resigning. I infer, therefore, that he did so of his own volition and for his own reasons. Accordingly, no compensation would flow after the date of his

resignation. In that respect, I accept the comments of Arbitrator Picher in **CROA 2028** wherein he states:

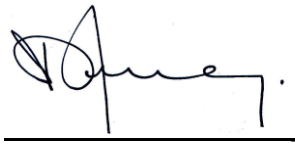
> "In the circumstances, however, two points of clarification must be made. The first is that by notifying the Company that he intended to resign, and thereafter by signing a resignation document, Mr. Shaw became the author of his own misfortunate in respect of any loss of wages or benefits which may have resulted from his actions."

IV

The grievance is allowed.

The Grievor shall be made whole from the period of time that the Company's *SAP* report was completed to the date of his resignation on August 11, 2016.

I shall retain jurisdiction with respect to the application, interpretation or administration of this award.



March 12, 2018

RICHARD I. HORNUNG, Q.C.
ARBITRATOR