

**CANADIAN RAILWAY OFFICE OF ARBITRATION  
& DISPUTE RESOLUTION**

**CASE NO. 4738 (S)**

Concerning

**CANADIAN PACIFIC RAILWAY**

And

**TEAMSTERS CANADA RAIL CONFERENCE**

**Submissions on behalf of the Company:**

D. Zurbuchen – Manager Labour Relations, Calgary

**Submissions on behalf of the Union:**

K. Stuebing – Counsel, Caley Wray, Toronto

**SUPPLEMENTARY AWARD**

An Award was issued on June 11, 2020 reinstating the grievor, Denis Neglia, to his Conductor position "...without loss of seniority but without any further compensation". A dispute arose after the award was issued regarding whether the grievor was entitled to post-reinstatement compensation. The parties were directed in a conference call on August 18, 2020 to provide written submissions (no more than two pages in length) by September 4, 2020.

The grievor was required under the Railway Medical Guidelines to attend for a medical assessment prior to returning to work. The grievor was contacted by a third-party medical assessment firm, Wellpoint Health Ltd., on Wednesday June 17, 2020 regarding his availability for an appointment at a medical clinic retained by Wellpoint Health Ltd. The grievor indicated in his discussion with a representative of Wellpoint Health Ltd. on June 17, 2020 that he could attend at the medical clinic the following week for an assessment. Wellpoint Health Ltd. then contacted the medical clinic on June 18, 2020 but was advised that they had no availability until June 29, 2020. The grievor attended for his scheduled medical appointment on June 29, 2020 at the medical clinic. The Company's OHS Department was provided with his test results that same day. On July 2, 2020 the grievor was medically cleared by the OHS Department to return to work. He returned to work in active service on July 7, 2020.

The Company maintained in its initial submission that it should not be responsible for having to compensate for the three weeks it took the grievor to comply with the reinstatement award and the Railway Medical Guidelines. The Company noted that it took 1.5 weeks for the grievor to schedule his medical appointment for his assessment, which amounts to half the time it took for him to be cleared to return to work. The Company also maintains that the grievor would have been required to provide the employer where he was working before his reinstatement with two weeks notice of his last day of work prior to returning to work for CP.

The Union cited several authorities in their initial submission to support their position that employees have been consistently compensated for the period following the reinstatement orders where the Company requires medical testing prior to reinstatement. See: **CROA 4355-S; CROA 4400; CROA-4505-S**. The Union argues that the authorities from this office stand for the proposition that the Company must bear the full cost of compensation for the time between the issuance of the reinstatement award and the employee's return to active service. The Union further submits that absent evidence of undue delay on the part of the grievor, he is entitled to be compensated for all time lost for the period between the issuance of the award and his return to active service.

After reviewing the parties' initial written submissions, the arbitrator requested further written supplementary submissions from the parties on the Company's allegation in their initial submission that the delay in the scheduling of the medical assessment to June 29, 2020 was the fault of the grievor. The Union and the Company provided supplementary written submissions on this point on September 25, 2020 and October 2, 2020 respectively.

The arbitrator notes that the cases cited by the Union in their initial submission support their position that absent undue delay by the grievor, the Company is typically required to compensate a returning employee for the period between the reinstatement order and the first day of active service. As Arbitrator Clarke noted in **CROA&DR 4505-S** (referring by footnote to CROA&DR4355-S and CROA&DR 4400S) at para 43:

Similarly, for reinstatement situations, it appears that the time it takes to comply with medical requests is generally compensated, *subject to unreasonable delays attributable to the employee.*

The timeline set out in the email provided by Wellpoint Health Ltd. of September 18, 2020 to the OHS Department, as set out in the Company's supplementary written submissions, is helpful. It indicates that the first contact with the grievor initiated by the third-party contractor, Wellpoint Health Ltd., took place on Wednesday, June 17, 2020, six days after he was ordered reinstated on June 11, 2020. In his conversation with the Wellpoint Health Ltd. on June 17, 2020, the grievor, according to the timeline, indicated that he would be available "*next week sometime, around 10 am-11am preferably*".

The timeline then confirms that a representative of Wellpoint Health Ltd. was in touch at 10:54 on June 18, 2020 with the medical clinic where the grievor was required to attend for his medical assessment. According to the timeline, the medical clinic advised Wellpoint "*I have nothing available next week, I have June 29, Monday at 10 a.m.*". The timeline further indicates that a Wellpoint Health Ltd. representative then contacted the grievor at 11:03 a.m. and verbally advised him of his appointment time. The grievor agreed to the appointment time of June 29, 2020.

I do not accept the Company's argument that it took the grievor 1.5 weeks to set up his appointment of June 29, 2020. The grievor was not contacted by Wellpoint Health Ltd. until Wednesday, June 17, 2020, some six days after he was ordered reinstated. With only two business days left in that week (Thursday, June 18<sup>th</sup> and Friday, June 19<sup>th</sup>) he made what I find to be a reasonable offer to attend the following week (June 22-26,

2020) for his appointment. Wellpoint Health Ltd. was unable, through no fault of the grievor's, or Wellpoint Health Ltd. for that matter, to arrange for an appointment for the grievor at the medical clinic for the following week. Instead, the clinic offered up an appointment for Monday, June 29, 2020, which the grievor accepted.

In summary, the grievor cannot be faulted in my view for any inaction on his part for the scheduling of his medical assessment. Nor is there any documentary or other reliable evidence to support the Company's assertion in its initial submission that the grievor would have been required to provide two weeks resignation notice to another employer prior to returning to active service with the Company.

The grievor shall be compensated from the date of the issuance of the award on June 11, 2020 to the date he returned to duty, June 29, 2020. I shall remain seized should the parties disagree on the amount owing to the grievor for this time period.



**JOHN MOREAU, Q.C.**

**October 6, 2020**