Supplemental Award

IN THE MATTER OF AN ARBITRATION

BETWEEN:

The Canadian Pacific Railway Company

and

Teamsters Rail Conference

(Implementation Dispute: Disclosure of Personal Information)

Before:	William Kaplan Sole Arbitrator
Appearances	
For the Company:	Lauren McGinley Labour Relations CPR
For the Union:	Ken Stuebing Caley Wray Barristers & Solicitors

The matters in dispute proceeded to a hearing held by Zoom on December 1, 2022.

Introduction

On October 31, 2018, this matter first proceeded to a hearing. In brief, the Company revised the consent portion of the Functional Abilities Form (FAF) and a grievance was filed both about this and about Company Policy 1804. The factual context underlying the grievance is fully set out in the initial pleadings. There is no doubt – discussed further below – that both the FAF consent provision and Policy 1804 were directly engaged by the grievance and that I had jurisdiction over both.

After an unsuccessful effort to assist the parties in resolving the matters in dispute – undertaken with their consent both at and after the hearing – I issued the following award (the 2018 award):

Except as required by law, supervisors and managers are only entitled to information about functional limitations.

The FAF provides:

I authorize the healthcare professional who has signed this form to release to CP i.e. my supervisor, Disability Management Specialist, Health Services (HS) and, where applicable, the WCB Specialist, any functional limitations and/or restrictions information relevant to my return to work. I also authorize my healthcare professional to release, and discuss, information concerning my present medical condition solely to/with HS. Furthermore, I authorize CP to release to my union representative: this Functional Abilities Form (FAF) (excluding the "Medical Report") for the purposes of return to work planning; this FAF (without exclusions) for the purposes of responding to any grievance, arbitration, or other proceedings when the information is relevant to the proceeding. I consent to receiving correspondence related to my functional limitations and/or restrictions information, medical condition(s) and assessments from HS and/or Disability Management by email. I understand that a copy of this consent is as valid as the original. This consent is valid unless and until withdrawn in writing to HS and/or my Disability Management Specialist. I also acknowledge that use and disclosure of my medical information by CP will be in accordance with legal requirements and CP Policy and Procedure 1804, Privacy of Information.

Policy 1804 provided and still provides:

2.2 Release / Disclosure of Medical and Occupational Health Information

2.2.1 Medical and occupational health information is collected by Canadian Pacific (CP) to manage the employment relationship. OHS can release medical and occupational health information to CP Managers/Supervisors about an

employee's or applicant's health status as relates to their ability to perform duties. Relevant medical and occupational health information may be shared with CP Managers/Supervisors where necessary to manage the employment relationship including investigating misconduct or performance issues. Medical and occupational health information may also be released or disclosed to other stakeholders within the Company on a "need to know" basis without consent in the following circumstances:

> a) To assess CP's legal duty to accommodate. In such cases, fitness to work assessments and limitations and/or restrictions may form part of the information shared.
> b) To assess compliance with last chance, reinstatement and/or employment agreements.
> c) For the purposes of judicial or quasi-judicial proceedings.
> d) Where it is required or provided for by regulation or statutory authority. For example, medical and occupational health information may be released to provincial Workers Compensation Boards (WCB), the Transportation Safety Board, Transport Canada or for addressing a health or safety related complaint under the Canada Labour Code.
> e) Where there is litigation which involves the individual's medical condition(s), including grievances, arbitrations or other proceedings before tribunals such as Canadian Railway Office of Arbitration (CROA), WCB, or the Canadian Human Rights Commission or Tribunal and the information is relevant to the proceedings.
> f) In order to investigate misconduct or a breach of policy or agreement and the information is relevant to the investigation.
> g) Where there is a fitness to work concern related to an individual in a Safety Critical or Safety Sensitive Position.

For further certainty, although medical and occupational health information may be released or disclosed in these limited circumstances, due to its particularly sensitive nature, diagnostic information or treatment information will only be released or disclosed where it is absolutely necessary. The decision as to what information is relevant will be made in consultation with the Occupational Health Nurse, the Director Health Services and/or the Chief Medical Officer.

In the aftermath of the award, the union sought to bring the matter back before me alleging that the Company was non-compliant. The Company disagreed. However, on June 14, 2021, I concluded that I retained jurisdiction having remained seized with respect to the implementation of the award. A process was then agreed upon for the exchange of submissions and the case proceeded to a hearing held by Zoom on December 1, 2022.

Union Submissions

In brief, in the union's submission both the consent provision of the FAF and Policy 1804 remain in continued conflict with the clear direction of the award. Put another way, by requiring employees to consent to disclose medical information in accordance with Policy 1804, the Company was in breach of the award. By its very terms, which the union emphasized in its

submissions, and at the hearing, the Company could release and was releasing to various members of management medical information that went well beyond information about functional limitations for accommodation purposes as circumscribed by the award. Doing so not only violated the award, but also violated employees' rights under the collective agreement and applicable legislation. Limited disclosure of functional abilities for accommodation purposes was one thing; requiring an employee to consent to a policy that allowed for medical disclosure that went miles beyond that was quite another. There was no legal basis for this Company – indeed any employer anywhere in Canada – to disclose to various members of management employee health records at its discretion and for virtually any reason it saw fit, which was permissible under Policy 1804. In 2018, and again in these proceedings, the union provided examples where entire unredacted medical files were shared with managers and labour relations personnel for reasons that had nothing to do with accommodation and in circumstances that were in clear conflict with the award, i.e., to the Company's labour relations officials to be used and relied upon as part of a disciplinary process. It was noteworthy to the union that when it objected to private medical information being used in this way, the Company responded by saying that such use was explicitly authorized under Policy 1804.

Very simply, in the union's submission, Policy 1804 allowed supervisors, managers and labour relations professionals access to employee personal medical information for a wide variety of offside purposes, and as such, it was contrary to law, completely inappropriate and open to abuse (which the union documented). Both the FAF and the Policy had to be revised to come into compliance with the award, and the union sought a direction to that effect. In particular, the union asked for a finding that Policy 1804 was in breach of the award and was, therefore, null

and void. The union further requested a cease-and-desist order and a direction to the Company, going forward, to comply with the award among other relief.

Company Submissions

In the Company's submission, the union's request for relief should be dismissed in its entirety as it went beyond an implementation dispute arising out of the award. The Company was also of the view that the union had failed to prove that the Company disclosed any medical information in a manner prohibited by the award and that, in any event, the Company's practices were authorized by Policy 1804 and applicable legislation and therefore permissible. This view was informed by the fact that when the union first brought concerns about the FAF to management's attention, it did not yellow highlight reference to Policy 1804 in the FAF consent form. Indeed, the Company made it clear from the beginning that it objected to the union expanding its grievance to include a challenge to Policy 1804. The grievance itself provided, in the Company's opinion, "unambiguous proof that the Union took no exception to the use and disclosure of employee medical information pursuant to Policy 1804." It would, therefore, be wrong for the union to now challenge any aspect of the Policy as it was "unquestionably outside of the scope of the Union's original grievance…."

In addition, and as another reason in support of its request that the union request for relief be rejected, the Company observed that the award was clearly limited to the FAF. In support of this submission, the Company referred to the preface to the direction (quoted above): "I direct as follows with respect to the consent provision of the FAF". In these circumstances, residual jurisdiction was limited to the consent provision of the FAF not Policy 1804. None of the factual

circumstances the union advanced established a violation of the consent provision of the FAF. In addition, CROA rules, which the Company cited, gave further support to limiting jurisdiction in this manner as did the *Personal Information Protection and Electronic Documents Act* (PIPEDA), which, the Company asserted, permitted it to disclose personal medical information when reasonable to do so and where disclosure was to establish or manage and terminate an employment relationship when the employee has been informed of this potential use (which was this case). For all these reasons and others, the Company asked that all aspects of the union's request for relief be dismissed.

Award

Having carefully considered the submissions and authorities of the parties, I am of the view that the Company is not in compliance with the award and must take immediate steps to establish compliance.

To be clear: there has never been any dispute between the parties that both the FAF itself and Policy 1804 were in issue; a conclusion that was in any event made manifest by the JSI, not to mention the conduct of the parties before, at and after the hearing. It is true enough that the Company objected to what it described as an expansion of the grievance, nevertheless, in their written submissions, at the hearing, and afterwards, the parties by their actions and submissions made it perfectly clear that Policy 1804 was central to the case (a conclusion that would have been, in any event, reached by the application of governing principles that direct arbitrators to focus on the actual issues in dispute).

To now argue otherwise is, respectfully, counterfactual. The union has been on record since the date its grievance was first filed that it objected to the FAF and Policy 1804, and the parties cast all their submissions in the shadow of this objection. Indeed, the documentary record is incontrovertible that Policy 1804 was squarely in issue when the grievance proceeded to a hearing and thereafter (See, for example, Tab 5 of the union Book of Documents). Moreover, it is beyond normative and well accepted in the authorities that medical information cannot be disclosed without consent, unless required by law. To my knowledge, there is no accepted arbitral authority to the contrary. Indeed, the cases establish a guiding principle when it comes to employee health records and information: limited disclosure and based on consent (unless otherwise required by law). Managers are entitled to know about functional limitations and restrictions, not diagnosis or other private health information. Generally, when medical information is disclosed in the workplace it is for purposes of accommodation and it is always limited to functional abilities to further the accommodation process (as anyone reading the FAF form would readily conclude). Moreover, there is no interpretation of the award where required by law would include pursuant to a Company policy. Whatever *PIPEDA* stands for, it does not include the discretionary disclosure of medical information without employee consent in many of the circumstances set out in Policy 1804 and as outlined by the union in its submissions. It does not escape attention that the Company did not make any submissions that Policy 1804 passed a *KVP* analysis.

To the extent, as asserted by the union, that "union members who are required to attend disciplinary investigations have found that their personal health information beyond functional limitations are relied on as Appendixes in such proceedings," that practice must come to an

immediate end. An employee who provides consent on a FAF to disclosure of medical information does so for one purpose only: to provide the necessary information for accommodation. Any other use of the information is completely improper (not including, of course, when necessary to respond to an accommodation grievance or some other legal proceeding or as required by law).

In the aftermath of the award, the FAF disclosure provision should have been revised to comply with the award. The Company is directed to immediately amend the FAF consent provision to eliminate reference to Policy 1804 and to promptly inform that union that it has done so. To the extent that Policy 1804 continues to allow disclosure of medical information beyond functional abilities and restrictions for accommodation purposes (or for use in an accommodation grievance or as required by law) it is of no force and effect.

Conclusion

I continue to remain seized with respect to the implementation of the award and this award. Any breach of this award, and the earlier one, can be brought back before me on an expedited basis.

DATED at Toronto this 13th day of December 2022.

"William Kaplan"

William Kaplan, Sole Arbitrator