CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4272

Heard in Montreal, December 11, 2013

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the denial of severance pay for Locomotive Engineer DB following his file closure with the Company.

JOINT STATEMENT OF ISSUE:

In December 2012, Mr. DB was notified that, due to his prolonged absence from the workplace, his file would be closed as of January 11, 2013.

The Union contends that the Mr. DB is entitled to severance pay under the *Canada Labour Code.*

The Company disagrees and denies the Union's request.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) B. Brunet	**(SGD.) D. Burke**
General Chairperson	**Labour Relations**

There appeared on behalf of the Company:

N. Hasham	– Legal Counsel, Calgary
B. Sly	– Director Labour Relations, Calgary
D. Guerin	– Director Labour Relations, Calgary
A. Lunn	– WCB Specialist,
D. Burke	– Manager Labour Relations, Calgary
M. Pilon	– WCB Specialist

There appeared on behalf of the Union:

A. Stevens	– Counsel, Caley Wray, Toronto
B. Brunet	– General Chairman, Montreal
J. Campbell	– Vice General Chairman, Toronto

AWARD OF THE ARBITRATOR

The facts material to this grievance are not in dispute. The grievor, D.B. worked actively for the Company for a period of some sixteen years between 1985 and 2001. On September 5, 2001 a person jumped in front of his train, committing suicide. It is not disputed that he suffered emotional and psychological trauma, in the nature of post-traumatic stress disorder by reason of which he remained absent from work for a period of two years. Following an unsuccessful attempt at returning to work in the period of 2003 and 2006 the grievor resumed receipt of WSIB benefits, no longer performing any work for the Company. In October of 2012 the WSIB awarded him a partial entitlement to loss of earnings benefit, a benefit now being paid by the Company, which will he will receive to the age of 65. It was also determined, and it was not disputed, that D.B. will never be able to return to work with the Company.

By letter dated January 18, 2013, the Company advised the grievor that his employment record was closed, effective January 11, 2013. The Union maintains that in that circumstance the Company should have paid to the grievor severance pay in accordance with the provisions of the ***Canada Labour Code***. Section 235 (1) of the Code provides as follows :

> (1) An employer who terminates the employment of an employee who has completed twelve consecutive months of continuous employment by the employer shall, except where the termination is by way of dismissal for just cause, pay the employee the greater of
> (a) two days wages at the employee's regular rate of wages for his regular hours of work in respect of each completed year of employment that is within the term of the employees continuous employment by the employer, and
> (b) five days wages at the employee's regular rate of wages for his regular hours of work.

Counsel for the Union submits that as the grievor's termination was not for just cause, in the sense that it was related to any behavioural misconduct, he remains entitled to severance pay pursuant to section 235 of the ***Canada Labour Code***.

Counsel for the Company submits that it was entitled to close the grievor's employment file, citing the following passage from CROA 2371:

> It is generally accepted by boards of arbitration that where an employee has a substantial record of absenteeism which is, in large part, linked to a medical condition or disability, absent compelling evidence with respect to the cure or control of that condition or disability, it may reasonably be inferred that the employee's record of attendance will not improve in the future. That inference may be the very basis of the Company's judgement as to the viability of the employment relationship an, absent contrary evidence, may suffice to discharge the employer's burden.

Counsel for the employer submits that its been a long standing practice of the Company, on file closures, to make no further payment to the employees concerned, something which he maintains has never been grieved by the Union.

With respect, the Arbitrator has some difficulty with the Company's position. At issue in the instant case is the grievor's entitlement to a statutory form of compensation, being severance pay as mandated by Section 235 (1) of the ***Canada Labour Code***. That provision expressly makes a single exception to entitlement to severance pay, namely dismissal for just cause. It is not disputed that the instant case does not involve a just cause termination, but rather a non-culpable administrative termination of the grievor's employment by reason of his medical condition.

While it may be that in the past employees so terminated have not grieved, or their Union has not grieved on their behalf, that practice cannot trump the right of any individual or worker provided as a statutory protection, as is the case under the ***Canada Labour Code***. Even assuming, without finding, that the parties have passively agreed over the years that severance pay would not be given to employees whose files are administratively closed, there is no basis in law of which I am aware by which any such arrangement or practice can be said to suspend an individual's statutory right to the payment of severance pay.

I am satisfied that by closing the grievor's employment file, as it did, the Company terminated his employment for the purposes of Section 235 (1) of the ***Canada Labour Code***. It did not do so for just cause. In the result, I am compelled to conclude that the Union is correct and that the grievor is entitled to be paid severance pay in accordance with Section 235 (1) of the ***Canada Labour Code***.

While the Arbitrator can appreciate the employer's perspective, noting as it does that the grievor had on more than one occasion indicated that he did not truly wish to return to work with the Company, those facts cannot change the law which properly applies. Nor, in my view, does the grievor's entitlement to WSIB payments have any bearing on the grievor's entitlement to severance pay under the Code.

For the foregoing reasons the grievance must be allowed. The Arbitrator directs that the Company pay to the grievor forthwith severance pay in accordance with Section 235 of the ***Canada Labour Code.***

December 16, 2013

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MICHEL G. PICHER
ARBITRATOR