CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4359

Heard in Montreal, February 10, 2015

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERNCE

DISPUTE:

The Company's new policy statement that any grievance withdrawal by the Union is done on a with prejudice basis.

JOINT STATEMENT OF ISSUE:

On July 9, 2013, the Company communicated their interpretation of Article 121.1(c) of the 4.3 Agreement which was that the only way the Union can withdraw a grievance that has been progressed to arbitration in a timely manner, on a without prejudice basis, is with the consent of the Company. The Company further contends that without the Company's consent, any withdrawal of a grievance which has been progressed to arbitration in a timely manner will be with prejudice, and as such may be relied upon in future cases.

The Union disagrees with the Company's interpretation/policy. The Union contends that the Company's position constitutes a violation of the 4.3 Agreement, including Article 121.1(c), and the *Canada Labour Code*. The Union also contends that the Company's new policy statement is a fundamental departure from extensive past practice between the parties, and therefore that the Company is estopped from advancing such at this stage.

The Union seeks an order that the Company withdraw its policy statement.

The Company disagrees and denies the Union's request.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) R. Hackl	**(SGD.)**
General Chairman	

There appeared on behalf of the Company:

D. Larouche	– Labour Relations Manager, Montreal
A. Daigle	– Labour Relations Manager, Montreal

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
R. Thompson	– General Chairman, Saskatoon
R. Hackl	– Vice-President, Saskatoon

AWARD OF THE ARBITRATOR

1. Both parties wish to have the principle determined. Certain clarification is appropriate.

2. The Company relies on the provisions of Article 121.4 of Agreement 4.3. It reads:

> Any grievance not progressed by the Union within the prescribed time limits shall be considered settled on the basis of the last decision and shall not be subject to further appeal. The settlement of a grievance on this basis will not constitute a precedent or waiver of the contentions of the Union in that case or in respect of other similar claims. Where a decision is not rendered by the appropriate officer of the Company within the prescribed time limits, the grievance may, except as provided in paragraph 121.5, be progressed to the next step in the grievance procedure.

The Company submits that, because not progressing a grievance by the Union within the prescribed time limits give rise to the presumption of settlement of the grievance on a without prejudice and without precedent basis, it follows that, where a grievance is progressed by the Union within the prescribed time limits, that grievance, if subsequently withdrawn, is necessarily with prejudice and precedential.

3. The suggested conclusion is not a necessary consequence of the premise. It does not follow that, because not progressing a grievance within the prescribed time limits results in without prejudice disposition of it, that the opposite holds true for grievances that are progressed in a timely manner. Article 121.4 says nothing of what occurs if a grievance is progressed by the Union in a timely manner. The purpose of the provision is merely to ensure that grievances, which are not advanced, are deemed to be resolved. That is done on the basis that the resolution is without prejudice to the Union's rights to pursue the issue underlying the grievance. Consequently, the language of Article 121.4 does not assist the Company in the position it has adopted.

4. The normal rules of arbitral jurisprudence apply to the dispute between the parties. The cases filed by both parties support this conclusion: *Reliacare Inc. and SEU, Local 210*, [1991] OLAA No. 52 (Dissanayake); *Saint-Gobain Abrasives v. CEP, Local12 (Gutland)*, [2003] OLAA No. 495 (Burkett); *Surrey School District No. 36 v. Surrey Teachers' Assn. of British Columbia Teachers' Federation (Haworth)*, [1994] B.C.C.A.A.A. No.167 (Laing); *ONA v. Sherwood Park Manor Inc. (Job Posting)*, [2008] OLAA No. 768 (Etherington); *UHN v. ONA (Ferguson)*, [2012] OLAA No. 49 (Waddingham); *CROA 2826*; *Great Atlantic and Pacific Co. of Canada Ltd. and RWDSU, Local 414* (1991), 22 LAC (4th) 72 (M. Picher); *Verspeeten Cartage Ltd. and Teamsters Local 141 (Burtch)* (2001), 103 LAC (4th) 174; and *Toronto (City) and CUPE, Local 79 (T.(S.))*, [2014] 118 CLAS 266 (Stout).

5. There is no hard and fast rule, such as the Company would like to impose, that applies to every situation. Each case must be decided on its own merits. A union is always entitled to withdraw a grievance unless to do so would cause the employer significant prejudice. This will occur, for example, if a union were seeking to avoid an obvious impending dismissal of a grievance, when to withdraw the grievance at that stage would be an abuse of process. This might occur, for example, after a hearing has commenced and evidence has been advanced, when the employer could reasonably expect a determination by the arbitrator that the grievance is without merit.

6. In all other circumstances, a union is entitled to withdraw a grievance when it chooses to do so. Whether a union will be entitled to do so without consequences, or whether the employer will be entitled to prevent the union from again pursuing the same or a similar

grievance, depends on the particular circumstances at the time the union seeks to revive the grievance and the prejudice then to the employer.

7. There are good reasons why the arbitral jurisprudence takes a narrow view of when a grievance will be deemed to be withdrawn other than without prejudice. Were the standard otherwise, it would unnecessarily promote litigation, for it would oblige a union to pursue grievances which, for whatever reason, it had decided not to pursue. Given the range of circumstances, interests and considerations that prevail in the pursuit or non-pursuit of any grievance, a union must have a reasonably free hand to decide which grievances it will advance to a hearing and which not. As the Union submits, there are many reasons why it might choose not to pursue a grievance to a hearing, after fuller investigation and consideration prior to a hearing. Arbitrator Luborsky expressed similar considerations in *St. Lawrence Lodge v. CUPE, Local 2107* (2013), 238 LAC (4th) 263, at para. 79:

> 79 To consequently accept the Employer's proposition that the Union was not allowed to withdraw its earlier grievances on a without prejudice basis without the express consent of the Employer, in the absence of which the Union is deemed to have agreed with or forfeited the grievances to the Employer giving rise to issue estoppel on the matter, would have a chilling effect on the Union's readiness to raise issues and discourage an open dialogue on differences through the forum of the grievance procedure, lest any misstep or decision not to proceed with a grievance to arbitration for any number of reasons that might not include the merits of its dispute would be deemed to concede the point to the Employer. In the absence of clear language in the collective agreement having that effect, such a result would in my opinion be at odds with the general purpose of a dispute resolution process intended to encourage the open discussion and debate of differences, which the parties could not have reasonably intended.

8. The issue the parties have posed is not answered in the abstract. Unless a case is well advanced in a hearing and a withdrawal would significantly prejudice the Company, as I have described, the Union can withdraw a grievance. The entitlement to challenge the revival of a grievance, if the Union decides subsequently to pursue it (or one very similar), is done not

when the grievance is withdrawn, but when the grievance is revived. The arbitrator hearing the revived grievance will determine, on the facts and circumstances of the particular grievance at that time, whether the Company has been so prejudiced by its revival that the Union should not be entitled to pursue it. Each such case will be decided on its own merits. Consequently, in the absence of agreement from the Union, there cannot be a general determination, as the Company wants, that all grievances withdrawn at a particular stage will be deemed withdrawn with prejudice. The determination will depend on the particular facts and circumstances at the time the grievance is revived.

9. Accordingly, the grievance is allowed. The Company's statement that every grievance withdrawn without the Company's consent, which has been progressed to arbitration in a timely manner, is with prejudice, is set aside as not binding on the Union.

February 27, 2015

CHRISTOPHER ALBERTYN
ARBITRATOR