IN THE MATTER OF AN ARBITRATION

BETWEEN:

CANADIAN PACIFIC RAILWAY COMPANY
(the "Company")

-and-

CANADIAN SIGNAL AND COMMUNICATIONS SYSTEM COUNCIL NO. 11 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
(the "Union")

GRIEVANCE RE: REQUEST THAT EMPLOYEES SUBMIT TO SAFETY SENSITIVE ALIGNMENT MEDICAL ASSESSMENTS

SOLE ARBITRATOR: MICHEL G. PICHER

APPEARING FOR THE COMPANY:

Mike Moran	**- Manager, Labour Relations**
Maggie Chernenkoff	**- Labour Relations Officer**

APPEARING FOR THE UNION:

Ken Stuebing	**- Counsel**
Luc Couture	**- International Representative**
Lee Hooper	**- IBEW Western Regional Chairman**

A teleconference hearing in this matter was held on February 23, 2012 and a hearing was held in Ottawa, Ontario on April 16, 2012.

AWARD

This arbitration concerns the Union's grievance against a Company policy which now requires employees of long service who occupy safety sensitive positions to be subject to a medical assessment process. The nature of the dispute is reflected in the Joint Statement of Issue filed with the Arbitrator, which reads as follows:

> On October 2, 2011, the Company issued a Fitness to Work Medical Policy (Policy OHS 400) and Fitness to Work Medical Procedures (Procedures # OHS 5000). Further to this Policy, commencing in September 2011 and thereafter, several of the Union's members received a Safety Sensitive Alignment Medical Assessment, with a cover letter requesting that the member undergo a Safety Sensitive Alignment Medical Assessment.
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> The Union contends that the Company's requests are unnecessary, overly intrusive and redundant. The Union further contends that the Company's requests violates employees' personal privacy rights.
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> Therefore, the Union contends that these requests constitute a violation of Wage Agreement No. 1. As well, the Union further contends that the Company's recent request breach members' rights including rights under PIPEDA and the Canadian Human Rights Act.
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> The Union seeks an order that the Company's requests breach Wage Agreement No. 1, its members' privacy rights, PIPEDA and/or the Canadian Human Rights Act. The Union requests an order that the Company cease and desist from these requests.
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> The Company denies the Union's contentions and declines the Union's request.

There is no dispute with respect to the facts. It is common ground that on June 16, 2000, Transport Canada published rules which governed safety critical positions in the railway industry. Referred to as the "Safety Critical Position Rules" they were developed pursuant to section 20 of the *Railway Safety Act*. Those rules identified what is termed a "Safety Critical Position" which is defined as follows:

a. Any railway position directly engaged in operation of trains in main track or yard services; and,

b. Any railway position engaged in rail traffic control.

The above was promulgated as Transport Canada Order 0-17. That Order prompted a consideration by the Railway Association of Canada, in conjunction with the Company as well as the Canadian National Railway Company and Via Rail, to examine which positions fell into the Safety Critical category. That exercise also caused the Company to realize that there are positions which, although not safety critical, do involve occasional risk to employees and to the public. Those positions became identified as Safety Sensitive Positions (SSP), in accordance with the Company's Safety Management System. In furtherance of its policy, on December 1, 2001, the Company published its Safety Sensitive Position List identifying all positions which fall within that category. Among the positions identified are the positions of S&C Maintainer/Wireman, as well as S&C Helper. As noted in the Company's presentation, in fact a number of other S&C positions, virtually all of them, fell into the SSP category, based on the risk inherent in the work of those employees. The policy provides an exception to the extent that S&C employees who are not working in the field, for example, who might be

working in a shop, are not considered Safety Sensitive while performing non-field duties. After further consideration, however, it was determined that no exception would apply to all S&C Technicians and Helpers, and that they would be uniformly classified as Safety Sensitive. That resulted in a revised SSP List which became effective October 1, 2011.

In tandem with the development of that list the decision was made that the Company must be in possession of a medical fitness report for all Safety Sensitive employees, confirming their fitness to work in a SSP.

These changes obviously have consequences for S&C Maintainers and S&C Helpers, many of whom have 20 or more years of service. The Company's notice with respect to changes to its Fitness to Work Medical Policy, effective October 1, 2011, includes the following information:

FTW Requirements for SSP's

- All SSP and SCP employees are subject to the Fitness to Work Medical Policy and Substance Testing Policy. This includes: :
  - Pre-employment or pre-placement medical assessment (includes baseline hearing and vision testing) prior to being allowed to work
  - Further mandated hearing testing within 5 years after hire and after age 40 (as directed by Occupational Health Services – OHS)
  - Medical assessment for any reinstatement
  - OHS medical monitoring based on the medical condition and job requirements
  - Medical assessment from treating physician after prolonged absence greater than 6 months (for other than medical reasons)
  - For Cause, Post Incident/Accident, Unannounced and Applicant/Pre-Placement drug and alcohol testing as required

Essentially, the Company determined that its obligations under the *Railway Safety Act* in respect of being the employer of individuals in Safety Sensitive Positions require it to have on record a medical assessment confirming the fitness to work in a Safety Sensitive Position of all such employees, including S&C Maintainers and S&C Helpers. Under the Company's policy that requirement is satisfied to the extent that it is in possession of a pre-employment medical assessment for a given employee. That was in fact the case for the great majority of the some 462 S&C employees who became classified as holding Safety Sensitive Positions. It was eventually determined that of that number all but 33 had medical assessments on file with the Company, generally pre-employment assessments which satisfied the Company's policy. It appears that subsequently medical forms were in fact found for 18 of the 33 employees, which left 14 employees for whom the company has no medical assessment on file.

On September 1, 2011, the Company's Occupational Health Services issued a letter to employees who were designated as Safety Sensitive. That letter reads as follows:

> Dear (Employee)
>
> **Re: SAFETY SENSITIVE POSITIONS**
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> The Company's Fitness to Work (FTW) committee recently reviewed the existing Safety Sensitive Position (SSP) list and made recommendations to add or delete certain job positions from that list as a result of various collective bargaining agreement changes and the Accountability & Alignment initiative. The Company's Health, Safety, Security and Environment Committee (HSSE) have approved the

changes and several positions have now been classified as Safety Sensitive from Non Safety Sensitive.

Your current job position of S&C TECHN has been added to the updated Safety Sensitive Position List.

Canadian Railway employees in Safety Sensitive Positions may work with heavy moving equipment, work at heights, work with railway machinery, work around "live track" or perform railway policing duties. These are positions where impaired performance due to a medical condition may put public safety at occasional risk, as well as putting at risk the safety of employees, customers, customer's employees, property or the environment.

All employees who hold a SSP designation are subject to the Company's Fitness to Work (FTW) Medical Policy & Procedures and Substance Testing Policy. You are subject to these policies effective 1st October 2011.

The FTW policy requires that Safety Sensitive employees be "subject to Pre-Employment or Pre-Placement Medical Assessment **prior** to being allowed to work in such a position". In order to align you with this Policy prior to the effective date you are required to undergo a specially designed individual Safety Sensitive Alignment (SSA) Medical Assessment which can be performed by your own Physician.

Attached to this letter is a reporting package with medical form to take to your Physician in order to get this medical assessment completed.

What do you need to do now:

1. Make an appointment with your Physician to have this medical completed.

2. Complete your sections in Part 2 and 3 of the Safety Sensitive Alignment (SSA) Medical Report Form prior to attending your appointment. Your Physician is required to complete the remainder of the form and return it directly to OHS.

3. Take this letter, the SSA Medical Report Form, and the attached Job Demands Analysis (JDA) to your

Physician on your appointment so that he/she is aware of what is required.

4. Ensure this medical and report form is completed and returned to OHS directly by your Physician **within 6 months** of the date of this letter.

The cost of this medical assessment will be paid for by the Company. Your Physician can forward the medical report form with their invoice for services directly to:

Canadian Pacific Railway
Occupational Health Services
Suite 600, Gulf Canada Square
401 – 9th Avenue SW
Calgary, AB T2P 4Z4
Fax: (omitted)

In order to determine your ongoing fitness to work in a Safety Sensitive Position the medical assessment is required as soon as possible but not later than 6 months of the date of this letter.

If you require further information about the new SSP designations and the Company requirement for this medical assessment, please contact your Manager or local Union representative.

If you have any questions about the medical assessment itself or there are delays in providing this information by the due date, please contact your Regional Occupational Health Nurse in OHS at (omitted).

Sincerely,

(signature)

for

Matthew Foot
General Manager

Those employees who were required to undergo this Safety Sensitive Alignment Medical Assessment are required to fill out a health questionnaire. That questionnaire includes the following questions:

In the last year have you ***ever*** had any of the following:

Loss of consciousness or awareness
Loss of vision in either eye
Double vision
Balance problems
Medical care for injuries to your muscles, bones or joints
Kidney stones

Drug and Medication Use

Have you used tobacco regularly **in the last year**?
If yes, how many packs per day? _____
Have you used marijuana or hashish in the last year?
If yes, date last used _____

Have you **ever** used cocaine, crack, LSD, PCP, heroin, Amphetamines (e.g. crystal meth or ecstasy) or other illegal drugs. If yes, specify what drug and date last used:

_____

Have you **ever** been in a treatment program for alcohol/drug addiction? If yes, specify date(s) and location(s):

_____

_____

Has the use of alcohol or other drugs **ever** caused any problems in your life? (e.g. driving convictions, police encounters, injury to you or others, etc)

If yes, please describe: _____

_____

The Union strongly objects to existing employees of long service being required to answer the questions reproduced above. It is common ground that other than the 14 employees being required to undergo alignment medical assessments, new employees have been required to answer these questions relating to their alcohol and/or drug history. It is common ground that all S&C employees, all of whom are said to have in excess of 20 years of service, save one whose service totals 13 years, were not questioned about their drug and alcohol history at the time of their pre-employment medical assessment. Counsel for the Union stresses that to the extent that the Company is not requiring those employees for whom pre-employment medical assessments are on file to undergo the Alignment Medical Assessment, the questionnaire and assessment process to which the remaining 14 employees are being subjected is discriminatory. On behalf of the Union he submits that those employees should not now be subjected to any Alignment Medical Assessment or, alternatively, should they be subjected to such a requirement the Company should utilize the same Pre-Employment Medical Assessment form and process which all of the employees filled out and followed at the time of hire, the very process and documentation which is now relied upon by the employer for all but 14 of them to satisfy the Company's policy.

The Union stresses that the employees in S&C Technician positions have been considered to hold Safety Sensitive Positions since 2001. Its counsel notes that they were further confirmed in that status by GOI-1 on May 17, 2004, as reconfirmed in additional GOI rules promulgated on May 28, 2008. Counsel for the Union

characterizes the Safety Sensitive Alignment Medical Assessment form as: "... broad, intrusive and unprecedented in the scope of information requested from employees."

The Union notes that at the outset some 75 employees were identified as requiring alignment medical assessments, although that number was subsequently reduced to 34 and eventually to 14. He submits that whatever the number, the requirement now imposed on that separately identified group of employees is arbitrary and discriminatory as well as being overly intrusive of the privacy rights of the individuals in question. Its counsel cites the decision in *Doman Forest Products Ltd. and International Woodworkers Local 1-357*, (1990) 13 L.A.C. (4th) 275 (Vickers), as well as the *Charter*-like protections of the privacy of individuals found under the *Personal Information Protection and Electronic Documents Act (PIPEDA)*. Additionally, counsel submits that requiring the 14 employees identified to undergo what he characterizes as invasive medical assessments may also involve a violation of the *Canadian Human Rights Act*, presumably on the basis that employees might be denied the same working conditions and assignments as others, based on the information which the Company seeks.

Counsel also refers the Arbitrator to a recent decision of the Ontario Court of Appeals in *Sandra Jones v Winnie Tsige*, a decision dated January 18, 2012. In that decision the Court recognized the tort of breach of privacy and awarded damages for what it characterized as an intrusion into privacy which was intentional and amounted to

an unlawful invasion of the plaintiff's private affairs. Counsel emphasizes the following passages from paragraphs 67 and 72 of the Court's judgement:

> [67] For over one hundred years, technological change has motivated the legal protection of the individual's right to privacy. In modern times, the pace of technological change has accelerated exponentially. Legal scholars such as Peter Burns have written of "the pressing need to preserve 'privacy' which is being threatened by science and technology to the point of surrender": "The Law and Privacy: the Canadian Experience" at p. 1. See also Alan Westin, *Privacy and Freedom* (New York: Atheneum, 1967). The internet and digital technology have brought an enormous change in the way we communicate and in our capacity to capture, store and retrieve information. As the facts of this case indicate, routinely kept electronic data bases render our most personal financial information vulnerable. Sensitive information as to our health is similarly available, as are records of the books we have borrowed or bought, the movies we have rented or downloaded, where we have shopped, where we have travelled, and the nature of our communications by cell phone, e-mail or text message.
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> ...
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> [72] These elements make it clear that recognizing this cause of action will not open the floodgates. A claim for intrusion upon seclusion will arise only for deliberate and significant invasions of personal privacy. Claims from individuals who are sensitive or unusually concerned about their privacy are excluded: it is only intrusions into matters such as one's financial or health records, sexual practices and orientation, employment, diary or private correspondence that, viewed objectively on the reasonable person standard, can be described as highly offensive.

The Company submits that it is simply attempting to apply a reasonable policy whereby medical records confirming the fitness of all employees to work in Safety Sensitive Positions are obtained by the Company, in furtherance of its obligations as an

employer subject to the *Railway Safety Act*. Its representative submits that there is nothing inconsistent with the collective agreement, nor with any statute, with respect to the request being made of the 14 employees who are the subject of this grievance. In essence, he argues, the Company is simply striving to ensure that records exist for all employees, and to that extent it is applying a principle of equal treatment. He argues that the Company is in fact striving to apply its Fitness to Work Policy in a consistent manner to all employees and that it is entitled, by the exercise of its management rights to require medical assessments of that small number of employees for whom no such records can now be found.

With respect to the Company's obligations its representative cites the following passage from the decision of the Arbitrator in CROA 3124:

> The Corporation is a common carrier engaged in the safety sensitive transportation of passengers by rail throughout Canada. In that capacity it must be sensitive to its public image, and its responsibilities towards federal and provincial transportation authorities. In the event of any accident or mishap, its operations and employees may be the subject of intense and occasionally high profile scrutiny.

Additionally, the Company notes the further arbitral recognition of the right of the Company to determine qualifications, as reflected in the following passage from the Arbitrator's decision in CROA 2649:

> As a general matter, it is within the prerogatives of the Company to establish qualifications for particular job assignments, subject only to limitations negotiated by the

> Union within the terms of the collective agreement. It is generally considered by boards of arbitration that *an implied term of any collective agreement is that qualifications for a given position must be established by the employer in good faith, and for bona fide business purposes having regard to the nature of the work in question*, subject always to any specific restrictions found within the language of the collective agreement
> [Emphasis added.]

Finally, the Company's representative draws to the Arbitrator's attention his recent award in a grievance filed by the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 101 against the same policy. That award, dated March 30, 2012, allowed the grievance in part, to the extent that the Company could not properly require Diesel Mechanics who were not qualified to operate locomotives to be subject to the Fitness to Work Medical Assessment, where no pre-employment assessment could be found in their file. He notes, however, that the Arbitrator found that the policy itself did not violate the collective agreement and "... is being implemented for legitimate and valid business considerations."

I turn to consider the merits of this dispute. Firstly, I consider it important to distinguish the award in the Canadian Pacific Railway Company and the CAW-Canada, Local 101 case cited by the Company. It is true, as noted above, that that award concerned the application of the same revised Fitness to Work Policy as it applied to members of the Mechanical Services bargaining unit represented by CAW-Canada. However, it should be stressed that in that grievance the Union did not argue that the employees for whom no records could be found were being treated in a discriminatory fashion as compared to the majority of employees in respect of whom pre-employment

medical assessments were on record. In the instant case, that is a central argument advanced by the Union, which has filed in evidence before the Arbitrator an example of the Pre-Employment Medical Assessment form and record which dates from years ago and which is relied upon by the Company in satisfaction of its Fitness to Work policy for the great majority of S&C Technicians for whom those records are clearly on file. In my view the issue of discrimination as among employees, which is raised in the instant case and was not pleaded in the CAW-Canada grievance, is a critical distinction.

On a review of the evidence it becomes clear that there is a substantial difference between the medical assessment which is now being required of the 14 long service employees for whom no records are on file and the pre-hire medical assessment which was conducted in respect of the balance of the members of the bargaining unit and which is being relied on in satisfaction of the Company's policy. Specifically, the questionnaire and medical assessment form used in the 1980s and 1990s, which is filed in evidence, is a relatively simple single page document. It does not question the employee about his or her personal record of tobacco, alcohol or drug use, a topic canvassed in considerable detail in the new Safety Sensitive Alignment Medical Assessment which is here under grievance. What emerges from the evidence in the instant case is that the 14 employees who are being required to undergo the Safety Sensitive Alignment Medical Assessment, a process which on its face appears to be designed for employees being newly hired into Safety Sensitive Positions, are, as the Union submits, being required to undergo a process which is fundamentally different

and far more intrusive than the pre-employment medical assessment for the balance of the more than 400 employees who comprise the bargaining unit.

As a matter of general principle, I take it as well established that, absent collective agreement language to the contrary, an employer exercising management rights must do so in a manner which is fair and non-discriminatory as among the employees to whom a company policy applies. In other words, as a general rule, employees are entitled to equal treatment as regards the administration of the collective agreement, including the exercise of management's rights. A close review of the facts in the instant case causes substantial concern, in the Arbitrator's view, as to whether in fact there has been a discriminatory treatment applied to the 14 employees who are now being required to undergo the Safety Sensitive Alignment Medical Assessment as that assessment has been formulated by the Company.

As is clear from the facts recited above, for the vast majority of the members of the bargaining unit for whom pre-employment medical assessments remain on file, and who are not required to undergo the new Alignment Medical Assessment, no enquiries were ever made with respect to their personal lives, and in particular to their use of tobacco, alcohol or illegal drugs at any point in their lifetime. In contrast, very extensive questions about those precise issues are being put to the 14 members of the bargaining unit who are now required to undergo the Safety Sensitive Alignment Medical Assessment, because their original Pre-Employment Medical Assessment records cannot now be found.

I do not consider it necessary to deal with the issue of the alleged intrusiveness and/or illegality of the questions contained in the Safety Sensitive Alignment Medical Assessment pleaded in the instant case by counsel for the Union. It is sufficient to note, however, that the arguments raised by counsel for the Union in the instant case are substantially broader and more detailed than the objections which were pleaded in the grievance of CAW-Canada against the same policy. For the purposes of this Award I consider it critical to conclude that all employees in the bargaining unit are entitled to the same treatment with respect to the Company's satisfying itself as regards their medical fitness to assume the duties and responsibilities of a Safety Sensitive Position. Subject to the arguments about intrusiveness which are not dealt with here, it was arguably open to the Company to apply the Safety Sensitive Alignment Medical Assessment to all employees in the bargaining unit. However, it chose not to do so, but rather to require 14 employees for whom records could not be found to undergo a far more thorough and intrusive medical questionnaire and assessment process than was undergone by the great majority of the employees in the bargaining unit at the time of their pre-hire medical fitness assessment, which is the assessment now relied upon by the Company for all but 14 of the employees. I find the conclusion inescapable that what has occurred is effectively an uneven and discriminatory practice by the Company to the extent that it now subjects the 14 employees who are the subject of this grievance to a medical assessment, questionnaire and process which is substantially different and far more intrusive, with respect to personal and private matters, than is the case for the assessment being relied upon for the balance of the bargaining unit, which is in excess

of 400 employees. After careful consideration, I cannot see the basis upon which the 14 employees, who are all of long service, can now to be required to undergo what appears to be a pre-employment questionnaire and medical assessment which might be appropriate for persons being newly hired into Safety Sensitive Positions (a matter on which I make no comment or ruling) in a manner that is not required of the majority of their fellow employees in the bargaining unit.

On the foregoing basis I am satisfied that the grievance must be allowed. The requirement imposed upon the 14 employees by the Company is, in my view, beyond the Company's prerogatives by the proper exercise of management's rights, as it is clearly an uneven, unfair and discriminatory practice as regards the 14 employees for whom no prior records can be found. I therefore direct the Company to cease and desist in requiring the employees who are the subject of this grievance from completing any questionnaire or undergoing any medical assessment which is different from the questionnaire and medical assessment completed at the time of hire for the majority of the bargaining unit, and which is being relied upon by the Company for the balance of the employees in the bargaining unit. The Company is therefore directed to require the employees for whom no medical records are on file to undergo a questionnaire and medical assessment which is substantially the same as that relied upon for the great majority of the employees in the bargaining unit.

I retain jurisdiction in the event of any dispute between the parties concerning the interpretation or implementation of this Award.

Dated at Ottawa, Ontario this 27th day of April, 2012.

"Michel G. Picher"

Michel G. Picher
Arbitrator