CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3036

Heard in Montreal, Wednesday, 10 February 1999

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Claim of behalf of Mr. John McCarthy.

EX PARTE STATEMENT OF ISSUE:

In April 1997, the grievor, who had been on medical leave, was authorized by his doctor to return to employment (with restrictions).

To date, the grievor has not returned to active employment with CP Rail.

The Union contends that: **1.)** The Company has failed to meet its legal duty to accommodate the grievor; **2.)** The Company is in violation of Appendix B-12 of agreement no. 41; **3.)** By not providing the grievor with appropriate training, the Company violated article 5 of the Job Security Agreement.

The Union requests that the Company be ordered to provide the grievor with employment and to compensate him for all wages lost, and any and all other financial losses incurred, as a result of this matter.

The Company denies the Union's contentions and declines the Union's request.

FOR THE BROTHERHOOD:

(SGD.) J. J. KRUK
SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

D. E. Freeborn	– Labour Relations Officer, Calgary
L. Nkemdirim	– Manager, Clinical Programs, Calgary
R. M. Andrews	– Manager, Labour Relations, Calgary

And on behalf of the Brotherhood:

D. W. Brown	– Sr. Counsel, Ottawa
J. J. Kruk	– System Federation General Chairman, Ottawa
G. D. Housch	– Vice-President, Ottawa
P. Davidson	– Counsel, Ottawa
J. McCarthy	– Grievor

AWARD OF THE ARBITRATOR

A preliminary issue arose in this matter concerning the burden of proof and the order of proceeding. Counsel for the Brotherhood submits that as the issue in dispute concerns the alleged failure of the Company to reasonably accommodate the grievor's physical disabilities the burden of proof in respect of that issue rests with the Company, and it is incumbent upon it to proceed first. At the hearing the Company was unprepared for the motion, and agreed to proceed first, without prejudice to its ultimate position. The Arbitrator granted both parties time to file written submissions with respect to the issue of burden of proof, and proceeded to hear the grievance on its merits. The written submissions have now been received and the matter can be ruled upon.

It appears to the Arbitrator that there is in fact very little in dispute between the parties with respect to the issues of the order of proceeding and burden of proof. Counsel for the Company writes that there is a shifting burden in a case of this kind. He submits that the Brotherhood bears the initial onus of establishing that an employee is ill or disabled, that there has been discrimination against the employee on that basis and that ultimately the collective agreement has been violated. The Arbitrator takes the position so stated by the Company as implicitly recognizing that the collective agreement cannot be interpreted in a manner contrary to the overriding provisions of the **Canadian Human Rights Act** R.S.C. 1985, c. H-6. Counsel goes on to state "The onus then shifts to the Company to demonstrate that it has accommodated the grievor to the point of undue hardship." He further submits that the employee and the Brotherhood also have a role to play in the accommodation process.

Counsel for the Brotherhood replies that the position of the Company is not substantially different from its own position. He submits that the denial of work to an employee by reason of illness or a physical disability is, by definition, discrimination. The issue then becomes whether it is discrimination which is permissible because the employee cannot be accommodated beyond the point of undue hardship. In other words, in his submission, discrimination can be lawful or unlawful. An employer can properly "discriminate" in respect of an employee on the basis of a physical disability if it can be shown that the disability cannot be reasonably accommodated within the meaning of the **Canadian Human Rights Act** and the related jurisprudence. He stresses that in the instant case there is no dispute between the parties with respect to the fact that the grievor, Mr. McCarthy, suffered a back injury, and has been held out of service solely on the basis that his back injury renders him unemployable. In that circumstance Counsel argues that the elements which the Brotherhood would be required to prove are in fact established by agreement: namely that the grievor is an employee, that he suffered a disability, and that his active employment was suspended because of his disability. If there is any point of difference between the parties it would appear to be that when the initial elements of employment, disability and removal from work are established, the Brotherhood would submit that the burden is upon the employer to demonstrate that it has not violated the collective agreement, which is to be applied in a manner consistent with the **Canadian Human Rights Act**, by going forward with evidence of reasonable efforts to find work which will accommodate the grievor's disabilities, to the point of undue hardship.

I am satisfied that the position advanced by the Brotherhood is more precise, and is to be preferred. It is well settled in Canadian arbitral and judicial jurisprudence that it is the employer which bears the burden of establishing that it has made reasonable efforts to accommodate the disability of an employee, to the threshold of undue hardship. The rationale for the arbitral and judicial reasoning is not difficult to understand. It is the employer which has the fullest knowledge of its operations both inside and outside a given bargaining unit, or a given location. It is possessed of the fullest knowledge with respect to job vacancies or the existence of jobs which could be performed by the disabled employee with a reasonable degree of adjustment. As these matters reside within the employer's knowledge, just as in the case of discipline or discharge, the employer is best placed to adduce the evidence relating to efforts at reasonable accommodation, and to demonstrate why an employee's illness or disability cannot be reasonably accommodated.

In the Arbitrator's opinion the state of the jurisprudence if well reflected in the award of Arbitrator Mitchnick in **Re Pharma Plus Drug Mart Ltd. and United Food & Commercial Workers** (1933), 33 L.A.C. (4th) 1 (Mitchnick). At issue in that case was whether an employee had been denied reasonable accommodation and, as alleged by the employer, whether she had been insufficiently forthcoming in providing information about her medical limitations. At pp. 9-12 Arbitrator Mitchnick exhaustively reviewed a number of pertinent authorities as follows:

… It generally used to be the case, in other words, that the handicapped employee took the job as he or she found it, and the rights of both parties to the employment relationship were measured by the ability of the employee to perform that job, without special accommodation, on a regular basis. Whatever debate there may have been previously, however, that clearly is not the law today. The Ontario *Human Rights Code* had already provided that:

> **5(1)** Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or *handicap*.

(emphasis added) and that:

> **17(1)** A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of handicap.

And in 1986 (effective April 18, 1988), the legislature removed all doubt with respect to the existence of a duty to accommodate by enacting what is now s. 17(2) of the Code, providing as follows:

> **17(2)** The Commission, a board of inquiry or a court shall not find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

That enactment in the Code, we recognize, does not create a "guarantee" that a handicapped employee will be accommodated in his or her employment. Rather, the law is as stated, for example, in *Chamberlain v. 599273 Ontario Ltd.* (1989), 11 C.H.R.R. D/110, at p. D/116:

> … the *Code* does not ignore the fact that certain handicaps can negatively impact on an individual's ability to perform certain types of work. If a person is unable to adequately perform a particular job because of a handicap, the *Code* does not entitle that person to employment in the job. What the *Code* does do is ensure that persons with a handicap are not discriminated against with respect to jobs they are capable of performing.

And what the Code in its present form does more particularly is to give new meaning to the terms "discriminate" and "capable", as used in the last sentence quoted above. An employer cannot demand of a handicapped individual that he or she perform any more than the "essential duties or requirements" of a job, and even then, the employer is required to seek a way to accommodate the employee's handicap, short of "undue hardship" as defined. In other words, as it was stated in the board of inquiry decision filed with us in *Re Bonner v. Ontario (Ministry of Health, Insurance Systems Branch)* (1992), 92 C.L.L.C. ¶17,019, 16 C.H.R.R. D/485 (H.A. Hubbard), issued February 3, 1992, at p. 36 [p. 16,175 C.L.L.C.]:

> If the employer can without undue hardship adjust the conditions of the workplace to enable the handicapped employee to do the work satisfactorily while subject to the effects of that handicap, then that must be done.

The employer acknowledges this statement of the law, but, in accordance with the evidence given by Ms. Wright, submits that it is the responsibility of the *employee* to trigger the obligation by providing the employer in detail with information as to just what the disabilities and restrictions *are* that the employer is being asked to accommodate. In support of that the employer points to the recent decision of the Supreme Court of Canada in *Central Okanagan School District No. 23 v. Renaud* (1992), 95 D.L.R. (4th) 577, [1992] 6 W.W.R. 193, [1992] 2 S.C.R. 970, file No. 21682, released September 24, 1992, and the Ontario Human Rights Commission's own "guidelines" published to assist in the interpretation of the Code with respect to "accommodation".

The "guidelines" we note, while obviously useful in dealing with the commission itself, have not been given the force of law, and are of no "binding" effect on the courts or adjudicators. In terms of any persuasive value they might have as being reasonable, however, the "guidelines" do themselves provide, in line with the employer's argument, that:

> **8.** A person who requests accommodation has a responsibility to communicate his or her needs in sufficient detail and to co-operate in consultations to enable the person responsible for accommodation to respond to the request.

At the same time, however, they do go on to provide on the same page that:

> **A.** The person who is responsible for making the accommodation is required to prove that the accommodation causes undue hardship within the meaning of the standards set out in [the Code]. It is not up to the person with a disability to prove that the requested accommodation can be accomplished without undue hardship.

And indeed, on that point the Supreme Court of Canada has stated, in *Central Alberta Dairy Pool v. Alberta (Human rights Commission)* (1990), 72 D.L.R. (4th) 417 at p. 439, [1990] 2 S.C.R. 489, [1990] 6. W.W.R. 193, for example: "The onus is upon the respondent employer to show that it made efforts to accommodate the religious beliefs of the complainant up to the point of undue hardship." As for the Supreme Court's *Renaud* case, it does in fact state, as the employer notes, at pp. 592-3:

> *Duty of complainant*
> The search for accommodation is a multi-party inquiry. Along with the employer and the union, there is also a duty on the complainant to assist in securing an appropriate accommodation. The inclusion of the complainant in the search for accommodation was recognized by this court in *O'Malley*. At p. 335, McIntyre J. stated:
>
> > Where such reasonable steps, however, do not fully reach the desired end, the complainant, in the absence of some accommodating steps on his own part such as an acceptance in this case of part-time work, must either sacrifice his religious principles or his employment.
>
> To facilitate the search for an accommodation, the complainant must do his or her part as well. Concomitant with a search for reasonable accommodation is a duty to facilitate the search for such an accommodation. Thus, in determining whether the duty of accommodation has been fulfilled, the conduct of the complainant must be considered.

As is apparent from a full reading of the case, that statement in its context and on the facts before the court is an admonition to complainants that they must not only be forthcoming with respect to relevant information they may have in their possession, but also, with respect to any accommodation that *is* being considered, demonstrate a willingness to be as co-operative as they can. As the court continued however [at p. 593]:

> … *This does not mean that, in addition to bringing to the attention of the employer the facts relating to discrimination, the complainant has a duty to originate a solution. While the complainant may be in a position to make suggestions, the employer is in the best position to determine how the complainant can be accommodated without undue interference in the operation of the employer's business.* When an employer has initiated a proposal that is reasonable and would, if implemented, fulfil the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. If failure to take reasonable steps on the part of the complainant causes the proposal to founder, the complaint will be dismissed. The other aspect of this duty is the

> obligation to accept reasonable accommodation. This is the aspect referred to by McIntyre J. in *O'Malley*. The complainant cannot expect a perfect solution. If a proposal that would be reasonable in all the circumstances is turned down, the employer's duty is discharged.
>
> (original emphasis)

This Office accepts without reservation the principles stated in the foregoing passage. It may also be noted that the Courts and arbitrators in Canada have acknowledged that an employee's trade union has a role to play in the accommodation process, a process which may extend to the bending of collective agreement rules in respect of such matters as job postings and seniority, as the greatest flexibility must be reserved in attempting to find tasks, hours of duty and a location where an employee can be reasonably accommodated. (See, e.g., **Union Carbide Canada Ltd. and E.C.W.U., Local 593** (1991), 21 L.A.C. (4th) 261 (Hinnegan).)

In the instant case there is no dispute as to the threshold issues of the grievor's employment, and the fact that he was discriminated against on the basis of medical disability in being held out of work. Therefore, it does fall to the Company to establish, on the balance of probabilities, facts to demonstrate that it made every reasonable attempt to accommodate his disability short of undue hardship. As there is nothing for the Brotherhood to prove, the Company must proceed first, and bear the ultimate burden of establishing that it did not improperly fail to accommodate the grievor in respect of his physical disabilities.

I turn to consider the merits of that issue. The material before the Arbitrator establishes that the Company has taken the initiative of setting up a relatively sophisticated system for tracking disabled employees and attempting to redeploy them into positions which reasonably accommodate their injuries or disabilities. It is clear, however, that the system was in flux, and was being substantially developed during the time the grievor became eligible for accommodation in conformity with the **Canadian Human Rights Act** and the provisions of Appendix B-12 of the collective agreement. Upon a review of the relatively extensive material before me, I am compelled to conclude that, notwithstanding its good faith, the Company did fail in its obligation to reasonably accommodate Mr. McCarthy.

Mr. McCarthy held the position of truck driver/clerk at the time of his initial lower back injury, and was later accommodated in the work of a maintainer and shop labourer until November 12, 1992. However, it is clear that his prior experience is substantially broader than his rank and classification at that time would suggest. Among other things Mr. McCarthy previously held a supervisory position within the Company as a Parts Coordinator in two separate locations over a total period of seven years. There can be little doubt that he has extensive administrative and clerical experience and skills. It is also common ground that he completed the substance of a retraining course as a computer programmer/analyst under the auspices of the WCB, a program in which he participated from January of 1996 to March of 1997.

The representations before the Arbitrator establish, beyond dispute, that during the period of the grievor's absence from work a number of positions for which he was arguably eligible as an accommodated employee were in fact filled. For example, it does not appear disputed that vacancies in the position of rail traffic controller were filled, and that the grievor would have been well suited to that work, although he would have required the accommodation with respect to bilingualism which apparently had been extended to certain other employees. Additionally, there appear to be certain positions for which the grievor was considered and rejected which, in the Arbitrator's opinion, could have been made available to him with a degree of accommodation. For example, two positions headed "Administrative Assistant Y2K Core Team" described education requirements and administrative experience entirely consistent with Mr. McCarthy's background. The same would appear for the position of "APEX Sustainment Administrator". On the whole, the Arbitrator is compelled to the conclusion that the Company's new system, which is to be commended and was admittedly in its break-in stages, failed to match Mr. McCarthy with positions in which he could reasonably have been accommodated as a disabled employee. In the circumstances it is unnecessary for the Arbitrator to determine whether there was a violation of Appendix B-12. I am satisfied that the Company failed, in any event, to satisfy its more general legal obligation to accommodate the grievor's disability in a manner consistent with the **Canadian Human Rights Act**. If there any inconsistencies between that obligation and the specific provisions of Appendix B-12, the Arbitrator must resolve those in a manner which gives precedence to the statute.

The grievance is therefore allowed. The Arbitrator finds and declares that the Company did fail to reasonably accommodate the grievor, and that it could have done so short of undue hardship from and after March 1997. The Arbitrator remits the matter to the parties for the identification of a position for which the grievor is suited and which he can perform with reasonable accommodation. The Arbitrator further directs that the grievor be

compensated for all wages and benefits from the completion of his computer course in March of 1997 to the date he shall be reinstated into a position with the Company in a manner consistent with its obligation to reasonably accommodate his disabilities. Should there be any dispute between the parties with respect to any aspect of the implementation of this award the matter may be spoken to.

February 26, 1999

(signed) MICHEL G. PICHER
ARBITRATOR