CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3348

Heard in Edmonton, Tuesday, 8 July 2003

concerning

CANPAR

and

UNITED STEELWORKERS OF AMERICA, LOCAL 1976

DISPUTE:

Mr. Michael Bodnaruk, a Canpar Edmonton employee not being awarded the Dockperson/Leadhand position as a permanent accommodation at the Canpar Edmonton Terminal.

JOINT STATEMENT OF ISSUE:

On November 8, 1977, while working at CANA Construction Company Ltd., Mr. Bodnaruk injured his right knee. A claim on this injury was filed, recognized and accepted by the Alberta Workers' Compensation Board.

In January 1986, Mr. Bodnaruk became an employee of Canpar Transport Ltd.

The Union contends Mr. Bodnaruk worked at Canpar Transport without lost time due to said knee injury until April 5, 2002 when surgery was performed on Mr. Bodnaruk's right knee. The Alberta WCB recognized this operation as needed and related to the November 8, 1977 injury to his right knee that Mr. Bodnaruk suffered while employed at CANA Construction.

In December 2002, an accommodation was discussed for Mr. Bodnaruk with the Company re placement as a Lead-hand at the Edmonton terminal as said position was available and posted at which time Mr. Bodnaruk bid on said position. On December 16, 2002, the Company informed the Union that the position of the Lead-hand required a Class 1 licence which the Union contends was previously unknown to them and the bulletin was reposted December 16, 2002 with the above change. Mr. Bodnaruk did not have such a licence therefore the Company deemed him as unqualified for the position.

January 14, 2003 a work-site analysis was done in conjunction with the Company and the Alberta Workers' Compensation Board on the position of Driver Representative for Mr. Bodnaruk. January 27 to February 21, 2003 a work trial period was conducted where Mr. Bodnaruk performed the duties of a Driver Representative. Mr. Bodnaruk was disqualified from this position through the WCB and the Company for not performing up to Canpar standards of the position.

In the spring of 2003 Mr. Bodnaruk through approval of the WCB took training for a Class 1 driver's licence at a Truck Driver Training Institute. This Mr. Bodnaruk did in March-April 2003, passing the course. In May 2003 the Company tested Mr. Bodnaruk in Alberta using an Ontario Ministry of Transport Driver Exam. Mr. Bodnaruk received a failing grade on said test by the Company's examiner.

The Union requested a second test. The Company denied said request. The Union maintains that Mr. Bodnaruk has a right to be permitted to apply for the Dockperson/Leadhand position under the terms of the collective agreement exercising his rights to claim under article 5.2.3.

The Company does not agree and has denied our request that Mr. Bodnaruk be awarded this position.

FOR THE UNION:

(SGD.) D. NEALE
EVP/FST

FOR THE COMPANY:

(SGD.) P. D. MACLEOD
VICE-PRESIDENT, OPERATIONS

There appeared on behalf of the Company:

Mike. D. Failes	– Counsel, Toronto
Paul. D. MacLeod	– Vice-President, Operations, Mississauga
K. Greenfield	– District Manager (Observer)
K. Fullbrook	– Supervisor, (Observer)
Wm. Morris	– Interested Party / Observer

And on behalf of the Union:

Brent Plante	– Local Chairman, Alberta
Michael Bodnaruk	– Grievor

AWARD OF THE ARBITRATOR

The material before the Arbitrator confirms that by reason of a physical disability the grievor has been unable to perform the duties of his previous P&D Driver position. In December of 2002, when the Company posted the dockperson/leadhand position at the Edmonton terminal Mr. Bodnaruk applied. It then became evident, however, that the position required a Class I driver's licence, as the leadhand is required to operate a tractor-trailer on a relatively regular basis, both within the yard and on the road. In the face of that requirement Mr. Bodnaruk withdrew his application for the leadhand position.

The evidence discloses that unbeknownst to the Company Mr. Bodnaruk subsequently undertook a tractor-trailer driver's training course, and succeeded in obtaining his Class I driver's permit in Alberta. It appears that that permit was obtained on or about April 29, 2003. Well before that, effective January 19, 2003, the Company had hired Mr. William Morris to assume the position of dockperson/leadhand at the Edmonton terminal.

The record discloses that when the Company became aware that the grievor had obtained his Class I driver's permit, further to requests for accommodation by the Union, management agreed to allow Mr. Bodnaruk to take the Company's own tractor-trailer driver's test. While a letter from a local manager indicated to the Union that if the grievor should be successful in that test he would be able to return to work, that was not the position taken by higher management. The Arbitrator is satisfied that the Company clearly communicated to the Union that the grievor would be given the opportunity to take the Company test, reasoning that in the event that he should not be successful the issue concerning his ongoing accommodation in a driver's position would be resolved.

In the result, the grievor did fail the driver's test administered by the Company's own supervisor. In his own evidence Mr. Bodnaruk did not dispute that he did have certain difficulties during the course of the test, and that he would perform better if he had the opportunity of acquiring greater experience. He also indicated that he had a problem of unfamiliarity as the Company's truck was of an older generation than the equipment on which he had trained in preparation for obtaining his Alberta Class I driver's licence.

The Union submits that the grievor should be given the opportunity to be retested, and if successful should be permitted to displace Mr. Morris from the leadhand position. However, it has declined the Company's request that the Union undertake that in the event that Mr. Morris should be removed from his position there would be no grievance brought on his behalf. It is against that background that the Union asserts that the Company has failed in its obligation to accommodate the disabilities of Mr. Bodnaruk. It also claims that he should be entitled to apply again for the dockperson/leadhand position at Edmonton under the provisions of article 5.2.3 of the collective agreement. That article reads as follows:

> **5.2.3** Employees desiring positions bulletined as required by 5.3.1 and 5.2.2 of this Article shall file their application with the designated officer within the prescribed time and the award shall be made promptly following the close of the bulletin.
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> **Employees returning from vacation or authorized leave of absence as outlined in Articles 3 and 11 will be permitted to apply, upon return or within five (5) calendar days thereafter, for any bulletin which was posted during the employee's absence.**
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> Pending the award, and where applicable, the senior qualified employee at the location affected desiring the vacancy (as bulletined under Article 5.2) shall be allowed the position.
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> (emphasis added)

The Company submits that the concept of accommodation argued by the Union is incorrect in law. It's counsel draws to the Arbitrator's attention the decision of the Supreme Court of Canada in **Central Okanogan School District No. 23 v. Renaud**, [1992] 2 S.C.R. 970. In particular, reference is made to the following passage at page 585:

> The concern for the impact on other employees which prompted the court in *Harrison* to adopt the *de minimis* test is a factor to be considered in determining whether the interference with the operation of the employer's business would be undue. However, more than minor inconvenience must be shown before the complainant's right to accommodation can be defeated. The employer must establish that actual interference with the rights of other employees, which is not trivial but substantial, will result from the adoption of the accommodating measures. Minor interference or inconvenience is the price to be paid for religious freedom in a multicultural society.

Counsel for the Company stresses that the arbitral jurisprudence has, consistent with the above passage, recognized that it does constitute undue hardship to compel the termination or substantial demotion of another employee to facilitate the accommodation of a disabled individual. Counsel submits that in the case at hand the expectations of Mr. Morris, who left a secure position to join Canpar as a leadhand qualified to do occasional linehaul driving, would be entirely defeated by the accommodation proposed by the Union, assuming that the grievor could qualify himself as a tractor-trailer driver. He argues that the law of accommodation does not, in any event, extend so far as to require that Mr. Morris be compelled to surrender his position, and perhaps be reduced to part-time or casual work as a dockhand to accommodate the grievor's disability. Counsel also questions the applicability of article 5.2.3 to the circumstance of the grievor, stressing that in fact he withdrew his application at the time of the vacancy in the leadhand position, and only obtained outside training in tractor-trailer driving a substantial time later, apparently after it became evident that he could not perform any of the work which was available for him within the workplace.

Counsel for the Company stresses that the grievor has not been terminated from his employment. Indeed, he maintains that should Mr. Bodnaruk obtain further experience in tractor-trailer driving, so as to eventually be able to successfully pass the Company's driver's test on the occasion of a future vacancy, for example in a linehaul driver's position, the opportunity for accommodation could then be realised. He argues, however, that in the circumstances disclosed the accommodation now being sought by the Union is clearly outside the standard of compliance required in law of the employer, and would constitute undue hardship.

The Arbitrator is satisfied that the position argued by the Company is correct. Firstly, the provisions of article 5.2.3 do not address the fact situation raised in the instant grievance. Mr. Bodnaruk was in fact at work at the time of the job posting for the leadhand position, and by his own acknowledgement was not qualified at that time. On that basis he withdrew his application. There is nothing within the provisions of the collective agreement, nor within the principles of accommodation, that would effectively give the grievor the opportunity to request, several months later, that he be given the job for which he was originally not qualified when he was at work, particularly where to do so would substantially prejudice the individual newly hired into that position.

Nor is the Arbitrator persuaded that the Union has, in the circumstances, done it's part to facilitate the grievor's accommodation. By it's representative's own admission, the Union would not agree to forego advancing a grievance on the part of Mr. Morris, or any other employee who might be adversely affected by the accommodation of Mr. Bodnaruk should he be placed in Mr. Morris' position. That, in the Arbitrator's view, is contrary to the Union's obligation to participate in the process of accommodation, a process which may to some degree involve a compromise of strict collective agreement rules, as implicitly recognized by the Supreme Court of Canada in **Renaud**.

On a review of the facts and submissions made, the Arbitrator is satisfied that the Company has not failed to discharge it's obligation to accommodate the grievor's disability, to the point of undue hardship. The grievance must therefore be dismissed.

July 14, 2003

(signed) MICHEL G. PICHER
ARBITRATOR