CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3398

Heard in Montreal, Tuesday, 13 January 2004

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Claim on behalf of Mr. Ken O'Connor, alleging that the Company has violated Article 17 and Appendix V of Agreement 10.1 and that the Company has failed to provided suitable accommodation in accordance with the *Canadian Human Rights Act*.

JOINT STATEMENT OF ISSUE:

Mr. O'Connor was previously employed in the Company's Engineering Track Department. Mr. O'Connor reported a back injury occurring on September 22, 1981. A second injury was sustained on November 21, 1985, in which Mr. O'Connor injured his right shoulder and back. Subsequently, Mr. O'Connor reported a re-injury to his back in 1987, which was related to the initial September 22, 1981, report of injury.

Mr. O'Connor has received Workplace Safety and Insurance Board (WSIB) benefits since last working with CN on August 19, 1987, and was additionally assigned permanent restrictions as follows:

- Lifting of weights limited to 10 kilograms
- No repetitive bending or twisting, especially against resistance
- No strenuous pulling or pushing
- Limited low level work
- Opportunity to change positions as required

On July 23, 1997, Mr. O'Connor's family physician declared that he was able to return to unrestricted work. Following his family physician's declaration, Mr. O'Connor obtained a medical card from MEDCAN/CN Occupational Health Services indicated that he was fit to return to work.

The Union contends that: **(1.)** The Company has failed to meet its legal duty under the *Canadian Human Rights Act* to accommodate the grievor. **(2.)** The Company is in violation of the grievor's seniority rights to recall under Article 17 of Agreement 10.1 in its entirety. **(3.)** The Company is in violation of Appendix V of Agreement 101.

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

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

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD.) R. A. BOWDEN	**(SGD.) R. BATEMAN**
SYSTEM FEDERATION GENERAL CHAIRMAN	**FOR: SENIOR VICE-PRESIDENT, EASTERN CANADA REGION**

There appeared on behalf of the Company:

C. McDonnell	– Counsel, Toronto
P. Bourque	– Manager, Human Resources, Toronto
R. Bateman	– Sr. Manager, Labour Relations, Toronto
L. Smolska	– Workers Compensation Coordinator, Montreal
J. Winch	– Counsel, Toronto
M. Salvati	– Manager, Human Resources, Montreal

And on behalf of the Brotherhood:

P. Davidson	– Counsel, Ottawa
A. Trudel	– System Secretary/Treasurer & General Chairman, Montreal
D. W. Brown	– Sr. Counsel, Ottawa
K. O'Connor	– Grievor

AWARD OF THE ARBITRATOR

The facts of this grievance are unusual. The grievor, Mr. Ken O'Connor, commenced working for the Company at Capreol, Ontario in April of 1980. In 1981 he sustained a lower back injury while at work. A serious reoccurrence of that injury arose in 1987, as a result of which the grievor has never returned to work from that time to the present.

It appears that Mr. O'Connor had two back operations, in April 1988 and December 1989, respectively. In July of 1992 the then Workers' Compensation Board

awarded him a 20% permanent disability pension. Since that time that amount has been paid to him directly by the Company under the administrative arrangement which it had with the Workers' Compensation Board, and continues to have with the Workplace Safety & Insurance Board of Ontario (WSIB).

It appears that there has been a marked improvement in the grievor's condition. On July 23, 1997 his personal physician issued a return to work certificate indicating that Mr. O'Connor was fit "to return to unrestricted work". The Company then directed the grievor to undergo assessments to evaluate his fitness to return to work. That resulted in a report issued by the CBI Physiotherapy and Rehabilitation Centre dated August 18, 1998. According to that report the grievor was found fully fit to return to work. It reads, in part:

> In our opinion, we can see no physical contraindication to Mr. O'Connor returning to his previous position of track maintenance/foreman on a full time, full duty basis.

The record also indicates that the grievor received supplementary WCB benefits and full vocational rehabilitation training which eventually led to his employment, for a time, as an assistant in an addiction/detoxification centre. Following the termination of that employment, the grievor sought to be reinstated into his position with the Company.

Notwithstanding the results of fitness abilities evaluations, the Company's physician declined to recommend the reinstatement of the grievor, citing two factors.

The Company's first concern relates to whether the return to work can be viewed as compatible with the ongoing WSIB permanent disability restrictions, for which the grievor continues to receive a disability pension. Secondly, concern was expressed by the Company's physician with respect to the possible impact of pain medications on the grievor's ability to perform his work safely. On the basis of that opinion, rendered on February 27, 2000, the Company declined to reinstate the grievor into service.

A further independent medical examination was undertaken on April 17, 2002. The results of that examination again confirmed Mr. O'Connor's fitness to return to work. Nevertheless, the Company continues hold to the position that he cannot be reinstated, based on concerns with respect to his use of pain medications and his continuing permanent restrictions as a result of which he remains in receipt of the 20% disability pension provided by the Company and administered by the Workplace Safety & Insurance Board.

The Company has understandable concerns with the apparent inconsistency of the grievor being under continuing restrictions by virtue of his ongoing status as a worker who is permanently partially disabled, in accordance with the WSIB ruling and in relation to which he continues to receive a 20% permanent disability pension. Based in part on a letter received from Claims Adjudicator Dina Bacik, dated September 24, 2002 stating in part, "… standard type back precautions would remain in effect …", the Company has ongoing concern that the grievor would be at risk of re-injuring himself if he is returned to normal duties.

It would appear that the Company also finds itself on the horns of a dilemma. On the one hand the grievor continues to have the status of a worker with a partial permanent disability, in respect of which it continues to pay for his benefit a permanent 20% disability pension. Strangely, it would appear that that status is immutable, in light of a policy reflected in a decision of the Workplace Safety & Insurance Appeals Tribunal issued on September 1, 1998. That decision, rendered by members E. Newman, P.A. Barbeau and J. Anderson, states, in part, “Board policy does not contemplate the possibility of the revocation of an award, once made, on the ground that the worker has “recovered”.” In the Company’s submission, it would appear that the WSIB will not relieve the employer of its obligation to pay the permanent partial disability pension to the grievor by revoking or amending its earlier decision that he does have a permanent partial disability. In the result, should the grievor be reinstated into his employment with full duties and full wages, the employer will be placed in the invidious position of paying the grievor not only full wages, but a further supplement of 20% over and above for a disability which he claims he no longer suffers and which, it appears, the WSIB refuses to treat as no longer existing, even if he has in fact recovered.

As the record before the Arbitrator discloses, this is plainly not a case in which the Company has acted in bad faith or has sought to shirk its obligation to accommodate the grievor in suitable employment. While no employment could be found for the grievor in Capreol that is compatible with his WSIB restrictions, in August of 2002 the Company did offer the grievor an equipment operator shunt position in Concord,

Ontario. Mr. O'Connor declined that position by reason of his unwillingness to relocate from Capreol to Concord. Subsequently Mr. O'Connor was permitted to bid on a flagman position at Mimico, Ontario, which he was successful in securing. However, he never attended at the worksite. In a letter which the Arbitrator finds difficult to understand, on May 13, 2003 the grievor wrote to the Brotherhood's General Chairman a letter stating, in part, the following:

> I feel that this position (Flagmen) [sic] doesn't fall within my restrictions from W.S.I.B. For example, I was informed that I would be required to climb fences & ascend/descend steep embankments, while carrying flags. Further, when no work is available for this position I would be required to do Track-Maintenance work.
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> It has been the company's position that my W.S.I.B. restrictions bar me from doing track work. However, suddenly I am **now** capable of doing these tasks as a Flagman. If I am able to do these tasks (Track Maintenance) on a part-time basis I should be able to do them on a full-time basis & exercise my seniority.
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> (original emphasis)

It would appear from the foregoing that the grievor placed in himself in a position of debating with the Company his fitness to perform the work of a flagman, with partial involvement in track maintenance work, as leverage for his personal view that he is fit to perform full track maintenance duties in Capreol, while he continues to be under the WSIB restrictions.

On the whole, the Arbitrator has considerable difficulty with the position argued on behalf of the grievor. He cannot have it both ways. On the one hand he continues to receive a disability benefit of considerable substance, paid for by the Company, while claiming to be entitled to work in his original position, without restrictions and with the

further payment of 100% of his wages for his normal classification. On the other hand, he has refused alternate employment which he feels does not properly accommodate his restrictions. When, based on advice from its own physician, the Company expresses concerns as to the ongoing WSIB restrictions under which the grievor remains, he simply asserts that he is able to do the work and should be placed back in his employment, with the benefit of both full wages and his ongoing partial disability pension. The Company's concern that he might aggravate his condition seems not to be shared by Mr. O'Connor, albeit it is the Company alone which will bear the additional burden of any work related aggravation of his back condition under the WSIB regime.

In the Arbitrator's view if the grievor cannot succeed, whether by an application for reconsideration or otherwise, to obtain a decision of the WSIB finding that he is no longer under any restrictions, that he no longer has a permanent partial disability and that the Company is no longer obligated to provide the 20% disability pension payments to him, he cannot assert that he is fit to return to unrestricted work and claim reinstatement into his regular employment with full wages. It is far from clear to the Arbitrator that the grievor has made any serious attempt at reversing the decision of the WSIB.

Nor does the evidence before the Arbitrator establish that the Company has failed in its obligation of accommodation. The employer paid hundreds of thousands of dollars to the grievor, both in relation to his partial permanent disability pension, and also for his rehabilitation and retraining as an Addictions Counsellor. Further, it offered

him two separate positions which the Arbitrator is satisfied he would have been physically fit to perform and which would be an appropriate form of return to active employment. The grievor insists, however, that he must be accommodated at Capreol, Ontario, where work opportunities subject to his physical restrictions have not been shown to be available. Decisions of this Office have repeatedly confirmed that an employee's obligation to participate in the process of accommodation can require the employee to accept work at another location where suitable employment is available, where such work is not otherwise accessible at his or her original place of employment. (See **CROA 3354** and **2998**.)

The foregoing observations do not spell the end of the grievor's rights. He remains on the employment rolls, with the possibility of being placed in an accommodated assignment. Should he succeed in freeing himself of his status as a worker with a permanent disability in the eyes of the WSIB, his request to return to his original employment would obviously become more compelling.

Based on all of the foregoing the Arbitrator is satisfied that the grievance must be dismissed.

February 13, 2004

(signed) MICHEL G. PICHER
ARBITRATOR